

**ALPHABETICAL HISTORY OF  
SUMMARY OF CASE LAW  
PERTAINING TO GUARDIANSHIPS  
FROM 1/1/97 – 8/1/09**

**ACCOUNTING**

- 1. A guardian has the right to expend all of the income of a ward's estate for the support and maintenance of the ward and has no duty to apply to the court for an order to expend income for those limited purposes.**

*In re Milliwe, AIP*, No. 05-99-00029-CV, 2000 WL 1185578 (Tex. App.—Dallas Aug. 22, 2000, no pet.) (not designated for publication).

**ADVERSE INTEREST**

- 1. While an applicant for guardian may be disqualified to serve as a guardian, such disqualification does not create an adverse interest under Section 642 of the Texas Probate Code.\***

*Betts v. Brown*, No. 14-99-0049-CV, 2001 WL 40337 (Tex. App.—Houston [14th Dist.] Jan. 18, 2001, no pet.) (not designated for publication).

\* Editor's Note: If this decision is correct, it effectively renders Section 642 of the Texas Probate Code useless to curtail guardianship contests. Fortunately, it is an unpublished opinion.

**APPEAL**

- 1. The order appointing a guardian ad litem to investigate the need for a guardianship is interlocutory.**

*In re Bauer*, No. 01-00149-CV, 2001 WL 549027 (Tex. App.—Houston [1st Dist.] May 24, 2001, pet. denied) (not designated for publication).

Appellant Bauer appealed an order the probate court signed appointing a guardian ad litem under Section 683 of the Texas Probate Code. Section 683 provides that if a court has 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, the court shall appoint a guardian ad litem or court investigator to investigate and file an application for the appointment of a guardian of the person or estate, or both, of the person believed to be incapacitated.

Darlene Smith, guardian ad litem, filed a motion to dismiss the appeal for lack of jurisdiction, arguing that the order in question is a non-appealable interlocutory order. The court applied the test set forth by the Texas Supreme Court in *Crowson v. Wakeham*, "If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or [involve] parties not disposed of, then the probate order is interlocutory." 897 S.W.2d 779, 783 (Tex. 1995). See also, *Forlano v. Joyner*, 906 S.W.2d 118, 119-20 (Tex. App.—Houston [1st Dist.] 1995, no writ); *In re Murphy*, 1 S.W.3d 171, 173 (Tex. App.—Fort Worth 1999, no pet.)(transfer order not final and appealable).

Applying the *Crowson v. Wakeham* test, the court held that there is no statute declaring the phase of guardianship proceedings under Section 683 to be final and appealable. The court also concluded that an order under Section 683 may be logically considered a preliminary part of guardianship proceedings, as the guardian ad litem is appointed, "to investigate and file an application for the appointment of a guardian of the person or estate, or both, of the person believed to be incapacitated." TEX. PROB. CODE ANN. § 683(a). Therefore, the appellate court granted the motion filed the guardian ad litem and dismissed the appeal.

## **2. Finality of Rule 12 Order.**

An order on a motion to show authority under Rule 12 of the Texas Rules of Civil Procedure constitutes a final order in a guardianship proceeding.

*Logan v. McDaniel*, 21 S.W.3d 683 (Tex. App.—Austin 2000, pet. denied).

Johnson suffers a stroke in August of 1996; Johnson's son files for guardianship in Hays County. Johnson retains his own lawyer to defend him against the guardianship and rejects the court's appointed ad litem. Johnson signs a contract with McDaniel on October 31, 1996. Son files a motion for McDaniel to show his authority to represent Johnson. Johnson testified why he hired his own attorney. The Hays County Court found that, at the time Johnson hired McDaniel to represent him, that Johnson had capacity to do so and therefore, McDaniel had shown sufficient authority. The order was not severed or appealed. Ultimately, son was appointed temporary guardian of the person and estate of Johnson. The Hays County Court appears to have never entered an order authorizing the payment of attorney fees. Johnson died January 6, 1998.

Probate of Johnson's estate was filed in Travis County and a claim by McDaniel in the amount of \$76,542.00 for attorneys' fees earned in representing Johnson was denied by the personal representative. McDaniel filed suit seeking a judgment to enforce the claim for fees alleging (i) at the time Johnson entered into the legal services agreement, Johnson had capacity to consent; and (ii) the contract authorized McDaniel to represent Johnson. The trial court granted partial summary judgment and the issue was severed for appeal.

The court of appeals held that the resolution of the Rule 12 Motion concluded a discrete phase of the guardianship proceeding and that the order was final and appealable. Since the parties were cast as adversaries in the earlier guardianship proceeding and the issues sought to be litigated in the guardianship were essential to the earlier order, the doctrine of collateral estoppel prevented the personal representative from relitigating her father's capacity to retain his own counsel.

## **APPEAL AND FINALITY OF PROBATE JUDGMENT**

- 1. Ward's death did not render a contested guardianship removal moot as the rights of the parties still needed be adjudicated.**

*Zipp v. Wuemling*, 218 S.W.3d 71 (Tex. 2007).

Former guardian appealed the order removing her as guardian of an incapacitated ward. Pending the appeal, the ward died. The Texas Supreme Court held that guardian's appeal is not rendered moot upon the death of a party when a court's action on appeal can affect the rights of the parties. The court's determination as to whether there was just cause for removal affects those who will settle the estate and final account and affects the guardian's right to recover attorneys' fees and costs in defending herself.

## **APPOINTMENT AND SELECTION OF GUARDIAN**

- 1. The trial court's appointment of a guardian is reviewable on appeal on an abuse of discretion standard.**

*Chang v. Family Eldercare, Inc.*, No. 03-00-00632-CV, 2001 WL 300314, (Tex. App.—Austin March 29, 2001, pet. denied) (not designated for publication).

Appellant appealed *pro se* from an order appointing Family Eldercare, Inc. as guardian of the person and the estate of his brother, the ward. The ward had lived with his brother since 1997, and the brother had filed an application seeking to be appointed guardian of the person and the estate. In May 2000, Family Eldercare, Inc. filed an amended application for the appointment of guardian.

At a trial before the court, the parties agreed that the ward was incapacitated. The brother testified that he removed the ward in 1997 from a nursing home against medical advice. An Adult Protective Service specialist testified that the brother had left the ward alone during the day, that the brother acknowledged that the ward made mistakes with his medication, and at times forgot to turn off the stove. The specialist also testified that the ward was discovered at home alone in a stupor with a pot of boiling water after the brother had gone out of town for two or three days. The trial court expressed concern that the ward had been left alone, in light of the brother's testimony that a relative of the

brothers tended to arrive at the residence unannounced and had previously destroyed property at the house.

A trial court has broad discretion in the selection of a guardian, and an appellate court will not reverse an order appointing a guardian absent a showing of abuse of discretion on the part of the trial court. *Trimble v. Texas Dep't. of Protective & Regulatory Serv.*, 981 S.W.2d 211, 214 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Ramirez v. Garcia de Bretado*, 547 S.W.2d 717, 718 (Tex. Civ. App.—El Paso 1977, no writ). The court held that the trial court did not abuse its discretion and concluded that the trial court had sufficient evidence to disqualify appellant. Therefore, the appellate court affirmed the trial court's judgment.

### **ATTORNEY AD LITEM**

- 1.1 Relationship of attorney ad litem in guardianship proceeding is created differently than the ordinary attorney/client relationship because it is initially mandated by statute.**
- 1.2 Trial court has discretion to remove attorney ad litem for an incapacitated person because of discord or conflict with others if the court follows proper procedure and a record is made showing the "principled reason" to justify removal or replacement.**
- 1.3 Court order continuing attorney ad litem's appointment after guardian has been appointed is a final appealable order.**

*Coleson v. Bethan*, 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no writ).

Attorney ad litem was appointed in guardianship proceeding involving minor. Attorney ad litem continued to represent minor ward after guardian was appointed. Guardian failed to timely qualify by filing oath and bond, was consistently delinquent in meeting filing requirements, and expended guardianship funds without court authority. Attorney ad litem diligently attempted to force guardian to comply with statutory requirements. Guardian then tried to remove attorney ad litem claiming that attorney ad litem's actions were causing stress in the ward's home and ward lacked confidence in the attorney ad litem. Upon hearing, the court denied guardian's removal motion. Several months later, the court *sua sponte* removed the attorney ad litem without notice to the attorney ad litem.

Attorney ad litem appealed his removal, in part, because the court removed him without notice or hearing. The Fort Worth Court of Appeals held that the attorney ad litem was entitled to notice and a hearing. In reaching its decision, the court stated that there are two ways to remove an attorney ad litem. The guardian could file a sworn motion challenging the attorney ad litem's authority to act pursuant to Texas Rule of Civil Procedure 12. Attorney ad litem, as the "challenged attorney" would be entitled to ten days notice prior to the hearing on the motion. Alternatively, the guardian could seek the removal of

the attorney ad litem by filing a motion to remove the attorney ad litem and request a temporary restraining order pursuant to Texas Rule of Civil Procedure 680. The probate court could then temporarily remove an attorney ad litem *sua sponte* provided the attorney ad litem has notice and a subsequent hearing is held.

## **ATTORNEY FEES**

**1.1 The affidavit supporting a guardian’s request for attorney’s fees may be filed separately from the application requesting the fees and will still comply with Section 667 of the Texas Probate Code.**

**1.2 The award of attorney’s fees and expenses to a guardian will be reviewed on an abuse of discretion standard.**

*Meduna v. Holder*, No. 03-02-00067-CV, 2003 WL 124214 (Tex. App.—Austin, no pet.) (not designated for publication).

**2.1 Payment of attorney fees set by the court as compensation to appointees in a guardianship is to be taxed as costs in the case. Texas Probate Code Section 665A.**

**2.2 When a rule of procedure conflicts with a statute, the statute prevails.**

*Guardianship of Humphrey*, 2008 WL 2445503 (Tex. App.—Tyler, no pet. h.).

As the result of a car accident, Luke Humphrey became incapacitated at nineteen years of age. In April 2005, his father, Landy Humphrey was appointed his temporary guardian and J. Scott Killough as his attorney and guardian ad litem. Killough filed an application seeking Humphrey’s appointment as permanent guardian, which Luke’s mother opposed.

In August 2005, Killough withdrew as guardian ad litem, but remained attorney ad litem. In this capacity, Killough filed a motion to compel and for sanctions against McLendon, Luke’s mother, for withholding medical records. He also sought a temporary restraining order and temporary injunction for McLendon to have no contact with Luke and his medical providers. After hearing evidence, the court granted the restraining order, the motion to compel and for sanctions, including an award of Killough’s fees to be paid by McLendon.

McLendon appealed the order assessing fees against her based on Section 665A of the Texas Probate Code. This section mandates that appointee’s fees are to be taxed as costs in a case and that if the ward is unable to pay, the county is to pay. The Court agreed that fees should not be assessed against her, as Section 665A, rather than Texas Rule of Civil Procedure 4, which allows a court to adjudge costs otherwise than as provided by law, controls.

## CAPACITY

### **1. An adjudication of capacity by a divorce court is not binding on a district court supervising a 142 trust under the Texas Property Code.**

*Texas State Bank v. Amaro*, 87 S.W.3d 538 (Tex. 2002).

In 1989, the 206<sup>th</sup> district court authorized the creation of a 142 trust under the property code for the benefit of Vargas. The trust was to terminate when Vargas regained capacity and the judgment specifically provided that the trust “would take effect immediately to remain in full force and effect until further orders of this Court.” In May 1997, Vargas filed a Motion to terminate the trust alleging he had regained capacity. In September of 1997, Vargas had appeared in an uncontested divorce matter in the 370<sup>th</sup> district court of Hidalgo County. The divorce court found that Vargas was fully capable of acting as sole managing conservator for his minor child and suffered no incapacity. Five days after the 370<sup>th</sup> district court issued the divorce decree, Vargas filed a notice of non suit and sent a demand letter to the Trustee requesting all of the assets in the 142 Trust due to the divorce court’s adjudication that he had capacity. Vargas threatened the bank with legal action if it did not comply with the demand.

The bank responded by interpleading the funds into the 206<sup>th</sup> asking the Court: (1) to determine if the trust was terminated because of Vargas’s regained capacity; (2) to allow the bank to resign as trustee and to appoint a substitute trustee in case the trust was not terminated; (3) to “approve final accountings to be submitted to the court; and (4) to order any other relief to which the bank may be entitled. The bank alleged the 206<sup>th</sup> had continuing jurisdiction under Chapter 142 of the Texas Property Code, the declaratory judgment action, and section 115.001 of the Texas Trust Code.

Vargas filed a new suit against the bank in the 93<sup>rd</sup> District Court in Hidalgo County alleging fraud, breach of fiduciary duty, negligence, breach of the duty of good faith and fair dealing, breach of contract, and DTPA violations in administering the trust.

The 206<sup>th</sup> denied the plea to the jurisdiction and retained jurisdiction to any matters pertaining to the assets of the Trust. The 206<sup>th</sup> subsequently held hearings restoring Vargas’s capacity, terminating the trust and judicially approving the trust accountings.

Vargas appealed, complaining that the 206<sup>th</sup> district court erred in absolving TSB of liability for its handling of the trust. Vargas argued that the declaratory judgment act could not expand the district court’s jurisdiction over the trust to allow it to adjudicate Vargas’s tort claims against the bank. The court of appeals agreed, and modified the district court’s judgment by reversing those parts of the district court’s order: (1) approving all distributions, fees, costs, and expenses the bank paid, except for the fees, costs and expenses relating to the trust’s termination; (2) approving the bank’s investment philosophy; and (3) absolving the bank from any liability to Vargas or the Vargas trust.

The bank filed a petition for review, asking the Texas Supreme Court to resolve four issues:

- (1) Did the 206<sup>th</sup> district court exercise continuing jurisdiction over the Chapter 142 trust that it created, and thus have jurisdiction to issue its declaratory judgment in connection with the trust, related issues, and parties?
  - (2) Did the 206<sup>th</sup> district court have jurisdiction to and properly approve the investment philosophy, distributions, and expenses of the trustee of the Vargas trust, to discharge the trustee from liability, and to issue its declaratory relief;
  - (3) Did Vargas waive his argument concerning the proper scope of declaratory relief by failing to make the argument to the district court?
- And,
- (4) Did Vargas waive his arguments by accepting payment under the judgment?

The Supreme Court held that the 206<sup>th</sup> district court retained continuing jurisdiction over the trust under Chapter 142 and under the terms of the trust instrument. Thus, although the 379<sup>th</sup> district court adjudicated Vargas's capacity in the divorce action, the 206<sup>th</sup> had jurisdiction to consider whether he regained capacity such that the trust was terminated, and the trust did not terminate until the 206<sup>th</sup> so decreed.

The 206<sup>th</sup> district court also retained continuing jurisdiction over the trust to approve the accounting. However, the Supreme Court held that approving the trustee's investment philosophy and absolving the trustee's liability were inappropriate. Trustee only asked the Court to rule whether the trust was terminated, if removal was warranted, and to approve it's accounting. Ruling on the trustee's tort liability and investment decisions was relief the trustee did not request through a motion. The Supreme Court distinguished that approval of distributions, fees, and costs was proper, since they are properly part of the accounting under Property Code § 113.152(2).

Moreover, the Supreme Court found that Vargas did not waive his objections to the proper scope of the declaratory relief by failing to make the argument to the district court. Vargas objected when the bank tried to introduce evidence that went beyond its requested relief. He also properly preserved his objections to the district court's order in an appellate brief filed with the court.

Finally, the bank argues that Vargas waived his objection to the district court's judgment by accepting payment of his trust monies under the judgment. The Supreme Court rejected that argument as it was clear that everyone conceded that Vargas had regained capacity and that the trust should have been terminated. The Supreme Court also noted that neither of the parties argued with the winding up of the trust and the distribution of the corpus.

## **CERTIFICATE OF DEPOSIT**

- 1.1 **Guardian was authorized to take possession of a certificate of deposit held in ward's name jointly with another person and restyled the certificate of deposit solely in ward's name.**
- 1.2 **Since the ward retained her name on the certificate of deposit she did not divest herself absolutely and irrevocably of ownership giving her the power to exchange the document for cash at any time.**
- 1.3 **A guardian appointed by the probate court does not have judicial immunity for his actions.**

*Edwards v. Pena*, 38 S.W.3d 191 (Tex. App.—Corpus Christi 2001, no pet.).

### **CHILD SUPPORT FOR ADULT DISABLED CHILD**

1. **Standing to file suit for child support for an adult disabled child may be filed by a parent of the child or another person having physical custody or guardianship of the child under a court order. An adult disabled child also may file suit for support, but the child must (1) be 18 years of age or older, (2) not have a mental disability, or (3) be capable of managing his financial affairs as determined by the court.**

*Rasbach v. Phillips, et al.*, No. 14-05-00576-CV, 2006 WL 2433849 (Tex. App.—Houston [14th Dist.] Aug. 24, 2006, no pet. h.) (not designated for publication).

### **CITATION**

- 1.1 **Eligibility to serve as guardian must be determined prior to determining whether the applicant is a spouse.**
- 1.2 **Citation under Section 633(e) is mandatory in order for the court to have jurisdiction to hear cross-application for guardianship.**

*Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.).

In 1971, Mary and Horacio divorced but continued to live together. Mary subsequently suffered a stroke which rendered her incapacitated. Mary's daughter applied for guardianship of her person and estate. Horacio responded to the application by alleging he was Mary's common law husband and filing a cross-application for guardianship seeking his appointment as guardian. The trial court found Horacio to be Mary's common law spouse but appointed Mary's daughter as guardian because it also found that Horacio was not qualified to serve as Mary's guardian. The daughter appealed the court's finding that Horacio was Mary's common law spouse arguing the finding was not necessary.

The appellate court held that the Texas Probate Code implicitly requires that the trial court first determine whether a person is eligible, and thus qualified, to serve as a guardian before determining if that person is a spouse. Therefore, the trial court was not required to make a finding that Horacio was the common law spouse and the trial court's judgment was modified to delete any reference to Horacio's status as the common law spouse. It is notable that the appellate court found that the probate court had no jurisdiction over Horacio's claims because he failed to personally serve Mary with his cross-application for guardianship or provide notice to her relatives or the nursing home as required under Section 633(e).

## **CONTRACT**

- 1.1 There is an inherent conflict of interest when an attorney represents multiple parties asserting claims against the same settlement proceeds if the damages suffered by the parties exceed the amount of the settlement proceeds.**
- 1.2 For a contingent-fee contract to be enforceable, it must satisfy §82.065 of the Texas Government Code and Rule 1.04(d) of the Texas Disciplinary Rules of Professional Conduct.**
- 1.3 For a contract to be enforceable against a ward, a guardian must obtain the court's authorization to execute a contract on the ward's behalf.**

*Ray v. T.D.*, No. 03-06-00242-CV, 2008 WL 341490 (Tex. App.—Austin Feb. 7, 2008, no pet. h.) (mem. op.).

Dock L. Dire died in an automobile-motorcycle accident, leaving one minor child, T.D. Shortly after his death, T.D.'s mother, Teaneah Jackson, qualified as guardian of her estate. The Executor of Dire's Estate, along with Jackson, as T.D.'s next friend, filed a wrongful death suit against the automobile insurance carrier in district court to obtain court approval of a settlement reached among the parties. The suit was filed by attorney Caggins, who purportedly represented all of the plaintiffs in the cause. The district court appointed Neale Potts as guardian ad litem for the minor.

Caggins sought approval of his attorney's fees in the amount of  $33 \frac{1}{3}$  of the recovery. Potts objected, claiming that (a)  $33 \frac{1}{3}$  recovery was not a reasonable value for Caggins' services, as he did little work to obtain the settlement; (b) a hand written letter from Jackson stating she was employing Caggins to represent her daughter "for the death of her father," which was not dated, not signed by Caggins, and did not mention fees, was not an enforceable contract with the minor; and (c) Caggins had a conflict of interest in representing the three parties without disclosure of and consent to the conflict.

The Court found that for a contingent-fee contract to be enforceable, it must be in writing and signed by the attorney and client, pursuant to §82.065 of the Texas Government Code. A contract under §82.065 is voidable by the client if it is procured as a result of conduct violating the Texas Disciplinary Rules of Conduct. Caggins' purported contract

was violative of the disciplinary rules, as it did not state how the fee would be determined, and there was no evidence the probate court had authorized Jackson, as T.D.'s guardian, to execute a contract with Caggins on T.D.'s behalf. The contract, therefore, is not an enforceable contract entitling Caggins to attorney's fees from the settlement proceeds paid to T.D. Further, Caggins was not entitled to a fee based on quantum meruit as he failed to present evidence of the reasonable value of his services.

### **COSTS IN A GUARDIANSHIP PROCEEDING**

- 1. Co-owner of ward's bank accounts, who sought a declaratory judgment as to ownership of the accounts, is not entitled to have court costs paid from the guardianship estate pursuant to the guardianship cost statute, Texas Probate Code Section 669(a). The action brought by co-owner is not considered a guardianship proceeding, as it was not against the guardian for improper acts or for the appointment of a guardian.**

*In the Guardianship of L.A. Moon*, 216 S.W.3d 506 (Tex. App.—Texarkana 2007, no pet. h.).

- 2. The ward's estate, or if insufficient, the county are the sole sources of assessment of costs in a guardianship proceeding.**

*In re Guardianship of Soberanes*, 100 S.W.3d 405 (Tex. App.—San Antonio 2002, no pet.).

On June 4, 2001, Marcello went to a hospital in Houston, Texas, for inpatient treatment of a hip fracture. Marcello and Marta are citizens of Mexico, but maintain a home in Laredo. While at the hospital, Marcello suffered a cerebrovascular accident and was left with cognitive and motor deficits. Marcello was transferred to a hospital in Laredo. Marcello has been married to Marta since 1977 and has two adult children with Marta. Marcello has four children from a prior marriage, one of who is Maria Sanchez.

On July 24, 2001, without notice to his wife, Marcello's physician permitted his discharge to Sanchez's residence. On that same day, Sanchez filed an application to be appointed temporary guardian of the person omitting the existence of the wife or the fact that his wife lived in Laredo.

On July 25, 2001, Sanchez was appointed temporary guardian of the person with an affirmation hearing set for August 3, 2001. Sanchez posted a \$2,000 bond. An attorney ad litem was appointed for Marcello.

On July 26, 2001, Marta learned of her husband's discharge from the hospital, but could not locate him. She returned to Mexico.

The affirmation hearing was extended until August 8, 2001, due to a scheduling conflict. The guardianship was then confirmed until September 12, 2001, on which date the court would consider the necessity of a permanent guardianship.

On August 29, 2001, appellant and her children were finally served with process. On September 12, appellant appeared at the scheduled hearing alleging: (1) Sanchez had claims adverse to Marcello, (2) Sanchez was an unsuitable guardian and lacked standing, and (3) appellant was not disqualified to act as guardian, if one was necessary. Also, a contest to the need for the appointment of a guardian was filed.

A brief hearing was held on September 12, but the court stated it would maintain the status quo and continued the hearing until September 20. The court ordered that appellant be allowed to visit with her husband. Following a confrontation later that day between the families, appellant filed a Motion for immediate removal of violent, abusive, temporary guardian, in which appellant alleged that she and her family had been kept waiting when they went to see Marcello, she was allowed a visit of only five minutes, and Sanchez's family was verbally and physically abusive. Appellant asked that Sanchez be removed as temporary guardian and that she be appointed. An *ex parte* emergency hearing was held on September 13, following which the court again maintained the status quo until September 20, and deferred ruling on the motion because all parties had not been served.

On September 20, Montemayor moved for a continuance on the grounds that Marcello had suffered a relapse and was so disoriented that he would not be able to attend the hearing. The court granted the motion and rescheduled the hearing to October 4, 2001. The court again ordered that the wife have visitation with her husband and remain in Laredo, Webb County.

On October 1, Sanchez changed counsel and filed a motion to terminate temporary guardianship on the grounds that Marcello was now in Mexico. At the October 4 hearing, the court ruled from the bench that it was terminating the guardianship because all parties had left the jurisdiction. The court signed a final judgment on January 8, 2002, terminating the guardianship on the grounds that the ward, Marcello, had left the State of Texas.

The only issue preserved for appeal was that the trial court erred in terminating the temporary guardianship. On appeal, Sanchez asserts the temporary guardianship expired on its own terms on September 12, 2001, because that is the date on which the trial court was to consider the necessity of a permanent guardianship.

The court of appeals reversed the trial court and held that once the contest was filed, Sanchez's appointment as temporary guardian was triggered under Section 875(k) [the contest section] and the appointment of Sanchez as temporary guardian did not automatically expire at the conclusion of the sixty (60) day period. Moreover, the court held that jurisdiction was established when the temporary application was filed. Once the

court acquired jurisdiction over the ward and appointed a temporary guardian, it maintained it.

Finally, the court held that it was improper to tax the wife with ½ of the ad litem fee since under Section 646(a) the cost of the proceeding should be paid by the guardianship estate or if insufficient by the county.

Editor's Note: This case appears to indicate that Section 875(k) is automatically triggered once a contest has been filed and will automatically extend the sixty day termination provision of a temporary guardianship. The safest practice would be to obtain an order verifying the extension of the sixty-day period, but this is a case of first impression that actually reaches such a holding.

## **DIRECTIVE TO PHYSICIAN**

- 1.1 Medical decisions are to be made by guardian and not court presiding over guardianship.**
- 1.2 Guardian is authorized to execute a directive to physicians regarding life-sustaining procedures within limits of Texas Health and Safety Code.**

*In re L.C.D.*, 16 S.W.3d 153 (Tex. App.—Beaumont, orig. proceeding).

Non-relative guardian of the person filed a motion for instructions with the probate court. The motion sought the court's instruction regarding whether it would be in the ward's best interest to authorize the guardian to execute a directive to physicians to withhold or withdraw life sustaining procedures. Guardian did not, however, affirmatively request permission to sign a directive or seek to ratify the execution of a directive to physician. The court appointed an attorney ad litem to represent the ward. The attorney ad litem advocated against the execution of a directive by the guardian. The only other interested parties were the Ward's parents. The parents both executed affidavits expressing their desire that a directive be executed, however, they did not seek any affirmative relief. At the conclusion of the hearing, the probate court entered an order *directing* the guardian to execute an irrevocable directive.

Ward's attorney ad litem petitioned for a writ of mandamus to compel the trial court to withdraw its order and also requested a stay of the order pending the mandamus. The appellate court agreed to stay the trial court's order pending the mandamus and requested briefing. On appeal, the appellate court ultimately held the trial court lacked jurisdiction to enter order because there was no justiciable controversy because of the manner in which the issue was presented to the court. *See discussion supra*. Because the trial court exceeded its authority, the appellate court conditionally granted the writ of mandamus and directed the trial court vacate its order. In reaching its decision, however, the appellate court noted in its decision that a guardian of the person already has the power to consent to medical, psychiatric and surgical, treatment of a ward without court

intervention. The appellate court also noted that the Texas Health and Safety Code authorizes a guardian to execute a directive.

## **DIVORCE**

**1.1 Probate court lacks jurisdiction over divorce and accompanying parent-child proceeding involving a ward unless a statute explicitly grants the court such jurisdiction.**

**1.2 Divorce and parent-child proceedings are not matters appertaining and incident to a guardianship estate.**

*Milton v. Herman*, 947 S.W.2d 737 (Tex. App.—Austin, orig. proceeding) (substituted decision).

Ward married in 1991. In 1995, ward's wife was named guardian of his person and estate. In 1997, ward's wife filed petition in district court seeking a divorce and to be appointed sole managing conservator of the couple's child. The wife then resigned as ward's guardian.

A successor guardian was appointed and he filed an application to transfer the divorce and parent-child proceeding to the probate court. The probate court granted the petition and entered an order transferring the divorce and parent-child proceeding. Ward's wife filed an application seeking to enjoin the transfer of the divorce and parent-child proceeding to probate court. The parties entered into a Rule 11 agreement to maintain the status quo until the court of appeals determined whether the probate court had jurisdiction to transfer the proceeding.

In its first decision, the Austin Court of Appeals concluded that the probate court did not have the authority to transfer the proceeding. As a result, the probate judge withdrew his order of transfer but later reinstated it upon learning that the parties would be filing a motion for rehearing.

Although the Austin Court of Appeals ultimately overruled the motion for rehearing, it did issue a substituted decision in which it held that the divorce and parent-child proceedings were not transferable to the probate court. The court of appeals held that a divorce and parent-child proceeding were not appertaining and incident to the guardianship estate or a suit against the guardian of the ward's estate. The court of appeals also found that the divorce and parent-child proceeding should not be transferred under the probate court's pendant and ancillary jurisdiction because judicial economy would not be served.

## **DOCTOR'S LETTER**

- 1.1 An appellate court must examine a probate court’s appointment of a guardian, as well as the challenges to the admission or exclusion of evidence, for an abuse of discretion.**
- 1.2 The foundation of the business reports exception, Texas Rule of Evidence 803(6), rests upon a circumstantial guarantee of trustworthiness in the source of the information or the method of preparation of the records, reports or data.**
- 1.3 Evidence rises to the level of being clear and convincing when, on the entire record, a fact finder could reasonably form a firm conviction or belief that its finding was true.**

*In the Matter of the Guardianship of Virgie Louise Parker*, 2007 WL 4216255 (Tex. App.–Fort Worth, no pet. h.) (not yet designated for publication).

On August 22, 2005, after a visit to the home of Virgie Louise Parker (“Parker”), Adult Protective Services determined that she was at risk for physical neglect and that it was necessary to initiate a guardianship proceeding. The Court appointed guardian ad litem filed an application for the appointment of a temporary and permanent guardian of the person for Parker and Parker filed a contest.

At trial, Applicant presented evidence of Parker’s incapacity and the need for a guardian through witness testimony and the admission of medical records from the nursing facility. The Certificates of Medical Exam and reports from two independent physicians were also admitted, indicating that Parker was unable to make decisions and care for herself and that her memory was impaired.

The jury found Parker to be an incapacitated person in need of a guardian. Parker appealed on two grounds: (1) it was error to admit the two physician reports, as they were not made in the regular practice of their business and therefore, were inadmissible hearsay; and (2) the evidence presented at trial was legally and factually insufficient to support the jury’s findings.

The Court overruled Parker’s first issue, holding that the physicians’ reports complied with Rule 803(6) and that there was no question about trustworthiness in their preparation. The reports were not requested by interested parties having a pecuniary interest, were the result of an agreed order for medical examination, and were accompanied by affidavits indicating they were kept in the regular course of business.

The Court also held that the evidence presented at trial was such that the jury could reasonably form a firm belief or conviction that Parker was an incapacitated person, that it was in her best interest to have a guardian appointed, and that she would be protected by such appointment; therefore, the verdict was supported by legally and factually sufficient evidence.

## **EVIDENCE**

- 1. 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 2001, no pet.).

Proposed ward's nephew filed an application for guardianship. In connection with the application and a request for proposed ward's attorney to show authority under Rule 12, nephew sought the testimony of a psychiatrist employed by a prior attorney for proposed ward. Houseman, proposed ward's attorney, sought a mandamus to prevent the testimony.

The writ of mandamus was granted conditionally. The court held that since the doctor was engaged by the former lawyer to assist in the rendition of legal services, relator has the right, based on the attorney client privilege to prevent the disclosure. The court reasoned that an individual defending their capacity in a guardianship is not seeking affirmative relief.

## **EVIDENCE: CLEAR AND CONVINCING**

- 1. For the purpose of establishing a guardianship, “clear and convincing evidence” means the measure or degree of proof that 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.**

*In re Guardianship of Hinrichsen*, 99 S.W.3d 773, 781 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

## **EXECUTORS OF WILLS**

- 1.1 A testator has testamentary capacity when she has sufficient mental ability to understand she is making a will, the effect of making a will, the general nature and extent of her property, the persons to whom she meant to devise and bequeath her property, the persons dependent upon her bounty, and the mode of distribution among them.**
- 1.2 Age and its maladies, by themselves, do not raise a fact issue that the testator's mind was in fact subverted or overpowered at the time of the instrument's execution.**
- 1.3 Evidence not presented to the trial court for summary judgment cannot be considered as evidence on appeal.**

*Lewis v. Lamb*, 2007 WL 2002901 (Tex. App.—Beaumont] no pet. h.) (not yet designated for publication).

Greg Lewis challenged the Will of Lillian Loyd, dated December 28, 1993, which was admitted to probate. The Will left Loyd's estate to Susan Lamb. Lewis claimed Loyd lacked testamentary capacity, testamentary intent and was unduly influenced by Lamb. Lamb filed a no evidence summary judgment, which was granted. Lewis appealed arguing that he had evidence Loyd fell and hit her head in 1991 and was also under a guardianship because she could not consent to medical treatment. Lewis and Lamb agreed that Loyd was released from the guardianship prior to the 1993 Will.

The court held that evidence of incompetency at times other than the date of execution of the will has probative force only if the evidence demonstrates that the condition persists and has some probability of being the same condition that existed at the time of the making of the will. The court further found that the exertion of undue influence cannot be inferred by opportunity alone; therefore, evidence of Lamb's relationship with Loyd did not raise a fact issue.

On appeal, Lewis contended that the summary judgment should not have been granted when the testator had been under a guardianship up until the day before the execution of the will. The Court of Appeals, however, could not consider the evidence because it was not presented to the trial court. Lewis' issue was overruled.

### **EVIDENCE: MENTAL HEALTH**

- 1. A first year resident in clinical psychology was qualified to testify as an expert in mental health commitment proceedings when resident was shown to be treating physician, had received medical degree in Pakistan and passed examinations for licensure in the United States, had experience dealing with psychiatric patients, and had worked on research program on psychotropic drugs and their effects.**

*State ex rel. L.C.F.*, 96 S.W.3d 651 (Tex. App.—El Paso 2003, no pet.).

### **EX PARTE COMMUNICATIONS**

- 1. Ex Parte communications are never appropriate.**

*In re Easton*, 203 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

Relator, Easton, asks relief of the appellate court to set aside a show cause order entered by the Honorable Mike Wood.

The underlying dispute arises out of the *Whatley* guardianship proceeding.

As part of the contested guardianship proceeding, Judge Wood advised relator that:

An email to my email address is an *ex parte* communication. It is forbidden. If you do it again, or if anybody does it again, I am going to hold you in contempt.

Despite these specific instructions, relator allegedly sent an e-mail to Judge Wood's personal e-mail address the following day.

The Court issued a personal citation commanding relator to appear at 9:30 a.m. on August 31, 2006, to show cause why he should not be held in contempt due to the continued *ex parte* contact with the court. Relator failed to appear.

The trial court issued a writ of attachment for Relator's arrest when he failed to show.

The purpose of a habeas corpus proceeding is not to determine the ultimate guilt or innocence of the relator, but to ascertain whether the relator has been confined unlawfully.

Relator is not in actual confinement. He was evading the writ of attachment at the time the court of appeal was considering the appeal.

Relator contends that all of Judge Wood's aforementioned actions and orders are void because several motions for recusal were still pending against Judge Wood. In a second issue, relator contends that Judge Wood should not be permitted to be "the complainant, sole witness, and trial judge."

The court of appeals held that it did not perceive Judge Wood's show cause order or the writ of attachment as having any relation to the underlying guardianship dispute. The court pointed out that Tex. R. Civ. P. 18a(d) provides that "the judge shall make no further orders and shall take no further action in the case."

Rule 18a(d) is designed to be a shield—not a sword. It does not permit a party to file a motion to recuse and then disobey, insult, antagonize, or disrespect the court with impunity.

Judge Wood had not had an opportunity to conduct a show cause hearing, relator had not yet been held in contempt and no punishment has been assessed. Further, relator is not an attorney, does not claim to be an officer of the court, and has not sought a hearing before another judge because it is premature to do so.

Only after the offended judge has made a determination that an offer of the court is in contempt does the court have the right to a hearing before another judge. The court of appeals denied Relator's petition for habeas corpus.

## **EXTRINSIC EVIDENCE AND INSURER'S DUTY TO DEFEND**

- 1.1 **Where temporary guardian plead that a ward lacked the mental capacity, due to dementia and Alzheimer's disease, to intentionally harm a fellow patient, the alleged facts alone were sufficient to trigger the insurance carrier's duty to defend the case against the ward and temporary guardian to bring the case within ward's coverage.**
- 1.2 **Extrinsic evidence of insured's mental state was immaterial to insurer's duty to defend under the eight corners rule and should not have been considered.**

*Hochheim Prairie Casualty Insurance Company v. Appleby*, ---S.W. 3d ---, 2008 WL 141587 (Tex. App.—San Antonio May 7, 2008 no pet. h.) (not yet released for publication).

[This case is sufficiently described in the head note].

## **FIDUCIARY DUTY**

- 1.1 **Guardian has no duty to emancipated ward other than to file final account.**
- 1.2 **Guardian of minor ward who has attained the eighteen years of age does not have continuing fiduciary duty to emancipated ward.**

*Maeberry v. Gayle*, 955 S.W.2d 875 (Tex. App.—Corpus Christi 1997, no pet.).

Minor's uncle was appointed as guardian of nephew. After nephew became an adult but prior to the filing of the guardianship final account, uncle took nephew to lawyer's office and had him execute a deed conveying real property to uncle for consideration of \$10. Nephew later sued uncle for fraud and breach of fiduciary duty relating to the uncle advising him that he was executing legal documents related to the guardianship and for uncle's failure to deliver the remaining guardianship assets to nephew upon reaching majority. In particular, the nephew contends that the uncle failed to deliver to him the proceeds from a life insurance policy payable to the nephew. The trial court awarded nephew actual and punitive damages for fraud and breach of fiduciary duty.

Uncle appealed, in part, contending that the trial court erred in finding that (i) he owed a fiduciary duty to the emancipated ward arising from the guardianship, and (ii) he failed to deliver the proceeds from the life insurance policy because he never collected the policy in his capacity as guardian.

The Corpus Christi Court of Appeals reversed the trial court, in part, holding that the uncle did not have a continuing fiduciary duty to emancipated ward. The term "emancipated ward" in Texas Probate Code Section 750 indicates that the guardianship relationship has terminated even though the former guardian must file a final account. As such, the former guardian has no duty to emancipated ward other than to file final account. The court further held that the nephew could not recover for the former guardian's failure to deliver the proceeds of the life insurance policy because there was no evidence

to prove guardian received the proceeds. Further, nephew could not recover for former guardian's failure to collect the policy because nephew did not specifically assert a cause of action for failure to collect assets.

## **FINALITY OF PROBATE JUDGMENT**

- 1. Ward's death did not render a contested guardianship removal moot as the rights of the parties still needed be adjudicated.**

*Zipp v. Wuemling*, 2007 WL 704581 (Tex. 2007) (not yet designated for publication).

Former guardian appealed the order removing her as guardian of an incapacitated ward. Pending the appeal, the ward died. The Texas Supreme Court held that guardian's appeal is not rendered moot upon the death of a party when a court's action on appeal can affect the rights of the parties. The court's determination as to whether there was just cause for removal affects those who will settle the estate and final account and affects the guardian's right to recover attorneys' fees and costs in defending herself.

## **GUARDIAN AD LITEM**

- 1. Award of guardian ad litem fees in a temporary guardianship can only be taxed as cost against the proposed ward or the county not against an unsuccessful applicant for guardianship.**

*Overman v. Baker*, 26 S.W.3d 506 (Tex. App.—Tyler 2000, no pet.).

Niece filed a temporary guardianship of the person and estate of 93 year old aunt, Baker. Baker retained private counsel and the court also appointed an attorney ad litem under Section 646(a) of the Texas Probate Code. Baker requested security for cost for her private attorney fees and ad litem fees. Baker also filed a contest alleging the application as being groundless, requesting a dismissal and sanctions under Rule 13 of the Texas Rules of Civil Procedure. The dismissal motion alleged that Baker had disqualified Overman from ever serving as her guardian under Section 679 of the Texas Probate Code and had expressly designated a friend, Louise Broussard, to serve as her guardian in the event of subsequent incapacity. Overman sought by motion to withdraw her application. However, Baker pursued her motion for sanctions.

After a hearing, the trial court granted Overman's request to withdraw her application, but entered a judgment against the niece assessing as sanctions the costs, including the ad litem's fees of \$2,651.71 and Baker's personal attorneys' fees of \$2,300.00 against niece.

Overman appealed based on three points: (a)the trial court abused its discretion in sanctioning Overman; (b)the trial court erred in awarding ad litem fees after Baker

obtained private counsel; and (c) the trial court erred in awarding ad litem's fees as costs against the unsuccessful applicant, Overman.

The appellate court looked to the facts known to the applicant at the time the appointment of a temporary guardianship was sought. The burden was on Baker to show there was no basis in law or fact for the filing of the application. Baker argued that there was no physician's certificate to support a temporary guardianship. The appellate court rejected that argument as no physician's certificate is required under Section 875 of the Texas Probate Code.

The court of appeals discussed that there was no evidentiary support for the trial court's finding in the sanction order that the application filed by Overman was brought in bad faith and for the purpose of harassment, that good cause exists for the imposition of sanctions against Overman; that the application was brought for an improper purpose and caused needless increase in the costs of litigation and that the allegations had no evidentiary support nor would likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

The court of appeals also noted that under Section 699 of the Texas Probate Code, the costs of the proceeding could only be paid from the guardianship estate or the county treasurer if the estate was insufficient to pay the cost of the proceeding.

The court of appeals reversed the judgment and rendered a take nothing judgment against Overman and that the attorneys fees and ad litem fee be assessed against Baker. The court of appeals affirmed the portion of the judgment granting Overman's motion to withdraw her application for appointment of temporary guardian of the person and estate of Baker and dismissing said application for appointment of temporary guardian is affirmed.

- 2.1 When a next friend representing a minor in a lawsuit, has an adverse interest to the minor plaintiff, the trial court must appoint a guardian ad litem.**
- 2.2 The conflict between the next friend and minor need not be actual; potential conflict during trial or settlement also authorizes the appointment of a guardian ad litem.**

*Dewberry v. Mota*, 2008 WL 2719989 (Tex. App.—Dallas, no pet. h.).

Mota was appointed as guardian ad litem for minor plaintiffs to finalize a settlement of a wrongful death claim brought on behalf of minors by their mother. The wrongful death claim resulted from the death of the minors' father. Since the minors' mother was not married to the deceased father, she did not bring a claim for herself.

At the hearing on the settlement, the Defendant, Dewberry, objected to Mota's fees and for the first time objected to Mota's appointment as ad litem, claiming no conflict between the mother and the minors existed. The fees were awarded and Dewberry appealed.

On appeal, the Court held Dewberry's issue of whether guardian ad litem's appointment was proper was not perfected on appeal. With respect to his compensation, the Court found that Dewberry failed to object to the amount of guardian ad litem's fees on appeal or at the trial court. Dewberry only claimed the ad litem was not *entitled* to a fee because her appointment was improper. Since this basis was not perfected on appeal, Dewberry's second issue was not perfected either.

### **GUARDIAN AD LITEM FEES**

- 1. A guardian ad litem is not an attorney for the child, but an officer appointed by the court to assist in protecting the child's interest when a conflict arises between the child and the child's guardian or next of friend. If a guardian ad litem performs work beyond the scope of this role, such work is non-compensable. An ad litem may be compensated a reasonable fee for performing necessary services in the guardian ad litem's role, and a reasonable hourly rate multiplied by the number of hours necessarily spent yields a reasonable fee.**

*Youngstown Area Jewish Federation. v. Dunleavy*, 2007 WL 740894 (Tex.App.- Dallas] no pet. h.) (not yet designated for publication).

### **REMOVAL AND ROLE OF GUARDIAN AD LITEM**

- 1.1 When a conflict of interest arises between a child and the child's next friend or guardian representing that child in a suit, the trial court must appoint a guardian ad litem to assist in protecting the child's interests.**
- 1.2 Any party may seek mandamus review of an order appointing a guardian ad litem for litigation under Rule 173 of the Texas Rules of Civil Procedure.**
- 1.3 Work performed beyond the scope of an ad litem's proper role in representing a minor's interest in a case is not compensable.**

*In re Newsom*, 2008 WL 962107 (Tex. App.—Beaumont 2008, no pet. h.) (mem. op.).

Defendant Jason Newsom was sued by minor plaintiffs, who were represented by next friends pursuant to Rule 44 of the Texas Rules of Civil Procedure. Newsom believed that in order to depose the minor plaintiffs, the appointment of a guardian ad litem was necessary, despite the minor having representation by next friends, and he filed a motion requesting same. Over plaintiffs' opposition, the court appointed a guardian ad litem.

Newsom became concerned about the guardian ad litem's mounting fees and role in the case and filed a motion to withdraw his prior request for the appointment. The trial court denied the request and Newsom filed a petition for writ of mandamus seeking compliance with Rule 173 of the Texas Rules of Civil Procedure and claiming that there was no

conflict between the minors and next friends necessitating the appointment. Newsom further claimed that the ad litem exceeded the scope of her proper role in the case.

The Court conditionally granted the writ, holding that other than by agreement of the parties, the only ground for appointment of a guardian ad litem under Rule 173.2(a) is the existence of an adverse interest between the next friend and the minor. The record shows that plaintiffs did not agree to the appointment and there is no evidence of a conflict between the next friends and minors. There was also no evidence the ad litem's requested compensation was reasonable, as her services were not in conformity with the duties set out for a guardian ad litem in Rule 173.4.

- 2.1 A guardian ad litem may not be compensated for time expended by other attorneys unless the trial court has made a specific finding that the other attorney's services were reasonable and necessary under a particular extenuating circumstance.**
- 2.2 In setting a guardian ad litem's hourly rate, it is necessary and proper for the trial court to consider the attorney's customary hourly rate in his field of practice.**
- 2.3 It is appropriate for the trial court to consider evidence of state wide hourly fees, if such evidence is presented, in determining a reasonable fee for a guardian ad litem.**
- 2.4 When the evidence is undisputed that time was billed by a guardian ad litem for sleeping, that billing is unreasonable as a matter of law and may not be compensated.**
- 2.5 A guardian ad litem is not entitled to recover fees to draft fee statements, fee applications and to defend their fee award.**

*Goodyear v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Goodyear appealed a portion of a trial court's award of approximately \$400,000.00 in aggregate fees to six guardians ad litem and \$30,000.00 in appellate fees. The underlying litigation arises out of a products liability case involving a 15 passenger van carrying sixteen individuals. Six passengers were killed; the driver and other passengers suffered personal injuries. The plaintiffs initially sued the driver of the van, but later added Goodyear as a third party defendant alleging it manufactured a defective tire.

Approximately four months before trial, Notzon was appointed guardian ad litem for one of the minor plaintiffs. Three months later, and less than one month before trial, the court appointed four more attorneys, Lopez, Rodriguez, Jaime and Castillo to serve as guardian ad litem for twenty minor plaintiffs. The last guardian ad litem, Morales was appointed nineteen days before trial for one additional minor.

The guardians ad litem attended two days of mediation, however the case did not settle. Morales did not attend because she was appointed after the mediation. On September 12, 2002, eleven days before trial, a settlement conference was held and a settlement was

reach. The settlement was dictated into the record in open court at a half day hearing on September 13. A hearing was held on October 11, 2002, at which time the court approved the terms of the minors' settlement. All plaintiffs and minors were present, except for the minors of the surviving plaintiffs.

Goodyear objected that the requested ad litem fees were excessive, and an evidentiary hearing on the fees was held on October 21, 2002. The court entered a final judgment awarding aggregate ad litem fees of \$397,741.12 to be taxed against Goodyear as court costs. Upon Goodyear's request, the trial court entered written findings of fact and conclusions of law with respect to each of the ad litem's fees. Thereafter, the ad litem requested a modification of the judgment to include appellate fees of \$15,000.00 each. The court authorized a total of \$5,000.00 for each ad litem or a total of an additional \$30,000.00 in appellate fees. Goodyear appealed, arguing that the ad litem are not entitled to any appellate fees, and that the award of almost \$400,000 in ad litem fees was excessive. The appellate court reviewed the fees on an abuse of discretion standard.

The appellate court noted that a trial court shall award a guardian ad litem a reasonable fee for his services to be taxed as costs of court. A trial court determines the appropriateness of a guardian ad litem fee by examining the same factors that determine the reasonableness of all attorneys' fees as set out in Rule 1.04 of the Texas Disciplinary Rules. Those factors include:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services 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.

Goodyear argued that the fees are unreasonable because the guardians ad litem were compensated for work that was outside the scope of their ad litem role and more appropriate for the plaintiffs attorneys to perform; work done after the trial court approved the minors' settlement and the conflict ended; excess and unconscionable amounts of time for certain tasks, and excessive hourly rates. In addition, Goodyear argues that the trial court did not have plenary power to award the appellate fees, and even if the court had jurisdiction, there is no authority to award appellate fees.

The trial court found that the following fees for each ad litem are reasonable and consistent with the customary ad litem fees in the community:

Ad Litem	Fee Awarded	Hours Awarded	Rate Per Hour
Notzon	\$109,879.51	365 hrs.	\$350.00
Castillo	64,434.28	210 hrs.	300.00
Jaime	60,208.66	195 hrs.	300.00
Lopez	59,914.91	222 hrs.	300.00
Rodriguez	54,178.76	175 hrs.	300.00
Morales	49,125.00	160 hrs.	300.00

The trial court's finding of facts and conclusions of law showed that the court examined each ad litem's bill, applied the Garcia factors to each ad litem and reduced the hourly rate and number of hours submitted by each ad litem on an individual basis and concluded the fees were reasonable and necessary.

The court of appeals found that the guardian ad litem's duty is to act as the personal representative of the minor rather than as the attorney for the minor. The court held that participating in, attending, and reviewing depositions were not relevant to the ad litem's minors, as well as time for reviewing pleadings and discovery motions, including deposition notices, was beyond the scope of the necessary participation to perform the limited role. The guardian ad litem's services must not duplicate the work performed by the plaintiff's attorney. A guardian ad litem may only attend depositions, hearings and conferences, necessary to protect their respective minor's interests. A guardian ad litem clearly has the duty to evaluate a proposed settlement from their minor's perspective and make a recommendation to the court on the minor's behalf. In reviewing a settlement offer, the guardian ad litem's duty includes evaluation of the damages suffered by the minor, the adequacy of the settlement, the proposed apportionment and manner of distribution of the settlement proceeds and the amount of attorney's fees charged by the plaintiff's attorney.

The court held that it is not reasonable or necessary for a guardian ad litem to attend or review every deposition, or to review and bill time for every motion and pleading filed in a case, without regard to relevance to the ad litem's minor. The court noted that all ad litem's duplicated the tasks already being competently performed by the plaintiff's attorneys by reviewing countless deposition notices and other discovery motions, attending depositions not related to their minor and reviewing every pleading filed in the case regardless of the relevance to their minor. The court of appeals remanded to the trial court to determine which, if any, particular discovery motions, discovery materials (including depositions) and pleadings were necessary to protect the interests of the various minors.

The ad litem's also billed time after the settlement for preparing their ad litem reports and fee statements and researching fees and attending the fee hearing. The court of appeals held it was reasonable and necessary for the ad litem's to charge time for preparing their reports but not to defend their fee awards.

Additionally, the ad litem billed for work by several people in their offices. The court of appeals held that unless extenuating circumstances exists, the guardian ad litem should perform the work, and if possible, to obtain court approval authorizing assistance or other resources.

Goodyear also complained of excessive billing. Not surprisingly, the court of appeals indicated that bills submitted by the ad litem in excess of 24 hours in one day including time for sleeping were per se unconscionable. Finally, the ad litem billed different times to perform the same tasks. To view a single deposition notice, the ad litem time ranged between .10 to 4.00 hours. Additionally, Goodyear complained of excessive rates, which ranged from \$300.00 to \$350.00 when their regular rates ranged from \$150.00 to \$225.00 an hour. The ad litem argued they should look to the rates customarily charged for similar legal services in Webb County. The court of appeals indicated they could discern no reason why compensation for guardian ad litem services would be dramatically different from one county to another. Therefore, the court of appeals held it appropriate for the trial court to consider evidence of state-wide hourly fees if such evidence is presented. Finally, the court of appeals denied all appellate fees to argue the fee issue since it benefited the ad litem and not the minors.

Not surprisingly, the appellate court found an abuse of discretion and remanded to the trial court to reconsider the fees and expenses in accordance with the opinion.

A concurring opinion was filed indicating that Justice Duncan was going to submit this matter to a local grievance committee as she believed this is why the legal system is under siege and she encouraged the full court to join in to report these lawyers to the grievance committee.

- 3.1 Trial court must state on record the explicit reason for assessing a guardian ad litem's fees against the prevailing party.**
- 3.2 When minor and minor's parent are represented by an attorney, the guardian ad litem is not entitled to compensation for work preformed in role of "attorney ad litem" because it is duplicative and unauthorized by Texas Civil Procedure Rule 173.**
- 3.3 There is no statutory authority for court to appoint an attorney for minor to assist as co-counsel and charge attorneys fees against the successful party.**

*Marshall Investigation & Security Agency v. Whitaker*, 962 S.W.2d 62 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

Attorney was appointed ad litem for minor in wrongful death lawsuit brought by plaintiff's counsel representing surviving spouse, individually and on behalf of minor child. Trial court's order of appointment incorrectly designated attorney as "attorney ad litem" instead of as "guardian ad litem." Attorney referred to himself as attorney ad litem during the litigation and trial. The defendants prevailed at trial and the court entered a

take-nothing judgment in favor of the defendants. The court then held a separate hearing on ad litem's fees and taxed the fees against the defendants.

On appeal, defendant's assert that the trial court erred in taxing the ad litem's fees against it because it was the prevailing party and the court failed to state in the record why such fees were not taxed against the losing party in accordance with Texas Rule of Civil Procedure 141.

The Houston Court of Appeals reversed and remanded on the basis that the trial court must state on record the explicit reason for assessing guardian ad litem's fees against the prevailing party. In reaching its decision, the appellant also noted that the trial court should review the ad litem's statement of work. As the surviving spouse and minor were represented by plaintiff's counsel throughout the litigation and trial, attorney would only be entitled to fees for serving as guardian ad litem and not as attorney ad litem. In an concurring opinion, the appellant court noted that there is no statutory authority for court to appoint an attorney for a minor to assist as co-counsel and charge attorneys fees against the successful party.

**4.1 The factors used to determine the reasonableness of a guardian ad litem's fees are the (i) difficulty and complexity of the case, (ii) amount of time spent by the attorney, (iii) benefit derived by the client; and (iv) skill and experience reasonably needed to perform the service.**

*Parkway Hospital, Inc. v. Lee*, 946 S.W.2d 583 (Tex. App.—Houston [14th Dist.] 1997, no writ).

A guardian ad litem is not an attorney for the child, but an officer appointed by the court to assist in protecting the child's interest when a conflict arises between the child and the child's guardian or next of friend. If a guardian ad litem performs work beyond the scope of this role, such work is non-compensable. An ad litem may be compensated a reasonable fee for performing necessary services in the guardian ad litem's role, and a reasonable hourly rate multiplied by the number of hours necessarily spent yields a reasonable fee.

*Youngstown Area Jewish Federation. v. Dunleavy*, 223 S.W.3d 604 (Tex. App.—Dallas 2007 no pet. h.).

## **GUARDIANSHIP ESTATE**

**1. The “guardianship estate” consists of the real and personal property owned by the ward.**

*In re Guardianship of Rodriguez*, No. 04-06-00800-CV, 2007 WL 2042553 (Tex. App.—San Antonio, July 18, 2007, no pet. h.) (mem. op.).

Lynda Lazo filed an application in the guardianship cause to establish community property. The probate court denied the application, as the property Lazo sought to have declared community property was sold over four years before the guardianship was established. The appellate court affirmed the finding that Lazo failed to produce evidence that the property belonged to the ward at the time the guardianship was established.

## **HOMESTEAD**

- 1. Guardian may sell ward's homestead with court approval in order to provide for ward's care even though the sale may damage or extinguish the inheritance rights of a named beneficiary under ward's will.**

*Hardeman v. Judge*, 931 S.W.2d 716 (Tex. App.—Fort Worth 1996, writ denied).

## **INDEPENDENT MEDICAL EXAMINATION**

- 1. In a case of first impression, trial court's denial of applicant's request for an independent medical examination was not an abuse of discretion.**

*Karlen v. Karlen*, 209 S.W.3d 841 (Tex. App.—Houston [14th Dist.], 2006, no pet. h.).

Applicant for guardianship filed a motion seeking a court ordered independent medical examination of the proposed ward pursuant to Texas Rule of Civil Procedure 204 and Texas Probate Code Section 687(b). The proposed ward, through counsel, opposed the motion and filed a motion to dismiss guardianship application. The trial court denied Applicant's motion for independent medical examination and granted proposed ward's motion to dismiss. Applicant appealed the denial of his request for an independent medical examination of the proposed ward. Appellant contended that the trial court erred in denying his motion for an independent medical examination so that he could comply with the guardianship procedural requirements because he was prevented from having access to the proposed ward. The appellate court held that Texas Rule of Civil Procedure 204 did not apply to guardianship proceedings because the Texas Probate Code maintains its own framework for evaluating such issues. The appellate court, noting that it was a case of first impression, held that the applicable standard of review was an abuse of discretion standard. The appellate court held that the trial court did not act arbitrarily or unreasonably in denying the motion.

## **INSURANCE**

- 1. Insurance company which issued homeowner's policy to person accused of committing fraud against a proposed ward does not have a duty to defend insured in a guardianship proceeding if the only relief sought is the appointment of a guardian for the proposed ward even though applicant seeks the guardianship, in part, to compel insured to return ward's property.**

*Smith v. Fire Insurance Exchange*, No. 14-95-00901-CV, 1996 WL 499453 (Tex. App.—Houston [14th Dist.] 1996, no writ) (not designated for publication).

## **IN TERROREM CLAUSE**

### **1. Guardian did not invoke in terrorem clause.**

*Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Ugo di Portanova, a partially incapacitated adult (“Ugo”), is the grandson of H.R. and Lillie Cullen. Mr. di Portanova has lived with Mr. and Mrs. LaMatta since 1974. Mrs. LaMatta is the guardian of Ugo’s person and Mr. Monroe is the successor guardian of this estate.

Paul Piero di Portanova and Antonella Apuzzo di Portanova are Ugo’s half brother and sister. They share the same father. Ugo’s mother is D’Alesandro Filament, a woman from Naples, Italy.

The guardian filed an application to make tax motivated gifts for the benefit of the LaMatta family in which guardian sought to use over \$5 million from a trust to fund the gift and taxes be paid from the trust—for a total of \$6.6 million. If approved, approximately \$2.9 million would remain in the trust.

Simultaneously, the guardian also filed a declaratory judgment action that the Cullen wills permitted or authorized a distribution of income and corpus from the trust for funding purposes of the gifts and taxes.

The trustees filed a partial summary judgment that there was no material fact question as the trustees had already exercised their discretion and decided not to make the gifts.

The di Portanovas filed two summary judgments: (1) invoking the in terrorem clause, and (2) that the dispersal of the trust funds for the stated purpose would not be in Ugo’s best interest.

The guardian moved for partial summary judgment that the terms of the trust would support the dispersal of such funds and it was in Ugo’s best interest to make the distributions. On November 23, 2004, a final declaratory judgment was signed by the trial court indicating that the wills and codicil authorized the proposed gifts, including the payment of federal gift taxes and that there had been no violation by the guardian of the in terrorem clause.

The court of appeals rejected guardian's argument that the request for a declaratory judgment was nothing more than an improper request for an advisory opinion. The appellate court reversed the trial court indicating that no justiciable issue exists.

The wills and codicils provided that the trustee may make distributions from the trust estate only if the distribution is "in the discretion of the Trustee; [is] in the best interest of the [beneficiary]." Therefore, the trial court's declaration that the trustees were authorized to fund the gifts and that the proposed disbursement was essentially in Ugo's best interest.

The court of appeals reversed the judgment of the trial court holding that the beneficiary of a discretionary trust cannot compel the trustee to pay to him or apply for his use any part of the trust property. The trial court reiterated the long-standing rule that a court cannot substitute its judgment for the trustee.

The record was devoid of any evidence that the trustees had acted with malice or lack of good faith. The holding of the trial court usurped the trustees' role and decision.

Each of the Cullens' wills contains the following in terrorem or "no contest" clause:

Should any beneficiary hereunder, or anyone duly authorized to act for such beneficiary, institute or direct, or assist in the institution of prosecution of, any action or proceeding of any kind in any court, at any time, for the purpose of modifying, varying, setting aside or nullifying any provision hereof relating to my Louisiana estate on any ground whatsoever, all interest of such beneficiary, and the issue of such beneficiary, to my Louisiana estate shall cease, and the interest of such beneficiary, and such beneficiary's interest shall be paid, assigned, transferred, conveyed, and delivered to, or for the benefit of, those person who would take such beneficiary's interest in my Louisiana estate if such beneficiary died intestate, unmarried, and without issue on the date of the institution of the above described action or proceeding. (Emphasis added).

The di Portanovas argue that the guardian sought to modify, nullify and vary the purpose and effect of the Louisiana trust by, as a practical matter, changing the trust beneficiaries. The trial court held that the request for declaratory relief by guardian did not violate the in terrorem clause. The court of appeals reversed the decision holding that there was no judiciable controversy and dismissed that portion of the case for want of jurisdiction.

## **JURISDICTION**

### **1. Probate court lacks jurisdiction to rule on a motion for instructions sought by a guardian when there is no controversy presented to the court.**

*In Re L.C.D.*, 16 S.W.3d 153 (Tex. App.—Beaumont 2000, no pet.).

Non-relative guardian of the person filed a motion for instructions with the probate court. The motion sought the court's instruction regarding whether it would be in the ward's best interest to authorize the guardian to execute a directive to physicians to withhold or withdraw life sustaining procedures. Guardian did not, however, affirmatively request permission to sign a directive or seek to ratify the execution of a directive to physician. The court appointed an attorney ad litem to represent the ward. The attorney ad litem advocated against the execution of a directive by the guardian. The only other interested parties were the Ward's parents. The parents both executed affidavits expressing their desire that a directive be executed, however, they did not seek any affirmative relief. At the conclusion of the hearing, the probate court entered an order *directing* the guardian to execute an irrevocable directive.

Ward's attorney ad litem petitioned for a writ of mandamus to compel the trial court to withdraw its order and also requested a stay of the order pending the mandamus. The appellate court agreed to stay the trial court's order pending the mandamus and requested briefing. On appeal, the attorney ad litem argued that the trial court erred in ordering the guardian to execute the directive as the ward wanted to live and expressed a desire to live. The appellate court ultimately held the trial court lacked jurisdiction to enter order because there was no justiciable controversy because of the manner in which the issue was presented to the court. Therefore, there was nothing to appeal. In reaching a decision, the appellate court noted that subject matter jurisdiction requires (i) the party bring the suit to have standing, (ii) there be a live controversy between two or more parties, and (iii) the case be justiciable. Because no controversy was presented to the trial court, it exceeded its authority and the court conditionally granted the writ of mandamus and directed the trial court to vacate its order.

**2. Probate court retains jurisdiction over a contested matter until the matter is resolved or turned over to another court.**

*Gough v. Gough*, No. 05-99-00459-CV, 2000 WL 371034 (Tex. App.—Dallas April 12, 2000, pet. denied)(not designated for publication).

Son was appointed temporary guardian of his Mother and also applied for permanent guardianship. Mother filed a counterclaim for damages relating to the conversion of property while Son served as her temporary guardian. Son subsequently dismissed his application for permanent guardianship, but damages and costs were assessed against him. He appealed on six grounds, two of which challenged the trial court's jurisdiction to assess damages against him as the Mother's former temporary guardian.

On appeal, Applicant complained of no personal jurisdiction by failure to properly serve him. The appellate court found that Son asked for relief, including continuances and thus had made a general appearance. The Son also claimed that the trial court lost jurisdiction over the guardianship matter when he dismissed his application for permanent guardianship, there was no estate and thus no jurisdiction. The Court held that the dismissal did not deprive the court of jurisdiction over the counterclaim against him since

it was against him as the purported personal representative. It was not necessary that the estate itself was “pending” in probate court.

- 3.1 Upon ward's death, probate court lacks jurisdiction to continue guardianship for purposes of collecting and liquidating assets in order to pay expenses and creditor of ward's estate.**
- 3.2 Upon ward's death, probate court's jurisdiction is limited to that necessary to settle and close guardianship estate.**

*In re Estate of Glass*, 961 S.W.2d 461 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

Ward died and the probate court ordered guardian to file a final account and terminate the guardianship. Guardian filed motion to reconsider the termination of guardianship because he wanted time to collect and liquidate assets of ward to pay expenses and creditor of guardianship. Probate court denied guardian's motion on the basis that the court lacked jurisdiction to take any action with respect to the guardianship other than ordering the guardian to file final account and conclude guardianship. Guardian appealed.

On appeal, guardian argued that the recent expansive amendments to the Texas Probate Code rendered the Texas Supreme Court's decision in *Easterline v. Bean*, 49 S.W.2d 427 (Tex. 1932) inapplicable. In *Easterline*, the Texas Supreme Court held that, upon the ward's death, the probate court loses jurisdiction over the guardianship matter except to the extent necessary to immediately settle and close the estate and discharge the guardian.

Affirming the probate court, the Houston Court of Appeals held that notwithstanding the recent revisions to the Texas Probate Code, *Easterline* was applicable and the probate court properly ordered the guardian to submit a final account and settle and close the guardianship.

- 4. A statutory probate court has exclusive jurisdiction to enter guardianship orders under Section 606(d) of the Texas Probate Code.**

*In re J.B.H.*, No. 14-05-00745-CV, 2006 WL 2254130 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (not designated for publication).

- 5. The trial court where guardianship was pending lacked power to enter turnover order because there was no underlying judgment to be enforced against a judgment debtor when parties had entered settlement agreement that resulted in underlying claims being nonsuited with prejudice.**

*Central Bank of Houston v. Guardianship of Neblett ex rel. Neblett*, Nos. 01-05-01075-CV, 01-05-00811-CV, 2006 WL 3518568 (Tex. App. —Houston [1st Dist.] 2006, no pet. h.) (not designated for publication).

- 6.1 Court lacked subject-matter jurisdiction to appoint permanent guardian during ten-day period after service of notice and citation.**
- 6.2 The provision of Texas Probate Code Section 633 that provides the hearing for the appointment of a permanent guardian cannot be held for ten days after service of notice and citation is jurisdictional and the proposed ward cannot waive jurisdictional procedures.**

*In re Guardianship of Erickson*, 208 S.W.3d 737 (Tex. App.—Texarkana 2006, no pet. h.).

- 7.1 District court lacked jurisdiction over a second action filed by guardian as to issues left unresolved in prior guardianship proceedings after the district court transferred the prior action back to county court due to resolution of contested matters in the initial proceeding.**

*In re Oestreich*, 219 S.W.3d 81 (Tex. App.— San Antonio 2006, no pet. h.).

A guardianship was filed in the county court of Gillespie County. A contest was filed and, pursuant to Texas Probate Code Section 606, the contested portions were transferred to the district court. After the initial contested matters were resolved, the district court transferred the entire proceeding back to the county court as required by the Texas Probate Code. The appointed guardian subsequently filed a lawsuit against a third party and requested the appointment of a statutory probate judge. A statutory probate judge was assigned, but declined to hear the guardian's suit. The district court subsequently ordered that it retained jurisdiction of all contested matters relating to the guardianship, including the subsequent lawsuit against the third parties. The appellate court held that under these circumstances, the district court had no authority to exercise jurisdiction over the subsequent lawsuit and the district court's order retaining jurisdiction was void.

- 8. Order granting temporary guardianship was void for want of jurisdiction; notice was not served on proposed ward or counsel for proposed ward before the hearing on the application for temporary guardianship as required by Section 875 of the Texas Probate Code.**

*In re Mask*, 198 S.W.3d 231 (Tex. App.—San Antonio 2006, orig. proceeding).

On January 23, 2006, Ronnie and Jimmy Rogers filed an Emergency Application for Appointment of Temporary Guardian of Person and Estate alleging that their grandmother, Ella Mask, was incapacitated. The following day, the trial court signed an order appointing Ronnie and Jimmy Rogers as temporary guardians of Ella Mask's person and estate. It was undisputed that Mask was not given notice of the application for temporary guardianship or of the January 24, 2006 hearing on the application. Only Mask's court-appointed guardian ad litem was personally served with citation. Mask did not appear at the hearing.

After learning of the temporary guardianship order, Mask retained counsel, who filed a motion to dismiss the temporary guardianship application. On February 9, 2006, the trial court held a hearing to entertain the motion to dismiss, but ultimately denied the motion. Mask's counsel then filed a petition for writ of mandamus in the San Antonio Court of Appeals.

The Court of Appeals held that, because Mask had not been served with notice before the hearing on the application for temporary guardianship, the court lacked jurisdiction over Mask and the temporary guardianship order was void. The Court cited Texas Probate Code section 875, which clearly states that the respondent and counsel for respondent in an application for temporary guardianship shall be served with notice before the hearing, and that a person for whom a temporary guardian is appointed may not be presumed to be incapacitated.

The Court rejected the Rogers' arguments that the February 9 hearing on the motion to dismiss cured any defects in service, that Mask waived any complaints about service by appearing at that same hearing, and that Mask waived her complaint by failing to file a special appearance. "Mask's complaint is not that she was not subject to the jurisdiction of the Texas courts, but that the trial court's jurisdiction over her was not invoked by complying with the Probate Code's notice requirements." The Court further observed that a void order is not subject to ratification, confirmation, or waiver, and that in any event an attempted waiver of service by an incapacitated person would be ineffective.

- 9.1 The power of a court to appoint a guardian is a special power conferred by statute and compliance with the [guardianship] statute is a condition precedent to the valid exercise of that power and is *jurisdictional*.**
- 9.2 Texas Probate Code Section 633 does not set out optional procedures for notice in a guardianship; only through compliance with Section 633 is the trial court's jurisdiction invoked.**
- 9.3 A judgment is void when the rendering court has no jurisdiction of the parties, no jurisdiction to enter the judgment, or no capacity to act as a court.**

*In re Peggy Fowler Redding*, 2007 WL 1241512 (Tex. App.—Tyler] no pet. h.) (not yet designated for publication).

Ward's daughter, Peggy Fowler Redding, was appointed temporary guardian of her father, William Neal Fowler, pending a hearing on her temporary guardianship application set for August 21, 2006. Prior to the hearing, Ward's spouse filed a competing application for temporary guardianship, along with an application for permanent guardianship. At the hearing on August 21, 2006 on the temporary guardianship, the trial court appointed Ward's spouse as permanent guardian of the person and estate. The return date on the spouse's application, however, was August 28,

2006. The court signed the order appointing the spouse permanent guardian on September 18, 2006.

Redding contends that the order is void because (i) the order was rendered before the return date and (ii) a proof of notice affidavit pursuant to Section 633 of the Texas Probate Code was not filed, showing that Ward's children were served with the application for permanent guardianship.

The Court held that pursuant to Section 633(f), the earliest date the court could act on the permanent application was August 28, 2006. The date of the judgment was the date of the court's oral pronouncement in open court on August 21, 2006, rather than the date it signed the written order. The trial court acted before it acquired jurisdiction to order the permanent appointment and therefore, the order was held void.

**10.1 A proposed ward alleged to be an incompetent person cannot waive service of citation.**

**10.2 An agent under a power of attorney cannot accept or waive serve for a proposed ward. Texas Probate Code §633 prevails over Texas Probate Code § 500(6), which permits an attorney in fact to accept service of process for a principal.**

*In re Martinez*, 2008 WL 227987 (Tex. App.–San Antonio, no pet. h.) (not yet designated for publication).

The Court found that orders entered in a guardianship proceeding void where the proposed ward was never personally served with citation. Without personal service, the trial court lacked jurisdiction over the proposed ward.

**11.1 Generally an appeal can only be brought by a named party to a suit.**

**11.2 A party does not need to be a named party in an underlying suit to seek mandamus relief. The party must merely have a justiciable interest in the underlying controversy.**

**11.3 A justiciable controversy is one that is definite and concrete and impacts the legal relations of parties having adverse legal interests.**

*Guardianship of Javier DeLuna*,---S.W.3d---, 2008 WL 1747581 (Tex. App.–Corpus Christi, no pet. h.) (not yet designated for publication).

[This case is sufficiently described in the head note.]

- 12.1 Upon the filing of an application for guardianship and until the guardianship is settled and closed, the administration of the estate is considering one proceeding for purposes of jurisdiction and is a proceeding in rem.**
- 12.2 A guardianship proceeding initiated in county court at law or constitutional county court gains exclusive jurisdiction to all actions incident to a guardianship estate and matters relating to the settlement and distribution of the guardianship estate.**

*Wood v. Dalhart R&R Machine Works, Inc.*, ---S.W.3d---, 2008 WL 2185747 (Tex. App.—Amarillo, no pet. h.) (not yet designated for publication).

[This case is sufficiently described in the head note.]

## **JURY TRIAL**

- 1. There is no right to a jury trial in a temporary guardianship proceeding.**

*In re Kuhler*, 60 S.W.3d 381 (Tex. App.—Amarillo 2001, orig. proceeding).

- 2. The applicant, as well as the proposed ward, has a right to a jury trial in a contested guardianship.**

*In re Norman*, No. 14-06-00488-CV, 2006 WL 2947845 (Tex. App.—Houston [14th Dist.] Oct. 13, 2006, orig. proceeding).

Applicant filed application for guardianship of proposed ward. Attorney ad litem moved to dismiss the application based, in part, on attorney ad litem’s own testimony in the form of an affidavit. Applicant requested a jury trial on ad litem’s motion to dismiss, and paid a jury fee. Three months later, the trial court held a hearing on the motion to dismiss. Upon the conclusion of the hearing, the court granted the motion and dismissed the application pursuant to Section 692 of the Texas Probate Code. Section 692 provides for a dismissal of a guardianship if an adult person is found to have the capacity to care for himself or herself and to manage the individual’s property as would a reasonably prudent person.

The appellate court held that the trial court violated Section 643 of the Texas Probate Code that provides “[a] party in a contested guardianship proceeding is entitled, on request, to a jury trial.” TEX. PROB. CODE ANN. § 643 (Vernon Supp. 2000). The appellate court also found that Section 692 and 643 could be read harmoniously to “describe the authority of the trial court once capacity is resolved by the appropriate fact-finder.” *Norman*, 2006 WL 128010 at \*3. Therefore, the appellate court reversed and remanded for a jury trial on the application for guardianship.

- 3. In a county court at law, a jury of six is proper to hear a contested guardianship. In a statutory probate court, a jury of twelve is proper, if requested, as there is concurrent jurisdiction with the district court in probate matters.**

*In re Guardianship of Lynch*, 35 S.W.3d 162 (Tex. App.—Texarkana 2000, no pet.).

- 4. There is an absolute right to a jury trial in proceedings to appoint a permanent guardian.**

*In re Guardianship of Whitcomb*, No. 13-04-022-CV, 2005 WL 1039656 (Tex. App.—Corpus Christi 2005, no pet.) (mem. op.).

In a prior decision regarding this case, the appellate court had remanded this case back to the trial court because the trial court had improperly appointed co-guardians in violation of Section 690 of the Texas Probate Code. *See In re Whitcomb*, 35 S.W.3d 220 (Tex. App.-Corpus Christi 2000, no pet.). Instead of retrying the guardianship, the trial court attempted to rectify the voidable appointment by simply allowing one of the co-guardian's to resign. The trial court also found that all prior orders of the court were to remain in full force and effect.

The appellate court reversed and vacated the order of the trial court and remanded for a second new trial. The court of appeals noted that at the new trial, Mr. Whitcomb should be afforded the right be present at the hearing and to conduct further proceedings consistent with the Texas Probate Code. Moreover, the court noted that Mr. Whitcomb was entitled to a jury trial on all contested issues and the court's acceptance of the resignation without rehearing the merits of the guardianship effectively denied him of his right to jury trial in this contested guardianship proceeding. The appellate court further ordered the parties to conduct the proceedings on remand without delay and as expeditiously as possible.

- 5. Where the trial court denied Guardian's request for a jury trial under Texas Probate Code Section 643 and suspended Guardian's powers on its motion in a guardianship proceeding, Guardian was not entitled to mandamus relief to vacate the orders. Mandamus will not issue without a showing there is no adequate remedy at law. Guardian could have exercised her right to appeal and had the trial court's rulings reversed and remanded for a trial by jury.**

*In re Marilyn S. Johnson*, 2007 WL 3037102 (Tex. App.—El Paso, no pet. h.) (not yet designated for publication).

[This case is sufficiently described in the head note].

## **LIABILITY OF WARD**

- 1.1 **Where temporary guardian plead that a ward lacked the mental capacity, due to dementia and Alzheimer's disease, to intentionally harm a fellow patient, the alleged facts alone were sufficient to trigger the insurance carrier's duty to defend the case against the ward and temporary guardian to bring the case within ward's coverage.**
- 1.2 **Extrinsic evidence of insured's mental state was immaterial to insurer's duty to defend under the eight corners rule and should not have been considered.**

*Hochheim Prairie Casualty Insurance Company v. Appleby*, ---S.W. 3d ---, 2008 WL 141587 (not yet designated for publication).

[This case is sufficiently described in the head note].

## **MANDAMUS**

- 1.1 **Generally an appeal can only be brought by a named party to a suit.**
- 1.2 **A party does not need to be a named party in an underlying suit to seek mandamus relief. The party must merely have a justiciable interest in the underlying controversy.**
- 1.3 **A justiciable controversy is one that is definite and concrete and impacts the legal relations of parties having adverse legal interests.**

*Guardianship of Javier DeLuna*,---S.W.3d---, 2008 WL 1747581 (Tex. App.—Corpus Christi, no pet. h.) (not yet designated for publication).

[This case is sufficiently described in the head note.]

## **MEDICAL CARE FOR MINORS**

1. **Parents have no right to withhold life sustaining medical treatment when minor child has severe disabilities and deformities regardless of the severity when condition is not certified as terminal.**

*HCA v. Miller, et al.*, 36 S.W.3d 187 (Tex. App.—Houston [14th Dist.] 2000), aff'd, 118 S.W.3d 758 (Tex. 2003).

## **MENTAL HEALTH**

- 1. Trial Court did not err in finding that expert medical opinions were sufficient evidence in a commitment proceeding because those opinions were supported by a showing of the factual basis on which they were grounded. The trial court correctly rejected the argument that both expert and lay testimony regarding a patient's dangerousness is required before a court can order mental health services.**

*Campbell v. State of Texas*, 118 S.W.3d 788 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

- 2. Written request to reset hearing to determine whether involuntary commitment is warranted must be filed by a party to the action.**

*In re K.A.K.*, No. 04-99-00375-CV, 1999 WL 974020 (Tex. App.—San Antonio 1999, no pet.) (not designated for publication).

Application for commitment was filed on May 12, 1999 and hearing was set for May 19, 1999. Commitment Coordinator for San Antonio State Hospital sent a written request to reset the hearing to May 25, indicating that further evaluation of the patient was necessary. The parties were notified of the reset on May 20.

At the May 25 hearing, counsel for K.A.K. moved to dismiss the application on the grounds that the hearing was improperly continued. Section 574.005(c) of the Health and Safety Code states that a hearing can be continued on the motion of a party and for good cause shown or on agreement of the parties. K.A.K. argued, and the court of appeals agreed, that the commitment coordinator was not a “party” to the action, thus the resetting of the hearing was improper. However, the court of appeals held there was no error because the hearing on the commitment application was still held within fourteen days of the date the application was filed as required by Section 574.005(a) of the Health and Safety Code.

- 3. A person under a temporary mental health commitment does not have to file a motion for new trial under Rule 324 of the Texas Rules of Civil Procedure to complain about factual insufficiency on appeal.**

*Johnstone v. State*, 22 S.W.3d 408 (Tex. 2000).

## **MENTAL HEALTH COMMITMENT**

- 1. Clear and convincing evidence standard used to support a mental health commitment reflects the value society places on individual liberty and must not be taken lightly by courts and prosecutors.**

*T.G. v. The State of Texas*, 7 S.W.3d 248 (Tex. App.—Dallas 1999, no pet.).

T.G. appealed her involuntary commitment. After reviewing the “sparse record,” the court of appeals found no evidence to support the order of commitment and strongly believed that “the system failed, and there [was] nothing [the court could] do to rectify the fact that T.G. was confined against her will on less evidence than is required by statute.” The court of appeals reiterated that the level of proof required before ordering a person's involuntary commitment is nothing less than clear and convincing evidence and reminded “mental health prosecutors and judges that anything less [would] result in a reversal.”

In reversing the mental commitment, the court of appeals took the prosecutor to task for the “perfunctory manner in which the State prosecuted” this involuntary commitment and stated that it found “disturbing the quantum of evidence determined by the trial court to be clear and convincing” as to deprive T.G. “of her liberty for up to ninety days.”

2. **Medical evidence that patient is mentally ill without a further showing of recent overt act or continuing pattern of behavior that tends to confirm the likelihood of serious harm to the patient or a substantial deterioration of the patient’s ability to function independently to provide for her basic needs, requires the reversal of an order for temporary involuntary commitment.**

*K.T. v. State*, 68 S.W.3d 887 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

- 3.1 **An order of temporary commitment must be supported by clear and convincing evidence of a recent overt act or a continuing pattern of behavior that tends to confirm either the likelihood of serious harm to the proposed patient or others, or the proposed patient’s distress and the deterioration of her ability to function.**
- 3.2 **To satisfy an order of temporary commitment under the Health and Safety Code, the expert opinion of a doctor as to the proposed patient’s mental condition must be factually based and not supported by generalities of the mental illness.**

*The State of Texas for the Best Interest and Protection of B.G.*, No. 12-07-00029-CV, 2007 WL 2447124 (Tex. App. —Tyler August 30, 2007 no pet. h.) (mem. op.).

An application for the temporary commitment of B.G. was filed with a supporting certificate of medical examination prepared by Dr. Cuellar. The trial court ordered B.G. committed to Rusk State Hospital. B.G. appealed the order claiming the evidence was legally and factually insufficient to support the order, as it does not show an overt act or continuing pattern of behavior indicating she is likely to harm herself or is unable to care for herself.

At trial, Dr. Cuellar testified that B.G. has been deteriorating for several years, she had a history of fighting with her caregivers, was aggressive and unable to care for herself.

The Court of Appeals reversed the trial court’s order, holding that evidence merely showing a patient is mentally ill and needs hospitalization is not enough to satisfy the

State's burden. The Health and Safety Code requires clear and convincing evidence of an overt act or a specific, factually based, continuing pattern of behavior that confirms B.G. is likely to harm herself.

**4. When a person is charged with the criminal offense of unwarranted mental health commitment, the amount of time the complainant actually spends in the mental health facility is irrelevant.**

*Rent v. State*, 949 S.W.2d 418 (Tex. App.—Houston [14th Dist.] 1997), *aff'd*, 982 S.W.2d 302 (Tex. Crim. App. 1998).

An ex-husband executed an application for emergency apprehension of former wife. The application and affidavit stated that he was fearful of her because the former wife had a history of violence, exhibited weird behavior, and she refused to accept reality. Based on the application, the probate court signed an emergency detention warrant for the former wife.

As a result, the former wife was arrested and taken to a mental health facility. The former wife was forced to spend the night at the facility and submit to two medical examinations. The examining doctor determined that the former wife did not require treatment and she was released.

Subsequently, the ex-husband was charged with the misdemeanor offense of unwarranted mental health commitment. He was convicted and on appeal he claimed that there was insufficient evidence to show that the former wife was ever "committed" to a mental health facility.

The court of appeals held that the amount of hours or days that the former wife actually spent in the facility was irrelevant. The court concluded that the defendant should not benefit from a speedy evaluation of a person which results in a quick discharge from a mental health facility.

## **MISAPPLICATION OF GUARDIANSHIP PROPERTY**

**1.1 Social Security Benefits. A representative payee does not have to account for social security benefits in a guardianship proceeding if they are not commingled with the ward's assets.**

**2.1 Costs charged against Guardian and Surety. Texas Probate Code Section 668 is construed liberally and can be applied even if the ward has died.**

*Alford v. Marino*, No. 14-04-00912-CV, 2005 WL 3310114 (Tex. App.—Houston [14th Dist.] Dec. 8, 2005, no pet.) (mem. op.).

William was appointed guardian of Mathew's estate in 1988 and posted an \$8,000 surety bond. Mathew began receiving social security benefits of approximately \$1,059 per

month and a lump sum benefit of \$10,000 for past benefits. William deposited the social security money into a certificate of deposit. In 1989, Mathew moved to Louisiana to live with his mother, Willie Alford. Alford then qualified as representative payee and social security asked for an accounting of the funds previously distributed. Sometime in 1996, Mathew returned to a nursing home in Houston and died one month later, on March 7, 1997.

Prior to Mathew's death, Mathew's son filed suit in probate court to demand an annual and final accounting of the guardianship estate. At the same time, a daughter, Simone, filed an application to be appointed successor guardian. In August of 1998, the probate court removed William as Mathew's guardian and appointed Tim Weaver (an attorney) as successor guardian of the estate. Weaver filed an inventory identifying \$8,201.50 in Mathew's estate and the probate court approved the final account without objection. Weaver was discharged and the guardianship was closed.

Simone, as administratrix, filed suit in district court alleging, among other things, that William breached his fiduciary duty as Mathew's guardian and failed to account. She also sued the bonding company and sought attorney's fees under Section 38.001 of the Texas Civil Practice and Remedies Code based on the amount of the surety bond.

In October of 2003, the case was tried to the Bench. On June 30, 2004, the court entered a judgment awarding Simone damages in the amount of \$105,922.01, and additional damages of \$7,415.82 as a penalty under Section 758 of the Probate Code for William's failure to timely turn over the money in Mathew's estate to the successor guardian. The trial court entered judgment against William and Fidelity jointly and severally for \$8,000 representing the face amount of the bond. The court further awarded Simone attorney's fees of \$12,200 through trial, \$2,500 if there is an unsuccessful appeal by any of the defendants, \$1,400 if a petition for review is granted and there is an appeal to the Texas Supreme Court.

Alford appealed on two issues (1) the evidence was legally and factually insufficient to support the trial court's findings of facts and conclusions of law and the judgment and (2) the evidence was legally and factually insufficient to support the award of attorney's fees.

The court of appeals reversed the trial court holding that social security benefits that are not commingled with the ward's estate do not have to be accounted for by the guardian. The judgment was reformed to award total damages of \$42,122.01.

The court of appeals then discussed Texas Probate Code Section 668, which provides as follows:

When costs are incurred because a guardian neglects to perform a required duty or if a guardian is removed for cause, the guardian and the sureties on the guardian's bond are liable for:

- (1) costs of removal and other additional costs incurred that are not authorized expenditures under this chapter; and

(2) reasonable attorney's fees incurred in removing the guardian or in obtaining compliance regarding any statutory duty the guardian has neglected.

TEX. PROB. CODE ANN. § 668. Among other things, the trial court found that William failed to comply with Probate Code Section 741, because he failed to file annual accountings, and the final account he did file failed to comply with that section's requirements. *See* Tex. Prob. Code § 741(a)(3), (c)(1)-(c)(2).

William contends that Section 668 does not apply to Simone's suit because it was not a suit to remove a guardian and the guardianship was already closed. He characterizes the suit as one for breach of fiduciary duty claims, which does not ordinarily support an attorney fee award.

The court found that the suit did fall within the statute as it was a suit to obtain compliance regarding a statutory duty. Moreover, the court of appeals noted it is too liberally to construe the statute to achieve its purposes and promote justice.

The appellate court concluded that William did not have to account for the social security money during the time Mathew's mother was representative payee. The court also held that the burden of proof was properly shifted to William. The court correctly determined that William as in a fiduciary position and so bore the burden to explain all expenditures and income received by Mathew. He could not account for Mathew's income and expenses and so did not sustain his burden was liable.

William acknowledged at trial that Mathews received \$310 per month in disability benefits, \$1,000 per month in social security and interest on a certificate of deposit and his other accounts. William acknowledged he did not file annual accounts as required under Texas Probate Code Section 741. In fact, during the eight years of guardianship, the only accounting filed was a final one, which was compelled once Mathew's son complained.

The final account reflected that in 1997 Mathew had a savings account of \$6,678.61 and a checking account containing \$1,453.71. It also showed rental income in the amount of \$800 per month. For each year of the guardianship, William provided handwritten statements. Checks were made out to cash sometimes and some had little or no description. Numerous checks for \$200 were made to William's wife for caretaking, even during the time Mathew lived elsewhere. Money was spent on Mathew's truck although he was not driving it. William also paid for improvements to his mother's home. Some of the expenses were counted more than once or there were mathematical errors.

The court of appeals affirmed in part, reversed in part and reformed the judgment to reduce damages by the amount of social security payments.

*Latham v. State*, Nos. 14-04-00248-CR, 14-04-00249-CR, 14-04-00250-CR, 2005 WL 1981296 (Tex. App.—Houston [14th Dist.] August 18, 2005, no pet.) (mem. op.).

In January 1991, a Harris county probate judge appointed Sheila Latham, an attorney practicing probate and guardianship law, to be the guardian of Graves' estate. Beginning in 1994, the probate court began to notice problems with Latham's annual accounts for the estate. After that, the court refused to approve Latham's accounts and refused to pay her for her work as guardian.

In the mid-1990s, Latham became disillusioned with her legal practice and opened several stores with her legal secretary, Ingrid Caldwell. About \$72,000 from Graves's estate was used to finance the business. The stores were never profitable and closed after several months.

In 1998, the probate court appointed a successor guardian, Wesley Wright. Wright discovered that Graves's estate, which had held almost \$100,000 when his guardianship began, now held only \$3,100. Latham was convicted of misapplication of fiduciary property and assessed punishment at probation for ten years and a \$10,000 fine. On appeal, the appellate court affirmed her conviction.

Latham's defenses were creative to say the least. Latham claimed that because the probate court never approved her annual reports after 1993 and never renewed her letters of guardianship, there was insufficient evidence to support a finding of a fiduciary relationship an element necessary to support misapplication of fiduciary property. Two probate experts testified that Latham officially remained Grave's guardian until a successor qualified. Moreover, the appellate court confirmed that as long as Latham had possession of the funds, she owed a fiduciary duty to the ward. Accordingly, the appellate court held that the evidence was factually sufficient to support a finding of a fiduciary relationship, even though the probate court never approved Latham's annual reports after 1993 and never renewed her letters of guardianship, because Latham still had possession of money in ward's estate and because the probate court had not officially removed her and appointed a successor guardian until 1998.

**\*\*\*\*Editor's note:** This is the first time I have ever included a summary of a criminal case in the guardianship section. It is important for guardian's to realize that the misapplication of fiduciary property in the State of Texas not only has civil ramifications, it has criminal ramifications as well. The criminal statute pertains to all fiduciaries not just guardians.

## **MOOTNESS**

- 1. Once temporary guardian was replaced with a permanent guardian, issues concerning the appointment of temporary guardian were moot.**

*In re Guardianship of Berry*, AIP, 105 S.W.3d 665 (Tex. App.—Beaumont 2003, no pet.).

**2. The death of a ward mooted appeal of a contested removal action of a guardian.**

*In re Guardianship of Keller*, AIP, 171 S.W.3d 498 (Tex. App.—Waco 2005, pet. granted), judgment revised by *Zipp v. Wuemling*, 218 S.W.3d 71 (Tex. 2007).

Cynthia Zipp timely perfected an appeal of her removal as guardian of the person of Jewel W. Keller, an AIP. Several months after the appeal was perfected, the attorney ad litem filed a suggestion of death advising the Court that Ms. Keller had passed away. Zipp opposed dismissal of the appeal because (1) it would deprive her from seeking relief to which she was otherwise entitled; (2) there was a controverted issue of attorneys' fees and the assessment of costs and (3) the Court of Appeals could make an appropriate order that the law and the nature of the case required. The successor guardian/appellee responded with a motion to dismiss alleging the death of the ward effectively terminated the guardianship and a final account was the only thing left that Zipp had authority to undertake. The court of appeals dismissed the appeal as moot.

The appellate court recognized three exceptions to the mootness doctrine: (1) the capable of repetition yet evading review exception; (2) the collateral consequences exception and (3) the public interest exception. The majority opinion found none of these exceptions to be applicable. In a dissenting opinion, Chief Justice Tom Gray, argued that the dispute did not die with Ms. Keller as the decision as to who had authority to decide on the propriety of payment of various expenses and make an accounting would be impacted. It is unclear from either opinion if the removed guardian would have an opportunity to argue expenses related to the removal action and whether costs could be still addressed on the final account.

## **PERMANENT GUARDIANSHIPS**

**1. Evidence was sufficient to sustain trial court's finding of incapacity despite contradictory medical evidence; trial court did not abuse its discretion in denying ward's motion for new trial because "newly discovered evidence" was in fact created after the guardianship hearing.**

*Robinson v. Willingham*, No. 03-05-00221-CV, 2006 WL 903734 (Tex. App.—Austin April 6, 2006, no pet.) (mem. op.).

At the time of the hearing on the application for permanent guardianship in December 2004, Robinson was a seventy-nine year old man with a recent history of numerous accidents and near-collisions, three failures of a driving test, numerous loans to strange women that were not repaid as well as impulsive withdrawals of \$26,000 in cash advances on a credit card, leaving his invalid wife unattended and in unsanitary conditions, and threats of violence.

At the hearing Robinson and Willingham submitted competing expert reports on Robinson's mental condition. Willingham's expert, Dr. Dickerson, diagnosed Robinson with mild dementia and probable Alzheimer's disease based on the facts above and found him partially incapacitated. Robinson's expert, Dr. Wright, found Robinson to be logical and coherent with only age-appropriate deterioration in his cognitive functioning, and concluded that a guardianship was not appropriate.

*The trial court ruled that Robinson was partially incapacitated and appointed Willingham as his guardian of person and estate. Robinson appeals the decision of the trial court to appoint his wife's niece, Glenda Willingham, as permanent guardian of Robinson's person and estate. Robinson specifically asserted that (1) the evidence was insufficient to support the appointment of a guardian, in part because he did not waive his physician-patient privilege with Dr. Dickerson and thus Dr. Dickerson's report was inadmissible, and (2) that the trial court abused its discretion in denying his motion for new trial based on newly discovered evidence.*

The Court ruled that Robinson's acts in the six months prior to the application for appointment of a guardian and the opinion of Dr. Dickerson were sufficient to support the trial court's conclusion of partial incapacity. The trial court, as fact finder, was entitled to find Dr. Dickerson's report more credible than Dr. Wright's. The Court also found that Robinson waived his argument regarding the admissibility of Dr. Dickerson's report by failing to object to its admission at the trial court.

The Court also ruled that the trial court did not abuse its discretion in denying Robinson's motion for new trial. Robinson had moved for a new trial based on "newly discovered evidence," which was the report of a Dr. Escobar opining that Robinson was competent. However, Dr. Escobar examined Robinson after the date of the guardianship hearing and his opinion was not introduced to the trial court until after the judgment was signed. This was not newly discovered evidence, but rather evidence created after the hearing with no showing as to why Dr. Escobar's opinion had not been obtained in time for the guardianship hearing.

## **PROCEDURE**

### **1. A next friend may file suit on behalf of an incapacitated person without the necessity of a formal guardianship proceeding.**

If the nature of the suit against the defendants remains unchanged by an amended petition, the substitution of a next friend or guardian for an alleged incapacitated does not constitute a new lawsuit.

*Thomas v. Dickson*, No. 14-02-00342-CV, 2003 WL 22176589 (Tex.App.—Houston [14th Dist] 2003, no pet.) (mem. op.).

Shirley Thomas, as next friend of Jena Thomas, sued Dickson for negligence, gross negligence and breach of implied warranty after the kitchen ceiling in her apartment allegedly fell on her head. At trial, the court granted a motion to dismiss in favor of Dickson. Shirley Thomas contends the trial court (1) violated Rule 12 of the Texas Rules of Civil Procedure; (2) erred in dismissing the case due to the statute of limitations; and (3) harmed her by failing to make findings of fact and conclusions of law.

Jena's alleged injury occurred on or about August 8, 1998. The original suit naming Jena Thomas as plaintiff was filed on March 20, 2000. During a deposition, Jena testified that she suffers from schizophrenia and that her mother is her legal guardian. On November 5, 2001, the day before trial, Dickson filed a motion to show authority because Jena lacked the capacity to sue. The trial granted a continuance, and on November 27, 2001, Shirley Thomas, the mother of Jena Thomas, filed a second amended petition as next friend of Jena Thomas. Following the substitution, Dickson filed an "Amended Motion to Show Authority or In the Alternative Motion to Dismiss" in which he argued that either (1) Jena lacked the capacity to sue or (2) Shirley could not sue on Jena's behalf because the amended pleading was filed more than two years after Jena's injury. The record reflects that no guardianship proceeding exists. The trial court granted the motion and the cause was dismissed. On appeal, Thomas contends in her third issue that the trial court erred in ordering a dismissal of the cause. The appellate court agreed and reversed and remanded.

*The appellate court noted that to the extent Jena was competent, her suit was timely filed. To the extent Jena is not competent, a suit may be filed on her behalf by next friend. The court noted that if the nature of the suit against the defendants remains unchanged by the amended petition, the substitution of parties-plaintiff does not constitute a new suit. Thus, the court noted, that the second amended petition related back to the original petition, and the date of the original petition controls the disposition of the case. The court declined to address the other two appellate issues since the case was remanded for a new trial on the basis of a wrongful dismissal.*

## **QUALIFICATION OF GUARDIAN**

- 1.1 The guardian must timely file an oath and bond in order to qualify.**
- 1.2 The court does not abuse its discretion by removing a guardian who has been appointed but never qualified.**

*Thedford v. White*, 37 S.W.3d 494 (Tex. App.—Tyler 2000, no pet.).

After a contested guardianship hearing, the Court on December 22, 1999, appointed Thedford as guardian of the person of Grove and appointed White guardian of the estate. Thedford's bond was set at \$2,000.00 and White's was set at \$125,000.00. The court handed written instructions to Thedford at the hearing which directed her to qualify within 20 days which Thedford signed. The court on the record also told each of the applicants that failure to comply with the probate statutes and instructions would result in

removal. On January 13, 2000, Thedford had failed to file her oath and bond and the court entered a removal order without notice and appointed White guardian of the person. Thedford appealed alleging two grounds. The first was that the court abused its discretion in removing her and appointing White. The second was that the court did not require White to post the \$2,000.00 bond. The court of appeals held that it was not an abuse of discretion to remove the guardian under Section 761(a)(1) of the Texas Probate Code which provides that a guardian can be removed without notice when he or she neglects to qualify in the manner and time required by law. The trial court properly made a finding in its removal order that a \$125,000.00 bond was sufficient to cover the additional duties of guardian of the person. The judgment was affirmed.

## **REAL ESTATE**

### **1. Failure to obtain court approval for sale of real estate in a guardianship proceeding results in a void deed.**

*Johnson v. McClintock*, 202 S.W.3d 821 (Tex. App.—Corpus Christi 2006, no pet.).

### **2. In 1993, Stevens was declared incapacitated and Davis was appointed guardian of her person and estate. Stevens owned (1) Lot 5A, (2) Lot 3, and (3) Lot 3A. Davis asked for court authority to sell Lot 5A to Appellee. Appellants contested the sale and the application to sell was denied.**

*On February 25, 1994, Davis, without court permission, executed a quit claim deed to Lot 3A to Appellee and his wife. A year later, on March 19, 1995, Davis signed another quit claim deed to Lot 3 to Appellee's wife. Stevens died on June 19, 1995.*

From 1994 to 2005, Appellee paid off a HUD lien, paid taxes, and executed an oil, gas and other mineral lease. Throughout the time, Appellants were aware of Appellee's use of and dealings with the property.

After paying off the lien in 2003, Appellee filed a suit to quiet title. In response, Appellants demanded Appellee vacate the property and filed their own trespass to try title suit.

At a bench trial, the trial court found that under the five-year statute of limitations, Appellee had adversely possessed Lots 3 and 3A. Appellants filed a motion for new trial, which was denied and the appeal was pursued.

Texas Civil Practice & Remedies Code, Section 16.021, defines adverse possession as: "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to claim of another person." To establish adverse possession under the five-year statute:

- (a) A person must bring suit not later than 5 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who:
- (1) cultivates, uses, or enjoys the property.
  - (2) pays applicable taxes on the property and
  - (3) claims the property under a duly registered deed.

Appellants contend that Appellee did not satisfy the third element of the statute. They assert that because a quit claim deed only transfers the rights that the transferee possesses and Davis, as Grantor, did not have the right to transfer Stevens' property. Appellee did not present evidence at trial of a duly registered deed.

## **RECUSAL**

1. **This case involves a contested guardianship proceeding. During the proceeding, three recusal motions were filed against Judge Wood. The Court of Appeals granted mandamus relief against the Honorable Mike Wood, who had entered orders appointing a guardian while a recusal motion remained pending. Since the opinion issued, the pending recusal motion was denied by the Honorable Gladys Burwell. Real parties, Mylius Walker and Ray Black, each filed motions for rehearing challenging the Jurist's opinion.**

*In re Whatley*, No. 14-05-01222-CV, 2006 WL 2257399 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, no pet h.) (supp. mem. op.)

Walker argued that the recusal motion was tertiary. A tertiary recusal motion is a third or subsequent recusal motion filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.

The court of appeals construed the statute to mean that the three or more recusal motions must have been filed by the same party against the same judge because the same party had not filed the three recusal motions, the court of appeals found that the tertiary because it was not a third motion filed by relator against Judge Wood.

Walker argues that the holding creates a judicial loophole that can be used to prevent a case from proceeding to trial or judgment.

Walker notes that a party can file a recusal motion against the trial judge and then subsequent recusal motion against the judge assigned to hear that recusal motion. Effectively preventing the case from moving forward because no judge can act while a recusal motion is pending.

The court of appeals noted that whether recusal motions are groundless is a matter for the assigned judge.

Walker also argued that good cause existed for issuing the orders during the pending recusal, which is exception to the rule that no further action be taken under Tex. R. Civ. P. 18a(d).

One of the orders did not have good cause language. Two of the orders did mention “good cause”. The good cause language, however, must relate to any further action taken and not general good cause. The court of appeals reasoned that the appointment of a guardian pending

The December 14 order states “Mr. Whately is an incapacitated person as that term is defined by the Texas Probate Code and lacks necessary physical and mental capacity to care for himself and to manage his financial affairs.” The December 14 order also states that it is in Mr. Whatley’s best interest for the trial court to appoint a guardian of his person and estate.

The court of appeals go to the merits of the underlying motions and without more, do not show good cause for entering these orders while a recusal motion was pending.

To enter an order appointing a temporary guardian, a trial judge must find evidence of, among other facts, “imminent danger that the physical health or safety of the respondent will be seriously impaired or that the respondent’s estate will be seriously damaged or dissipated unless immediate action is taken”.

The statement in the December 13 order tracks the statutory language. The court of appeals held that the statutory language did not, without more, establish good cause to deviate from the statutory procedure for recusal motions.

The December 14 order finds Mr. Whatley an incapacitated person and it is in his best interest to appoint a guardian of his person and estate. Likewise the December 13 order appointing a temporary guardian tracks the statutory language.

**2.1 When a motion to recuse is filed with a trial court, the trial court judge has only two options. She may recuse herself, or she may refer the matter to the presiding judge of the statutory probate courts to assign a judge to hear the motion.**

**2.2 All documents filed in probate proceedings must be filed with the county clerk.**

*Harris v. Winston*, 2007 WL 1500279 (Tex. App.–Houston [1<sup>st</sup>. Dist.] no pet. h.) (not yet designated for publication).

Harris’ conviction for the murder of his wife, Wenona, was pending when he made claim to a life insurance policy held by her. Winston, as guardian of the person and estate of Harris and Wenona’s minor child, also made claim to the same death benefits.

The insurance company filed an interpleader action in the district court. As a result of Winston's motion, the probate court, where the guardianship was pending, transferred the insurance claim from the district court to the probate court.

Harris' murder conviction was affirmed in February 2004 and Winston filed a motion for summary judgment, contending that the benefits were forfeited due to the conviction. The summary judgment was granted on July 28, 2005. Harris appealed on the basis that the probate court judge abused her discretion by ruling on the summary judgment when a motion to recuse was on file.

The court found that Harris had filed a motion to recuse the judge two days before the court rendered the summary judgment. However, the motion was filed with the district clerk and not the county clerk. Thus, no recusal action was pending before the probate court when the court rendered summary judgment against him.

### **REMOVAL AND TRANSFER OF A PROBATE MATTER**

- 1.1 In contested guardianship matters, the county court may request the assignment of a statutory probate judge or may transfer the removal action to the district court on its own motion. If a party requests the assignment of a statutory probate judge before the case is transferred to the district court, the county judge shall grant the party's motion and may not transfer the matter to district court unless the party withdraws the motion.**
- 1.2 Section 761(c)(6) of the Texas Probate Code authorizes the removal of a guardian who cruelly treats the ward or neglects to educate or maintain the ward as liberally as the means of the ward's estate and the ward's ability or condition permit.**

*In re Keller*, 233 S.W.3d 454 (Tex. App.—Waco 2007, pet. denied).

[This case is sufficiently described in the head note].

### **REMOVAL AND GUARDIAN'S ATTORNEY FEES FOR APPEAL**

- 1.1 A guardian appointed under Texas Guardianship statutes may be removed only for some cause declared by the removal statute to be a sufficient cause.**
- 1.2 Texas Probate Code Section 690 is not a proper ground of removal of an otherwise properly appointed husband or wife as a joint guardian.**
- 1.3 The statutory causes for removal of a permanent guardian under Texas Probate Code Section 761 do not include removal solely on the trial court's determination that it is in the ward's best interest.**
- 1.4 While a guardian is generally entitled to reimbursement from the estate for attorney's fees, as a proper expense of the guardianship estate, the fees must be**

**determined by the trial court. A court of appeals may not award attorney's fees for a guardian's appeal, since this would be the exercise of original rather than appellate jurisdiction.**

*In the Matter of the Guardianship of Jeremy Lynn Finley*, 2007 WL 1148681 (Tex. App.—Texarkana] no pet. h.) (not yet designated for publication).

[This case is sufficiently described in the head note].

## **RES JUDICATA AND TEMPORARY INJUNCTION**

- 1.1 At the close of the guardianship proceeding due to Ward's death, the court awarded Ward's joint survivorship account to the named survivor. Claims against the survivor regarding funds in the account were brought in the deceased Ward's probate proceeding and were not barred by res judicata, as the court in the guardianship proceeding expressly stated it disposed only of matters decided by the jury.**
- 1.2 A party need not prove its underlying case in order to obtain a temporary injunction, but the party must show that it is probably entitled to the relief sought. Where the pleadings and arguments of counsel were the only evidence presented, the court found the evidence could not reasonably support the conclusion that the account holder's action gave rise to a cause of action or that the estate had a probable right of recovery.**

*Moon v. The Estate of L.A. Moon*, 2007 WL 1202767 (Tex. App.—Texarkana] no pet. h.) (not yet designated for publication).

## **RETENTION OF ATTORNEY**

- 1. A contract with a law firm to recover on behalf of an incapacitated person must be signed by someone with legal authority to contract.**

*Levin v. Harrington*, No. 14-99-01094-CV, 2001 WL 422072 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

A daughter sought advice from an attorney to have a guardian appointed for her mother. The attorney referred her to another attorney, Mark Levin, when the daughter raised the issue of pursuing a claim against a hospital in which her mother had suffered an accident as patient. The mother signed a power of attorney, which purported to retain Levin to prosecute her claims. At the time the mother signed the document, her daughter had to physically assist her in signing, and her daughter and many others considered her to be mentally incompetent. Later, Levin referred the daughter to another attorney, Alan

Winters. The daughter signed an agreement for legal services with Winters, and he attempted to negotiate a settlement with the hospital.

The probate court eventually appointed the woman's husband as her guardian. The guardian then filed suit against the hospital. Winters intervened, seeking attorney's fees and expenses allegedly due under his document. The court struck his intervention. Levin intervened separately, seeking attorney's fees under his document. In response, Harrington filed a counterclaim against Levin and a third-party action against Winters. Levin and Winters filed a joint motion for summary judgment, Harrington responded and moved for summary judgment. The probate court denied Levin's motion and granted the guardian's motion and awarded him \$10,000 in attorney's fees under the Texas Declaratory Judgment Act. It then granted Levin and Winters' motion to modify the judgment in part, reducing the attorney's fees awarded to \$500.

On appeal, Levin and Winters presented the following guardianship issue: Even if the ward was incompetent when she signed the Levin document, did the family ratify the document?

The court found that the family did not ratify the document. The husband could not sign for his wife. Her claims were either her separate property or her sole management community property. TEX. FAM. CODE §§ 3.001(3), 3.002, 3.102(a). Absent actual authority, the mere husband/wife relationship does not give one spouse authority to enter into contracts concerning the other spouse's separate property. *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978); TEX. FAM. CODE §§ 3.001(3) and 3.101. Additionally, absent actual authority, unless the other spouse has been declared incapacitated, the mere husband/wife relationship does not give one spouse authority to contract with regard to the other's sole management community property. TEX. FAM. CODE §§ 3.002 and 3.102(a); TEX. PROB. CODE ANN. §883; *City of Fort Worth v. Brandt*, 444 S.W.2d 210, 211-13 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.) The right of one spouse to act for an incapacitated spouse as to community property does not exist until the incapacitated spouse has been judicially declared to be incapacitated, even though the spouse may have been incapacitated long before this judicial declaration. TEX. PROB. CODE ANN. § 883; *Brandt*, 444 S.W.2d at 211-213. \*4

As the probate court did not declare the wife to be incapacitated until February 3, 1997, the husband had no actual authority to act as his wife's agent in August 1996, and thus had no authority to bind. Therefore, the appellate court affirmed the judgment of the probate court.

- 2.1 A proposed ward alleged to be an incompetent person cannot waive service of citation.**
- 2.2 An agent under a power of attorney cannot accept or waive serve for a proposed ward. Texas Probate Code §633 prevails over Texas Probate Code §500(6), which permits an attorney in fact to accept service of process for a principal.**

*In re Martinez*, No. 04-07-00558-CV, 2008 WL 227987 (Tex. App.—San Antonio Jan. 30, 2008, no pet. h.) (mem. op.).

The Court found that orders entered in a guardianship proceeding void where the proposed ward was never personally served with citation. Without personal service, the trial court lacked jurisdiction over the proposed ward.

## **SANCTIONS**

- 1.1 An appellant must attack all independent bases or grounds that support a complained of ruling or judgment.**
- 1.2 A party who is the subject of a motion for sanctions is entitled to notice of the allegations and a reasonable opportunity to respond to the allegations.**

*In the Interest of Jeanne Stratton Hansen, an Alleged Incapacitated Person*, 2007 WL 824587 (Tex. App.- Dallas] no pet. h.) (not yet designated for publication).

The trial court ordered sanctions against Applicant for guardianship of his mother. In the sanctions order, the trial court specifically found that the application was groundless, brought in bad faith in violation of Rule 13 of the Texas Rules of Civil Procedure, and was presented for an improper purpose in violation of Chapter 10 of the Civil Practice and Remedies Code. Applicant appealed the order granting sanctions contending he was deprived of an evidentiary hearing. Applicant did not challenge the court's finding of the basis for sanctions. Pursuant to Chapter 10 of the Civil Practice and Remedies Code, the sanctions award was proper, as Appellant was only entitled to notice of the allegations and a reasonable opportunity to respond, which Appellant received. Further, Appellant objected to Appellee's request for an evidentiary hearing on damages and Appellant's objection was sustained. An evidentiary hearing was, therefore, waived.

## **STANDING**

- 1.1 A party has capacity to sue when it has the legal authority to act, regardless of whether it has a justiciable controversy.**
- 1.2 A next friend is one who, without being regularly appointed guardian, acts for the benefit of one who is under a legal disability to act.**
- 1.3 If a claim for which the plaintiff lacks capacity to sue is deemed cured by the representative's later obtaining capacity, the corrected capacity relates back to the claim's original filing, rather than from the date of the cure.**

*Intracare Hospital North v. Campbell*, 2007 WL 926531 (Tex. App.—Houston [1<sup>st</sup> Dist.] no pet. h.) (not yet designated for publication).

On August 13, 2004, Cindy Campbell filed suit, individually and as next friend of her son, Frank Brown, against Intracare Hospital for claims relating to her son's escape from the institution. Intracare specially excepted to Campbell's petition, alleging Campbell lacked capacity to sue as next friend for an adult without being his legal guardian. Campbell was appointed Brown's guardian on March 2, 2006 and amended her petition, bringing suit individually, as guardian for Brown and as his next friend.

Intracare moved to dismiss Campbell and Brown's claims for Campbell's failure to file an expert report within 120 days of the claim's filing, (which is required for health care liability claims under Section 74.351 of the Texas Civil Practice and Remedies Code). The trial court denied Intracare's motion to dismiss and Intracare appealed.

On appeal, Intracare relied, by analogy, on Texas Supreme Court authority on capacity and statute of limitations: when a claim is brought by a party alleging capacity that is actually lacking before the statute of limitations, and the capacity is cured after the limitations passes, the corrected capacity relates back to the claim's original filing. The Court of Appeals agreed, holding that there has been one health-care-liability claim filed by only one claimant in this matter and that claims was initially asserted in the original petition. The real party plaintiff in this suit is the incompetent person. The same conclusion of the Texas Supreme Court relating to cured capacity and statutes of limitations holds true for deadlines relating to claims. The corrected capacity of Campbell relates back to her originally filed claim and therefore, the 120-day deadline began running from the date of the claim's filing, rather than from the date of the cure.

**2.1 A person having an adverse interest to a proposed ward is prohibited from contesting the appointment of a person as guardian.**

*Guardianship of Valdez*, 2008 WL 2332006 (Tex. App.—San Antonio, no pet. h.)

Martha Jane Valdez is the mother of fourteen children, including Jerry and Dorothy. Dorothy sought temporary and permanent guardianship of her mother after her mother, who was under the care and control of Jerry, was taken to the hospital with bruises and a swollen eye. Subsequent to her filing for guardianship, Jerry removed funds from Ms. Valdez's account and claimed it as his own. He also filed a lawsuit against his mother to try title to properties in dispute.

After a hearing on the matter, the court appointed Dorothy as temporary guardian. Jerry contested Dorothy's appointment as permanent guardian. Dorothy sought to dismiss Jerry's contest for lack of standing through a motion in limine, which was granted.

On appeal, Jerry claimed that he did not lack standing and that Dorothy was indebted to their mother. The Court held that based on Texas Probate Code Section 642(b)(3), Jerry was prohibited from contesting the guardianship, as he had an adverse interest. The Court also upheld Dorothy's appointment as guardian, because Jerry failed to object to her qualification to the trial court.

## **STATUTE OF LIMITATIONS**

- 1. A minor's cause of action is not barred during his or her minority on the running of the two-year statute of limitations.**

*Enciso v. Chmielewski*, 16 S.W.3d 858 (Tex. App.—Houston, [14th Dist.] 2000, no pet.).

Decedent died on February 2, 1996, surviving by his wife and child. A wrongful death lawsuit was filed by the wife, individually and on behalf of the couple's minor child on March 9, 1998. Defendant filed a motion for summary judgment on the basis of limitations. The trial court granted summary judgment on the basis that the wife and child's claims were barred on the basis of a two year statute of limitations.

On appeal, the appellate court reversed the summary judgment as to the minor child. The court held that Section 16.001(b) of the Texas Civil Practice and Remedies Code tolls the statute of limitations until the minor reaches age 18.

Statute of limitations serve to compel the assertion of claims within a reasonable period during which the evidence is fresh in the minds of the parties and witnesses.

- 2.1 The discovery rule defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action.**
- 2.2 Fiduciaries are presumed to possess superior knowledge, and the injured party is presumed to possess less information than the fiduciary.**
- 2.3 Texas Property Code Section 112.054(a) gives courts the authority to order the terms of a trust modified on the petition of a trustee of beneficiary.**

*Conte v. Ditta*, No. 01-05-00603-CV, 2007 WL 2519466 (Tex. App.—Houston [1st Dist.] Aug. 31, 2007 pet. filed) (mem. op.).

Doris Conte was the primary beneficiary of a family trust created by her and her husband, Joseph Conte, Sr.. After her husband's death, Doris Conte and her children, Susan Conte and Joseph Conte, Jr. became co-trustees of the Trust. Susan filed suit to remove her brother, Joseph, Jr. as co-trustee for failing to administer the trust according to its terms. Subsequently, various claims between Susan and Joseph, Jr. were filed relating to the trust and the guardianship of their mother, Doris.

Ditta was appointed as temporary guardian of the person and estate of Doris Conte in 1997. In 1998, the court appointed a successor temporary trustee over the trust to prepare an accounting, as Ditta alleged the Trust assets were in danger of being lost or injured due to the actions and inactions of Susan and Joseph, Jr. The accounting, which was

approved by the court in January 2001, reported that Susan and Joseph, Jr. paid unauthorized personal expenses from the trust.

The trial court appointed Ditta as permanent guardian of the estate of Doris Conte in March 2001 and removed her co-trustee of the trust. The court removed Joseph, Jr. as co-trustee in January 2003. Ditta filed a removal action against Susan Conte on April 5, 2004 for breach of fiduciary duty, specifically for Susan's misuse of trust funds, for Susan's conflict of interest with her duties as trustee, and hostility between Susan and Joseph, Jr., interfered with her duties as co-trustee.

The trial court removed Susan as co-trustee and modified the trust's terms in appointing a successor. On appeal, Susan Conte argues Ditta's removal action was barred by the four-year statute of limitations for breach of fiduciary duty. The Court sustained Susan's issue on appeal, holding that pursuant to the discovery rule, Ditta knew or should have known Susan misused trust funds when he was served with the accounting in October 1999. The statute of limitations, therefore, required Ditta to bring suit against Susan by October 2003. The Court also held that Ditta knew or should have known of the hostile relationship among the co-trustees when Ditta agreed to the appointment of a successor temporary trustee in October 1998. The statute of limitations, therefore, required Ditta to bring suit against Susan by October 2002.

Susan Conte also argues on appeal that since the removal claim was barred by the statute of limitations, the trial court could not modify the terms of the trust and appoint a appoint a successor trustee to replace Susan. Texas Property Code Section 112.054(a) allows a court to order the terms of a trust be modified on the petition of a trustee or beneficiary. Since the Court held that the petition filed by Ditta, as guardian for Doris Conte, was barred by the statute of limitations, the Court held that there was no petition filed allowing for a modification.

- 3.1 **A statute denies a plaintiff's access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another.**
- 3.2 **The open courts guarantee differs from tolling provisions. Unlike the discovery rule, which defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the claims, the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit.**

*Yancy vs. United Surgical Partners International, Inc.*, 2007 WL 3036878 (Tex.), (not yet designated for publication).

On May 3, 2000, Carletha Yates suffered complications during surgery, resulting in her becoming comatose. In December 2001, her mother, Eula Yancy, as Guardian of her Person and Estate, filed a medical malpractice claim naming one of the physicians and the anesthesiologist as defendants. Almost 2 years later, Yancy added United Surgical, Valley View, and Judith Smith, R.N. as defendants to the malpractice suit.

The added defendants assert Yancy's claims were filed outside the limitations period per the Medical Liability Insurance Improvement Act (MLIIA) and are barred. Yancy claims that because Yates was in a vegetative, comatose state since May 3, 2000, the limitations were tolled and the MLIIA two-year limitations period violates the open courts guarantee of the Texas Constitution.

The MLIIA prescribes a two-year limitation in which to file a medical malpractice claim, regardless of minority or incapacity.

The open courts guarantee under the Texas Constitution provides that all courts shall be open and every injury done him, in his land, goods, person or reputation, shall have remedy by due course of law. Under this provision, a statute effectively denies access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another.

The Court sided with Yancy, affirming its previous ruling that the MLIIA is unconstitutional as to minors and the Court extended its ruling to apply to mental incapacity. The Court concluded, however, that although MLIIA violates the open courts guarantee, Yancy cannot establish the open courts provision applies to her in this case.

The premise behind the open courts provision is that the Legislature has no power to make a remedy by due course of law contingent on an impossible condition. This provision does not save Yate's time-barred negligence claim against the late added defendants, as Yancy cannot establish that Yate's incapacity made it impossible to comply with the two-year limitation. Yancy knew from the date of the surgery in 2000 that her daughter was incapacitated and could file a claim on her behalf. Further, Yancy was appointed as Yate's guardian, retained a lawyer and filed suit against the original defendants, all within the applicable period. She was, therefore, not faced with an impossible condition, invoking the open courts guarantee.

## **TEMPORARY GUARDIANSHIP**

### **1. Ward's Right to Retain Counsel.**

**A person under a temporary guardian may contract with counsel, both individually and via his or her attorney-in-fact, and that such contract (even if proposed ward is proved to be incapacitated) is *voidable*, not void.**

*Price v. Golden*, No. 03-99-00769-CV, 2000 WL 1228681 (Tex. App.—Austin 2000, no pet.) (not designated for publication).

In *Price v. Golden*, the proposed ward's attorney-in-fact engaged Al Golden to defend the proposed ward in a contested guardianship matter. The trial court also appointed an ad litem who denied the need for a guardianship. The applicant for guardianship filed a

motion to show authority under Tex. R. Civ. P. 12 but it was never heard by the trial court. A settlement agreement was ultimately reached by all parties that resulted in the dismissal of the request for the appointment of a permanent guardian of the estate and appointed the applicant for guardianship as guardian of the proposed ward's person. The settlement did not address the payment of Golden's fees and expenses incurred in defending against the guardianship.

At the hearing to appoint the guardian, the medical evidence established that the proposed ward was incapacitated at the time the proposed ward engaged Golden. Golden's fees were not addressed at that hearing. Golden subsequently filed an application seeking payment of his attorney's fees and expenses, related to his representation of the proposed ward, from her estate. Golden also sought the payment of his fees and expenses for the time period after the appointment of the guardian of the person. Golden claimed that these fees and expenses were necessary to implement the settlement agreement, or related to the approval of his attorney's fees and expenses. The trial court, however, held that the contract was void and the proposed ward lacked capacity to contract with Golden. Notwithstanding this finding, the trial court awarded Golden the majority of his fees and expenses incurred prior to the appointment of the guardian of the person, but denied his fees and expenses incurred after the appointment, on the basis that the parties waived the right to challenge Golden's fees incurred up to the date of the settlement.

The guardian of the person appealed the trial court's order granting a portion of Golden's fees arguing that there was no enforceable contract for legal services or statutory authority to award attorney's fees to Golden. He also argued that the ward lacked capacity to hire Golden and thus the attorney fee contract was void. Golden-cross appealed arguing that the trial court erred in finding that (i) the attorney fee contract was void after the appoint of a permanent guardian of the person, and (ii) fees incurred after the date of the settlement were not recoverable under the theory of *quantum merit*.

The appellate court held that a contract with an incapacitated person is voidable at the election of the incapacitated person or someone authorized to act on his or her behalf but was not *automatically* void. *Id.* The contract continues until active steps are taken to either disaffirm it or find it voidable. The appellate court further noted that even when a person is legally incapacitated, a contract for legal services may be considered a necessary good or service. Thus, the appellate court affirmed the trial court's finding that the guardian of the person waived his motion to show authority by not obtaining a ruling prior to the approval of the settlement agreement. The appellate court notes that Golden later signed the settlement agreement acting for the ward and participated in the hearing to approve the settlement agreement without challenge by the guardian. The court further agreed that the ward's then acting attorney in fact was legally authorized to retain Golden under the power of attorney for his mother and to pay him a retainer of \$15,000.00. This engagement was also approved by the ward's attorney ad litem, who had subsequently been appointed temporary guardian pending the contest. Finally, the appellate court affirmed the trial court's denial of the fees requested after the appointment of a permanent guardian of the ward's person because Golden was then on notice that the contract was

being repudiated by the guardian and the authority of the agent under the power of attorney had terminated due to the appointment of a permanent guardian of the person.

EDITOR'S NOTE: The *Price* decision is one of the first cases to confirm the authority of the proposed ward's attorney-in-fact to engage counsel for the proposed ward. At a minimum, *Price* points out that a lawyer who defends a potentially incapacitated person is wise to have the contract guaranteed and approved by an agent who holds a power of attorney. Note, however, the power of attorney should be durable in nature to protect against a later finding that the proposed ward was incapacitated at the time of the engagement. This recent decision also makes an interesting observation that there could be a cause of action for interference with a voidable contract. Since one is legally justified in filing a motion to show authority, it is presumed that there would have to be some other evidence to support an award against a person who attempts to interfere with a contract with the attorney.

- 2.1 The relocation of the Ward to another state is not ground for termination of a temporary guardian.**
- 2.2 If a contest is filed within the sixty day period of a temporary guardianship, the provisions of Section 875(k) are automatically invoked to extend the temporary pending the outcome of the contest.**
- 2.3 The ward's estate, or if insufficient, the county are the sole sources of assessment of costs in a guardianship proceeding.**

*In re Guardianship of Soberanes*, 100 S.W.3d 405 (Tex. App.—San Antonio 2002, no pet.).

On June 4, 2001, Marcello went to a hospital in Houston, Texas, for inpatient treatment of a hip fracture. Marcello and Marta are citizens of Mexico, but maintain a home in Laredo. While at the hospital, Marcello suffered a cerebrovascular accident and was left with cognitive and motor deficits. Marcello was transferred to a hospital in Laredo. Marcello has been married to Marta since 1977 and has two adult children with Marta. Marcello has four children from a prior marriage, one of who is Maria Sanchez.

On July 24, 2001, without notice to his wife, Marcello's physician permitted his discharge to Sanchez's residence. On that same day, Sanchez filed an application to be appointed temporary guardian of the person omitting the existence of the wife or the fact that his wife lived in Laredo.

On July 25, 2001, Sanchez was appointed temporary guardian of the person with an affirmation hearing set for August 3, 2001. Sanchez posted a \$2,000 bond. An attorney ad litem was appointed for Marcello.

On July 26, 2001, Marta learned of her husband's discharge from the hospital, but could not locate him. She returned to Mexico.

The affirmation hearing was extended until August 8, 2001, due to a scheduling conflict. The guardianship was then confirmed until September 12, 2001, on which date the court would consider the necessity of a permanent guardianship.

On August 29, 2001, appellant and her children were finally served with process. On September 12, appellant appeared at the scheduled hearing alleging: (1) Sanchez had claims adverse to Marcello, (2) Sanchez was an unsuitable guardian and lacked standing, and (3) appellant was not disqualified to act as guardian, if one was necessary. Also, a contest to the need for the appointment of a guardian was filed.

A brief hearing was held on September 12, but the court stated it would maintain the status quo and continued the hearing until September 20. The court ordered that appellant be allowed to visit with her husband. Following a confrontation later that day between the families, appellant filed a Motion for immediate removal of violent, abusive, temporary guardian, in which appellant alleged that she and her family had been kept waiting when they went to see Marcello, she was allowed a visit of only five minutes, and Sanchez's family was verbally and physically abusive. Appellant asked that Sanchez be removed as temporary guardian and that she be appointed. An *ex parte* emergency hearing was held on September 13, following which the court again maintained the status quo until September 20, and deferred ruling on the motion because all parties had not been served.

On September 20, Montemayor moved for a continuance on the grounds that Marcello had suffered a relapse and was so disoriented that he would not be able to attend the hearing. The court granted the motion and rescheduled the hearing to October 4, 2001. The court again ordered that the wife have visitation with her husband and remain in Laredo, Webb County.

On October 1, Sanchez changed counsel and filed a motion to terminate temporary guardianship on the grounds that Marcello was now in Mexico. At the October 4 hearing, the court ruled from the bench that it was terminating the guardianship because all parties had left the jurisdiction. The court signed a final judgment on January 8, 2002, terminating the guardianship on the grounds that the ward, Marcello, had left the State of Texas.

The only issue preserved for appeal was that the trial court erred in terminating the temporary guardianship. On appeal, Sanchez asserts the temporary guardianship expired on its own terms on September 12, 2001, because that is the date on which the trial court was to consider the necessity of a permanent guardianship.

The court of appeals reversed the trial court and held that once the contest was filed, Sanchez's appointment as temporary guardian was triggered under Section 875(k) [the contest section] and the appointment of Sanchez as temporary guardian did not automatically expire at the conclusion of the sixty (60) day period. Moreover, the court held that jurisdiction was established when the temporary application was filed. Once the

court acquired jurisdiction over the ward and appointed a temporary guardian, it maintained it.

Finally, the court held that it was improper to tax the wife with ½ of the ad litem fee since under Section 646(a) the cost of the proceeding should be paid by the guardianship estate or if insufficient by the county.

Editor's Note: This case appears to indicate that Section 875(k) is automatically triggered once a contest has been filed and will automatically extend the sixty day termination provision of a temporary guardianship. The safest practice would be to obtain an order verifying the extension of the sixty-day period, but this is a case of first impression that actually reaches such a holding.

**3. The temporary guardian's authority is limited to the powers given to him by the Court.**

*Bennett v. Miller*, 137 S.W.3d 894 (Tex. App.—Texarkana 2004, no pet.).

On July 17, 2002, Miller was involved in a car accident. Nelson, an attorney, signed a contract with Alberta Miller on July 20, 2002 to represent Miller for damages arising out of the car accident. Bennett, also an attorney, signed a contract with Hobert Stanley Miller, temporary guardian of Alberta Miller. The temporary guardianship was granted on August 19, 2002 and the contract was signed on August 20, 2002. Subsequently, the temporary guardianship was terminated and no permanent guardianship was granted.

Both attorneys filed declaratory judgment actions to determine the validity of their respective contracts. Each party moved for summary judgment and the trial court granted Nelson's summary judgment. Bennett appealed.

Bennett argues that he provided evidence that at the time Alberta signed the contract with Nelson, she was incompetent. Bennett points to a letter written by a physician that indicated he examined Alberta on July 25, 2002. He stated that she had a closed head injury from a motor vehicle crash on 7/17/02 and that she suffered an intracranial hemorrhage, and that her prognosis is good but her recovery will be slow. It is not clear if all of her mental capacity will return, and that her thinking is quite muddled. The letter was filed of record on August 15, 2002, however, it was not in admissible form.

Nelson produced an affidavit from Alberta, attached to his response to Bennett's summary judgment. In the affidavit, Alberta reiterated that at the time she signed the contract with Nelson, she had not been placed under a guardianship, or deemed mentally incapacitated or incompetent by any court or medical professional. She also stated that she fully understood the effect of her actions and intended to be bound by them. Nelson objected both in writing and orally at the hearing to the letter. The trial court did not rule on the objection. However, the court noted that even assuming the trial court considered the affidavit, it does not state that Alberta was incompetent when she signed the contract.

*The trial court's judgment was affirmed.*

**4. Order granting temporary guardianship was void for want of jurisdiction; notice was not served on proposed ward or counsel for proposed ward before the hearing on the application for temporary guardianship as required by Section 875 of the Texas Probate Code.**

*In re Mask*, 198 S.W.3d 231 (Tex. App.—San Antonio 2006, orig. proceeding).

On January 23, 2006, Ronnie and Jimmy Rogers filed an Emergency Application for Appointment of Temporary Guardian of Person and Estate alleging that their grandmother, Ella Mask, was incapacitated. The following day, the trial court signed an order appointing Ronnie and Jimmy Rogers as temporary guardians of Ella Mask's person and estate. It was undisputed that Mask was not given notice of the application for temporary guardianship or of the January 24, 2006 hearing on the application. Only Mask's court-appointed guardian ad litem was personally served with citation. Mask did not appear at the hearing.

After learning of the temporary guardianship order, Mask retained counsel, who filed a motion to dismiss the temporary guardianship application. On February 9, 2006, the trial court held a hearing to entertain the motion to dismiss, but ultimately denied the motion. Mask's counsel then filed a petition for writ of mandamus in the San Antonio Court of Appeals.

The Court of Appeals held that, because Mask had not been served with notice before the hearing on the application for temporary guardianship, the court lacked jurisdiction over Mask and the temporary guardianship order was void. The Court cited Texas Probate Code section 875, which clearly states that the respondent and counsel for respondent in an application for temporary guardianship shall be served with notice before the hearing, and that a person for whom a temporary guardian is appointed may not be presumed to be incapacitated.

The Court rejected the Rogers' arguments that the February 9 hearing on the motion to dismiss cured any defects in service, that Mask waived any complaints about service by appearing at that same hearing, and that Mask waived her complaint by failing to file a special appearance. "Mask's complaint is not that she was not subject to the jurisdiction of the Texas courts, but that the trial court's jurisdiction over her was not invoked by complying with the Probate Code's notice requirements." The Court further observed that a void order is not subject to ratification, confirmation, or waiver, and that in any event an attempted waiver of service by an incapacitated person would be ineffective.

**5.1 Trial court's finding that continuation of temporary guardianship was not in ward's best interest was not authorized ground for removal under statute governing removal of guardians.**

**5.2 Trial court erred in removing temporary guardianship on the basis of protecting the**

ward because it was not a ground for removal of a guardian under statute governing removal of guardians.

- 5.3 Trial court did not abuse its discretion in removing temporary guardian pursuant Texas Probate Code Section 875(k) governing contested temporary guardianships based on finding that removal was in the ward's best interest.**

*In re Guardianship of Erickson*, 208 S.W.3d 737 (Tex. App.—Texarkana 2006, no pet.).

- 6.1 A temporary guardianship expires by operation of law sixty days after the guardianship is commenced, unless it is contested within that sixty-day period. After this period, the only actions the trial court is authorized to take are those necessary to close the guardianship and discharge the guardian.**
- 6.2 After the expiration of a temporary guardianship, the court has no statutory authority to transfer ancillary proceedings and claims into the temporary guardianship.**
- 6.3 The mere filing of an application for permanent guardianship does not create a guardianship estate to be pending for the purpose of a transfer statute.**

*In the Matter of the Guardianship of Gibbs*, 2008 WL 1777859 (Tex. App.—Fort Worth, no pet. h.).

On May 7, 2001, Kip and Sandra Gibbs, on application to the Court, were appointed temporary co-guardians of Kathryn Gibbs, mother of Kip and mother-in-law of Sandra. The appointment expired May 17, 2001, but was extended by the agreement of the parties until July 6, 2001. During this time, temporary guardians filed an application to convert the temporary guardianship to a permanent guardianship.

On July 6, 2001, the court again extended the temporary guardianship until August 3, 2001.

On October 5, 2001, the probate court again entered an order extending the original appointment as temporary guardians until further orders of the court.

The temporary guardianship was converted to a permanent guardianship on April 27, 2004. The probate court subsequently signed five orders, which Kenneth, Kip's brother, alleges on appeal that the court lacked jurisdiction to make the five orders because the temporary guardianship expired by operation of law on July 6, 2001. The Court agreed, holding that pursuant to Texas Probate Code Section 875(h), a temporary guardianship expires sixty days after the guardianship is commenced until it is contested. There was no contest on file to extend the order of the court.