PROBATE TIPS FOR PROBATE PROS

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APPENDIXES

In this paper the term personal representative refers to the administrator or executor of a decedent's estate. Likewise references to the probate estate refer to a decedent's estate as opposed to an estate administered under a guardianship which is referred to as a guardianship estate or guardianship of the estate.

CREATION OF THE PROBATE ESTATE

Holographic Wills

Attorneys will usually bring two disinterested witnesses to prove up a holographic will. While this is perfectly appropriate witnesses do not need to be disinterested to prove up a holographic will. So if an attorney has arranged for disinterested witnesses and one of the witnesses doesn't show up, the applicant (most always interested) may provide the requisite testimony. This concept was originally discussed in *Dillard*[1] and was reiterated in *Estate of Wlecyk*:

> …the Texas Estates Code does not require two disinterested witnesses to prove a holographic will; it "may be proved by two witnesses to the testator's handwriting," regardless of their interest. *In re Dillard*, No. 06-08-00015-CV, 2008 Tex. App. LEXIS 7254, 2008 WL 4411717, at *2 (Tex. App.—Texarkana Sept. 30, 2008, pet. denied) (mem. op.) (observing former Texas Probate Code section 84(c), recodified as Texas Estates Code section 256.154, "requires two witnesses to identify the handwriting of the testator; it does not require two disinterested witnesses"); see Tex. Est. Code Ann. § 256.154. [2]

Although a holographic will must be signed, it need not be signed at the end. The following sentence which was at the beginning of a holographic will by containing the testator's name in his handwriting was sufficient to qualify as a signature on the will. "That I, Roy Wheeler Bell, of Harris Co. Tex being of sound disposing mind memory, do make this my last will & testament, hereby revoking any & all other wills heretofore made by me."[3]

Will Not Produced

In this section "non-produced will" refers to a will not produced in court whether a copy has or has not been offered.

Citation must be served on the decedent's intestate heirs when an application is made to probate a non-produced will.[4] The court must pay attention to whether a purported heir is deceased, specifically as to whether that purported heir died before or after the decedent. If an heir of the decedent dies after the decedent that individual is still the decedent's heir and beneficiary…*not* the heirs of the deceased heir. Many attorneys confuse this fact and attempt to get service or waivers from the heirs of a deceased heir who has died after the decedent. If an heir of the decedent dies

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[1] I*n re Dillard*, No. 06-08-00015-CV, 2008 Tex. App. LEXIS 7254, 2008 WL 4411717, at *2 (Tex. App.—Texarkana Sept. 30, 2008, pet. denied)
[2] *In the Estate of Wlecyk*, 2021 Tex. App. LEXIS 2939, 2021 WL 1537489
[3] *Burton v. Bell*, 380 S.W.2d 561, 568 1964 Tex. LEXIS 646, 7 Tex. Sup. J. 484, 22 A.L.R.3d 1330
[4] Tex. Estates Code § 258.002

after the decedent and was not served before death, service should be had on the personal representative of that heir's estate. If there is no personal representative then the applicant should obtain service of citation by publication.[5] An attorney ad litem is necessary to protect the interest of said heir.[6] Although a formal heirship determination is not necessary, testimony at the time of hearing will be required to establish the intestate heirs of the decedent to determine if notice was properly given and jurisdiction is established.

Our appellate courts have helped clear up some confusion with regard to evidence required to admit a non-produced will to probate, but the jury is still out on other evidentiary issues regarding non-produced wills. Attorneys often offer witness testimony to prove up a self-proved, non-produced will. This is because, Texas Est. Code § 256.156(a) directs applicants offering a non-produced will to Tex. Est. Code §§ 256.153 (proof of execution of attested will) & 256.154 (proof of execution of holographic will) creating the impression that to prove up any non-produced will (whether self-proved or not) such witness testimony is necessary; however, this is not the case.[7] *In re Estate of Sandeford* is particularly clear in this regard stating,

> Appellant argues that there was insufficient evidence under Section 256.156(a), which requires that "[a] will that cannot be produced in court must be proved in the same manner as provided in Section 256.153." Est. § 256.156(a). Section 256.153, however, applies to a will "that is not self-proved." Est. § 256.153(a). And a "will that is self-proved . . . is not required to have any additional proof . . . to make the will valid." Est. § 256.152(b). We must decide whether Randy had to meet the requirements of Section 256.153, although he presented a self-proved will.
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> The court in *Bracewell* was presented with the same issue we face now. There, the court concluded that a valid self-proving affidavit attached to a photocopy of a will made it unnecessary for the will's proponent to meet the requirements of Section 256.153. *Bracewell*, 20 S.W.3d at 26. We agree. The trial court found that the will was self-proved, and we held that Appellant's arguments in regard to the validity of Elwin's signatures did not invalidate the self-proving affidavit. Therefore, because the will was self-proved, Randy met his burden of proof under Section 256.156(a). We overrule Appellant's challenge under Section 256.156(a).[8]

This same statute presents judges with differing opinions from appellate courts with regard to the evidence required to prove up a non-produced will where a copy of a will has been offered. Tex. Est. Code § 256.156(b)(2) which states "the contents of the will must be substantially proved by the testimony of a credible witness who has read either the original or a copy of the will, has heard the will read, or can identify a copy of the will." The court in the *Garton v. Rockett*[9] case focused on the specific language requiring that there be testimony of a credible witness that has *read the will or heard the will read* giving a detailed review of this requirement carefully differentiating other cases discussing other aspects of 256.156. In *Garton* the trial court granted a judgment

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[5] Tex. Estates Code § 258.002(c)
[6] Tex. Rules Civ. Pro. § 244
[7] See *Bracewell v. Bracewell*, 20 S.W.3d 14, 2000 Tex. App. LEXIS 1210,
[8] *In re Estate of Standefer*, 530 S.W.3d 160 at 169, 2015 Tex. App. LEXIS 8806
[9] *Garton v. Rockett*, 190 S.W.3d 139, 2005 Tex. App. LEXIS 10626

notwithstanding the verdict stating "…there was no testimony proving the contents of the "written will not produced in court" by someone who had read it or heard it read, and there was no testimony establishing that the copy was an accurate copy of the "written will not produced in court."[10] Using this case a savvy attorney on cross examination may question how a witness knows it is an accurate copy if the witness never actually read the will or had it read to him. Absent circumstances addressing this question, the *Garton* court opines, "…reading a purported copy of a will only proves the contents of the copy…"[11] The court concludes, "Despite Sid's suggestion that when a proponent presents a copy of an executed will courts are less concerned about requiring additional evidence regarding contents, we cannot disregard the plain language in section 85, which requires the contents of a "written will not produced in court" to be proved by the testimony of a credible witness "who has read it or heard it read."[12] In conflict with the above cited cases, the Beaumont Court of Appeals in the *Estate of Jones*[13] case issued a well-reasoned opinion differentiating between cases wherein a copy of a non-produced will is tendered verses cases wherein there is no written copy offered. The court opines,

> When a written will cannot be produced in court, and the required proof is provided, a probate court may determine the contents of a written will from the testimony of a witness who has read the will or heard the will read. See Tex. Prob. Code Ann. § 85. The court then sets forth the contents of the written will in a written order. See Tex. Prob. Code Ann. § 91. In those circumstances, the court is essentially relying on what the witness recalls of the will's contents. The procedures under sections 85 and 91 presume the court is not presented with a written will to probate.
>
> We do not see the "read it or heard it read" requirement in section 85 as intending to determine the accuracy of a photocopy of a written will, though under other circumstances that type of testimony may be necessary to determine the accuracy of a photocopy apart from any requirement of section 85. The purpose of section 85, as we see it, is to establish the contents of a written will not in the custody of the court and that can only be reproduced by a written order of the probate court based on testimony describing the will's contents. See Tex. Prob. Code Ann. §§ 85, 91. The testimony to support the order must come from a credible witness who has read the written will or heard it read. If a writing is an accurate reproduction of the valid unrevoked written will of the testator, the probate court need not rely on or require the testimony of a credible witness who testifies from memory regarding the provisions of the testator's will, because the written terms of the will are before the court.
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> We believe construing section 85 as being inapplicable when an exact photocopy of a valid, unrevoked will is produced in court follows the statute's plain language.[14]

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[10] Id. at 147
[11] Ibid.
[12] Ibid. Also note that the Probate Code was codified as the Texas Estates Code resulting in the renumbering of the statutes and references to § 85 are now applicable to § 256.156 with no substantive changes to the language.
[13] *In re Estate of Jones*, 197 S.W.3d 894, 2006 Tex. App. LEXIS 6567
[14] Id. at 903

Admission of a Will After the Period for Probate

Just like when a will is not produced for probate, citation must be served on the decedent's intestate heirs when the admission to probate will takes place longer than four years after the decedent's death.[15] If an heir of the decedent dies after the decedent and was not served before death, service should be had on the personal representative of the heir's estate. If there is no personal representative then the court should appoint and attorney ad litem to protect the interest of said heir.[16] Although a formal heirship determination is not necessary, testimony at the time of hearing will be required to establish the intestate heirs of the decedent to determine if notice was properly given and jurisdiction is established.

PROBATE ESTATE ADMINISTRATIONS

Inventory

In cases where bond is required review of the inventory to determine the appropriateness of the bond amount is imperative to appropriate probate administration, because it is important that the estate and judge are sufficiently protected. By the time the inventory is filed there may be information available about assets of the estate that was unknown at the time the orders establishing the probate were signed. If review of the inventory reflects an adjustment in bond is warranted then issue orders increasing bond (or decreasing as appropriate) and calendar for review to make sure the new bond is obtained.

An item often overlooked on the inventory which belongs under claims of the estate is pending or planned lawsuits. Remember to review the inventory to ensure the personal representative has included the suit as a claim of the estate and has appropriately valued it if the court is aware of a pending or potential lawsuit.

Another item that can cause problems on later accountings if not shown appropriately on the inventory is the separate and community property designation. Community property should be identified in total and then estate's amount. It is unclear if the guardian simply states the value and identifies it as community property as to whether the estate owns the entire value stated or ½ the value stated. For example if an inventory lists community property as $50,000.00 with no further explanation it could mean there is $100,000.00 total and $50,000.00 belongs to the estate or it could mean there is $50,000.00 total and $25,000.00 belongs to the estate.

Other items to watch for on inventories:

- Real property located outside Texas does not belong on the inventory as it must be administered as an ancillary probate estate in the state where the property is located.
- Detailed identification of assets identification (bank, type, account x1234; vehicle and vin, as examples)

[15] Texas Estates Code § 258.051(a)
[16] Texas Estates Code § 258.052

- Claims owed by the estate shouldn't be on the inventory, it should only include claims owed to the estate
- Property values should not be reduced due to a loan due on the property
- Unknown values should be kept to a minimum and there should be a good reason for allowing for an unknown value to remain on an inventory

It is fairly common for someone to complain about an inventory, but it is a rare situation that they do it properly. Normally an objection to inventory will appear in the file; however, the appropriate method to object to an inventory is by filing a request for show cause order accompanied by the proposed order.[17]

Accountings

Accountings are required yearly for dependent probate estates.[18] The savvy judge will again take this opportunity to review the estate to determine whether bond is sufficient. Tenacious auditing of probate accountings will yield a plethora of problems. A detailed list of items to review on a guardianship accounting is attached to this paper as an appendix. Many of the items on this list are also applicable to review of a probate estate accounting. The most common problem encountered with accountings is simply missing information. The backup documents supporting the accounting are just important as the accounting itself, and although it may feel like pulling teeth an audit cannot be complete without review of the backup documents such as receipts, vouchers, statements, etc. A less obvious problem found with several accountings is the misplacement of changes to the character of the corpus of the estate. For example the sale of a home is not income to the estate, it is simply changing the character of the asset from real property to cash. This is important, because the fees a personal representative charges the estate are based on income and expenses. A home sale characterized as income will inappropriately raise the personal representative's fee for administering the estate. Other areas where personal representatives often mischaracterize a change in character of corpus as income are:

- They might record transfers between financial institutions as receipts & disbursements
- They might record deposits and withdrawals as receipts & disbursements
- They might record the changing of one property type to another as receipts & disbursements
- They might record the personal property sales as receipts & disbursements
- They might record unrealized gains / loss (stock fulgurations) as receipts and disbursements
- Refunds for overpayments should be netted against the overpayments

SUPPLEMENTARY PROBATE ESTATE MATTERS

Businesses as Part of the Probate Estate

An option for addressing business operations as part of a probate estate without implementing a

[17] Texas Estates Code §§ 309.102 & 309.103
[18] Texas Estates Code § 359.002

receivership may be found in Texas Estates Code § 351.202 which provides the circumstances under which a court in which a probate administration is pending may allow a personal representative to operate a business that is part of an estate. It provides as follows:

> (a) A court, after notice to all interested persons and a hearing, may order the personal representative of an estate to operate a business that is part of the estate and may grant the representative the powers to operate the business that the court determines are appropriate, after considering the factors listed in Subsection (b), if:
>
> (1) the disposition of the business has not been specifically directed by the decedent's will;
> (2) it is not necessary to sell the business at once for the payment of debts or for any other lawful purpose; and
> (3) the court determines that the operation of the business by the representative is in the best interest of the estate.[19]

Caution should be exercised as many applicants requesting authority under this statute will often seek to operate the business and sell it immediately in the same pleading. If the application and/or testimony reveals the imminent need to sell the business then the court may not by the plain text of this statute grant the personal representative the power to operate the business. If the court does grant authority under Section 351.202 then it has the power of enhanced monitoring over business activities by ordering more frequent and/or extensive accountings.[20]

Businesses as Part of the Probate Estate - Lawfirms

There are a few ways to administer a decedent's law practice if no person has lawful custody of the client files or if there is no consent given by the clients for another licensed attorney to assume responsibility for their matter. The first of which is through a receivership. The second is to petition a district court or statutory probate court in the county of the deceased attorney's residence to assume jurisdiction over the attorney's law practice.[21] The third is for the personal representative of a deceased attorney to designate an attorney to disburse and close the deceased attorney's trust or escrow accounts for client funds.[22]

HEIRSHIP PROCEEDINGS

A common point of confusion encountered in heirship proceedings occurs upon the death of an heir to a decedent. The Court is to look at the heirs who survive the decedent when making a determination as to heirship. As a point of clarification the term "decedent" in this section of the paper refers to the person for whom the court has been requested to make an heirship determination and the term "deceased heir" refers not to the decedent but to a deceased potential heir of the decedent.

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[19] Tex. Estates Code § 351.202
[20] Tex. Estates Code § 351.204
[21] Rule 13.02 of the Texas Rules of Disciplinary Procedure
[22] Tex. Estates Code § 456.002

Sometimes attorneys will propose to the Court that the heirs of the deceased heir are the heirs of the decedent. While this sounds like a logical conclusion it is oftentimes incorrect. For example, if the deceased heir was married and had children the heirs of the deceased heir are his spouse and children whereas the heirs of the decedent, ***if the deceased heir dies before the decedent,*** are solely the deceased heir's children. The spouse of the deceased heir never takes under the decedent's intestate estate.

If an heir of the decedent dies ***after*** the decedent dies the deceased heir is ***still*** the heir of the decedent that should be served and named in the heirship order. The heirs of the decedent are those surviving the decedent at his date of death. Oftentimes attorneys will attempt to use the procedure described in the paragraph above or name the heirs of the deceased heir as the heirs of the decedent. This is improper, because it essentially creates another heirship proceeding within the decedent's heirship. This implicates many jurisdictional issues which step on the jurisdiction of the appropriate probate court for the deceased heir to make the heirship determination for that deceased heir and therefore deprives the court establishing the heirship of the decedent of jurisdiction to make such a determination.

A deceased heir should be served through the personal representative of the deceased heir's estate. If no personal representative has been appointed then, citation must be served on the person or entity by publication in the county in which the proceeding to declare heirship is commenced and in the county of the last residence of the decedent who is the subject of the proceeding, if that residence was in a county other than the county in which the proceeding is commenced.[23] Remember also, that as with all citations by publication an attorney ad litem must be appointed to represent the party so served.

Two final notes on heirships:

- The requirement that the addresses of the heirs be reflected in the order was dispensed with by the legislature, so although most lawyers still include addresses they are no longer necessary.

- When an attorney ad litem is ordered paid, the Texas Supreme Court has declared the order must be a separate order and not a part of the Heirship order. Misc. Docket No. 94-9143 (Sept. 21, 1994).

[23] Texas Estates Code § 202.052

GUARDIANSHIP CREATION

Avoiding Guardianship

The first rule of guardianship creation is to avoid, if possible, creating a guardianship. By law, the court should always consider lesser restrictive alternatives.[24]

Representative Payee: Never open a guardianship of the estate solely for the purpose of collecting and spending social security funds. A guardianship of the person entitles, but is not required, a person to collect social security as a representative payee and avoids all of the requisite filings to the probate court.

Supported Decision Making Agreements: A supported decision making agreement is an agreement between an adult with a disability ("principal") and a trusted individual ("supporter") wherein the principal agrees to allow the supporter to support and accommodate him to enable him to make life decisions, including decisions related to where he wants to live, the services, supports and medical care he wants to receive, whom he wants to live with and where he wants to work without impeding his self-determination.[25] Supported decision making agreements[26] create a fiduciary relationship between the principal and the supporter allowing for the supporter to advise the principal on various financial, residential and other matters[27] whether or not a statutory Supported Decision Making Act form[28] is used.

Community Administration: Whenever the long term spouse of a proposed ward applies for a guardianship of the estate the court should always determine if imposition of a community administration[29] would better suit the needs of the couple. Unlike guardianships the court can waive financial reporting which allows for a less expensive alternative to guardianship of the estate.

Receivership: The judge of a probate court in the county in which an incapacitated person resides or in which the incapacitated person's endangered estate is located shall, with or without application, enter an order appointing a suitable person as receiver to take charge of the estate if:

(1) it appears that all or part of the estate of the incapacitated person is in danger of injury, loss, or waste and in need of a guardianship or other representative;
(2) there is no guardian of the estate who is qualified in this state; and
(3) a guardian is not needed.

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[24] Tex. Estates Code § 1002.0015
[25] Tex. Estates Code §1357.002(3)
[26] Tex. Estates Code § 1357.002
[27] Tex. Estates Code § 1357.052
[28] Tex. Estates Code § 1357.056
[29] Tex. Estates Code Chapter 1353, Subchapter A

The court order must specify the duties and powers of the receiver the judge considers necessary for the protection, conservation, and preservation of the estate.[30]

Court Registry: Another tool to avoid guardianship of the estate is where a creditor or creditor(s) owe a proposed ward and the total amount owed is less than $100,000 is to deposit the funds in the court registry.[31] When using this option be advised that the Texas Attorney General mandates that the total value owed the proposed ward from ALL creditors to be deposited into the court registry must be $100,000 or less.[32]

ABLE Account: The Texas Achieving a Better Life Experience Act established the Texas ABLE Program to encourage and assist individuals and families in saving funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life and to provide secure funding for qualified disability expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under Title XIX of the Social Security Act, the Supplemental Security Income program under Title XVI of the Social Security Act, the Social Security Disability Insurance program under Title II of the Social Security Act, the Designated Beneficiary's employment, and other sources.[33]

To qualify for an ABLE account the proposed ward must meet the following requirements:

1. The person is a Texas resident.
2. The person can establish that he or she has a disability through one of the following ways:
3. The Social Security Administration has determined that the person is eligible to receive Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), and he or she is still eligible to receive SSI or SSDI when he or she opens the account.
4. A licensed physician has provided a written diagnosis that the person is either:
   blind (within the meaning of the Social Security Act),
   or has a medically determinable physical or mental impairment that results in marked and severe limitations, and which can either be expected to result in death, or has lasted or is expected to last at least 12 months.
5. The person has a condition listed on the Social Security Administration's list of Compassionate Allowances Conditions.
6. The person's disability was present before age 26.

[30] Tex. Estates Code Chapter 1354
[31] Tex. Estates Code Chapter 1355
[32] Tex. Atty. Gen. Op. 95-105 (1996)
[33] https://www.texasable.org/about/

7. The person must have no other active ABLE account in their name except for during a Rollover or Program-to-Program Transfer process.[34]

Other Alternatives to Guardianship

The alternatives to guardianship discussed above as well as those following may help avoid guardianship or may help to alleviate the necessity for a guardianship already created. Creativity is helpful when attempting to avoid guardianship.

Medical Power of Attorney[35]
Residence in Facility
Consent to Medical Treatment Act[36]
Emergency Medical Treatment[37]
Advance Directive[38]
Declaration for Mental Health Treatment[39]
Commitments Pursuant to Mental Health Act[40]
Durable Power of Attorney[41]
Sale of a Minor's Interest in Property without Guardianship[42]
Sale of Ward's Property without Guardianship of the Estate[43]
Trusts
- Revocable Trusts[44] or Management Trusts[45]
- Court Created Management Trusts[46]
- Section 142 Trusts[47]
- Special Needs Trusts[48]
- Pooled Trust Subaccount[49]

Guardianship Application Checklist

There are many requirements of an applicant in applying for a guardianship. These requirements tend to grow every legislative session. Attached to this paper as an appendix[50] is a current checklist for use in determining whether an application for guardianship is ripe to hear. Note as part of this

[34] https://www.texasable.org/eligibility/#eligibility
[35] Health and Safety Code § 166.002
[36] Health and Safety Code Chapter 313
[37] Health and Safety Code Chapter 773
[38] Health and Safety Code Chapter 166
[39] Civ. Prac. & Rem. Code Chapter 137
[40] Health and Safety Code Chapter 574
[41] Tex. Estates Code Subtitle P
[42] Tex. Estates Code Chapter 1351, Subchapter A
[43] Tex. Estates Code Chapter 1351, Subchapter B
[44] Tex. Prop. Code § 112
[45] Tex. Prop. Code § 142
[46] Tex. Estates Code Chapter 1301
[47] Tex. Prop. Code § 142
[48] Security Act at §1917(d)(4)(A); 42 U.S.C. § 1396p(d)(4)(A); Tex. Prop. Code § 142
[49] Tex. Estates Code Chapter 1302
[50] Form drafted by the Texas College of Probate Judges

checklist the requirement for an attorney ad litem fee. This fee is *not* a requirement and may be ignored. For the curious, however; the probate courts in Montgomery County and Travis County have issued a standing order requiring payment of fees into the court registry upon request for an attorney ad litem. This requirement allows for some funds to pay some of the fees of an attorney ad litem in the event the application is nonsuited and no probate administration or guardianship of the estate is created.

GUARDIANSHIP ADMINISTRATION

Timeline

Below is a timeline detailing items the Court is required collect from guardians as part of its guardianship administration duties. Although these are very basic elements of a guardianship the timeline has been included in this paper, because probate courts have faced increasing scrutiny for failing to abide by the legislative mandates governing guardianship administration.[51]

- Bond and oath: 21 days to qualify[52]
- Inventory: 30th day after qualification[53]
- Monthly Allowance/Budget: 30th day after qualification[54]
- Investment Plan: 180th day after qualification[55]
- Annual Accountings: 60th day after first anniversary of qualification and yearly thereafter[56]
- Annual Review: Every anniversary after guardianship order signed[57]

- Only when there is a guardianship of the estate.
- Where there is guardianship of the estate and/or guardianship of the person.

Inventory

Review of the inventory to determine the appropriateness of the bond amount is another basic element of guardianship administration; however, it is so important that the estate and judge are protected that it warrants mention. By the time the inventory is filed there may be information available about assets of the estate that was unknown at the time the orders establishing the guardianship were signed. If review of the inventory reflects an adjustment in bond is warranted then issue orders increasing bond (or decreasing as appropriate) and calendar for review to make sure the new bond is obtained.

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[51] See the Report on Texas Guardianship Reform and Guardianship Compliance Project Performance Report both published by the Texas Office of Court Administration.
[52] Texas Estates Code §§ 1105.001-1105.257
[53] Texas Estates Code Chapter 1154
[54] Texas Estates Code § 1156.001
[55] Texas Estates Code § 1161.051
[56] Texas Estates Code § 1163.001
[57] Texas Estates Code § 1201.052

An item often overlooked on the inventory which belongs under claims of the estate is pending or planned lawsuits. This information is often garnered by the court during the hearing establishing the guardianship of the estate. Remember to review the inventory to ensure the guardian has included the suit as a claim of the estate and has appropriately valued it.

Another item that can cause problems on later accountings if not shown appropriately on the inventory is the separate and community property designation. Community property should be identified in total and then estate's amount. It is unclear if the guardian simply states the value and identifies it as community property as to whether the estate owns the entire value stated or ½ the value stated. For example if an inventory lists community property as $50,000.00 with no further explanation it could mean there is $100,000.00 total and $50,000.00 belongs to the estate or it could mean there is $50,000.00 total and $25,000.00 belongs to the estate.
Other items to watch for on inventories:

- Real property located outside Texas does not belong on the inventory as it must be administered as an ancillary guardianship estate in the state where the property is located.
- Detailed identification of assets identification (bank, type, account x1234; vehicle and vin, as examples)
- Claims owed by the estate shouldn't be on the inventory, it should only include claims owed to the estate
- Property values should not be reduced due to a loan due on the property
- Unknown values should be kept to a minimum and there should be a good reason for allowing for an unknown value to remain on an inventory

It is fairly common for someone to complain about an inventory, but it is a rare situation that they do it properly. Normally an objection to inventory will appear in the file; however, the appropriate method to object to an inventory is by filing a request for show cause order accompanied by the proposed order.[58]

Investment Plan

An investment plan is required to be filed before 180 after qualification of the guardian or another date specified by the court.[59] The Texas Estates Code expressly sanctions certain investments[60] while other types of investments must be approved by the court as part of the investment plan.[61] One such investment not expressly sanctioned by the Texas Estates Code that are a commonly found in investment plans are stocks. Often the stocks were part of the ward's investment portfolio before the guardianship was established and the guardian of the estate desires to continue forward with the pre-guardianship stock investments. The judge should inquire as to stock investments and should not be satisfied with a general response deferring responsibility for the investment selections to the broker or advisor. Another area for concern in reviewing investment plans is the plan for unoccupied real estate. This often includes a real estate that is no longer occupied by the ward, because he is now permanently living in an assisted living facility. After approval of the

[58] Texas Estates Code §§ 1154.102 & 1154.103
[59] Texas Estates Code § 1161.051(a)
[60] Texas Estates Code § 1161.003
[61] Texas Estates Code § 1161.051(2)

inventory, appraisement, and list of claims, the personal representative of an estate promptly shall apply for a court order to sell, at public auction or privately, for cash or on credit for a term not to exceed six months, all estate property that is liable to perish, waste, or deteriorate in value, or that will be an expense or disadvantage to the estate if kept.[62]

Accountings

After the inventory and initial accounting, accountings must be filed yearly where there is a guardianship of the estate.[63] Guardianship accountings, like probate accountings, can be replete with problems. The same problems discussed with regard to probate accountings are applicable to guardianship accountings.[64] Attached to this paper as an appendix is a list of items that should be given review when auditing guardianship accountings.

On occasion the court will realize a mistake or intentional misrepresentation by a guardian after approval of an accounting. Luckily previous accountings may be re-examined even after approval.[65]

Annual Review

Supported decisions making agreements are discussed above as a lesser restrictive alternative to guardianship, but they are also pertinent to the annual review process. Supported decision making agreements were made part of the legal framework in Texas in 2015. It is highly likely that the court will have several guardianships that were create before 2015. Therefore, the ward in those guardianships was not provided with the option for a supported decision making agreement before his guardianship was created. Special attention should be given to review of guardianships, especially partial guardianships to see if a supported decision making agreement or any other alternative to guardianship would alleviate the need for a guardianship. It is also a good time to determine if a new CME might support converting a full guardianship to a partial guardianship. This is also an excellent time to determine if the guardianship of an estate is no longer necessary, because the corpus of the ward's estate has been used.

TEMPORARY GUARDIANSHIPS

Meticulous attorneys will review the clerk's form for temporary guardianship citations. Not only is it required to have different language than regular guardianship citations, but the legislature modified the language during the most recent legislative session.[66]

Citations are not the only pitfalls to be wary of in temporary guardianships. The Court must upon filing for temporary guardianship schedule a hearing within ten days.[67] Service on the ward in

[62] Tex. Estates Code § 356.051
[63] Tex. Estates Code Chapter 1163, Subchapter A
[64] A guardian's fee for an estate is calculated on estate income and expenses just as like a personal representatives fee.
[65] *Di Portanova v. Hutchison,* 766 S.W.2d 856, 1989 Tex. App. LEXIS 394
[66] Texas Estates Code § 1251.005
[67] Texas Estates Code § 1251.006(b)

such a short timeframe can be challenging, and lack of service is detrimental because the only method to extend the hearing past ten days after filing is with the agreement of the ward's attorney or ward.[68]

The judge should be mindful of the language contained in temporary guardianship orders. Unlike regular guardianship orders which may simply provide for a full guardianship, temporary guardianship orders must detail the powers and duties of the temporary guardian while only assigning those "powers and duties that are necessary to protect the proposed ward against imminent danger."[69] The order in a temporary guardianship is especially important, because no letters of temporary guardianship will be promulgated. The temporary guardian will only have the temporary guardianship order to use in accomplishing his duties. Although not required for temporary guardianship orders it is recommended that the temporary guardianship order contain the notice language mandated by statute for permanent guardianship orders to warn third parties that interference with a guardian of the person's rights over the ward is a felony[70] which will aid the temporary guardian of the person just as it does a permanent guardian.

Because the temporary guardianship is by nature created to address emergency situations, it is advisable to hold at least one status conference after appointing a temporary guardian. It is often the case that once the temporary guardian has been able to intervene in the proposed ward's emergency more information has come to light and it becomes clear that additional powers or orders are necessary to allow the temporary guardian to fulfill his duties. A set date for a status conference two weeks to 30 days after creation of the temporary guardianship depending on the situation gives all involved a chance to reconvene to make sure the best interests of the proposed ward are being served. At the status conference the judge can determine if additional status conferences are necessary. Status conferences in temporary guardianships also keep all involved mindful of the statutory expiration of the temporary guardianship. In contested matters the temporary guardianship expires after nine months unless a motion to extend is filed and granted after hearing.[71] In uncontested matters the absolute deadline is 60 days after the temporary guardianship commences.[72]

There is no requirement for training during or before the initial appointment of a temporary guardian under Chapter 1251, Estates Code; however, the court cannot extend the guardianship without the guardian completing the training. Always advise guardians when the temporary guardianship is initiated to complete the training as soon as possible (or even before the temporary guardianship is instituted).

Requiring an inventory and annual accountings for temporary guardianships of the estate and annual reports for temporary guardianships of the person stemming from contested matters as are required in permanent guardianships is recommended and permitted by the Texas Estates Code.[73] Accountings provided by the temporary guardian reflect only those assets over which the court has

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[68] Texas Estates Code § 1251.006(c)
[69] Texas Estates Code § 1251.010(b)
[70] [70] Texas Estates Code §§ 1101.151(c) (order w/full authority) & 1101.152(c) (order with limited authority)
[71] Texas Estates Code § 1251.052(b)(3)
[72] Texas Estates Code § 1251.151 & Guardianship of Gibbs, 253 S.W.3d 866 (Tex. App.—Ft. Worth 2008, writ dism.)
[73] Texas Estates Code § 1251.102

given the temporary guardian authority. For example, a temporary guardian of the estate who has been appointed solely to sell a specific asset should not include in the inventory and accounting(s) for the temporary guardianship of the estate assets other than the asset he has been empowered to sell nor should he exercise authority over other assets.

To maintain accuracy in reporting requirements it is important to follow through with those provisions outlined in the Texas Estates Code for closing temporary guardianships.[74] All guardianships that are opened, including temporary guardianships, are reported to the state for statistical purposes. Failure to close temporary guardianship will artificially inflate the pending guardianships in the court reflected in public reports that are generated by the Texas Office of Court Administration.

As a final thought before concluding the discussion on temporary guardianships some attention must be given to temporary restraining orders. A temporary restraining order may be more appropriate in certain situations than a temporary guardianship. For example, if a third party is abusing or harassing a proposed ward a temporary guardianship doesn't do much to stop the inappropriate behavior. In this situation an interested party, the proposed ward's attorney or attorney ad litem or an appointed guardian ad litem for the proposed ward should file for a temporary restraining order and injunctive relief. Appropriate orders restraining and/or enjoining the behavior enable interested parties and the court the ability to address the emergency situation without instituting a temporary guardianship with all the attendant restrictions on the proposed ward and reporting requirements. Unfortunately some situations will require a temporary guardianship, temporary restraining order and/or injunctive relief to serve the proposed wards best interests. These cases are often representative of the most extreme exploitation and neglect and should be brought to the attention of local law enforcement and/or Adult Protective Services. Many persons do not realize that the failure to report physical abuse or financial exploitation is a crime. The Human Resources Code, §48.051 states:

(a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation, including a disabled person receiving services as described by Section 48.252, shall report the information required by Subsection (d) immediately to the department.

(b) If a person has cause to believe that an elderly or disabled person, other than a disabled person receiving services as described by Section 48.252, has been abused, neglected, or exploited in a facility operated, licensed, certified, or registered by a state agency, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.

(c) The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional.

[74] Texas Estates Code §§ 1251.153 & 1251.152.

Many people view the abuse but are concerned of the ramifications of the report and that the predator might come after them. Section 48.052 discusses what happens if you have knowledge of the abuse but decide not to report the abuse. It reads:

(a) A person commits an offense if the person has cause to believe that an elderly or disabled person has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter. An offense under this subsection is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the disabled person was a person with mental retardation who resided in a state supported living center, the ICFMR component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the disabled person had suffered serious bodily injury as a result of the abuse, neglect, or exploitation.

(b) This section does not apply if the alleged abuse, neglect, or exploitation occurred in a facility licensed under Chapter 242, Health and Safety Code. Failure to report abuse, neglect, or exploitation that occurs in a facility licensed under that chapter is governed by that chapter.

SUPPLEMENTARY GUARDIANSHIP MATTERS

Wards as Criminal Defendants

There have been fairly recent legislative developments drafted to aid guardians and wards who find themselves traversing the criminal justice system. Sadly laws described below came about due to actual circumstances in which a ward or guardian was denied common access to their ward during a criminal proceeding.

- If a ward cannot afford an attorney his guardian may request from the indigent defense department or the criminal court that counsel be appointed to represent the ward.[75] The guardian is allowed to provide any information required by the indigent defense department or court to determine the financial need for an attorney.[76]

- The jail must give the guardian access (during normal visiting hours) to his ward, regardless of whether the ward has listed the guardian on the jail visitation paperwork.[77] Similarly, if the ward is incarcerated in the penitentiary (as opposed to the local jail), access to the ward (during normal visitation hours) by the guardian is mandatory regardless of whether the guardian is identified on the ward's visitation paperwork.[78]

[75] Code of Criminal Procedure § 26.041
[76] Code of Criminal Procedure § 26.041
[77] Texas Government Code § 503.030
[78] Texas Government Code § 501.010

- The most recent legislative change was made effective on September 1, 2021. As of this date guardians may not be excluded from the court room in legal proceedings where the ward is a party or witness.[79]

[79] Texas Estates Code § 1151.005

APPENDIX A
ITEMS TO CHECK WHEN REVIEWING GUARDIANSHIP ACCOUNTINGS

Were all of the expenses approved by the court, ratified by the court or statutorily allowed without court action? If not, determine whether the expense is appropriate. If the expense is appropriate have the guardian submit a motion for ratification of the expense before approving the annual account. If the expense is inappropriate and set the guardian for a show cause hearing.

Were all of the expenses within the budget categories? In other words did they budget $5000 for living expenses and $500 for miscellaneous, but spend $1000 in living expenses and $4,500 in miscellaneous? Guardians should use the same budget categories in their accountings as they did in their budget. Guardians should not exceed individual budget category expenses.

A guardian may charge rent for the ward living in the guardian's home; however the ward should pay fair market value for a room rental, not a pro rata share of all mortgage expenses, utilities, living and maintenance expenses of the home.

When reviewing expenses (especially miscellaneous expenses) look at the receipts. If it is a meal, was the meal for one or two?

When reviewing expenses (especially miscellaneous expenses) look for funds given to individuals. What is their relationship to the ward and the guardian? Why are they getting money from the ward? Many times these will jump off the page, because they are family members sharing the ward's or guardian's last name.

Look for transfers between bank accounts. Verify that a transfer between the ward's bank accounts actually appeared in the receiving account once it left the originating account. Transfers should not be listed in the section of the accounting regarding changes in asset value, because there was no change in the value of the asset for a transfer…just a change in location of the asset. If there is a change in value, then money is lost and it must be found.

If attorney fees were paid and not approved they need to be approved, before approval of the accounting. If the fees are not approved in part or in whole then what was overpaid to the attorney needs to be listed in the accounting as a claim due to the estate from the attorney.

Check the accounting for claims due to the estate. Did any claims due to the estate disappear between accounting periods? Why?

Check beginning balances. They should match the inventory if it is an initial accounting and they should match the ending balances of the prior accounting if it is a subsequent accounting.

Are there receipts for everything? The code requires the guardian to file receipts. If they do not have receipts, are there cancelled checks or credit card statements the court may review.

Are the investments in compliance with the investment plan, and are they doing well?

If there are expenses made for a home, check the address listed where the work was done to ensure it is a home the ward owns.

Are there expenses for an assisted living facility AND home expenses (repair, electricity, etc.)? The ward should not have both unless the home is garnering income for the estate! If not, then show cause for failure to sell the home. The guardian of an estate, shall promptly apply for an order of the court to sell all of the estate that is liable to perish, waste, or deteriorate in value or that will be an expense or disadvantage to the estate if kept.

Is the ward running out of money? Do changes need to be made to the budget to ensure the ward has funds with which to live?

Has a source of income disappeared? Why?

Verify the amounts listed in the accounting reconcile with the bank statements and certification of account balances provided by the bank.

If the ward is a minor and the guardian is the ward's parent or legal conservator, look for funds taken from the ward's estate that are for the wards health, education and maintenance. Funds cannot be taken from the ward's estate for this purpose absent a showing that the parent or legal conservator is unable to pay the expense.

Things guardians may spend money on: pools, travel expenses, gifts for "others", home improvements, expenses for the guardian not necessarily related to the guardianship. Any items like these should be given additional scrutiny to determine whether there is justification for the expense to be charged to the estate.

APPENDIX B
ITEMS TO CHECK WHEN REVIEWING GUARDIANSHIP APPLICATIONS

Hearing Checklist for Cause Number _____, ESTATE OF: _____
DOB: _____

Type: Guardianship of Person – Incapacitated
Applicant:
Proposed Guardian:

Background Check Completed? ❑ Yes ❑ No
Registered? ❑ Yes ❑ No Training? ❑ Yes ❑ No

Applicant Attorney:
Attorney ad Litem

	YES	NO	NOTES
APPLICATION COMPLETE	❑	❑	
PERSONAL SERVICE ON WARD	❑	❑	
CITATION POSTED DATE: _____			

NOTICE & WAIVERS
(§§1051.103 – 1051.104)

	YES	NO	N/A	NOTES
Mother	❑	❑	❑	
Father	❑	❑	❑	
Conservator	❑	❑	❑	
Spouse	❑	❑	❑	
Adult Children	❑	❑	❑	
Adult Siblings	❑	❑	❑	
Facility Administrator	❑	❑	❑	
Agent/Attorney-in-fact	❑	❑	❑	

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAM (PCME)

Date of Exam: _____

Date of Letter: _____

Reason for Guardianship: _____

§1051.104 Affidavit filed: _____

Court Investigator's Report: _____

$400 Deposit: ❑ YES ❑ NO, because:

Amount of Estate: _____

Application Checklist for Cause Number _____, ESTATE OF: _____

- ☐ Application is sworn to by the applicant (with effective jurat) (§1101.001(b))
- ☐ Attorney's email address is included on the application (TRCP Rule 21(f)(2))
- ☐ Applicant's attorney has Guardianship Certification (§1054.201(a))

In all cases, application states:

- ☐ Proposed ward's full name, sex, date of birth, and address. (§1101.001(b)(1))
- ☐ Name, relationship to proposed ward, and address of the person the applicant seeks to have appointed as guardian. (§1101.001(b)(2))
- ☐ Whether seeking guardianship of the person or estate, or both. (§1101.001(b)(3))
- ☐ Whether alternatives to guardianship and available supports and services to avoid guardianship were considered. (§1101.001(b)(3-a))
- ☐ Whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for guardianship (§1101.001(b)(3-b))
- ☐ Nature and degree of the alleged incapacity. (§1101.001(b)(4))
- ☐ Specific areas of protection and assistance requested. (§1101.001(b)(4))
- ☐ Limitation or termination of rights requested to be included in the court's order of appointment, including a termination of (A) the right of a proposed ward who is 18 years of age or older to vote in a public election; and (B) the proposed ward's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code. And (C) the right of a proposed ward to make personal decisions regarding residence. (§1101.001(b)(4))
- ☐ Facts requiring that a guardian be appointed. (§1101.001(b)(5))
- ☐ Interest of the applicant in the appointment. (§1101.001(b)(6))
- ☐ Nature and description of any guardianship of any kind existing for the proposed ward in any other state. (§1101.001(b)(7)) *If none, please indicate.*
- ☐ Name and address of any person or institution having the care and custody of the proposed ward. (§1101.001(b)(8))
- ☐ Approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled. (§1101.001(b)(9))
- ☐ Name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney. (§1101.001(b)(10)) *If none, please indicate.*
- ☐ Facts showing that the court has venue over the proceeding. (§1101.001(b)(14))
- ☐ If applicable, that person to be appointed as guardian is a private professional guardian certified as required by the Government Code, who has complied with the requirements of Section 1104.301 of this code. (§1101.001(b)(15))

(If a person named in the application is protected by a protective order issued under Chapter 85, Family Code, see Estates Code §1101.002.)

If proposed ward is an adult, application states:

- ☐ (1) name of the proposed ward's spouse, if any, and (2) the spouse's address or (2b) that the spouse is deceased, if known by applicant. (§1101.001(b)(13)(A)) *If proposed ward is not married or if any information is not known, please indicate.*
- ☐ (1) name of each of the proposed ward's parents and (2a) each parent's address or (2b) that the parent is deceased, if known by applicant. (§1101.001(b)(13)(B)) *If any information is not known, please indicate.*
- ☐ (1) name of each of the proposed ward's siblings and (2a) each sibling's address or (2b) that the sibling is deceased, if known by applicant. (§1101.001(b)(13)(C)) *If any information is not known, please indicate.*
- ☐ (1) name of each of the proposed ward's children, if any, and (2a) each child's address or (2b) that the child is deceased, if known by applicant. (§1101.001(b)(13)(D)) *If proposed ward has no children or if any information is not known, please indicate.*
- ☐ If there is no living spouse, parent, adult sibling, or adult child of the proposed ward, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults. (§1101.001(b)(13)(E))