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Vultures and Lambs: A Journey through Protective Services for the Texas Elderly.

Christopher J. Pettit

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VULTURES AND LAMBS: A JOURNEY THROUGH PROTECTIVE SERVICES FOR THE TEXAS ELDERLY

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*"Such protection as vultures give to Lambs."*¹

I. INTRODUCTION

An organized state of affairs is one of the most important gifts a person can give his or her family. Record keeping and pre-planning are of the utmost importance when managing a person's estate during his or her lifetime in the event of a disability or upon death. Nevertheless, no matter how well a person plans his or her

1. RICHARD BRINSLEY SHERIDAN, PIZARRO act 2, sc. 2.

estate, there are sometimes predators waiting and devising plans to seize all or a part of the person's estate.²

In the year 2000, it was estimated that there were approximately 2,031,051 persons over age 65 living in Texas.³ As a result, the State of Texas created the Texas Department of Mental Health and Mental Retardation ("MHMR"), which seeks to protect the elderly through its agency known as Adult Protective Services.⁴ During the fiscal year 2000, Adult Protective Services completed an estimated 55,197 intakes of reports seeking protective services for senior citizens.⁵ Of those reported cases, 51,479 merited Adult Protective Services investigation.⁶ Furthermore, of the cases investigated, 33,978 were ultimately reported as valid cases of abuse requiring the agency to provide protective services.⁷ The average time to conduct an investigation statewide was 24.70 days.⁸ A single social worker acting on behalf of Adult Protective Services handles an average of 31.7 cases at any given time.⁹

For purposes of Adult Protective Services, the term "abuse" encompasses cases of emotional or verbal abuse, exploitation, medical neglect, mental health neglect, physical abuse, physical neglect, suicidal threat, or sexual abuse.¹⁰ Interestingly, sources of reported abuse are quite varied: 39.8% are attributable to adult children; 15.3% are attributable to spouses; 10.2% are attributable to grandchildren; 7.9% are attributable to parents; 5.7% are attributable to other relatives; 5% are attributable to sibling; 4.4% are attributable to service providers; 3.1% are attributable to persons with no relationship to the abused person; 2.4% are attributable to friends or neighbors; 0.7% are un-attributable to any particular source; and 0.3% are attributable to the staff of a facility or institu-

2. See Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (recounting three examples of guardians misappropriating their ward's finances).

3. TEX. DEP'T OF PROT. & REG. SERVS., 2000 DATA BOOK, at 7 (2000).

4. See *id.* at 2 (expressing the goals of Adult Protective Services with regard to the elderly, abused and neglected).

5. *Id.* at 9.

6. *Id.*

7. *Id.*

8. TEX. DEP'T OF PROT. & REG. SERVS., 2000 DATA BOOK, at 21 (2000).

9. *Id.* at 22.

10. *Id.* at 18, 26.

tion.¹¹ Of the abused, 62.9% are women.¹² If the person making the report to Adult Protective Services is not satisfied with the result of the investigation, subsequent reports of abuse may be made.¹³ In fact, approximately 29.3% of clients reported to Adult Protective Services are reported more than once.¹⁴

Although Adult Protective Services' role is emergency intervention to stop the abuse of the elderly, the agency is sometimes used as a tool to circumvent the stated wishes of a potentially disabled person.¹⁵ Additionally, sometimes the person seeking to exploit an elderly and potentially disabled person uses tools otherwise available to protect the elderly to gain control over their affairs.¹⁶ To combat this situation, the guardianship process and pre-planning, through powers of attorney, seek to empower persons to choose who shall manage the disabled person's affairs.

A. *Purpose of a Guardian*

The goal of a guardianship is to ensure the proper balance between the administration of the ward's estate with the need to preserve the incapacitated person's self-reliance to the greatest extent possible.¹⁷ The powers and limitations of guardianship proceedings are governed by the terms of the Texas Probate Code. Under the Texas Probate Code, the purpose of a guardianship is to "promote and protect the well-being of" the incapacitated person and to "encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person."¹⁸ The first

11. *Id.* at 11 (finding that an additional 5.2% of the cases are attributable to "other" sources).

12. *Id.* at 15.

13. *See* TEX. DEP'T OF PROT. & REG. SERVS., 2000 DATA BOOK, at 23 (2000) (referring to statistical data indicating that some cases are investigated by Adult Protective Services more than once).

14. *Id.*

15. *See* Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (stating the social service system fails to adequately serve those who are unable to protect themselves).

16. *See id.* (asserting that judges often "strip individuals of their civil rights and turn them over to guardians who are loosely supervised at best").

17. *See* Valdes-Fuerte v. State, 892 S.W.2d 103, 107 (Tex. App.—San Antonio 1994, no writ).

18. TEX. PROB. CODE ANN. § 602 (Vernon Supp. 2001); *see also* Eddins v. Estate of Sievers, 789 S.W.2d 706, 707 (Tex. App.—Austin 1990, no writ) (holding that trial court

step in a guardianship proceeding is to determine whether the person is incapacitated.

1. Incapacity Determination

A court ordered guardianship, under which the ward is removed from the ability to manage his or her own affairs, is limited to instances in which the ward is determined to be mentally incapacitated. A person is incapacitated if he or she is:

(A) a minor;

(B) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs; or

(C) a person who must have a guardian appointed to receive funds due the person from any governmental source.¹⁹

It is essential to remember that a physical incapacity in and of itself is not sufficient to trigger a guardianship proceeding. Further, age may not solely determine incapacity under which the court may appoint a guardian.²⁰

2. Objective of Guardianship

The primary objectives of an administration of the ward's estate through guardianship is to: (1) marshal the assets of the disabled person, (2) pay the creditors, and (3) preserve the estate of the ward to provide for the ward financially as long as possible.²¹ The overriding factor in a guardianship administration is to administer the ward's estate under court supervision.²² Court supervision applies not only to the implementation of the three-part purpose of

decisions as to guardianship matters are left to the discretion of the trial judge and are not disturbed absent a clear abuse of discretion).

19. Act of May 22, 2001, 77th Leg., ch. 217, § 2, 2001 Tex. Sess. Law Serv. 389 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 601(14)) (recognizing this provision appeared as TEX. PROB. CODE ANN. § 601(13)).

20. See *Coleson v. Bethan*, 931 S.W.2d 706, 710 (Tex. App.—Fort Worth 1996, no writ) (stating that an attorney ad litem may be appointed for a minor).

21. See TEX. PROB. CODE ANN. §§ 771-72 (Vernon Supp. 2001) (specifying the duties of guardians).

22. See *id.* §§ 671-72 (detailing the guardian's duties and responsibilities when administering the estate).

guardianship but also applies to the qualifications and administration of the categories.²³

In addition, the scope of a guardian's power over his or her ward is limited in authority.²⁴ As such, the ward retains all rights and powers not expressly granted to the guardian.²⁵

There are two types of guardians appointed to serve the public policy goals enumerated in the Texas Probate Code.²⁶ Guardians of the Estate are responsible for the management of the ward's financial affairs, and Guardians of the Person oversee the physical custody of the ward.²⁷ A person can be both Guardian of the Estate and Guardian of the Person, or these services can be performed by two different people.

3. Court Appointment of a Guardian for an Incapacitated Adult

The Texas Probate Code expressly governs the selection of a guardian for an incapacitated person other than a minor child.²⁸ Once again, the overriding principle behind the statutory authority is the appointment of a guardian who will best protect the interests of the incapacitated ward.²⁹

In determining who shall serve as the guardian of an incapacitated adult, the Texas Probate Code instructs the probate court to consider the following matters:

23. *See id.* §§ 771-72, 774 (delineating which duties require court authorization); Act of May 23, 2001, 77th Leg., ch. 305, § 1, 2001 Tex. Sess. Law Serv. 544 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 774(a)) (listing guardian activities conducted with court approval).

24. TEX. PROB. CODE ANN. §§ 675 (Vernon Supp. 2001). "An incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian." *Id.*

25. *Id.*

26. *See* Valdes-Fuerte v. State, 892 S.W.2d 103, 107 (Tex. App.—San Antonio 1994, no writ) (indicating that a guardian protects the rights of the ward or the ward's property).

27. *See generally* TEX. PROB. CODE ANN. § 771 (Vernon Supp. 2001) (detailing the Guardian of Estate's duties); *id.* § 677 (discussing the appointment of a Guardian of the Person).

28. *Id.* § 677.

29. *Id.*; *see also* Carney v. Aicklen, 587 S.W.2d 507, 511 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (asserting that the ward's best interest is served by a qualified guardian); Silber v. Southern Nat'l Life Ins. Co., 326 S.W.2d 715, 715 (Tex. Civ. App.—San Antonio 1959, no writ) (stating that the natural parent is not automatically qualified as a guardian of the ward's estate).

If the court finds that two or more eligible persons are equally entitled to be appointed guardian:

- (1) the ward's spouse is entitled to the guardianship in preference to any other person if the spouse is one of the eligible persons;
 - (2) the eligible person nearest of kin to the ward is entitled to the guardianship if the ward's spouse is not one of the eligible persons;
- or
- (3) the court shall appoint the eligible person who is best qualified to serve as guardian³⁰

Additionally, the Texas Probate Code affords Texas residents the right to appoint his or her own guardian in case of future incapacitation.³¹ Such a declaration should be made substantially similar to the format provided in the Code.³²

4. Persons Disqualified to Serve as Guardian

According to the terms of the Texas Probate Code, there are certain individuals who are disqualified from being a guardian.³³ Those disqualified persons include minors, incapacitated persons,

30. TEX. PROB. CODE ANN. § 677(a) (Vernon Supp. 2001); *see also Carney*, 587 S.W.2d at 511 (indicating that the overriding principal is still the best interest of incapacitated ward); *Silber*, 326 S.W.2d at 717 (maintaining that a natural parent is not automatically qualified as guardian of ward's estate).

31. *See Act of May 22, 2001, 77th Leg., ch. 217, § 8, 2001 Tex. Sess. Law Serv. 393* (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 679) (providing a person the opportunity to designate a guardian by executing a written declaration should the need arise or stating who shall not be appointed); *see also Adcock*, 923 S.W.2d at 76 (inferring that the person appointed as guardian in prior declarations may still be disqualified).

32. *See Act of May 22, 2001, 77th Leg., ch. 217, § 8, 2001 Tex. Sess. Law Serv. 393-94* (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 679(i)) (describing the requirements for a written instrument designating a guardian).

33. *See TEX. PROB. CODE ANN. § 681* (Vernon Supp. 2001) (identifying persons who may not serve as guardian); *see also Trimble v. Texas Dep't of Protective & Regulatory Servs.*, 981 S.W.2d 211, 220 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (affirming that a spouse was not qualified to serve as guardian); *Adcock v. Sherling*, 923 S.W.2d 74, 77 (Tex. App.—San Antonio 1996, no writ) (noting that the son's management of the ward's other assets are not automatically a fatal conflict of interest for purposes of choosing a guardian); *Mireles v. Alvarez*, 789 S.W.2d 947, 948 (Tex. App.—San Antonio 1990, writ denied) (finding that a husband's maintenance of tort lawsuit for and on behalf of his wife may constitute conflict of interest); *Blackburn v. Gantt*, 561 S.W.2d 269, 273 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (indicating that the standard for choice of a guardian should be based upon the totality of circumstances, including the guardian's education and expertise); *Dobrowolski v. Wyman*, 397 S.W.2d 930, 932 (Tex. Civ. App.—San Antonio 1965, no writ) (contending that the spouse's maintenance of separate property from the proposed ward may constitute a conflict of interest).

persons with bad conduct, persons who are party to a lawsuit involving "the welfare of the proposed ward," persons indebted to the proposed ward, persons asserting an adverse claim to the proposed ward's property, an inexperienced or uneducated person, an unsuitable person or corporation, persons disqualified under Section 679 of the probate code, and nonresidents who have not registered with the court as a resident to accept service of process relating to the guardianship.³⁴

II. IMPLEMENTING A GUARDIANSHIP PROCEEDING

To implement a guardianship proceeding, the proposed guardian must follow the statutory requirements set forth in the probate code. The mandate of the probate code is to serve the best interests of the disabled ward, both physically and financially.³⁵ To protect these interests, courts exercising jurisdiction over the affairs of the disabled ward follow a series of rigid procedures. These measures balance the needs of the disabled ward and the desires of the proposed guardian to protect the ward from himself or herself as well as from third party influence.³⁶

A. *Jurisdiction over Guardianship Proceedings*

To initiate a guardianship proceeding, the applicant must first determine which court has jurisdiction over the matter. The Texas Probate Code grants jurisdiction in guardianship cases to county courts and statutory probate courts.³⁷ In addition, a statutory probate court may exercise ancillary and pendent jurisdiction over related matters for purposes of judicial economy.³⁸

34. TEX. PROB. CODE ANN. § 681 (Vernon Supp. 2001); *see also Adcock*, 923 S.W.2d at 76 (noting that a person may not be appointed as a guardian if they have an adverse claim to the ward's real or personal property).

35. TEX. PROB. CODE ANN. § 602 (Vernon Supp. 2001).

36. *See id.* (articulating the policy behind guardianship appointments).

37. *See id.* § 605 (granting jurisdiction to specific courts to appoint and manage guardians); Act of June 15, 2001, 77th Leg., ch. 1174, § 1, 2001 Tex. Sess. Law Serv. 2498 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 606) (outlining the provisions to determine court jurisdiction); *see also Milton v. Herman*, 947 S.W.2d 737, 739 (Tex. App.—Austin 1997, orig. proceeding), *overruled sub. nom. In re Graham*, 971 S.W.2d 56 (Tex. 1998) (recognizing that probate courts have the authority to act in accordance with statutory law). *See generally* Charles B. Gorham, *The Jurisdiction of Statutory Probate Courts*, 59 TEX. BAR J. 240 (1996) (discussing jurisdiction in probate matters).

38. TEX. PROB. CODE ANN. § 607(d) (Vernon Supp. 2001).

B. *Venue*

Interestingly, more than one court may have competent jurisdiction over a disabled ward's application for guardianship. To determine which court may hear the matter, the applicant must seek the proper venue for the hearing on the application for guardianship. The Texas Probate Code governs venue in guardianship proceeds.³⁹ Under the Code, a guardianship proceeding may be brought:

- (1) in the county in which both the minor's parents reside;
- (2) if the parents do not reside in the same county, in the county in which the parent who is the sole managing conservator of the minor resides, or in the county in which the parent who is the joint managing conservator with the greater period of physical possession of and access to the minor resides;
- (3) if only one parent is living and the parent has custody of the minor, in the county in which that parent resides;
- (4) if both parents are dead but the minor was in the custody of a deceased parent, in the county in which the last surviving parent having custody resided; or
- (5) if both parents of a minor child have died in a common disaster and there is no evidence that the parents died other than simultaneously, in the county in which both deceased parents resided at the time of their simultaneous deaths if they resided in the same county.⁴⁰

In addition, the application for guardianship "may be brought in the county in which the will was admitted to probate."⁴¹ A proceeding to appoint a guardian may be initiated in the county where the will was probated or in the county of the proposed guardian's residence if within Texas.⁴²

C. *The Process of Implementing a Guardianship*

To initiate and administer a guardianship, whether the guardianship is of the estate, the person, or both, the applicant is required to complete a five-part process. The process requires filing an ap-

39. *Id.* § 610.

40. *Id.* § 610(b)(1)-(5).

41. *Id.* § 610(c).

42. *Id.*; see also *Loudd v. Davis*, 650 S.W.2d 556, 557 (Tex. App.—Houston [14th Dist.] 1983, no writ) (indicating situs of guardianship depends on location of person or property over which the guardian is to control).

plication for the appointment of a guardian, the issuance of citation to all interested parties, the filing of the requisite proof of the ward's incapacity and estate, a hearing on the propriety of the application for guardianship, and the issuance of an order appointing the guardian. This five-part process is designed to administer a guardianship, regardless of whether the guardian is to administer the ward's estate, the person, or both, and protects the interests of both the applicant and the ward.

D. *The Application for Guardianship*

The Texas Probate Code mandates the requirements for implementing guardianship. "Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue."⁴³ Under the code "[t]he application must be sworn to by the applicant."⁴⁴ Former Section 682(3) also required the application to state "the social security

43. TEX. PROB. CODE ANN. § 682 (Vernon Supp. 2001).

44. *Id.* The application must state:

- (1) the name, sex, date of birth, and address of the proposed ward;
- (2) the name, relationship, and address of the person the applicant desires to have appointed as guardian;
- (3) whether guardianship of the person or estate, or both, is sought;
- (4) the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order of appointment;
- (5) the facts requiring that a guardian be appointed and the interest of the applicant in the appointment;
- (6) the nature and description of any guardianship of any kind existing for the proposed ward in any other state;
- (7) the name and address of any person or institution having the care and custody of the proposed ward;
- (8) the 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;
- (9) the 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;
- (10) if the proposed ward is a minor, the names of the parents and next of kin of the proposed ward and whether either or both of the parents are deceased;
- (11) if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding;
- (12) if the proposed ward is 60 years of age or older, the names and addresses, to the best of the applicant's knowledge, of the proposed ward's spouse, siblings, and chil-

number of the proposed ward and of the person the applicant desires to have appointed as guardian. . . ."⁴⁵ This is no longer required under the current section.

E. *Notice*

Once an application to institute a guardianship proceeding is filed with the appropriate court, notice must be issued. The Texas Probate Code requires notice to all interested persons before a hearing on the application for appointment of a guardian.⁴⁶ Notice upon all interested persons may be accomplished through proper service.⁴⁷ Specifically, service under the probate code may be made by posting, certified mail, or citation.⁴⁸

F. *Hearing*

Once proper notice is given to all interested parties, a hearing is held to determine the propriety of the application for guardianship.⁴⁹ The hearing on an application for appointment of a guardian must take place no earlier than the first Monday after the expiration of ten days from notice by posting, personal service, or certified mail.⁵⁰ At the hearing, the judge shall hear the evidence and proof offered to support the facts alleged in the application for appointment of a guardian.⁵¹ If the proof offered is sufficient to support each of the facts alleged in the application, the court must

dren, or, if there is no spouse, sibling, or child, the names and addresses of the proposed ward's next of kin;
 (13) facts showing that the court has venue over the proceeding; and
 (14) if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who has complied with the requirements of Section 697 of this code.

Id.

45. Act of June 19, 1993, 73rd Leg., ch. 957, § 1, 1993 Tex. Gen. Laws 4101 (amended in 1997) (current version at TEX. PROB. CODE ANN. § 682 (Vernon Supp. 2001)) (citing previous Section 682(3)).

46. TEX. PROB. CODE ANN. § 633(a)-(b) (Vernon Supp. 2001).

47. *Id.* § 633.

48. *Id.*

49. See Act of June 15, 2001, 77th Leg., ch. 1174, § 2, 2001 Tex. Sess. Law Serv. 2499 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 633(f) (discussing the notice requirements in cases involving an application for guardianship)).

50. *Id.*

51. See TEX. PROB. CODE ANN. § 684 (Vernon 2001) (indicating that the court must make certain findings of fact).

issue an order granting guardianship over the person, the estate, or both.⁵²

Before a guardian is appointed, however, the probate court must find by clear and convincing evidence the matters outlined in Texas Probate Code Section 684.⁵³ Additionally, if the court deems it appropriate, the court may *sua sponte* appoint a guardian for a minor or incapacitated person.⁵⁴ Likewise, when determining whether a guardianship should be appointed upon the court's own motion, the court must determine whether there is clear and convincing evidence to support such a finding based upon the evidence provided in a letter of information.⁵⁵

52. *Id.* § 684(c).

53. *See id.* § 684(a) (listing those elements to be proved by clear and convincing evidence); *see also* State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979) (defining "clear and convincing evidence"); Ulrickson v. Hawkins, 696 S.W.2d 704, 707 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (indicating that the court must consider the totality of relevant evidence in determining the propriety of guardianship).

54. *See* TEX. PROB. CODE ANN. § 683(a) (Vernon Supp. 2001) (explaining that a guardian may be appointed when the court has probable cause that an individual is incapacitated). According to the probate code:

- (a) 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.
- (b) To establish probable cause under this Section, the court may require:
 - (1) an information letter about the person believed to be incapacitated that is submitted by an interested person and satisfies the requirements of Section 683A of this code; or
 - (2) a written letter or certificate from a physician who has examined the person believed to be incapacitated that satisfies the requirements of Section 687(a) of this code, except that the letter must be dated not earlier than the 120th day before the date of the filing of an application under Subsection (a) of this Section and be based on an examination the physician performed not earlier than the 120th day before that date.
- (c) A court that creates a guardianship for a ward under this chapter may authorize compensation of a guardian ad litem who files an application under Subsection (a) of this section from available funds of the ward's estate. If after examining the ward's assets the court determines the ward is unable to pay for services provided by the guardian ad litem, the court may authorize compensation from the county treasury.

Id. § 683.

55. *See id.* § 684, 683A (listing what an information letter includes and the standard for appointing a guardian). The letter may:

- (1) include the name, address, telephone number, county of residence, and date of birth of the person;
- (2) state whether the residence of the person is a private residence, health care facility, or other type of residence;

G. Required Court Findings

The Texas Probate Code designates the matters which the court must find in order to appoint a guardian.

Before appointing a guardian, the court must find by clear and convincing evidence that:

- (1) the proposed ward is an incapacitated person;
- (2) it is in the best interest of the proposed ward to have the court appoint a person as guardian of the proposed ward; and
- (3) the rights of the proposed ward or the proposed ward's property will be protected by the appointment of a guardian.⁵⁶

Additionally, the trier of fact determines each of these issues.⁵⁷

The Texas Probate Code further mandates the requirements for the court to exercise jurisdiction and venue over the proposed ward. The court must determine by a preponderance of the evidence that it has venue in the case, the appointed guardian is eligible, the guardianship for a minor is not for the sole purpose for residency status for enrollment in a school, and the proposed ward is incapacitated and unable to care for himself or herself.⁵⁸ If all of the above requirements are not determined by the applicable burden of proof, the probate court may not appoint a guardian. "The court may not grant an application to create a guardianship unless the applicant proves each element required by this code."⁵⁹

-
- (3) describe the relationship between the interested person and the person;
 - (4) contain the names and telephone numbers of any known friends and relatives of the person;
 - (5) state whether a guardian of the person or estate of the person has been appointed in this state;
 - (6) state whether the person has executed a power of attorney and, if so, the designee's name, address, and telephone number;
 - (7) describe any property of the person, including the estimated value of that property;
 - (8) list any amount and source of monthly income of the person; and
 - (9) describe the nature and degree of the person's alleged incapacity and include a statement of whether the person is in imminent danger of serious impairment to the person's physical health, safety, or estate.

Id. § 683A.

56. *Id.* § 684(a).

57. *See In re Guardianship of Dahl*, 590 S.W.2d 191, 198 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (explaining that it is the duty of the jury to evaluate evidence).

58. TEX. PROB. CODE ANN. § 684(b) (Vernon Supp. 2001).

59. *Id.* § 684(c); *see also id.* § 692 (providing for the dismissal of the application for guardianship if the ward is not incapacitated).

The overall determination of the propriety of a guardian's appointment is governed by the need to oversee the incapacitated ward's ongoing affairs. "A determination of incapacity of an adult proposed ward . . . must be evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances of negligence or bad judgment."⁶⁰ In addition, the appointment of a guardian may be necessitated by the need to disburse funds to a disabled ward.

A certificate of the executive head or a representative of the bureau, department, or agency of the government, to the effect that the appointment of a guardian is a condition precedent to the payment of any funds due the proposed ward from that governmental entity, is prima facie evidence of the necessity for the appointment of a guardian.⁶¹

H. *Scope of an Order Appointing Guardianship*

If convinced that the Application for Appointment of a Guardian is appropriate, the court shall issue an order appointing the guardian.⁶² The order by the judge issuing the letter of guardianship shall specify the capacity in which the guardian may act on behalf of the disabled ward. In other words, the order must state whether the guardian is serving as the Guardian of the Ward's Person or the Ward's Estate or both.

Specifically, the order must state:

If it is found that the proposed ward is totally without capacity as provided by this code to care for himself or herself and to manage the individual's property, the court may appoint a guardian of the individual's person or estate, or both, with full authority over the incapacitated person except as provided by law.⁶³

In addition, an order must contain findings of fact regarding the circumstances of the disabled ward. The order must include the following: the name of the appointed person, the ward's name, whether the guardian is of the person, the estate, or both, any bond required, the disinterested appraisers if appraisal of the guardian-

60. *Id.* § 684(c).

61. *Id.* § 684(e).

62. TEX. PROB. CODE ANN. § 693 (Vernon Supp. 2001).

63. *Id.* § 693(a).

ship of the estate is needed, and that it is the clerk's duty to issue letters of guardianship to the qualified guardian.⁶⁴

Finally, the order must state: "that the guardian has full authority over the incapacitated person; and . . . if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to expend for the education and maintenance of the person under Section 776 of this code."⁶⁵

Additionally, the proposed ward need not be completely incapacitated. A court may appoint a guardian with limited powers when "it is found that the person lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage the individual's property."⁶⁶ Thus, the court can allow an individual to care for himself and manage his property to a level commensurate with his or her ability.⁶⁷

I. *Content of an Order Appointing Guardianship*

If it is determined that the appointment of a guardian is in the ward's best interests, the probate court shall issue an order appointing a guardian. The order must contain "the specific powers, limitations, or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian," and the specific amounts of funds used for educational and maintenance purposes.⁶⁸

III. TERM AND DURATION OF THE APPOINTMENT OF GUARDIANSHIP

Only the guardian or guardians approved by court order may serve as a guardian. To implement this policy, the order may not duplicate or conflict with any duties already assigned to another guardian.⁶⁹ Additionally, the appointment of a guardian during the pendency of an application for permanent appointment is limited in duration. "An order appointing a guardian or a successor guardian may specify a period of not more than one year during which a

64. *Id.* § 693(c)(1)-(6).

65. *Id.* § 693(a)(2)-(3).

66. *Id.* § 693(b).

67. TEX. PROB. CODE ANN. § 693(b) (Vernon Supp. 2001).

68. *Id.* § 693(b)(2)-(3).

69. *Id.* § 693(d).

petition for adjudication that the incapacitated person no longer requires the guardianship may not be filed without special leave.”⁷⁰

Further, the term of the guardian's final appointment is regulated and the guardian must serve until the estate is closed or removed by law.⁷¹ A guardianship is closed when the incapacitated person (1) dies and if married, the spouse is qualified as a “survivor in community”, (2) the person is deemed to have full capacity of himself or herself, (3) reaches the age of majority, or (4) the person no longer needs a guardian to receive governmental funds.⁷² To close a guardianship proceeding on the basis that it is no longer necessary, an application must be filed with the probate court.⁷³

70. *Id.* § 693(e).

71. *Id.* § 694(a).

72. TEX. PROB. CODE ANN. § 694(a) (Vernon Supp. 2001); *see also* *Easterline v. Bean*, 121 Tex. 327, 337, 49 S.W.2d 427, 431 (1932) (concluding that a guardianship terminated upon the ward's death); *American Sur. Co. v. Hardwick*, 186 S.W.2d 804, 806 (Tex. Civ. App.—Dallas 1916, error ref'd) (stating that guardianship terminated upon the minor reaching the age of majority).

73. TEX. PROB. CODE ANN. § 694B (Vernon Supp. 2001). Such an application must meet the following criteria:

- (1) contain the name, sex, date of birth, and address of the ward;
- (2) contain the name and address of any person serving as guardian of the person of the ward on the date the application is filed;
- (3) contain the name and address of any person serving as guardian of the estate of the ward on the date the application is filed;
- (4) state the nature and description of the ward's guardianship;
- (5) state the specific areas of protection and assistance and any limitation of rights that exist;
- (6) state whether the relief being sought is:
 - (A) a restoration of the ward's capacity because the ward is no longer an incapacitated person;
 - (B) the granting of additional powers or duties to the guardian; or
 - (C) the limitation of powers granted to or duties performed by the guardian;
- (7) if the relief being sought under the application is described by Subdivision (6)(B) or (C) of this section, state:
 - (A) the nature and degree of the ward's incapacity;
 - (B) the specific areas of protection and assistance to be provided to the ward and requested to be included in the court's order; and
 - (C) any limitation of the ward's rights requested to be included in the court's order;
- (8) state the approximate value and description of the ward's property, including any compensation, pension, insurance, or allowance to which the ward is or may be entitled; and
- (9) if the ward is 60 years of age or older, contain the names and addresses, to the best of the applicant's knowledge, of the ward's spouse, siblings, and children or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Id.

This application must demonstrate that the guardianship no longer applies or should be modified.⁷⁴

A. *Qualification*

Upon issuance of an order appointing the guardian, the appointed guardian must qualify to serve.⁷⁵ Qualification requires the following: (1) the guardian must sign an oath within twenty days of appointment, as prescribed by Section 700 of the Texas Probate Code;⁷⁶ (2) the guardian must post the court specified bond unless waived by the probate court or waived automatically

74. *Id.* § 694A.

(a) A ward or any person interested in the ward's welfare may file a written application with the court for an order:

(1) finding that the ward is no longer an incapacitated person and ordering the settlement and closing of the guardianship;

(2) finding that the ward lacks the capacity to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and granting additional powers or duties to the guardian; or

(3) finding that the ward has the capacity to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and:

(A) limiting the powers or duties of the guardian; and

(B) permitting the ward to care for himself or herself or to manage the ward's own financial affairs commensurate with the ward's ability.

(b) A ward may make a request for an order under this section by informal letter to the court. A person who knowingly interferes with the transmission of the request to the court may be adjudged guilty of contempt of court.

(c) On receipt of an informal letter under Subsection (b) of this section, the court shall appoint the court investigator or a guardian ad litem to file an application under Subsection (a) of this section on the ward's behalf. A guardian ad litem appointed under this subsection may also be appointed by the court to serve as attorney ad litem under Section 694C of this code.

(d) When an application is filed under this section, citation shall be served on the ward's guardian and on the ward if the ward is not the applicant.

(e) Except as otherwise provided by the court, on good cause shown by the applicant, a person may not reapply for complete restoration of a ward's capacity or modification of a ward's guardianship before the first anniversary of the date of the hearing on the last preceding application.

Id.

75. *Id.* § 699.

76. Act of May 22, 2001, 77th Leg., ch. 217, § 11, 2001 Tex. Sess. Law Serv. 395 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 701).

for a corporate fiduciary acting as guardian;⁷⁷ and (3) the guardian is required to give notice to the creditors of the estate in accordance with Sections 783 and 784 of the Texas Probate Code.⁷⁸

The bond required in qualification of the guardian shall take the form mandated by Section 702A(b). "To ensure the performance of the guardian's duties, the court may accept only: (1) a corporate surety bond; (2) a personal surety bond; (3) a deposit of money instead of a surety bond; or (4) a personal bond."⁷⁹

B. *Notice to Creditors*

The Guardian of the Estate is required to give creditors of the ward's estate notice so they may prove the existence of debt and thereby seek payment.⁸⁰ Such notice shall afford the creditor the opportunity to file a claim for payment with the guardian of the ward's estate.⁸¹

According to whether a creditor is secured or unsecured, notice times vary. Unsecured creditors may be given notice by publication within one month of the issuance of letters of guardianship.⁸² Secured creditors are given notice by certified mail within four months of the issuance of letters of guardianship.⁸³

C. *Inventory, Appraisal, and List of Claims*

Following the issuance of notice and the return of the creditor's claims, the Guardian of the Estate shall file an inventory,⁸⁴ appraisal of the estate assets,⁸⁵ and a list of claims.⁸⁶ This is com-

77. *Id.* §§ 702, 703(d) (recognizing that the bond is an amount equal to the value of the ward's personal property, liquid assets, and the anticipated revenue for the first twelve months after the initiation of a guardianship administration).

78. *Id.* §§ 783-84 (Vernon Supp. 2001); *see also* Gilbert v. Jennings, 890 S.W.2d 116, 116 (Tex. App.—Texarkana 1994, writ denied) (addressing how notice is published in the newspaper); Roberts v. Carlisle, 4 S.W.2d 144, 151 (Tex. Civ. App.—Dallas 1928, writ dismissed w.o.j.) (requiring notice to creditors even if the administration is independent).

79. TEX. PROB. CODE ANN. § 702A(b) (Vernon Supp. 2001).

80. *See id.* §§ 783-84 (Vernon Supp. 2001).

81. *Id.*

82. *Id.* § 783(a). *But see id.* § 784(b) (requiring the guardian within four months of appointment, to give notice by mail to any known unsecured creditor).

83. TEX. PROB. CODE ANN. § 784(a)-(b) (Vernon Supp. 2001).

84. *Id.* § 729.

85. *Id.*

86. *Id.* § 730.

monly referred to as the “inventory, appraisal and list of claims.”⁸⁷ The document details the assets and outstanding liabilities of the ward, and the net assets available to the guardian for the maintenance of the ward.⁸⁸

1. Inventory and Appraisal

Unless an extension is granted upon application of the Guardian of the Estate, the inventory must be filed within ninety days of the court’s issuance of letters of guardianship.⁸⁹ Specifically, the inventory and appraisal portion of the inventory, appraisal and list of claims shall contain the following: “(1) all real property of the ward that is located in this state; and (2) all personal property of the ward wherever located.”⁹⁰ Additionally, the guardian must appraise the fair market value of each listed property item as of the date the court issued letters of guardianship.⁹¹ Furthermore, the inventory shall state whether the property is separate property or community property.⁹²

Once the inventory is prepared, it must be filed with the clerk of the appropriate probate court.⁹³ Care should be exercised in the preparation of the inventory and appraisal, for the matters contained therein can be treated as judicial admissions of the estate’s representative.⁹⁴ Finally, if necessary, “[t]he court for good cause shown may require the filing of the inventory and appraisal at a time not later than the 90th day after the date of qualification of the guardian.”⁹⁵

87. See FRANK W. ELLIOT, *TEXAS METHODS OF PRACTICE* § 22.46 (2d ed. 1990), 11 TXPRAC § 22.46 (providing suggested form for use in Texas practice).

88. *Id.*

89. TEX. PROB. CODE ANN. § 729(a) (Vernon Supp. 2001).

90. *Id.* § 729(a)(1)-(2).

91. *Id.* § 729(b). “If the court appoints an appraiser of the estate, the guardian shall determine the fair market value of each item of the inventory with the assistance of the appraiser and shall set out in the inventory the appraisal made by the appraiser.” *Id.*

92. *Id.* § 729(c). “If any property is owned in common with other persons, the interest owned by the ward shall be shown in the inventory, together with the names and relationship, if known, of co-owners.” TEX. PROB. CODE ANN. § 729(c) (Vernon Supp. 2001).

93. See *id.* § 729 (requiring court approval of the filed inventory).

94. See, e.g., *Lee v. Lee*, 43 S.W.3d 636, 641-42 (Tex. App.—Fort Worth 2001, no pet.) (holding that counsel, who stated no objections to the amended inventory, made a judicial admission).

95. TEX. PROB. CODE ANN. § 729(e) (Vernon Supp. 2001).

2. List of Claims

The Guardian of the Estate must also prepare a list of claims and file it with the probate court.⁹⁶ The list of claims details the debts owed by the ward and the net assets available to the guardian for administration. The probate code mandates that the list of claims shall include the following:

- (1) the name of each person indebted to the ward and the address of the person if known;
- (2) the nature of the debt, whether it is a note, bill, bond, or other written obligation or whether it is an account or verbal contract;
- (3) the date of the indebtedness and the date when the debt is or was due;
- (4) the amount of each claim, the rate of interest on each claim, and time for which the claim bears interest; and
- (5) what portion of the claim is held in common with others, including the names and the relationships of other part owners and the interest of the estate in the claim.⁹⁷

Together, the inventory, appraisal and list of claims, establishes the net assets (after payment of debts) over which the guardian has management authority during the pendency of the guardianship administration.⁹⁸

D. *Annual Accountings Filed by the Guardian of the Estate*

In addition to filing an initial inventory, appraisal and list of claims, the Guardian of the Estate must file an annual accounting of the estate within sixty days of the expiration of the first twelve months after appointment as the Guardian of the Estate.⁹⁹ On the

96. *Id.* § 730.

97. *Id.*

98. See generally 29 TEX. JUR. 3d *Decedent's Estates* § 342 (1996) (commenting that the nature and purpose of an inventory, appraisal and list of claims is to "protect the creditors and others interested in the estate").

99. TEX. PROB. CODE ANN. § 741(a) (Vernon Supp. 2001); see also *Tharp v. Blackwell*, 570 S.W.2d 154, 161 (Tex. Civ. App.—Texarkana 1978, no writ) (requiring that supporting documentation, by voucher or other satisfactory proof, must be submitted to support the representations of an administrator); *Heyn v. Massachusetts Binding & Ins. Co.*, 110 S.W.2d 261, 267 (Tex. Civ. App.—Dallas 1937, writ dismissed w.o.j.) (permitting the admissibility of defenses to a breach of statutory duties, yet placing the burden on the fiduciary).

anniversary of this date, the Guardian of the Estate must file an annual accounting each and every year until the estate is closed.¹⁰⁰

The annual accounting shall list: (1) any property not previously listed as property of the ward; (2) any property changes; (3) a complete accounting of all receipts and disbursements spanning the accounting period; (4) a full report on the status of any property of the ward including the condition and use of the property; (5) an accounting of the cash balance used in the administration of the guardianship; and (6) a full description of personal property relating to “bonds, notes, and other securities” including dates of maturation and interests rates.¹⁰¹ Once an annual accounting is filed by the guardian, facts and circumstances may arise which render the information provided therein invalid. As such, the Guardian of the Estate should file an amended annual accounting that accurately reflects any and all changes from the former account.¹⁰² Regardless of whether the annual accounting is original or an amended annual accounting, the guardian must provide actual proof of all claims and financial statements as attachments.¹⁰³

100. See TEX. PROB. CODE ANN. § 741 (Vernon Supp. 2001) (mandating the guardian to file the estate’s annual accounts with the court).

101. *Id.* § 741(a).

102. *Id.* § 741(b). “The description of property sufficiently described in an inventory or previous account may be by reference to the property.” *Id.*

103. *Id.* § 741(c). All accounts shall attach the following:

- (1) proper vouchers for each item of credit claimed in the account, or, in the absence of a voucher, the item must be supported by evidence satisfactory to the court, and original vouchers may, on application, be returned to the guardian after approval of the guardian’s account;
- (2) an official letter from the bank or other depository in which the money on hand of the estate or ward is deposited that shows the amounts in general or special deposits; and
- (3) proof of the existence and possession of securities owned by the estate, or shown by the accounting, and other assets held by a depository subject to court order, the proof by one of the following means:
 - (A) an official letter from the bank or other depository that holds the securities or other assets for safekeeping; provided, that if the depository is the representative, the official letter shall be signed by a representative of the depository other than the depository that verifies the account;
 - (B) a certificate of an authorized representative of the corporation that is the surety on the representative’s bonds;
 - (C) a certificate of the clerk or a deputy clerk of a court of record in this state; or
 - (D) an affidavit of any other reputable person designated by the court on request of the guardian or other interested party.

TEX. PROB. CODE ANN. § 741(c) (Vernon Supp. 2001).

Further, the annual accounting must be verified to demonstrate that the facts and circumstances listed therein are true and correct to the best of the guardian or affiant's knowledge.¹⁰⁴ In particular, the guardian must attest that:

- (1) the account contains a correct and complete statement of the matters to which the account relates;
- (2) the guardian has paid the bond premium for the next accounting period;
- (3) the guardian has filed all tax returns of the ward due during the accounting period; and
- (4) the guardian has paid all taxes the ward owed during the accounting period, showing:
 - (A) the amount of the taxes;
 - (B) the date the guardian paid the taxes; and
 - (C) the name of the governmental entity to which the guardian paid the taxes.¹⁰⁵

Further, if the guardian does not file a tax return on behalf of the ward, the guardian must attach to the account the reasons for the failure to file.¹⁰⁶ However, there are certain circumstances under which the Guardian of the Estate may waive the necessity of filing annual accountings on behalf of the estate of the ward. For instance, annual accountings may be waived "[i]f the estate produces negligible or fixed income," thus allowing the guardian to receive all income on behalf of the ward.¹⁰⁷

E. *Annual Reports Filed by the Guardian of the Person*

While the Guardian of the Estate must file an annual accounting of the financial assets managed under the guardianship, the Guardian of the Person must likewise file an annual report concerning the physical and emotional status of the ward. The Guardian of the Person must file an annual report in compliance with probate code Section 743 which requires the guardian to prepare a sworn report of "each item of receipts and disbursements" regarding the ward and the ward's dependents.¹⁰⁸

104. *Id.* § 741(d).

105. *Id.* § 741(e).

106. *Id.* § 741(f).

107. *Id.* § 741(g).

108. TEX. PROB. CODE ANN. § 743(a) (Vernon Supp. 2001).

The annual report of the Guardian of a Person provides the court information regarding the capacity and health of the incapacitated ward. The report must detail the activity of the ward, the ward's health, the ward's living arrangements, and the guardian's evaluation of the ward's needs.¹⁰⁹ However, "[i]f the ward is deceased, the guardian shall provide the court with the date and place

109. *Id.* § 743(b).

The guardian of the person, whether or not there is a separate guardian of the estate, shall submit to the court an annual report by sworn affidavit that contains the following information:

- (1) the guardian's current name, address, and phone number;
- (2) the ward's current:
 - (A) name, address, and phone number; and
 - (B) age and date of birth;
- (3) the type of home in which the ward resides, described as the ward's own; a nursing, guardian's, foster, or boarding home; a relative's home, and the ward's relationship to the relative; a hospital or medical facility; or other type of residence;
- (4) the length of time the ward has resided in the present home and, if there has been a change in the ward's residence in the past year, the reason for the change;
- (5) the date the guardian most recently saw the ward, and how frequently the guardian has seen the ward in the past year;
- (6) a statement indicating whether or not the guardian has possession or control of the ward's estate;
- (7) the following statements concerning the ward's health during the past year:
 - (A) whether the ward's mental health has improved, deteriorated, or remained unchanged, and a description if there has been a change; and
 - (B) whether the ward's physical health has improved, deteriorated, or remained unchanged, and a description if there has been a change;
- (8) a statement concerning whether or not the ward has regular medical care, and the ward's treatment or evaluation by any of the following persons during the last year, including the name of that person, and the treatment involved:
 - (A) a physician;
 - (B) a psychiatrist, psychologist, or other mental health care provider;
 - (C) a dentist;
 - (D) a social or other caseworker; or
 - (E) another individual who provided treatment;
- (9) a description of the ward's activities during the past year, including recreational, educational, social, and occupational activities, or if no activities are available or if the ward is unable or has refused to participate in them, a statement to that effect;
- (10) the guardian's evaluation of the ward's living arrangements as excellent, average, or below average, including an explanation if the conditions are below average;
- (11) the guardian's evaluation of whether the ward is content or unhappy with the ward's living arrangements;
- (12) the guardian's evaluation of unmet needs of the ward;
- (13) a statement of whether or not the guardian's power should be increased, decreased, or unaltered, including an explanation if a change is recommended;
- (14) a statement that the guardian has paid the bond premium for the next reporting period; and

of death, if known, in lieu of the information about the ward otherwise required to be provided in the annual report.”¹¹⁰

F. *Actions Taken upon Annual Report*

Once filed, the probate court must either accept or reject, in whole or in part, all of the annual report. “Unless the judge is satisfied that the facts stated are true, he shall issue orders as are necessary for the best interests of the ward If the judge is satisfied that the facts stated in the report are true, the court shall approve the report.”¹¹¹ Depending upon the financial resources of the estate of the ward, the court may waive the costs related to filing an annual report.¹¹² Beginning with his or her appointment, a guardian must file a report each year spanning a twelve month period for the duration of the guardianship.¹¹³ Although a court may alter the reporting period, the court may not extend the reporting period to more than twelve months.¹¹⁴ Reports are due to the court “not later than the 60th day after the date on which the reporting period ends.”¹¹⁵

IV. CLOSING A GUARDIANSHIP

At some point, the administration of the affairs of the incapacitated ward must be closed. There are essentially two ways guardianship is terminated: the ward can regain his or her capacity, or the ward dies. In either instance, the Texas Probate Code delineates the process for termination of a guardianship and the release of the guardian from his or her bond and oath. If the ward does not die, a guardianship must be settled and closed when (1) the minor ward either reaches the age of majority; (2) the incapacitated ward is “restored to full legal capacity”; (3) the ward’s spouse qualifies as “survivor in community” where the ward owns no separate property; (4) the estate is exhausted; (5) the guardianship

(15) any additional information the guardian desires to share with the court regarding the ward.

Id.

110. *Id.* § 743(c).

111. *Id.* § 743(d)-(e).

112. TEX. PROB. CODE ANN. § 743(f) (Vernon Supp. 2001).

113. *Id.* § 743(g).

114. *Id.* § 743(h).

115. *Id.* § 743(i).

would be burdensome when future income is negligible; (6) all of the ward's assets have been placed in trust; and (7) the court determines guardianship is no longer necessary.¹¹⁶ Further, a guardianship may close at an earlier date if the cash assets administered by the guardian are less than the statutorily established limit of \$100,000.¹¹⁷

If the guardianship closes in such a way, the county clerk must manage the ward's funds.¹¹⁸ Finally, "[i]n the settlement of a guardianship, the court may appoint an attorney ad litem to represent the interests of the ward, and may allow the attorney reasonable compensation for services provided by the attorney out of the ward's estate."¹¹⁹

A. *Payment of Claims*

Prior to distributing the ward's estate, the guardian must pay the outstanding debts due and owing by the estate. With court approval, the guardian may arrange and pay for the ward's funeral, and all other debts of the estate.¹²⁰ In addition, the ward's outstanding debts must be paid in the order mandated under Section 805 of the probate code by the guardian of the estate.¹²¹ Payment of the estate debts are made in the following order:

- (1) expenses for the care, maintenance, and education of the ward or the ward's dependents;
- (2) funeral expenses of the ward and expenses of the ward's last illness, if the guardianship is kept open after the death of the ward as

116. Act of June 11, 2001, 77th Leg., ch. 484, § 4, 2001 Tex. Sess. Law Serv. 878-79 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 745(a)); *see also* Maeberry v. Gayle, 955 S.W.2d 875, 878 (Tex. App.—Corpus Christi 1997, no pet.) (agreeing that guardianship terminates once the ward reaches the age of eighteen); Romick v. Cox, 360 S.W.2d 430, 434 (Tex. Civ. App.—Dallas 1962, no writ) (stating that guardianship terminates once the ward is no longer disabled or once the minor is emancipated).

117. Act of June 15, 2001, 77th Leg., ch. 1174, § 5, 2001 Tex. Sess. Law Serv. 2500 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 745(c)).

118. *Id.*

119. Act of June 11, 2001, 77th Leg., ch. 484, § 4, 2001 Tex. Sess. Law Serv. 878-79 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 745(d)).

120. Act of June 11, 2001, 77th Leg., ch. 484, § 5, 2001 Tex. Sess. Law Serv. 879 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 746); *see also* Carroll v. Carroll, 893 S.W.2d 62, 68 (Tex. App.—Corpus Christi 1994, no writ) (noting the ward's death triggers closing procedures of the ward's estate and requires the guardian to file a final accounting).

121. TEX. PROB. CODE ANN. § 805 (Vernon Supp. 2001).

provided under this chapter, except that any claim against the estate of a ward that has been allowed and approved or established by suit before the death of the ward shall be paid before the funeral expenses and expenses of the last illness;

(3) expenses of administration; and

(4) other claims against the ward or the ward's estate.¹²²

B. *Guardian's Power of Sale and Sale of Assets*

It is often advantageous for the guardian to have the power to liquidate the assets of the estate and pay the outstanding debts owed by the deceased. In instances of a guardianship, the power of sale is vested by the probate court in the Guardian of the Estate.¹²³ The probate court allows the sale of property under circumstances of necessity, such as when the property of the estate "is liable to perish, waste, or deteriorate in value."¹²⁴ To sell assets of the ward, a guardian must complete a three-step process: (1) filing of an application for sale,¹²⁵ (2) obtaining an order of sale,¹²⁶ and (3) reporting the sale.¹²⁷

1. Application for Sale

To initiate a sale, the Guardian of the Estate must file an application for sale stating the need for the sale, the terms of the proposed sale and a prayer for authority to consummate the sale.¹²⁸ The guardian's application for sale of the ward's property must outline not only the necessity of the sale, but also the proposed terms of the sale. The application for sale must include all property that will

122. *Id.* § 805(a). In an insolvent estate, the expenses incurred during the administration take first priority, then follows the order of a solvent estate. *Id.* § 805(b).

123. *See id.* § 812 (authorizing the probate court to approve the sale of estate property).

124. *See id.* (noting an exception to the rule in that "[p]roperty exempt from forced sale, a specific legacy, or personal property necessary to carry on a farm, ranch, factory, or any other business that it is thought best to operate, may not be included in a sale under this section").

125. TEX. PROB. CODE ANN. § 812(a) (Vernon Supp. 2001).

126. *Id.* § 825.

127. *Id.* § 832.

128. *See id.* § 811 (ordering the sale of the ward's property only upon court order); *see also* *Hardeman v. Judge*, 931 S.W.2d 716, 718 (Tex. App.—Fort Worth 1996, writ denied) (stating that the powers of a guardian include the right to sell real estate with court approval including but not limited to a homestead).

“perish, waste, or deteriorate in value” which will be sold at public or private auction.¹²⁹ In determining the propriety of the application for sale, the court considers the guardian’s duty to manage the estate, and whether assets of the estate are subject to investment by a trustee under Section 113.056 or Subchapter F, Chapter 113 of the Texas Property Code.¹³⁰

2. Order for Sale

If the application for sale is approved, an order is issued meeting the terms of probate code Section 346.¹³¹ Once issued, an order of sale of assets may not be overturned absent an abuse of discretion on the part of the court.¹³² The Texas Probate Code provides that upon proper hearing and determination that the property should be sold, the court shall enter an order authorizing the sale of the property; otherwise the court may deny the application to sell the property and order the guardian to sell other property of the estate.¹³³

In addition, the Texas Probate Code prescribes additional criteria that must be followed to effectuate the sale of real estate. The order for the sale of real estate must include (1) the description of the property to be sold; (2) the time and place of the sale and whether the sale shall be conducted by private sale or public auction; (3) the purpose of the sale; (4) the court’s finding regarding the amount of bond posted by the representative; (5) the court’s finding that the sale is approved and shall be reported; and (6) the terms of the sale.¹³⁴

129. TEX. PROB. CODE ANN. § 812(a) (Vernon Supp. 2001).

130. *Id.* § 812(b).

131. *Id.* § 346 (Vernon 1980); *see also* Baldwin v. Davis Hill Oil Co., 245 S.W.2d 353, 368 (Tex. Civ. App.—Beaumont 1951, writ ref’d n.r.e.) (noting that the court may order a bond); Roberts v. Kenna, 241 S.W.2d 680, 697 (Tex. Civ. App.—Beaumont 1951, no writ) (discussing that a court order allowing the sale of assets shall not be set aside absent irregularities); Jones v. Sun Oil Co., 137 Tex. 353, 153 S.W.2d 571, 575 (1941) (recognizing the rights of innocent purchasers when a facially valid court order permits a sale).

132. *See* Estate of Mitchell, 20 S.W.3d 160, 162 (Tex. App.—Texarkana 2000, no pet.) (holding that absent conclusive evidence of inadequacy of sale price, a probate court does not abuse its discretion).

133. TEX. PROB. CODE ANN. § 346 (Vernon 1980).

134. *Id.* § 825; *cf.* Simpson v. Booth, 163 S.W.2d 1080, 1087 (Tex. Civ. App.—Dallas 1942, writ ref’d w.o.m.) (explaining that the probate court’s power of sale is based on equitable partition and may not be surrendered to a District Court).

3. Report of Sale

The report of the sale must be filed with the probate court at least five days prior to the court's issuance of a confirmation of sale.¹³⁵ The report of sale of real estate must also comply in form with the probate code.¹³⁶ As such, the report "must be in writing, sworn to, filed with the clerk, and noted on the probate docket," no later than thirty days following the sale of the property.¹³⁷

V. PROPERTY MANAGEMENT IN CASES OF DISABILITY: ALTERNATIVES TO GUARDIANSHIP

Guardianship is the management of the affairs of an incapacitated person, by a guardian appointed by the court.¹³⁸ A guardianship proceeding is often necessary when a person becomes incapable of making his or her own decisions regarding the implementation of an estate plan to provide for property management upon disability.¹³⁹ Depending on the extent of the assets owned by the disabled person, a guardianship may still be necessary, despite proper estate planning. Banks and financial institutions fear liability if they allow an unscrupulous person to manage a disabled person's financial affairs.

A guardianship proceeding imparts authority to the court-appointed guardian allowing third parties to justifiably rely upon the authority of the guardian to manage all of the affairs of the ward.¹⁴⁰

135. TEX. PROB. CODE ANN. § 834 (Vernon Supp. 2001).

136. *Id.* § 832.

137. *Id.*

A report made under this section must contain:

- (1) the date of the order of sale;
- (2) a description of the property sold;
- (3) the time and place of sale;
- (4) the name of the purchaser;
- (5) the amount for which each parcel of property or interest in the parcel of property was sold;
- (6) the terms of the sale, and whether the sale was private or made at a public auction;
- and
- (7) whether the purchaser is ready to comply with the order of sale.

Id.

138. *See* TEX. PROB. CODE ANN. § 602 (Vernon Supp. 2001) (regarding policies in appointing a guardian).

139. *See id.* §§ 683-84 (discussing initiation of guardianship proceedings and the required findings).

140. *Id.* tit. 2, app. at 58-59 (Vernon Supp. 2001).

In return for the grant of authority to the guardian, the courts require the guardian to follow certain formalities.¹⁴¹ It is the implementation of these formalities that raise criticism, namely, that guardianship is costly, time-consuming, and aggravating.¹⁴²

Fortunately, alternative measures can prevent the necessity of a guardianship proceeding.¹⁴³ Prior implementation of powers of attorney may allow the named person to have the authority to manage the financial affairs of an incapacitated ward without a grant of authority from a Texas court. Specifically, prior declarations of who should serve as the guardian of the person often simplify, if not eliminate, the need for extensive guardianship proceedings.¹⁴⁴

A. Powers of Attorney

Various forms of powers of attorney are available to avoid a guardianship. A power of attorney allows a person to delegate the power to perform certain or all financial transactions to designated agents.¹⁴⁵ Broadly speaking, there are four powers of attorney categories: (1) a general power of attorney, (2) a special power of attorney, (3) durable power of attorney,¹⁴⁶ and (4) durable power of attorney for healthcare.¹⁴⁷ Each format is designed to address a particular type of problem or problems. Under a general, special, or limited power of attorney, all acts done by an attorney in fact or agent have the same effect and inure to the benefit of principal as if the principal had performed the action.¹⁴⁸

141. *Id.*

142. John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer's Ass'n, San Antonio, Tex.), Mar. 7-8, 1996, at 2 (on file with the *St. Mary's Law Journal*).

143. *See generally id.* (suggesting the implementation of durable powers of attorney as an alternative to guardianship).

144. *Id.* at 13.

145. *See* TEX. PROB. CODE ANN. tit. 2, app. at 58-59 (Vernon Supp. 2001) (commenting on the distinctions between special and general powers of attorney).

146. *See id.* § 482 (Vernon Supp. 2001) (defining a durable power of attorney).

147. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.152 (Vernon 2001) (discussing medical power of attorney).

148. *See* John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer's Ass'n, San Antonio, Tex.), Mar. 7-8, 1996, at 3 (on file with the *St. Mary's Law Journal*) (illustrating the differences in powers of attorney).

All acts done by an attorney in fact or agent pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and

1. General and Special Powers of Attorney

The purpose of a general power of attorney is to allow a principal to delegate to an agent the legal authority to perform all transactions on his or her behalf.¹⁴⁹ In contrast, special powers of attorney, also known as limited powers of attorney, meet specific needs.¹⁵⁰ Rather than granting the agent complete authority to act on behalf of the agent, a special or limited power of attorney conveys limited authority to an agent to act on behalf of the principal.¹⁵¹ Further, a limited power of attorney may limit an agent's authority to a specified period of time.¹⁵²

2. Durable Powers of Attorney

The purpose of a durable power of attorney is to allow a principal to delegate to an agent the legal authority to perform certain financial transactions on his or her behalf, even upon the principal's incapacity.¹⁵³ As previously stated, a general power of attorney allows the agent to perform certain specified transactions on behalf of the principal.¹⁵⁴ The reason for the distinction between a durable power of attorney and a general power of attorney is that Texas law presumes that a power of attorney is automatically revoked if the principal becomes incapacitated.¹⁵⁵ To eliminate the automatic trigger, Texas law allows the principal to specify that the power of attorney survives beyond incapacity.¹⁵⁶ "A durable power of attorney does not lapse because of the passage of time

inure to the benefit of and bind the principal and the principal's successors in interest as if the principal were not disabled or incapacitated.

TEX. PROB. CODE ANN. § 484 (Vernon Supp. 2001).

149. *Id.* at 3.

150. See John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer's Ass'n, San Antonio, Tex.), Mar. 7-8, 1996, at 3 (on file with the *St. Mary's Law Journal*) (indicating examples of limited powers of attorney).

151. *Id.*

152. *Id.*

153. TEX. PROB. CODE ANN. § 483 (Vernon Supp. 2001).

154. See John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer's Ass'n, San Antonio, Tex.), Mar. 7-8, 1996, at 3 (on file with the *St. Mary's Law Journal*) (illustrating the agent's powers under a general power of attorney).

155. TEX. PROB. CODE ANN. § 483 (Vernon Supp. 2001).

156. See *id.* §§ 482-84 (providing the definition, duration and effect of durable power of attorney).

unless the instrument creating the power of attorney specifically states a time limitation.”¹⁵⁷

a. History of Durable Powers of Attorney

Unfortunately, the characteristics of the durable power of attorney in Texas has changed often over recent years. Prior to 1989, Texas allowed its citizens to create durable powers of attorney with little or no formalities other than the form used by the declarant was required to somehow verify that it was true and correct.¹⁵⁸

In 1989, the Texas Legislature intervened to bring predictability and consistency to the format used for durable powers of attorney.¹⁵⁹ A 1989 statute required that the power of attorney be signed by the declarant, witnessed by two independent witnesses over the age of fourteen, notarized, and filed of record with the county clerk of the declarant’s residency.¹⁶⁰ Compliance with the requirements of the statute afforded third parties a qualified privilege to accept the power of attorney.¹⁶¹

Again in 1993, the Legislature sought to streamline the process of implementing a durable power of attorney.¹⁶² The 1993 Durable Power of Attorney Act simply required a valid power of attorney to be signed by the declarant in the presence of a notary public.¹⁶³ Subsequent amendments to the Durable Power of Attorney Act merely modified the format of the statutory durable power of attorney.¹⁶⁴

b. Durable Powers of Attorney in Practice

For a power of attorney to be durable, that is to survive the subsequent disability of the principal, a durable power of attorney must incorporate certain language.¹⁶⁵ However, the Texas Probate

157. *Id.* § 483.

158. Act of May 13, 1971, 62nd Leg., ch. 173, § 3, 1971 Tex. Gen. Laws 971, *repealed* by Act of Apr. 29, 1993, 73rd Leg., ch. 49, § 2, 1993 Tex. Gen. Laws 102.

159. Act of June 14, 1989, 71st Leg., ch. 404, § 1, 1989 Tex. Gen. Laws 1550-51.

160. *Id.*

161. *Id.*

162. Act of Apr. 29, 1993, 73rd Leg., ch. 49, § 2, 1993 Tex. Gen. Laws 102-13 (citing to the current version of TEX. PROB. CODE ANN. § 481 et seq.).

163. *Id.* at 102 (referring to § 482).

164. TEX. PROB. CODE ANN. § 481 et seq. (Vernon Supp. 2001).

165. *See id.* § 482(3) (specifying acceptable language for creating durable power of attorney).

Code does not require specific language for a power of attorney to be durable.¹⁶⁶ Rather, for a power of attorney to be durable, the document must simply reference that it is the intent of the principal that the power of attorney will stay in effect even upon the subsequent disability of the principal.¹⁶⁷

B. *Time of Taking Effect: Immediate versus Springing Powers*

Regardless whether the power of attorney is general,¹⁶⁸ special or limited,¹⁶⁹ durable, or for healthcare decisions,¹⁷⁰ all powers of attorney may be structured so the powers they impart to the agents are immediately utilized or only take effect upon the happening of a certain event such as disability.¹⁷¹ If the power of attorney grants authority to the agent immediately upon its execution, the power of attorney is called an immediate power of attorney.¹⁷² In the instance of a immediate durable power of attorney, the following language is often used: “[t]his power of attorney is not affected by subsequent disability or incapacity of the principal”¹⁷³

If the power of attorney only grants authority to the agent upon the happening of a triggering event, the power of attorney is known as a springing power of attorney.¹⁷⁴ Such powers of attorney are known as springing because the agent’s powers only spring forth upon the happening of an event.¹⁷⁵ The following language is often used in the instance of a springing durable power of attorney: “[t]his power of attorney becomes effective on the disability or

166. *See id.* (suggesting language of a durable power of attorney yet recognizing similar language may be used).

167. *Id.*

168. *See* John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer’s Ass’n, San Antonio, Tex.), Mar. 7-8, 1996, at 3 (on file with the *St. Mary’s Law Journal*) (delineating the scope of the general power of attorney).

169. *See id.* (distinguishing limited power of attorney from general power of attorney).

170. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.152 (Vernon 2001) (defining the scope and duration of medical power of attorney).

171. *See* TEX. PROB. CODE ANN. § 490(a) (Vernon Supp. 2001) (providing a sample form that allows a choice for when the power of attorney becomes effective).

172. *See id.* (indicating that immediate effectiveness is the desired default).

173. *Id.* § 482(3).

174. *See* John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer’s Ass’n, San Antonio, Tex.), Mar. 7-8, 1996, at 3 (on file with the *St. Mary’s Law Journal*) (specifying the principal’s disability or incapacity as triggering events for the springing power of attorney).

175. *Id.*

incapacity of the principal,' or similar words showing the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity."¹⁷⁶

C. *Revocation of Powers of Attorney*

Third parties may rely upon the effectiveness of a power of attorney, if it was executed with the requisite formalities, until the third party receives actual notice of the revocation of the power of attorney or the death of the principal.¹⁷⁷ Specifically, the Texas Probate Code provides that "[u]nless otherwise provided by the durable power of attorney, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation."¹⁷⁸

D. *Third Party Reliance*

One of the greatest short-comings of powers of attorney is the reluctance of third parties, such as banks and financial institutions, to accept the document. To alleviate this problem, Texas Probate Code Sections 486(b) and 487 grant further protection to third parties who in good faith rely upon the representation of the validity of the document.¹⁷⁹

To encourage third party reliance, the right of a spouse to act as the agent of a disabled spouse terminates automatically upon the divorce of the spouses or annulment of the marriage.¹⁸⁰ Nevertheless, a third party who relies upon such a power of attorney without knowledge that the power of attorney is revoked affords the agent and the third party the right to honor the power of attorney.¹⁸¹ To prove such good faith reliance, the third party need only file an

176. TEX. PROB. CODE ANN. § 482(3) (Vernon Supp. 2001).

177. *See id.* § 486(a) (stating that power of attorney is not revoked for third parties acting in reliance or good faith of the power when they do not have actual knowledge of the power's revocation or termination).

178. *Id.* § 488.

179. *See id.* §§ 486(b), 487 (providing, for instance, that third parties can rely on durable power of attorney despite divorce of the principal and that good faith reliance on durable power of attorney protects third parties).

180. *See id.* § 485A (stating that when a spouse has power of attorney, a divorce or annulment terminates the power unless otherwise provided by the durable power of attorney).

181. TEX. PROB. CODE ANN. § 486(b) (Vernon Supp. 2001).

affidavit that he or she was unaware of the divorce of the principle and agent.¹⁸² Likewise, the probate code now provides immunity from liability for a third party who in good faith relies upon the presentation of a duly executed power of attorney.¹⁸³ Under prior law, such protection was afforded only when the parties used the statutory form of the durable power of attorney.¹⁸⁴

E. *Recording of Power of Attorney*

Although Texas law no longer requires filing to validate a durable power of attorney, the power of attorney must still be filed with the county clerk's office when the agent under the power of attorney acts as an agent for purposes of real estate transactions.¹⁸⁵ The attorney of record should file with the county clerk where the real estate is located, the durable power of attorney with any relating agreements, mortgages, deeds of trust, encumbrances, releases, assignments, conveyances, liens, mineral leases or any other rights associated with the real property.¹⁸⁶

VI. TEMPORARY GUARDIANSHIP - PROCEDURE

Regardless of the terms of a person's pre-planning, the Texas court system provides a fallback procedure to ensure the proper administration of a disabled person's physical and financial well-being.¹⁸⁷ To afford a person the right to manage the affairs of a

The divorce of a principal from a person who has been appointed the principal's attorney in fact or agent before the date on which the divorce is granted or the annulment of the marriage of a principal and a person who has been appointed the principal's attorney in fact or agent before the date the annulment is granted does not revoke or terminate the agency as to a person other than the principal's former spouse if the person acts in good faith under or in reliance on the power.

Id.

182. *See id.* § 487(b) (stating requirements to prove good faith).

183. *See id.* § 487(e) (stating that a third party is not liable to the principal).

184. *See* Act of May 13, 1971, 62nd Leg., ch. 173, § 3, 1971 Tex. Gen. Laws 971, *repealed by* Act of Apr. 29, 1993, 73rd Leg., ch. 49, § 2, 1993 Tex. Gen. Laws 102; *see also* TEX. PROB. CODE ANN. § 490(a) (Vernon Supp. 2001) (providing that a statutory durable power of attorney form, when executed, grants an agent powers with respect to a person's property and financial matters).

185. *See id.* § 489 (requiring that a real property durable power of attorney be recorded in the county clerk's office where the property is located).

186. *Id.*

187. *See id.* § 875 (outlining temporary guardianship procedures); *see also* Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1,

disabled person during the interim between the onset of disability and before a final decree appointing a guardian, the Texas Probate Code allows for the appointment of a temporary guardian.¹⁸⁸ Upon granting temporary guardianship, the powers of an agent under a power of attorney may be suspended during the term of temporary guardianship.¹⁸⁹

To institute a temporary guardianship, the application must declare, by statements attesting to probable cause, that there is a need for an appointment of a temporary guardian.¹⁹⁰ In response, the court appoints a temporary guardian with the limited rights and powers necessary to protect the ward's person or property.¹⁹¹ Although a person for whom a temporary guardianship is established is not presumed incapacitated, the sworn application of the temporary guardian raises a rebuttable presumption of disability.¹⁹² The application for temporary guardianship must contain: (1) the name and address of the proposed ward; (2) any imminent danger believed to befall the proposed ward or the ward's property; (3) the "assistance being requested" on behalf of the proposed ward, including what type of protection is sought; (4) any supporting facts to the allegations made; (5) the name of the proposed temporary

1989, at 140, 1989 WL 2493837 (stating that guardianship is designed to protect mental or physically incapacitated persons).

188. TEX. PROB. CODE ANN. § 875 (Vernon Supp. 2001).

If a court is presented with substantial evidence that a person may be a minor or other incapacitated person, and the court has probable cause to believe that the person or person's estate, or both, requires the immediate appointment of a guardian, the court shall appoint a temporary guardian with limited powers as the circumstances of the case require.

Id. § 875(a).

189. See Act of May 22, 2001, 77th Leg., ch. 217, § 1, 2001 Tex. Sess. Law Serv. 387 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 485(b)) (detailing that a probate court has the discretion to suspend the powers of the attorney in fact or agent).

190. TEX. PROB. CODE ANN. § 875(a)-(c) (Vernon Supp. 2001); Act of May 22, 2001, 77th Leg., ch. 217, § 17, 2001 Tex. Sess. Law Serv. 398 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 875(c)). "A sworn, written application for the appointment of a temporary guardian may be filed before the court appoints a temporary guardian." *Id.*

191. See TEX. PROB. CODE ANN. § 875(b) (Vernon Supp. 2001) (articulating that the ward of the temporary guardianship retains all rights not specifically granted to the temporary guardian).

192. *Id.*; but see Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (stating that mental or physical impairments are disabilities that warrant guardianship).

guardian; (6) the name and interest of the applicant; and (7) that if they are a private professional guardian, they comply with Section 697 of the Texas Probate Code.¹⁹³

Once an application for temporary guardianship is filed, the court appoints an attorney ad litem to represent the proposed ward in all further proceedings.¹⁹⁴ At this point, the clerk of the court issues notice to the proposed ward and his or her attorney as well as to all other known interested parties stating the date, time, and location of the hearing on the merits of the application for guardianship.¹⁹⁵ This hearing must take place within ten business days.¹⁹⁶ Until such time, the applicant serves as temporary guardian and may have his or her service extended for up to sixty days past the hearing date.¹⁹⁷

At the hearing, the proposed ward retains his or her due process rights¹⁹⁸ to defend himself or herself against the guardianship proceedings instituted by the applicant.¹⁹⁹ Prior to the hearing date set by the court, the proposed ward may seek emergency intervention to set aside the temporary guardianship; however, the proposed ward bears the burden of proving that dissolution of the temporary guardianship is justified.²⁰⁰ In addition, the proposed ward may

193. Act of May 22, 2001, 77th Leg., ch. 217, § 17, 2001 Tex. Sess. Law Serv. 398 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 875(c)).

194. TEX. PROB. CODE ANN. § 875(d) (Vernon Supp. 2001); *see also* Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (establishing that expenses of appointment of attorney ad litem be born by the ward's estate).

195. *See* TEX. PROB. CODE ANN. § 875(e) (Vernon Supp. 2001) (acknowledging that notice must be given to all interested parties).

196. *Id.* § 875(f)(1).

197. *Id.* § 875(f)(2), (g)-(h).

198. *See* U.S. CONST. amend. V (guaranteeing due process); U.S. CONST. amend. XIV (guaranteeing due process); *see also* Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (describing the story of a 76 year-old Mississippi woman denied due process and the right to counsel of her choice).

199. TEX. PROB. CODE ANN. § 875(f)(1) (Vernon Supp. 2001). "At a hearing under this section, the respondent has the right to: (A) receive prior notice; (B) have representation by counsel; (C) be present; (D) present evidence and confront and cross-examine witnesses; and (E) a closed hearing if requested by the respondent or the respondent's attorney." *Id.*

200. *See id.* § 875(f)(5).

On one day's notice to the party who obtained a temporary guardianship before a hearing on the application required by Subdivision (1) of this subsection, the respondent or the respondent's attorney may appear and move for the dissolution or modifi-

seek the appointment of another person other than the applicant as the temporary guardian during the pendency of the court's hearings.²⁰¹ Nevertheless, the proposed ward does not have an automatic right to remove the applicant as temporary guardian, but rather the determination is left to the sound discretion of the court.²⁰²

If temporary guardianship is granted, the temporary guardian must qualify by taking his or her oath and posting the bond set by the court.²⁰³ The temporary guardian must account to the court for the ward's estate and for the well-being of the ward.²⁰⁴

The key determination upon initiation of a temporary or permanent guardianship is whether or not the applicant can make a prima facie allegation of incapacity such as by virtue of exploitation or abuse.²⁰⁵ To make such an allegation, pendency of an investigation by Adult Protective Services may support an application for guardianship.²⁰⁶

cation of the temporary guardianship. If a motion is made for dissolution or modification of the temporary guardianship, the court shall hear and determine the motion as expeditiously as the ends of justice require.

Id.; see also Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (affirming that the ward bears the burden of proof of capacity once guardianship is established).

201. See TEX. PROB. CODE ANN. § 875(k) (Vernon Supp. 2001) (providing a method to appoint an alternative temporary guardian).

202. See *id.* (noting that the court or an interested party may contest the appointment of a temporary or permanent guardian whereby the court may appoint a new temporary guardian); see also Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (referring to the story of the 76 year-old Mississippi woman who appealed to the Mississippi Supreme Court for the right of representation to appeal an incapacity determination).

203. See TEX. PROB. CODE ANN. § 876 (Vernon Supp. 2001) (reiterating the bond requirement before a temporary guardian order takes effect); see also Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (suggesting that the bonding requirement for a guardian is insufficient to protect the ward).

204. See TEX. PROB. CODE ANN. §§ 876, 879 (Vernon Supp. 2001) (delineating the duties and responsibilities of the guardian); see also Denise M. Topolnicki, Teresa Tritch & Beth M. Gilbert, *The Gulag of Guardianship*, MONEY, Mar. 1, 1989, at 140, 1989 WL 2493837 (claiming lax supervision of guardians).

205. See Act of May 22, 2001, 77th Leg., ch. 217, § 17, 2001 Tex. Sess. Law Serv. 398 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 875(c)) (defining the application contents).

206. See *id.* (allowing any evidence to be introduced regarding abuse).

VII. ADULT PROTECTIVE SERVICES

The Texas Department of Protective and Regulatory Services, and specifically its department of Adult Protective Services, is charged with preventing and stopping the abuse, neglect, and exploitation of the elderly.²⁰⁷ To that end, the term "exploitation" is defined as:

the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.²⁰⁸

To invoke the review of Adult Protective Services, a report of abuse, neglect or exploitation must be made by an informant seeking intervention of the department.²⁰⁹ Interestingly, the statute imposes an affirmative duty upon persons having "cause" to believe that "abuse, neglect or exploitation" has taken place to report such abuse to the department.²¹⁰ A report to the department may be made orally or in writing.²¹¹ Surprisingly, the report must only include: "(1) the name, age, and address of the elderly or disabled person; (2) the name and address of any person responsible for the elderly or disabled person's care; (3) the nature and extent of the elderly or disabled person's condition; (4) the basis of the reporter's knowledge; and (5) any other relevant information."²¹² In addition, once the report is made, the identity of the informant and all of the investigation work-product is confidential.²¹³ Absent a court order to the contrary, the elderly or disabled person and the person accused of the wrongdoing will not know the identity of their accuser.²¹⁴ While notions of due process do allow the person

207. TEX. HUM. RES. CODE ANN. § 48.001 (Vernon 2001). "The purpose of this chapter is to provide for the authority to investigate the abuse, neglect, or exploitation of an elderly or disabled person and to provide protective services to that person." *Id.*

208. *Id.* § 48.002(a)(3).

209. *See id.* § 48.051(a). "[A] person having cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation shall report the information . . . immediately to the department." *Id.*

210. TEX. HUM. RES. CODE ANN. § 48.051(a) (Vernon 2001).

211. *Id.* § 48.051(d).

212. *Id.*

213. *Id.* § 48.101(a).

214. *See id.* § 48.101(b)-(c) (outlining the provisions to reveal confidential information).

who is the subject of a report of abuse to review matters found in the department's report, the information released to the person is redacted to conceal the informant's identity.²¹⁵ In addition, the informant is given immunity from civil or criminal penalty for doing so.²¹⁶ The only exception to the immunity is actual proof that the informant acted intentionally in filing a false report;²¹⁷ however, the identity of the informant still remains confidential.²¹⁸

Once a report is filed, within twenty-four hours of the report the department must institute an investigation to determine whether or not neglect, abuse, or exploitation took place.²¹⁹ The only exceptions are in instances where the report is on its face "frivolous or patently without a factual basis; or . . . does not concern abuse, neglect, or exploitation. . . ." ²²⁰ The investigation must include an interview with the elderly or disabled person and anyone else that appears to have relevant information.²²¹ A court

A court may order disclosure of confidential information only if:

- (1) a motion is filed with the court requesting release of the information and a hearing on that request;
- (2) notice of that hearing is served on the department or investigating state agency and each interested party; and
- (3) the court determines after the hearing and an in camera review of the information that disclosure is essential to the administration of justice and will not endanger the life or safety of any individual who:
 - (A) is the subject of a report of abuse, neglect, or exploitation;
 - (B) makes a report of abuse, neglect, or exploitation; or
 - (C) participates in an investigation of reported abuse, neglect, or exploitation.

TEX. HUM. RES. CODE ANN. § 48.101(c) (Vernon 2001).

215. *See id.* § 48.101(d) (requiring the investigating agency to edit the report to protect the confidentiality of the reporter's identity and other individuals).

216. *See id.* § 48.054(a) (immunizing the informant from criminal or civil liability unless the informant acted in bad faith).

217. *Id.* § 48.053. "A person commits an offense if the person knowingly or intentionally reports information . . . that the person knows is false or lacks factual foundation. An offense under this section is a Class B misdemeanor." *Id.* § 48.053.

218. TEX. HUM. RES. CODE ANN. § 48.101(d) (Vernon 2001).

219. *Id.* § 48.151(a).

220. *Id.* § 48.151(a)(1)-(2).

221. *Id.* § 48.152. "The investigation may include an interview with an alleged juvenile perpetrator of the alleged abuse, neglect, or exploitation. The department or state agency may conduct an interview under this section in private or may include any person the department or agency determines is necessary." *Id.* The county court or probate court may authorize entry into the elderly or disabled person's home in order to investigate the reported abuse, neglect, or exploitation. TEX. HUM. RES. CODE ANN. § 48.153 (Vernon 2001). In addition, "[t]he department or state agency, as appropriate, shall have access to

may also enjoin anyone from interfering with the investigation process.²²²

If exploitation, abuse or neglect is found, Adult Protective Services is given a broad mandate to render services to the elderly to remedy the wrongdoing.²²³ The purpose of the investigation is to determine what measures, if any, are needed to safeguard the elderly or disabled person from the alleged abuse, neglect, or exploitation.²²⁴ Once the protective measures, if any, are determined, it must then be determined how the costs of these services are met, namely, whether the cost is paid from the assets of the elderly or disabled person or through government benefits.²²⁵ Once the investigation and findings of the department are finalized, the department reports its findings to the elderly or disabled person,²²⁶ his or her caregiver,²²⁷ or the court where the guardianship proceedings are pending.²²⁸

VIII. ATTEMPTED SOLUTIONS

Although execution of durable powers of attorney is an attempt to avoid the court's intervention through guardianship proceedings, court intervention may still be necessary to avoid abuse of

any records or documents, including client-identifying information and medical and psychological records . . . " to aid in the investigation. *Id.* § 48.154.

222. *Id.* § 48.155(b).

223. *See id.* § 48.002(a)(5). The provision states:

'Protective Services' means the services furnished by the department or by a protective services agency to an elderly or disabled person who has been determined to be in a state of abuse, neglect, or exploitation. These services may include social casework, case management, and arranging for psychiatric and health evaluation, home care, day care, social services, health care, and other services consistent with this chapter.

Id.

224. *See id.* § 48.202.

225. *See* TEX. HUM. RES. CODE ANN. § 48.206 (Vernon 2001) (providing that elderly persons receiving benefits who are financially able to contribute to the cost of services shall pay a reasonable reimbursement from their assets).

226. *See id.* § 48.101(d) (stating that the department or investigating agency shall release confidential information to persons who are the subject of a report of abuse, or to their legal representative in a redacted form to protect the identity of the informant).

227. *Id.*

228. *See id.* § 48.211 (requiring that the findings of the investigation be sent to the court for guardian review).

exploitation through the use of durable powers of attorney.²²⁹ In 2001, the Texas Legislature passed modifications to the Texas Probate Code to allow accountability for the actions of a person or persons utilizing a durable power of attorney.²³⁰ In addition to other common law or statutory duties of agents under a power of attorney, the Texas Legislature created accountability for the agent under a power of attorney by creating the duty to account.²³¹ The duty to account²³² requires the agent to account, upon request, to the principal who granted the power of attorney.²³³ However, failure to do so does not automatically terminate the agency relationship.²³⁴ In addition, the agent now has an affirmative duty to maintain records to support such future requests for an account-

229. See Act of June 15, 2001, 77th Leg., 1st C.S., H.B. 1883, § 1 (to be codified at TEX. PROB. CODE ANN. § 489(B)(g)) (stating that the principal may file suit to compel an attorney who fails or refuses to inform the principal).

230. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B(a)). “The attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney.” *Id.*

231. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B(d), (j)).

232. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B(d)).

[T]he accounting shall include:

- (1) the property belonging to the principal that has come to the attorney in fact’s or agent’s knowledge or into the attorney in fact’s or agent’s possession;
- (2) all actions taken or decisions made by the attorney in fact or agent;
- (3) a complete account of receipts, disbursements, and other actions of the attorney in fact or agent, including their source and nature, with receipts of principal and income shown separately;
- (4) a listing of all property over which the attorney in fact or agent has exercised control, with an adequate description of each asset and its current value if known to the attorney in fact or agent;
- (5) the cash balance on hand and the name and location of the depository where the balance is kept;
- (6) all known liabilities; and
- (7) such other information and facts known to the attorney in fact or agent as may be necessary to a full and definite understanding of the exact condition of the property belonging to the principal.

Act of June 15, 2001, 77th Leg., 1st C.S., H.B. 1883, § 1 (to be codified at TEX. PROB. CODE ANN. § 489B(d)).

233. See *id.* (to be codified at TEX. PROB. CODE ANN. § 489B(b)). “The attorney in fact or agent shall timely inform the principal of all actions taken pursuant to the power of attorney. Failure of the attorney in fact or agent to inform timely, as to third parties, shall not invalidate any action of the attorney in fact or agent.” *Id.*; see also *id.* (to be codified at TEX. PROB. CODE ANN. § 489B(e)-(f)) (establishing a duty to account for status of property owned by principal).

234. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B).

ing.²³⁵ If an agent fails to provide the requested accounting within a reasonable period of time, the principal may file suit to terminate the agent's authority.²³⁶

IX. CONCLUSION

Despite attempts to legislate accountability into the use of powers of attorney²³⁷ and the guardianship process,²³⁸ much of Texas' recent legislation attempts to protect a disabled person from abuse. However, our system leaves not only the principal but also the agent under a durable power of attorney or the guardian of a person or a person's estate vulnerable to attack by claims of abuse.

To adequately protect a disabled adult, the proposed ward should always be afforded his or her due process rights.²³⁹ These rights allow a disabled adult to defend himself or herself against guardianship before the process is instituted so that temporary and even permanent guardianship cannot be instituted based merely on one-sided affidavits submitted by the applicant.²⁴⁰ Secondly, guardianship should only be implemented when there are no less intrusive means available such as powers of attorney.²⁴¹ Finally, civil and criminal sanctions should be widely available and exer-

235. Act of June 15, 2001, 77th Leg., 1st C.S., H.B. 1883, § 1 (to be codified at TEX. PROB. CODE ANN. § 489B(c)).

236. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B(g)).

If the attorney in fact or agent fails or refuses to inform the principal, provide documentation, or deliver the accounting within 60 days (or such longer or shorter time that the principal demands or a court may order), the principal may file suit to compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or to terminate the power of attorney.

Id.

237. *Id.* (to be codified at TEX. PROB. CODE ANN. § 489B(a)). "The attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney." *Id.*

238. See TEX. PROB. CODE ANN. § 741 (Vernon Supp. 2001).

239. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

240. See Act of May 22, 2001, 77th Leg., ch. 217, § 17, 2001 Tex. Sess. Law Serv. 398 (Vernon) (to be codified as an amendment to TEX. PROB. CODE ANN. § 875(c)) (requiring filing with the court a sworn, written application for temporary guardianship prior to appointment).

241. See generally John E. Banks, Jr., *Alternatives to Guardianship*, DOCKET CALL IN PROB. CT. (San Antonio Young Lawyer's Ass'n, San Antonio, Tex.), Mar. 7-8, 1996, at 1 (on file with the *St. Mary's Law Journal*) (describing some of the frustrations of guardianship).

cised against persons who institute guardianship or Adult Protective Services proceedings in bad faith.

While no one wants to see an elderly or disabled person abused, our system does little to afford protection to the caregiver and the alleged disabled person from abuse arising out of continuous investigation caused by allegations of disgruntled persons. A person seeking to exploit an elderly person may do so by simply filing charges with Adult Protective Services. While the application is pending, the exploiting party seeks temporary guardianship of the elderly person, thereby at least temporarily allowing them access to the elderly person's estate.

While the courts in these instances do allow for sanctions against the temporary guardian or guardian, there is currently no mechanism other than a mere civil lawsuit to allow the principal or an agent under power of attorney to seek sanctions for frivolous reports of abuse to Adult Protective Services. As such, sometimes our system gives a financial vulture watch over the elderly or disabled. Without the tools for implementation of sanctions against persons who bring guardianship or Adult Protective Services proceedings in bad faith, we are leaving our elderly vulnerable to the attacks of financial and emotional vultures.

