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## Getting Paid in Probate Court.

Robert J. Augsburg

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## ESSAY

### GETTING PAID IN PROBATE COURT

ROBERT J. AUGSBURGER\*

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## I. INTRODUCTION

After reviewing the Texas Probate Code,<sup>1</sup> Texas Property Code,<sup>2</sup> and current case law,<sup>3</sup> this Essay compiles relevant information designed to assist attorneys in obtaining payment for services provided to their clients. Attorneys commonly act as attorneys *ad litem*,<sup>4</sup> provide professional

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1. See generally TEX. PROB. CODE ANN. § 12(a) (West 2003) (“The provisions of law regulating costs in ordinary civil cases shall apply to all matters in probate . . . .”); *id.* § 242 (stating expenses incurred “in the preservation, safekeeping, and management of the estate” shall be collectible by the personal representative of the estate); *id.* § 665A (West 2003 & Supp. 2012) (noting that, under certain circumstances, court-appointed attorneys are entitled to an order for payment of fees); *id.* § 665B(a) (providing a means for compensation for those attorneys who represent a person at a hearing on an application to create a guardianship).

2. See generally TEX. PROP. CODE ANN. § 114.064 (West 2007) (“In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney’s fees as may seem equitable and just.”).

3. See, e.g., *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 707, 710 (Tex. 2007) (finding the trial court appropriately awarded attorney’s fees, but that respondent was required to segregate the recoverable fees from the unrecoverable fees); see also *In re Estate of Frederick*, 311 S.W.3d 127, 131 (Tex. App.—Fort Worth 2010, no pet.) (concluding the absence of guidance from the Texas Probate Code on attorney *ad litem* fees indicates that the Texas Rules of Civil Procedure should control); *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (declaring attorney *ad litem* fees are “charged against the estate to which” the *ad litem* was appointed).

4. See, e.g., PROB. § 34A (West 2003) (illustrating probate courts may appoint attorneys *ad litem* to represent certain individuals in probate proceedings); see also TEX. FAM. CODE ANN. § 107.005 (West 2008) (describing the duties of amicus attorneys).

guardianship services,<sup>5</sup> engage in will defense,<sup>6</sup> and create trusts for guardianships.<sup>7</sup> However, there are limited bases for recovering attorney's fees.<sup>8</sup> Navigation of the Texas Probate Code,<sup>9</sup> Texas Property Code,<sup>10</sup> and current case law<sup>11</sup> provides the roadmap for attorneys to obtain fees incurred and retain monies earned while assisting others in a time of need.

## II. COSTS AND SECURITY UNDER THE TEXAS PROBATE CODE

### A. Section 12. Costs and Security Therefor

(a) Applicability of Laws Regulating Costs. The provisions of law regulating costs in ordinary civil cases shall apply to all matters in probate when not expressly provided for in this Code.

(b) Security for Costs Required, When. When any person other than the personal representative of an estate files an application, complaint, or

5. See PROB. § 665B (West 2003 & Supp. 2012) (allowing courts to authorize compensation for attorneys who act as guardians for wards).

6. E.g., *In re Frederick*, 311 S.W.3d at 129, 132 (affirming judgment of attorney's fees where lower court appointed attorney sua sponte to act in the defense of a contested will).

7. See PROB. § 867(b) (West 2003 & Supp. 2012) (allowing an attorney to apply to the court to create a trust to manage guardianship funds); see also *id.* § 242 (West 2003) (acknowledging attorneys may incur expenses during the management of an estate).

8. See *State v. Estate of Brown*, 802 S.W.2d 898, 901 (Tex. App.—San Antonio 1991, no writ) (proclaiming that “an award of attorney's fees must” be grounded in statute or contract, rather than on a “judicially created basis” (citing *First City Bank-Farmers Branch v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984))).

9. See generally PROB. § 12(a) (West 2003) (explaining when the probate code does not expressly provide for costs, “The provisions of law regulating costs in ordinary civil cases shall apply”); *id.* § 242 (“Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safekeeping, and management of the estate . . . .”); *id.* § 665A (West 2003 & Supp. 2012) (noting that, under certain circumstances, court-appointed attorneys are entitled to an order for payment of fees); *id.* § 665B(a) (West Supp. 2012) (“A court that creates a guardianship . . . for a ward . . . may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian . . . .”).

10. See, e.g., TEX. PROP. CODE ANN. § 114.064 (West 2007) (“In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.”).

11. See *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007) (“[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees.” (quoting *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006))); see also *In re Frederick*, 311 S.W.3d at 131 (basing its conclusion—the rules of civil procedure should control attorney *ad litem* fees—on the absence of guidance in the Texas Probate Code); *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“[A]n attorney *ad litem*'s services must be charged against the estate to which his appointment relates . . . .”).

opposition in relation to the estate, he may be required by the clerk to give security for the probable cost of such proceeding before filing the same; or any one interested in the estate, or any officer of the court, may, at any time before the trial of such application, complaint, or opposition, obtain from the court, upon written motion, an order requiring such party to give security for the probable costs of such proceeding. The rules governing civil suits in the county court respecting this subject shall control in such cases.

(c) Suit for Fiduciary. No security for costs shall be required of an executor or administrator appointed by a court of this state in any suit brought by him in his fiduciary character.<sup>12</sup>

### B. *Applicable Case Law*

In *State v. Estate of Brown*,<sup>13</sup> the state brought suit regarding the liability of an estate for sales and use taxes.<sup>14</sup> Following a non-suit in Travis County,<sup>15</sup> the district court in Dimmit County granted a motion to release the state tax liens and awarded attorney's fees to the estate.<sup>16</sup> The state appealed the district court's decision.<sup>17</sup> The court of appeals in San Antonio held that the motion to release tax liens was not sufficient to justify a judgment for attorney's fees.<sup>18</sup> Ultimately, the motion failed to identify a plaintiff and defendant, failed to state a cause of action, and failed to allege a statutory basis for recovery of attorney's fees.<sup>19</sup>

In essence, any award of attorney's fees must have a statutory or contractual grounding;<sup>20</sup> it is impermissible to award such fees based

12. PROB. § 12.

13. *State v. Estate of Brown*, 802 S.W.2d 898 (Tex. App.—San Antonio 1991, no writ).

14. *Id.* at 899.

15. *See id.* (explaining after the non-suit was signed in Travis County, "Appellee's motion to release state tax liens was transferred from the probate court to a district court of Dimmit County").

16. *Id.*

17. *Id.*

18. *Id.* at 900 ("To hold that the mere filing of the motion is sufficient to support the judgment for attorney's fees would be untenable." (citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983))). The court went on to state, "Appellee's motion to release state tax liens, the live pleadings upon which the court below rendered judgment, does not contain a request for attorney's fees." *Id.*

19. *Id.*

20. *E.g.*, *First City Bank-Farmers Branch v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984) ("[I]n a suit founded on a written contract, a party is entitled to recover reasonable attorney's fees . . . . [A]n award of attorney's fees may not be supplied by implication but must be provided for by the express terms of the statute in question."); *see also New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967) ("[A]ttorney's fees are not recoverable either in an action in tort or a suit upon a contract unless provided by statute or by contract between the parties."), *implied overruling recognized on other grounds*, *Gramercy Ins. Co. v. Arcadia Fin. Ltd.*, 96 S.W.3d 320 (Tex. App.—Austin 2001, pet. denied).

solely on judicial construction.<sup>21</sup> Absent a mandatory statute,<sup>22</sup> a court lacks jurisdiction to order attorney's fees unless a party invokes such fees by the pleadings; failure to invoke the fees renders such an award a nullity.<sup>23</sup> In *Estate of Brown*, the estate's motion to release the tax liens did not contain a request for attorney's fees; thus, no basis for a judgment existed, and the court reversed and rendered the matter accordingly.<sup>24</sup>

In *A.G. Edwards & Sons, Inc. v. Beyer*,<sup>25</sup> the Texas Supreme Court recognized that segregation of fees is sometimes necessary.<sup>26</sup> "[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees."<sup>27</sup> However, when the fees are derived from "both recoverable and unrecoverable claims . . . the services are so intertwined that the associated fees need not be segregated."<sup>28</sup>

### III. ATTORNEYS *AD LITEM* UNDER THE TEXAS PROBATE CODE

#### A. Section 34A. Attorneys *Ad Litem*

Except as provided by [s]ection 53(c) of this code, the judge of a probate court may appoint an attorney [*ad litem*] to represent the interests of a person having a legal disability, a nonresident, an unborn or unascertained person, or an unknown heir in any probate proceeding. Each attorney [*ad litem*] appointed under this section is entitled to reasonable compensation for

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21. See *Estate of Brown*, 802 S.W.2d at 901 (emphasizing that attorney's fees are not recoverable in Texas unless specifically provided for in either a contract between the parties or by statute (citing *First City Bank-Farmers Branch*, 677 S.W.2d at 30)); see also *New Amsterdam Cas. Co.*, 414 S.W.2d at 915 (recognizing the law in Texas that an attorney may not recover fees in a tort or contract suit "unless provided by statute" or contract).

22. E.g., TEX. PROB. CODE ANN. § 665A (West 2003 & Supp. 2012) (mandating that attorney's fees must be taxed as costs where an attorney was appointed under section 646 or 687 of the Texas Probate Code).

23. See *Estate of Brown*, 802 S.W.2d at 900 ("Absent a mandatory statute, a trial court's jurisdiction to render a judgment for attorney's fees must be invoked by pleadings, and a judgment not supported by pleadings requesting an award of attorney's fees is a nullity." (citing *Wolters v. White*, 659 S.W.2d 885, 888 (Tex. App.—San Antonio 1983, writ dismissed)); see also *Ex parte Fleming*, 532 S.W.2d 122, 123 (Tex. Civ. App.—Dallas 1975, no writ) (asserting a court does not have jurisdiction to enter a judgment for attorney's fees unless and until the pleadings adequately request them).

24. *Estate of Brown*, 802 S.W.2d at 901.

25. *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704 (Tex. 2007).

26. *Id.* at 710.

27. *Id.* (quoting *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006)).

28. *Id.* (citing *Tony Gullo Motors*, 212 S.W.3d at 313–14).

services in the amount set by the court and to be taxed as costs in the proceeding.<sup>29</sup>

### B. *Applicable Case Law*

In *Ajudani v. Walker*,<sup>30</sup> the court appointed an attorney *ad litem* to represent the decedent's minor child in a will dispute.<sup>31</sup> The probate court granted the attorney *ad litem*'s various applications for appointee's fees, to be paid "by the personal representative from funds of the estate."<sup>32</sup> The probate court further granted the attorney *ad litem*'s motion for summary judgment, which argued that the will lacked testamentary intent, and it was ordered "all costs of this proceeding are adjudged against the applicants."<sup>33</sup> Later, the court also granted the attorney *ad litem*'s motion to assess costs, providing that "the costs of this proceeding, in the amount of \$27,607.65 are assessed, jointly and severally against the Applicants."<sup>34</sup>

As stated above, section 34A of the Texas Probate Code provides that "[e]ach attorney [*ad litem*] appointed . . . is entitled to reasonable compensation for services in the amount set by the court and to be taxed as costs in the proceeding."<sup>35</sup> Thus, where the attorney *ad litem* represents the successful party, the court should assess costs against the estate and not against the adverse party.<sup>36</sup> Accordingly, in *Ajudani*, the Harris County Probate Court erred in charging the attorney *ad litem*'s fees against the applicants in their individual capacities.<sup>37</sup>

Additionally, the conclusion that attorney's fees are reasonable "must be supported by competent evidence."<sup>38</sup> "When no evidence or insufficient evidence supports an award, the court abuses its discretion in making the

29. TEX. PROB. CODE ANN. § 34A (West 2003).

30. *Ajudani v. Walker*, 232 S.W.3d 219 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

31. *Id.* at 221.

32. *Id.*

33. *Id.* at 222.

34. *Id.* at 223.

35. TEX. PROB. CODE ANN. § 34A (West 2003).

36. *Ajudani*, 232 S.W.3d at 224 (citing HOUSE COMM. ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex. H.B. 266, 68th Leg., R.S. (1983)).

37. *Id.* ("Because compensation for an attorney [*ad litem*]'s services must be charged against the estate to which his appointment relates, the probate court erred when it charged these costs against appellants."); *see also* HOUSE COMM. ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex. H.B. 266, 68th Leg., R.S. (1983) (stating that "HB 266 would make the probate process fairer for all heirs and beneficiaries" and that it would allow an attorney *ad litem* to recover fees "which would be charged against the estate").

38. *Ajudani*, 232 S.W.3d at 225 (citing *In re R.D.Y.*, 51 S.W.3d 314, 325 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

award.”<sup>39</sup> In *Ajudani*, the attorney *ad litem*'s applications for fees totaled \$25,187.07, and the motion to assess costs contained an additional and unsupported \$2,420.58, totaling \$27,607.65.<sup>40</sup> Therefore, the probate court abused its discretion in rendering an award in excess of the amount that the evidence supported.<sup>41</sup> Consequently, the court of appeals in Houston modified the probate court's order to award only \$25,187.07 in fees to the attorney *ad litem* to be paid out of the estate.<sup>42</sup>

In *Dalworth Trucking Co. v. Bulen*,<sup>43</sup> an attorney *ad litem* represented the decedent's minor son in a tort suit between an employer and employee over a fatal car accident.<sup>44</sup> Although this case did not involve the Texas Probate Code, it examined the pertinent factors that may be used to determine reasonable *ad litem* fees:

In determining the reasonableness of an attorney's fee, the trial court may consider the time and labor involved, the nature and complexities of the case, the amount of money involved, the attorney's responsibilities, whether the attorney lost other employment because of the appointment, the benefits the client received, contingency or certainty of compensation, and whether the employment is casual or for an established or constant client.<sup>45</sup>

The Texarkana Court of Appeals further explained, “A reviewing court may look at the record and draw on the common knowledge of the court justices and their experience as lawyers and judges to view the matter in the light of the testimony, the record, and the amount in controversy.”<sup>46</sup>

In *Estate of Tarrt v. Harpold*,<sup>47</sup> the executors appealed an award of *ad litem* fees.<sup>48</sup> The Fourteenth Court of Appeals addressed the issue of “whether the probate court had jurisdiction” to award *ad litem* fees and expenses, payable by the executors “pending the final disposition on appeal of a consolidated suit to construe the will and to determine heirship.”<sup>49</sup> The court of appeals reasoned that as a result of the probate court's continuing

39. *Id.* (citing *Woollett v. Matyasik*, 23 S.W.3d 48, 53 (Tex. App.—Austin 2000, pet. denied)).

40. *Id.*

41. *Id.* (citing *Woollett*, 23 S.W.3d at 53).

42. *Id.*

43. *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728 (Tex. App.—Texarkana 1996, no writ).

44. *Id.* at 731.

45. *Id.* at 738 (citing *Valley Coca-Cola Bottling Co. v. Molina*, 818 S.W.2d 146, 149 (Tex. App.—Corpus Christi 1991, writ denied)).

46. *Id.* (citing *Alford v. Whaley*, 794 S.W.2d 920, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ)).

47. *Estate of Tarrt v. Harpold*, 531 S.W.2d 696 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

48. *Id.* at 697.

49. *Id.*

administration of the estate, the probate court retained jurisdiction to award reasonable attorney's fees.<sup>50</sup> The appellate court further explained that the "[*ad litem*] is an officer of the court" whose "fees are assessed as costs of suit" rather than requiring the *ad litem* to seek "fees only from his clients' recovered shares."<sup>51</sup> If *ad litem*s were only able to obtain fees out of recovered shares, payment of *ad litem*s would essentially shift to a contingent fee basis, whereby they may never be able to recover their fees for rendering professional services.<sup>52</sup> In other words, this practice would defeat the purpose of appointing an *ad litem* to represent unknown heirs.<sup>53</sup>

In *In re Estate of Frederick*,<sup>54</sup> the court appointed an *ad litem* to represent unknown heirs and the decedent's minor child in a trial to determine heirship and to appoint an administrator for the estate.<sup>55</sup> Subsequently, the court taxed the costs of the *ad litem* against the losing party rather than against the estate.<sup>56</sup> On appeal, the court affirmed the decision, stating that it was within the trial court's discretion to determine who should pay the costs of the suit.<sup>57</sup> The court of appeals in Fort Worth reasoned that because section 34A of the Texas Probate Code<sup>58</sup> does not specify against whom costs must be assessed, the Texas Rules of Civil Procedure<sup>59</sup> allow the trial court to decide.<sup>60</sup> The appellate court further explained its ruling

50. *Id.* at 698.

51. *Id.*

52. *Id.* at 698–99 (condemning the contingent fee practice with regard to *ad litem*s and explaining that "[t]o so hold would require the attorney [*ad litem*] in this case to render professional services for a period in excess of ten years prior to receipt of any fee and to advance expenses for his unknown clients, which expenses and fees the attorney might not recover unless he prevailed").

53. *See id.* at 699 ("To so hold would discourage courts from appointing attorneys to serve as officers of the court as contemplated by the Texas Rules of Civil Procedure.").

54. *In re Estate of Frederick*, 311 S.W.3d 127 (Tex. App.—Fort Worth 2010, no pet.).

55. *Id.* at 129.

56. *Id.*

57. *Id.* at 131. *But see* *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (declaring attorney *ad litem* fees are to be charged against the estate).

58. TEX. PROB. CODE ANN. § 34A (West 2003).

59. *See* TEX. R. CIV. P. 131 ("The successful party to a suit shall recover of his adversary all costs incurred therein . . ."); *id.* R. 141 ("The court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules."); *see also* *Guerra v. Perez & Assocs.*, 885 S.W.2d 531, 533–34 (Tex. App.—El Paso 1994, no writ) (stressing because the trial court did not explain its finding of good cause on the record, it failed to comply with Rule 141 of the Texas Rules of Civil Procedure, which amounted to action "without reference to guiding rules and principles" and an abuse of discretion); *Dover Elevator Co. v. Servellon*, 876 S.W.2d 166, 169 (Tex. App.—Dallas 1993, no pet.) ("[T]he trial court was not authorized to assess guardian [*ad litem*] fees against [the successful party] unless good cause was shown on the face of the record.").

60. *See In re Frederick*, 311 S.W.3d at 131 (reviewing the legislative history of section 34A and concluding the trial court has discretion to allocate fees (citing TEX. R. CIV. P. 131, 141)); *see also* PROB. § 12(a) (West 2003) ("The provisions of law regulating costs in ordinary civil cases shall apply

by opining that the legislature omitted express provisions specifying which party may be ordered to pay attorney's fees "because it contemplated the possibility that parties arguing over an estate could unnecessarily prolong litigation, thereby increasing an [*ad litem*]'s fees and depleting the estate."<sup>61</sup> Thus, the Second Court of Appeals declined to follow the First Court of Appeals' ruling in *Ajudani*.<sup>62</sup>

In *In re Estate of Stanton*,<sup>63</sup> the court of appeals in Tyler considered the probate court's denial of attorney's fees for a temporary administrator.<sup>64</sup> The court determined that the probate court could legitimately deny the attorney's application,<sup>65</sup> and explained that "[w]here a temporary administrator is also an attorney, he is entitled to reasonable attorney's fees for his legal services."<sup>66</sup> However, the attorney is required to "separately identify the services he performed as temporary administrator and the services he performed as attorney for the estate."<sup>67</sup> Given the probate court's inability to distinguish the fees for work completed as the temporary administrator from the fees for legal services, it properly denied his application.<sup>68</sup>

In *Overman v. Baker*,<sup>69</sup> a case involving the appointment of a guardian for an incapacitated person, the plaintiff argued that the trial court erred in charging the attorney *ad litem*'s costs against her.<sup>70</sup> The plaintiff cited the Texas Probate Code<sup>71</sup> to explain that fees must be charged against the

to all matters in probate when not expressly provided for in this Code."); *id.* § 34A (lacking any provision as to which party should pay fees).

61. *In re Frederick*, 311 S.W.3d at 131.

62. Compare *id.* at 129–31 (arguing that because "section 34A clearly omits any express provision regulating costs for appointments under that section, the language of section 34A shows the legislature's intent that provisions regulating costs in ordinary civil cases apply to the assessment of attorney [*ad litem*] fees as costs under that section"), with *Ajudani*, 232 S.W.3d at 224 (concluding that "costs cannot be assessed against an adverse party, even if the attorney [*ad litem*] represents the successful party" because "costs are to be charged against the estate").

63. *In re Estate of Stanton*, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied).

64. *Id.* at 207.

65. *Id.* at 210.

66. *Id.* at 209 (citations omitted); see also TEX. PROB. CODE ANN. § 242 (West 2003) (discussing allowable expenses incurred during the representation of an estate).

67. *In re Stanton*, 202 S.W.3d at 209–10 (citing *Burton v. Bean*, 549 S.W.2d 48, 51 (Tex. Civ. App.—El Paso 1977, no writ)); see also *Burton*, 549 S.W.2d at 51 (explaining how an attorney acting in dual capacities should itemize services and differentiate between those for the estate and those for general counseling).

68. *In re Stanton*, 202 S.W.3d at 210.

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

70. *Id.* at 508–09.

71. See PROB. § 665A (West 2003 & Supp. 2012) (providing a court shall order the payment of the attorney *ad litem*'s fees, "to be taxed as costs in the case"); *id.* § 669(a) (West Supp. 2012) ("[I]n a guardianship proceeding, the cost of the proceeding, including the cost of the guardian [*ad litem*] or

estate of the proposed ward or, if the ward is insolvent, to the county.<sup>72</sup> The appellate court agreed with the plaintiff, stating that “the attorney [*ad litem*]'s fee[,] which is assessed as costs[,] is to be paid out of the proposed ward's assets unless the court determines that the proposed ward is unable to pay for such services[,] in which case the county is to be responsible for such costs.”<sup>73</sup> Accordingly, the appellate court found that the lower court erred in assessing costs against the plaintiff.<sup>74</sup>

#### IV. WILL DEFENSE UNDER THE TEXAS PROBATE CODE

##### A. *Section 242. Expenses Allowed*

Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safekeeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claim, and all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court.<sup>75</sup>

##### B. *Applicable Case Law*

In *Burrow v. Arce*,<sup>76</sup> the court explained that while factual disputes about an attorney's culpability may present jury issues, the amount of a fee that requires forfeiture is a question for the court, not the jury.<sup>77</sup> Further, an attorney who breaches a fiduciary duty to a client may be required to forfeit all or part of the fee, irrespective of whether the breach caused the client actual damages.<sup>78</sup>

In *Drake v. Muse, Currie & Kohen*,<sup>79</sup> the administrator was not entitled to expenses incurred in contesting an application to probate a foreign will because the action did not involve “a claim against the estate” and did not

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court visitor, shall be paid out of the guardianship estate, or, if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding shall be paid out of the county treasury, and the judgment of the court shall be issued accordingly.”)

72. *Overman*, 26 S.W.3d at 512.

73. *Id.* at 512–13.

74. *Id.* at 513.

75. PROB. § 242 (West 2003).

76. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

77. *Id.* at 245–46.

78. *Id.* at 240.

79. *Drake v. Muse, Currie & Kohen*, 532 S.W.2d 369 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

involve “preservation, safe-keeping, and management of the estate.”<sup>80</sup> In addition, the expenses were disallowed because the administrator “was not seeking to have a will admitted to probate nor was she defending a will already admitted.”<sup>81</sup>

C. *Section 243. Allowance for Defending Will*

When any person designated as executor in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney’s fees, in such proceedings. When any person designated as a devisee, legatee, or beneficiary in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he may be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney’s fees, in such proceedings.<sup>82</sup>

D. *Applicable Case Law*

In *In re Estate of Wilcox*,<sup>83</sup> Mary Lou, a will beneficiary, sued her brother Peter, an alternate co-executor of the will, on multiple grounds, including negligent misrepresentation, conversion, and fraud.<sup>84</sup> After granting summary judgment for Peter, the trial court awarded him attorney’s fees in accordance with section 243 of the Texas Probate Code.<sup>85</sup> Mary Lou appealed.<sup>86</sup> Neither party disputed the admission of the will to probate, and no will contest was filed.<sup>87</sup> However, because Mary Lou’s claims stemmed from the assertion that Peter was liable to her as a tortfeasor,<sup>88</sup> Peter only incurred attorney’s fees from allegations of personal wrongdoing, not from will defense.<sup>89</sup> Consequently, his claim for attorney’s fees fell outside the coverage of section 243 of the Texas

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80. *Id.* at 374 (citations omitted).

81. *Id.* at 375.

82. PROB. § 243 (West 2003).

83. *In re Estate of Wilcox*, 193 S.W.3d 701 (Tex. App.—Beaumont 2006, no pet.).

84. *Id.* at 702.

85. *Id.*; see PROB. § 243 (allowing certain parties seeking to admit a will to probate to recover expenses and attorney’s fees).

86. *In re Wilcox*, 193 S.W.3d at 702.

87. *Id.* at 704.

88. *Id.*

89. *Id.*

Probate Code.<sup>90</sup> Ultimately, the award of attorney's fees from the estate was reversed and judgment rendered that Peter take nothing.<sup>91</sup>

## V. GUARDIANSHIPS UNDER THE TEXAS PROBATE CODE

### A. *Section 665A. Payment for Professional Services*

The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under this chapter, as applicable, to be taxed as costs in the case. If after examining the proposed ward's assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under this chapter, as applicable, the county is responsible for the cost of those services.<sup>92</sup>

### B. *Applicable Case Law*

In *In re Guardianship of Glasser*,<sup>93</sup> the court appointed an attorney *ad litem* in a hotly contested and complex guardianship proceeding.<sup>94</sup> The *ad litem* applied for authorization to retain litigation counsel, and after the court assessed the ward's best interest, it approved the retention of litigation counsel.<sup>95</sup> The probate court ordered payment of attorney *ad litem* fees and expenses out of the guardianship estate, subject to application and approval by the court.<sup>96</sup> The former guardian appealed the probate court's order and contended: (1) the court lacked authority to allow the *ad litem* to employ litigation counsel; and (2) the court committed an abuse of discretion by granting excessive and unnecessary *ad litem* fees.<sup>97</sup>

The Fourth Court of Appeals in San Antonio explained that nothing in the Texas Probate Code constrains the court to appoint only one representative for a proposed ward.<sup>98</sup> Conversely, it is the court's statutory obligation "to authorize the number and caliber of counsel appropriate to the case."<sup>99</sup>

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90. *Id.*; see PROB. § 243 (providing for attorney's fees in connection with will defense and similar actions).

91. *In re Wilcox*, 193 S.W.3d at 704.

92. PROB. § 665A (West 2003 & Supp. 2012).

93. *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009, no pet.).

94. *Id.* at 372.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 375.

99. *Id.* at 375–76 (citations omitted); see also *In re Estate of Stanton*, 202 S.W.3d 205, 210 (Tex. App.—Tyler 2005, pet. denied) (determining the probate court acted within its discretion in

The Fourth Court went on to provide that an attorney *ad litem*'s compensation is subject to the trial court's discretion, and appellate courts will only overturn an award of compensation upon a clear showing of an abuse of discretion.<sup>100</sup> At trial, the *ad litem* and her attorney presented evidence and opposing counsel cross-examined them regarding the reasonableness of their fees.<sup>101</sup> The judge disallowed the portion of the fees that related to work on separate matters, but approved the remainder.<sup>102</sup> On appeal, the court did not find an abuse of discretion and affirmed the judge's order awarding *ad litem* fees.<sup>103</sup>

In order to defend the attorney's fees order on appeal, the *ad litem* filed a motion seeking reappointment as attorney *ad litem*, and requested a fee award for the appeal itself.<sup>104</sup> The court of appeals in San Antonio explained that when *ad litem*s are defending their client's interests on appeal, they are entitled to compensation regardless of the outcome.<sup>105</sup> Attorneys may not, however, recover for fees accrued in representing their own interests, which is precisely what the *ad litem* was doing in defending both the judge's authorization to hire a litigator and the award of *ad litem* fees.<sup>106</sup> Since the *ad litem* was protecting her own personal interests, rather than the interests of the ward, the appellate court held that there was no basis in the probate code to compensate these fees.<sup>107</sup>

### C. Section 665B. Payment of Attorney's Fees to Attorney Representing Applicant

(a) A court that creates a guardianship or creates a management trust under [s]ection 867 of this code for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, may authorize the payment of reasonable and necessary

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authorizing the attorney *ad litem* to retain an attorney for appeal (citing *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992)).

100. *In re Glasser*, 297 S.W.3d at 377 (quoting *Brownsville–Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995)).

101. *Id.*

102. *Id.* at 378.

103. *Id.*

104. *Id.*

105. *Id.* (citations omitted); see *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) (determining that an attorney is entitled to reasonable fees incurred in defending an appeal).

106. *In re Glasser*, 297 S.W.3d at 378 (citations omitted); see *Harris Cnty. Children's Prot. Servs. v. Olvera*, 77 S.W.3d 336, 342–43 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (declaring attorneys *ad litem* were not entitled to fees incurred in defense of their own interests).

107. *In re Glasser*, 297 S.W.3d at 379.

attorney's fees, as determined by the court, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created, from:

- (1) available funds of the ward's estate or management trust, if created; or
- (2) subject to [s]ubsection (c) of this section, the county treasury if:
  - (A) the ward's estate or, if created, management trust, is insufficient to pay for the services provided by the attorney; and
  - (B) funds in the county treasury are budgeted for that purpose.

(b) The court may not authorize attorney's fees under this section unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.

(c) The court may authorize the payment of attorney's fees from the county treasury under [s]ubsection (a) of this section only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services described by that subsection from any other source.<sup>108</sup>

#### Amendment of Section 665B<sup>109</sup>

The legislature amended section 665B in 1999 to allow payment from the county treasury in the event a ward's estate is insufficient to provide for attorney's fees.<sup>110</sup>

#### D. *Applicable Case Law*

In *In re Guardianship of Person and Estate of A.M.K.*,<sup>111</sup> a Mrs. Gilda sought appointment as guardian of the person and estate of her two minor children.<sup>112</sup> After Gilda suffered an unexpected mental deterioration, the court substituted her cousin, Luxandra, as temporary guardian.<sup>113</sup> Gilda then filed a motion seeking full payment of her attorney's fees from her ex-husband, Shaun.<sup>114</sup> The lower court granted the motion in part and

108. TEX. PROB. CODE ANN. § 665B (West Supp. 2012).

109. Act of May 20, 1999, 76th Leg., R.S., ch. 905, § 2, 1999 Tex. Gen. Laws 3604, 3605 (amended 2009) (current version at PROB. § 665B).

110. *Compare id.* (permitting payment of appointed attorney of a ward from the county treasury if ward's estate is insufficient), *with* Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 28, 1995 Tex. Gen. Laws 5145, 5157–58 (amended 2009) (current version at PROB. § 665B) (allowing for payment of appointed attorney of a ward from only the estate of the ward).

111. *In re Guardianship of Person and Estate of A.M.K.*, No. 04-08-00268-CV, 2009 WL 1028074 (Tex. App.—San Antonio Apr. 15, 2009, no pet.) (mem. op.).

112. *Id.* at \*1.

113. *Id.*

114. *Id.*

ordered Shaun to pay half of Gilda's court costs and attorney's fees.<sup>115</sup> Shaun appealed, arguing that the trial court acted with blatant disregard for section 665B of the Texas Probate Code, and thereby abused its discretion by requiring him to pay Gilda's fees.<sup>116</sup> Because Gilda's motion was part of a guardianship proceeding, the Probate Code governed its disposition.<sup>117</sup> Section 665B provides the court may order compensation for an attorney who represented an applicant in a guardianship proceeding, with this compensation drawn from "available funds of the ward's estate," or alternatively from the county treasury, if: (1) "the ward's estate . . . is insufficient to pay for the services," and (2) "funds in the county treasury are budgeted for that purpose."<sup>118</sup> Any compensation received from Shaun did not amount to compensation from the ward's estate or the county treasury; therefore, the court abused its discretion in making the order.<sup>119</sup>

#### E. *Compensation for Attorneys Serving As Guardian*

##### Section 665D. Compensation and Payment of Attorney's Fees of Attorney Serving as Guardian

(a) Notwithstanding any other provision of this subpart, an attorney who serves as guardian and who also provides legal services in connection with the guardianship is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate or other funds available for that purpose unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services.

(b) An attorney described by [s]ubsection (a) of this section is not entitled to payment of attorney's fees for guardianship services that are not legal services.

(c) The court shall set the compensation of an attorney described by [s]ubsection (a) of this section for the performance of guardianship services in accordance with [s]ection 665 of this code. The court shall set attorney's fees for an attorney described by [s]ubsection (a) of this section for legal services provided in accordance with [s]ections 665A, 665B, and 666 of this code.<sup>120</sup>

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115. *Id.*

116. *Id.* at \*2.

117. *Id.*

118. TEX. PROB. CODE ANN. § 665B(a) (West Supp. 2012).

119. *In re A.M.K.*, 2009 WL 1028074, at \*3.

120. PROB. § 665D (West Supp. 2012).

### Section 666. Expenses Allowed

A guardian is entitled to be reimbursed from the guardianship estate for all necessary and reasonable expenses incurred in performing any duty as a guardian, including reimbursement for the payment of reasonable attorney's fees necessarily incurred by the guardian in connection with the management of the estate or any other matter in the guardianship.<sup>121</sup>

#### F. *Applicable Case Law*

In *In re Guardianship of Fortenberry*,<sup>122</sup> attorneys filed claims for recovery of attorney's fees for services rendered to former guardians under the theories of quantum meruit or, alternatively, unjust enrichment.<sup>123</sup> The attorneys believed they could no longer enforce contractual claims against their clients after the court removed them as guardians.<sup>124</sup> The Dallas Court of Appeals held removal as guardian was irrelevant to enforceability of a contract against the estate.<sup>125</sup> Further, because the attorneys had an express contract with the guardian of the estate, they could not recover under either a quantum meruit or unjust enrichment theory.<sup>126</sup>

The court of appeals in Dallas further stated that an attorney who provides services on behalf of a probate estate could obtain payment by filing a claim against the estate, as would any creditor of the estate.<sup>127</sup> Section 805 of the Texas Probate Code governs claims for such "expenses of administration," which includes attorney's fees.<sup>128</sup>

Where a guardianship application is contested, resulting in the appointment of the contestant as guardian, an award of attorney's fees is proper when funds are disbursed for the betterment of a ward and his or her estate.<sup>129</sup>

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121. *Id.* § 666 (West Supp. 2012).

122. *In re Guardianship of Fortenberry*, 261 S.W.3d 904 (Tex. App.—Dallas 2008, no pet.).

123. *Id.* at 907.

124. *Id.* at 908–09.

125. *Id.* at 916.

126. *Id.*

127. *Id.* at 913 n.13 (quoting *Morton's Estate v. Ferguson*, 45 S.W.2d 419, 420 (Tex. Civ. App.—Eastland 1932, writ ref'd)).

128. *Id.* at 913 (citing TEX. PROB. CODE ANN. § 805 (West 2003); *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied)).

129. *Carney v. Aicklen*, 587 S.W.2d 507, 511 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (citing PROB. § 242 (1955); *Legler v. Legler*, 189 S.W.2d 505, 510–11 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.)).

### G. Section 667. Expense Account

All expense charges shall be:

- (1) in writing, showing specifically each item of expense and the date of the expense;
- (2) verified by affidavit of the guardian;
- (3) filed with the clerk; and
- (4) paid only if the payment is authorized by court order.<sup>130</sup>

### H. Applicable Case Law

In *Woollett v. Matyastik*,<sup>131</sup> the lower court appointed a son as temporary guardian of his mother and her estate and authorized payment of attorney's fees.<sup>132</sup> The court erred in ordering attorney's fees because the application: (1) was not verified or itemized as required by section 667 of the Texas Probate Code; (2) was not grounded on expert testimony; (3) did not provide hourly rates or hours expended on guardianship matters; and (4) did not state the rates were reasonable in the county.<sup>133</sup> The only evidence that the son provided was "a layman's unsupported assertion regarding reasonableness and necessity for attorney's fees," which was wholly insufficient to support payment of fees from the estate.<sup>134</sup>

In *Meduna v. Holder*,<sup>135</sup> a daughter applied for appointment as her mother's guardian.<sup>136</sup> Subsequently, the daughter and her siblings filed lawsuits over the family property.<sup>137</sup> Nearly two and a half years after her initial application, the court appointed the daughter as her mother's guardian.<sup>138</sup> Shortly thereafter, the daughter applied for reimbursement of a down payment for attorney's fees.<sup>139</sup> The daughter attached billing statements and other supporting documents but failed to swear to the application.<sup>140</sup> Six days later, she filed a sworn affidavit verifying that the

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130. PROB. § 667 (West 2003).

131. *Woollett v. Matyastik*, 23 S.W.3d 48 (Tex. App.—Austin 2000, pet. denied).

132. *Id.* at 50–51.

133. *Id.* at 53 (citations omitted).

134. *Id.* (citing *Barrett v. Parchman*, 675 S.W.2d 289, 291–92 (Tex. App.—Dallas 1984, no writ)).

135. *Meduna v. Holder*, No. 03-02-00067-CV, 2003 WL 124214 (Tex. App.—Austin Jan 16, 2003, no pet.) (mem. op.).

136. *Id.* at \*1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

fees were necessary, reasonable, and incurred in pursuing her mother's best interests.<sup>141</sup> The siblings objected, arguing the majority of the time billed was spent on non-guardianship matters, that the estate could not pay fees for work performed before the daughter was appointed guardian, and that omissions from the statements made it difficult to assess the reasonableness and necessity of the fees.<sup>142</sup> The county court at law, however, awarded 90% of the fees requested, finding both that: (1) the fees were reasonable and just, and (2) the expenditures for other legal work performed for the daughter was "inextricably intertwined" with the guardianship proceedings.<sup>143</sup>

On the issue of the unsworn application, the Austin Court of Appeals held that section 667 of the Texas Probate Code does not require a guardian to file a verifying affidavit simultaneously with the application for attorney's fees.<sup>144</sup> In other words, the affidavit filed six days later, together with the previously filed application, satisfied the requirements of section 667.<sup>145</sup>

#### I. *Section 669. Costs Against Guardianship*

(a) Except as provided by [s]ubsection (b) of this section, in a guardianship proceeding, the cost of the proceeding, including the cost of the guardian [*ad litem*] or court visitor, shall be paid out of the guardianship estate, or, if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding shall be paid out of the county treasury, and the judgment of the court shall be issued accordingly.

(b) If a court denies an application for the appointment of a guardian under this chapter based on the recommendation of a court investigator, the applicant shall pay the cost of the proceeding.<sup>146</sup>

#### J. *Applicable Case Law*

In *Simmons v. Harris County*,<sup>147</sup> the Fourteenth Court of Appeals explained that, "Section 247 [of the Texas Probate Code] makes *no* provision for the payment of attorney[']s fees as *costs* in the event of

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at \*2.

145. *Id.*

146. TEX. PROB. CODE ANN. § 669 (West 2003 & Supp. 2012).

147. *Simmons v. Harris Cnty.*, 917 S.W.2d 376 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

insolvency of a guardianship.”<sup>148</sup> The court of appeals further provided that “[a]ttorney fees are not costs unless made so by statute.”<sup>149</sup> Thus, when an attorney is not appointed by the court, but instead hired by the client, the attorney’s fees are not recoverable from the county if the estate is insolvent.<sup>150</sup> Additionally, the court of appeals explained that the application for attorney’s fees was an insufficient pleading to allow a trial court to charge attorney’s fees against the county because the application did not name a plaintiff and defendant, state a cause of action, or allege a statutory basis for the award of attorney’s fees.<sup>151</sup>

In *In re Guardianship of Moon*,<sup>152</sup> the Texarkana Court of Appeals based its finding that section 669(a) did not apply to the factual situation on the fact that the suit over bank accounts could be filed outside of the guardianship proceeding.<sup>153</sup> The court of appeals further held that the losing party was appropriately assessed costs.<sup>154</sup>

K. *Section 670. Compensation of Certain Guardians; Certain Other Guardianship Costs*

(a) In this section:

- (1) “Applied income” means the portion of the earned and unearned income of a recipient of medical assistance or, if applicable, the recipient and the recipient’s spouse, that is paid under the medical assistance program to an institution or long term care facility in which the recipient resides.
- (2) “Medical assistance” has the meaning assigned by [s]ection 32.003, Human Resources Code.

(b) Notwithstanding any other provision of this chapter and to the extent permitted by federal law, a court that appoints a guardian for a recipient of medical assistance who has applied income may order the following to be

148. *Id.* at 377. Note that section 247 is now section 669 of the Texas Probate Code. *Id.*

149. *Id.*

150. *See id.* at 378 (noting the Texas Probate Code only allows for fees to be taxed as costs if an attorney was appointed by the court, and “[b]ecause we have concluded that appellant is not entitled to attorney fees under [s]ection 247 of the [Texas] Probate Code and that there is no statutory authority providing for attorney fees to be paid by the county as costs, we find the trial court was correct in denying appellant’s motion for judgment”).

151. *Id.*

152. *In re Guardianship of Moon*, 216 S.W.3d 506 (Tex. App.—Texarkana 2007, no pet.).

153. *See id.* at 511 (noting the factual distinctions rendering section 669 inapposite).

154. *See id.* at 511–12 (“[W]e recognize that the general statute states that a losing party in a lawsuit is subject to imposition of costs.” (citing *Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003))); *see also* TEX. R. CIV. P. 131 (providing that the successful party is entitled to recover costs from the losing party); *id.* R. 141 (allowing a court to award costs in a manner that is inconsistent with the rules, so long as it has “good cause for doing so,” and the explanation is included in the record).

deducted as an additional personal needs allowance in the computation of the recipient's applied income in accordance with [s]ection 32.02451, Human Resources Code:

- (1) compensation to the guardian in an amount not to exceed \$175 per month;
- (2) costs directly related to establishing or terminating the guardianship, not to exceed \$1,000 except as provided by [s]ubsection (c) of this section; and
- (3) other administrative costs related to the guardianship, not to exceed \$1,000 during any three-year period.

(c) Costs ordered to be deducted under [s]ubsection (b)(2) of this section may include compensation and expenses for an attorney [*ad litem*] or guardian [*ad litem*] and reasonable attorney's fees for an attorney representing the guardian. The costs ordered to be paid may exceed \$1,000 if the costs in excess of that amount are supported by documentation acceptable to the court and the costs are approved by the court.<sup>155</sup>

L. *Section 694K. Attorney Retained on Ward's Behalf*

- (a) A ward may retain an attorney for a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship.
- (b) The court may order that compensation for services provided by an attorney retained under this section be paid from funds in the ward's estate only if the court finds that the attorney had a good-faith belief that the ward had the capacity necessary to retain the attorney's services.<sup>156</sup>

M. *Section 694L. Payment for Guardians Ad Litem*

As provided by [s]ection 645(b) of this code, a guardian [*ad litem*] appointed in a proceeding involving the complete restoration of a ward's capacity or modification of a ward's guardianship is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or modification of the ward's guardianship.<sup>157</sup>

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155. TEX. PROB. CODE ANN. § 670 (West Supp. 2012).

156. *Id.* § 694K (West 2003).

157. *Id.* § 694L (West Supp. 2012).

## 2007 Amendments

In 2007, section 694 was amended to add sections 694C(c)<sup>158</sup> and 694L,<sup>159</sup> which were incorporated to explicitly state that a guardian *ad litem* or attorney *ad litem* is entitled to payment for fees associated with proceedings that either restore a ward's rights or modify a guardianship, even if no change to the guardianship actually occurred.<sup>160</sup>

N. *Section 794. Claims Providing for Attorney's Fees*

"If the instrument that evidences or supports a claim provides for attorney's fees, the claimant may include as a part of the claim the portion of the fee that the claimant has paid or contracted to pay to an attorney to prepare, present, and collect the claim."<sup>161</sup>

## VI. TRUSTS

A. *Section 114.064. Costs Under the Texas Property Code*

Section 114.064 of the Texas Property Code stipulates that "[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."<sup>162</sup>

B. *Applicable Case Law*

In *In re Lesikar*,<sup>163</sup> a sister sued her brother for "construction of trust, declaratory judgment, an accounting, appointment of a receiver, injunctive relief, negligence, breach of fiduciary duty, conversion, and civil

158. Act of June 15, 2007, 80th Leg., R.S., ch. 614, § 9, 2007 Tex. Gen. Laws 1177, 1177 (codified at PROB. § 694C(c) (West Supp. 2012)).

159. Act of June 15, 2007, 80th Leg., R.S., ch. 614, § 11, 2007 Tex. Gen. Laws 1177, 1177 (codified at PROB. § 694L (West Supp. 2012)).

160. See PROB. § 694C(c) (West Supp. 2012) ("An attorney [*ad litem*] appointed under this section is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or a modification of the ward's guardianship."); *id.* § 694L (providing that a guardian *ad litem* "is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or modification of the ward's guardianship").

161. *Id.* § 794 (West 2003).

162. TEX. PROP. CODE ANN. § 114.064 (West 2007); see Charles Epps Ipock, Comment, *A Judicial and Economic Analysis of Attorney's Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries*, 43 St. Mary's L.J. 855, 876 (2012) (illustrating the competing inequities of awarding attorney's fees, from the corpus of a trust, to a trustee whose neglectful conduct was dissipating the trust).

163. *In re Lesikar*, 285 S.W.3d 577 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

conspiracy.”<sup>164</sup> The trial court awarded the sister \$400,000 in attorney’s fees.<sup>165</sup> On appeal, the brother argued that the evidence was insufficient to support the finding that the \$400,000 awarded in attorney’s fees was both reasonable and necessary.<sup>166</sup>

The Fourteenth Court of Appeals explained that courts have the discretion to award attorney’s fees to a prevailing party if the prevailing party shows the fees were reasonable and necessary in litigating the claim.<sup>167</sup> In determining the amount of attorney’s fees to award, the courts have developed the “Fee-Segregation Rule,” which requires the fact-finder to separate the legal work into “component tasks” and identify all of the legal fees incurred solely from a non-recoverable cause of action.<sup>168</sup> Then, any identified component tasks considered non-recoverable must be segregated from the allocable attorney’s fees.<sup>169</sup> Here, the sister did not segregate her non-recoverable legal fees from her recoverable fees, so the case was remanded to determine the reasonable amount of fees necessary to litigate her claims and the amount of those fees considered equitable and just.<sup>170</sup>

Whether legal fees are reasonable and necessary is a question of fact.<sup>171</sup> However, the determination of equitable and just legal fees is a question of law.<sup>172</sup> A trial court abuses its discretion when it rules “arbitrarily, unreasonably, without regard to guiding legal principles, or without

164. *Id.* at 581 (citing *Moon v. Lesikar*, 230 S.W.3d 800, 802 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).

165. *Id.* (citing *Lesikar v. Moon*, 237 S.W.3d 361, 365 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).

166. *Id.* (citing *Lesikar*, 237 S.W.3d at 375).

167. *Id.* at 583. *But see* Charles Epps Ipock, Comment, *A Judicial and Economic Analysis of Attorney’s Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries*, 43 St. Mary’s L.J. 855, 883 (2012) (“[L]egislative intent seems to indicate that the statute [section 114.064] should act as a prevailing party statute, in that if the trustee prevails in a removal or surcharge action then costs and fees should be allowed from trust funds; but if the trustee does not prevail, then the trustee is not entitled to costs and fees from trust funds. Despite the clear intent of the legislature, courts have consistently held the opposite.”).

168. *Id.* at 582–83 (citing *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys.*, 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).

169. *Id.* at 583 (citing *7979 Airport Garage, L.L.C.*, 245 S.W.3d at 509).

170. *Id.* at 584–85; *see also* *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999) (“[O]nce the jury has found the value of reasonable and necessary legal services, the court must decide whether the award would be equitable and just.” (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998))); *Alpert v. Riley*, 274 S.W.3d 277, 295 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (explaining that the award should be equitable and just).

171. *In re Lesikar*, 285 S.W.3d at 584 (citing *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 161 (Tex. 2004)).

172. *Id.* (citations omitted).

supporting evidence.”<sup>173</sup> On the other hand, the court retains the authority to decrease the awarded attorney’s fees despite the fact-finder deeming the fees reasonable and necessary.<sup>174</sup>

Failure to request attorney’s fees at trial waives the issue on appeal.<sup>175</sup> Accordingly, an appellee that fails to offer evidence as to future attorney’s fees and does not procure a judgment thereon waives the potential right to recovery.<sup>176</sup>

173. *Id.*; see also *Bocquet*, 972 S.W.2d at 21 (citing *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (“It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, . . . or to rule without supporting evidence . . .”)); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 228 (Tex. 1991) (Gonzalez, J., concurring) (stating the burden of showing harmful error is the same regardless of whether the standard of review is “abuse of discretion” or “no evidence”).

174. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2011) (“In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.”); *Ridge Oil Co.*, 148 S.W.3d at 162 (“[C]ourts have the authority to award less than an amount determined by a jury to be reasonable and necessary and that this is a matter committed to the trial court’s sound discretion.”); *Hunt v. Baldwin*, 68 S.W.3d 117, 135 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (“The determination of the amount of attorney’s fees to be awarded under section 37.009 [of the Texas Civil Practice and Remedies Code] is a question of fact for the trier of fact[] . . . [h]owever, the determination of whether to award attorney’s fees at all is solely within the sound discretion of the trial court” (citing *Hansen v. Academy Corp.*, 961 S.W.2d 329, 333 (Tex. App.—Houston [1st Dist.] 1997, writ denied); *Leon Ltd. v. Albuquerque Commons P’ship*, 862 S.W.2d 693, 708 (Tex. App.—El Paso 1993, no writ)).

175. See TEX. R. CIV. P. 279 (“Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived.”); *Stoner v. Thompson*, 578 S.W.2d 679, 682–83 (Tex. 1979) (“A judgment must be based upon pleadings, and as this Court has stated, ‘[A] plaintiff may not sustain a favorable judgment on an unpleaded cause of action, in the absence of trial by consent . . .’” (quoting *Oil Field Haulers Ass’n, Inc. v. R.R. Comm’n.*, 381 S.W.2d 183, 191 (Tex. 1964))); *State v. Estate of Brown*, 802 S.W.2d 898, 900 (Tex. App.—San Antonio 1991, no writ) (citing *Wolters v. White*, 659 S.W.2d 885, 888 (Tex. App.—San Antonio 1983, writ dismissed) (explaining trial courts do not have authority to award attorney’s fees unless the pleadings request attorney’s fees or the legislature enacted a statute allowing such an award); *Ex parte Fleming*, 532 S.W.2d 122, 123 (Tex. Civ. App.—Dallas 1975, no writ) (“Absent a mandatory statute, a trial court’s jurisdiction to render a judgment for attorney’s fees must be invoked by pleadings, and a judgment not supported by pleadings requesting an award of attorney’s fees is a nullity.”); see also *Osterberg v. Peca*, 12 S.W.3d 31, 55–56 (Tex. 2000) (providing that a party seeking attorney’s fees must obtain a jury finding).

176. See *In re Lesikar*, 285 S.W.3d at 586 (citing *City of San Antonio v. Int’l Ass’n of Fire Fighters*, 539 S.W.2d 931, 935 (Tex. Civ. App.—El Paso 1976, no writ) (“An Appellee that does not offer any evidence as to future attorney’s fees and does not procure a finding and judgment thereon, waives any such recovery.”); *Loomis Constr. Co. v. Matijevich*, 425 S.W.2d 39, 44 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (“By not having offered any evidence as to such future attorney[s] fees and by not procuring a finding and judgment thereon, the appellee has waived any such recovery.”).

VII. COMMON FUND DOCTRINE<sup>177</sup>

A court of equity will allow a complainant to recover reasonable attorney's fees when he or she, at its own expense, maintains a successful suit that relates to the preservation, protection, or increase of a common fund.<sup>178</sup> This rule is known as the "common fund doctrine," and it is premised on the rationale that when an individual preserves or protects a common fund for the benefit of others, those who benefit should be required to bear their share of the expenses, including reasonable attorney's fees.<sup>179</sup> "The most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered."<sup>180</sup>

To ensure that those benefited make an equitable contribution for the benefits they receive, necessary expenses should be made chargeable against the protected fund.<sup>181</sup> "The nature of the benefit to non-participating members of a class that will be required for purposes of the common fund rule is inconclusive under the decisions."<sup>182</sup>

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177. In order to prevent unjust enrichment, the "common fund doctrine" provides that a fund which has been created and protected by an attorney's services should provide compensation for the attorney's successful efforts. See *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121, 1136 (10th Cir. 2011) ("The common fund doctrine is an equitable remedy originating in fiduciary law and grounded in the principles of quantum meruit and unjust enrichment."); *Knebel v. Capital Nat. Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1974) ("The rule thus invoked rests in equity and not in contract in charging a common fund with expenses, including attorneys' fees. The equitable objective is that of distributing the burden of such expenses among those who share in an accomplished benefit.").

178. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 472 (1980) ("[P]ersons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."); see also *Knebel*, 518 S.W.2d at 799 ("[A] court of equity will allow reasonable attorney's fees to a complainant who at his own expense has maintained a successful suit or proceeding for the preservation, protection, or increase of a common fund." (quoting *Brand v. Denson*, 81 S.W.2d 111, 112 (Tex. Civ. App.—Austin 1935, writ dismissed))).

179. *Knebel*, 518 S.W.2d at 799 ("The rule is founded upon the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney's fee; and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered." (quoting *Brand*, 81 S.W.2d at 112)).

180. *Id.* (quoting *Brand*, 81 S.W.2d at 112).

181. *Id.* at 800; see also *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957) ("The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits although no judgment has been obtained if they show substantial benefit to the corporation through their efforts.").

182. *Knebel*, 518 S.W.2d at 801.

## VIII. CONCLUSION

Attorneys may recoup their fees through a multitude of legal avenues, such as the Texas Probate Code,<sup>183</sup> the Texas Property Code,<sup>184</sup> and vis-a-vis our state's case law.<sup>185</sup> However, as the legislature passes new legislation and enacts corresponding statutes, it is imperative for an attorney to stay apprised of the law. By doing so, attorneys will not only be better equipped to confidently and zealously represent their clients, but will also be more likely to obtain and collect outstanding legal fees.

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183. See generally TEX. PROB. CODE ANN. §§ 12, 34A, 242, 243, 665D, 666, 667, 669, 670, 694K, 694L, 794 (West 2003) (providing for recovery of fees); PROB. §§ 665A, 665B (West 2003 & Supp. 2012) (allowing recovery of fees).

184. E.g., TEX. PROP. CODE ANN. § 114.064 (West 2011) (allowing courts to “award of costs and reasonable and necessary attorney’s fees as may seem equitable and just”).

185. See *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006) (“[F]ee claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not.”); *Burrow v. Arce*, 997 S.W.2d 229, 240–41 (Tex. 1999) (“Forfeiture of all compensation . . . [by] an attorney who commits a serious breach of fiduciary duty to a client . . . cannot fairly be said to [be] automatic . . . . [T]he remedy of forfeiture must fit the circumstances presented.”); *In re Guardianship of Glasser*, 297 S.W.3d 369, 377 (Tex. App.—San Antonio 2009, no pet.) (“The amount of compensation awarded to the [ad litem] lies within the sound discretion of the trial court . . . . A reviewing court will not overturn a fee award absent evidence showing a clear abuse of discretion.” (quoting *Brownsville–Valley Regional Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995))); *In re Guardianship of Person and Estate of A.M.K.*, No. 04-08-00268-CV, 2009 WL 1028074, at \*3 (Tex. App.—San Antonio Apr. 15, 2009, no pet.) (mem. op.) (citing PROB. § 665B(a)) (explaining the ability of applicants to recover attorney’s fees); *In re Guardianship of Fortenberry*, 261 S.W.3d 904, 913 (Tex. App.—Dallas 2008, no pet.) (discussing cases in Texas that allowed “an attorney who has rendered services on behalf of a probate estate . . . the right to file a claim as any other creditor of the estate”) (citations omitted); *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“Under the Texas Probate Code, ‘[e]ach attorney [ad litem] appointed . . . is entitled to reasonable compensation for services in the amount set by the court and to be taxed as costs in the proceeding.’” (quoting PROB. § 34A)); *Meduna v. Holder*, No. 03-02-00067-CV, 2003 WL 124214, at \*2 (Tex. App.—Austin 2003, no pet.) (mem. op.) (“[C]ompensation for an attorney who represented an applicant in guardianship proceedings must be paid by either the ‘available funds of the ward’s estate’ or ‘the county treasury.’”); *Simmons v. Harris Cnty.*, 917 S.W.2d 376, 378 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (“There is no provision in the Probate Code for the payment of attorney fees as costs under [s]ection 247, now [s]ection 669. There is no statutory or other authority for the award of such fees as costs.”); *State v. Estate of Brown*, 802 S.W.2d 898, 901 (Tex. App.—San Antonio 1991, no writ) (“It is established law in Texas that a claimant seeking an award of attorney’s fees must establish a statutory or contractual ground for the award, since attorney’s fees may not be awarded on any judicially created basis.” (citing *First City Bank–Farmers Branch v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984))); *Drake v. Muse, Currie & Kohen*, 532 S.W.2d 369, 374 (Tex. Civ. App.—Dallas 1975, writ ref’d) (providing section 243 of the Texas Probate Code allows an administrator to recover attorney’s fees for action related to “hav[ing] a will admitted to probate [or] . . . defending a will already admitted”).