

# Guardianship Issues for the Impaired Divorce Client<sup>1</sup>

Presented by:

**Sarah Patel Pacheco**

Crain, Caton & James, P.C.  
1401 McKinney Street, Suite 1700  
Houston, TX 77010  
(713) 658-2323  
Fax: (713) 658-1921

Authored by:

**Bruce D. Bain**

Bain, Files, Jarrett,  
Bain & Harrison, P.C.  
109 West Ferguson  
Tyler, Texas 75702  
903-595-3573  
Fax 903-597-7322  
[bbain@bain-files.com](mailto:bbain@bain-files.com)  
[www.bain-files.com](http://www.bain-files.com)

**THE UNIVERSITY OF TEXAS SCHOOL OF LAW  
17<sup>TH</sup> ANNUAL ESTATE PLANNING, GUARDIANSHIP  
AND ELDER LAW CONFERENCE  
August 6 – 7, 2015  
Galveston, Texas**

---

<sup>1</sup> This outline and any related presentation is for educational purposes only and is not intended to establish an attorney-client relationship or provide legal advice. And, to ensure compliance with requirements imposed by the Internal Revenue Service, the authors inform you that any discussion of U.S. federal tax contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding penalties under the internal revenue code, as amended or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter[s].

---

**Bruce D. Bain**

---

Bain, Files, Jarrett, Bain & Harrison, P.C.  
109 W. Ferguson  
Tyler, Texas 75702  
(903) 595-3573  
(903) 597-7322 fax  
[bbain@bain-files.com](mailto:bbain@bain-files.com)

**PERSONAL – The important stuff first**

Married to Martha for 20+ wonderful years, full time father of three boys as homework helper, standardized test review urger, bleacher warmer, yellor of encouragement, and ready to provide rarely asked for dating and life lesson advice (which is never well received.)

**AREAS OF PRACTICE**

Complex divorces and child custody cases. Protection of separate property and pursuit of reimbursement claims through tracing. Grandparent and third party conservatorship claims. Interstate custody conflicts and dealing with international compacts.

**LECTURER & AUTHOR (SELECTED)**

Inventory & Appraisalment, SBOT Marriage Dissolution, 101 Course - 2013  
Child Support: Contractual and Statutory; SBOT Marriage Dissolution - 2012  
Parentage and Paternity Fraud: Smith County Bar Assoc., Family Law Section - 2012  
Child Support and the Failing Economy; UT Law – Critical Thinking for Critical Issues - 2009  
Ethics: Paralegal and You – SBOT Marriage Dissolution Boot Camp – 2007  
Economic Contribution and Valuation – Texas College for Judicial Studies - 2007  
Post Judgment Issues – SBOT Ultimate Trial Notebook: Family Law – 2006  
Motions in Limine – SBOT Family Law Basic Training – 2005  
New Grievance Procedures – Smith County Bar Assoc. - 2004  
When Disaster Strikes – SBOT Advanced Family Law 2003  
Recent Cases and Legislation - Smith County Bar Assoc., Family Law Section – 2002, 2003  
Current Issues in Family Law – Tyler Area Association of Legal Professionals - 2003  
Texas Private Schools: Family Law Issues and School Responsibility - 2002  
Economic Contribution – Texas Panhandle Family Law Assoc. - 2002  
Modification of Custody – SBOT – Pro Bono Project - 2001

**PROFESSIONAL ASSOCIATIONS**

Board Certified – Family Law – Texas Board of Legal Specialization - 2001- present  
SBOT – Family Law Council – 2011 - present  
Texas Academy Family Law Specialists – Member (Prior Board of Director)  
Texas Pattern Jury Charge – Family 2001-2007  
SBOT – Family Law Practice Manual Committee – 2006 - 2008  
SBOT Grievance Committee – District 2A - 2003 – 2009 (Prior Chairman)  
Unauthorized Practice of Law Committee – Texas Supreme Court – 2001 - current  
Smith County Bar Association – President 2005-2006; Vice President 2004-2005; Secretary 2002-2003; Director 2001-2002  
Smith County Bar Foundation – President 2007-2008; Director, 2005-2007

**I AM MORE THAN THE ABOVE...**

But it is immaterial for now and please review the paper and listen to the presentation.

SARAH PATEL PACHECO  
Crain, Caton & James, P.C.  
1401 McKinney, 17th Floor  
Houston, Texas 77010  
[spacheco@craincaton.com](mailto:spacheco@craincaton.com)  
(713) 658-2323

Sarah Patel Pacheco is a shareholder with the law firm of Crain, Caton & James, P.C., in Houston, Texas, where she generally limits her practice to litigation, administration and tax issues relating to estate, trust, guardianship and related fiduciary appointments. She was elected its President in 2008. She received her Doctor of Jurisprudence in May 1993 from Southern Methodist University, School of Law, Dallas, Texas, and undergraduate degree in accounting in May of 1990 from the University of Texas at Arlington. She is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization.

She is a co-author of the West Publishing's Texas Probate Practice Guide and West Publishing's Texas Wills, Trusts and Estate Planning Practice Guide, and the Editor of the Second and Third Editions of the State Bar of Texas' Guardianship Manual.

She served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term. In 2011, she was appointed to the State Bar of Texas Pattern Jury Charge Oversight Committee. She has served as the course director for the State Bar of Texas 2003 and 2011 Building Block of Wills, Trusts and Estate Planning Courses, 2005 Nuts and Bolts of Wills, Trusts and Estate Planning Course, the 2006 Advanced Estate Planning and Probate Course, the 2011 Advanced Guardianship and Elder Law Course and the 2013 Annual Advanced Estate Planning Strategies Course. In addition, she has served on numerous additional CLE planning committees. She is a frequent author and speaker for various state and local professional organizations. She was awarded the Standing Ovation Award for 2011 by the staff of TexBarCLE.

She remains active in various local and state legal organizations including: Houston Bar Association, Probate, Trust & Estates Section; Chair 2009-2010: CLE Committee; Co-Chair 2008-2009, Institutes Subcommittee Co-Chair 2006-2007: Judicial Polls Committee; 2008-2010: Houston Bar Foundation, Fellow (elected 2004): Houston Young Lawyers Association; Fellow (2000) & Co-Chair of Elder Law Committee (1998-2003): Texas Young Lawyers Association; Needs of Senior Citizens Committee (1999-2003): Generation-X Estate Planning Forum; Member (1999-present): American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member (1993-present).

She has been repeatedly selected as a Texas Super Lawyer and before that a Texas Rising Star by Texas Monthly Magazine, including as One of the Top 50 Female Texas Super Lawyers and One as the Top 100 Houston Super Lawyers. She has also been named a Top Lawyer in Houston, one of the Best Lawyers Under 40 by H Texas Magazine, and as a Top Lawyer in Houston by Houston Magazine. And, she has been selected as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates annually since 2012. In 2014, she has been named as Best Lawyers' 2014 Houston Litigation - Trusts and Estates "Lawyer of the Year."

## Table of Contents

I.	INTRODUCTION .....	1
II.	GUARDIANSHIP OVERVIEW .....	1
A.	Guardianship Of The Person v. Estate .....	1
1.	Guardianship of the Person .....	1
2.	Guardianship of the Estate .....	2
B.	Temporary v. Permanent Guardianships .....	2
1.	Temporary Guardianships .....	2
2.	Permanent Guardianships .....	2
C.	Choice of Courts .....	2
III.	DIRECT CLIENT ISSUES .....	3
A.	Duty to Report Abuse of Elderly .....	3
B.	Death During Divorce .....	3
C.	New Will And Trust Designations .....	4
D.	Death After Divorce .....	4
E.	Deposition Of The Impaired Client .....	4
IV.	INCAPACITY WITH DIVORCE .....	4
A.	Divorce .....	4
1.	Seek Authority for Ward To Divorce .....	4
2.	Challenging Attorney's Standing to Represent Ward .....	5
B.	Death During the Divorce .....	5
1.	Homestead .....	5
2.	Family Allowance .....	5
3.	Death During Divorce Article .....	6
C.	Annulment .....	6
D.	Putative Spouse .....	6
V.	SECTION 142 TRUSTS .....	7
A.	Background And General Information .....	7
B.	Mandatory 142 Trust Provisions .....	8
C.	Optional 142 Trust Provisions .....	8
D.	Additional Drafting Considerations For 142 Trusts .....	9
VI.	SECTION 1301 MANAGEMENT TRUSTS .....	10
A.	Background And General Information .....	10
B.	Required Terms For 1301 Management Trusts .....	10
C.	Optional 1301 Management Trust Provisions .....	11
D.	Additional Drafting Considerations For 1301 Management Trusts .....	12
VII.	SPECIAL NEEDED TRUSTS .....	12
VIII.	CHILDREN SUPPORT ARREARS AND DISCLAIMERS .....	12
IX.	BIBLIOGRAPHY .....	13

## **GUARDIANSHIP AND THE IMPAIRED DIVORCE CLIENT**

### **I. INTRODUCTION**

As America grays, so do our clients. The Baby Boomers begin to reach age 70 starting next year, and their large numbers necessitate our business models to pay attention to their needs. And their needs through divorces will include more and more in guardianship and probate matters.

Tie the Baby Boomer's aging population to the high rates of divorce and remarriage, the divorce of an aging blended family becomes ever more complicated. Retirement fund values are creeping back up, more double income houses, children having children and grandparents (both biological and step-grandparents) raising grandchildren continue to stress the second marriage relationships. As such, more divorces will occur with our older population which may include the incapacity of one of the parties. And step-children will get involved and claim incapacity of their biological parent. This paper will provide guidance on the issues presented.

As you assist your older clients in divorce, consider enlisting the aid of regular practitioner in the estate and probate arena. The overlap of trusts' unique requirements, of the Estates Code intricacies and the long term effects of money management require some extra research and prior proper planning.

But don't forget that the planning purposes evident for the older client who is ill are also relevant to a young client if they were to pass away unexpectedly. Many of the appellate cases we utilize went up on appeal because of the unexpected death of a party in the middle of a divorce. So prepare to be the first source of contact with family members if your client dies during the divorce and be able to explain that all precautions have been done to protect your client's assets. Also, prepare for the claim of incapacity and need for guardianship being advanced by a child for their parent as a divorce looms.

### **II. GUARDIANSHIP OVERVIEW**

Historically a person subject to a guardianship was presumed to lose his or her rights to engage in most transactions and make

most decisions. Since at least 1993, under Section 1151.001, 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. *See* TEX. ESTATES CODE § 1151.001.

When a guardianship is potentially needed, there are differing standards of review depending upon which issue is of concern for the prospective ward. As such you need to recognize there are differing applicable standards of capacity as relates to financial transactions, as to need of a full or temporary guardianship, or the capacity to execute testamentary instruments. This article does not address each issue, but if your client's conduct is being called into question, it is important to know what specific allegations are asserted and what conduct is being questioned. Generally, a guardianship is either for the person and/or the estate.

#### **A. Guardianship Of The Person v. Estate**

##### **1. Guardianship of the Person**

Section 1151.051 grants the guardian of the person the right and duty to provide care to and control of the person, subject to any limitations set by the court. Specifically, Section 1151.051(c) provides that the guardian of the person has the right to have physical possession of the person and to establish the person's legal domicile, the duty of care, control, and protection of the person and to provide the person with clothing, food, medical care, shelter, and the power to consent to medical, psychiatric, and surgical treatment *other than* in-patient psychiatric commitment of the person. *See* TEX. ESTATES CODE § 1151.051(c).

If a person is found to lack the capacity to handle any of his personal matters, the guardian would have full authority to handle such matters and the person is presumed to have no legal right to make such decisions. If, however, a person is not found to be totally incapacitated (either expressly by the court or pursuant to the current presumption) to handle his personal affairs, a person retains all civil rights and powers not expressly revoked or granted to a guardian of his person. *See* TEX. ESTATES CODE § 1101.152.

## Guardianship and the Impaired Divorce Client

### 2. Guardianship of the Estate

Section 1151.101 provides that a guardian of the estate is entitled to the possession and management of all property belonging to the person, to collect all debts, rentals, or claims that are due to the person, to enforce all obligations in favor of the person, and to bring and defend suits by or against the person, subject to the provisions of the Estates Code. TEX. ESTATES CODE § 1151.101.

Similarly to the guardian of the person, if a person is found to lack the capacity to handle any and all of his or her financial matters, the guardian would have full authority to handle such matters and the person is presumed to have no legal right to bind his estate. If, however, a person is not found to be totally incapacitated (either expressly by the court or pursuant to the current presumption) to handle his estate, a person may retain certain civil rights and powers relating to his estate. *See* TEX. ESTATES CODE § 1151.051.

### **B. Temporary v. Permanent Guardianships**

#### 1. Temporary Guardianships

In certain limited circumstances, a court may appoint a temporary guardian if it is presented with substantial evidence<sup>1</sup> that a person *may* be incapacitated and it has probably cause to believe person or his or her estate requires the immediate appointment of a guardian. TEX. ESTATES CODE § 1251.001 *et seq.* The intended purpose of a temporary guardianship is to protect the person's health and well-being, and/or preserve the estate until it can pass into the hands of a permanent guardian, the situation giving rise to the temporary guardianship is resolved by a less restrictive alternative, or the court has the opportunity to determine whether the person is not incapacitated.

To balance the civil rights of the person alleged to be incapacitated with the ability to protect him or her, the Estates Code limits both the circumstances under which a temporary guardian can be appointed and the powers and duties of the temporary guardian. A court is only to grant a temporary guardian those powers and duties that are necessary to protect the respondent against the imminent danger shown. TEX. ESTATES CODE § 1251.010(B). Even following a temporary guardian's appointment, the person

subject to a temporary guardianship is *not* presumed to be incapacitated. TEX. ESTATES CODE § 1251.002.

#### 2. Permanent Guardianships

The majority of guardianships are permanent guardianships. A permanent guardianship requires that a court find, by clear and convincing evidence, that (i) the person is an incapacitated person; (ii) it is in the best interest of the person to have the court appoint a person as guardian of the person; and (iii) the rights of the person or the person's property will be protected by the appointment of a guardian. *See* TEX. ESTATES CODE § 1101.001 *et seq.* Before appointing a permanent guardian, the court must also find by a preponderance of the evidence that an adult person is totally without capacity to care for himself and to manage the individual's property, or the individual 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. TEX. ESTATES CODE § 1101.101. If the need for a guardianship is disputed, the proposed ward is entitled to a trial, either to the court or (if he requests) to a jury. TEX. ESTATES CODE § 1101.052. Upon the conclusion of the trial, the court may appoint a permanent guardian of the individual's person and/or estate with either full or limited authority. TEX. ESTATES CODE § 1101.151.

### **C. Choice of Courts**

If a spouse is a ward in a guardianship proceeding, the spouse with capacity may seek a divorce in district court and transfer the proceeding to the guardianship court or file the divorce proceeding directly in the guardianship court if it is pending in a statutory probate court. TEX. ESTATES CODE CH. 1022; *In Re Graham*, 971 S.W. 2d 56 (Tex. 1998). If the spouse with capacity is serving as the guardian of the other spouse, he or she will no longer be able to serve as guardian and will need to request the appointment of a successor guardian.

*In re Graham* is significant in that it forced the Texas Court of Appeals to recognize the expanded jurisdiction of statutory probate courts. The Texas Supreme Court outlined the statutory probate court's jurisdiction and defined "appertaining to or incident to" an estate. *Graham*, 971 S.W.2d at 59. More importantly, it held that the probate court can effectively and

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Guardianship Issues for the Impaired Divorce Client

Also available as part of the eCourse

[2015 Guardianship Bundle for Attorneys Ad Litem](#)

First appeared as part of the conference materials for the  
17<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Guardianship Issues for the Impaired Divorce Client"