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TOP TEN MISTAKES IN GUARDIANSHIP LITIGATION.

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I. SCOPE OF ARTICLE

This article discusses issues frequently encountered by practitioners involved in contested guardianship matters. Failure to consider these matters can lead to costly mistakes. The article attempts to address these issues from both the technical side, i.e., any statutory and common-law requirements, and the practical side, i.e., the authors' observations, suggestions, and experiences.

All references to sections will refer to the Texas Estates Code unless otherwise noted.

II. MISTAKE NUMBER ONE: FAILING TO CONSIDER PRE-APPEARANCE ISSUES AND OPTIONS

A. Decide Who You are Going to Represent

An attorney is often approached to represent one or more persons relating to a guardianship. However, the first person to contact the attorney may or may not be the proposed client. Often a child calls on behalf a parent/proposed ward who seeks to contest the guardianship. Likewise, an agent under a power of attorney may seek to engage counsel for the principal/proposed ward. Alternatively a child or agent may be seeking to engage counsel to represent the child or agent, rather than the proposed ward. Who the client is can have a significant impact on future challenges to the right to represent (i.e., through a Rule 12 Motion) and the right to be paid (i.e., to be found in good faith). Therefore, the attorney should carefully consider who would be his or her client. A brief discussion of the most common situations follows.

1. ATTORNEY RETAINED DIRECTLY TO REPRESENT PROPOSED WARD

In all civil cases, a party is generally entitled to represent him or herself or to be represented by an attorney. *See* TEX. R. CIV. P. 7. When, however, the central issue in the civil case is whether the client has the legal capacity to handle his or her affairs, as in a guardianship proceeding, the right to retain counsel must be considered in conjunction with the proposed ward's ability to understand the act of retaining counsel. When the proposed ward is the client, the attorney must personally meet the potential client to determine whether the potential client appears to be

acting independently, understands that he or she is seeking to retain the attorney for representation, is generally oriented to time, place and person, and understands the basic financial arrangement and resulting obligations. If the court has appointed an attorney ad litem, it is suggested that he or she be advised of the potential representation as the proposed ward's court appointed counsel.

Note that effective January 1, 2014, Section 1054.006 was added to confirm when a ward or proposed ward can select his or her counsel instead of electing to use a court appointed attorney ad litem. New Section 1054.006 provides as follows:

(a) The following persons may at any time retain an attorney who holds a certificate required by Subchapter E to represent the person's interests in a guardianship proceeding instead of having those interests represented by an attorney ad litem appointed under Section 1054.001 or another provision of this title:

(1) a ward who retains the power to enter into a contract under the terms of the guardianship, subject to Section 1202.103; and

(2) a proposed ward for purposes of a proceeding for the appointment of a guardian as long as the proposed ward has capacity to contract.

(b) If the court finds that the ward or the proposed ward has capacity to contract, the court may remove an attorney ad litem appointed under Section 1054.001 or any other provision of this title that requires the court to appoint an attorney ad litem to represent the interests of a ward or proposed ward and appoint a ward or a proposed ward's retained counsel.

TEX. ESTATES CODE § 1054.006.

Because of the requirements of Section 1054.006, it may be advisable to seek the opinion of the proposed ward's physician or a doctor qualified to render a medical opinion regarding the proposed ward's capacity to enter into a contract. If possible, the doctor should reduce his or her opinions to writing. The attorney can use the medical opinion to establish that he or she was in "good faith" in representing the proposed ward, even if he or she is not successful in defeating the guardianship. *See* TEX. R. CIV. P. 7.; *Oldham v. Calderon*, No. 14-95-01426-CV, 1998 WL

104819 (Tex. App.—Houston [14th Dist.] 1998, no writ) (not designated for publication); *Price v. Golden*, 2000 WL 1228681, No. 03-99-00769-CV (August 31, 2000) (not designated for publication)(provides good discussion of proposed ward's right to be represented by counsel of her own selection and payment of such attorney's fees).

2. ATTORNEY RETAINED TO REPRESENT PROPOSED WARD VIA PROPOSED WARD'S ATTORNEY-IN-FACT

Furthermore, the attorney may be retained on behalf of the proposed ward via his or her attorney-in-fact. Even if the proposed ward is later proved to be incapacitated, the fee contract is *voidable*, not void. See *Price v. Golden*, 2000 WL 1228681. In *Price*, the proposed ward's attorney-in-fact engaged an attorney to defend the proposed ward in a contested guardianship matter. The trial court also appointed an ad litem who denied the need for a guardianship. After a settlement was reached which resulted in the appointment of a guardian, the attorney filed an application seeking payment of his attorney's fees and expenses, from her estate. The trial court awarded the attorney a majority of the requested fees and expenses and the appointed guardian appealed the trial court's order arguing that there was no enforceable contract for legal services or statutory authority to award attorney's fees. He also argued that the ward lacked capacity to hire the attorney and thus the attorney fee contract was void. The appellate court held that the proposed ward's then acting attorney-in-fact was legally authorized to retain the attorney under the power of attorney for the principal and to pay him the requested retainer. The court further held the contract was voidable at the election of the incapacitated person or someone authorized to act on his or her behalf but was not *automatically* void. *Id.* Thus, the contract continues until active steps are taken to either disaffirm it or find it voidable.

3. ATTORNEY RETAINED TO REPRESENT PROPOSED WARD'S ATTORNEY-IN-FACT

Furthermore, an attorney may be retained to represent a proposed ward's agent under a valid power of attorney. The agent may seek to intervene in his or her fiduciary capacity on the basis that a least restrictive alternative exists to a guardianship. The attorney should clarify in his or her fee agreement that the agent, rather than the principal, is the client. Furthermore, the attorney should advise the agent that the agent should be prepared to account for his or her actions under the

power of attorney to avoid claims of disqualification under Chapter 1104. See TEX. ESTATES CODE § 1104.351 *et seq*; see discussion *infra*.

4. ATTORNEY RETAINED BY APPLICANT

When an attorney is to be retained by an applicant for guardianship, it is suggested that the attorney confirm that he or she has not previously represented the proposed ward. Once the application is filed, the attorney will be representing a person in a proceeding that may be adverse to the proposed ward. Therefore, an attorney who represents a proposed ward and then represents a person seeking to establish a guardianship on his or her former client faces claims of conflict of interest and disqualification. The attorney should also confirm that the client is not disqualified. See discussion *infra*.

B. Reach a Clear Understanding Regarding Payment of Fees and Expenses

Although seemingly simplistic, an attorney should reach a clear understanding with his or her client regarding who is responsible for the payment of the legal fees relating to the guardianship proceeding. In a guardianship proceeding, reasonable and necessary attorneys' fees may be charged against the ward's estate; or, if the estate is insufficient, they may be charged to the county under Section 1155.054 of the Estates Code. See *Nelkin v. Panzer*, 833 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1992, writ dismissed w.o.j.). Section 1155.054 of the Texas Estates Code provides that "[t]he court may authorize amounts that otherwise would be paid from the ward's estate or the management trust as provided by Subsection (a) to instead be paid from the county treasury, subject to Subsection (e), if: (1) the ward's estate or management trust is insufficient to pay the amounts; and (2) funds in the county treasury are budgeted for that purpose." TEX. ESTATES CODE § 1155.054 (recent amendments emphasized). Further, a private attorney who defends the proposed ward in the guardianship proceeding may also seek payment of attorneys' fees and expenses from the ward's estate. See discussion *infra*.

The ability to request payment of an attorney's fees and expenses from a proposed ward's estate should not be seen as a guarantee of payment. The presiding court may find that the fees are not reasonable, particularly after a lengthy contest, or find that the applicant did not act in good faith. Furthermore, a client may be less inclined to engage in protracted litigation if he or she faces the possibility of having to pay the attorneys' fees and expenses pending the resolution of the

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