

**TEN COMMON CONUNDRUMS:
LITIGATION ISSUES ARISING
DURING GUARDIANSHIP PROCEEDINGS**

BY:

**SARAH PATEL PACHECO¹
CRAIN, CATON & JAMES, P.C.
1401 MCKINNEY ST., SUITE 1700
HOUSTON, TX 77010
spacheco@craincaton.com
713-752-8630**

The University of Texas School of Law
20th Annual
Estate Planning Guardianship and Elder Law Conference
August 9 – 10, 2018
Moody Gardens Hotel – Galveston, TX

¹ This outline and any related presentation are for educational purposes only and are not intended to establish an attorney-client relationship or provide legal advice.

TABLE OF CONTENTS

I. SCOPE OF ARTICLE..... 1

II. CONUNDRUM NUMBER 1: PROPER JURISDICTION AND VENUE..... 1

A. Definition of a Guardianship Proceedings 1

B. Jurisdictional Conflicts Between Family Court and Probate Court 2

 1. CONTESTED GUARDIANSHIP OF MINOR’S PERSON 2

 2. CONTESTED GUARDIANSHIP OF ADULT DISABLED CHILD 2

C. Assignment of a Statutory Probate Judge 3

 1. FORM AND TIMING OF REQUEST 3

 2. PROPER PLACE FOR HEARING HELD BY ASSIGNED STATUTORY PROBATE JUDGE..... 3

D. Anticipate Continued Resistance To Statutory Probate Courts’ Jurisdiction Over Related Matters 3

 1. OVERVIEW 3

 2. IDENTIFY MATTERS RELATING TO A GUARDIANSHIP PROCEEDING 3

 3. PREPARE FOR ‘VENUE’ CHALLENGES 4

 4. TRANSFERS TO STATUTORY PROBATE COURTS – THE DEBATE GOES ON..... 4

 5. TRANSFERS *FROM* STATUTORY PROBATE COURT 5

E. Recognize that a Probate Court’s Jurisdiction May Be Limited After Ward’s Restoration or Death..... 5

 1. OVERVIEW 5

 2. PROBATE COURT JURISDICTION GENERALLY 5

 3. SECTION 1021.001 5

 4. TRANSFERS FROM GUARDIANSHIP COURT 5

III. CONUNDRUM NUMBER 2: WHO IS THE ATTORNEY’S CLIENT 6

IV. CONUNDRUM NUMBER 3: THE EXTENT OF A WARD’S ABILITY TO EXERCISE CERTAIN PERSONAL RIGHTS DURING A GUARDIANSHIP 7

A. General Overview 7

B. Wills & Similar Estate Planning Documents 7

 1. General Overview 7

 2. Seeking Permission/Clarification for Ward to Execute a Will 8

 3. Ward’s Right to Engage Counsel..... 8

C. Marriage..... 8

 1. General Overview 8

 2. Seeking Permission/Clarification of Ward’s Right to Marry..... 9

 3. Consider Negotiating a Premarital Agreement 9

D. Divorce..... 10

 1. General Overview 10

 2. Seek Authority for Ward To Divorce 10

E. Seeking Restoration 11

 1. Ward’s Right To Seek Restoration 11

 2. Ward’s Right To Engage Counsel To Seek Restoration..... 12

V. CONUNDRUM NUMBER 4: FAILING TO CONSIDER ABILITY AND LIMITS OF WARD’S RIGHT TO HIRE PRIVATE COUNSEL..... 12

A. Overview 12

B. Ward’s Right To Retain Private Counsel..... 12

 1. BASIS OF AUTHORITY 12

2.	CONSIDERATIONS BEFORE ACCEPTING REPRESENTATION	12
C.	Challenging Attorney’s Standing to Represent Ward.....	13
1.	TEXAS RULE OF CIVIL PROCEDURE 12.....	13
2.	REALITIES OF RULE 12 MOTIONS.....	13
D.	Effect on Determination of Lack of Capacity on Contract	13
1.	Effect of Inability to Overcome Presumption of Incapacity	13
2.	Contract Voidable Not Void	14
E.	Payment of Legal Fees.....	14
F.	Claim of Ineffective Assistance of Counsel.....	14
VI.	CONUNDRUM NUMBER 5: FAILING TO UNDERSTAND WHAT IS TRIABLE TO A JURY	15
A.	Overview.....	15
1.	AUTHORITY PURSUANT TO TEXAS ESTATES CODE	15
2.	AUTHORITY PURSUANT TO TEXAS CONSTITUTION.....	15
B.	Issues Which May Not Be Tried To a Jury.....	15
1.	RULE 12 MOTIONS.....	15
2.	TEMPORARY GUARDIANSHIP	16
3.	ADMINISTRATIVE ISSUES.....	16
C.	Issues Which May Be Tried to Jury.....	17
1.	CAPACITY.....	17
D.	Whether To Request a Jury.....	17
1.	ISSUE OF CAPACITY	17
a.	Seeking to Prove Incapacity.....	17
b.	Seeking to Prove Capacity	17
2.	RIGHT TO SERVE	17
a.	Spouse.....	17
b.	Others.....	18
3.	OTHER ISSUES.....	18
E.	Number of Jurors	18
VII.	CONUNDRUM NUMBER 6: CAN A WARD BE COMPELLED TO TESTIFY.....	18
VIII.	CONUNDRUM NUMBER 7: CAN A WARD BE CRIMINALLY PROSECUTED	18
IX.	CONUNDRUM NUMBER 8: SEEKING AND OBJECTING TO FEES & EXPENSES.....	18
A.	Fees Relating to Appointment of Guardian.....	18
1.	GENERAL RULE	18
2.	PLEAD GOOD FAITH AND JUST CAUSE.....	20
3.	FORM OF REQUEST	20
4.	EVIDENTIARY REQUIREMENTS.....	20
5.	ASSESSMENT OF FEES.....	21
6.	OBJECTIONS TO FEES.....	21
B.	Motion for Security for Costs	21
C.	Fees Relating to Administration of Guardianship Estate	21
1.	GENERAL RULE	21
2.	FORM OF REQUEST	21
X.	CONUNDRUM NUMBER 9: MEDIATION AND SETTLEMENT	22
A.	General Overview	22
B.	Reasons to Mediate	22
C.	Getting to Mediation.....	22
D.	Ethical Issues in Mediation.....	22

1. GOOD FAITH 22

2. MAINTAINING CLIENT CONFIDENCES..... 23

E. Section 1055.151 Mediation of Contested Guardianship Proceedings..... 23

F. Sample Checklists for Settlement in Mediation..... 24

XI. CONUNDRUM NUMBER 10: IS THE ORDER INTERLOCATORY OR FINAL..... 26

A. Overview 26

B. The *Crowson* Standard 26

C. Final Orders 27

1. STANDING 27

2. ORDER APPOINTING A GUARDIAN..... 27

3. ORDER FINDING APPLICANT UNSUITABLE..... 27

4. ORDER APPROVING ATTORNEYS FEES - MAYBE 27

5. ORDER AUTHORIZING GUARDIAN TO SEEK DIVORCE FOR WARD 28

6. ORDER CONTINUING AD LITEM’S APPOINTMENT 28

7. ORDER HOLDING PROPOSED WARD HAD CAPACITY TO RETAIN
COUNSEL 28

8. ORDER CONFIRMING OR DISAPPROVING SALE OF REAL PROPERTY 28

9. ORDER BARRING CLAIM AGAINST GUARDIANSHIP ESTATE 28

D. Interlocutory Orders 29

1. ORDER TRANSFERRING BUSINESS OF GUARDIANSHIP 29

2. ORDER TRANSFERRING LAWSUIT TO GUARDIANSHIP 29

3. ORDER DENYING STANDING CHALLENGE..... 29

4. ORDER APPOINTING GUARDIAN AD LITEM TO INVESTIGATE NEED FOR
GUARDIANSHIP IS INTERLOCUTORY..... 29

5. ORDER DENYING A MOTION TO DISMISS 29

E. When In Doubt File Notice Of Appeal 30

F. Pursue all Claims Against A Guardian Before Approval of Such Guardian’s Final Account..... 30

THE CONUNDRUMS: WHEN GUARDIANSHIP ADMINISTRATION TURNS INTO LITIGATIONSHIP

I. SCOPE OF ARTICLE

This article discusses issues frequently encountered by practitioners related to litigation in guardianship matters. Failure to consider these issues can lead to costly mistakes. The article attempts to address these commonly encountered 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. CONUNDRUM NUMBER 1: PROPER JURISDICTION AND VENUE

A. Definition of a Guardianship Proceedings

Effective January 1, 2014, Section 1002.015 defines a guardianship proceeding as follows:

The term "guardianship proceeding" means a matter or proceeding related to a guardianship or any other matter covered by this title, including:

- (1) appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child;
- (2) application, petition, or motion regarding guardianship or an alternative to guardianship under this title;
- (3) a mental health action; and
- (4) application, petition, or motion regarding a trust created under Chapter 1301.

TEX. ESTATES CODE § 1002.015.

Likewise, the provisions defining matters relating to guardianship proceedings was also expanded in Section 1021.001. Section 1021.001 now defines matters relating to guardianship proceedings as follows:

- (a) For purposes of this code, in a county in which there is *no statutory probate court*, a matter related to a guardianship proceeding includes:

- (1) the granting of letters of guardianship;
- (2) the settling of an account of a guardian and all other matters relating to the settlement, partition, or distribution of a ward's estate;
- (3) a claim brought by or against a guardianship estate;
- (4) an action for trial of title to real property that is guardianship estate property, including the enforcement of a lien against the property;
- (5) an action for trial of the right of property that is guardianship estate property;
- (6) after a guardianship of the estate of a ward is required to be settled as provided by Section 1204.001:

(A) an action brought by or on behalf of the former ward against a former guardian of the ward for alleged misconduct arising from the performance of the person's duties as guardian;

(B) an action calling on the surety of a guardian or former guardian to perform in place of the guardian or former guardian, which may include the award of a judgment against the guardian or former guardian in favor of the surety;

(C) an action against a former guardian of the former ward that is brought by a surety that is called on to perform in place of the former guardian;

(D) a claim for the payment of compensation, expenses, and court costs, and any other matter authorized under Chapter 1155 and Subpart H, Part 2, Subtitle Z; and

(E) a matter related to an authorization made or duty performed by a guardian under Chapter 1204; and

(7) the appointment of a trustee for a trust created under Section 1301.053 or 1301.054, the settling of an account of the trustee, and all other matters relating to the trust.

(b) For purposes of this code, in a county in which there is *a statutory probate court*, a matter related to a guardianship proceeding includes:

(1) all matters and actions described in Subsection (a);

(2) a suit, action, or application filed against or on behalf of a guardianship or a trustee of a trust created under Section 1301.053 or 1301.054; and

(3) a cause of action in which a guardian in a guardianship pending in the statutory probate court is a party.

TEX. ESTATES CODE § 1021.001(emphasis added).

These Sections are important as the jurisdiction of contested guardianship proceedings are now based on these definitions. Estates Code Section 1022.003 through 1022.006 provides which court will have jurisdiction depending on if the county has a county court, county court at law and/or statutory probate court.

For example, Section 1022.005 provides that “a statutory probate court has *exclusive jurisdiction of all guardianship proceedings*, regardless of whether contested or uncontested.” TEX. ESTATES CODE 1022.005 (emphasis added). Section 1022.005 also provides that a “*cause of action related to a guardianship proceeding of which the statutory probate court has exclusive jurisdiction* as provided by Subsection (a) *must be brought in the statutory probate court* unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 1022.006 or with the jurisdiction of any other court.” *See Id.* (emphasis added).

In contrast, counties with only a county court, the court may:

- (1) request the assignment of a statutory probate court judge to hear the contested matter, as provided by Section 25.0022, Government Code; or
- (2) transfer the contested matter to the district court, which may then hear the contested matter as if originally filed in the district court.

TEX. ESTATES CODE 1022.003.

And, when the county has a county court at law, the “county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the county court at law. In addition, the judge of the county court, on the judge's own motion or on the motion of a party to the proceeding, may transfer the entire proceeding to the county court at law.” TEX. ESTATES CODE 1022.004.

B. Jurisdictional Conflicts Between Family Court and Probate Court

The overlapping jurisdiction of Texas family courts and Texas probate courts has been the subject of much discussion and debate. Unfortunately, little has been done to clarify the jurisdictional issues between

these two courts. A discussion of the most common conflicts follows.

1. CONTESTED GUARDIANSHIP OF MINOR’S PERSON

Section 1022.008 authorizes a probate judge to transfer the contested guardianship of a minor’s *person* to a court of competent jurisdiction where a suit affecting the parent/child relationship (“SAPCR”) is pending. Typically, this is in a family district court. *See* TEX. ESTATES CODE § 1022.008. While Section 1022.008 attempts to deal with conflicting issues involving the custody or right to custody of a minor, there is no similar provision relating to a contested guardianship of a minor’s *estate*. Thus, the transferring court (i.e. the probate court) retains jurisdiction over the minor ward’s estate and even over another minor who may also be the subject of the suit.

2. CONTESTED GUARDIANSHIP OF ADULT DISABLED CHILD

Jurisdictional issues often arise between the family and probate courts when a disabled child, that was previously the subject of a SAPCR, reaches majority. The primary issue is whether the family court retains jurisdiction over issues relating to the adult disabled child’s person and/or estate, or the probate court assumes jurisdiction.

Some have argued that Section 154.309 of the Texas Family Code grants the family court that originally presided over the SAPCR continuing, exclusive jurisdiction over the adult disabled child. A careful review of Section 154.309 of the Texas Family Code, addressing the possession of or access to an adult disabled child, reveals that it is located under the chapter entitled “Child Support” and the subchapter entitled “Support for a Minor or Adult Disabled Child.” It is not under the chapter of the Texas Family Code that relates to possession or access provisions. *See* TEX. FAM. CODE § 154.309. In contrast, the Texas Estates Code provides that all applications for guardianship must be filed with the court presiding over guardianship proceedings. *See* discussion *supra*.

One of a few opinions or cases to address this issue is *Garland v. Garland*, 868 S.W.2d 847 (Tex. App. – Dallas 1993, no writ). In *Garland*, a family district court appointed a managing conservator for a mentally incapacitated child which continued after the child reached the age of eighteen (18). The child’s father subsequently filed an application for guardianship in a statutory probate court in Dallas County, Texas upon the child reaching majority. The child’s mother, who

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: The Conundrums: When Guardianship Administration Turns Into Litigation

Also available as part of the eCourse

[2018 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the
20th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Conundrums: When Guardianship Administration Turns Into Litigation"