

EVIDENCE IN GUARDIANSHIP PROCEEDINGS

PAUL A. ROMANO, *Sugar Land*
Romano & Sumner, PLLC

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | SCOPE OF THE ARTICLE..... | 1 |
| II. | PROCEDURES FOR INTRODUCING EVIDENCE | 1 |
| A. | Laying the Foundation..... | 1 |
| 1. | In General | 1 |
| 2. | Laying Foundation on Direct Examination | 1 |
| 3. | Laying Foundation on Cross-Examination..... | 1 |
| B. | Handling Exhibits..... | 2 |
| III. | PRESERVING CLAIMS OF ERROR..... | 2 |
| A. | Pre-Trial Motion in Limine | 2 |
| B. | Objections at Trial | 3 |
| C. | Motions to Strike at Trial | 3 |
| D. | Taking a Witness on Voir Dire..... | 3 |
| E. | Offer of Proof..... | 4 |
| F. | Limiting Instruction..... | 4 |
| IV. | PRIVILEGES & COMPROMISE OFFERS | 4 |
| A. | Introduction | 4 |
| B. | Privileges..... | 4 |
| 1. | Invoking a Privilege..... | 4 |
| 2. | Waiver of a Privilege..... | 5 |
| 3. | Specific Privileges Relevant to Guardianships..... | 5 |
| C. | Compromise Offers | 7 |
| V. | AUTHENTICATION OF EVIDENCE..... | 8 |
| A. | Threshold Requirements..... | 8 |
| B. | Documents..... | 8 |
| 1. | Private Writings..... | 8 |
| 2. | Business Writings..... | 10 |
| 3. | Official and Public Writings..... | 11 |
| C. | Electronic Evidence..... | 11 |
| 1. | Email Transmissions..... | 11 |
| 2. | Text Messages | 12 |
| 3. | Social Media | 14 |
| D. | Oral Statements, Recordings, and Telephone Conversations | 14 |
| 1. | Oral Statements..... | 14 |
| 2. | Audio & Video | 15 |
| E. | Demonstrative Evidence..... | 15 |
| F. | Real or Original Evidence | 15 |
| G. | Photographs & Videos..... | 16 |
| H. | Other Methods for Authentication..... | 16 |
| 1. | Self-Authenticating Documents | 16 |
| 2. | Deposition on Written Questions..... | 17 |
| 3. | Request for Admissions..... | 17 |
| 4. | Stipulations | 17 |
| 5. | Admission Through Expert | 17 |
| I. | Best Evidence (Original Writing) Rule | 17 |
| 1. | Introduction | 17 |
| 2. | Best Evidence Rule Doesn't Apply | 18 |
| 3. | "Original" or "Duplicate" | 19 |
| 4. | Admissible Secondary Evidence | 20 |
| 5. | Voluminous Records | 23 |
| VI. | WITNESS TESTIMONY | 23 |

| | | |
|--------------|---|----|
| A. | Determining Competency | 23 |
| 1. | Introduction | 23 |
| 2. | “Insane Persons” | 23 |
| 3. | Children | 24 |
| 4. | Personal Knowledge | 25 |
| 5. | The Dead Man’s Rule | 25 |
| B. | Credibility | 26 |
| 1. | Credibility Evidence Generally | 26 |
| 2. | Bolstering Witnesses before Impeachment | 26 |
| 3. | Impeachment of a Witness | 26 |
| 4. | Rehabilitation of Witness after Impeachment | 31 |
| C. | Character, Habit, and Other Acts Evidence | 32 |
| 1. | Character Evidence | 32 |
| 2. | Habit Evidence | 34 |
| 3. | Evidence of Crimes or Other Acts | 34 |
| D. | Opinion Evidence | 35 |
| 1. | Introduction | 35 |
| 2. | Lay Opinions | 35 |
| 3. | Expert Opinions | 36 |
| VII. | HEARSAY | 40 |
| A. | Introduction | 40 |
| B. | Defining Hearsay | 41 |
| 1. | Hearsay – General Definition | 41 |
| 2. | Definition of a “Statement” | 41 |
| 3. | Definition of “Out-of-Court Declarant” | 42 |
| 4. | Offered to Prove the “Truth of the Matter Asserted” | 42 |
| C. | Exemptions from the Hearsay Rule | 44 |
| 1. | Exemptions in General | 44 |
| 2. | Declarant Witness’s Prior Statement | 44 |
| 3. | Statements by an Opposing Party | 45 |
| 4. | Deposition Exemption | 46 |
| D. | Exceptions to Hearsay | 47 |
| 1. | Exceptions Based on Reliability | 47 |
| 2. | Exceptions to Hearsay Based on Unavailability | 54 |
| E. | Impeaching/Rehabilitating Hearsay Declarant | 55 |
| 1. | Absent Hearsay Declarant | 55 |
| 2. | Hearsay Declarant Witness Called by Opponent – Bias | 57 |
| VIII. | EVIDENTIARY RULES IN THE ESTATES CODE | 57 |
| A. | TEC 54.051. Applicability of Certain Rules Relating to Witnesses and Evidence | 57 |
| B. | TEC 1055.101. Applicability of Certain Rules Relating to Witnesses and Evidence | 57 |
| C. | TEC 1055.102. Use of Certain Records as Evidence. | 57 |
| D. | TEC 1101.101. Findings and Proof Required. | 58 |
| E. | TEC 1101.102. Determination of Incapacity of Certain Adults: Recurring Acts or Occurrences. | 58 |
| F. | TEC 1101.103. Determination of Incapacity of Certain Adults: Healthcare Provider Examination | 58 |
| G. | TEC 1101.106. Evidence of Necessity of Guardianship to Receive Governmental Funds..... | 58 |
| H. | TEC 1104.151-158. Written Declaration By Certain Parents To Appoint Guardian For Their Children | 58 |
| I. | TEC 1104.201-1104.212. Written Declaration to Designate Guardian Before Need Arises | 58 |
| J. | TEC 1106.005. Effect of Letters or Certificate (of Guardianship)..... | 59 |
| K. | TEC 1154.151. Use of Inventory, Appraisement, and List of Claims as Evidence | 59 |
| L. | TEC 1157.062. Lost or Destroyed Evidence Concerning Claim..... | 59 |
| IX. | OBJECTING TO EVIDENCE – THE BIG TWELVE | 59 |
| | BIBLIOGRAPHY | 60 |

EVIDENCE IN GUARDIANSHIP PROCEEDINGS

I. SCOPE OF THE ARTICLE

This article is intended to help you prepare for the rules of evidence that are most likely to come into play at a contested guardianship hearing or trial. Any rule of evidence that you might possibly encounter in a contested guardianship or a matter related to guardianships (such as a Motion in Limine hearing, a request for accounting from an agent under durable power of attorney pursuant to 751.251(a) of the Texas Estates Code, a claim for breach of fiduciary duty against a guardian, etc.) is addressed in this paper. If in the author's opinion a rule of evidence is very unlikely to be needed in a guardianship proceeding, then it has not been addressed.

Any reference to a "Rule" refers to the Texas Rules of Evidence. Any reference to "TEC" refers to the Texas Estates Code.

II. PROCEDURES FOR INTRODUCING EVIDENCE

A. Laying the Foundation

1. IN GENERAL

Laying a foundation under the Texas Rules of Evidence involves establishing the admissibility of evidence by demonstrating its relevance and reliability to the court. The party introducing the evidence must prove that it is what it claims to be, is material to the case, and is sourced in a way that maintains its integrity and trustworthiness. For documentary evidence, this might involve proving its authenticity. For witness testimony, the witness must be qualified to speak on the subject, and their testimony must be based on personal knowledge. When introducing expert testimony, the foundation must show that the expert is qualified by knowledge, skill, experience, training, or education, and that the methodology used is reliable and relevant to the issues at hand. The foundational requirements ensure that the evidence presented is both credible and fitting for consideration in resolving the case's factual disputes.

2. LAYING FOUNDATION ON DIRECT EXAMINATION

a. Rules of Evidence May not Apply

The Rule

- Rule 104(a).

Commentary on the Rule

Other than rules of privilege, the technical rules of evidence do not apply to laying a foundation.

b. Conditional Relevance

The Rule

- Rule 104(b).

Commentary on the Rule

Rule 104(b) of the Texas Rules of Evidence addresses conditional relevance. It states that when the relevance of evidence depends on whether a fact exists, the court may admit the evidence on the condition that the proof of the required fact is introduced later. The judge must determine if there is sufficient evidence for a reasonable jury to find the necessary fact by a preponderance of the evidence. If the foundational fact is not established, the evidence may be struck from the record.

c. Leading

The Rule

- Rule 611(c).

Commentary on the Rule

The general rule is that counsel may not ask leading questions on direct examination. However, the exception found in Rule 611(c) allows the direct examiner to use leading questions on preliminary matters, including laying a foundation.

3. LAYING FOUNDATION ON CROSS-EXAMINATION

The Rule

- Rule 611.

Commentary on the Rule

The same general rules for laying foundations on direct examination also apply to cross-examination. However, the way that counsel must ask questions to lay that foundation is somewhat altered. For instance, Rule 611(c) allows counsel to use leading questions (questions which suggest the answer) to elicit the required foundational elements from a witness on cross-examination. While the rules do not explicitly prohibit the use of argumentative questions during cross-examination, courts typically rely on Rule 611(a)(3) to prevent such questioning.

There is a common misconception that cross-examination can only cover topics that were brought up during the direct examination; however, this is not

accurate. Rule 611 allows the cross-examiner to address any relevant matter, including credibility.

B. Handling Exhibits

The steps listed in this section are comprehensive and presume that exhibits have not been pre-marked, pre-admitted or provided to opposing counsel. Judges often require the parties to pre-mark their exhibits, provide them to opposing counsel, and attempt to agree on the preadmission of exhibits before the beginning of trial. Therefore, the practitioner will often skip steps one and three. Even if an exhibit has been pre-admitted, it is often still a good idea to do step two, “laying the foundation,” so that the jury will find the exhibit more credible.

Step One – Marking the Exhibit & Showing to Opposing Counsel

The first step is to identify the exhibit by marking it with an exhibit sticker. Prior to being admitted, an exhibit is “marked for identification.” Sometimes the court will require you to take the exhibit to the court reporter to be marked; however, more commonly, the attorney will be allowed to mark the exhibit themselves. The exhibit sticker should have a number and a party designation, such as “Contestant 1.” The attorney would say, “I am marking this as Contestant’s Exhibit 1 for identification.”

It is good practice to have a document handy that lists all your exhibits with columns for the exhibit number, a description of the exhibit, and status of admission (i.e., “admitted” or “denied”). If you have a paralegal available, have them update the chart for you during trial so you have one less thing to think about. At the end of each day of trial, you should review this document to ensure that you have not forgotten to offer an exhibit into evidence.

Once an exhibit has been marked for identification, the proponent should then show the exhibit to the opposing counsel. Rather than wasting time waiting for the opposing attorney to look at your exhibit (because they will), the better practice is to give a separate copy to your opponent.

After showing opposing counsel the exhibit, the proponent then talks the exhibit into the record by saying, “I am now showing you [the numbered exhibit].” Counsel then should ask the witness to tell the jury what the exhibit is.

Step Two – Laying the Foundation or Predicate

The “foundation” or “predicate” refers to the testimony the proponent must elicit from the witness before offering an exhibit into evidence. Different types

of evidence have different foundational elements which are discussed in this paper.

Step Three – Offer the Exhibit into Evidence

After laying the foundation, the proponent should formally offer the exhibit into evidence. For example, counsel might say, “Your honor, we offer Contestant’s Exhibit 1 into evidence.” Once the exhibit has been offered, the judge will look to the opposing counsel for a response. The opposing counsel will either enunciate why they are objecting to the admission of the evidence or will respond “no objection.” If the judge delays ruling on the admission of the exhibit, counsel should be prepared to re-urge admission before the end of trial or risk waiver.

Step Four – Showing or Reading the Exhibit to the Jury

If the judge admits the exhibit into evidence, the proponent should “publish” the exhibit to the jury (i.e., ensure that the jury sees or hears the exhibit). There are various ways to allow the jury to see the admitted exhibit. A copy of the exhibit can be projected on a screen using an Elmo, a computer, or a tablet device. Once counsel is done with the actual exhibit it should be handed back to the court reporter for safekeeping.

III. PRESERVING CLAIMS OF ERROR

A. Pre-Trial Motion in Limine

The Rule

- None, but see Rule 103 & Rule 104.

Commentary on the Rule

A motion in limine is a procedural device that allows a party to identify certain evidentiary issues before the trial begins. This procedure requires parties to seek a court ruling on these issues before presenting them in front of the jury. The primary purpose of this process is to prevent the jury from being exposed to potentially prejudicial information before a decision on its admissibility can be made. This helps avoid the introduction of irrelevant, inadmissible, and prejudicial information during the trial. Although a motion in limine is optional and not required for objections to evidence, it does not preserve error for appeal.

A motion in limine is typically made in writing and is heard at a pre-trial hearing. A trial judge has discretion on whether to entertain the motion. Often the judge will prefer to rule on the issue during trial, after the issues become clearer. The three possibilities for the judge’s ruling on a motion in limine are:

1. The judge may deny the motion;

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Rules of Evidence in Guardianship Proceedings

Also available as part of the eCourse

[2024 Guardianship Bundle for Attorneys Ad Litem](#)

First appeared as part of the conference materials for the
26th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Rules of Evidence in Guardianship Proceedings"