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Fee Petitions in Guardianship Cases

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Table of Contents

- 1. Introduction**
- 2. The Attorney-Client Relationship**
 - a. Scope of Representation**
 - b. Communication**
 - c. Participation**
- 3. Enabling Authority Authorizing Attorney's Fees**
- 4. Duty of Preparation of the Fee Petition**
- 5. Tips about the Form of a Guardianship Fee Petition**
 - a. Review local rules for fee rates**
 - b. Experience Legend**
 - c. Paralegal and Legal Assistant Billing**
 - d. Signature of the Client**
 - e. Avoid Block Billing!**
 - f. Include All of your Time!!!**
 - g. Justify extraordinary efforts**
 - h. No fees for preparation of fee petition**
 - i. Conversations with the court staff**
 - j. Costs necessitated by misfeasance or malfeasance**
 - k. Ancillary expenses**
 - l. Include an itemized invoice/bill**
- 6. Timing**
- 7. Tip: Understand the difference between attorney's fees and costs**

1. Introduction

This paper explores a review of existing published local rules related to attorney's fees in guardianship proceedings. The goal of this paper is to supply the practitioner with an understanding of how attorney fee issues are treated in various courts that have published rules regarding fee petitions in guardianship proceedings. It begins with important guidance on the treatment of attorney's fees by statute and case law and then, places in context local rules for fee petition submission.

In furtherance of understanding local practices, the author found it important to review first existing local rules establishing guardianship practices. However, it is apparent that a statewide survey of judicial preferences would assist attorneys in non-statutory or specialty courts designated to hear either probate and guardianship or probate matters without published local rules. Therefore, the author has coordinated an e-mail blast with program attendees of the future survey results to come from a statewide court inquiry on judicial practices and preferences on fee petitions in guardianship matters. A supplement to your electronic course binder will follow upon receipt of survey responses from participating courts.

2. Attorney-Client Relationship

Core areas of the attorney-client relationship often are areas of court scrutiny for fee petition review. Some top-level planning forethought must be given for an attorney to establish an appropriate expectation with the client to encourage healthy client participation and successfully fee review by the court. Therefore, this section explores top level issues to consider when developing a fee petition in a guardianship proceeding.

a. Scope of Representation

In writing this section, I am concerned to advise counsel about their duty to advise the fiduciary versus doing the fiduciary's role. As a guardian, the Texas Estates Code sets forth several duties for a guardian of the person, including but not limited to the right to have physical possession of the ward and to establish the ward's legal domicile; the duty to provide care, supervision, and protection for the ward; the duty to provide the ward with clothing, food, medical care, and shelter; the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward; on application to and order of the court, the power to establish a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B) and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code; and the power to sign documents necessary or appropriate to facilitate employment of the ward if: the guardian was appointed with full authority over the person of the ward under Section 1101.151; or the power is specified in the court order appointing the guardian with limited powers over the person of the ward under Section 1101.152.¹

¹ Tex. Est. Code § 1151.051(c).

Also, a guardian of the estate has several statutory duties, including subject to Subsection (b), the guardian of the estate of a ward is entitled to: possess and manage all property belonging to the ward; collect all debts, rentals, or claims that are due to the ward; enforce all obligations in favor of the ward; bring and defend suits by or against the ward; and access the ward's digital assets as provided by Chapter 2001.²

It can be easy for a practitioner to find themselves in the circumstance of performing due diligence related to the duties of a guardian. However, a court in it's a discretionary authority may not award fees to the guardian's counsel or pay guardian's counsel the local fiduciary rate paid to guardians for guardian services which published fee schedules vary between \$55 to \$150 per hour. The practitioner is aware of extraordinary efforts guardian's counsel have made including assisting a guardian with a ward who is exiting and such fees being heavily reduced or denied in part. With that being said, the issue of pay for those hours does not mean that the guardian should not assist the guardian but should likely encourage their client to fully and properly participate in their role as guardian. Therefore, it is important for the attorney to consider the nature of the work being performed during the midst of a guardianship administration to ensure the attorney has not mistakenly stepped into the shoes of a court appointed fiduciary.

b. Communication

A lawyer must keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.³ Further, a lawyer must explain a matter as reasonably necessary to permit a client to make an informed decision regarding the representation.⁴ The method, manner, and timing of that communication is not defined with specific parameters; rather, it is left to a concept of "reasonable," which the rules explain is "...used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."⁵ That understanding of reasonable becomes subject to the court's own view of reasonable. With respect to a fee petition in a guardianship, there are often considerations the court must make about the necessity of communication with the client. For the court to make a determination about the necessity and reasonableness of such communication, the attorney will have to provide adequate explanation of the nature of the call, which explains the reasons for such communication and why the duration of the entry would be necessary. For example, the following entry would likely be reduced in many court's based on the adequacy of the billing explanation:

Date	Description	Duration	Rate	Cost
01/24/2024	Call w/client explaining role as guardian.	1	\$300/hr	\$300.00

Assume that the practitioner provides further context to the court demonstrate the types of things reviewed with the client:

² Tex. Est. Code § 1151.101.

³ See, Tex. R. Disc. P. 1.03.

⁴ Id.

⁵ See, Tex. R. Disc. P. at p. 9.

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