THE RUNAWAY AD LITEM

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CHAPTER 6

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I. INTRODUCTION.

The Fifth Amendment to the United States Constitution contains what is commonly referred to as the "due process clause" and provides that: "No person shall be . . . . deprived of life, liberty, or property, without due process of law." When a person deemed incapable of representing himself in court because he is: a minor child, incapacitated, unknown, missing, unborn, or unascertained, the courts appoint an ad litem to represent such person's interests in court when property or liberty is at stake. By appointing an ad litem in such situations and giving a voice to those incapable of advocating on their own behalf, the courts safeguard the person's right to due process.

Most attorneys appointed by the courts to serve as ad litems faithfully discharge their duties to those whom they serve. Indeed, many ad litems seem mission driven and service oriented. For example, some attorneys ad litem practicing in guardianship refuse payment from families with modest means. Others help connect the family with community resources in an effort to enrich the lives of their clients. What is more, two appointees in Harris County translated the Guardianship Handbook, an eight-page informational publication put out by the Harris County Probate Courts, into two languages to better serve Spanish-speaking and Hindi-speaking communities.

In mental health, court appointed attorneys for patients often bring clothes, shoes, and grooming supplies to their clients who wish to appear at their hearings but do not want to disrespect the court by showing up disheveled. This past weekend, an attorney, on his own time, traveled one-hundred and fifty miles to visit Rusk State Hospital to prepare himself for counseling clients facing involuntary commitment to such hospital.

Even in heirships, attorneys ad litem shine as they make visual aids to simplify complex family trees or as they bring a bit of levity and compassion to families trying to explain unconventional family relationships. For example, in a recent heirship in Harris County Probate Court 4, one of the witnesses hesitantly explained that none of the decedent's five children shared the same mother; and rather than probe the issue further or raise a judgmental brow, the attorney ad litem gave the witness a side hug, chuckled lightly and said, "So, papa was a rollin' stone, huh?"

In the examples above, the attorneys shine as beacons of light in someone's darkness. Despite the best intentions though, a few attorneys appointed as ad litems by the courts get off track by: 1) failing to understand their duties; 2) venturing beyond their scope of authority; 3) running up huge fees fighting windmills; or 4) sitting on their hands as unnecessary litigation persists. Hopefully, the tools suggested toward the end of this outline will enable attorneys working with a runaway ad litem to keep the case on track for efficient and just resolution.

II. ROLE OF ATTORNEY AD LITEM.

A. Heirships.

The court shall appoint an attorney ad litem in a proceeding to declare heirship to represent the interests of heirs whose names or locations are unknown. TEX. EST. CODE § 202.009. The court may expand the appointment of the attorney ad litem appointed to include representation of an incapacitated heir on a finding that the appointment is necessary to protect the interests of the heir. TEX. EST. CODE § 202.009. Proceedings to declare heirships most commonly result when a decedent dies intestate, but heirships may be also be used when a will fails to dispose of all property of the decedent or when a trustee of a trust must determine the heirs of a deceased beneficiary. TEX. EST. CODE § 202.002.

1. Probate of Will after Four Years.

If an applicant filing a will for probate as a muniment of title more than four years after the testator's death cannot without reasonable diligence ascertain the address of testator's heirs at law, the court shall appoint an attorney ad litem to protect the interests of such missing heirs. TEX. EST. CODE § 258.052. Note that the Estates Code does not require the appointment of an attorney ad litem when an applicant seeks the probate of a will not produced in court, rather service of citation may be satisfied by publication if the names or addresses of heirs are unknown or if the heirs are transient persons. *See* TEX. EST. CODE § 258.002.

2. Other Probate Proceedings.

The judge of a probate court may appoint an attorney ad litem in any probate proceeding to represent the interests of any person including: a) a person who has a legal disability; b) a nonresident; c) an unborn or unascertained person; d) an unknown or missing heir; or e.) an unknown or missing person for whom cash is deposited into the registry of the court. TEX. EST. CODE § 53.104.

3. Duties and Authority.

Like any other client, the attorney ad litem owes unknown heirs the following general duties: a) serve with competence and diligence; b) charge a reasonable fee for the services rendered; c) avoid conflicts of interest; d) assert or controvert an issue only when there is a basis for doing so that is not frivolous; e) minimize burdens and delays; and f) act with candor to the court. *See* Texas Disciplinary Rules of Professional Conduct, (1989) reprinted in TEX. GOVT CODE ANN., tit. 2, subtit. G. Though the attorney ad litem in an heirship

represents unknown heirs and seemingly reports only to the court and his own conscience, he must represent such clients with tenacity and good judgment. "For it is the duty of [an attorney ad litem] to defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. In suits of this character, nothing can be admitted against the interest of the absent defendant, and the one chosen to represent that interest in a case stands in court to insist that no pleading shall go unchallenged, no step shall be taken, no act done, no evidence produced, which shall in any manner be legitimately the subject of an objection or exception." *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.—San Antonio 1926, writ dism'd).

B. Appointment of Guardian and Modification of Guardianship.

In a proceeding for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the proposed ward's interests (or wishes). *See* TEX. EST. CODE § 1054.001. Unless the court determines that the continued appointment of an attorney ad litem is in the ward's best interests, the attorney's term of appointment expires, without a court order, on the date the court appoints a guardian or denies the application for guardianship. TEX. EST. CODE § 1054.002.

An attorney ad litem is an attorney appointed by the court to represent and advocate on behalf of the proposed ward, an incapacitated person or person who has a legal disability, an unborn or unascertainable person, a nonresident, or unknown or potential heir in a guardianship proceeding. *See* TEX. EST. CODE §§ 1002.002, 1054.007. The duties of the attorney ad litem include meeting with the proposed ward within a reasonable time before the hearing to establish guardianship and discussing with the proposed ward, to the extent possible, the following:

- the law and facts of the case;
- the proposed ward's legal options regarding disposition of the case;
- the grounds on which guardianship is sought; and
- whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian.

In addition, before the hearing, the attorney ad litem shall review:

- the application for guardianship;
- certificates of current physical, medical, and intellectual examinations; and
- all of the proposed ward's relevant medical, psychological, and intellectual testing records.

Finally, before the hearing, the attorney ad litem must discuss with the proposed ward the attorney ad litem's opinion regarding:

- whether a guardianship is necessary for the proposed ward; and
- if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.

In carrying out his duties, the attorney may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records. TEX. EST. CODE § 1054.003.

A court appointed attorney and the attorney representing an applicant seeking guardianship must be certified by the State Bar of Texas as having completed a course of study in guardianship law and procedure. TEX. EST. CODE § 1054.201. Query whether or not an attorney appointed by the court to serve as a guardian ad litem must also be certified, as the statute fails to specifically address the issue. The course of study in guardianship and procedure requires four hours of credit, including one hour on alternatives to guardianship and supports and services available to proposed wards. TEX. EST. CODE § 1054.201. Though the applicant's attorney and the attorney ad litem must hold guardianship certification, other attorneys who represent the interests of the ward in concomitant matters need not carry such certification. *See Guardianship of Glasser*, 279 S.W.3d 369 (Tex. App.—San Antonio 2009, no writ) (*holding* that when the guardianship involved complex litigation and the probate court authorized the retention of litigation counsel, such counsel was not required to hold guardianship certification).

C. Mental Health Commitments.

Upon the filing of an Application for Court Ordered Mental Health Services and a Motion for Order of Protective Custody ("OPC"), the court must: 1) appoint an attorney ad litem to represent the proposed patient; 2) set a probable cause hearing if an OPC has been or will be issued; 3) set final hearing on the merits; and 4) effect service of notice on both the proposed patient and the attorney ad litem. Notice shall also be given to the parent of the proposed patient if the proposed patient is a minor child, to the appointed guardian provided the proposed patient is under guardianship, and to each managing and possessory conservator that has been appointed for the proposed patient. The notice must include all pleadings, attorney appointments, and hearing settings. In addition, the attorney must receive a list of duties from the court. TEX. HEALTH & SAFETY CODE ANN. §574.003.

The Texas Mental Health Code outlines the duties of the attorney representing the proposed patient. The duties are as follows:

- Interview the proposed patient within a reasonable time prior to each hearing.
- Discuss with the proposed patient the facts of the case, the applicable law, and the options available to the proposed patient, including but not limited to the option to hire their own lawyer.
- While the attorney may advise the proposed patient as to the wisdom associated with either agreeing or resisting efforts to provide mental health services, the proposed patient must make the ultimate decision in such regard.
- Regardless of the attorney's personal opinion about the case, the attorney must use all reasonable efforts within the bounds of the law to advocate the proposed patient's right to avoid court ordered mental health services or receive lesser restrictive treatment alternatives to temporary inpatient mental health services.
- Before the hearing, the attorney shall: 1) review the Application, Certificates of Medical Exam, and the proposed patient's relevant medical records; 2) interview supporting witnesses who will testify at the hearing; and 3) explore the least restrictive treatment alternatives to court-ordered inpatient mental health services.
- The attorney shall advise the proposed patient of his right to attend a hearing or waive the right to attend a hearing; and if the proposed patient will not attend a hearing, explain to the court why a proposed patient is absent from the hearing.
- The attorney shall discuss with the proposed patient the procedures for appeal, release, and discharge, if the court orders inpatient commitment, and other rights the patient may have during the period of the court's order.
- To withdraw from a case after the proposed patient is interviewed, the attorney must file with the court a motion to withdraw; and until the withdrawal is authorized by the court, the attorney represents the proposed patient.

The attorney is responsible for the proposed patient's representation until: 1) the Application is dismissed; 2) an appeal from an order directing treatment is taken; 3) the time for giving notice of appeal expires by operation of law; or 4) another attorney assumes responsibility for the case. TEX. HEALTH & SAFETY CODE ANN. §574.004.

III. ROLE OF GUARDIAN AD LITEM

A. General Duties.

In accepting an appointment, a guardian ad litem assumes the dual responsibility of protecting the [child's, incapacitated person's, or proposed ward's] interests and acting as an officer of the court. *See Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 (Tex. 1995).

B. Typical Situations Requiring Appointment of Guardian Ad Litem.

Judge Steve King, in his authoritative and informative Ad Litem Manual, which is regularly updated, sets out what must be every situation where a judge may or must appoint a guardian ad litem. Listing every scenario where a guardian ad litem may or must be appointed goes beyond the scope of this outline, but in this author's experience, that the following four proceedings most often give rise to the appointment of a guardian ad litem.

1. Appointment of Guardian or Modification of Guardianship.

In guardianship, a guardian ad litem is appointed to represent the best interests of an incapacitated person. *See* TEX. EST. CODE §1002.013. While the appointment of an attorney ad litem in guardianship is mandatory, the appointment of a guardian ad litem is at the discretion of the court. *See* TEX. EST. CODE §1054.051. Appointing a guardian ad litem can increase the cost of the proceeding considerably. Consequently, judges generally make such appointments in limited circumstances, for example when: 1) the guardianship is contested; 2) the applicant for guardianship is a party to a lawsuit concerning or affecting the welfare of the proposed ward; 3) a potential conflict of interest exists between the applicant for guardianship and the proposed ward and requires evaluation. *See* TEX. EST. CODE §1104.354.

In addition, in cases where original probate jurisdiction rests with a county court or county court-at-law and the court has probable cause to believe that a person domiciled or found in the county where the court is located is an incapacitated person, the judges appoint a guardian ad litem to investigate the person's conditions and circumstances to determine whether such person is in fact incapacitated and whether a guardianship is necessary. *See* TEX. EST. CODE §1102.001. All statutory probate courts in Texas employ a court investigator and normally the investigator is appointed by such courts to investigate the potential need for a guardianship. Though nothing in §1102.001 prohibits a statutory probate court from appointing a guardian ad litem to serve the function of a court investigator, it is not the regular practice of most statutory probate courts to make such appointments.

2. Trust Construction or Modification Actions.

If the court determines that the interests of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown is inadequately represented, then at any point during the proceeding, the court may appoint a guardian ad litem or attorney ad litem to represent such interests. TEX. PROP. CODE §115.014. Interestingly, in trust construction or modification actions, virtual representation often obviates the need for the appointment of an attorney or guardian ad litem. When a beneficiary has not been specifically named and there is no conflict of interest and no guardian of the estate or guardian ad litem has been appointed, a parent may represent a minor child as guardian ad litem or as next friend. Further, unborn or unascertained persons who are not otherwise represented are bound by an order to the extent their interest is adequately represented by another party having a substantially identical interest in the proceeding. *See* TEX. PROP. CODE §115.013.

3. Sale of Minor's Interest in Property.

When a minor without a parent or managing conservator has an interest in real property and such interest is valued at less than $100,000, the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in property. *See* TEX. EST. CODE §1351.001.

4. Personal Injury Settlement.

Guardians ad litem are often appointed in the context of personal injury suits to represent the best interest of and serve as the personal representatives of minor children, incapacitated persons, and proposed wards. It is the duty of the guardian ad litem to report to the court and evaluate proposed settlements from the perspective of the person to whom they owe a duty considering: a) the damages suffered; b) the adequacy of the settlement; c) the manner in which settlement proceeds are distributed; and d) the attorney fees charged by the plaintiff's attorney. *See Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ denied).

IV. SELECTION PROCESS FOR APPOINTEES.

For courts in counties having a population of 25,000 or more and for each case in which the appointment of an ad litem is necessary, courts must use a rotation system and appoint the person whose name appears first on the applicable list maintained by the court. *See* TEX. GOV'T. CODE ANN. §§37.001, 37.004. What is more, the court must generate and post a list of all attorneys who are qualified to serve as an ad litem and are registered with the court. *See* TEX. GOV'T. CODE ANN. §37.003. The Government Code fails to offer guidance as to who is "qualified" to serve as an ad litem. Consequently, many courts take the view that any licensed attorney who registers with the court and has earned guardianship certification, if required by the appointment, should be placed on the appointment list and incorporated into the appointment rotation. As a result, the pool of ad litem appointees has swelled and now includes many attorneys who are new to the probate and guardianship practice.

Consequently, considering the often pivotal role appointees serve in probate and guardianship proceedings, avoiding the appointment of an inexperienced or out-of-depth appointee may be key to resolving a complex case efficiently. Thankfully, the Texas Legislature considered that discretion on the part of the parties and the judge may be necessary in certain circumstances. Parties to a case may agree on the appointment of an attorney ad litem or guardian ad litem, so long as such proposed appointee is approved by the court. In addition, the court may appoint an attorney ad litem or guardian ad litem who is out of order or not included on the court's appointment list, provided such appointee possesses relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case; has relevant prior involvement with the parties or case; or is in a relevant geographic location. *See* TEX. GOV'T. CODE ANN. §37.004.

V. RUNAWAY AD LITEMS

A. Crazy Train.

Some ad litems pursue senseless litigation or undue research. Overzealous advocacy occurs most often in probate court within the context of heirship or guardianship proceedings.

1. Heirships.

Distinguishing the "Plain Jane" and the "Mystery" case in heirship is important. The long serving statutory probate judge in Tarrant County, Judge Steve King, aptly dubs the run-of-the-mill heirship a "Plain Jane." An attorney ad litem in such cases should expect the court to find reasonable a fee falling within the range of $300 to $750. An attorney ad litem is entitled to reasonable compensation for services provided in the amount set by the court and such fees are payable out of the estate or by any party at any time during the proceeding. TEX. EST. CODE §53.104.

The attorney ad litem in an heirship determination represents the interests of unknown heirs and must investigate the family affairs of the decedent in an effort to determine the rightful heirs of the estate. Sometimes, it requires extraordinary effort to verify findings. For example, it may be necessary to obtain birth certificates, divorce decrees, adoption papers, and documents related to the termination of a parent child relationship. Some

facts can be hard to prove. For example, it can be difficult to verify that a person has no children, but it is not necessary to identify and contact every love interest of the decedent, research the public records of every town in which a decedent lived, or inquire as to the decedent's personal proclivities or medical procedures.

In one case known to the author, an attorney ad litem was appointed to represent unknown heirs where a trust terminated and passed outright and free of trust to the settlor's son provided the son did not have children. Despite the testimony of the son, family members, and friends stating that the son had never been married and never had children, the attorney ad litem required the son to provide the names and addresses of every woman with whom he had relations, every address where he had lived, and provide witness testimony from those familiar with him during his teenage years. The attorney ad litem followed up on the information provided and contacted each girlfriend and searched the public records in every jurisdiction where the son had lived. The attorney ad litem also hired a genealogist. By the time the attorney ad litem was satisfied that the son had no children, trust resources had been unnecessarily squandered, old wounds had been opened, and the son suffered embarrassment, delay, and frustration.

It is the duty of the attorney ad litem to defend the rights of his involuntary clients with vigor and astuteness. The courts recognize this duty and will allow reasonable compensation. However, when an attorney ad litem treats a "Plain Jane" like a "Mystery" case, they risk: 1) unnecessarily delaying bringing the case to conclusion; 2) generating unnecessary fees and expenses that may not be approved by the court; 3) hurting their professional reputations; and 4) being removed as attorney ad litem for the case.

"Mystery" cases often develop when witnesses use words and phrases like "technically," "given up for adoption," "common-law," and "illegitimate." Before launching into a full-blown, forensic inquiry, consider the benefits of a status conference with all known parties and the court. Once a list of questions or issues has been developed, it may be a good idea to inform the court and the parties regarding concerns and request permission from the court to spend more time developing the facts of the case. This will increase the likelihood that the attorney ad litem's efforts will be rewarded and put all parties on notice that the ad litem plans to go the distance to uncover the true heirs of the decedent. If the attorney ad litem senses his efforts will go unrewarded, he may petition the court for fees in advance of the final hearing. TEX. EST. CODE § 53.104.

2. Guardianship.

In contested guardianships, knowing when to make war and when to make peace proves valuable. Internecine struggles abound in guardianship. Often, longstanding conflicts among children kept at bay by strong parental influences erupt when the capacity of such parent erodes. Irrespective of whether the appointee represents the best interest or the wishes of the proposed ward, carefully preserving the remainder of such person's capacity, health, relationships, and wealth is important but can also be a balancing act. Naturally, a flurry of discovery demands, capacity assessments, reports, and records can obscure the vision of the keenest eyes, but ad litems must be mindful of their duties and work to efficiently guide the case to just resolution.

In the words of Abraham Lincoln, "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity to be a good man. There will still be business enough." The ad litem should not hop on the crazy train, but if the ad litem finds himself on the crazy train, he should check to make sure he is not the engineer.

However, bringing a case to just resolution sometimes requires war, or the lawyer's version of war, going to trial. Even Aristotle acknowledged, "We make war that we may live in peace."

B. Light Rail.

Some ad litems sit on their hands as parties pursue senseless litigation and run up the costs of the proceeding. The passengers on a crazy train do not mind the ride when they are sitting in the dining car of the Orient Express. So, when the proposed ward will likely pay the freight and the court faces awarding fees out of the assets of the ward's estate to the applicant, contestant, cross applicants, attorney ad litem, guardian ad litem, temporary guardian, mediator, and capacity assessor, it often falls upon the attorney or guardian ad litem to bring the mounting expenses to the attention of the court. Often, litigants' demands become more reasonable when pursuing the litigation impacts their own wallet. For that reason, in 2011, the Texas Legislature equipped ad litems and others interested in the guardianship with the power to petition the court for an order requiring the person filing the application, complaint, or opposition to provide security for the probable costs of the proceeding. *See* TEX. EST. CODE §1053.052.

As an advocate of the proposed ward or for the best interest of the proposed ward, the ad litem should work to preserve the assets of the proposed ward and make efforts to contain any costs of litigation that diminish the estate of the proposed ward, especially when those

assets will be needed in the future for the care of the proposed ward.

C. Off the Rails.

Some appointees venture beyond the scope of their duties. In *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, defendant Goodyear appealed a portion of the trial court's judgment awarding $400,000 in fees to six guardians ad litem. This products liability case arose when a high occupancy van rolled over in Arizona with sixteen migrant farm workers on board. Six of the passengers died as a result. Six guardians ad litem were appointed to represent a total of twenty-two minor plaintiffs, with five guardians ad litem being appointed within one month of trial. Shortly before trial, the minor plaintiffs arrived at a settlement, but Goodyear objected to the requested fee of the guardians ad litem on the grounds that such fees were excessive. Over the objections of Goodyear, the trial court entered a final judgment approving the settlement, dismissing all claims against Goodyear, and awarding total fees of almost $400,000 to the guardians ad litem. *See Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 .S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Generally, guardians ad litem must represent the best interests of their client while also serving as an officer of the court. "The ad litem is required to participate in the case to the extent necessary to adequately protect the interests of his ward." *Goodyear* at 580 (*quoting Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 (Tex. 1995). What is more, the role of the guardian ad litem ends when the conflict giving rise to such appointment ends; and work performed outside the scope of his duties or after the conflict has been resolved will not be compensated. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995). However, the trial court shall award the guardian ad litem a reasonable fee to be taxed as costs of court and the appropriateness of such fee is determined by factors set out in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct such as time and labor required and the novelty or difficulty of the legal questions involved. Additionally, the appellate court will not set aside an award of guardian ad litem fees without a showing of abuse of discretion. *Goodyear* at 580 (*quoting Boncquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)).

Goodyear complained that, among other things, the guardians ad litem charged for activities outside the scope of their appointment when they prepared for, attended, and reviewed depositions not relevant to the minors to whom the guardians ad litem owed a duty. In addition, the guardians ad litem reviewed liability-related pleadings, discovery motions, and deposition notices.

The appeals court in *Goodyear* ultimately found that the guardians ad litem acted beyond the scope of appointment and unreasonably when they attended or reviewed every deposition, motion, and pleading without regard to its relevance to the minor child to whom they owed a duty. *See Goodyear* at 584.

D. Ghost Train.

Some attorneys ad litem fail to communicate. Silence is golden except when it is from an ad litem, and then sometimes it is yellow. Recognize that people fail to communicate for myriad reasons including lack of confidence, inexperience, unavailability, and illness; but if an appointee shirks their duties and will not respond after numerous attempts at communication, proper advocacy may require seeking removal of the ad litem. Sometimes a letter to the court, copying all counsel, advising the judge that an ad litem has "disappeared" may spur him or her to contact you immediately.

E. Train Wreck.

Some ad litems are unprepared. Life is full of surprises; and many of those surprises happen at the bench, especially during heirship dockets. If an ad litem serves consistently, he will be surprised at some time or another. This author's desk drawer contains more than a few short notes of apology from attorneys ad litem who, surprised by witness testimony at the bench, had to continue the "final" hearing to gather more research. These attorneys ad litem are not Train Wrecks, they serve with integrity and work diligently to bring cases to proper resolution.

Attorneys ad litem become Train Wrecks when they frustrate the efficient resolution of a case out of neglect, inexperience, or incompetence. Do not despair if the court appoints a Train Wreck, as a Train Wreck can often be salvaged and remade into the Little Engine that Could, given time, tutoring, and encouragement. Craig Hopper, in his outline, "Whack-A-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem," suggests the following options when dealing with the inexperienced ad litem: 1) share written resources with the appointee; 2) request the appointment of a guardian ad litem to help guide the appointee; 3) set the matter for trial to enable swift resolution. If these options are inappropriate or fail to get results, other options are set out later in this outline.

F. Gravy Train.

Some appointees charge too much. As this paragraph was being written, an attorney ad litem appointed to represent an indigent proposed ward in a guardianship proceeding filed by the Harris County Guardianship Program called the court coordinator to report that she had already invested one hundred hours in the case and she wanted to know how to get paid.

Naturally, spending an inordinate amount of time representing a proposed ward when his doctor found him to be incapacitated and the court investigator found him to be clearly in need of a guardian seems wasteful, especially considering the fact that the appointee failed to set a status conference with or seek direction from the court before racking up $10,000 in fees. Sadly, the overzealous attorney ad litem will not be paid by the county more than the customary fee for such case.

Many factors play into determining whether appointee's fees are reasonable. Public perceptions of attorney fees, claims of cronyism among judges and attorneys, and pressure from lawmakers cause probate judges to scrutinize the fees charged by appointees of the court and increase the transparency with which appointments are made and fees awarded. In reviewing fees, the courts look to several sources for guidance, including: reports detailing customary fees; fee standards established by the court; and the standards established by the Texas Rules of Professional Conduct.

Importantly, Rule 173 of the Texas Rules of Civil Procedure authorizes the court to award an ad litem a reasonable fee for his or her services. Even though the amount of compensation awarded to the ad litem lies within the sound discretion of the court, a reviewing court will not overturn a fee award absent evidence showing a clear abuse of discretion. *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 794 (Tex.1987). However, if there is no evidence or insufficient evidence to support the award, there has been an abuse of discretion in making the award. *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 16 (Tex.App.—El Paso 1990, no writ).

VI. FEES

A. Attorney Fees in Historical Perspective.

Before the advent of the billable hour, lawyers charged clients in other ways. The lawyers considered many factors including the expertise required, the novelty of the issues involved, the result or value to the client, the opportunity cost to the lawyer for taking the case, the time required to bring the matter to conclusion, and whether the fee was fixed or contingent. *See* ABA Commission on Billable Hours Report 2001-2002. Many times, the charges to the client were determined retrospectively at the conclusion of the matter; and as a result, there were fewer fee disputes. With this kind of fee arrangement, the lawyer's fee was tied to the results enjoyed by the client and the business risk of the relationship was more heavily borne by the attorney. *Id.* Though no one expects hourly billing to go away, it is valuable to recognize the historical concepts that once governed how lawyers charged clients.

The 1950s and 1960s saw the burgeoning of hourly billing and now well over half of the attorneys surveyed by the American Bar Association Commission on Hourly Billing reported that more than 81% of their invoices are based upon the traditional hourly billing model, other lawyers base fees upon contingency fee contracts and still others upon a flat fee approach. *Id.*

B. Public Perception of Attorney Fees.

Henry Brougham, a Victorian Age, British Statesman who practiced law for a short time, defined a lawyer as, "a learned gentleman who rescues your estate from your enemies and keeps it himself." For some time, the Houston Chronicle has scrutinized the attorney fees awarded by the Harris County Probate Judges. In 2010, the paper published an article entitled, "Harris County Probate Fees Provide Bonanza for Some Lawyers," in which Lise Olsen reported that Harris County probate judges had awarded over $8,000,000 in attorney fees in one year, far surpassing the fees awarded in any other Texas county.

A good attorney's billing practice should reflect ethical and moral responsibility, common sense, and professionalism. Judge Mike Wood said it best when he described an attorney fee application as a "public relations document." It is the attorney's opportunity to establish in the public record the attorney's manner of practice and billing and his dedication to his client's case.

Calls for enhanced transparency with regard to the appointment process used by judges gained traction after a handful of unhappy litigants voiced concern and offered testimony to the Texas Legislature that reforms were necessary to avoid cronyism. In 2015, during the 84th legislative session, the Texas Legislature answered these calls and judges are now required to maintain lists of attorneys ad litem, guardians ad litem, mediators, and guardians who are qualified to serve and have registered with the court. These lists must be posted on the court's website and at the courthouse. Judges must now use these lists and make appointments on a rotating basis. However, the judges maintain a modicum of discretion and may go out of order or off the list in the event the matter is complex and requires that the appointee have special expertise. *See* TEX. GOV'T. CODE ANN. §§37.003-37.005.

In addition to the reporting requirements imposed upon Texas judges, the clerk of each court must prepare a report on court appointments listing every attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator appointed by the judge of the court. The report must provide the following details about such appointments: name of appointee; judge making appointment; date compensation approved; number of appointments the appointee received by the court each month; the source and total amount of compensation approved by the court for each appointee each month; and if the appointee received over $1000 in compensation during a month, detailed information

from the appointee's invoice. *See* TEX. GOV'T. CODE ANN. §36.004. Such report must be displayed at the courthouse and posted on the clerk's website. *See id.*

C. Attorney Hourly Rates.

Periodically, the State Bar of Texas, Department of Research & Analysis, produces an Hourly Rate Report ("SBOT Hourly Rate Report" or "Report"). The stated purpose of the Report is "to obtain information on hourly rates charged . . . by Texas attorneys" and provide attorneys with a "valuable competitive tool in today's environment." *See* State Bar of Texas Department of Research & Analysis's 2015 Hourly Fact Sheet.

According to the SBOT Hourly Rate Report, the median hourly rate for attorneys practicing in the areas of wills, trusts, and probate was $250 in 2015. The geographic areas reporting the highest median hourly rates for probate practitioners include, not surprisingly, Austin, Houston, and Dallas-Fort Worth, with attorneys clocking in at $275 an hour. *See id.* Texas probate attorneys practicing in rural areas around El Paso and Corpus Christi report the lowest hourly rates, at around $220 an hour. Probate attorneys outside the State of Texas command an average of $300 an hour, relatively high according to Texas standards. *See id.*

The Report added credibility to the notion that attorneys from larger, urban law firms charge higher hourly rates. According to the SBOT Hourly Rate Report, the median rate for a solo practitioner hanging his shingle in an urban area is approximately $260, while the median hourly rate for a solo practitioner serving non-metro areas is $200. Attorneys associated with large, urban law firms with more than 200 attorneys bill at an hourly rate of $400, or so. *See id.*

The Report also analyzed the impact years of practice had on the hourly fees sought by attorneys. While the Report failed to provide data specific to attorneys practicing in the areas of probate, wills, and trusts, the Report set out the median hourly rates being charged by attorneys in the metropolitan areas according to years of practice. Attorneys serving metropolitan areas and practicing for two years or less had a median hourly rate of $215, while their rural counterparts charge around $175 an hour. Attorneys having between eleven and fifteen years of practice experience and serving metropolitan communities charged a median hourly rate of approximately $275, and attorneys with similar years in practice and setting up shop in rural areas command an hourly rate of around $230. The attorneys with the most experience, having been in practice over twenty-five years, and serving metropolitan areas enjoyed a median hourly rate just north of $300. *See id.*

D. Fee Standards.

Set out below are the hourly rates set out in the published Fee Standards established in five of the ten the Texas counties having statutory probate judges and representing the standards of ten of eighteen statutory probate judges.

The hourly fee ranges seem appropriate considering the data provided by the SBOT Hourly Rate Report.

Dallas County	
Years in Practice in Probate	Hourly Fee Range
0-2	Up to $125
3-5	$125-$150
6-10	$150-$200
11+	$200-$350

Denton County	
Years in Practice in Probate	Hourly Fee Range
0-2	Up to $125
3-4	$125-$175
5-9	$150-$250
10-15	$200-$325
15+	$285-$375

Galveston, Harris, Travis Counties	
Years in Practice in Probate	Hourly Fee Range
0-2	Up to $165
3-5	$165-$195
6-10	$195-$250
11+	$250-$350

In addition to outlining the rate structures set out above, the fee standards adopted by many statutory probate judges in Texas provide that: a) appointees paid out of county funds receive around $100 an hour; b) attorneys ad litem appointed in a typical solvent estate situation often receive compensation ranging between $300 to $750; c) support staff may be billed at hourly rates ranging from $45 to slightly over $100. Further, in preparing fee applications for approval by a probate court, consider the following tips: a) avoid block billing and separate each task for which a time entry is being made; b) be descriptive with each entry; c) include all time even if not charging for task; d) justify extraordinary efforts and fees; and e) do not charge for conversations with court staff, preparing fee applications, or research unless it involves a novel issue.

E. Reasonable Fees.

Rule 1.04 of the Texas Rules of Professional Conduct provides that attorney fees must be reasonable. In evaluating whether or not attorney fees are reasonable, the following factors are considered:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained and whether there exists uncertainty regarding collection of the fee before the legal services have been rendered.

See Texas Disciplinary R. Prof'l Conduct 1.04 *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A.

Reasonable fees are determined by multiplying the number of hours worked by the attorney's hourly rate. *See City of Houston v. Levingston*, 221 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, no pet). Both components of the calculation, the hours worked and the hourly rate charged, must be reasonable. *Guity v. C.C.I. Enter. Co.*, 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

VII. PUTTING THE BRAKES ON A RUNAWAY AD LITEM

A. Ride the Right-Hand Side.

Maintain regular contact and be a resource to the ad litem. An old proverb teaches, "If you light a lamp for someone, it will also brighten your own path." In the context of guardianship, closely working with and helping the ad litem enables the matter to be resolved properly and efficiently. Promptly and thoroughly responding to requests from the ad litem, facilitating the availability of people whom the ad litem wishes to interview, and educating the ad litem with respect to applicable law minimizes misunderstandings and missteps along the way. Set out below are some written materials which are easily accessible online and invaluable to any ad litem appointed by the courts:

King, Hon. Steve M., "The Ad Litem Manual for 2016 for Guardianship and Heirship Proceedings in Texas Probate Courts," presented at the 18th Annual Estate Planning, Guardianship and Elder Law Conference, August 11-12, 2016.

Hopper, Craig, "Whack-A-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem," presented at the State Bar of Texas Advanced Guardianship Law Course, April 4, 2014, Dallas Texas.

Ghobrial, Roxanne, "Nuts and Bolts: You Have Been Appointed Guardian Ad Litem. What Now?" presented at the South Texas Guardianship Ad Litem Certification Course, September 18, 2013.

Haney, Jayna Oakley, "What Ad Litems Should Know about Structured Settlements," presented at the South Texas Guardianship Ad Litem Certification Course, September 12, 2012.

Ward, Denyse Renee, "Duties of the Ad Litems in Guardianship Cases," presented at the South Texas Guardianship Ad Litem Certification Course, September 12, 2012.

The State Bar of Texas puts out a Guardianship Manual which is periodically updated and costs either $245 or $295 depending upon whether the manual is downloaded or in printed form.

B. Stop Feeding the Firebox.

Just say "No." Don Carnes, the author's co-presenter, suggests the no-nonsense approach when an ad litem makes unreasonable requests; and he recommends refusing such unreasonable requests. Naturally, refusing requests might lead the ad litem to double down and file a motion to compel. If the requests of the ad litem are truly unreasonable and the court agrees, this approach will likely prove instructive to the ad litem and curb future overreaching by the ad litem.

Mr. Carnes reported his encounter with an attorney ad litem in an heirship matter in further explaining his "Just say 'No.'" approach. Such attorney ad litem requested that the family agree to pay both the court ordered fee and the difference between the court ordered fee and the amount the attorney ad litem bills based upon his regular rate and billing practice. Though the problems with such attorney ad litem's request are legion, two obvious issues stand out. First, an attorney requesting ad litem appointments from a judge necessarily agrees to be paid according to the court's

standard fee schedule. Second, the attorney reports his fees to the court and the judge signs the fee order based upon a finding that such fees are fair, reasonable, equitable and just.

C. Visit the Roundhouse.

Request a status conference with the court. Most statutory probate courts offer litigants the ability to meet with the judge or court staff to discuss cases, provided all parties are present or represented. Sometimes, the status conference takes place in the courtroom and is on the record. Most times, however, the parties prefer a more informal setting and meet in the jury room with a member of the court staff or a judge. Often, the judge or court staff point the litigants in the right direction and offer suggestions for bringing the case to efficient and just resolution.

The court might also help the parties enter into an agreed docket control order so that a trial date is set and deadlines for discovery, designation of experts, and mediation, among other things, may be established. Importantly, the parties will likely leave a status conference with a date before which mediation must take place. The vast majority of contested probate and guardianship matters settle once the parties engage in formal or informal mediation.

Finally, bringing to the attention of the court an overzealous ad litem during a status conference enables the court to gently remind the ad litem of his duties and point out that the ad litem should seek guidance from the court when he is in doubt as to the scope of his appointment or extent of his duties. Typically, when an ad litem questions the scope of their appointment, it is done via a formal motion for instruction. The court in *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) suggests that it is wise for parties to seek direction from the court when they disagree about the role of an ad litem; but the court warns that pursuing every disagreement in this manner could be costly and disruptive. *See id*.

D. Call in a Stockholder.

Request the appointment of a guardian ad litem. When it appears that an attorney ad litem must advocate an insupportable position on behalf of a proposed ward, the applicant for guardianship might consider requesting that the court appoint a disinterested third party to serve as guardian ad litem to advocate for the best interest of the proposed ward. The judge may appoint a guardian ad litem to represent the best interests of an incapacitated person during a guardianship proceeding. TEX. EST. CODE §1054.051. In the words of Craig Hopper, in his outline entitled "Whack-A-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem" and discussed above, "Requesting the appointment of a guardian ad litem can serve to bring sense back into a guardianship proceeding. If some outlaw party or an overzealous attorney ad litem is unnecessarily increasing the financial and emotional costs of the guardianship, a guardian ad litem can push everyone to become more realistic in the continued litigation."

E. Rattle Her Hocks.

Request the appointment of a temporary guardian. Sometimes, an attorney ad litem or guardian ad litem, perhaps facing pressure from the proposed ward or the family of the proposed ward, drags their feet and fails to allow the case to progress efficiently. Some amount of stalling can be tolerated unless it is at the peril of the proposed ward's person or property. When avoiding a determination of incapacity or imposition of guardianship threatens to place the proposed ward or the proposed ward's estate in imminent danger, a temporary guardian or temporary guardian pending contest may be necessary.

If substantial evidence supports a finding that the proposed ward is incapacitated and if probable cause exists that the immediate appointment of a temporary guardian is necessary to protect the proposed ward's person, estate, or both, from imminent danger, the court shall appoint a temporary guardian with powers and duties necessary to protect the proposed ward. *See* TEX. EST. CODE §§1251.001, 1251.101. Importantly, an application for temporary guardianship is not required to be accompanied by a physician's certificate of medical exam indicating incapacity. *See Overman v. Baker*, 26 S.W.3d 506 (Tex. App.—Tyler 2000, no writ). A hearing on such application must take place within ten days after the date the application was filed unless the proposed ward's attorney consents to postponing the hearing; but, in any event, the hearing must be held within thirty days after the date the application is filed. *See* TEX. EST. CODE §1251.006. A party contesting the appointment of a temporary guardian has no right to a jury trial. *See In re Kuhler*, 60 S.W.3d 381 (Tex. App.—Amarillo 2001, no writ).

Naturally, the appointment of a temporary guardian or temporary guardian pending contest increases the costs of the guardianship in terms of attorney fees, bond premiums, and costs associated with preparing accountings. In addition, the appointment of a temporary guardian is, as the title of the position indicates, temporary. The temporary guardianship may not remain in effect for more than sixty days. *See* TEX. EST. CODE §1251.151. Importantly, while a temporary guardian pending contest appointed before January 1, 2014 could serve without interruption until the dismissal of the application or appointment and subsequent qualification of a permanent guardian, temporary guardians pending contest appointed after such date may serve until the nine-month anniversary of the date the temporary guardian qualified unless the term is

extended by court order issued after a motion to extend the term is filed and heard. *See* TEX. EST. CODE §1251.052. Finally, many statutory probate courts hesitate to appoint a temporary guardian, especially if the court's own appointee contributes to the delay which placed the proposed ward in danger. The court will likely encourage the parties to proceed immediately on the application for the appointment of a permanent guardian instead.

F. Pull the Pin.

Seek the removal of the ad litem. The Estates Code is largely silent as to the removal of an ad litem, but case law makes a distinction between the removal of an attorney ad litem as compared to the removal of a guardian ad litem.

1. Removal of Guardian Ad Litem.

The guardian ad litem is an officer of the court and appointed to represent the best interest of the proposed ward. They participate as personal representative of the proposed ward, not as the proposed ward's attorney. The decision to appoint or to replace a guardian ad litem is within the discretion of the trial court, and that decision should be based upon the best interests of the proposed ward, not the interests of the applicant or attorney. *See Coleson v. Bethan*, 931 S.W.2d 706 (Tex.App.—Fort Worth 1996). *See also Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431–32 (Tex.1986).

2. Removal of Attorney Ad Litem.

Since the attorney ad litem owes the same duty to his client as the attorneys representing applicants seeking to become guardian or personal representative, allowing unrestrained discretion to remove an attorney ad litem once the court has made the appointment is counterproductive. However, probate courts must protect the interests of proposed wards and must not permit delays injurious to estates. "So, in the context of such representation, [the court's] hands cannot be tied if it, or some opposing party, perceives a true need for the removal of an attorney ad litem." *Coleson* at 713.

The court in *Coleson* discusses three methods to remove an attorney ad litem and only two of those three methods are proper. The *Coleson* case involved parents serving as the co-guardians of the estate for each of their minor children. Though they were appointed in May of 1992, they failed to timely obtain a bond. So, the attorney ad litem, in representing the minor children, filed a motion to remove the parents as co-guardians of the estate in October of 1992. The parents were removed in January of 1993. Shortly after being removed, the parents filed the required bond and the court reversed itself and reappointed the parents as co-guardians of the estate. The attorney ad litem continued on the case, bringing it to the attention of the minor children and the court when inventories were late, accountings were incomplete, and expenditures were improperly made.

In September of 1994, the attorney for the parents and co-guardians motioned for removal of the attorney ad litem, but the court denied the motion. Then, in February of the following year, the attorney for the co-guardians writes in his timesheets (that must be reviewed and approved by the court) that he made a trip to the courthouse "to ask judge for in chambers meeting with ad litem. Telephone conference with client regarding judge's commits [sic]. Call to judge that client wanted new ad litem." *Coleson* at 709. Two days after such entry was made, the court signed an order removing the attorney ad litem and substituting a new attorney ad litem without a hearing.

The appeals court reversed the decision of the trial court to remove the attorney ad litem, as such decision was without a hearing, not based upon substantive grounds, and apparently the result of ex parte communications between counsel for the co-guardians and the judge. *See Coleson* at 713. Perhaps nervous about tying the hands of courts with respect to unruly attorneys ad litem, the appeals court in *Coleson* went on to clarify that the attorney ad litem appointed by the trial court could be removed by the trial court provided that proper procedures had been followed and sufficient justification for the removal or replacement exists. *See id*. Such actions by the trial court should be reviewed under the abuse of discretion standard because the ultimate responsibility for the protection of the ward lies with the court. *Coleson* at 714.

Two proper procedures for removal are discussed by the court in *Coleson*, including a motion requiring the attorney ad litem to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure and seeking a temporary restraining order followed up by a permanent injunction pursuant to Rule 680 of the Texas Rules of Civil Procedure. *See Coleson* at 712. The appeals court also discussed the third method or the method used in *Coleson v. Bethan*, whispering in the judge's ear so as to coax a removal order without a hearing. Naturally, this method was frowned upon and went unendorsed by the court of appeals.

Though the appeals court in *Coleson* identifies two valid procedures for the removal of an attorney ad litem, the motion to show authority and a motion for temporary restraining order, such procedures can be time consuming and costly. The attorney ad litem in *Coleson* actively oversaw the administration of the guardianship estate and drew the ire of the co-guardians and the attorney for the co-guardians when he rightfully pointed out deficiencies in the performance of the co-guardians. It should be difficult to remove an attorney ad litem who

dutifully fulfills his responsibility to his clients even when it irritates the others.

What if an attorney ad litem fails to dutifully represent his client, is overzealous in such representation, or overcharges and nothing short of removal will enable the case to progress efficiently? Must one resort to a motion to show authority or seeking an injunction? The appeals court in *Coleson* seems to acknowledge that trial courts have broad discretion in removing an attorney ad litem, but removals require three elements: 1) proper procedures; 2) substantive grounds; and 3) principled reason justifying removal. *See Coleson* at 713-714. Query whether a motion to remove the attorney ad litem followed with notice and a hearing constitutes a "proper procedure."

What if an attorney ad litem is a Ghost Train and never connected with the parties, never filed an initial pleading, failed to return phone calls and correspondence from the court and parties, and seemed to have fallen off the face of the earth? What if the attorney ad litem was appointed on a simple heirship or guardianship and resources were scarce? This author, rightly or wrongly, took matters into her own hands and simply discharged the Ghost Train and appointed The Little Engine that Could. In the future, however, this author will motion, *sua sponte*, that such attorney ad litem appear and show cause why he should not be removed.

G. Make 'Em Pay Freight.

Set out below are tools ad litems might use to protect the interests of a proposed ward. The ad litem who fiddles in the tent while Rome burns, or the Light Rail discussed above, fails to guard the interests he was appointed to protect. So often, in the context of contested guardianships, the timid, inexperienced, or inattentive ad litem allows contestants to pursue litigation, lose sight of the ward's interests, and squander the assets of the proposed ward. In such cases, the ad litem should act with boldness and consider taking the following actions.

1. Seek Security for Costs in Guardianship.

A court that creates a guardianship, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created, from available funds of the ward's estate or management trust, if created. *See* TEX. EST. CODE §1155.054. In contested guardianships, often the court awards attorney fees to each applicant, the attorney ad litem, and, if appointed, a guardian ad litem. The fees for the attorney ad litem and the guardian ad litem are taxed as costs of the proceeding.

When the ward likely foots the bill in a contested guardianship, contestants, unburdened with the financial responsibility for the litigation, sometimes allow it to persist beyond what would otherwise be considered a reasonable point. One way to insure that the contestants have skin in the game is to seek security for costs. At any time before the trial of an application, complaint, or opposition in a guardianship proceeding, an officer of the court or a person interested in the guardianship or in the welfare of the ward may, by written motion, obtain from the court an order requiring the person who filed the application, complaint, or opposition to provide security for the probable costs of the proceeding. *See* TEX. EST. CODE §1053.051.

Rule 143 of the Texas Rules of Civil Procedure sets out the consequences of noncompliance when a party ordered to give security for costs and fails to do so. Rule 143 provides as follows, "A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. If such rule be entered against any party and he fails to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed." TEX. R. CIV. P. 143.

Sadly, ordering a party to deposit security for costs had limited use for several years as the costs of the guardianship were taxed to the guardianship estate or the county treasury unless the court denied an application for the appointment of a guardian based upon the recommendation of the court investigator. *See* TEX. PROB. CODE §669 (West 2013). Only in this limited circumstance was an applicant for guardianship required to pay for the cost of the proceeding. Consequently, even if the court ordered a party to deposit with the clerk security for costs, the court was not authorized to tax court costs against such security unless the court denied the application for appointment of a guardian based upon the recommendation of the court investigator. *See In re Mitchell*, 342 S.W.3d 186 (Tex. App.—El Paso 2011, no writ). In other words, prior to the legislative changes of 2013, even if a party was ordered to deposit security for costs in a contested guardianship, such security would likely not be used to pay the costs of the guardianship, as the court in almost every case was only authorized to tax the costs of the guardianship against the estate of the ward or the county treasury.

In 2013, the Texas Legislature amended §1155.151 of the Estates Code (formerly §666 of the Texas Probate Code) to add a provision enabling a court finding that a party acted in bad faith or without just cause to order such party to pay all or part of the costs of the proceeding. If such party was required to provide security for costs, the costs of the proceeding ordered to be paid by such party would be taxed first against the security deposited with the clerk by such party. *See* TEX. EST. CODE §1155.151. In a guardianship proceeding, the following expenses represent "costs of the proceeding": a) guardian ad litem fees; b) attorney ad litem fees; c) court visitor expenses; d) fees of mental health professionals; and e) fees charged by interpreters. *See id.*

In sum, the recent legislative changes to §1155.151 of the Estates Code augmented the court's authority to order a party to deposit security for the probable costs of the guardianship proceeding pursuant to §1053.051 of the Estates Code. So, in the context of contested guardianships, if the court finds that a party is prosecuting or objecting to an application in bad faith or without just cause, the court may order such party to place in the registry of the court security for costs. Ultimately, the costs of the proceeding may be taxed against such funds placed in the registry of the court.

2. Seek Applicant's Attorney Fees in Guardianship.

The Texas Legislature amended §1155.054 of the Estates Code (formerly §665B of the Texas Probate Code) in 2013 to authorize the court to require a party whom the court found to be acting in bad faith or without just cause in prosecuting or objecting to an application in the proceeding to reimburse the ward's estate for all or part of the attorney's fees awarded by the court. *See* TEX. EST. CODE §1155.054. The amendment to §1155.054 relating to attorney fees parallels the amendment to §1155.151 relating to costs of the proceeding and ups the ante for parties seeking to pursue applications or objections in bad faith or without just cause.

Both §§1155.054(d) and 1155.151(c) of the Estates Code require the court to make a finding that a party acted in bad faith or without just cause in a guardianship proceeding. This begs the question, what constitutes bad faith? Bad judgment or negligence alone does not constitute bad faith; rather, bad faith is the "conscious doing of a wrong for dishonest, discriminatory, or malicious purpose." *Elkins v. Stotts–Brown*, 103 S.W.3d 664, 669 (Tex. App.–Dallas 2003, no pet.). Improper motive is an essential element of bad faith. *Id*. However, direct evidence of a sanctioned person's subjective intent is not required and may be shown by circumstantial evidence. *See Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 289–90 (Tex. App.–Dallas 2012, no pet.).

Interestingly, the statutory probate court in Collin County recently found the mother of a disabled adult child with a longstanding, acrimonious relationship with the child's father and guardian acted in bad faith and without just cause when she prosecuted a series of numerous motions seeking to modify the guardianship and remove the guardian. *See In re Guardianship of Laroe*, 2017 WL 511156 (Tex. App.—Dallas 2017). Perhaps also irritated by the fact that the mother sent emails to the facility where the father sought to place his incapacitated adult daughter warning the facility of the daughter's difficult behavior, the probate court awarded costs pursuant to §1155.151 of the Estates Code and ordered the mother to pay $3,342.50, which equaled half of the outstanding attorney ad litem fees. *See id.* The appellate court dubbed the order requiring the mother to pay costs a "sanction" and found it to be an abuse of discretion, as the appellate court found no evidence rebutting the strong presumption that mother filed her motions in good faith. *See id* at 21.

3. Motion to Show Authority.

Sometimes, the proposed ward will hire private counsel, either before or after the attorney ad litem has been appointed by the court. If the private counsel is not certified pursuant to §1054.201 of the Estates Code, he is not qualified to represent the proposed ward. If the private attorney hustles and obtains the necessary educational credentials required by §1054.201 of the Estates Code (4 hours of credit that may be obtained by webcast through the Texas State Bar at a cost of $170), such attorney may represent the proposed ward well and enable the matter to be efficiently and peacefully brought to resolution, especially if the private attorney has earned the trust and respect of the proposed ward. The attorney ad litem, if already appointed by the court, may wish to withdraw in favor of the private attorney representing the proposed ward.

However, if the private attorney sees the case as a cash cow and becomes a Gravy Train, promising to deplete the resources of the proposed ward with his overzealous representation, a Rule 12 Motion to Show Authority might be the best tool to put the case back on track. In his outline presented to the 2014 Conferences & CLE, Disability Planning - Health Care, Elder Law, Guardianship and entitled, "Whack-a-Mole: Handling Problem Litigants and the Occasional Overzealous Ad litem," Craig Hopper offers some cautionary advice regarding who should file a Rule 12 Motion and advocate for the idea that a proposed ward lacked capacity to hire a private attorney. The attorney ad litem must adhere to ethical obligations and advocate on behalf of his client. So, the Rule 12 Motion to Show Authority would most properly be filed by a guardian ad litem or an applicant. Craig Hopper's outline also offers

practical and commonsense ideas to work with private attorneys to avoid filing a Rule 12 motion.

4. Motion in Limine to Challenge Party's Standing.

Sometimes, parties in a guardianship proceeding lack standing. A person who has an interest that is adverse to a proposed ward or incapacitated person may not: 1) file an application to create a guardianship; 2) contest the creation of guardianship; 3) contest the appointment of a person as guardian; or 4) contest the application for complete restoration of the ward's capacity or modification of the ward's guardianship. *See* TEX. EST. CODE §1055.001. The motion in limine enables a person to challenge a party's standing to pursue a matter in guardianship based upon such person's alleged adverse interest. *See id.*

The standard for determining a person's standing to file a guardianship application under §1055.001(b)(1) of the Estates Code is distinct from the standard for determining whether a person is disqualified from being appointed as guardian under §1104.354 of the Estates Code. "A good example of these differences arises in regard to the issue of debt. A person who is indebted to the proposed ward is disqualified from serving as guardian unless the debt is paid before the appointment; however, being indebted to the proposed ward does not automatically deprive a person of standing to apply for a guardianship." *In re Guardianship of Gilmer*, 2015 WL 3616071 (Tex. App.—San Antonio 2015, no pet.). *See also In re Guardianship of Miller*, 299 S.W.3d 179, 188–89 (Tex.App.–Dallas 2009, no pet.). Challenging the standing of a party may be done at any time during the proceeding, as it relates to jurisdiction. Standing, which focuses on who may bring a lawsuit, is a prerequisite to subject matter jurisdiction, which is essential to a court's power to decide a case. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). Further, whether a person has standing to file an application to create a guardianship is a question of law not of fact. *In re Guardianship of Benavides*, 2014 WL 667525, at 1 (Tex. App.—San Antonio 2014, pet. denied).

What constitutes an interest adverse to that of a proposed ward or incapacitated person? Not surprisingly, Texas courts find that plaintiffs prosecuting claims against a proposed ward lack standing to oppose the creation of a guardianship, even when it interferes with the plaintiff's ability to depose the proposed ward. *See Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App.—El Paso 1991, orig. proceeding). Similarly, courts have held that a person who is suing a proposed ward or an incapacitated person has an interest adverse to the proposed ward or incapacitated person. *See In re Guardianship of Valdez*, 2008 WL 2332006 (Tex.App.—San Antonio June 4, 2008, pet. denied). Further, when an applicant for guardianship is the spouse of the proposed ward and such applicant takes actions which conflict with the terms of a premarital agreement, such spouse lacks standing to pursue guardianship as such spouse has an interest adverse to the proposed ward. *See Benavides* at 1. However, the fact that the adult children of a proposed ward seek guardianship during the pendency of divorce proceedings between the children's father and the proposed ward did not constitute an interest adverse to the proposed ward on the part of the children. *See Gilmer*, at 1.

The courts in *Allison*, *Valdez*, and *Benavides* found that litigants in a guardianship lacked standing because they advocated for a position that threatened the estate of the proposed ward. Finding adverse interest in those situations seems straight forward. But, what if a litigant in a guardianship advocates for a position that might harm the physical or emotional well-being of the proposed ward? Conflicts of this type arise regularly in contested guardianships. For example, it seems that a child married to a spouse having a history of domestic violence and living with an incapacitated parent in such parent's home might have interests adverse to such incapacitated parent and such child might lack standing to pursue a guardianship over such incapacitated parent. It is the duty of the attorney ad litem, and if appointed, the guardian ad litem, in a guardianship matter to determine whether the applicant has standing to pursue guardianship, and if the case is contested, whether the contestant has standing to pursue the contest. A party's standing confers subject matter jurisdiction on the court. Without it, the court lacks jurisdiction to hear the case.

VIII. CONCLUSION

Aside from motherhood, serving as a member of the probate bar for almost twenty years and working with other attorneys and judges as we all seek to help families in times of crisis represents my most noble and fulfilling pursuit. The pride with which I entered the legal profession rarely wanes and often waxes thanks to others who take the time and effort to share their wisdom and experience and lead by example with dignity, integrity, and competence. My dad was my first mentor and law partner. He suffered through my many mistakes and always reassured me that a collection of mistakes is called experience. Hopefully, this outline will be one of many resources that assist you as you mentor others and improve their serve.