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REPRESENTING PROPOSED WARDS: HOW DISORGANIZED IS LEGALLY DISORGANIZED?

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I. Introduction

Guardianship proceedings are becoming more abundant as our population ages. As the number of Texans over age 65 is expected to double to six million by 2030, probate lawyers who practice in the field of guardianship will play an increasingly critical role in promoting and protecting the well-being and welfare of Texans who are allegedly incapacitated or experiencing diminished capacity. In particular, Texas attorneys who accept court appointments as an Attorney Ad Litem must appreciate the gravity of a guardianship proceeding for their clients. As Chief Justice Hecht of the Texas Supreme Court stated in his noteworthy 2019 Opinion in *In Re Thetford*, "A guardianship is a court-sanctioned infringement of an incapacitated person's right to control her own property, liberty, and life in order to 'promote and protect [her] wellbeing." *In re Thetford*, 574 S.W.3d 362, 364 (Tex. 2019). Therefore, it is the role and responsibility of an Attorney Ad Litem to ensure that their client, the proposed ward, is not unjustly and summarily deprived of his or her rights. Just because a proposed ward may appear disorganized or disheveled does not necessarily mean that they are legally incapacitated or in need of a full guardianship. The Attorney Ad Litem's job is to defend the proposed ward accordingly, no matter how disorganized they may be.

The goal of this paper is to assist Attorneys Ad Litem in fulfilling this responsibility by 1) defining the role and responsibilities of an Attorney Ad Litem; 2) offering tools to assess a proposed ward's capacity; and 3) providing potential strategies for an Attorney Ad Litem to protect the proposed ward who is not incapacitated, the proposed ward who is partially incapacitated, or the proposed ward who is totally incapacitated.

II. Legal Landscape for Serving as an Attorney Ad Litem

The Texas Estates Code sets out the basic duties of an Attorney Ad Litem that should serve as a starting point and step-by-step guide for any Attorney Ad Litem appointment. These are the minimum legal requirements every Attorney Ad Litem must meet. Complicated cases, however, may require more strategy.

At the outset of their appointment, every Attorney Ad Litem should remind themselves of the purpose of a guardianship, as reflected in the Texas Estates Code's policy statement in Section 1101.001(a), which provides, "A court may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the incapacitated person." Tex. Estates Code §1001.001(a). The Code's emphasis on crafting the least intrusive guardianship possible continues in Section 1101.001(b), which further states, "In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence." *Id.* §1001.001(b).

An Attorney Ad Litem's job is to ensure that this legislative intent behind the creation of a guardianship is carried out. Therefore, in all guardianship proceedings, "the court shall appoint an attorney ad litem to represent the proposed ward's interests, including the proposed ward's expressed wishes." Tex. Estates Code §§1054.001; 1054.007(c). In contrast, a Guardian Ad Litem's role is to investigate whether a guardianship is necessary for a proposed ward in such a way that will enable the court to determine the action that will be in that person's best interests. *Id.* §1054.054.

In order to adequately represent the proposed ward's interests, including his or her expressed wishes, the Estates Code requires an Attorney Ad Litem to interview the proposed ward within a reasonable time before the hearing on an application for the appointment of a guardian. Tex. Estates Code §1054.004(a). During the course of such interview(s), the attorney ad litem *shall* discuss with the proposed ward: 1) the law and facts of the case; 2) the proposed ward's legal options regarding disposition of the case; 3) the grounds on which guardianship is sought; and 4) whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. *Id*. In addition, the Attorney Ad Litem is required to review: 1) the application for guardianship; 2) certificates of current physical, medical, and intellectual examinations; and 3) all of the proposed ward's relevant medical, psychological, and intellectual testing records. *Id*. §1054.004(b). In 2015, the Attorney Ad Litem's duties were expanded to require additional discussion with the proposed ward concerning the Attorney Ad Litem's opinion of whether a guardianship is necessary for the proposed ward and, if so, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services, in addition to whether alternatives to a guardianship are appropriate. *Id*. §1054.004(c).

Upon the initiation of a guardianship proceeding, proposed wards are often confused and fearful of the repercussions of being under a guardianship. Therefore, in the course of representing a proposed ward and discussing the necessity and potential limitations of the guardianship, an Attorney Ad Litem should also review with the proposed ward the Estates Code's Bill of Rights for Wards, which provides an extensive list of tasks and items a ward under guardianship is still authorized to do unless limited by the court or otherwise restricted by law. *See* Tex. Estates Code §1151.351. *See also* Appendix "A."

Beyond the basic duties of an Attorney Ad Litem outlined in the Estates Code, the principal role of an Attorney Ad Litem is to require the applicant to meet their burden of proof for each element of a guardianship. In all guardianship cases, before appointing a guardian for a proposed ward, the applicant must show and the court must find *by clear and convincing evidence* that:

(A) the proposed ward is an incapacitated person;
(B) it is in the proposed ward's best interest to have the court appoint a person as the proposed ward's guardian;
(C) the proposed ward's rights or property will be protected by the appointment of a guardian;
(D) alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and

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