

CHAPTER 5

Managing Resources of the Elderly

5-1 Introduction

Consider the following:

Walter is 68. He is apparently healthy and in high spirits. One day, his close friend, Mortimer, dies. Just like that. No illness, no accident, no warning. Mortimer went to sleep one night and the following morning his wife woke up to discover she had spent part of the night sleeping next to a dead man. As simple as that.

Now Walter is concerned that he, too, might die suddenly. Or worse, he might become disabled. He ponders which of the two would be the better option—sudden death or living with a disability. He cannot make up his mind. So, he considers his options: If he dies, who will come into ownership of his property? That does not matter much to him. He'll be dead, and he remembers reading in the book that he reads five times a day that the dead do not know anything. But what if he becomes disabled? Who will take over his property? Who will make decisions for him? Who will decide where he should live, and how he should live? Who will make decisions for him?

Walter sets himself to doing some research. He discovers six legal techniques he can use to get a firm grip on his life and property should he suffer a disability:

1. power of attorney;
2. guardianship;
3. community property administration;
4. Social Security Representative Payee;
5. account management; and
6. a trust.

This chapter discusses five of these six techniques. We shall cover the sixth (trusts) in Chapter 9.

5-2 The Power of Attorney

With a power of attorney, an individual selects a representative to assist him or her with financial and property matters.¹ The individual ("the principal") delegates to the

¹ Tex. Est. Code § 752.051.

representative (“the agent” or “attorney in fact”) whatever powers the principal feels the agent will need to properly manage the property.

Many powers of attorney are written to grant very broad powers to the agent. However, the principal may, if he or she wishes, grant very narrow powers to the agent, and be very specific in detailing what the agent is to do. Generally, however, for estate planning purposes, the powers granted are extensive, allowing the agent great flexibility.

5-2:1 Types of Powers of Attorney

Financial powers of attorney may be broken down into two types: “regular” and “durable.”

5-2:1.1 Regular Power of Attorney

A regular power of attorney is based on the common law of agency and on statutes about agency. Pursuant to this law, a principal appoints an agent whose authority can be exercised only while the principal has capacity to undertake the same action. Hence, if the principal cannot do something for himself or herself, the agent cannot do it either. Stated another way, if the principal becomes disabled in any way, the agent can no longer act on the principal’s behalf. This is problematic in the estate planning context. After all, if the principal becomes disabled, he or she truly needs someone to act on his or her behalf. Alas, this is just when the regular power of attorney vanishes!

Dissatisfied, states began devising ways to create a document whereby an agent would be able to act on behalf of a principal who lacked competency. In 1954, Virginia became the first state to authorize a durable power of attorney, which provided that the agent retained the authority to act even if the principal lacked competency.²

5-2:1.2 Durable Power of Attorney

The most significant difference between a regular power of attorney and a durable power of attorney, then, is the following: A durable power of attorney remains in force even if the principal becomes disabled.³ Moreover, a durable power of attorney does not lapse because of the passage of time unless the instrument creating the power specifically states a time limitation.⁴ Indeed, unless the principal revokes it or a court of competent jurisdiction acts to effectively revoke it, the power of attorney remains in effect and continues to work until the principal’s death.

However, the common law did not create the durable power of attorney; it was created by statute. Hence, to create and use a durable power of attorney, the client—or his or her attorney—must carefully follow the instructions provided by the statute.

² Code of Virginia § 11-9.1. Sections 11-9.1 through 11-9.7 of the Virginia Code were subsequently repealed by Acts 2010, cc. 455 and 632, cl. 2. The replacement statute reads: “A power of attorney created under this chapter is durable unless it expressly provides that it is terminated by the incapacity of the principal.” Code of Virginia § 64.2-1602.

³ Tex. Est. Code § 751.0021.

⁴ Tex. Est. Code § 751.132(b).

5-2:2 Fundamental Requirements of the Durable Power of Attorney

The Texas statute⁵ requires few formalities to create a durable power of attorney. Essentially, the principal must “write out” his or her instructions, date it, sign it, and have it notarized.⁶ The statute does not require that the instrument have any witnesses.⁷

To assist people in creating the durable power of attorney, the legislature created a form called the “Statutory Durable Power of Attorney.”⁸ A copy of this form is contained in Appendix 7. However, the form and its wording are not exclusive, and attorneys are free to draw up their own or to use other formats, so long as the wording used complies substantially with the wording prescribed by Texas Estates Code § 752.051.⁹

The statute does not require that the durable power of attorney be filed with the County Clerk. However, if the agent uses the power with respect to a real property transaction, he or she will then need to record the power of attorney with the County Clerk’s office in the county where the real property is located.¹⁰ The 2015 Texas Legislature mandated that such a power be filed no later than the 30th day after the filing of the real property instrument.¹¹ The statute is silent regarding the consequences for a failure to file.

A principal can use the durable power of attorney to grant a wide variety of powers to his or her agent. The agent could have the power to, on the principal’s behalf, enter into transactions ranging from personal and real property transactions to foreign interests.¹² However, to grant these powers to the agent, the principal must specifically mention them in the instrument. When using the statutory durable power of attorney form, the principal must ensure that he or she initializes the line to the left of each power he or she is granting to the agent.¹³ The principal’s failure to initialize the line to the left of each enumerated power will be construed as an indication that the principal did not wish to grant this power to the agent.¹⁴

5-2:3 Springing Durable Power of Attorney

Unless the instrument states otherwise, a power of attorney takes effect upon its execution.¹⁵ The Texas statute changes that; it allows principals to choose whether the power takes immediate effect,¹⁶ or whether the agent’s authority to act takes effect only if the principal loses the ability to act for himself or herself—that is, if he or she

⁵ Tex. Est. Code §§ 751.001–751.251.

⁶ Tex. Est. Code § 751.0021.

⁷ See Tex. Est. Code § 751.0021.

⁸ Tex. Est. Code § 752.051.

⁹ Tex. Est. Code § 752.003.

¹⁰ Tex. Est. Code § 751.151.

¹¹ Tex. Est. Code § 751.151.

¹² Tex. Est. Code §§ 752.001–752.015.

¹³ See Tex. Est. Code § 752.051.

¹⁴ See Tex. Est. Code § 752.051.

¹⁵ Uniform Power of Attorney Act § 109(a).

¹⁶ Tex. Est. Code § 751.0021(3)(A)(i).

becomes disabled or incapacitated.¹⁷ This latter form of durable power of attorney is called a "springing power of attorney."

The advent of the statutorily blessed springing power of attorney raises a valid question: If someone executed a durable power of attorney prior to its being authorized by the Durable Power of Attorney Act in 1993, is that power of attorney valid? If the principal signed a durable power of attorney with a springing power in 1991 and suffers a disability today, is the springing power effective notwithstanding the fact that it was created prior to its being authorized by law?

In *Comerica Bank v. Texas Commerce Bank*,¹⁸ the Court of Appeals in Texarkana held that although no explicit statute authorizing springing powers of attorney existed prior to 1993, such powers were indeed legal. Notwithstanding the court's authorization of these pre-1993 springing powers of attorney, it is advisable that someone with such a power of attorney execute a current durable power of attorney based on the Texas Durable Power of Attorney Act. This would save the individual from possibly going to court to determine whether his or her particular power is valid.

5-2:4 Revocation of the Power of Attorney

A durable power of attorney does not lapse because of passage of time unless the instrument creating the power specifically states a time limitation.¹⁹ However, other circumstances can give rise to a termination of the power:

1. The principal dies.²⁰
2. Where the principal appointed his or her spouse as agent (or a court appointed the spouse as agent) and the principal and agent divorce or their marriage is annulled, the power of attorney terminates as a matter of law unless the instrument creating the power of attorney expressly states otherwise.²¹
3. A guardian of the principal's estate is appointed by a court sitting in the principal's domicile.²²

Notwithstanding the aforementioned provisions, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation.²³ Also, the filing of a voluntary or involuntary petition in a bankruptcy proceeding on behalf of the principal does not revoke or terminate the power of attorney.²⁴

¹⁷ Tex. Est. Code § 751.0021(3)(A)(ii).

¹⁸ *Comerica Bank v. Tex. Commerce Bank Nat'l Ass'n*, 2 S.W.3d 723 (Tex. App.—Texarkana 1999, *pet. denied*).

¹⁹ Tex. Est. Code § 751.132.

²⁰ Tex. Est. Code § 751.131(1).

²¹ Tex. Est. Code § 751.132(a)(3).

²² Tex. Est. Code § 751.131(6).

²³ Tex. Est. Code § 751.134.

²⁴ Tex. Est. Code § 751.057.

5-2:5 The Agent's Fiduciary Responsibilities

The Durable Power of Attorney Act is clear: The agent is a fiduciary with a duty to account for actions he or she takes under the power of attorney.²⁵ Accordingly, the agent is obligated to perform his or her duties pursuant to the standards of good faith and trustworthiness.²⁶ Should he or she fail to do that, the principal may revoke the power of attorney and/or seek restitution from the agent for misused funds or other property.²⁷

Even in situations where the principal lacks mental capacity, Texas law provides an avenue whereby the agent can be removed. If, after a principal has executed a durable power of attorney, a court sitting in the principal's domicile is convinced that the agent has been abusing his or her power, the court may appoint a guardian of the principal's estate—either permanent or temporary—at which time the powers of the agent will terminate and the agent will turn over to the guardian all of the principal's property in his or her possession.²⁸

5-2:6 Capacity to Execute a Power of Attorney

Texas has no statutory requirement that a principal possess a certain level of capacity in order to execute a power of attorney. However, Texas courts appear to apply the capacity requirements for entering into contracts for determining whether principals had the requisite capacity to execute powers of attorney.²⁹ Under this standard, someone who challenges a principal's mental capacity when signing a power of attorney has the burden of showing that the principal "did not understand the nature or consequences of his act at the moment the power of attorney was executed."³⁰

5-3 Guardianship

Guardianship is a court-supervised procedure for stripping authority from one person and placing it into the hands of another. It is seldom a voluntary procedure; rather, it can often be thrust upon an elderly person if and when he or she becomes incapacitated.

5-3:1 Avoiding Guardianship

Most people view guardianship as a procedure of last resort. In short, they view guardianship as something to be avoided at all costs. Experienced Texas attorney,

²⁵ Tex. Est. Code § 751.101.

²⁶ Vaughn E. James, *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Practical Issues*, 64 (AMACOM Books 2009).

²⁷ Tex. Est. Code § 751.105.

²⁸ Tex. Est. Code § 751.133.

²⁹ See *In re Estate of Vackar*, 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, *reh'g overruled*).

³⁰ *In re Estate of Vackar*, 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, *reh'g overruled*) (citing *Tomlinson v. Jones*, 677 S.W.2d 490, 492–93 [Tex. 1984]; *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 [Tex. 1969]).

Paul Premack, argues that guardianship is (1) expensive, (2) slow, and (3) “a detailed and often troublesome task for the person appointed to be guardian.”³¹

This being the case, whenever possible, attorneys and their clients should seek to avoid guardianship. The best way to succeed at this, however, is for the proposed ward to engage in pre-planning. Typically, the person’s execution of a durable power of attorney and a medical power of attorney should be sufficient to ward off future guardianship. The durable power of attorney would normally make guardianship of the estate redundant, since the principal would have already appointed someone to act on his or her behalf regarding his or her finances and property. Meanwhile, a medical power of attorney negates the need for guardianship of the person since the instrument would have already delegated the power to make health care decisions to someone of the ward’s choosing.

5-3:2 Declaration of Guardian

While an individual’s execution of both a durable power of attorney and a medical power of attorney should be sufficient to ward off guardianship, it remains true that someone might still try to force him or her into guardianship. Additionally, as we have already discovered, if a court of competent jurisdiction appoints a permanent guardian for the principal, both the durable power of attorney and the medical power of attorney would become void.³²

While it is unlikely that someone would force an elderly person into guardianship knowing that such elderly person has already executed powers of attorney, it is quite possible that a disgruntled family member, unhappy about the proposed ward’s decisions, would indeed make such an attempt. The way to stop this well-meaning relative is for the elderly person to make a “Declaration of Guardian.”

A Declaration of Guardian is a legal document wherein someone tells the court who the person wants to serve as his or her guardian in the event he or she becomes incapacitated and/or a guardianship proceeding is ever commenced against him or her.³³ The Declaration allows the declarant to appoint a guardian of his or her estate and a guardian of his or her person.³⁴ The declarant may appoint one person to fill each role, or could have the same person fill both. Of much importance, the declarant could disqualify an individual from ever becoming one of his or her guardians.³⁵

The Texas legislature has developed a form for use in the formation of a Declaration of Guardian. However, the form is not exclusive. While it may be used, the legislature does not require that it *must* be used.³⁶ A sample form and accompanying self-proving affidavit is included in Appendix 10. Appendix 11 contains a sample alternative to the self-proving affidavit.

³¹ Paul Premack, *The Senior Texan Legal Guide*, 13 (Longview Publishing 4th ed. 2001).

³² Tex. Est. Code § 751.133; Tex. Health & Safety Code § 166.156.

³³ Tex. Est. Code § 1104.202(a).

³⁴ Tex. Est. Code § 1104.201.

³⁵ Tex. Est. Code § 1104.202(b).

³⁶ Tex. Est. Code § 1104.204.

5-3:2.1 Filing of Declaration and Self-Proving Affidavit

No requirement exists that the Declaration be filed with the court in advance. However, the proposed guardian must file the document when he or she goes to court to be appointed guardian (if the need arises). Timing is important: The Declaration must be filed *after* someone starts a guardianship proceeding (by filing an Application for Guardianship) and *before* the court appoints a guardian.³⁷

5-3:2.2 Revocation of the Declaration of Guardian

The declarant may revoke the Declaration of Guardian by using any of the methods authorized for revoking a Last Will and Testament—i.e., the declarant could destroy it, cancel it, or have someone destroy or cancel it in his or her presence.³⁸

5-3:2.3 Effect of Divorce

If a declarant designates his or her spouse to serve as guardian and the declarant is subsequently divorced from the spouse before a guardian is appointed, the provision of the declaration designating the spouse is effectively revoked and has no effect.³⁹

5-3:2.4 Alternate or Other Court-Appointed Guardian

If the guardian designated in the declaration does not qualify, predeceases the declarant, refuses to serve, resigns, or is otherwise unavailable to serve as guardian, the court shall appoint the next eligible alternate guardian to serve as guardian.⁴⁰ However, if none of the eligible alternate guardians named in the declaration are available to serve, the court shall appoint someone else as guardian.⁴¹

5-3:2.5 Private Professional Guardians

To provide a sufficient pool of guardians to meet the need for guardianships in Texas, the Texas legislature has created a class of private professional guardians. These individuals must be certified under Subchapter C, Chapter 155 of the Texas Government Code.⁴² In addition to being certified as professional guardians, individuals wishing to serve in this capacity must also annually apply for a certificate of registration from the Judicial Branch Certification Commission.⁴³

5-3:2.5a Application Requirements

To apply for a certificate of registration, a private professional guardian must submit a sworn statement containing the following information:

³⁷ Tex. Est. Code § 1104.207.

³⁸ Tex. Est. Code § 1104.210.

³⁹ Tex. Est. Code § 1104.211.

⁴⁰ Tex. Est. Code § 1104.212(a).

⁴¹ Tex. Est. Code § 1104.212(b).

⁴² Tex. Est. Code § 1104.251(a)(1).

⁴³ Tex. Est. Code § 1104.303(a).

1. his or her place of residence;
2. his or her business address and business telephone number;
3. his or her educational background and professional experience;
4. at least three professional references;
5. the name of each ward for whom he or she will be serving as guardian;
6. the aggregate fair market value of the property of all wards that the private professional guardian is or will be managing;
7. whether he or she has ever been removed as a guardian by the court or has resigned as guardian in a particular case, and if so, a description of the circumstances leading up to the removal or resignation; and
8. the certification number or provisional certification number issued to the private professional guardian by the guardianship certification program of the Judicial Branch Certification Commission.⁴⁴

The application must be made out to the clerk of the county having venue of the proceeding for the appointment of a guardian for the proposed ward, and must be accompanied by a nonrefundable fee of \$40.⁴⁵

5-3:2.5b Registration Renewal

The certificate of registration must be renewed annually.⁴⁶ Specifically, an application for renewal must be completed during December of the year preceding the year for which the renewal is requested.⁴⁷

5-3:3 Mental Health Commitment

Texas law allows any adult to petition a court to force an allegedly mentally ill person to receive clinical attention.⁴⁸ This mental health commitment is not the same as guardianship. While mental health commitment is severe and short-term, guardianship is targeted toward the long-term care of an incapacitated person.

Texas law allows mental health commitment under limited circumstances. The judge must find that the proposed patient is mentally ill and that because of this illness, the proposed patient is likely to cause serious harm to himself or to someone else.⁴⁹ In the alternative, the judge could find that the proposed patient is suffering severe and abnormal mental, emotional, or physical distress, accompanied by substantial mental or physical deterioration in his or her ability to function independently, and that he or she lacks the ability to make a rational and informed decision as to whether to submit to inpatient medical treatment.⁵⁰

⁴⁴ Tex. Est. Code § 1104.303(a).

⁴⁵ Tex. Est. Code § 1104.303(b).

⁴⁶ Tex. Est. Code § 1104.304(a).

⁴⁷ Tex. Est. Code § 1104.304(b).

⁴⁸ Tex. Mental Health Code § 574.001.

⁴⁹ Tex. Mental Health Code § 574.034(a).

⁵⁰ Tex. Mental Health Code § 574.034(a).

The purpose of a mental health commitment is to obtain immediate mental health care for the patient. However, the care cannot exceed 90 days.⁵¹ Unlike guardianship, the mental health commitment process does not give anyone financial control over the patient or his or her property.

5-3:4 Temporary Guardianship

If a person is at risk but the situation does not fit the mental health commitment guidelines, temporary guardianship might be an answer.

A temporary guardianship is a limited guardianship for a short duration; the majority last for a period not exceeding 60 days;⁵² in special circumstances, they may last 9 months.⁵³ A court may appoint a temporary guardian—with limited powers as the circumstances of the case require—if the court determines that “probable cause” exists to believe that the proposed ward or his or her estate would benefit from the immediate appointment of a guardian.⁵⁴ However, notwithstanding the appointment of a temporary guardian, the proposed ward retains all rights and powers the court does not specifically grant to the temporary guardian.⁵⁵ After all, the fact that the court has appointed a temporary guardian for the proposed ward does not in any way indicate that the proposed ward is incapacitated.⁵⁶

5-3:4.1 Application for Temporary Guardianship

Temporary guardianship can be initiated without the involvement of the proposed ward. Someone—the applicant—must allege to the court that the proposed ward and/or his or her property is in imminent danger, and that the temporary guardian is seeking the court’s assistance and protection for the proposed ward.⁵⁷ Once the application has been filed, the court appoints an attorney to represent the proposed ward in all guardianship proceedings in which independent counsel has not been retained by or on behalf of the proposed ward.⁵⁸ At this point, the clerk of the court serves notice of the application on the proposed ward, the proposed ward’s attorney, and, if the proposed temporary guardian is not also the applicant, the proposed temporary guardian.⁵⁹ The notice must describe the rights of the parties, and the date, time, place, purpose, and possible consequences of a hearing on the application.⁶⁰

5-3:4.2 The Hearing

Upon the court’s receipt of the Application for Temporary Guardianship, the clerk shall issue an order for the hearing on the application.⁶¹ Unless the hearing is subsequently

⁵¹ Tex. Mental Health Code § 574.034(g).

⁵² Tex. Est. Code § 1251.151.

⁵³ Tex. Est. Code § 1251.052.

⁵⁴ Tex. Est. Code § 1251.001(a).

⁵⁵ Tex. Est. Code § 1251.001(b).

⁵⁶ Tex. Est. Code § 1251.002.

⁵⁷ Tex. Est. Code § 1251.003.

⁵⁸ Tex. Est. Code § 1251.004.

⁵⁹ Tex. Est. Code § 1251.005.

⁶⁰ Tex. Est. Code § 1251.005.

⁶¹ Tex. Est. Code § 1251.006(a).

postponed by consent of the proposed ward or the proposed ward's attorney, it shall be held no later than 10 days after the date the application for temporary guardianship is filed.⁶²

The proposed ward—or his or her attorney—may move the court to postpone the hearing for a period of up to 30 days after the date the application is filed.⁶³ The proposed ward—or his or her attorney—may also move for dismissal of the application for temporary guardianship.⁶⁴ If the court denies the motion, the parties proceed to the hearing.

Hearings are normally public, but if the temporary ward requests it, the hearing will be conducted in private.⁶⁵ At the hearing, the proposed ward has the right to (1) receive prior notice, (2) be represented by counsel, (3) be present, (4) present evidence, and (5) confront and cross-examine witnesses.⁶⁶

If the applicant for temporary guardianship is not the proposed temporary guardian, the court will not grant the application unless the proposed temporary guardian appears in court for the hearing.⁶⁷

5-3:4.3 Order Appointing Temporary Guardian

The court shall appoint a temporary guardian by written order if, at the conclusion of the hearing, it determines that the applicant has established that substantial evidence exists that the proposed ward is incapacitated, that there is imminent danger that the proposed ward's physical health or safety will be seriously impaired, or that the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken.⁶⁸ The court shall assign to the temporary guardian only those powers and duties that are necessary to protect the proposed ward against the imminent danger shown.⁶⁹ Accordingly, the order appointing the temporary guardian must describe (1) the reasons for the temporary guardianship and (2) the powers and duties of the temporary guardian.⁷⁰

The court will also set bond for the temporary guardian as required by Texas Estates Code Chapter 1105.⁷¹

5-3:4.4 Duration of Temporary Guardianship

Except for certain temporary guardianships not relevant to our text, a temporary guardianship lasts no more than 60 days.⁷² Once initiated, a temporary guardianship will (1) end at the initial hearing, (2) be extended by agreement for up to 60 days, or

⁶² Tex. Est. Code § 1251.006(b).

⁶³ Tex. Est. Code § 1251.006(c).

⁶⁴ Tex. Est. Code § 1251.007(a).

⁶⁵ Tex. Est. Code § 1251.008(6).

⁶⁶ Tex. Est. Code § 1251.008.

⁶⁷ Tex. Est. Code § 1251.009.

⁶⁸ Tex. Est. Code § 1251.010(a).

⁶⁹ Tex. Est. Code § 1251.010(b).

⁷⁰ Tex. Est. Code § 1251.010(c).

⁷¹ Tex. Est. Code § 1251.012.

⁷² Tex. Est. Code § 1251.151.

(3) be extended by court order for up to 60 days. If the temporary guardian wants the guardianship to last beyond 60 days, he or she must file an application for a permanent guardianship.

5-3:5 Permanent Guardianship

A permanent guardianship begins when an interested person—through his or her attorney—files with the court clerk an Application for Guardianship.

5-3:5.1 Notifications

Although the law imposes no requirement that a proposed ward be consulted prior to the filing of the Application for Guardianship, once the application has been filed, the proposed ward is entitled to notice that someone has filed such a pleading.⁷³ Notice must also be served on the proposed ward's spouse—unless the spouse is the one applying to be guardian.⁷⁴

The law provides a number of ways in which the clerk may serve notice on the proposed ward, including personal service,⁷⁵ service by mail,⁷⁶ service by posting,⁷⁷ service by publication,⁷⁸ and service on the party's attorney of record.⁷⁹ Meanwhile, the applicant must mail a copy of the application and a notice containing the information required in the citation issued pursuant to Section 1051.102 of the Estates Code by registered or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery, to the following persons, if their whereabouts are known or can reasonably be ascertained:

- (1) each adult child of the proposed ward;
- (2) each adult sibling of the proposed ward;
- (3) the administrator of a nursing home facility or similar facility in which the proposed ward resides;
- (4) the operator of a residential facility in which the proposed ward resides;
- (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward;
- (6) a person designated to serve as guardian of the proposed ward by a written declaration of guardian if the applicant knows of the existence of the declaration;
- (7) a person designated to serve as guardian of the proposed ward in the probated will of the last surviving parent of the proposed ward;

⁷³ Tex. Est. Code § 1051.101(a), 103(a)(1).

⁷⁴ Tex. Est. Code § 1051.103(4).

⁷⁵ Tex. Est. Code § 1051.051.

⁷⁶ Tex. Est. Code § 1051.052.

⁷⁷ Tex. Est. Code § 1051.053.

⁷⁸ Tex. Est. Code § 1051.054.

⁷⁹ Tex. Est. Code § 1051.055.

(8) a person designated to serve as a guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and

(9) each adult named in the application as an "other living relative" of the proposed ward within the third degree by consanguinity, if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased and there is no spouse, parent, adult sibling, or adult child.

Notwithstanding the notice requirements, anyone other than the proposed ward may waive notice of the application for guardianship.⁸⁰

Probate courts in major metropolitan areas operate "Court Visitor Programs." The judge (on his or her own initiative) may require, or anyone involved in the guardianship can ask the judge to require, that a court visitor meet with the proposed ward before the court hearing.⁸¹ The court visitor's job is to give an independent assessment of the proposed ward's condition.⁸²

Depending on the nature of the guardianship proceeding, four other people deemed "Officers of the Court" may be involved therein: (1) the court investigator, (2) the attorney *ad litem*, (3) the interpreter, and (4) the guardian *ad litem*.

5-3:5.2 The Court Investigator

If the person seeking guardianship files the application in a Statutory Probate Court,⁸³ the court will appoint a court investigator.⁸⁴ The investigator meets with the proposed ward, attorney of record, social workers, family members, and any other persons necessary to determine whether guardianship is the least restrictive manner in which to handle the case.⁸⁵

The court investigator files a report with the court.⁸⁶ In a contested case, the court investigator provides copies of his or her report and conclusions to the attorneys for the involved parties.⁸⁷ If the applicant does not withdraw the application based on the

⁸⁰ Tex. Est. Code § 1051.105.

⁸¹ Tex. Est. Code § 1054.103.

⁸² Tex. Est. Code § 1054.004.

⁸³ See Tex. Gov. Code § 25.0025. The Statutory Probate Courts are courts in large metropolitan areas in the state. They have jurisdiction over their respective counties' probate matters, guardianship cases, and mental health commitments. They also have expansive jurisdiction to transfer virtually any civil matter which is related to an estate from the district, county, or statutory court in which the matter was filed to the Probate Court in which the estate is pending. Tex. Est. Code § 34.001. As of May 14, 2015, 18 Statutory Probate Courts existed in Texas, located in 10 of the largest counties in the state: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, and Travis. William D. Pargaman, 2015 Texas Estate and Trust Legislative Update (Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters), 2 (Texas Association of Counties, 2015).

⁸⁴ Tex. Est. Code § 1054.151.

⁸⁵ Tex. Est. Code § 1054.151.

⁸⁶ Tex. Est. Code § 1054.153.

⁸⁷ Tex. Est. Code § 1054.153(b).

court investigator's review and recommendation, the court appoints an attorney *ad litem* to advocate for the alleged incapacitated individual.⁸⁸

5-3:5.3 The Attorney *Ad Litem*

As we saw in Section 5-3:5.2, if the applicant does not withdraw his or her application after receiving the court investigator's report, the case will move forward. If the proposed ward is indeed incapacitated, he or she will need a legal representative. To fulfill that need, the court will appoint an attorney *ad litem* to serve as an advocate for the proposed ward and to protect his or her legal rights.⁸⁹

As an initial matter, the attorney *ad litem* shall be provided copies of all of the current records in the guardianship case.⁹⁰ Accordingly, he or she may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records.⁹¹

Next, the attorney *ad litem* has certain duties. Foremost among these is the duty to conduct a meeting with the proposed ward.⁹² At this meeting, the *ad litem* will discuss with the proposed ward the law, the facts of the case, the grounds on which the applicant is seeking guardianship, and the legal options available (including alternatives to guardianship).⁹³ Further to that, before the hearing, the *ad litem* will review the application for guardianship, the proposed ward's certificates of current physical, medical, and intellectual examinations, and all of the proposed ward's relevant medical, psychological, and intellectual testing records.⁹⁴ It is standard practice for the *ad litem* to deny the need for a guardianship—even in cases where the need is obvious to everyone. Truth is, this is not necessarily a bad thing. It actually forces the applicant to completely prove the proposed ward's incapacity, and offers some protection against abuse of the guardianship system.

The attorney *ad litem* is paid out of the proposed ward's funds.⁹⁵ This is so even if the proposed ward did not want the guardianship, and even if the court decides a guardianship is not necessary.

5-3:5.4 The Interpreter

At the same time that the court appoints the attorney *ad litem*, it will also, if necessary, appoint a language interpreter or sign language interpreter to ensure effective communications between the proposed ward and the attorney.⁹⁶

⁸⁸ Tex. Est. Code § 1054.001.

⁸⁹ Tex. Est. Code § 1054.001.

⁹⁰ Tex. Est. Code § 1054.003.

⁹¹ Tex. Est. Code § 1054.003.

⁹² Tex. Est. Code § 1054.004(a).

⁹³ Tex. Est. Code § 1054.004(a).

⁹⁴ Tex. Est. Code § 1054.004(b).

⁹⁵ Tex. Est. Code § 1054.007(b).

⁹⁶ Tex. Est. Code § 1054.005.

5-3:5.5 The Guardian *Ad Litem*

If the proposed ward is incapacitated, the court may appoint a guardian *ad litem* to represent the proposed ward's interests.⁹⁷ As an officer of the court, the guardian *ad litem* is charged with (1) investigating whether a guardianship is necessary for the proposed ward and (2) evaluating alternatives to guardianship supports and services available to the proposed ward that would avoid the need for appointment of a guardian.⁹⁸ The guardian *ad litem* will then report his or her findings to the court.⁹⁹ The guardian *ad litem* is entitled to compensation for his or her services, the costs of which are borne by the ward's estate.¹⁰⁰

5-3:5.6 Proof of Need for Guardianship

At the court hearing, the applicant must prove that the proposed ward needs to have a guardian appointed for him or her. Thus, before appointing a guardian for a proposed ward, the court must find by clear and convincing evidence that:

1. The proposed ward is an incapacitated person (i.e., he or she is unable, because of a mental or physical condition, to provide food, clothing, or shelter for himself or herself; provide for his or her own physical health; make responsible decisions; or manage his or her financial affairs¹⁰¹).¹⁰²
2. It is in the proposed ward's best interest to have the court appoint a guardian for him or her.¹⁰³
3. The proposed ward's rights or property will be protected by the appointment of a guardian.¹⁰⁴

As regards the court's determination that the proposed ward is incapacitated, such determination must be based on recurring acts or occurrences in the preceding 6 months, and not by isolated instances of negligence or bad judgment.¹⁰⁵

The court must also find by a preponderance of the evidence that:

1. The court has venue of the case.¹⁰⁶
2. The person to be appointed guardian is eligible to act as guardian and is entitled to appointment, or, if no eligible person entitled to appointment applies, the person appointed is a proper person to act as guardian.¹⁰⁷
3. The proposed ward:

⁹⁷ Tex. Est. Code § 1054.051.

⁹⁸ Tex. Est. Code § 1054.054(c).

⁹⁹ Tex. Est. Code § 1054.054(d).

¹⁰⁰ Tex. Est. Code § 1054.055.

¹⁰¹ Tex. Est. Code § 1101.103.

¹⁰² Tex. Est. Code § 1101.101(a)(1)(A).

¹⁰³ Tex. Est. Code § 1101.101(a)(1)(B).

¹⁰⁴ Tex. Est. Code § 1101.101(a)(1)(C).

¹⁰⁵ Tex. Est. Code § 1101.102.

¹⁰⁶ Tex. Est. Code § 1101.101(a)(2)(A).

¹⁰⁷ Tex. Est. Code § 1101.101(a)(2)(B).

- (a) is unable to care for himself or herself and to manage his or her property;
or
- (b) lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.¹⁰⁸

If the judge determines that the applicant has proved the existence of these facts, he or she will authorize the guardianship by signing an order appointing the guardian.¹⁰⁹ The order will name the guardian and the ward, and will state whether the guardian is of the estate or person of the ward, or both,¹¹⁰ and the amount of any bond required.¹¹¹ The order becomes effective when the court's clerk issues Letters of Guardianship to the guardian.¹¹² Because this text concerns the elderly, we note that Texas law prohibits the court from using age as the sole factor for determining whether it should appoint a guardian for a proposed ward.¹¹³

5-3:5.7 Choice of Guardian

When guardianship is the only alternative, the court has various choices. As an initial matter, the fact that an applicant has filed an application for guardianship does not guarantee that the court will appoint him or her guardian. Rather, before appointing a guardian, the court will make a reasonable effort to consider the proposed ward's preference of the person to be appointed guardian and, to the extent consistent with other provisions of the law, will appoint such person guardian.¹¹⁴ Accordingly, if the proposed ward has designated someone to serve as guardian under a Declaration of Guardian, the court will appoint that person unless it determines that he or she either is disqualified from serving or would not serve the proposed ward's best interests.¹¹⁵

5-3:5.7a Appointment According to Circumstances and Best Interests

In appointing a guardian, the court shall consider the circumstances and the incapacitated person's best interests.¹¹⁶

5-3:5.7b Appointment Preferences

With this standard in mind, the court has an order of preference for appointing guardians. If the incapacitated person did not make a Declaration of Guardian, the court will appoint his or her spouse as guardian—unless the spouse is somehow ineligible to serve.¹¹⁷ If the spouse is unavailable or ineligible to serve, the court shall appoint

¹⁰⁸ Tex. Est. Code § 1101.101(a)(2)(D).

¹⁰⁹ Tex. Est. Code § 1101.101(b).

¹¹⁰ Tex. Est. Code § 1101.153(a)(1), (2), (3).

¹¹¹ Tex. Est. Code § 1101.153(a)(4).

¹¹² Tex. Est. Code § 1101.153(a)(6).

¹¹³ Tex. Est. Code § 1101.105.

¹¹⁴ Tex. Est. Code § 1104.002.

¹¹⁵ Tex. Est. Code § 1104.202(a).

¹¹⁶ Tex. Est. Code § 1104.101.

¹¹⁷ Tex. Est. Code § 1104.102(1).

any "next of kin."¹¹⁸ If no next of kin volunteers, the court shall appoint any eligible person to serve.¹¹⁹

5-3:5.7c *Designation of Guardian by Surviving Parent*

Texas also makes provision for the surviving parent of an incapacitated adult to designate a guardian for the incapacitated person by will or written declaration that would take effect if the parent either dies or becomes incapacitated.¹²⁰ Of course, this would occur only in a situation where the parent had been appointed guardian of the incapacitated person.¹²¹ While this would be a rare occurrence in an Elder Law setting, it is indeed possible, and a choice to be considered in the context of this book.

5-3:5.8 Disqualification of Guardian

A potential guardian could be disqualified from serving if the person:

1. is under the age of 18 or otherwise incapacitated;¹²²
2. because of inexperience, lack of education, or some such reason, cannot assist the ward and cannot prudently manage and control the ward's estate;¹²³
3. has engaged in "notoriously bad conduct" and has been convicted of one or more of a list of crimes including sexual offenses, crimes against children, and crimes against the elderly;¹²⁴
4. appears to be in conflict of interest with the proposed ward in that he or she is a party (or his or her parent is a party) to a lawsuit affecting the welfare of the proposed ward (however, the court may waive this disqualification if it determines that the proposed ward and the applicant for guardian are actually on the same side of the lawsuit, or it appoints a guardian *ad litem* to represent the interests of the proposed ward throughout the litigation of the proposed ward's lawsuit claim);¹²⁵
5. owes money to the proposed ward, unless the debt is paid before the applicant gets appointed to be guardian;¹²⁶
6. asserts a claim adverse to the proposed ward or the proposed ward's property;¹²⁷
7. is found to be unsuitable by the court;¹²⁸
8. is disqualified in a Declaration of Guardian;¹²⁹

¹¹⁸ Tex. Est. Code § 1104.102(2).

¹¹⁹ Tex. Est. Code § 1104.102(3).

¹²⁰ Tex. Est. Code § 1104.103(a).

¹²¹ Tex. Est. Code § 1104.103(a).

¹²² Tex. Est. Code § 1104.351(1).

¹²³ Tex. Est. Code § 1104.351(2).

¹²⁴ Tex. Est. Code § 1104.353.

¹²⁵ Tex. Est. Code § 1104.354(1).

¹²⁶ Tex. Est. Code § 1104.354(2).

¹²⁷ Tex. Est. Code § 1104.354(3).

¹²⁸ Tex. Est. Code § 1104.352.

¹²⁹ Tex. Est. Code § 1104.355.

9. lacks the necessary certification to serve as guardian;¹³⁰
10. is not a resident of Texas and has not filed with the court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship;¹³¹ or
11. has committed family violence and is under a protective order issued under Chapter 85 of the Texas Family Code.¹³²

5-3:5.9 Guardianship in Action

The court order that appoints the guardian in effect spells out the powers given to the guardian. It states whether the guardian has financial powers (i.e., a guardian of the estate), medical and personal powers (guardian of the person), or both sets of authority.¹³³ The ward retains any powers the court does not specifically give to the guardian.

As we noted in Section 5-3:5.6, the court's order appointing a guardian indicates the amount of the bond the applicant must post. The truth is, the guardianship will not become effective until the applicant posts the bond and files an oath of office. The guardian must then prepare an initial inventory of the ward's estate for review and approval by the court.

Thereafter, the court shall use reasonable diligence to determine whether the guardian is performing all of the duties required of him or her that relate to the ward.¹³⁴ On an annual basis, the court will determine whether the guardianship should be continued, modified, or terminated.¹³⁵

The nature of the method used to make the determination will depend on the court in which the application for guardianship was filed. If the review is conducted in a statutory probate court, the court may review a report prepared by a court investigator, guardian *ad litem*, or court visitor; conduct a hearing; or review an annual account prepared by the guardian of the estate or a report prepared by the guardian of the person.¹³⁶ Regardless of the court's choice, the guardian of the estate shall each year file an annual account of the estate with the court, the first account being due no later than the 60th day after the first anniversary of the date of the imposition of the guardianship.¹³⁷ The account will list all claims against the estate presented to the guardian during the period covered by the accounting,¹³⁸ and specify how the guardian has disposed of those claims.¹³⁹ The annual account must also list all of the ward's property and carefully account for the initial property, and any additions or changes thereto.¹⁴⁰

¹³⁰ Tex. Est. Code § 1104.356.

¹³¹ Tex. Est. Code § 1104.357.

¹³² Tex. Est. Code § 1104.358.

¹³³ See Tex. Est. Code § 1101.153.

¹³⁴ Tex. Est. Code § 1201.001.

¹³⁵ Tex. Est. Code § 1201.052.

¹³⁶ Tex. Est. Code § 1201.053.

¹³⁷ Tex. Est. Code § 1163.001(a).

¹³⁸ Tex. Est. Code § 1163.001(a)(1).

¹³⁹ Tex. Est. Code § 1163.001(a)(2).

¹⁴⁰ Tex. Est. Code § 1163.001(b).

Meanwhile, the guardian of the person must submit an annual report to the court. This report will detail information such as the ward's visits to doctors, dentists, and other medical personnel during the year, funds expended for the ward's education, health, clothing, or religious exercises during the year, and whether and how often the guardian has had to file for emergency detention of the ward during the year.¹⁴¹

Failure by the guardian to file either the accounting or the report is a very serious breach and can be punished very severely by the court. The court can order the guardian to submit the accounting (or report), and, unless the court finds the guardian had good cause to not file the document in a timely manner, it could revoke the guardian's letters of guardianship, fine him or her up to \$1,000, or revoke his or her letters of guardianship and fine him or her up to \$1,000.¹⁴²

5-3:5.10 Terminating Guardianship

In the context of Elder Law, guardianship can end in two ways: the ward regains capacity or the ward dies.¹⁴³ If either of these events occurs, the guardianship is no longer necessary. How does someone go about ending a guardianship that is no longer necessary?

5-3:5.10a Termination or Modification of Guardianship Because the Ward Has Regained Partial or Full Capacity

If the ward has regained capacity, anyone interested in the ward's well-being (including the ward) can file a formal written application asking the court to hold a hearing about his or her present condition, with a view to the court finding that the ward has either completely regained capacity or, at the very least, regained some of his or her capacity.¹⁴⁴ The court could then find that (1) the ward is no longer an incapacitated person and could therefore order the settlement and closing of the guardianship;¹⁴⁵ (2) the ward lacks the capacity to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for his or her own physical health, or to manage his or her own financial affairs, and would therefore benefit from the court granting additional powers or duties to the guardian;¹⁴⁶ or (3) the ward has the capacity to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for his or her own physical health, or to manage his or her own financial affairs, whereupon the court would (a) limit the guardian's powers or duties and (b) permit the ward to care for himself or herself or to manage the ward's own financial affairs, commensurate with the ward's ability.¹⁴⁷

The law also allows the ward to start the process by simply writing an informal letter to the court.¹⁴⁸ Upon receiving the letter, the court must appoint either a court investigator or a guardian *ad litem* to investigate the ward's circumstances—including

¹⁴¹ Tex. Est. Code § 1163.101.

¹⁴² Tex. Est. Code § 1163.151.

¹⁴³ Tex. Est. Code § 1202.001(b).

¹⁴⁴ Tex. Est. Code § 1202.051.

¹⁴⁵ Tex. Est. Code § 1202.051(1).

¹⁴⁶ Tex. Est. Code § 1202.051(2).

¹⁴⁷ Tex. Est. Code § 1202.051(3).

¹⁴⁸ Tex. Est. Code § 1202.054(a).

any circumstances specifically alleged in the letter—to determine whether (1) the ward is no longer an incapacitated person or (2) a modification of the guardianship is necessary.¹⁴⁹ The appointed party shall then file with the court a report of the investigation's findings and conclusions. If the party determines that it is in the best interest of the ward to terminate or modify the guardianship, he or she will file an application seeking such a result.¹⁵⁰

Of course, before all this can happen, proper notice of the pending action must be served on the guardian and, if the ward is not the one serving the application, notice must be served on him or her also.¹⁵¹

In making its decision on whether the ward has been restored to partial or full capacity, the court is required to receive medical evidence that describes the ward's current medical condition. The timely filed physician's letter or certificate must describe the nature and degree of the ward's incapacity, and state whether, in the physician's opinion, the ward is either able or unable to (1) provide food for himself or herself, (2) care for his or her own physical health, and (3) manage his or her own financial affairs.¹⁵² The certificate or letter must also provide an outlook for the ward's future mental and physical health, paying particular attention to whether any indicia exists to conclude that the ward may someday suffer from senility.¹⁵³

Throughout the hearing, the burden of proof remains on the party who filed the application for the hearing.¹⁵⁴

5-3:5.10b Termination of Guardianship Because the Ward Has Died

If the ward dies, the guardianship estate must be settled and closed.¹⁵⁵ Usually, this involves the wrapping up of the ward's earthly affairs and the filing by the guardian of a final accounting with the court. However, before one can get to that stage, it is first necessary for the guardian of the estate to, subject to the court's approval, make all funeral arrangements and pay the funeral expenses and all other debts out of the deceased ward's estate.¹⁵⁶ If the probate court has appointed a personal representative to oversee the deceased ward's estate, this personal representative will move the court to have the guardian submit a final account for settlement of the deceased ward's estate.¹⁵⁷

The court will also require that either the guardian or the personal representative sell all estate properties that need selling, pay all taxes due, and distribute the estate to the rightful heirs before the final accounting is submitted and the estate may be closed.¹⁵⁸ To ensure that the guardian of the estate renders a true final accounting, the

¹⁴⁹ Tex. Est. Code § 1202.054(b).

¹⁵⁰ Tex. Est. Code § 1202.054(c).

¹⁵¹ Tex. Est. Code § 1202.053.

¹⁵² Tex. Est. Code § 1202.152(b)(1).

¹⁵³ Tex. Est. Code § 1202.152(b).

¹⁵⁴ Tex. Est. Code § 1202.151(b).

¹⁵⁵ Tex. Est. Code § 1204.001.

¹⁵⁶ Tex. Est. Code § 1204.051.

¹⁵⁷ Tex. Est. Code § 1204.051.

¹⁵⁸ Tex. Est. Code §§ 1204.052, 1204.053.

law requires that he or she will submit a verified account for final settlement of the ward's estate.¹⁵⁹ After the court has accepted the accounting and the guardian no longer possesses any of the ward's property, the court shall enter an order discharging the guardian and closing the guardianship estate.¹⁶⁰

5-3:6 Certification of Guardianship Attorneys

Attorneys who represent clients in guardianship proceedings must be certified by the State Bar of Texas or the state bar's designee as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee.¹⁶¹ The course of study must cover at least 4 credit hours, including 1 hour on alternatives to guardianship and supports and services available to proposed wards.¹⁶²

Attorneys receive initial certification for 2 years. After an attorney has been certified for two consecutive 2-year periods, he or she will be certified for the next 4 years, with the certification being renewable every 4 years thereafter.¹⁶³

5-4 Community Administration

If a married couple has nothing but community property and one spouse becomes incapacitated, the other spouse can avoid guardianship with a process called "community administration."¹⁶⁴ Of course, this does not negate the guardianship avoidance vehicles of durable powers of attorney or revocable living trusts executed before one of the spouses becomes incapacitated. However, in the event the incapacitated spouse did not prepare any estate planning documents before becoming incapacitated, all is not lost. Upon the judge ruling that one spouse is incapacitated, the other spouse becomes the "community administrator."¹⁶⁵ This healthy spouse, in his or her capacity as surviving partner of the marital partnership, acquires full power to manage, control, and dispose of the entire community estate, including the part that the incapacitated spouse would legally have the right to manage had he or she not been incapacitated.¹⁶⁶ Moreover, the spouse who is not incapacitated manages the entire community estate without an administration; the law presumes that he or she is suitable and qualified to serve as community administrator.¹⁶⁷

That being said, the appointment of one spouse as community administrator does not affect the duties and obligations of the spouses toward each other, including the duty to support each other as spouses, and the rights of creditors of either spouse.¹⁶⁸

¹⁵⁹ Tex. Est. Code § 1204.101.

¹⁶⁰ Tex. Est. Code § 1204.151.

¹⁶¹ Tex. Est. Code § 1054.201.

¹⁶² Tex. Est. Code § 1054.201.

¹⁶³ Tex. Est. Code § 1054.202.

¹⁶⁴ Tex. Est. Code § 1353.002(a).

¹⁶⁵ Tex. Est. Code § 1353.002(a).

¹⁶⁶ Tex. Est. Code §§ 1002.006; 1353.002(a).

¹⁶⁷ Tex. Est. Code § 1353.002(b).

¹⁶⁸ Tex. Est. Code § 1353.001(a).

However, the healthy spouse can sell the entire community estate if he or she so desires.¹⁶⁹

5-4:1 Duties of the Community Administrator

Unlike guardianship, community administration does not require the posting of bond by the healthy spouse. However, the court may, upon its own motion or upon the motion of an interested party, order the community administrator to file a verified, full, and detailed inventory and appraisal of the community estate and any income earned thereon.¹⁷⁰ This inventory and appraisal must be prepared in the same form and manner as similar reports filed by guardians, and must be filed with the court no later than 90 days after the date the order is issued.¹⁷¹

At any time after the 15th month following the date on which the court adjudicated the incapacitated spouse to be incapacitated, the court may, upon its own motion or upon the motion of an interested party, order the community administrator to file an account of any community property in the community estate, and any income earned thereon since the declaration of the spouse's incapacity.¹⁷² The account must be similar in form and manner to that required of guardians under the Texas Estates Code, and must be filed with the court no later than 60 days after the court issued its order.¹⁷³ Thereafter, the court may require annual accountings from the community administrator.¹⁷⁴

5-4:2 Disclosure of Lawsuits by Community Administrator

The community administrator is required to report to the court any lawsuit that names the incapacitated spouse as a defendant.¹⁷⁵ This specifically includes a divorce proceeding brought by the healthy spouse—the community administrator—to terminate the marriage.¹⁷⁶

5-4:3 Removal of Community Administrator

The law provides four reasons upon which the court may remove the community administrator. These are as follows:

1. The community administrator fails to comply with a court order for an inventory and appraisal or an accounting.¹⁷⁷
2. Sufficient grounds exist to show that the community administrator has embezzled or misapplied, or is about to embezzle or misapply, all or part of the community estate.¹⁷⁸

¹⁶⁹ Tex. Est. Code § 1353.002(a).

¹⁷⁰ Tex. Est. Code § 1353.051(a).

¹⁷¹ Tex. Est. Code § 1353.051(b).

¹⁷² Tex. Est. Code § 1353.052(a).

¹⁷³ Tex. Est. Code § 1353.052(b).

¹⁷⁴ Tex. Est. Code § 1353.052(c).

¹⁷⁵ Tex. Est. Code § 1353.053(2).

¹⁷⁶ Tex. Est. Code § 1353.053(1).

¹⁷⁷ Tex. Est. Code § 1353.101(1).

¹⁷⁸ Tex. Est. Code § 1353.101(2).

3. The community administrator has been found guilty of gross misconduct or gross mismanagement in the performance of his or her duties as community administrator.¹⁷⁹
4. The community administrator becomes incapacitated, is sentenced to prison, or otherwise becomes legally incapacitated from properly performing his or her functions as community administrator.¹⁸⁰

In a proceeding to remove the community administrator, the court must appoint an attorney *ad litem* to represent the interests of the incapacitated spouse.¹⁸¹ This attorney *ad litem* may then demand an accounting and/or an inventory and appraisal from the community administrator.¹⁸² The community administrator is obligated to respond within 60 days of receiving the request.¹⁸³

5-4:4 Appointment of Guardian of the Estate to Replace Community Administrator

If the court removes the healthy spouse as the community administrator, it will, after considering the financial circumstances of the couple, appoint a guardian of the estate for the incapacitated spouse and order the healthy spouse to turn over to the guardian one-half of the community estate that is subject to both spouses' joint management, control, and disposition.¹⁸⁴ The court will then authorize the guardian of the estate of the incapacitated spouse to administer that property, along with any community property that was subject to the incapacitated spouse's sole management, control, and disposition, as well as any of the incapacitated spouse's separate property.¹⁸⁵ From henceforth, any community property administered by the guardian of the incapacitated spouse's estate will be considered the incapacitated spouse's community property, subject to his or her sole management, control, and disposition.¹⁸⁶

Meanwhile, the healthy spouse will continue to administer his or her own separate property, any community property that is subject to his or her sole management, control, or disposition, and any portion of the spouse's community property subject to their joint management, control, or disposition that was left over after the spouse turned over the incapacitated spouse's portion to his or her guardian of the estate.¹⁸⁷ From then onward, the non-incapacitated spouse will administer these assets as his or her community property, subject to his or her sole management, control, and disposition.¹⁸⁸

¹⁷⁹ Tex. Est. Code § 1353.101(3).

¹⁸⁰ Tex. Est. Code § 1353.101(4).

¹⁸¹ Tex. Est. Code § 1353.151(a).

¹⁸² Tex. Est. Code § 1353.151(b).

¹⁸³ Tex. Est. Code § 1353.151(c).

¹⁸⁴ Tex. Est. Code § 1353.004(c).

¹⁸⁵ Tex. Est. Code § 1353.004(d).

¹⁸⁶ Tex. Est. Code § 1353.004(e).

¹⁸⁷ Tex. Est. Code § 1353.005(a).

¹⁸⁸ Tex. Est. Code § 1353.005(b).

5-4:5 Incapacitated Spouse's Separate Property

Community administration is designed to provide for the management and administration of community property. When an incapacitated spouse has separate property, the court will appoint a guardian of the estate to administer that spouse's separate property.¹⁸⁹ The court may appoint the healthy spouse or some other person or entity according to the order of preference provided in the Texas Estates Code¹⁹⁰ to serve as guardian, to administer only the separate property of the incapacitated spouse.¹⁹¹ The appointment of this guardian of the estate does not in any way interfere with the right of the healthy spouse, in his or her role as community administrator, to manage, control, and dispose of the entire community estate.¹⁹²

5-5 Social Security Representative Payee

A Social Security Representative Payee is a person or organization that receives Social Security benefits on behalf of another person.¹⁹³ This representative payee controls the funds. The payee's main duties are to use the Social Security benefits to pay for the current and future needs of the beneficiary, and to properly save any benefits not needed to meet current needs. While performing this delicate balance, the payee must also keep meticulous records of expenses. Whenever the Social Security Administration requests an accounting, the payee must provide one to the Administration showing how he or she either saved this amount of money or used it for the person's benefit. This being the case, the designation "Representative Payee" carries tremendous responsibility, a breach of which could have dire consequences.¹⁹⁴

It is important to note that being an authorized representative, having power of attorney, or having a joint bank account with the Social Security beneficiary is not the same as being a representative payee. While these arrangements give the designee much power, they do not give him or her legal authority to negotiate and manage a beneficiary's Social Security and/or Supplemental Security Income (SSI) benefits. To become a representative payee, one must apply for the position and be appointed by the Social Security Administration.

5-5:1 Becoming a Representative Payee

In the context of Elder Law, someone may become a representative payee for an elderly Social Security beneficiary if the relevant Social Security office in his or her district determines that it would be in the elder's best interest to pay the benefits to the representative payee to use or save for the beneficiary's benefit.¹⁹⁵ A person who senses the need to become a representative payee for a beneficiary should contact the nearest Social Security office to apply for such appointment. The applicant must complete Form SSA-11 (Request to be Selected as Payee) and provide the Administration with documents proving his or her identity.

¹⁸⁹ Tex. Est. Code § 1353.003(a).

¹⁹⁰ See Tex. Est. Code § 1104.

¹⁹¹ Tex. Est. Code § 1353.003(a).

¹⁹² Tex. Est. Code § 1353.003(b).

¹⁹³ 20 C.F.R. § 416.601(a).

¹⁹⁴ 20 C.F.R. § 416.625.

¹⁹⁵ 42 U.S.C. § 1007(a).

Upon receiving the application, the Social Security office conducts an investigation of the applicant to determine his or her qualification to become a representative payee.¹⁹⁶ To the extent possible, the investigation should include a face-to-face meeting between the applicant and a Social Security staffer.¹⁹⁷ If the investigation reveals that the applicant has in the past been involved in any type of Social Security fraud, the statute demands that the application be denied.¹⁹⁸

Prior to the payment of benefits to the representative payee, the Social Security office is required to give written notice to the beneficiary of its appointment of a representative payee for him or her.¹⁹⁹ Upon receiving this notice, the beneficiary—or his or her guardian—may acquiesce in the determination, or, if he or she disagrees, may (1) appeal the determination that he or she needs a representative payee, (2) appeal the designation of the person appointed representative payee to fill that position, or (3) seek a review of the evidence upon which the Social Security office made its determination and submit additional evidence.²⁰⁰

5-5:2 Duties of the Representative Payee

If the designee is able to withstand any challenges raised by the beneficiary and/or his or her guardian, the designee will go on to serve as the beneficiary's representative payee. We noted in Section 5-5 that the payee's main duties are to use the Social Security benefits to pay for the current and future needs of the beneficiary, and to properly save any benefits not needed to meet current needs.²⁰¹ Should the payee misuse the funds—by converting the benefit payment or any part thereof for the use and benefit of someone other than the elderly beneficiary²⁰²—the Social Security Administration will remove this person as a representative payee, and will require restitution from him or her.²⁰³

5-6 Account Management

The elderly can also manage their resources through the accounts they hold at banks, savings banks, and credit unions. Although these accounts may have all sorts of fancy-sounding names, what is really important to the elder is not the name of the account, but the manner in which the account is legally classified.

5-6:1 Types of Accounts

For a bank account to truly serve a resource management function for an elderly person, the elder should consider two issues: access and ownership. Some accounts give only the elder access to the funds in the account; some give access to multiple parties. While the elderly person's Last Will and Testament determines ownership of some accounts following the elder's death, in some others ownership is determined by the

¹⁹⁶ 42 U.S.C. § 1007(b).

¹⁹⁷ 42 U.S.C. § 1007(b)(1)(A).

¹⁹⁸ 42 U.S.C. § 1007(d).

¹⁹⁹ 42 U.S.C. § 1007(g).

²⁰⁰ 42 U.S.C. § 1007(g)(2).

²⁰¹ 42 U.S.C. § 1007(a).

²⁰² 42 U.S.C. § 1007(j).

²⁰³ 42 U.S.C. § 1007(i).

account type.²⁰⁴ Having determined the answers to his or her questions on ownership and access, the elder can choose among a variety of accounts available in Texas.

5-6:1.1 Single Party Account Without Pay-on-Death (POD) Beneficiary

With this type of account, while the elderly person is alive, he or she is the only person who can access the funds therein. He or she owns the account. Upon the elderly person's death, the financial institution will freeze the account until the decedent's Last Will and Testament or intestate estate is probated and the estate's personal representative provides evidence of the person entitled to receive the funds therein.²⁰⁵

5-6:1.2 Single Party Account With Pay-on-Death Beneficiary

With this type of account, the elderly person owns the account and, while he or she is alive, is the only person with authority to access it. Upon the elder's death, however, the person or persons named on the account card as the POD beneficiary or beneficiaries become the owner(s) of the account.²⁰⁶ The POD arrangement supersedes anything the elder may say about the account in his or her Last Will and Testament. The value of the account is not included in the decedent's estate.²⁰⁷

5-6:1.3 Multiple Party Accounts

Like all other accounts people hold in financial institutions, multiple party accounts are contractual arrangements for the deposit of money with these institutions. The difference here is that the financial institution will recognize more than one party as owner of the account. The disposition of the funds remaining in these accounts upon the death of one of the depositors depends on the type of account, the account contract.

These multiple party accounts are important non-probate transfer mechanisms. They are widely used in Texas, are easy to understand, and are inexpensive to obtain. The Texas Estates Code recognizes the validity of these accounts and their power to transmit property upon the death of one of the depositors. In particular, Texas recognizes five types of multiple party accounts: (1) multiple party account without right of survivorship, (2) multiple party account with right of survivorship, (3) multiple party account with right of survivorship and payable on death designation, (4) convenience account, and (5) trust account.²⁰⁸

5-6:1.3a Multiple Party Account Without Right of Survivorship

This type of account is commonly referred to as a "joint account." During the lifetime of all parties to the account, the account belongs to the parties in proportion to the

²⁰⁴ For a discussion of the distinction between the two types of accounts, see *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex. 1990).

²⁰⁵ Tex. Est. Code § 113.052.

²⁰⁶ Tex. Est. Code § 113.052.

²⁰⁷ Tex. Est. Code § 113.052.

²⁰⁸ Tex. Est. Code § 113.052.

net contributions by each party unless clear and convincing evidence exists that the parties intended otherwise.²⁰⁹ What this means is that each party is entitled to what he or she deposited, minus what he or she withdrew, plus a proportionate share of the interest earned by the account.²¹⁰ However, the financial institution may pay any sum in the account to anyone named as an owner thereof at any time.²¹¹ When one of the parties dies, his or her net contributions to the account pass according to the terms of his or her Last Will and Testament or (in the absence of a Last Will and Testament) by the laws of intestacy.²¹²

5-6:1.3b Multiple Party Account With Right of Survivorship

This type of account has all the features of the multiple party account without right of survivorship except that when an account holder dies, his or her share of the account passes to the surviving owners.²¹³ However, this is so only because the parties to the account have a written agreement—signed by the party who has died—establishing the right of survivorship in the joint account.²¹⁴ The agreement should contain language substantially similar to the following:

On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.²¹⁵

No probate is necessary for the survivors to access the funds in the account. Neither a Last Will and Testament nor the inheritance laws control the account. However, the Internal Revenue Service may seize the account to settle the tax debt of any of the owners.

5-6:1.3c Multiple Party Account With Right of Survivorship and Payable on Death Provision

The parties to this account own the account in proportion to their net contributions to it. The financial institution may pay any sum in the account to any of the parties at any time. On the death of the last surviving party, ownership of the account passes to the POD beneficiary or beneficiaries.²¹⁶

5-6:1.3d Convenience Account

Two or more names are on such an account—the depositor(s) and the co-signer(s). One or more co-signers (referred to as “convenience signers”) may make account transactions for one or more of the depositors. A convenience signer does not own the

²⁰⁹ Tex. Est. Code § 113.102.

²¹⁰ Tex. Est. Code § 113.003.

²¹¹ Tex. Est. Code § 113.203.

²¹² Tex. Est. Code § 113.151.

²¹³ Tex. Est. Code § 113.151.

²¹⁴ Tex. Est. Code § 113.051.

²¹⁵ Tex. Est. Code § 113.051(b).

²¹⁶ Tex. Est. Code § 113.052.

account.²¹⁷ He or she may not pledge or otherwise create a security interest in a convenience account or any part thereof.²¹⁸ On the death of the last surviving depositor, ownership of the account passes as part of that depositor's estate under the terms of his or her Last Will and Testament or by intestacy.²¹⁹

A financial institution is completely released from liability for a payment made from a convenience account before the financial institution received notice in writing by a depositor not to make the payment in accordance with the terms of the account.²²⁰

Creditors or the Internal Revenue Service may seize this account for a debt owed by the owner or owners thereof.²²¹

5-6:1.3e Trust Account

A trust account is an account with one or more persons named as trustee for the funds, and one or more persons named as beneficiary of those funds. During the life of the creator of the trust (referred to as the grantor or settlor), the funds belong to the trustee.²²² The beneficiary or beneficiaries have no rights to the account. The trustee may withdraw funds from the account.²²³ A beneficiary may not withdraw funds from the account before all trustees are deceased.²²⁴ Upon the death of the last surviving trustee, ownership of the account passes to the beneficiary or beneficiaries.²²⁵ Accordingly, the trust account is not a part of the trustee's estate and does not pass under the trustee's Last Will and Testament or by intestacy unless the trustee survives all of the beneficiaries and all of the other trustees.²²⁶

5-7 Conclusion

Several mechanisms exist in which people who love and care about the elderly can manage their resources in the event they suffer a disability. While in practice these options are exercised by these loved ones *after* the elderly have become disabled, it is quite possible—and desirable—for the elderly to choose their representatives and their preferred options for care and resource management *before* disability steps in.

²¹⁷ Tex. Est. Code § 113.052.

²¹⁸ Tex. Est. Code § 113.251(b).

²¹⁹ Tex. Est. Code § 113.154.

²²⁰ Tex. Est. Code § 113.208.

²²¹ Tex. Est. Code § 113.252.

²²² Tex. Est. Code § 113.104.

²²³ Tex. Est. Code § 113.052.

²²⁴ Tex. Est. Code § 113.052.

²²⁵ Tex. Est. Code § 113.153.

²²⁶ Tex. Est. Code § 113.052.