CASE LAW UPDATE –
NURSING HOME ARBITRATION CLAUSES
& FIDUCIARY LIABILITY CASES

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CHAPTER 1

Steven D. Fields has been the Court Administrator/Senior Attorney for Tarrant County Probate Court No. Two, Fort Worth, TX, since 1999. He has also served as an adjunct professor at Texas A&M University School of Law since 2010, teaching guardianship and estate administration practicums. He was on the National Guardianship Association board from 2000 to 2009, and was the President of NGA in 2008. He was the president of the Texas Guardianship Association in 2004-05, and was on the TGA board from 2000 to 2006. He was the Chair for the Texas Senior Advocacy Coalition for 2006-07, and was on the TSAC board from 2003 to 2009. He is currently on the board of Alternatives to Guardianship, Inc., a non-profit in Texas created to increase the prevalence and use of less restrictive alternatives to guardianship. He was the initial Guardianship Director at the Texas Health & Human Services Commission in 1998-1999. He served for almost five years as Court Investigator for the Tarrant County Probate Courts specializing in the filing of guardianship applications for indigent incapacitated individuals. He has been a licensed attorney since 1987 with a JD degree from the University of Oklahoma, and he specialized in guardianship, estate planning and probate law for various Texas law firms for 6 years. He has a BA degree in English from Oklahoma Christian University. He is married and has a 13 year old daughter and is an avid collector of record albums and compact discs.

Terry W. Hammond has concentrated his practice in adult protection and guardianship law since 1993, but other aspects of his practice include probate law and mental health litigation. He is the former Executive Director of the National Guardianship Association, for which he also previously served as past president. Mr. Hammond is currently seated on the Board of Directors for NGA. Mr. Hammond has been certified as a National Certified Guardian by the Center for Guardianship Certification and is a certified guardianship mediator. Mr. Hammond also presently serves on the Board of Directors for the Texas Guardianship Association and previously chaired the Texas Guardianship Advisory Board.

Mr. Hammond serves as a consultant to guardianship programs and providers and as an expert witness in guardianship litigation throughout the United States, having been retained by the State of New Mexico, Washoe County, Nevada, Denton County, Texas, and private counsel. Mr. Hammond has received statewide and national attention for his effort to reform the Texas Adult Protective Services and mental health systems, and his work has been featured on NBC Dateline and in Money Magazine, the New York Times, Los Angeles Times, Dallas Morning News, Associated Press, National Public Radio, PBS, as well as numerous local and statewide television and radio reports and programs. Mr. Hammond has testified before the United States Senate Special Committee on Aging, the Texas Legislature and has been consulted by other state legislatures on guardianship and Adult Protective Services issues.

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NURSING HOME ARBITRATION CLAUSES

By: Steven D. Fields

In 1996, Terry Hammond, as a board member of the National Guardianship Association had the brilliant idea of summarizing all guardianship cases reported during the previous year and compiling the summaries into a legal review. This event is now known as the NGA Legal Review, and it has become a six hour pre-conference intensive at the annual NGA conference. In 2000, I became part of the NGA Legal Review panel, and have participated almost every year since.

About ten years ago, appellate courts began reporting a lot of cases where nursing facility companies were attempting to enforce arbitration clauses included in their residential admission agreements. The typical fact pattern involved a family member who would sign an admission agreement on behalf of an incapacitated relative who was later injured at the nursing facility. The family member would then bring a wrongful death or personal injury lawsuit against the facility, and the facility would argue that the arbitration agreement precluded the court action and instead required mandatory and binding arbitration. Basically, the facilities argued that signing an arbitration agreement waived the resident's right to a jury trial.

About half the courts enforced these agreements and the other half did not for various reasons. Every year since 2006, the number of arbitration clause cases increased and spread like kudzu across the United States. This paper will analyze the arbitration clause cases summarized in seven NGA Legal Reviews from 2006 through 2014, and discuss the criteria that courts across the United States have used to decide these cases. The paper will also discuss Texas cases and laws regarding arbitration clauses in nursing facility residential agreements, and discuss whether attorneys and their clients should strike through arbitration clauses in residential admission agreements.

The first arbitration clause case that we noticed was In re: Owens v. National Health Corp, 2006 WL 1865009 (TN Ct. App. 2006). In *Owens*, Mary King signed a durable health care power of attorney naming Gwen Daniel as her agent. Daniel then signed an admission agreement to an NHC facility on King's behalf. About two years later, Dorothy Owens, conservator for King, filed suit against NHC for negligence in the care it provided to King. NHC filed a motion to compel arbitration and to stay proceedings citing the mandatory arbitration clause in the admission agreement signed by Daniel.

The circuit court denied NHC's motion to compel finding that Daniel lacked the authority to enter into an admission contract that included an arbitration agreement on behalf of King, and NHC appealed.

The Tennessee Court of Appeals in *Owens* reversed the circuit court ruling and remanded the case to the circuit court for an order to compel arbitration. The court of appeals held that a health care attorney-in-fact's authority to execute any necessary document for implementing health care decisions included executing an admission contract which includes an agreement to arbitrate. The court held that it was not uncommon for parties to agree to which forum they will use to resolve their disputes, and thus, Daniels had the authority to enter into an admission contract that included an agreement to arbitrate.

The conservator then appealed the *Owens* decision to the Supreme Court of Tennessee in Owens v. National Health Corporation, 263 S.W.3d 876 (TN 2007). The Supreme Court of Tennessee affirmed the appellate court ruling that Daniel had **apparent authority** to sign the admission contract with the arbitration clause, but remanded the case to the circuit court to decide whether the arbitration clause was **unconscionable**. The court stated that the "scant factual record in this case does not disclose the circumstances under which Daniel signed the arbitration agreement on behalf of King, including whether the arbitration agreement was offered on a 'take it or leave it basis'." The Tennessee Supreme Court, however, expressed no opinion as to the ultimate resolution of the unconscionability issue.

The *Owens* case did not return to the Supreme Court on appeal, but the Tennessee court of appeals in another case in 2007 ruled that an arbitration clause was not **unconscionable** in a situation where the patient signed the admission agreement and the patient's conservator later filed a medical malpractice action. Reagan v. Kindred Healthcare, 2007 Tenn. App. LEXIS 798 (TN Ct. App. 2007). In *Reagan*, the conservator argued that the arbitration agreement was invalid and unconscionable due to the patient's confusion and poor eyesight when the patient signed a 68 page admission agreement that included an arbitration clause. The conservator also argued that the patient lacked capacity to contract, but the court would not presume **lack of capacity** and the conservator offered no proof that the patient's medications impaired her capacity to understand the admission agreement.

In 2007, the appellate courts reported on ten more cases[1] involving arbitration agreements in nursing home admission agreements including the first Texas case we noticed, Sikes v. Heritage Oaks, 238 S.W.3d 807 (TX Ct. App. 10th Dist. Waco 2007, rehearing denied) . In *Sikes,* Eugenia Sikes, wife of Joel Sikes, signed an admission agreement on behalf of Joel containing an arbitration clause on the line labeled "Power of Attorney/Guardian's Signature." However, Eugenia was not Joel's guardian and had not been given a power of attorney for Joel. Joel was in fact not incapacitated and was capable of signing the admission agreement on his own.

After Joel's death, Eugenia brought wrongful death and survival claims against Heritage Oaks. Heritage Oaks filed a motion to compel arbitration which the trial court granted. Eugenia appealed, and the Texas appellate court reversed the trial court finding that Eugenia had no apparent authority to sign the agreement for Joel. The court also found that the arbitration agreement was unenforceable against Eugenia in her individual capacity because she signed it as "Power of Attorney/Guardian" and not in her individual capacity. Heritage Oaks then attempted to assert the common law affirmative defense of **equitable estoppel** but the court said that it fails under agency principles because "Eugenia acted without authority and, therefore, any misrepresentations on her part cannot be imputed to the ostensible principal, Joel Sikes."

The appellate court in *Sikes* referred to a previously reported Houston appellate court decision In re Marguerite Kepka, 178 S.W. 3d 279 (TX Ct. App. Houston 1st Dist. 2005) but didn't base its ruling on *Kepka* because Eugenia did not argue its rationale at the trial court level. In *Kepka,* Marguerite Kepka signed documents on behalf of her incapacitated husband William to admit him to Southfield nursing home in November of 2002. William then died in December of 2002, and Marguerite filed suit in 2003 against Southfield for gross negligence arising out of William's care at the Southfield nursing facility. Southfield moved to compel arbitration pursuant to the arbitration clause in the admission agreement that Marguerite signed. The trial court granted the motion to compel arbitration without stating the grounds for its ruling.

Marguerite filed for a writ of mandamus and argued that the admission agreement contained an arbitration clause that failed to comply with former 4590i, section 15.01(a) of the Texas Civil Practice and Remedies Code (TCPRC) which is now Section 74.451 of the TCPRC which provides:

> "(a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:
>
> **UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.**

Southfield asserted that the Federal Arbitration Act (FAA) pre-empts the requirements of 4590i, the Texas statute, which was the holding by the Texas Supreme Court in In re Nexion Health at Humble, Inc., 173 S.W.3d 67 (TX 2005). In *Nexion*, the court ruled that 4590i interfered with the enforceability of the arbitration agreement by adding the addition requirement of counsel's signature to arbitration agreements in personal injury cases. The court therefore granted a writ of mandamus to compel arbitration of a suit by the wife of John Lyman where the wife signed the admission agreement which contained an arbitration clause.

In *Kepka,* Marguerite asserted that another federal statute – The McCarran-Ferguson Act (MFA) reverse pre-empted the FAA from pre-empting former 4590i's requirements. The MFA provides "no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, o which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance…" [15 U.S.C.S. 1012(b) (West 1984)]

Marguerite noted that the "findings and purposes" section (former article 4590i, section 1.02) indicated that the article was enacted with the purpose of controlling the escalating costs of professional medical liability insurance. Southfield focused only on section 15.01 – the arbitration provision- "arguing that the goal

[1] Summaries of the other nine cases is included in this paper after a discussion of the Texas cases on this issue.

was to regulate the relationship between health providers and their patients by protecting the patients within that relationship, rather than to regulate the business of insurance."

The court in *Kepka* found that the purpose of 4590i was to decrease the costs of health-care liability claims in order to make insurance reasonably affordable so that health-care providers could have protection against potential liability and so that citizens could have more affordable and accessible health care. The court concluded that "former article 4590i, section 15.01 was part of the overall scheme: the Legislature not only intended to protect patients by it, but could also have determined that the sections protections could reduce litigation over arbitration agreements enforceability-thereby keeping down this aspect of litigation costs." (id at p. 291)

The court in *Kepka* held that the MFA prevented the FAA from pre-empting former article 4590i, section 15.01(a)'s arbitration notice requirements, and that the trial court abused its discretion in ordering Marguerite's claims to arbitration. The court also found that Marguerite signed on the line indicating "legal representative" and that the line for "individual" was left blank. Therefore, Marguerite was not a party to the arbitration agreement in her individual capacity either. The court therefore granted mandamus relief to deny Southfield's motion to compel arbitration.

In 2007, a Federal District Court in Texas cited *Kepka* in declining to enforce an arbitration clause in a nursing home admission agreement. Patterson v. Nexion Health, Inc., 2007 WL 2021326 (US Dist. Ct. E.D. Texas, Marshall 2007). In *Patterson*, Willie Faye Patterson was a resident at the Sherman Healthcare Center from August 2005 to March 2006. Pat Patterson, a representative of Willie Faye Patterson, signed the admission agreement and arbitration clause on behalf of Ms. Patterson. However, there was no evidence that a lawyer advised Ms. Patterson concerning the arbitration agreement and the agreement was not signed by a lawyer.

Ms. Patterson died in May of 2006, and Pat Patterson brought a suit against Nexion claiming that the death was a result of its negligence. Nexion moved to compel arbitration. Patterson claimed that the arbitration clause failed to comply with Section 74.451 of the Texas Civil Practice and Remedies Code and therefore, was not enforceable. The court in *Patterson* stated that generally the Federal Arbitration Act (FAA) preempts state laws relating to arbitration.

However, an exception exists under the McCarran-Ferguson Act (MFA) whereby a state law can reverse pre-empt the FAA if the state law was enacted for the purpose of regulating insurance. The *Patterson* court then cited *Kepka* as the only authority located by the court that holds that Chapter 74 of the Texas Civil Practice and Remedies Code was enacted for the purpose of regulating the business of insurance. *In re Kepka*,178 S.E.3d 279 [1st Dist.] 2005. The *Patterson* court found that the requirements for application of the MFA were satisfied, and that state law requirements, rather than those contained in the FAA, applied. Because the arbitration agreement didn't comply with requirements of TCPRC 74.451, the court in *Patterson* declined to compel arbitration.

In 2010, the Dallas Court of Appeals, granted a writ of mandamus ordering a trial court to vacate an arbitration order in In re Sthran, 327 S.W.3d 839 (TX Ct. App- Dallas 2010). In 2004, Mrs. Sthran signed an admission contract the "fiduciary party" for her husband Sam Sthran to admit Sam to Forest Lane for nursing care. Sam did not sign the contract, but the contract contained an arbitration agreement. Sam died in 2008, and Mrs. Sthran, as surviving spouse and representative, brought a negligence action against Forest Lane. Forest Lane asserted an affirmative defense that all disputes were governed by the arbitration agreement, and filed a motion for the court to compel arbitration which the court granted.

On appeal in *Sthran*, Forest Lane argued that the Texas Supreme Court's ruling in *Nexion*, that the FAA pre-empted TCPRC 74.451, applied. Mrs. Sthran argued that the *Kepka* ruling, that the MFA reverse pre-empted the FAA, applied and that the arbitration agreement didn't comply with the requirement of TCPRC 74.451. The appellate court in *Sthran* noted that the Texas Supreme Court in *Nexion* did not address whether the MFA prevents the FAA from pre-empting article 4950i or section 74.451 and actually stated in a supplemental opinion on motion for rehearing: "on rehearing, the real party raised for the first time that the [FAA] is "reverse pre-empted" by the [MFA], citing for authority [*Kepka*]. Because this issue has not been reviewed by the courts below, we decline to reach the issue and express no opinion as to the merits of this argument." *In re Nexion, 173 S.W.3d at 70.* Therefore, the court in *Sthran* disagreed with Forest Lane that *Nexion* was controlling, and concluded that the MFA reverse pre-empted the FAA with regard to the ten-point bold print notice requirement contained in TCPRC 74.451 which was also the ruling in *Kepka.*

The most recent Texas case involving an arbitration clause in a nursing facility admission agreement is Williamsburg Care Company v. Acosta, 406 S.W.3d 711 (TX Ct. App. – San Antonio 2013). In that case, several former residents of Princeton Place, either

individually or through their heirs or representatives of their estates, sued the nursing facility for negligence or gross negligence alleging there were denied appropriate medical and nursing care. The facility filed a motion to compel arbitration under the FAA based on the admission agreements signed by, or on behalf of, the former residents. Each admission agreement contained the same arbitration clause which did not contain the 10-point boldface type notice required by section 74.451, and did not contain the signature of an attorney for the patient.

In *Williamsburg*, the former residents filed a response asserting that the FAA did not apply because section 74.451 is a law regulating the business of insurance, and the MFA protects it from pre-emption by the FAA. Therefore, section 74.451 controls the enforceability of arbitration agreements, and that these agreements were not enforceable because they did not contain the 10-point boldface type notice and were not signed by the patients' attorneys. The trial court ruled in favor of the former residents and did not compel arbitration. The facility brought an interlocutory appeal on these three cases, and the *Williamsburg* opinion consolidates these appeals.

The appellate court in *Williamsburg* stated that the narrow issue on appeal was whether section 74.451 of the Texas Medical Liability Act (TMLA) was enacted for the purpose of regulating the business of insurance thereby bringing it within the MFA's protection against preemption by the FAA. The court then reviewed the three cases in Texas that directly addressed this issue, being *Kepka, Patterson &*

Sthran, and noted that all three held that the MFA prevents the FAA from preempting the arbitration restrictions in section 74.451 or its predecessor, article 4590i (15.01).

The appellate court then cited the Austin Court of Appeals for the proposition that "4590i was enacted in 1977 with the legislatures stated purpose being to remedy a medical malpractice insurance crisis in Texas," and that the object to be obtained by further broadening the law's scope in 2003 when it enacted Chapter 74 of the TMLA was "to rein in what was perceived to be excessive awards for noneconomic damages that were driving up the cost of medical malpractice insurance, which in turn reduced the number of health-care providers willing to provide services in Texas and the availability of medical and health-care services to the people of Texas." PM Management-Trinity NC, LLC v. Kumets, 368 S.W.3d 711, 718 (Tex. App. – Austin 2012).

The court in *Williamsburg* concluded that section 74.451 was a law "enacted for the purpose of regulating the business of insurance" within the meaning of the MFA and is thus exempted from preemption by the FAA. The court stated that it was joining the courts in *Kepka, Sthran & Patterson* that held that 74.451 was enacted as part of an effort to regulate the business of medical malpractice insurance in Texas. Therefore, the court held that the trial court did not err in denying the nursing facility's motion to compel arbitration under the FAA.

The attorney for the former residents in *Williamsburg*, Gavin McInnis, of San Antonio, TX, stated, "onerous and one-sided arbitration agreements imposed by the nursing home industry deprive vulnerable, elderly residents of Texas nursing homes of their day in court… this decision establishes an important precedent that will ensure nursing home victims are afforded the opportunity to obtain full justice in Texas courts." *Texas Panel Says Nursing Facility Can't Arbitrate Abuse Suit, Linda Chiem, www.law360.com article of June 26, 2013.*

Therefore, between 2005 and 2014, there was sufficient case law support for the fact that arbitration clauses in Texas must comply with the requirements of section 74.451 of the Texas Civil Practice and Remedies Code and must have the required notice in 10-point bold type and must be signed by the attorney for the resident or the attorney for the resident's agent.

These statutory requirements caused most nursing home companies to discontinue placing arbitration clauses in nursing home admission agreements used by Texas nursing homes.

However, the Texas Supreme Court very recently addressed the issue of whether the McCarran-Ferguson Act preempts the application of the Federal Arbitration Act in Fredericksburg Care Company, LP v. Perez, No. 13-0573 (opinion delivered March 6, 2015). Here is a link to the full opinion: http://www.txcourts.gov/media/885314/130573.pdf In *Ferguson*, Elisa Zapata signed the admission agreement with arbitration clause to enter Fredericksburg Care's nursing home. Elisa then died while in the care of the nursing home. Elisa's heirs sued Fredericksburg for negligent care and wrongful death. The trial court denied the motion to compel arbitration.

Fredericksburg appealed, and the court of appeals affirmed the trial court's denial on the same grounds used in *Kepka* and *Williamsburg* because the arbitration clause did not comply with TCPRC 74.451 which was reinstated by the McCarran-Ferguson Act

because it was "enacted for the purpose of regulating the business of insurance" thus avoiding pre-emption by the Federal Arbitration Act. Fredericksburg Care Co. v. Perez, 406 S.W.3d 313 (Tex. App.-San Antonio 2013).

The Texas Supreme Court then granted a petition for review of the appellate court's decision in *Fredericksburg.* The court stated that the Federal Arbitration Act applied to this matter because the nursing home received Medicare funds for Elisa's care and therefore, the matter involved "interstate commerce." The court then declared that it had previously ruled in *in re Nexion* that the Federal Arbitration Act preempts TCPRC 74.451 due to its added requirement that an arbitration clause was not effective without the signature of an attorney for the resident.

The court then directly addressed the issue of whether the McClarran-Ferguson Act preempts the Federal Arbitration Act. The court stated that the MFA applies to laws "enacted by any State for the purpose of regulating the business of insurance." In evaluating the purpose of TCPRC 74.451, the MFA focuses upon the relationship between the insurance company and its policyholders. The Supreme Court stated that the Court of Appeals focused instead on how 74.451 impacted the relationship between malpractice insurers and health care providers.

The Supreme Court then stated that 74.451 was enacted for the purpose of imposing tort reform to further the goal of making health care more affordable in Texas. The Texas Supreme Court then referred to a US Supreme Court case of Group Life v. Royal Drug, 440 US 205 (1979) which held that lowering insurance rates to pass savings to customers was too broad for the purposes of MFA "which exempts the business of insurance but not the business of insurance companies." The Texas court stated that aspirations of lower insurance rates was the reason behind the enactment of 74.451, and that this "tenuous impact on the business of insurance" was insufficient to extend MFA protection to TCPRC 74.451. Therefore, 74.451 is not a law enacted for the purpose of regulating the business of insurance, and thus, it is preempted by the Federal Arbitration Act.

The ruling in *Fredericksburg* will most likely cause nursing home companies in Texas to begin reinstating arbitration clauses somewhere within their often lengthy admission agreements. What it you are that attorney, and a prospective nursing home resident, or their agent or their guardian, asks you whether they should sign an admission agreement that contains an arbitration clause?

The prevailing opinion is that the attorney, the resident, the agent, or the guardian should strike through the arbitration clause prior to signing the admission agreement. That advice makes a lot of sense. Otherwise, why would so many nursing facility companies spend so much on legal fees trying to compel arbitration in these cases?

California Advocates for Nursing Home Reform (CANHR) state that "studies bear out arbitrators' pro-business bias – consumers tend to win less often and are awarded less money in arbitration than in the courts." *Arbitration Agreements in Nursing Homes: Don't Sign Them, www.cahr.org, article of July 1, 2013.* CANHR argues that arbitrators want repeat business and know that if they impose high awards, the corporate defendant or its insurance company won't use their services again whereas the nursing home resident is a one-time customer.

Aon Global Risk Consulting analyzed 1,449 closed claims involving long-term care providers between 2003 and 2011 and found that there was no money awarded in 30 percent of the claims where a valid arbitration clause was in place, compared with 19 percent of claims in which there was no arbitration agreement or the agreement was determined to be unenforceable. Nearly 12 percent of claims without arbitration agreements resulted in awards of $250,000 or more, compared with 8.5 percent of claims with arbitration agreements. *Signing a mandatory arbitration agreement with a nursing home can be troublesome, Michelle Andrews, September 17, 2012, www.washingtonpost.com*

The study mentioned in the Washington Post article was conducted with the American Health Care Association (AHCA) which represents 11,000 long-term care facilities. The report found that "loss rates," that reflect the dollar value of liability claims paid, are increasing four percent annually. A spokesman for AHCA stated that "liability costs for providing care have grown and escalated" and arbitration agreements help keep a lid on these costs.

The Washington Post article mentions two benefits of arbitration clauses. The first is that claims are typically resolved more quickly than court cases so attorney fees are lower and patients can retain a larger portion of any financial settlement. The second is that the arbitrators are jointly selected by the patient and the nursing home. However, the article doesn't mention another disadvantage of an arbitration agreement stated by CANHR being that the arbitrator's fees are generally split between the patient and the nursing home and can cost anywhere between $400 to $1,000 per hour. Of course, parties are not required to pay judges in court

cases as their salaries are paid by either the county or the state.

The Washington Post article then states that there is a simple way to avoid being forced into arbitration: "Don't sign the arbitration agreement." A spokesman for AHCA stated that the AHCA doesn't support requiring people to sign an arbitration clause as a condition of admission "although pracices may vary at individual nursing homes." If a patient signs an arbitration agreement and then changes their mind, arbitration agreements typically have a 30-day "opt-out" provision that allows the patient to retain their rights to sue in court.

Of course, clients may come to you more than 30 days after the admission and arbitration agreements have been signed and often after the patient has been injured or killed by the negligence of the nursing facility. Matters may also involve the laws of a state other than Texas. The arbitration clause cases from across the United States offer various reasons why courts have compelled or declined to compel arbitration despite the fact that a nursing facility admission agreement contained an arbitration clause. The remainder of this portion of the paper will summarize these cases by year of decision. For a very good article that summarizes nursing home arbitration clause cases by state, see *Arbitration In Nursing Home Cases: Trends, Issues, And A Glance Into The Future, Reed R. Bates and Stephen W. Still, Jr., Defense Counsel Journal, July 2009.*

2007 Cases (Denied 5 Compelled 4)

Flores v. Evergreen at San Diego, LLC, 148 Ca. App. 4th 581 (CA App. 2007)
Arbitration **denied** where husband signed incapacitated wife into facility. Court found no express or implied consent by wife to have husband act as her agent, and agency couldn't be implied from marriage alone.

Kindred Hospitals v. Luttrell, 2007 Ky. App. LEXIS 236 (KY Ct. App. 2007)
Arbitration **denied** where daughter without power of attorney signed incapacitated mother into facility. Court found daughter did not have authority to sign agreement and that health care decision act did not authorize daughter to sign arbitration agreement which is not a health care decision.

Covenant Health v. Brown, Grace & Goss, 949 So.2d 732 (MS 2007)
Arbitration **compelled** where daughter without power of attorney signed incapacitated mother into facility not because daughter had authority but because daughter was **surrogate** under health care decision act and arbitration clause was not unconscionable.

Grenada Living Center, LLC v. Coleman, 2007 Miss. LEXIS 407 (MS 2007)
Arbitration **denied** where sister without a power of attorney signed brother with capacity into a facility because health care decision act does not apply to allow a surrogate to make decisions for a person with capacity.

Carraway v. Beverly Enterprises Alabama, Inc., 2007 Ala. LEXIS 136 (AL 2007)
Arbitration **compelled** where brother who was not appointed as agent under power of attorney until 25 days after signing sister with capacity into facility was found to have **apparent authority** as act as sister's agent.

Noland Health Services v. Wright, 2007 Ala. LEXIS 79 (AL 2007)
Arbitration **denied** where daughter-in-law without power of attorney signed incapacitated mother-in-law into facility. Court found no authority to contract despite signing as "responsible party."

Dorothy Necessary v. Life Care Centers of America, Inc., 2007 Tenn. App. LEXIS 698 (TN Ct. App. 2007)
Arbitration **compelled** where husband with capacity gave wife **authority** to sign admission agreement on his behalf which also gave her authority to sign arbitration agreement contained therein.

Sullenberger v. HCF, Inc., 2007 Pa. Dist. & Cnty. Dec. LEXIS 179 (PA App. Ct. 2007)
Arbitration **denied** where son without power of attorney signed mother without capacity into facility because son had no apparent authority to sign agreement.

Trinity Mission of Clinton, LLC v. Barber, 2007 Miss. App. LEXIS 550 (MS Ct. App. 2007)
Arbitration **compelled** where son without power of attorney signed mother with capacity into facility because mother was a **third-party beneficiary** under the contract.

2008 Cases (Denied 6 Compelled 3)

Moffett & O'Brien v. Life Care Centers of America, 2008 Colo. App. LEXIS 806 (CO Ct. App. 2008)
Arbitration **compelled** where son with power of attorney signs incapacitated mother into facility because son had **authority** to execute admission forms including arbitration agreement.

Mt. Holly Nursing Center v. Crowdus, 2008 Ky. App. LEXIS 236 (KY Ct. App. 2008)
Arbitration **denied** where friend designated as health care surrogate signed physically incapacitated friend into facility because no apparent authority to sign arbitration agreement and health care decision act only allows decisions with regard to treatment.

Magnolia Healthcare, Inc. v Barnes, 2008 Miss. LEXIS 26 (MS 2008)
Arbitration **compelled** where wife of cousin of incapacitated person who later became conservator signed person into facility and was ruled to have authority as **surrogate** under health care decision act.

Forest Hill Nursing Center, Inc. v. McFarlan, 2008 Miss. App. LEXIS 194 (MS Ct. App. 2008)
Arbitration **compelled** where granddaughter without power of attorney signed grandmother with capacity into facility and court finds grandmother was **third-party beneficiary** under the contract and thus bound by arbitration agreement.

Waterman v. Evergreen, 2008 Cal. App. Unpub. LEXIS 7778 (CA Ct. App. 1st, Div. 4, 2008)
Arbitration **denied** where daughter without power of attorney signed father with dementia into facility because daughter did not have authority to consent to arbitration on behalf of her father.

Hearn v. Quince Nursing & Rehab. Center, 2008 Tenn. App. LEXIS 621 (TN Ct. App. Jackson 2008)
Arbitration **denied** where daughter without power of attorney signed new admission agreement for father at nursing facility because father took no action to give daughter authority to waive his constitutional rights.

Ricketts v. Christian Care Center, 2008 Tenn. App. LEXIS 476 (TN App. Ct. Nashville 2008)
Arbitration **denied** where daughter without power of attorney signed new admission agreement for mother to stay at facility because daughter did not have authority to sign arbitration agreement and health care decision act did not operate retroactively.

McKey v. National Healthcare Corp., 2008 Tenn. App. LEXIS 477 (TN Ct. App. 2008)
Arbitration **denied** where daughter without power of attorney signed incapacitated mother into facility but facility didn't have doctor determine mother was incapacitated and facility didn't document daughter as surrogate under health care decision act so such act didn't apply.

Barbee v. Kindred Healthcare Operating, Inc., 2008 Tenn. App. LEXIS 630 (TN Ct. App. 2008)
Arbitration **denied** where son without power of attorney signed father into facility and son didn't have authority under health care decision act because father had not been declared incapacitated by designated physician.

2009 Cases (Denied 8 Compelled 2)

Moffett & O'Brien v. Life Care Centers of America, 219 P.3d 1068 (CO 2009)
Arbitration **compelled** where son with power of attorney signed incapacitated mother into facility because agent under power of attorney has that authority unless agent shows that power of attorney excludes authority to sign arbitration agreement.

Luhan v. Life Care Centers of America, 222 P.3d 970 (CO Ct. App. Div. 5, 2009)
Arbitration **denied** where son without power of attorney but who was designated as health care proxy under health care decision act signed mother into facility because arbitration agreement is not a health care benefit decision.

Chung v. Medical Facilities of America, 2009 Va. Cir. LEXIS 51 (VA Cir. Ct. 2009)
Arbitration **denied** where daughter without power of attorney signed incapacitated mother into facility but didn't have authority to sign arbitration agreement on mother's behalf.

Lawrence v. Beverly Manor, 273 S.W.3d 525 (MO 2009)
Arbitration **denied** where daughter who was agent under a power of attorney signed mother into facility but wrongful death act created new cause of action with different parties who were not compelled to arbitrate under this agreement which daughter signed in her capacity as agent and not individually.

Ward & Woods v. National Healthcare Corp., 275 S.W.3d 236 (MO 2009)
Arbitration **denied** where daughter without a power of attorney and mother signed mother into nursing facility but wrongful death act creates new action not bound by arbitration agreement and daughter signing as legal representative had no legal meaning.

Tolbert v. Danmar Retirement Villa, 2009 Cal. App. Unpub. LEXIS 10320 (CA Ct. App. 2nd Dist, 2009)
Arbitration **denied** where alleged wife without power of attorney signed as legal representative for incapacitated husband because alleged wife had no authority to bind husband to arbitration.

Life Care Centers of America v. Smith, 2009 Ga. App. LEXIS 704 (GA App. 1st Div. 2009)
Arbitration **denied** where daughter with only health care power of attorney signed incapacitated father into facility because health care power of attorney did not give daughter authority to sign away mother's right to a jury trial.

Triad Health Management of Georgia v. Johnson, 2009 Ga. App. LEXIS 641 (GA App. 3rd Div. 2009)
Arbitration **compelled** where son with general power of attorney signed father into facility because power of attorney had broad financial powers and signing such agreement was within scope of the agency.

Wilson v. Americare Systems, Inc. 2009 Tenn. App. LEXIS 277 (TN App. Nashville 2009)
Arbitration **denied** where daughter with health care power of attorney signed mother with capacity into facility because health care power was only effective upon diagnosis of physician and records showed that mother was alert and oriented on agreement date.

Mitchell v. Kindred Healthcare Operating, Inc., 2009 Tenn. App. LEXIS 381 (TN App. Memphis 2009)
Arbitration **denied** where daughter claiming to have a power of attorney signed incapacitated mother into facility but facility could not produce power of attorney showing that daughter had authority.

2010 Cases (Denied 7 Compelled 2)

Gibson v. Medical Facilities of America, Inc., 2010 Va. Cir. LEXIS 17 (VA Cir. Ct., Norfolk 2010)
Arbitration **denied** where sister without power of attorney signed initial admission agreement for comatose sister who was sexually abused while in facility and sister who was then appointed guardian signed second admission agreement after sexual abuse as "responsible party" but not as guardian, and court rejected facility's ratification argument because if there had been a meeting of the minds with regard to arbitrating claims after sexual abuse was known by all parties, that would have been explicitly referred to in the readmission agreement.

Tennessee Health Management, Inc. v. Johnson, 2010 WL 1424018 (AL 2010)
Arbitration **compelled** where daughter without power of attorney signed mother with capacity into facility because daughter signed as representative and mother did not object to daughter signing arbitration agreement. Court noted that this follows earlier holding in *Carraway v. Beverly Enterprises (2007).*

Adams Community Care Center, LLC v. Reed, 2010 WL 1492584 (MS 2010)
Arbitration **denied** where two sons without power of attorney signed mother into facility because sons did not have authority to bind mother's interests and sons were not surrogates under health care decisions act because the procedures for determining mother's capacity were not followed and Act limited to health care decisions.

Williamson v. Windsor House One, LLC, 2011 N.C. App. LEXIS 881 (NC App. 2010)
Arbitration **denied** where county social worker with delegation of authority signed incapacitated man into nursing facility (and daughter was later appointed as her father's guardian) because delegation of authority did not give the social worker the actual or apparent authority to sign arbitration agreements.

Munn v. Haymount Rehabilitation & Nursing Center, Inc., 704 S.E.2d 290 (NC App. 2010)
Arbitration **denied** where mother without a power of attorney signed incapacitated daughter into facility because there was no actual agency relationship between mother and daughter and health care consent didn't give power to sign arbitration agreement and court rejects facility's public policy argument that "holding that a signature by a responsible party is not legally binding in an admission agreement will force nursing homes to require legal guardianship or power of attorney signatures for each and every admission."

Court said that responsible party's signature can make that person responsible for paying for services, but that "agency, guardianship or power of attorney is needed for one person to contract away the right of another person to seek redress in our court system."

Medical Facilities of America, Inc. v. Lige, 2010 Va. LEXIS 223 (VA 2010)
Arbitration **compelled** where sister who was appointed as guardian for her incapacitated sister signed readmission agreements that contained arbitration provisions because guardians have authority to make health care decisions and to contract for arbitration.

Mizerak and Azzaro v. Brookdale Living Communities, Inc., 1 A.3d 806 (NJ Sup. Ct. 2010)
Arbitration **denied** in two cases: 1) niece with power of attorney signs aunt into facility; and 2) wife without power of attorney signs husband into facility. The court noted that arbitration agreements were contracts of adhesion because the facility did not inform the patients that the terms of the agreements were negotiable, and the contracts were unconscionable because these patients were entitled to special protection against economic abuse.

Dickerson v. Longoria, 995 A.2d 721 (MD App. 2010)
Arbitration **denied** where wife without power of attorney signed incapacitate husband into facility because wife had no actual authority to bind husband to an arbitration agreement without express authorization of husband.

Carr v. Immaculate Mary Nursing Home, 2010 WL 5577017 (PA Ct. Com. Pleas 2010)
Arbitration **denied** where wife without power of attorney signed husband without capacity into facility because marriage does not necessarily imply an agency relationship and husband did not imply or express authority to wife to sign arbitration agreement on his behalf.

2011 Cases (Denied 3 Compelled 1)

Sager v. Harborside Connecticut Limited Partnership, 2011 WL 2669240 (US Dist. Ct. CT 2011)
Arbitration **denied** where daughter not designated as power of attorney signed mother into facility because court noted that for arbitration agreements there could be no implied legal authority but only actual authority.

Kindred Nursing Centers Limited Partnership v. Brown, Guardian for Childress, 2011 Ky. App. LEXIS 61 (KY App. 2011)
Arbitration **denied** where mother without power of attorney signed her incapacitated son into the facility and later sued facility for negligence after becoming son's guardian because mother had no legal authority to sign agreement prior to becoming guardian and was not estopped to deny her authority just because she eventually became son's guardian.

Brown v. Genesis Healthcare Corporation, 2011 W. Va. LEXIS 61 (WV Sup. Ct. App. 2011)
Arbitration **denied** where brother who was appointed as guardian of his brother with cerebral palsy sued nursing facility after brother died of injury in facility where court held that Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts and that such clauses signed prior to injury are not enforceable to compel arbitration in a dispute concerning negligence that results in personal injury or wrongful death.

Cook v GGNSC Ripley, LLC., 2011 US Dist. LEXIS 40838 (US Dist. Ct. N. Dist. MS 2011)
Arbitration **compelled** where daughter without power of attorney signed incapacitated mother into facility even though court found no authority to sign and found arbitration clause was not a health care decision daughter could have made under health care consent act, mother was the intended **third party beneficiary** to the agreement and was bound by the arbitration clause.

2013-2014 Cases (Denied 4 Compelled 1)

Johnson v. Kindred Healthcare, Inc., 2 N.E.3d 849 (MA Sup. Jud Ct. 2014)
Arbitration **denied** where wife with health care proxy signed incapacitated husband into facility and court stated that signing an arbitration agreement is not a health care decision and so arbitration agreement signed by wife was unenforceable.

Kindred Healthcare v. Henson, 2014 WL 1998728 (KY App. 2014)
Arbitration **denied** where son without power of attorney but with oral direction from mother signed mother into facility because arbitration agreement was not necessary to admit mother into facility, and so, son had no actual authority to sign it on mother's behalf.

Estate of Decamacho v. La Solana Care and Rehab, Inc., 316 P.3d 607 (AZ App. 2014)
Arbitration **compelled** where daughter without power of attorney signed incapacitated mother into facility and court ruled that arbitration agreement was binding on mother's estate under estoppel because mother resided at facility for three years prior to injury, but arbitration agreement was not binding on wrongful death beneficiaries.

Young v. Horizon West, Inc., 220 Cal. App.4th 1122 (CA App. 2013)
Arbitration **denied** where daughter signed mother into facility where mother was raped by facility employee and court stated that daughter had no authority to bind mother to arbitration because health care power of attorney on which daughter was alternate agent was not effective because doctor had not declared mother to be incapacitated.

Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450 (SC 2014)
Arbitration **denied** where sister without power of attorney signed incapacitated sister into facility and court ruled that signing arbitration agreement was not a health care decision under health care consent act and daughter not be equitably estopped because arbitration agreement was separate from admission agreement and daughter had no authority to sign arbitration agreement.

Final Score
This part of the paper has summarized 55 arbitration clause cases over portions of the last seven years. If you haven't been keeping score, here is the final tally:

Denied – 38
Compelled - 17

General Observations

So, about seven times out of ten, an appellate court in the United States will choose to deny a motion to compel when someone other than the patient has signed a patient into a nursing facility, and in so doing, signs an arbitration clause on the patient's behalf.

Even given those odds, we see a panoply of nursing home corporations allowing family members to sign their incapacitated loved ones into their facilities without asking to see letters of guardianship or a power of attorney showing a family members' authority to sign admission agreements with these hidden arbitration agreements.

And, we all know that appellate decisions are merely the tip of the iceberg, and that lurking beneath the water is a large mass of cases that go to arbitration without seeing the light of appellate day.

Also, reading the gruesome things that happen to these poor incapacitated people in nursing facilities that prompt these lawsuits, one has to wonder whether nursing facilities decide to provide a lesser degree of care to those patients for whom someone has signed an arbitration agreement.

The whole mess convinces me of the advocacy value of having educated guardians making wise placement decisions for their wards.

But, for your purposes, as attorneys for elderly or disabled clients or their guardians, I believe that the following advice can be gleaned from this multitude of arbitration clause cases:

Tell your clients to review nursing facility admission agreements carefully and to strike through any arbitration agreement contained therein. Don't be the test case for whether an arbitration agreement complies with Texas law or whether a guardian has the authority to waive their ward's right to a jury trial. It could be a very costly mistake.

FIDUCIARY LIABILITY CASES

By: Terry W. Hammond

(with assistance from Steven D. Fields and Patricia "Cally" Wagner)

This segment of this paper focuses solely on breach of fiduciary duty cases involving Texas guardians reported in the NGA Legal Review over the past ten years. The case summaries are mostly comprised of case summaries prepared by Steve Fields for the NGA Legal Review; however, I have updated the summaries and sprinkled in some case reviews not previously included. Patricia "Cally" Wagner, an associate attorney in my firm, assisted in preparation of the paper as well.

This paper does not address fiduciary liability cases involving administrators or executors of estates, agents under powers of attorney, or actions by guardians ad litem or other fiduciaries. The cases reported here are not exhaustive, nor are the comprehensive, but they do provide an indication of Texas courts' rulings on situations where guardians are alleged to have breached their fiduciary duty.

There are fifteen cases included in this paper. The trial court was affirmed in approximately two-thirds of the cases, and was reversed in about one-third of the cases. The appellate courts do demonstrate a great deal of deference to probate judges, but do not hesitate to reverse them when they stray from logic and reason, and when they deviate from established statutory schemes. The cases also reveal that statutory probate courts are reversed slightly more often than other lower courts.

In 2006, the Fourth Court of Appeals in San Antonio considered a case styled In re the Guardianship of Archer, 203 S.W.3rd 16 (Tex. App. - San Antonio 2006). In this proceeding, a niece brought a "derivative" malpractice suit against her uncle's attorneys for being careless with his money, because the uncle's temporary guardian (who was Mr. Archer's girlfriend) refused to file the suit. The niece also sued the temporary guardian for inflicting emotional distress on Mr. Archer. The trial court found that the niece lacked standing, and dismissed the action. The niece appealed to the San Antonio Court of Appeals, which affirmed the dismissal.

The niece alleged that several attorneys involved in changing her uncle's estate plan had been careless with his money by allowing him to set up a trust after he suffered a stroke. By the time the niece brought her suits the girlfriend had already been appointed as temporary guardian of his person, and a third party was appointed as guardian of the estate.

The trial court agreed with the defendant attorneys that the niece did not have standing under Texas law, which provides that only the guardian may bring suit on behalf of the ward. While the niece might be an interested person who could seek removal of the guardian, she could not bring suit on behalf of the guardian absent a showing that that the guardian had a conflict of interest with Mr. Archer. She made no such showing. She lacked both standing (having a justiciable interest in the suit) and capacity (the legal authority to act) to bring the suit.

The appellate court agreed with this reasoning and found that her arguments relied heavily on cases involving estate representatives, and that it would be a mistake to overlay the law of guardianship with the law of decedents' estates. Unlike heirs, who have a present property interest in the estate, a ward's relative has no property interest in the guardianship.

In Wilz v. Flournoy, 228 S.W.3d 674 (Tex. 2007), the Texas Supreme Court reversed the Waco Court of Appeals in considering a breach of fiduciary duty action against a father who was guardian for his son.

Patricia Wilz and Kenneth Flournoy divorced in 1973 and Kenneth was awarded custody of their son, Jon. In 1987, Jon suffered incapacitating injuries in a car accident. In 1991, Kenneth brought suit individually and as net friend against Ford Motor Company and recovered individually as well as on behalf of his son. Kenneth was named guardian for Jon's estate and invested $380,000 in stocks and bonds for Jon's benefit.

Kenneth and his new wife bought a 110 acre farm for $153,000, paying $49,000 down and executing a note for the balance with monthly $960 payments. Between 1991 and 1999, the Flournoys repeatedly withdrew thousands of dollars from Jon's account to pay their farm mortgage installments of $960 per month. At the end of 2001, Jon's estate was depleted and the Flournoys placed Jon in a state mental health facility.

In 2005, Patricia Wilz, Jon's mother, became Jon's successor guardian and sued Flournoys on Jon's behalf for conversion, breach of fiduciary duty and constructive fraud. At a jury trial, when questioned about checks drawn on Jon's account to the Flournoy's personal account, the Flournoys invoked their Fifth Amendment privilege against self-incrimination.

The jury found that Kenneth breached his fiduciary duty and committed constructive fraud and that the Flournoys converted Jon's property with malice. The trial court imposed a constructive trust on the entire farm.

The Flournoys appealed to the Court of Appeals, which reviewed deposition testimony and concluded that the trial court abused its discretion by imposing a constructive trust on the entire farm for Jon's benefit as Kenneth had given a deposition where he testified he had paid $50,000 of his own funds as down payment on the farm. A divided Court of Appeals concluded that Jon was entitled to a constructive trust on an undivided 35% of the farm.

The successor guardian appealed to the Texas Supreme Court.

The Supreme Court noted that the successor guardian had met her burden of tracing funds to the specific property sought to be recovered – the farm. The burden then shifted to the Flournoys to demonstrate what portion of the farm's purchase price came from their own funds.

The Texas Supreme Court, apparently in a humorous mood, stated, **"The Flournoys bet the farm (as it were) when they failed to obtain a jury finding on their affirmative claim that part of the purchase money came from personal funds."** Their claim was waived on appeal unless they "conclusively established" it. The jury was free to disregard Kenneth's deposition testimony as not being credible and to draw negative inferences from the Flournoys' repeated invocations of the Fifth Amendment.

The Supreme Court holds that the trial court did not abuse its discretion in imposing a constructive trust on the entire farm, reverses the Court of Appeals, and renders judgment that the entire farm is subject to a constructive trust for Jon's benefit.

In 2007, the Fourth Court of Appeals addressed another fiduciary liability case in Maltsberger v. Maloney and LeGrand, 2006 Tex. App. LEXIS 11039 (Tex. App. - San Antonio 2007). Zane Maltsberger was a minor who suffered personal injuries. His father, John Maltsberger, initiated a lawsuit as "next friend" and recovered $27,000, which was placed in the court registry on Zane's behalf. John subsequently filed to withdraw the funds from the court registry and filed a bond in the amount of $54,00, which was signed by John as principal and two attorneys, George LeGrand and Janice Maloney, as sureties. Zane, upon reaching majority, subsequently sued John for breach of fiduciary duty in misapplying the funds released from the registry and obtained a default judgment for $62,500 and $25,000 in exemplary damages.

Zane filed suit against Maloney and LeGrand alleging they were liable as sureties on the bond. Zane also alleged various torts relating to their actions in representing Zane in the original settlement and seeking the release of funds from the court registry. Maloney and LeGrand moved for no-evidence summary judgment and the trial court granted the motion without specifying the grounds on which it was granted. Zane appeals.

The Fourth Court of Appeals affirmed the summary judgment on the tort claims as Zane didn't present any evidence that Maloney and LeGrand breached any duty owed to him. However, court of appeals reversed the summary judgment on the bond issue as the purpose of the bond was to protect Zane even though it was payable to the county judge. The case was remanded to the trial court on Maloney and LeGrand's liability on the bond.

The Texas Supreme Court again had the opportunity to consider a breach of fiduciary duty action in a case that arose in the First District Court of Appeals in Houston in 2007, and where the litigation continued in Texas courts for three years.

In Conte v. Ditta, 287 S.W.3d 28 (Tex. App. – Houston - 1st Dist. 2007), the First District Court of Appeals in Houston issued a memorandum opinion after considering the following facts:

In 1987, Joseph P. Conte, Sr., and wife Doris Conte created the Joseph P. Conte Family Trust. Mr. Conte died in March of 1993, and was survived by Doris and their two children Joseph, Jr. and Susan, all of whom were to jointly manage the intervivos trust after Mr. Conte's death. Doris and Susan deferred to Joseph, Jr. to manage the trust, which directed the co-trustees to seriously consider his recommendations.

Two years after Mr. Conte's death, Doris and Susan became aware that Joseph Jr. had not divided the corpus of the trust into three separate trusts as required by the Trust agreement. The three trusts were to consist of a management trust consisting of Doris' separate and community property to be managed for her benefit, a "Family Trust" which was to consist of Mr. Conte's separate and community share of the property, and a Marital Deduction Trust to provide for the tax and other expenses resulting from the death of one of the spouses.

During the next 18 months, multiple lawsuits were filed between Susan and Joseph, Jr. Doris and Susan

(jointly and individually) sought to remove Joseph, Jr. as co-trustee and sought a declaratory judgment that the removal action would not violate a no-contest clause in the Trust. Susan also 1) sought a protective order against Joseph,, Jr., resulting from an incident of family violence, 2) sued Joseph, Jr., for fraud, conversion and breach of fiduciary duty, and 3) sued Joseph, Jr. and his attorneys for conversion and interference with the administration of the trust. Joseph, Jr. sued his mother and sister, and alleged they had no authority to be involved in the affairs of Mr. Conte's auto dealership, sought to rescind a settlement agreement, and alleged his mother was incapacitated and in need of the appointment of a temporary guardian.

The trial court determined Doris to be incapacitated, but appointed Susan as guardian of her person, and Louis Ditta as guardian of her estate. Doris was therefore removed as co-trustee, and Joseph, Jr. and Susan were left to continue as co-trustees of the Trust. In August, 1998, Ditta as guardian of the estate of Doris filed a motion for appointment of a receiver over the trust, alleging that the trust assets were being injured as a result of discord between Susan and

Joseph, Jr. Instead of a receiver, the court appointed Paula Miller as temporary successor trustee, which suspended the powers of Susan and Joseph, Jr., as co-trustees. Miller performed an accounting of the Trust and determined that both Joseph, Jr. and Susan had received substantial personal benefit from trust assets to pay personal expenses. Miller then successfully sued to remove Joseph, Jr. as trustee which left Susan as the only remaining trustee (although her powers were suspended). In April, 2004, Ditta as guardian filed this suit to remove Susan as trustee and for the appointment of a successor trustee. The Harris County probate court removed Susan as trustee and modified the trusts successor trustee appointment provisions to appoint Frost Bank as successor trustee.

Susan appealed, claiming that the trial court erred when it removed her because Ditta was barred from bringing his removal action by the four year statute of limitations. Susan argued that the removal action was brought in 2004, and that the guardian had known of her alleged breach of fiduciary duty for at least five years before bringing the removal action. The appellate court agreed, and reversed the trial court, finding that Ditta's cause of action for removal of the trustee due to discord between Susan and Joseph Jr. accrued when Ditta applied for the appointment of a receiver over the trust or at the latest when the agreed order appointing Miller as successor temporary trustee was signed on October 8, 1998. The four year statute on Susan's misuse of funds would have required Ditta to file suit by October 2003. Because Ditta's petitions were barred by statute of limitations, the probate court did not have authority to remove Susan as trustee or to modify the Trust. The appellate court reversed the trial court and remanded the case.

Ditta appealed to the Supreme Court of Texas, and the Supreme Court granted the petition for review.

In Ditta v. Conte, 298 S.W.3d 187 (Tex. 2009), the Texas Court reverses the Court of Appeals judgment on the statute of limitations issue and remands to the Court of Appeals. The Supreme Court holds that a trustee removal action, regardless of the underlying grounds on which it is brought, is not subject to a limitations period. The Supreme Court focused on the relationship between a fiduciary and the trust and beneficiaries, and states that **"to hold otherwise would allow trustees who previously harmed the trust relationship to remain in their fiduciary roles, regardless of their past transgressions."** However, limitation periods, such as the four year period for monetary recovery for a fiduciary's breach, continue to dictate when claims for *damages* resulting from a breach of fiduciary duty must be brought. The probate court found that Susan Conte, in her role as trustee, committed a breach of trust, and that her role of trustee was compromised due to her indebtedness to the Trust and her tenuous relationship with Joseph Jr. and Doris. The potential for injury to the Trust would remain as long as Susan continued her role as trustee. Therefore, the court ruled that the guardian Ditta's claim for Susan's removal was not time barred. The Supreme Court analogized a breach of fiduciary proceeding to remove a trustee to a an ongoing marital relationship where one spouse is not barred by a statute of limitations from later raising issues of adultery or cruelty, as well as real property actions to remove a cloud on title which are not time-barred and exist as long as an injury clouding the title remains. The Supreme Court remanded the proceeding for consideration of the merits of the appeal.

On remand in Conte v. Ditta, 312 S.W.3d 951 (Tex. App. Houston – 1st Dist. 2010), the Court of Appeals affirms the trial court's ruling with regard to removal of Susan as co-trustee, but reversed the trial court's modification of the Trust to appoint Frost Bank. The Court of Appeals concluded that the trial court "abused its discretion in modifying the terms of the Trust and by appointed the successor trustee because the court should not have given itself the authority to appoint a successor in place of a majority of the adult beneficiaries" as the Trust proscribed.

There are times when an attorney performs a lot of work for a guardian who is later removed for reasons

having nothing to do with the services rendered by counsel.

The Dallas Court of Appeals addressed this situation in 2008 in a case styled In the Matter of the Guardianship of Fortenberry, 261 S.W.3d 904 (Tex. App. – Dallas 2008). In Fortenberry, two attorneys filed claims in a guardianship proceeding seeking payment for services they rendered as attorneys on behalf of Brenda Sanders, court-appointed guardian of the estate of Ms. Fortenberry. The attorneys assisted the guardian in establishing the guardianship as well as by handling a divorce proceeding involving Ms. Fortenberry. Attorney Tandy incurred fees of $26,699.40, and Attorney Crumley incurred fees in the amount $13,149.84, and both filed fee applications with the probate court that were approved by the guardian. Nine months later the attorneys withdrew from representation of the guardian. Seven months later the probate court removed Ms. Sanders and appointed a successor guardian. The attorneys' fees still had not been approved at the time the guardian was removed.

The probate court then refused to act on the pending fee applications as the guardian, their former client, had been removed. The attorneys filed unsecured claims against the estate based on their contractual relationship with Ms. Sanders as the prior guardian. The attorneys later amended their claims and the claim amounts, alleging they were due payment not based on the contract with Ms. Sanders but instead based on unjust enrichment and quantum meruit. These claims were not contested by the successor guardian or anyone else in the proceeding.

The probate court conducted a hearing on the attorneys' claims, where the attorneys moved away from the contract-based claims due to Ms. Griffin's removal and instead relied on theories of quantum meruit and unjust enrichment by the guardianship estate. The probate judge responded that "your claim is against Mrs. Sanders, individually,, because she hired you…." The probate judge did not want to allow the fees as unsecured claims, and the attorneys could not get paid under contract because the guardian had been removed.

On appeal, the successor guardian argued that, although he had approved the claims, the attorneys had cited no authority under the Texas Probate Code on which their claims for attorneys' fees could be paid, and that the attorneys could not get paid under the equitable theories of quantum meruit and unjust enrichment as the Probate Code governs the payment of attorneys' fees, and they couldn't be paid under the Probate Code as the guardian had been removed prior to court approval of the fees.

The Dallas Court of Appeals determines that the probate court does, in fact, have jurisdiction to hear and decide attorneys' claims based on quantum meruit and/or unjust enrichment. The court examines Probate Code sections 665B, 665C, and 666 (now Texas Estates Code §1155.003, 1155.006, 1155.007, and 1155.001). The court concludes that "nothing in the probate code makes these the exclusive bases for seeking payment for such [legal] services," and that attorneys can use the claims sections for payment just as any other creditor can. After a lengthy analysis, the court finds that the evidence proved the necessity, fairness and reasonableness of the attorneys' claims, which were not disputed at the trial level. However, the attorneys could not recover under claims of quantum meruit or unjust enrichment as the attorneys did not demonstrate as a matter of law that these theories had to be applied to avoid injustice.

The court rejected the attorneys' appeal, stating "nothing in the probate code renders null Sanders's actions-taken in her authorized, representative capacity and before she was removed-in contracting for reasonable and necessary attorney's fees on behalf of the guardianship, and nothing prohibits the probate court from considering and ruling on those applications even after Sanders's removal." (citing Probate Code § 666).

The Third Court of Appeals in Austin addressed a similar issue in Daves v. Daniels, 319 S.W.3d 938 (Tex. App. – Austin 2010). In this proceeding, Carla Daniels was declared legally incapacitated, and her father was appointed as guardian of her person and estate. Attorney Russell Daves represented the guardian in a suit for divorce while the guardianship was in effect. Five years later the probate court (Williamson County Court at Law) removed the guardian *sua sponte* due to his failure to file annual reports. No successor guardian was appointed.

Two years after the removal of the guardian, Ms. Daniels hired Mr. Daves to represent her in an enforcement proceeding related to the divorce, which had been granted by a state district court while the guardianship was in effect. Ms. Daniels' ex-spouse filed a Motion to Show Authority against Mr. Daves pursuant to Rule 12 of the Texas Rules of Civil Procedure. The ex-husband argued that Ms. Daniels was still incapacitated – and had never been restored – and thus lacked legal capacity to retain Mr. Daves as counsel. The district court agreed with the ex-husband and dismissed the suit brought by Mr. Daves on behalf of Ms. Daniels. The district court also sanctioned Mr. Daves for knowingly filing a suit without authority to do so, and ordered him to pay the ex-husband's

attorney's fees incurred in seeking the appointment of a successor guardian to represent Ms. Daniels.

Mr. Daves appealed the sanctions order. He argued that the removal of the guardian for Ms. Daniels (and the lack of appointment of a successor guardian) left Ms. Daniels in a position where she could retain her own counsel.

The Court of Appeals reviews the order appointing permanent guardian for Ms. Daniels, and notes that the guardianship order found that Ms. Daniels "lacks the capacity to do some, but not all, of the tasks necessary to care for herself or to manage her property," which the court notes would support a limited guardianship. Further, the probate court's order did not list the specific powers, limitations, or duties of the guardian as required by the then Texas Probate Code, nor did it state "that the guardian has full authority over the incapacitated person" – language that would have supported a plenary guardianship of the person and estate. (Citing Texas Probate Code § 693, now Estates Code § 1101).

The Court of Appeals then concludes, **"Because the order here did not define the scope--either full or limited—of the guardian's powers and did not specify the powers granted, as required by the *probate code, Section 675's* presumption that a ward retains all powers not specifically granted to her guardian fills the void."** (Now Texas Estates Code § 1151.001). In light of that presumption, and because "the order here was not effective to vest any power in Carla's guardian," the court concludes that Ms. Daniels retained capacity to hire Mr. Daves to file suit on her behalf, and that the district court abused its discretion in imposing sanctions against Mr. Daves. The court adds that the prior "general finding" of incapacity, without more, did not mean that Ms. Daniels specifically lacked the capacity to hire counsel and prosecute a lawsuit.

In Bank of America v. Eisenhauer, 2010 Tex. App. LEXIS 5519 (Tex. App. - Corpus Christi-Edinburg 2010), H.W. and Lorene Walter were the owners of a $55,000 certificate of deposit at Bank of America that was payable on death to the living spouse and then on the death of the surviving spouse in equal shares to Dwight Eisenhauer and his employee, Jo Ann Day. Mr. Walter died in June, 2004. Mr. Eisenhauer and Ms. Day were co-executors of Mr. Walter's estate. On July 16, 2004, Ms. Day presented the death certificate to Bank of America and requested its employee, Joyce Sheen, to distribute funds from the CD to Ms. Day and Mr. Eisenhauer even though Mrs. Walter was still alive. Ms. Sheen complied and issued checks in equal amounts to Ms. Day and Mr. Eisenhauer, who was mailed his check.

Bank of America admits that it made a mistake when it distributed these funds in this manner. Pursuant to his agency under power of attorney from Ms. Walter, Mr. Eisenhauer opened a new account in Lorene's name with himself as the pay on death beneficiary. He deposited his check into that account. Bank of America phoned Ms. Day to inform her of the error. Ms. Day replied that she would have her attorney call Ms. Sheen. Ms. Day's attorney tendered $5,000 of her share of $27,497.67 to Bank of America, which it kept but told Ms. Day's attorney that Ms. Day had ten days to deposit the remaining funds or face legal action.

In August of 2004, Beverly Belcher Ringland was appointed temporary guardian of the person and estate of Ms. Walter, and her appointment was made permanent in October of 2004. In February of 2005, Ms. Ringland sent Bank of America a document stating that "in her capacity as guardian" she desired Ms. Day to retain the funds received by her and that she wanted the bank to withdraw its demand on Ms. Day to return funds to the account (Ms. Ringland's guardianship order provided that she "shall have…the power and duty to preserve all claims of the Ward). The guardian included an indemnification agreement to hold Bank of America harmless for claims in connection with the withdrawal. The bank then returned the $5,000 to Ms. Day's attorney and took no further actions to collect the money from Ms. Day. In March 2005, Mr. Eisenhauer replaced Ms. Ringland as guardian of Ms. Walter's person and estate. Ms. Walter died in May of 2005, and Mr. Eisenhauer became independent executor later than month.

In September 2005, Mr. Eisenhauer filed suit against Bank of America for breach of contract, violation of state law, negligence, gross negligence, and breach of fiduciary duty related to the wrongful payment of one half the CD to Ms. Day. Both filed motions for summary judgment. Mr. Eisenhauer prevailed. A jury in a separate proceeding determined the amount of Eisenhauer's attorney's fees and the court entered a judgment to Eisenhauer of $27,800 actual damages and $61,000 of attorney's fees. Bank of America appealed.

The court of appeals reversed the trial court's grant of summary judgment for Eisenhauer because it merely stated the facts and did not state grounds upon which his traditional motion for summary judgment was based. The court affirmed the trial court's order denying the Bank's traditional motion for summary judgment as to estoppel where the Bank was claiming that Mr. Eisenhauer's suit as executor was estopped by Ringland's actions as guardian as all elements of that

defense were not met. The court reversed the trial court's order denying the Bank's no-evidence motion for summary judgment on Mr. Eisenhauer's allegations of negligence, gross negligence, and breach of fiduciary duty claims and rendered judgment in favor of the Bank on those claims. Because the court reversed and remanded the underlying claim for breach of contract, the court also reversed and remanded the trial court's award of attorney's fees and court costs.

The Thirteenth District Court of Appeals again considered the above proceeding in a memorandum opinion styled Bank of America v. Eisenhauer, 2014 Tex. App. *LEXIS* 5140 (Tex. App. – Corpus Christi-Edinburgh 2014). In this proceeding, Bank of America appeals the jury's findings on remand, which were that 1) Bank of America failed to comply with the deposit agreement, 2) Bank of America's failure to comply was not excused, and 3) Ms. Walter and Mr. Eisenhauer did not fail to comply with the deposit agreement. All findings by the jury were affirmed by the court of appeals, as was the trial court's award of attorneys' fees to Eisenhauer's counsel

The Corpus Christi-Edinburg Court faced another challenging case when it decided Franks v. Roades, 310 S.W.3d 615 (Tex. App. - Corpus Christi-Edinburg 2010). This case involves a familiar scenario that occurs when an attorney has prepared planning for a person who later becomes incapacitated, and then is asked by the client's agent under power of attorney to bring a guardianship proceeding for the protection of the attorney's original client.

John Roades, an attorney in Wharton, Texas, began representing Christine Franks in 1999 when he prepared a power of attorney appointing her son, Michael, as attorney-in-fact. In 2001, Ms. Franks revoked the power of attorney naming Michael, and instead executed a power of attorney appointing her daughter, Carol Thompson, as attorney-in-fact and cosigner on her checking account. In January, 2003, Ms. Franks was diagnosed as having severe and global cognitive dysfunction due to suffering mini-strokes which required her to have 24 hour care. Ms. Thompson hired sitters and paid for them from Ms. Frank's funds. Michael disagreed with Ms. Frank's diagnosis, encouraged Ms. Franks not to take her medication, and threatened Ms. Thompson. Ms. Thompson visited with Ms. Franks' attorney Roades for advice on ways to resolve the family disputes. Mr.

Roades referred Ms. Thompson to an elder law attorney in Austin who he hoped could devise an estate plan to placate Michael. However, this didn't work and Ms. Thompson never hired other counsel.

Acting under the power of attorney, Ms. Thompson retained Mr. Roades to file an application for guardianship of Ms. Franks, paying him $5,000 from Ms. Frank's funds. Mr. Roades believed that guardianship was necessary to protect Ms. Franks and considered himself obligated to initiate the guardianship proceeding pursuant to Texas Disciplinary Rule of Professional Conduct 1.02(g), which states: "A lawyer shall take reasonable action to secure the appointment of a guardian…for…a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

That same day, Ms. Franks and Michael appeared in Mr. Roades' office because Michael wanted Mr. Roades to change Ms. Franks' power of attorney to re-appoint Michael as her attorney-in-fact. Mr. Roades told Michael that he couldn't represent him and that he should seek another attorney. Ms. Franks had previously instructed Mr. Roades to not discuss any of her legal matters with Michael, so Mr. Roades did not tell Michael or Ms. Franks about the guardianship application at that meeting. Mr. Roades believed that Ms. Franks was not competent to revoke her power of attorney at that time.

Michael contested the guardianship application and requested the appointment of a statutory probate judge. The court appointed an attorney to represent Ms. Franks, who also had a privately retained attorney. The court appointed a temporary guardian and ordered an independent medical exam. The court-appointed physician concluded that Ms. Franks was incapacitated. Ms. Franks' attorney ad litem moved to disqualify Mr. Roades from representing Ms. Thompson due to conflict of interest having previously represented Ms. Franks. The trial court denied the motion.

The parties eventually entered a binding mediated settlement agreement where they agreed to dismiss the guardianship application, pursue the viability of creating a trust to manage Franks' estate and to pay the fees of the temporary guardian, the attorney ad litem, Ms. Thompson's attorney fees and Ms. Franks' attorneys fees - all out of Ms. Franks' estate (totaling $120,000.00 with Mr. Roades' being $38,000.00). Mr. Roades then non-suited the guardianship petition.

In June 2005, Ms. Franks sued Mr. Roades and Ms. Thompson (later non-suited) asserting negligence, breach of fiduciary duty, gross negligence, conversion, fraud and deceptive trade practices resulting from his representation of Ms. Thompson in the guardianship against her mother (it is unclear who was representing Ms. Franks, but it is evident that she lacked capacity).

Mr. Roades filed for summary judgment and the court entered summary judgment for Mr. Roades.

Ms. Franks appealed, contending that Mr. Roades was not entitled to summary judgment because he offered no rebuttal testimony to refute Ms. Franks' expert; a fact issue exists on Ms. Franks' breach of fiduciary duty claim; and a fact issue exists on Ms. Franks' negligence claim. Mr. Roades argues that Ms. Franks' claims are all based on the assertion that he improperly sought the guardianship, and further argued that he was entitled to summary judgment because, as a matter of law, he had a duty under the Texas Disciplinary Rules of Professional Conduct to seek the guardianship.

The court of appeals affirmed the trial court's summary judgment in favor of Mr. Roades. The court first ruled that Ms. Franks' expert affidavit was conclusory on the issue of Mr. Roades' negligence and was therefore not competent summary judgment evidence. The affidavit stated: "It is my opinion that John Roades was negligent. Because he brought the guardianship proceeding for a person who was either competent… or incompetent and he dismissed the case with no benefit or protection for Christine Franks, he is on the horns of a dilemma… To wrongfully bring a guardianship proceeding would obviously be a breach of duty owed to a client… yet he consented to dismiss the application. He did so at the great expense of approximately $126,000 in attorneys' fees and costs." The affidavit concluded by stating, "A reasonably prudent attorney would have acted to benefit Christine Franks either by not filing the application for guardianship or by referring the case and letting another attorney for the agent have a proper guardianship established after filing, or conduct a jury trial on the merits."

The court stated that the affidavit is conclusory because it fails to state the standard by which Mr. Roades' fiduciary duty is measured and offers no legal basis for the conclusion that Mr. Roades wrongfully initiated the guardianship proceedings. It also does not state how Mr. Roades was representing anyone other than Ms. Franks through the person Ms. Franks appointed to handle matters on her behalf, and does not clarify how Ms. Franks received no benefit from Mr. Roades' actions.

Ms. Franks contended that Roades breached his duty of loyalty to her by continuing to pursue a guardianship over her objection and the objections of her attorneys, and by representing Ms. Thompson which amounted to advocating a position for another that was directly adverse to the position advocated by Ms. Franks and her attorneys.

The court of appeals disagreed.

The court defined breach of fiduciary duty by an attorney: "A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making representations."

The court finds in favor of Mr. Roades and gives a number of reasons for doing so. First, the record did not show any evidence that Ms. Franks' attorneys opposed the guardianship other than a general denial. The record was replete with medical evidence that Ms. Franks was incapacitated. Mr. Roades maintained throughout that he was Ms. Franks' attorney and that when he filed the guardianship application, he was acting under the disciplinary rules, which required him to seek guardianship. The court concluded that Mr. Roades' obligations under the TDRCP was a question of law, and that following the disciplinary rules did not form the basis for civil liability. The court also stated that Ms. Franks did not cite any authority indicating that under the Rule 1.02(g) duty, the attorney cannot file an application for guardianship on behalf of the person the client has already empowered with the ability to act on her behalf. The court concluded with this gem which is often hard to believe: **"Guardianships are not inherently adversarial proceedings; thus the applicant is not automatically adverse to the ward."**

Ms. Franks also argued that Mr. Roades breached his duty of full disclosure by failing to discuss the guardianship application with her. The court cited comment 5 to TDRPC 1.03, which states "when a lawyer reasonably believes a client …is not legally competent, it may not be possible to maintain the usual attorney-client relationship." The court stated that Ms. Franks does not direct the court to any case law demonstrating that an attorney's duty of full disclosure remains even when the attorney reasonably believes the client is not legally competent, and it was not aware of any. The court concluded that Mr. Roades did not breach his duty of full disclosure to Ms.Franks.

There are several cases in the Legal Review in which the Fort Worth Court of Appeals has addressed fiduciary liability issues. In Guardianship of Bays, 2011 Tex. App. LEXIS 4834 (Tex. Ct. App. - Fort Worth 2011), the court changed its memorandum opinion to a published opinion after considering the plight of Erma Lee Bays, a 93 year old woman who lived in Arlington, Texas. Ms. Bays was estranged from her only son who lived in San Francisco. About

ten years before this case came to trial, Nyagudi Okumu, a Kenyan national, met Ms. Bays at church, and began "taking care" of her. Over the years, Ms. Bays gave money to Okumu. She revoked a power of attorney she had granted to her son and named Okumu as agent under power of attorney. Ms. Bays designated Okumu and his children as beneficiaries in her will. Ms. Bays also signed quit claim deeds of her real property to Okumu.

In September 2008, a hospital social worker filed a suggestion of need for guardianship for Bay pursuant to Texas Probate Code § 683 (now Texas Estates Code § 1102) complete with a medical certificate stating that Bays was partially incapacitated and unable to handle her financial affairs. The court appointed Catherine Goodman as guardian ad litem to investigate the need for guardianship for Bays. The guardian ad litem filed an application for guardianship at the end of October, 2008, and the court appointed William Fitzgerald as attorney ad litem for Ms. Bays. In November, 2008, Mr. Okumu filed a pro se motion asking the court to keep him informed of any actions taken in the case and asking the court to recognize his power of attorney from Bays. On January 5, 2009, an attorney for Mr. Okumu filed a contest to the guardianship on Mr. Okumu's behalf claiming that Ms. Bays did not need a guardian, or alternatively, that the court appoint Mr. Okumu as Ms. Bay's guardian.

On January 21, 2009, the guardian ad litem filed an application for temporary guardianship alleging that Mr. Okumu had withdrawn almost $300,000 from bank accounts in Bay's name. The process server made several attempts to serve Ms. Bays, but was unsuccessful due to interference from Mr. Okumu who was at Ms. Bay's house. Based on the affidavit of the process server, the court approved substituted service under Rule 106 of the Texas Rules of Civil Procedure. The process server posted the citation on Ms. Bay's door.

The temporary guardianship hearing was held on January 27, 2009, and Mr. Okumu, accompanied by new counsel, attended the hearing. Ms. Bays did not attend the hearing as she was in the hospital due to failing health. Mr. Okumu's counsel requested to be substituted as new counsel and requested a continuance. The court granted the substitution, but denied the continuance, and appointed Lisa Ash, a private professional guardian, as temporary guardian of the person, and Wells Fargo Bank as temporary guardian of the estate. In the temporary guardianship order, the court ordered Mr. Okumu to place the funds that had been removed from Bay's accounts or from accounts held jointly in Ms. Bays' and Mr. Okumu's names into the court registry by January 29, 2009. Mr. Okumu failed to comply, and the court held a contempt hearing. Mr. Okumu attended the hearing, and the court ordered him incarcerated until the funds were paid into the court registry. Mr. Okumu then filed this appeal.

Mr. Okumu contended that Ms. Bays was never personally served before the temporary guardianship hearing, and therefore, the court lacked jurisdiction to enter the temporary guardianship order. The appellate court ruled that Mr. Okumu "is simply mistaken in his proposition that substituted service under Rule 106 is not an accepted method of personal service in a temporary guardianship setting." Where the record contains an affidavit by the process server, a motion for substituted service, an order allowing substituted service by the trial court, and a return by the process server, all before the hearing, substituted service is allowed in a temporary guardianship.

Mr. Okumu next contended that Ms. Bays was not present at the hearing, but was in the hospital, and therefore, the court lacked jurisdiction and the order was void. The court stated that "although the probate code does state that a proposed ward has the right to be present at a hearing, we find no infirmity in the trial court allowing Ms. Bays' attorney ad litem to represent her interests while Ms. Bays remained in the hospital.

Mr. Okumu next contended that a process server's return must be on file 10 days prior to a temporary guardianship hearing. The court stated that this is a misreading of the statute which requires the court to hold a hearing "not later than the 10th day after the date of filing of the application for temporary guardianship" TPC 875(f)(1) (now Texas Estates Code §1251.006). To require the return to be on file ten days would make compliance with the statute impossible.

Mr. Okumu also contended that he was deprived of due process when ordered to deposit funds in the court's registry. The appellate court concluded that Mr. Okumu was not deprived of due process because the application clearly indicated that Ms. Bays' attorney would seek return of the funds that Mr. Okumu removed from Bays' accounts, and Mr. Okumu attended the hearing with counsel who questioned witnesses and filed multiple post-hearing motions. The appellate court found that Mr. Okumu was granted his opportunity to be heard and had his day in court.

Mr. Okumu argued that the court's order requiring him to deposit funds withdrawn by him was void because it was not supported by sufficient pleadings or evidence as a vague and ambiguous. The appellate court overruled this issue because the order specifically noted four different bank accounts with specific dollar

amounts from which Mr. Okumu had taken funds. The court recognized that a trial court has inherent authority to order an individual to deposit funds into the court registry when the complainant can show a dispute about the ownership of the funds or that the funds are in danger of being depleted.

Mr. Okumu's final issue was that the court erred by holding him in contempt. The appellate court stated that contempt issues are not appealable because they are not concerned with disposing of all claims and parties before the court, but instead involve a court's enforcement of its own orders regardless of the statues of the claims between the parties. Therefore, the appellate court affirmed the trial court's order in its entirety.

In The Estate of Preston, 346 S.W.3d 137 (Tex. App. – Fort Worth 2011), Doris, Scherry, Michael and Gwendolyn were siblings. Gwendolyn was born with an intellectual disability and was the mother of a son, Deartis, who also suffered from an intellectual disability and a daughter, Eva, who evidently did not suffer from mental retardation. At some point in time, Doris adopted Deartis, making Deartis the sole heir of Doris's estate. Doris, her sister Gwendolyn, and her children Deartis and Eva all lived together in Denton County until Doris died in August, 2005.

Scherry applied in December 2005 to be appointed as dependent administrator of Doris's estate, stating that Doris owned a house in Bay City, TX; a 2004 vehicle; bank accounts of $20,000, and a teacher retirement account. The court appointed Gretchen Benolken as attorney ad litem and guardian ad litem for Deartis. At the hearing, Scherry also testified that Doris owned two CD accounts of $79,000 and $49,000 which Doris had entrusted to siblings Scherry and Michael to take care of Deartis but the accounts were in the name of Scherry and Michael. Scherry explained that her family had decided to relocate Deartis and Eva, along with Gwendolyn, to Bay City where Scherry lived and Eva would act as primary caregiver for Deartis. Funds from these two accounts would be used for Deartis' benefit. The Denton County probate judge expressed questions about these two accounts, but appointed Scherry as dependent administrator with $100,000 bond.

The administrator filed a motion to reduce the bond, and the court and guardian ad litem asked further questions about the two accounts, which Scherry said they had not touched. The court refused to lower the bond and the bond was eventually filed. A year later, Scherry filed an inventory listing $67,242 of property but not listing the two accounts mentioned above. At a later hearing, Scherry disclosed that she had procured a power of attorney from Deartis with the help of an attorney in Bay City so that she could receive Doris's teacher retirement account.

In November, 2006, the attorney ad litem filed a complaint requesting the filing of an additional inventory and imposition of constructive trust due to Scherry's omission of the two bank accounts from the Inventory. This began three and a half years of what the trial court described as "extensive, miserable, and tortured litigation." Scherry was eventually removed sua sponte by the court as administrator and replaced by attorney Stephen Dubner as successor administrator. Mr. Dubner brought several actions against Scherry, Michael and the bonding company.

The court criticized the administrator's decision to have a local attorney draft a power of attorney for Deartis, who everyone knew was incapacitated, and cited Scherry for failure to account for funds; commingling of funds, and the use of funds for the multiple benefit of other parties as well as the failure to account for oil and gas income and failure to produce or place funds in the registry of the court, all of which warranted immediate removal of Scherry as administrator. The trial court ultimately entered death penalty sanctions against both Scherry and Michael and awarded Deartis free and clear title to a house purchased by the administrator without court permission, actual damages in the amount of $127,000, and exemplary damages in the amount of $414,000, and assessed some $165,000 in attorneys' fees and costs against Scherry and Michael.

Scherry and Michael appealed but the appellate court affirmed the death penalty sanctions against their pleadings. The Court of Appeals modified the default judgment to delete the some of the actual damages, the exemplary damages, and the requirement that Scherry continue making payments on Deartis' house.

An adjunct of fiduciary liability occurs when a person has a legal or statutory duty to act on behalf of another, or when the person has assumed care, custody, and control of a disabled individual. The Amarillo Court of Appeals considered such a case in Will v State, 2011 Tex. App. LEXIS 9246 (Tex. App.—Amarillo 2011, *pet. disc. rev. ref'd* In re: Will, 2011 Tex. Crim. App. LEXIS 300 (Tex. Crim. Appp. Feb. 8, 2012) (mem. op.).

In Will, the mother of nineteen-year-old, who allegedly sought guardianship over her son, was convicted of the offense of injury to a disabled individual by omission.

At trial by jury, evidence showed that the son of Elizabeth Will, Terry, collapsed on the floor of their

apartment. Terry, who weighed between four and five hundred pounds, had been on the floor for thirty days, according to his mother when she called 911. Terry was found in layers of feces and was in poor condition. In an interview with police, Elizabeth stated that she was responsible for Terry's care since she was his mother and was in the process of becoming his guardian to handle his Social Security benefits. She stated that Terry was not capable of caring for himself and had not been able to do so for the last six months. Terry was hospitalized, and a guardian (not his mother) was appointed for him after his release from the hospital.

The jury found Elizabeth guilty of the charge of recklessly causing serious bodily injury to her son by omission. She appealed. Appellant, Elizabeth, argued that the evidence was insufficient to establish beyond a reasonable doubt that she had assumed care, custody, or control of Terry and that the evidence was insufficient to show that Terry was a disabled person. She also argued that she should not be responsible for Terry's injuries as she had never actually become his guardian.

Section 22.04(d) of the Texas Penal Code states that a person assumes care, custody or control of another when by acts, words, or course of conduct, the person acts so as to cause a reasonable person to conclude that she has accepted responsibility for protection, food, shelter, and medical care for the other person. Section 22.04(c)(3) states that a "disabled individual" is one who is older than 14 years of age who by reason of age or physical or mental disease, defect or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.

The jury heard evidence that Terry suffered from a mental defect and was mentally retarded with the IQ of 57. A guardian had been appointed for Terry after he was released from the hospital, further showing his inability to care for himself. Even appellant's own statements support the jury's finding: she told police that she was responsible for Terry, he had not been able to care for himself in the previous six months, and that she had cared for him for his entire life. When the paramedics arrived at the apartment, Terry was unable to provide his social security number or his phone number, or say when he last saw a doctor, or if he remembered going to school.

Appellant argued that Terry refused medical care and claimed that his enthusiasm for video games and his reading of video game magazines demonstrate his capacity for rational decision-making.

The court of appeals held that the evidence was both legally and factually sufficient to support the jury's finding that Terry was disabled under the statutory definition.

On the issue of appellant's assumption of Terry's care, the evidence demonstrated that Terry lived with appellant after he became an adult, that she told officers she was Terry's guardian, that she was responsible for him and had been taking care of Terry his entire life. At trial, appellant testified that she medicated Terry, brought him food and drink, and his medications while he lay on the floor. Based on the above, the court of appeals likewise determined that there was sufficient evidence to uphold the jury's decision.

Finally, at oral argument, appellant asserted that the evidence was insufficient that she caused Terry serious bodily injury by omission. Using the "but for" causal connection standard in the Texas Penal Code, the court of appeals held that the evidence supported the conclusion that Terry sustained a protracted impairment of the function of his skin that led to cellulitis and sepsis, and that but for appellant's failure to obtain or provide reasonable medical assistance, he would not have suffered these ailments. The court of appeals affirmed.

In 2012 the Fort Worth Court of Appeals considered an appeal of one of Judge Steve King's rulings related to a breach of fiduciary duty in a guardianship proceeding. In The Matter of the Guardianship of Covington, 2012 Tex. App. LEXIS 3562 (Tex. App. – Fort Worth 2012), the Second Court of Appeals issued an *en banc* memorandum opinion on rehearing from a decision it rendered three months before in the same proceeding, 2012 Tex. App. LEXIS 1091. In the Covington matter, Cecilia Covington's parents had been appointed as her co-guardians until they were removed by Judge King due to concerns raised by Cecilia's care provider.

Cecilia was a 40 year old woman with a diagnosis of Down Syndrome who lived in a group home for disabled adults. As Cecilia's behavior and condition deteriorated, the group home requested that the co-guardians have their daughter evaluated by a psychiatrist. Cecilia was hiding screwdrivers in her room and laid marbles at the bottom of the door to her room. She hit another resident, spoke with imaginary friends, and would often stay awake screaming. The co-guardians would not consent to a psychiatric evaluation of their daughter.

Judge King appointed a guardian ad litem for Cecilia without notice to the co-guardians, and the guardian ad litem sought removal of Cecilia's parents as co-

guardians. The guardian ad litem raised a number of concerns about the actions of the co-guardians, and cited Texas Probate Code § 761 (now Estates Code 1203) in alleging that the co-guardians had cruelly treated their daughter and had neglected to maintain her as liberally as her means permitted.

Judge King removed the co-guardians at a hearing at which they were not provided notice, and entered the findings requested by the guardian ad litem as well as finding that the co-guardians "have both been proven to be guilty of gross misconduct and gross mismanagement in the performance of their duties as Guardian." The co-guardians sought reinstatement as guardians and, after hearing, Judge King denied their request. Mr. and Mrs. Covington appealed.

On appeal, the Covingtons argued there was no evidence to support a number of Judge King's findings, and that their motion for reinstatement should be granted. The court of appeals framed the question before it to be "whether the trial court abused its discretion in finding that the Covingtons did not prove by a preponderance of the evidence that they did not engage in the conduct that directly led to their removal…." After a lengthy review of the evidence heard by Judge King, the court of appeals finds that the Covingtons did not prove by a preponderance of the evidence that they did not engage in the conduct that directly led to their removal, and affirms the judgment of the probate court.

Whenever an opinion starts out,"[i]n 2006, Appellant began dating Jack Brittain, a man much older than she," you know something bad must have happened to Jack. In McGaha v. State, 2013 Tex. App. LEXIS 15377 (Tex. App. - Tyler 2013) (Mem. Op.), the Tyler Court of Appeals considered whether the evidence was legally sufficient to support the conviction of Joyce McGaha for misapplication of fiduciary property from Jack Brittain, and elderly man. Joyce McGaha and Mr. Brittain began living together in Jack's house. Jack's children all lived out of state, and so, when Jack's health began to decline, Joyce became his *de facto* caregiver. In January of 2007, Jack signed a power of attorney appointing Joyce as his attorney-in-fact in the event that he became incapacitated. In March of 2007, Dr. James M. Cochran wrote a letter in which he certified that Jack was incapacitated due to moderate dementia.

Joyce took this opportunity to engage in various acts that benefitted her to Jack's detriment. She added her name to the title of Jack's vehicle, she withdrew money from Jack's accounts, and she deposited checks payable to Jack into her own account. She completed these transactions by signing her name followed by "POA." On of Jack's daughters, Kathleen Luther, instituted a guardianship proceeding protect her father from Joyce, and some of Jack's other children began providing home health care for Jack. Jack died before a guardian was appointed.

After Jack's death, the children discovered the extent of Joyce's actions, and a criminal investigation ensued resulting in Joyce being indicted for misapplication of fiduciary property from the elderly between $20,000 and $100,000. After a jury trial, the jury found Joyce guilty of the lesser included offense of misapplication of fiduciary property from the elderly between $1,500 to $20,000 and assessed Joyce with a sentence of ten years imprisonment and a fine of $10,000. Joyce appealed, claiming that Dr. Cochran's letter was insufficient to effectuate the power of attorney because Cochran could have determined that Jack was incapacitated but not necessarily unable to manage his financial affairs.

The appellate court affirmed the conviction and sentence. The court explained that, in order to prove that Joyce misapplied the fiduciary property of the elderly, the State had to prove that Joyce "intentionally, knowingly, or recklessly misapplied property that she held as a fiduciary in a manner that involved substantial risk of loss to the owner of the property or to a person for who's benefit the property is held." The court continues, "[o]ne acts in a fiduciary capacity with regard to another's property when the property she handles 'is not [hers] or for [her] own benefit, but for the benefit of another person as to whom [she] stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part."

The court rejected Joyce's argument that Jack's power of attorney that named her as agent was a "springing" power of attorney, and that Jack had never been declared "mentally incapable" of managing his financial affiars.

Joyce acted as a fiduciary under the power of attorney, and under the appointment, "she assumed the fiduciary and other legal responsibilities of an agent." Before Jack died, Joyce told his daughter that he had granted a power of attorney to Joyce. Numerous witnesses testified that Joyce signed her name as "power of attorney" for Jack. Dr. Cochran wrote his letter just several weeks after Jack executed the power of attorney, and found Jack to be mentally incapacitated. Regardless of whether the power of attorney was properly effectuated, Joyce met the definition of a fiduciary under Tex. Pen. Code §32.45(a)(1)(B). Her conviction was "in all things affirmed."

The Fort Worth Court of Appeals again addressed one of Judge Ferchill's breach of fiduciary duty cases when it considered In the Guardianship of Herron, 2014 Tex. App. LEXIS 10203 (Tex. App. – Fort Worth 2014) (Mem. Op. Upon Rehearing from In the Guardianship of Herron, 2014 Tex. App. LEXIS 6986 (Tex. App. – Fort Worth 2014).

Jeffrey Herron was incapacitated by a brain injury from a recreational vehicle accident, and his wife, Amy Herron, was appointed as guardian of his person and estate on November 4, 2010, by the Parker County Court. Ms. Herron posted a $50,000 surety bond. In June of 2012, the Parker County Court issued a show cause order regarding Amy's failure to demonstrate the capability of properly performing her duties as guardian. However, Mr. Herron was receiving treatment in Arlington, Texas, while living there, and Mrs. Herron moved to transfer the guardianship to Tarrant County before the Parker County Court conducted its show cause hearing. The guardianship was transferred to Tarrant County Probate Court Two on July 16, 2012.

The Tarrant County court appointed Tom Henry as guardian ad litem to investigate the status of the guardianship and to report to the court as to the best interests of Jeffrey. Mr. Henry's guardian ad litem report stated that Mrs. Herron never filed an Oath, didn't file an inventory timely, filed a deficient inventory and accounting, did not file an investment plan, did not file an application for a monthly allowance, did not file an application to pay expenses listed in the annual account or to pay her attorney's fees, did not file a notice to creditors, and had not handled any creditor claims of the guardianship.

At a conference in August of 2012, the Court allowed Mrs. Herron to resign as guardian of the estate instead of being removed. Mrs. Herron then filed her final accounting which the court rejected due to numerous deficiencies highlighted by the court's guardianship auditor including that the opening figures didn't match the inventory, no monthly allowance was ever established, that the disbursement section listed "?" for taxes, that exhibits showed money spent on family members and not solely on Mr. Herron, that no verification of funds was provided, and that the account did not balance.

On July 9, 2013, the court held a hearing to approve the settlement agreement in the personal injury suit arising from Mr. Herron's accident. Although the record does not reflect any discussion at that hearing of Mrs. Herron's liability, the court issued an order finding that Mrs. Herron and her surety were liable for the $50,000 bond amount. In its order, the court stated that it had reviewed and taken judicial notice of the contents of its file and that it had "previously expressed on multiple occasions its concern about the total failure of documents filed by counsel of record to comply with the requirements of the Texas Probate Code (now Estates Code) and the losses and damages caused to Jeffrey and his estate by same." Accordingly, having found that Mrs. Herron had caused loss or damage to Mr. Herron and his estate of at least $50,000, and in order to prevent further damage, the probate court ordered that Mrs. Herron and her surety were liable for the full bond amount. Mrs. Herron appealed.

Mrs. Herron argued that she was denied due process when the court *sua sponte* signed the order finding her liable without providing her notice and the opportunity to attend a hearing. The appellate court considered Probate Code § 629 (now Texas Estates Code §1053), which allows the probate judge wide latitude to address all matters related to the guardianship and authority § 632(a) (now Estates Code §1051.001 provides that "a person does not need to be cited or otherwise given notice in a guardianship matter except in situations in which this chapter expressly provides for citation or the giving of notice." . Also, Probate Code § 668 (now Estates Code § 1155.152) states that when a guardian neglects to perform her required duties, the guardian and the sureties on the guardian's bond are liable for the "additional costs incurred that are not authorized expenditures" and for "reasonable attorney's fees incurred in obtaining compliance or in removing the guardian or in obtaining compliance regarding any statutory duty the guardian has neglected."

The Fort Worth Court of Appeals concluded that these sections did not require the court to give notice to the guardian before finding her liable, and that the record contained numerous examples of how Ms. Herron had neglected her duties as guardian and damaged the estate. Section 760b (now Texas Estates Code 1023.002 and §1023.102) also provides that the court can accept a resignation of a guardian but not discharge them until the final order is rendered on the final account of the guardian. Therefore, Mrs. Herron was still a party to the ongoing guardianship proceeding at the time the court entered the deficiency order. Mrs. Herron also argued that there was no evidence to support her liability for any deficiency to the estate. The appellate court rejected that argument and said that the court can take judicial notice of its file at any stage of the proceedings, and that the file here showed that Mrs. Herron commingled guardianship funds and that most of the expenditures from the guardianship estate were not made for Mr. Herron's benefit. Therefore, the appellate court affirmed the probate court's order.

The final breach of fiduciary duty case arises out of Montgomery County, and was decided by the Houston Court of Appeals in a memorandum opinion in Guardianship of Hollis, 2014 WL 5685570 (Tex. App. – Houston [14th District] 2014 (Mem. Op.). In Hollis, Compass Bank as management trustee of a trust created for the benefit of Brandy Hollis was questioned by the probate judge regarding the expenditure of $67,000.00 of trust funds to finance the construction of a pool at Ms. Hollis' parents' home. Ms. Hollis had been in an automobile accident, and her mother was guardian of her person and estate. The guardian requested the creation of the management trust, which upon funding contained assets of approximately $2,000,000.00.

The trial court questioned the expenditure for the pool when Compass Bank filed its Third Annual accounting, and set a show cause hearing on the court's own motion. Compass Bank attempted to justify the expenditure due to Ms. Hollis' physical condition. The trial court, however, did not like the idea of Ms. Hollis' funds being used to improve the value of her parents' property. In response, Compass Bank prepared a deed of trust executed by Compass Bank which required Ms. Hollis' parents to pay the funds to Ms. Hollis upon sale/refinance of their property, or upon any other property transfer without Ms. Hollis' written consent. The trial court then reluctantly approved the annual accounting.

Subsequently, upon filing of the Fourth Annual Accounting, the trial court picked up on an expenditure of approximately $23,000.00 in attorneys' fees to the guardian's counsel. The trial court again show-caused Compass Bank, and threatened removal of Compass Bank for "misapplication of trust property, failure to obey court orders, gross mismanagement or gross misconduct in the performance of the duties of trustee." The trial judge characterized the fees as "the bank's attorney fees for inappropriately spending [Brandy's] money to put a pool on someone else's property that they then turned around and charged her for their wrongful acts." The trust presented expert testimony as to the reasonableness of its actions and the attorneys' fees incurred; however, the trial court removed the trustee and found that Compass Bank had committed gross mismanagement in its performance of duties as trustee, refused to approve the Fourth Annual accounting, and appointed a substitute trustee.

Compass Bank appealed. Applying an abuse of discretion standard, the Court of Appeals reversed the trial judge and found that Compass Bank had not engaged in gross misconduct. The management trust allowed for reasonable costs and expenses incurred in connection with administration of the trust, and the fees were incurred in administering and protecting the trust. The Court of Appeals reversed the removal action by the trial court, and remanded the remainder of the case.

CONCLUSION

The authors hope that this summary and the cases contained herein prove helpful to advance guardianship and elder law practitioners. The authors are available for discussion and collaboration should the need arise.