

**CRIMINAL ASPECTS OF GUARDIANSHIP
AND MENTAL COMMITMENT**

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CRIMINAL ASPECTS OF GUARDIANSHIP AND MENTAL COMMITMENT

A. INTRODUCTION: What happens when a minor is arrested? Our penal system has safeguards in place to protect the minor from detention through trial. By definition under the Texas Estates Code, a minor is an incapacitated person. So, even if the arrested minor is in a guardianship, the guardian can be assured that certain safeguards exist, guardianship or not. Now, what happens if an adjudicated incapacitated adult gets arrested? Suffice it to say, there is not even a public data search to see if the adult displaying incapacity is under a guardianship. Even if the individual is under a guardianship, there are virtually no protections. This person falls under the same Texas Estates Code Section 1002.017 as the minor, and should be afforded the same protections.

Bottom line, the Texas Family Code and Texas Estates Code have worked to overlap in an adequate fashion in dealing with minors and incapacitated adults. In comparison, when you look to the Texas Penal Code, little has been done to acknowledge guardianships, require notice to guardian, or provide protection to the ward if the adult is under a guardianship. This article discusses the problems minors, incapacitateds, and the mentally ill face in the criminal justice system, as a victim or defendant.

1. Standards for Incapacity: One of the problems in interfacing with the criminal justice system is the need to understand guardianship orders and what powers they give to the guardian, what the guardian can and cannot do, and what rights the ward retains. Most guardianships are limited in some fashion, even if it is to allow the ward to handle twenty dollars a month. The Texas Penal Code has no provisions to decipher guardianship orders or analyze how the ability to handle twenty dollars would have any effect on a Miranda warning.

a. Powers Retained by Ward: One difficult concept in a guardianship is that every power

imaginable except those taken away and given to the guardian is retained by the ward. How does this impact the criminal justice system? As an example, assume the guardian is not given the power to decide the ward's placement. So the ward chooses to live in a place where drugs are sold. This is a choice left to the Ward. In a police investigation, the ward gets caught up in the illegal acts. Is there a capacity defense? Not sure? Guardianship orders are not crafted with future criminal intent addressed, unless criminal behavior was the catalyst for the implementation of the guardianship.

b. Powers Awarded to Guardian: Sometimes the powers given to the guardian are open to interpretation. There is confusion in the meaning of the powers given and the meaning of the physician's letter in the file. Guardianships come with laws and guidance on how to administer the guardianship, but there is no "self-help" book on how to force an incapacitated person to do what you ask and be where you need them to be. There is no assurance that they will not run away and stay missing until the medication wears off. As they degrade, undesirable conduct can occur to violate the law. Law enforcement officials, even if they had your guardianship order and letters in hand, would most likely have no idea how to process this information in connection with detaining the ward and placing him in detention. If he can't contract, can he waive his rights? If he can't handle finances, can he sign an agreement stating his belongings are inventoried correctly? Who knows? There is no section in a physician's letter on "understands criminal conduct". The rights given to a guardian do not make sense when trying to reconcile them with the Texas Penal Code.

2. Standards of Criminal Capacity: Most guardians believe if their ward is arrested, they will

not be left in custody, arraigned, or tried because they have been adjudicated incapacitated. However, the standard for criminal capacity has little, if anything, to do with civil incapacity. As you know, under Texas Estates Code Section 1002.017, the definition of incapacity is as follows:

"Incapacitated person" means:

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is substantially unable to:
 - (A) provide food, clothing, or shelter for himself or herself;
 - (B) care for the person's own physical health; or
 - (C) manage the person's own financial affairs; or
- (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

TEX. ESTATES CODE §1002.017. Added by Acts 2011, 82nd Leg., R.S., Ch. 823, Sec. 1.02, eff. January 1, 2014.

Nothing in this definition addresses the ability, or lack thereof to commit a crime. Also keep in mind that some crimes do not require the element of intent. Finally, at the time the ward is arrested, arraigned, inventoried, examined, booked and housed, it is doubtful the word guardianship will ever be uttered. Now the ward is in jail. He or she may not even know to call anyone. A missing person report may issue because no one knows the ward is jailed.

a. Sufficient Ability to Consult with Counsel: There are two scenarios under Tex. Code Crim. Proc. Ann. Art. 46B wherein an otherwise incapacitated person can be found competent to stand trial. Keep in mind that the burden is the same as for a guardianship in that the accused is presumed competent to stand trial whether he has been adjudicated and has a guardian or whether he just appears incapacitated. Believe it or not, being

adjudicated has little effect on a jury since the Texas Estates Code standard has no bearing. The finding of competence can be as simple as "this is my lawyer" and "he is helping me".

b. A Rational Factual Understanding of the Proceeding Against The Person: It is important to note that the ability to assist counsel and an understanding of the proceeding against you is an "or" standard, not an "and" standard. This makes a finding of incompetence even harder in that you can assist your counsel and not have any understanding of the proceeding, *i.e.* possessing stolen goods and what could happen to you in the outcome of your case. To meet the second prong, it can sometimes be enough to know that having "stolen stuff" is not right. Again, the criteria is extremely low. This will be discussed later on in this article as well as the protection for an incapacitated person if they are found competent to stand trial or if they are found incompetent to stand trial.

B. IDENTIFYING PROBLEMS WHICH MAY GIVE RISE TO CRIMINAL ISSUES: If all persons in guardianships or at least a majority, committed criminal offenses, this article and remedial legislation would be a given. The grandmother with dementia may run away, but she is unlikely to commit a crime. She is just confused, lost and many times, combative. There are incapacities where the guardian has extreme difficulty controlling the behavior of the ward and/or appropriate conduct in public becomes a daily battle. Those wards prove a challenge for law enforcement, courts and jailers. It is often hard to keep a guardian from resigning, especially after an encounter with law enforcement and the criminal justice system. Below is a discussion of particularly difficult incapacity issues.

1. Head Injury: Head injury is a unique and unpredictable species of incapacity. The behavior of a head injured person may be sexually inappropriate to a criminal degree, yet the person believes he or she is expressing love. They may believe they can safely

drive, license or not, and steal cars and keys with no concept of the illegality of the act. A head injured person may stay on task or program for the rehabilitation in which he or she is enrolled. Without warning, the person may snap, becoming a dangerous and unpredictable person. If the head injury is not apparent, many times drugs are assumed by law enforcement.

2. Undiagnosed Dementia Type Symptoms:

Many diseases have short term memory aspects, aggression, outbursts, and hallucinations. Otherwise normal appearing persons can turn on others in seconds over imagined scenarios or slights. These persons do not always appear incapacitated. For example, a person with certain memory impairment may become convinced that a neighbor has stolen from him or her. He or she may stalk, harass and even attack the neighbor. In the incapacitated mind, the behavior is justified and the theft is real. If a weapon is added to the delusion, the incapacity becomes deadly. Below are some of the diseases that can cause such an altered mental state:

a. Dementia (sometimes early onset): The disorders in the “Dementia” definition are characterized by the development of multiple cognitive deficits (including memory impairment) that are due to the direct physiological effects of a general medical condition, to the persisting effects of a substance, or to multiple etiologies (e.g., the combined effects of cerebrovascular disease and Alzheimer’s disease). The disorders share a common symptom presentation but are differentiated based on etiology. The types of dementia include: Dementia of the Alzheimer’s Type, Vascular Dementia, Dementia Due to HIV Disease, Dementia Due to Head Trauma, Dementia Due to Parkinson’s Disease, Dementia Due to Huntington’s Disease, Dementia Due to

Pick’s Disease, Dementia Due to Creutzfeldt-Jakob Disease, Dementia Due to Other General Medical Conditions, Substance-Induced Persisting Dementia, and Dementia Due to Multiple Etiologies. DSM V (2013).

b. Lewy Body Disease:

Lewy bodies are abnormal microscopic protein deposits in the brain that disrupt the brain's normal functioning causing it to slowly deteriorate. The effects include a degradation of cognitive functioning, similar to Alzheimer's disease, or a degradation of motor control, similar to Parkinson's disease. Lewy bodies are named after Frederick Lewy who first observed their effects. Lewy Body Dementia can start differently in people. Sometimes those with LBD initially have a movement disorder that looks like Parkinson's but later they also develop dementia symptoms. DSM V (2013).

c. Organic Brain Syndrome:

Organic brain syndrome (OBS) is a general term used to describe decreased mental function due to a medical disease, other than a psychiatric illness. It is often used synonymously (but incorrectly) with dementia. DSM V (2013).

d. Pick’s Disease:

According to Arnold Pick, who first described the disease in 1892, Pick's disease causes an irreversible decline in a person's functioning over a period of years. Although it is commonly confused with the much more prevalent Alzheimer's disease, Pick's disease is a rare disorder that causes the frontal and temporal lobes of the brain, which

control speech and personality, to slowly atrophy. It is therefore classified as a frontotemporal dementia, or FTD. DSM V (2013).

These and other diseases may cause behavior which could involve the criminal justice system. The behavior is erratic and unpredictable.

3. Obsessive/Compulsive Disorders: Most Obsessive/Compulsive Disorders only hurt the suffering person. Some disorders, however, create a public nuisance and can become a violation of certain laws. Most persons with these disorders live alone as their disorder is distasteful or repugnant to their relatives. The law enforcement officers will warn the incapacitated, write citations and fines, but the person with the disorder is incapable of complying with the law. Thus, the bizarre behavior causes involvement with the criminal justice system.

a. General Hoarding: There are times we go into a home and immediately realize that this person is not messy. There will be papers from decades, sometimes piled to the ceiling, and sometimes over a year's worth of pure garbage set in rows. The person lacks the ability to discard even a take-out container from a restaurant. At times their automobile looks exactly the same. This is what is referred to as non-specific hoarding and can become a health hazard. The criminal justice system can come into play through the Health Department and/or DADS. If the person has elderly or impaired persons living with them, there can be a removal proceeding of the person and/or criminal justice intervention to force the removal of the health hazard.

b. Specific Hoarding: A subset of non-specific hoarding is the illness of buying and hoarding new, useless items. The individual, for example, may buy a pair of jeans in all sizes. They may like a pair of shoes and buy twenty pair. They may see a microwave on sale and buy seven. The item or the reason for the purchase makes no sense, and they can place themselves in financial peril. Any attempt to

remove or sell the items is met with resistance, even violence. The person must keep these items and buy more. Recently, our firm found five riding lawnmowers, with tags on them, in a kitchen. The decedent had to climb on them to get to the sink, stove or refrigerator. All attempts by family to help had failed and they were excluded from his life if they interfered with his continued purchases.

c. Animal Hoarding: Another form of hoarding is that of hoarding animals. Wild birds will live and die in the home, with no removal. Their bodies will just decay. Twenty cats will use an unchanged litter box and then give up. A landowner will fill the property with livestock, then not care for them. Entering the house will cause a gag reflex that the occupant has ceased to notice. The mistreatment of animals is a crime, and can even escalate to a felony. Texas Penal Code Section 42.09 states as follows:

§ 42.09. CRUELTY TO ANIMALS.

(a) A person commits an offense if the person intentionally or knowingly:

- (1) tortures an animal;
- (2) fails unreasonably to provide necessary food, care, or shelter for an animal in the person's custody;
- (3) abandons unreasonably an animal in the person's custody;
- (4) transports or confines an animal in a cruel manner;
- (5) kills, seriously injures, or administers poison to an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;
- (6) causes one animal to fight with another;
- (7) uses a live animal as a lure in dog race training or in dog coursing on a racetrack;
- (8) trips a horse;

(9) injures an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent; or

(10) seriously overworks an animal.

(b) It is a defense to prosecution under this section that the actor was engaged in bona fide experimentation for scientific research.

(c) For purposes of this section:

(1) "Abandon" includes abandoning an animal in the person's custody without making reasonable arrangements for assumption of custody by another person.

(2) "Animal" means a domesticated living creature and wild living creature previously captured. "Animal" does not include an uncaptured wild creature or a wild creature whose capture was accomplished by conduct at issue under this section.

(3) "Cruel manner" includes a manner that causes or permits unjustified or unwarranted pain or suffering.

(4) "Custody" includes responsibility for the health, safety, and welfare of an animal subject to the person's care and control, regardless of ownership of the animal.

(5) "Necessary food, care, or shelter" includes food, care, or shelter provided to the extent required to maintain the animal in a state of good health.

(6) "Trip" means to use an object to cause a horse to fall or lose its balance.

(d) An offense under Subsection (a)(2), (3), (4), (9), or (10) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section.

(e) It is a defense to prosecution under Subsection (a)(5) that the animal was discovered on the person's property in the act of or immediately after injuring or killing the person's goats, sheep, cattle, horses, swine, or poultry and that the person killed or injured the animal at the time of this discovery.

(f) It is a defense to prosecution under Subsection (a)(8) that the actor tripped the horse for the purpose of identifying the ownership of the horse or giving veterinary care to the horse.

(g) It is a defense to prosecution for an offense under this section that the person had a reasonable fear of bodily injury to the person or to another by a dangerous wild animal as defined by Section 822.101, Health and Safety Code.

(h) It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful:

(1) use of an animal if that use occurs solely for the purpose of:

(A) fishing, hunting, or trapping; or

(B) wildlife control as regulated by state and federal law; or

(2) animal husbandry or farming practice involving livestock.

(i) An offense under Subsection (a)(1), (5), (6), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section.

TEX. PENAL CODE §42.09

Also, Texas Penal Code Section 42.092 addresses non-livestock animals and their treatment. It states as follows:

- (a) In this section:
- (1) "Abandon" includes abandoning an animal in the person's custody without making reasonable arrangements for assumption of custody by another person.
 - (2) "Animal" means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.
 - (3) "Cruel manner" includes a manner that causes or permits unjustified or unwarranted pain or suffering.
 - (4) "Custody" includes responsibility for the health, safety, and welfare of an animal subject to the person's care and control, regardless of ownership of the animal.
 - (5) "Depredation" has the meaning assigned by Section 71.001, Parks and Wildlife Code.
 - (6) "Livestock animal" has the meaning assigned by Section 42.09.
 - (7) "Necessary food, water, care, or shelter" includes food, water, care, or shelter provided to the

extent required to maintain the animal in a state of good health.(8) "Torture" includes any act that causes unjustifiable pain or suffering.

(b) A person commits an offense if the person intentionally, knowingly, or recklessly:

- (1) tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal;
- (2) without the owner's effective consent, kills, administers poison to, or causes serious bodily injury to an animal;
- (3) fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody;
- (4) abandons unreasonably an animal in the person's custody;
- (5) transports or confines an animal in a cruel manner;
- (6) without the owner's effective consent, causes bodily injury to an animal;
- (7) causes one animal to fight with another animal, if either animal is not a dog;
- (8) uses a live animal as a lure in dog race training or in dog coursing on a racetrack; or
- (9) seriously overworks an animal.

(c) An offense under Subsection (b)(3), (4), (5), (6), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09. An offense under Subsection (b)(1), (2), (7), or (8) is a

state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09.

TEX. PENAL CODE § 42.092

The hoarder honestly believes they are a loving and caring pet owner. Many times as a part of their criminal punishment, they are forbidden to own pets. Without treatment, the person cycles back into the hoarding and animal abuse.

4. Schizophrenia and Bipolar Disorders:

Persons with schizophrenia and bipolar disorders are difficult to help. Schizophrenia is described as:

Schizophrenia is not a behavioral issue. It is the subject of scholarly debate whether this is a single disease entity or whether it refers to an inhomogeneous group of disorders with different causes.

Positive symptoms are those symptoms that make the patient feel or hear things that are beyond normal. Schizophrenia that is triggered by positive symptoms begins all of a sudden and there are no superficial characters.

Negative symptoms are often existent for huge amounts of time before the dangerous symptoms show up finally. About two-thirds of patients with Schizophrenia survive the negative symptoms and positive symptoms after an acute episode. DSM V (2013).

They may or may not be incapacitated depending on the medications. The trick is the correct medications and complete and total compliance in taking them as

directed. Most persons with schizophrenia do not take their medications. The side effects are difficult to cope with and persons describe themselves as “slow” or “flat”. Unmedicated, these persons pose a true threat to law enforcement and the public as it is impossible to comprehend their “reality”. They can see and hear things that do not exist. Everyday things become a threat or conspiracy. The unpredictable highs and lows of bipolar disorder are equally unpredictable. Bipolar Disorder is described as:

A mood disorder sometimes called manic-depressive illness or manic-depression that characteristically involves cycles of depression and elation or mania. Sometimes the mood switches from high to low and back again are dramatic and rapid, but more often they are gradual and slow, and intervals of normal mood may occur between the high (manic) and low (depressive) phases of the condition. The symptoms of both the depressive and manic cycles may be severe and often lead to impaired functioning.

Both phases of the disease are deleterious. Mania affects thinking, judgment, and social behavior in ways that may cause serious problems and embarrassment. For example, unwise business or financial decisions may be made when an individual is in a manic phase. Depression can also affect thinking, judgment, and social behavior in ways that may cause grave problems. For example, it elevates the risk of suicide. About 5.7 million American adults, or about 2.6 percent of the population aged 18 and older, have bipolar disorder. DSM V (2013)

The person may hibernate from life to the point of suicidal thoughts, and then reach an unbelievable high

where they don't sleep for days and days. Both ends of the spectrum can be dangerous.

C. CRIMINAL LIABILITY OF ADULT WARD AND THE TEXAS PENAL CODE: There are many statutes which protect a minor before, during and after arrest. However, although both a minor and an adult have definitions of incapacity in the Texas Estates Code, our laws are lacking in the Texas Penal Code to require safe housing, involvement by the guardian, and safeguards to make sure the incapacitated can understand a Miranda warning. It has not seemed to phase the process that a person incapacitated to contract may sign ten or so pieces of paper in the booking and arraignment process alone. Safeguards and protections do not exist.

1. Miscellaneous Crimes that Can Involve Wards: There are numerous Texas Penal Code sections that could affect an adjudicated ward, but contain no provisions to deal with incapacity at the time of commission of the crime.

- a. §22.011, Sexual Assault
- b. §15.03, Criminal Solicitation
- c. §49.08, Intoxication Manslaughter
- d. §22.01, Assault
- e. §22.02 Aggravated Assault
- f. §49.04, Driving Under the Influence
- g. §49.02, Public Intoxication

Incapacitation coupled with bizarre behavior, is often viewed with fear. The erratic behavior can be mistaken for drugs and alcohol, when in reality; there is a need for medication and special handling. Even though there is protection through health screening in the booking process of a jail, the ward may not understand the significance of stating he or she has a guardian and when he should inform someone that he or she has one. Also, wards typically do not carry "proof" of their adjudication, rarely talk about it, and would probably not say they were incompetent to sign a document. They will sign either no documents, or all of them, both with repercussions that may not be reversible.

2. Guardian Notification: The Texas Code of Criminal Procedure is where we look for procedures and notification to the guardian of the arrest, detention and arraignment of an incapacitated person. Sadly, you can look, but there is nothing there. This could be why wards remain in jail and no one knows where they are. They can sit in jail while their Texas Department of Public Safety ID is entered as a missing person by their guardian. They don't have the ID, so the number does not cross in NCIC or TCIC. By the time the ward is located, they have probably served their time for minor offenses, even if they have not been tried. After conviction, guardian is mentioned only two times in the Texas Penal Code, which will be discussed supra. This is a sad statement on our criminal justice system in the exclusion of adjudicated individuals in those that are protected.

D: LAWS EXISTING FOR PROTECTION OF MINORS IN CRIMINAL PROCEEDINGS:

1. Enactment of the Texas Juvenile Act: It is imperative in developing further legislation to safeguard accused adult disabled individuals/disabled persons to evaluate protections afforded other similarly situated individuals. The first area of comparison is the body of law set forth in Title Three of the Texas Family Code (Chapters 51 through 61) enacted to be applicable to juveniles. This law is relevant, because the idea that in a court of law a ten year old child is given greater legal protections than an adult diagnosed and under a judicially created guardianship. If the adult has the mental capacity of a ten year old child, the lack of protection emphasizes the disparity in the courts. It is helpful to understand the historical change that took place that produced the system we have today. Prior to 1907, it was the case that juvenile offenders were handled in the regular criminal justice system, similar to how adult disabled persons/individuals are today. This ceased in 1907 when the Texas Legislature enacted the Texas Juvenile Act, § 2338-1, Vernon's Ann.Civ.St., which evolved in the 1970's to become Title Three of the Texas Family Code. Associate Justice Jack Pope of the Texas Supreme Court opined regarding the

reasons for creation of the Texas Juvenile Act stating, "The Title of Article 2338-1 says that the purpose of the Act is "to change the method for handling delinquent children from the present criminal procedure to guardianship****." Section 1 of the Act makes children in such proceedings wards of the state." *Brenan v. Court of Civil Appeals*, Fourteenth District, 444 S.W.2d 290, 296 (Tex.Sup. 1968). Ironically the act indicated the necessity for deviation from criminal procedures with regard to children was because the act makes the children "wards of the state" and therefore procedures for their cases should be handled in a manner appropriate for guardianships. This begs the question why other wards of the state, ergo those established in probate guardianships, have been left subject to criminal procedures instead of those procedures more appropriate for guardianships. The following analysis from *In re V.R.S.*, 512 S.W.2d 350, 354-355 (Tex. Civ. App. Amarillo 1974) gives full clarification to the intent of the legislature when it enacted the Texas Juvenile Act and subsequently Title Three of the Texas Family Code:

Yet, from the time Texas determined that juveniles should no longer be treated the same as adult offenders and enacted the Texas Juvenile Act, Vernon's Ann.Civ.St. § 2338-1, to provide for a separate beneficial treatment of children, it was the view expressed in § 13(3) of that Act, which was held to be constitutional in *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944), and it continuously has been the prevailing view from that time that the child should not be charged, convicted nor classed as a criminal, and that he should not suffer, as a result of any adjudication, any disabilities ordinarily imposed by a conviction. *Dendy v. Wilson*, supra; *State v. Santana*, supra. As long as the child's constitutional rights were protected, the procedures employed were not those used in adversary criminal prosecutions,

but they were those used in civil cases. *Dendy v. Wilson*, supra; *State v. Thomasson*, 154 Tex. 151, 275 S.W.2d 463 (1955); *State v. Santana*, supra; *Carrillo v. State*, 480 S.W.2d 612 (Tex.1972); *In re Cockrell*, 493 S.W.2d 620 (Tex.Civ.App.—Amarillo 1973, writ ref'd n. r. e.).

Title 3 of the current Family Code retains and emphasizes this view. One of the stated purposes of the statute, pronounced in § 51.01(3), is "to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior." The adjudication finding is only "whether or not the child has engaged in delinquent conduct or conduct indicating a need for supervision", § 54.03(f), and "(a)n order of adjudication or disposition . . . is not a conviction of crime, and does not impose any civil disability ordinarily resulting from a conviction." § 51.13(a). Section 51.17 specifically provides that, except for conflict with another provision, "the Texas Rules of Civil Procedure govern proceedings under this title." Additionally, the right of appeal granted is not an appeal to the Court of Criminal Appeals which is vested with the jurisdiction over criminal appeals, but it is an appeal to the court of civil appeals with the proviso that the case may be carried to the Supreme Court by writ of error or upon certificate as in, and under requirements governing appeals of, civil cases generally. § 56.01(a) and (b). Furthermore, a child under the jurisdiction of the juvenile court may not be committed or transferred to a place used primarily for the execution of sentences of persons convicted of crime. § 51.13(c).

In brief, these writings manifest that the statutory scheme is the noncriminal treatment of the child subjected to the jurisdiction of the juvenile court, and not the fixing of criminal responsibility and punishment. The juvenile court is charged with the responsibility of determining the rehabilitative needs of the child rather than serving as a forum for the prosecution of criminal conduct; and, if the child is to be removed from his family environment, the court

serves not to punish, but to secure for the child custodial care and discipline as nearly as possible equivalent to that which his parents should have provided.

Accordingly, we hold that proceedings authorized by Title 3 of the Family Code are civil adjudications and not criminal prosecutions. This determination remains constant even though the delinquent conduct alleged may be the violation of a penal law of the grade of felony, and notwithstanding that the disposition made may result in the curtailment of the child's liberty for a limited time. It follows that the proceedings shall be governed, as long as the child's constitutional rights are protected, by the procedures used in civil cases.

2. Texas Family Code

a. Definitions: With a better understanding of how and why the current laws related to criminal proceedings involving minors were established, a further review of Title Three of the Texas Family Code ("TFC") sheds light on those benefits available to children that are unavailable to mentally identical adult wards. Tex. Fam. Code Ann. § 51.01 establishes the purpose of the code in part is to provide for the protection of the public and public safety; and consistent with the protection of the public and public safety to promote the concept of punishment for criminal acts. Tex. Fam. Code Ann. § 51.02 then goes on to indicate to whom the TFC applies providing the definition of child as a person who is ten years of age or older and under 17 years of age or seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. This section defines custodian as "the adult with whom the child resides" and guardian as "the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court." This definition would include probate guardians. Finally the definitions section of the TFC addresses what conduct it covers by defining delinquent conduct as "conduct, other than a traffic

offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail."

b. Goals of the Juvenile Court: Chapter 55 of the TFC is meant to be procedural in nature, so it does not establish criminal offenses as does the Texas Penal Code, but instead presents an alternate framework by which to enforce the Texas Penal Code and other laws establishing criminal activity against a child defendant. As discussed in *State v. Thomasson* above a paramount goal of Title Three of the Texas Family Code is to ensure juveniles who are adjudicated guilty of delinquent behavior do not suffer the permanent consequences of having a criminal conviction on their records. In fact, Tex. Fam. Code Ann. § 51.13 provides that except for enhancement purposes in punishment proceedings for future specified crimes, an order of adjudication or disposition in a proceeding under Title 3 of the Texas Family Code is not a conviction of a crime. Also discussed in *State v. Thomasson* above is the fact that juvenile proceedings are not procedurally governed by the Texas Code of Criminal Procedure as are criminal cases for adults. TEX. FAM. CODE ANN. § 51.17 establishes the procedural rules governing juvenile proceedings by combining the Texas Rules of Evidence, Texas Rules of Civil Procedure and discovery procedures found in the Texas Code of Criminal Procedure. Title Three of the Texas Family Code even provides alternative methods of handling delinquent behavior for juveniles other than through the courts. Tex. Fam. Code Ann. § 52.03 provides for case resolution by referral of the child to an agency other than the juvenile court; a brief conference with the child and his parent, guardian, or custodian; or referral of the child and the child's parent, guardian, or custodian for services under Tex. Fam. Code Ann. § 264.302. Other provisions of Title Three of the Texas Family Code allow for referral to court, but dismissal upon completion of a specialty program like "Teen Court"¹ and "Teen Dating Violence Court."²

¹ Tex. Fam. Code Ann. § 54.032.

² Tex. Fam. Code Ann. § 54.0325.

3. Procedures in Juvenile Court:

a. Waiver of Rights: Besides its focus on the disposition of cases, the TFC provides laws that substantially protect children during prosecution. These laws include, Tex. Fam. Code Ann. § 51.09 which provides that a waiver of rights established by the Texas or United States Constitution may not be waived by the child unless "the waiver is made by the child *and the attorney for the child* [emphasis added]...the waiver is voluntary...and the waiver is made in writing or in court proceedings that are recorded." Adults in criminal cases often waive rights without an attorney, without the waiver being in writing or without the waiver being recorded. Providing an exception to Tex. Fam. Code Ann. § 51.09 is Tex. Fam. Code Ann. § 51.095 addressing the admissibility of a statement of a child (waiver of the right to remain silent) in a juvenile proceeding. The most important difference between juvenile procedure and adult criminal procedure as outlined in this statute is the admissibility of statements made during an interrogation while the child is in custody or in the possession of the Department of Family and Protective Services if he is suspected of violating the Texas Penal Code. If an adult is in custody, any statements made during an interrogation are admissible if taken after the administration of *Miranda* warnings by a police officer so long as the right to counsel has not been invoked (and even thereafter if not in response to questioning). If a child is in custody, as described above, a statement is admissible if:

1. the statement is made in writing;
2. the statement shows that the child has at some time before the making of the

statement received from a magistrate *Miranda* warnings;

3. the statement must be signed in the presence of a magistrate by the child³ with no prosecuting attorney present;
4. the magistrate must be fully convinced that the child understands the nature and contents of the statement;
5. the magistrate must be fully convinced that the child is signing the statement voluntarily;
6. the magistrate must sign a written statement verifying the foregoing requisites have been met;
7. the child must knowingly, intelligently, and voluntarily waive *Miranda* rights before and during the making of the statement; and
8. the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer⁴ or prosecuting attorney or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights.

If a child is in custody as described above, an ORAL statement is admissible if:

1. the statement is recorded by an electronic recording device;
2. before making the statement, the child is given the *Miranda* warnings by a magistrate;
3. the warning is a part of the recording;

³ With an unarmed bailiff only if necessary for safety.

⁴ Except an unarmed bailiff if necessary for safety.

4. the child knowingly, intelligently, and voluntarily waives each right stated in the warning;
5. the recording device is capable of making an accurate recording;
6. the operator of the device is competent to use the device;
7. the recording is accurate;
8. the recording has not been altered;
9. each voice on the recording is identified; and
10. not later than the 20th day before the date of the proceeding, the attorney representing the child is given a complete and accurate copy of each recording of the child.

A magistrate who provides the Miranda warnings may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses this procedure, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.⁵

⁵ Notwithstanding the forgoing, similar to an adult accused, if a child is in custody as described above, a statement is admissible if given voluntarily, but only if it has bearing on the credibility of the child as a witness; or if recorded by an electronic recording device and taken out of state pursuant to another state's laws; or if recorded by an electronic recording device and taken by a federal officer pursuant to federal laws.

b. Counsel for Child: Similar to the substantial protections afforded by the aforementioned statutes Tex. Fam. Code Ann. § 51.10 mandates that a child cannot waive his/her right to counsel during the following proceedings:

1. a hearing to consider transfer to criminal court as required by Section 54.02 of the TFC;
2. an adjudication hearing as required by Section 54.03 of the TFC;
3. a disposition hearing as required by Section 54.04 of the TFC;
4. a hearing prior to commitment to the Texas Youth Commission as a modified disposition in accordance with Section 54.05(f) of the TFC;
5. hearings required by Chapter 55 of the TFC; or
6. at the detention hearing required by Section 54.01 of the TFC.

A judge has the ability to order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if said individual can afford an attorney. Forced compliance with retention of counsel may be achieved by the court appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. If the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child the court will appoint counsel. An adult may always waive representation by counsel in the most serious of criminal prosecutions and even if the individual is wholly without the knowledge or skill to represent himself.

c. Guardian Ad Litem: Yet another substantial protection for children is established by the Tex. Fam. Code Ann. § 51.11 which provides for the appointment of a guardian ad litem (in addition to counsel) if a child appears before the juvenile court without a parent or guardian. Furthermore, if the court determines the parent or guardian is incapable or unwilling to make decisions that are in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings. In furtherance of ensuring adequate support for the child Tex. Fam. Code Ann. § 51.115 mandates that each parent of a child, each managing and possessory conservator of a child, each court-appointed custodian of a child, and a guardian of the person of the child shall attend each hearing affecting waiver of jurisdiction and discretionary transfer to criminal court, adjudication hearings, disposition hearings, hearings to modify disposition; and release or transfer hearings. In an adult criminal proceeding not only will a guardian ad litem not be appointed if the probate guardian is not there, but the probate guardian is without a voice before the court and the law is completely devoid of requirements that the probate guardian is even notified of the pending criminal prosecution.

d. Detention: Many other important protections are afforded to children in the TFC. Another interesting protection provided for children is found in Tex. Fam. Code Ann. § 54.01 which requires a detention hearing within two days of a child being taken into custody. If the child continues to be detained after the initial hearing, then future detention hearings (typically weekly) are mandated at short intervals thereafter. These detention hearings are held until the child is released or the allegations against the

child resolved. An adult would be required to petition the court for a bond reduction, and this would typically only happen once or twice during the pendency of a case. Both the detention facilities handling juveniles and courts are given special attention in the TFC. The first enumerated difference between a juvenile proceeding and criminal prosecution is found in Tex. Fam. Code Ann. § 51.04 which provides for the establishment of specific court(s) in each county to act as juvenile courts in lieu of the criminal courts used for adult defendants. Tex. Fam. Code Ann. §§ 51.12, 51.125 and 51.126 govern detention facilities for juveniles with pending cases as well as those whom have been adjudicated. Provisions giving juvenile judges, juvenile boards, the Texas Juvenile Justice Department and the Texas Juvenile Probation Commission the authority to inspect and approve detention facilities give safeguards to juveniles who are in custody. Another special provision worth mention is Tex. Fam. Code Ann. § 54.04 which limits the incarceration punishment to 40 years for first degree offender as opposed to 99 years for an adult.

e. Notice Statutes: Many statutes are focused on giving parents, custodians and guardians legal notification at various stages of juvenile proceedings. Tex. Fam. Code Ann. § 52.02 provides that "a person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to" the child's parent, guardian, or custodian; and the office or official designated by the juvenile board. Tex. Fam. Code Ann. § 52.04 provides that upon "referral of the case of a child who has not been taken into custody to the office or official designated by the juvenile board, the office or official designated by the juvenile board shall promptly give notice of the referral and a statement of the reason for the referral to the child's parent, guardian, or custodian." Tex. Fam. Code Ann. § 53.01 provides "when custody of a

child is given to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board shall promptly give notice of the whereabouts of the child and a statement of the reason the child was taken into custody to the child's parent, guardian, or custodian..." Tex. Code Crim. Proc. Ann. art. 61.04 requires notification to the guardian (or parent) by a municipality of criminal information relating to a child associated with a combination or a criminal street gang. Tex. Fam. Code Ann. § 54.03 provides that "at the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

- (1) the allegations made against the child;
- (2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;
- (3) the child's privilege against self-incrimination;
- (4) the child's right to trial and to confrontation of witnesses;
- (5) the child's right to representation by an attorney if he is not already represented; and
- (6) the child's right to trial by jury."

Tex. Code Crim. Proc. Ann. art. 45.0215 is particularly interesting as governs pleas by minor defendants. It not only allows for a guardian to appear, but requires the court to secure appearance via subpoena of the guardian (or parent or managing conservator) for the plea and all other proceedings during the case. Failure to appear after subpoenaed is a Class C misdemeanor.

f. Confidentiality of Records: Some provisions of Title Three of the Texas Family Code

are focused on confidentiality. Tex. Fam. Code Ann. § 54.08 allows the judge to close the court to the public during juvenile proceedings, for good cause shown. The statute further provides that if "a child is under the age of 14 at the time of the hearing, the court shall close the hearing to the public unless the court finds that the interests of the child or the interests of the public would be better served by opening the hearing to the public." Tex. Fam. Code Ann. §§ 58.003, 58.024, 58.307 and 58.353 provide for sealing juvenile court records; restricted access to juvenile records; and confidentiality of juvenile records. Tex. Fam. Code Ann. § 58.005 restricts access to records and files concerning a child, including personally identifiable information, and information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court. Tex. Fam. Code Ann. § 58.006 provides for destruction of certain records mandating the "court shall order the destruction of the records relating to the conduct for which a child is taken into custody, including records contained in the juvenile justice information system, if:" no probable cause exists to believe the child engaged in the conduct or a determination that no probable cause exists to believe the child engaged in the conduct is made by a prosecutor. Tex. Fam. Code Ann. § 58.007 applies only to the inspection and maintenance of a physical record or file concerning a child and the storage of information, by electronic means or otherwise, concerning the child from which a physical record or file could be generated and applies in most

circumstances to restrict the records and files of a juvenile court, a clerk of court, a juvenile probation department, or a prosecuting attorney relating to a child who is a party to a proceeding as closed inspection by the public. Tex. Fam. Code Ann. § 58.00711 provides, with one exception, all records, files and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public.

g. Laws Specific to Guardians: Chapter 57 of the Texas Family Code provides for the guardians of victims to be included in persons for whom victims' rights are enacted, and includes the guardian of a victim⁶. Just like Chapter 57 of the Texas Family Code provides language for guardians of minors to be included along with parents, other statutes make similar provisions for guardians of minors. These statutes are as follows:

- Tex. Fam. Code Ann. § 59.015 provides a waiver of sanctions to guardians on "a finding by the juvenile court or probation department that a child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or engaging in conduct indicating a need for supervision and that, despite the parents' or guardians' efforts, the child continues to engage in such conduct."
- Chapter 61 of the Texas Family Code includes guardians of minors, referring to them as "other eligible

persons" in establishing the rights and responsibilities of parents. Chapter 61 establishes parents' rights to be informed of juvenile proceedings, rights of access to the child and most importantly states that when "petition for adjudication, a motion or petition to modify disposition, or a motion or petition for discretionary transfer to criminal court is served on a parent of the child, the parent must be provided with a form prescribed by the Texas Juvenile Probation Commission on which the parent can make a written statement about the needs of the child or family or any other matter relevant to disposition of the case."

- Tex. Code Crim. Proc. Ann. art. 6.10 includes a legal guardian in the list of the persons determined to be parents for purposes of answering to the court for certain offenses committed by minors.
- Tex. Code Crim. Proc. Ann. art. 7A.01 includes a guardian in the list of persons that may apply for protective orders on behalf of individuals under 17 and 18 years of age who are victims of certain crimes. Tex. Code Crim. Proc. Ann. art. 7A.07 follows up to allow the guardian to apply to rescind the same order.
- Tex. Code Crim. Proc. Ann. art. 42.0191 includes a legal guardian along with a parent to consent to release of information for an individual under 18 years of age for trafficking victims.
- Tex. Code Crim. Proc. Ann. art. 42.15 and Tex. Code Crim. Proc. Ann. art. 45.041 allow for the discharge of a fine and costs in prescribed alternate manner if the election made in writing and signed by a guardian if the defendant is a

⁶ Defined as a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.

child as defined by Tex. Code Crim. Proc. Ann. art. 45.058(h).⁷

- Tex. Code Crim. Proc. Ann. art. 45.0217 allows a defendant's guardian access to certain confidential criminal records of the defendant.
- Tex. Code Crim. Proc. Ann. art. 57.02 allows a victim's guardian (if the victim is under 17 years of age) to access certain confidential criminal records.
- Tex. Code Crim. Proc. Ann. art. 45.052 adds guardian to the list of persons to appear for a plea in justice of the peace court for minor defendants.
- Tex. Code Crim. Proc. Ann. art. 45.056 adds guardians along with parents of a juvenile to the list of persons who may consent to a case manager.
- Tex. Code Crim. Proc. Ann. art. 45.057 allows the court to require guardians (or parent or managing conservator) of a minor to attend certain classes the child may be required to attend by the court.
- Tex. Code Crim. Proc. Ann. art. 45.061 requires guardians (or parent or managing conservator) to pay the cost of a child attending certain educational programs.
- Tex. Code Crim. Proc. Ann. art. 45.059 requires the release of a child to the guardian (or parent or custodian) after confinement for violation of a curfew ordinance.
- Tex. Code Crim. Proc. Ann. art. 57.03, 57B.03, and 57D.03 add the

victim's guardian to those allowed an affirmative defense for the disclosure of certain of the victim's information in criminal cases.

- Tex. Code Crim. Proc. Ann. art. 57B.02 adds a victim's guardian to the list of those persons who may legally release certain of the victim's information in criminal cases (if the victim is under 17 years of age).
- Tex. Code Crim. Proc. Ann. art. 57C.02 adds the victim's guardian to the list of persons who may move a court to seal a child's (under 17 years of age) medical records made part of a criminal proceeding.
- Tex. Code Crim. Proc. Ann. art. 57D.02 adds the victim's guardian to the list of persons who may view confidential information in a criminal case.
- Tex. Code Crim. Proc. Ann. art. 61.075 and Tex. Code Crim. Proc. Ann. art. 61.08 specifies a child's guardian along with a parent as those who may request a law enforcement agency to determine whether the agency has collected or is maintaining criminal information on the child and review that information.
- Tex. Pen. Code §§ 9.61 and 9.63 provide defenses when an individual using force against a ward is the ward's guardian. These statutes would be applicable in corporal punishment scenarios.
- Tex. Pen. Code § 20.01 used in kidnapping cases broadens the offense to include minors taken without the guardian's consent just as if the guardian were the parent.
- Tex. Pen. Code §25.03 broadens the interference with child custody language to include guardians of

⁷ Tex. Code Crim. Proc. Ann. art. 45.058 regarding the release of children from confinement after arrest to guardians (or parent or custodian) defines "child" as a person who is at least 10 years of age and younger than 17 years of age; and charged with or convicted of an offense that a justice or municipal court has jurisdiction of under Article 4.11 or 4.14.

minors just as if the guardian were the parent.

- Tex. Code Crim. Proc. Ann. art. 42.12 governs community supervision and includes a legal guardian along with a parent to consent to release of information for an individual under 18 years of age for victims of trafficking or of criminal activity described by 8 U.S.C. Section 1101(a)(15)(U)(iii).
- Tex. Pen. Code § 25.11 includes children under guardianships as victims if sold by their guardians (just like a parent or conservator).

E. THE MINOR DEFENDANT AND CIVIL COMMITMENT:

1. Minor with Mental Illness or Mental Retardation: Just as there are provisions in the Code of Criminal Procedure that govern adult defendants who are unable to stand trial due to incompetency there are similar provisions that govern children, found in Chapter 55 of the TFC. Tex. Fam. Code Ann. § 55.01 defines mental illness as an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: substantially impairs a person's thought, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior.⁸ The TFC gives the juvenile court jurisdiction over proceedings to order mental health or mental retardation services for a child or for commitment of a child. If a child has a case pending in juvenile court, upon motion, the court shall determine whether probable cause exists to believe the child has a mental illness.⁹ If the court determines

that probable cause exists to believe that the child has a mental illness, the court shall order the child to be examined.¹⁰ The information obtained from the examination must include an expert opinion as to whether the child has a mental illness and whether the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code.¹¹ If the juvenile court determines that evidence exists to support a finding that a child has a mental illness or that the child meets the commitment criteria under Subtitle C, Title 7, Health and Safety Code, the court shall initiate proceedings to order temporary or extended mental health services or for commitment of the child.¹² If the court does not make such a determination the juvenile proceedings continue normally. If the juvenile court initiates proceedings for temporary or extended mental health services either party may file an application for court-ordered mental health services, and the juvenile court shall conduct a hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code.¹³ If the court orders mental health services for the child, the child shall be cared for, treated, and released in conformity to Subtitle C, Title 7, Health and Safety Code; however, a court order for mental health services for a child automatically expires on the 120th day after the date the child becomes 18 years of age.¹⁴ If the child is still committed on his 18th birthday, the juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court if the child is alleged

⁸ Texas Health and Safety Code § 571.003.

⁹ Tex. Fam. Code Ann. § 55.11.

¹⁰ The examination shall comply with Tex. Fam. Code Ann. § 51.20.

¹¹ Tex. Fam. Code Ann. § 55.11.

¹² Tex. Fam. Code Ann. § 55.12. Also see Tex. Fam. Code Ann. § 55.14.

¹³ Tex. Fam. Code Ann. § 55.13.

¹⁴ Tex. Fam. Code Ann. § 55.15.

to have engaged in delinquent conduct that included a violation of a penal law listed as follows and no adjudication concerning the alleged conduct has been made:¹⁵

- a. Section 19.02, Penal Code (murder);
- b. Section 19.03, Penal Code (capital murder);
- c. Section 19.04, Penal Code (manslaughter);
- d. Section 20.04, Penal Code (aggravated kidnapping);
- e. Section 22.011, Penal Code (sexual assault) or Section 22.021, Penal Code (aggravated sexual assault);
- f. Section 22.02, Penal Code (aggravated assault);
- g. Section 29.03, Penal Code (aggravated robbery);
- h. Section 22.04, Penal Code (injury to a child, elderly individual, or disabled individual), if the offense is punishable as a felony, other than a state jail felony;
- i. Section 22.05(b), Penal Code (felony deadly conduct involving discharging a firearm);
- j. Subchapter D, Chapter 481, Health and Safety Code, if the conduct constitutes a felony of the first degree or an aggravated controlled substance felony (certain offenses involving controlled substances);
- k. Section 15.03, Penal Code (criminal solicitation);

- l. Section 21.11(a)(1), Penal Code (indecent with a child);
- m. Section 15.031, Penal Code (criminal solicitation of a minor);
- n. Section 15.01, Penal Code (criminal attempt), if the offense attempted was an offense under Section 19.02, Penal Code (murder), or Section 19.03, Penal Code (capital murder), or an offense listed by Section 3g(a)(1), Article 42.12, Code of Criminal Procedure;
- o. Section 28.02, Penal Code (arson), if bodily injury or death is suffered by any person by reason of the commission of the conduct;
- p. Section 49.08, Penal Code (intoxication manslaughter); or
- q. Section 15.02, Penal Code (criminal conspiracy), if the offense made the subject of the criminal conspiracy includes a violation of any of the provisions referenced in Subdivisions (1) through (16) or
- r. The defendant is a habitual felony offender.¹⁶

The criminal court shall, within 90 days of the transfer, institute proceedings to determine the defendant's competence to stand trial.¹⁷ If those or any subsequent proceedings result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the

¹⁵ Tex. Fam. Code Ann. § 55.19.

¹⁶ Tex. Fam. Code Ann. § Section 53.045.

¹⁷ Tex. Fam. Code Ann. § 55.19.

delinquent conduct listed above that results in confinement for a period longer than the maximum period of confinement the defendant could have received if he had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court.¹⁸ The above described procedures are available to children who are appropriate for temporary or extended mental health services or civil commitment under Subtitle C, Title 7, Health and Safety Code regardless of whether that child is competent to stand trial as discussed earlier in the paper. The Texas Family Code does go further to create provisions similar to adult provisions governing competency as discussed below.

2. Minor with Competency Issues: A child who is the subject of juvenile proceedings and who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.¹⁹ Upon motion, the juvenile court shall determine whether probable cause exists to believe that the child is unfit to proceed, and upon making such a finding shall immediately order the child to be examined by an expert.²⁰ If after examination, evidence does exist to indicate that the child is unfit to proceed, the court will conduct a hearing to determine whether the child is unfit to proceed as a result of mental illness or mental retardation.²¹ Just as with adult defendants, a trial by jury may be requested on this issue.²² Upon trial/hearing, if such a finding is made the court shall order the child placed with the Texas Department of Mental Health and Mental

Retardation for a period of not more than 90 days;²³ or order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days;²⁴ or order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days.²⁵ If after treatment the treatment provider reports the child is not fit to proceed as a result of mental illness²⁶ or mental retardation,²⁷ the court shall initiate commitment proceedings.²⁸ If after treatment the court determines the child is fit to proceed, the defense may make an objection and again request a jury trial to determine if the child is fit to proceed.²⁹ If the juvenile court does initiate commitment proceedings it may order commitment or extended treatment.³⁰ Tex. Fam. Code Ann. § 55.44 governs the transfer of cases to the criminal court and initial procedure to be followed therein upon the child's 18th birthday for children who are under civil commitment because they were found "not fit to proceed" in the same manner as described above for children under civil commitment who were not found "not fit to proceed".

3. Minor Mental Health Defense: The final portion of Texas Family Code Chapter 55, is Subchapter D governs when a child should not be held responsible for his actions, because at the time they were committed he suffered from mental illness or mental retardation so he lacked substantial capacity either to appreciate the wrongfulness of his conduct or

¹⁸ Ibid.

¹⁹ Tex. Fam. Code Ann. § 55.31(a).

²⁰ Tex. Fam. Code Ann. § 55.31(b).

²¹ Tex. Fam. Code Ann. § 55.32.

²² Tex. Fam. Code Ann. § 55.32(c).

²³ Provided that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code (Tex. Fam. Code Ann. § 55.33(a)(1)(A)).

²⁴ Tex. Fam. Code Ann. § 55.33(a)(1)(B).

²⁵ Provided the child suffers from mental illness. Tex. Fam. Code Ann. § 55.33(a)(2).

²⁶ ...and the child meets the commitment criteria for civil commitment under Subtitle C, Title 7, Health and Safety Code...

²⁷ ...and the child meets the commitment criteria for civil commitment under Subtitle D, Title 7, Health and Safety Code...

²⁸ Tex. Fam. Code Ann. §§ 55.37 & 55.40.

²⁹ Tex. Fam. Code Ann. § 55.36.

³⁰ Tex. Fam. Code Ann. §§ 55.38 & 55.41.

to conform his conduct to the requirements of law.³¹ Upon motion the court shall order an examination by an expert.³² The issue of whether the child is not responsible for the child's conduct as a result of mental illness or mental retardation shall be tried to the court or jury in the adjudication hearing.³³ If the court or jury finds that a child is not responsible for the child's conduct as a result of mental illness or mental retardation³⁴ the court shall order the child placed with the Texas Department of Mental Health and Mental Retardation for a period of not more than 90 days;³⁵ or order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days;³⁶ or order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days.³⁷ If after treatment the treatment provider reports the child has mental illness³⁸ or mental retardation,³⁹ the court shall initiate commitment proceedings.⁴⁰ If after treatment the treatment provider reports that the child does not have a mental illness or mental retardation the juvenile court shall discharge the child unless an adjudication hearing was conducted concerning conduct that included a violation of a penal law listed above, the

grand jury has accepted the case,⁴¹ and the prosecution timely objects.⁴² Upon objection the juvenile court shall hold a hearing without a jury to determine whether the child has a mental illness or mental retardation and whether the child meets the commitment criteria for civil commitment under Subtitle C or D, Title 7, Health and Safety Code.⁴³ If, after a hearing, the court finds that the child does not have a mental illness or mental retardation and that the child does not meet the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, the court shall discharge the child.⁴⁴ If, after a hearing, the court finds that the child has a mental illness or mental retardation and that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, the court shall issue an appropriate commitment order.⁴⁵

F. LAWS EXISTING FOR PROTECTION OF MENTALLY DISABLED ADULTS IN CRIMINAL PROCEEDINGS:

1. Penal Code Provisions Establishing Crimes: A review of the criminal laws mandating special treatment for adult wards involved in the criminal proceeding yields few results. Most notable are the Texas Penal Code provisions that criminalize certain behaviors victimizing the mentally disabled. Before delving into these provisions, it is important to identify the individuals to which they apply. Tex. Pen. Code § 22.04 defines “disabled individual” for use in criminal proceedings as “a person older than 14 years of age who by reason of age or physical or

³¹ Tex. Fam. Code Ann. §§ 55.51(a).

³² Tex. Fam. Code Ann. §§ 55.51(b).

³³ Tex. Fam. Code Ann. §§ 55.51(c).

³⁴ Tex. Fam. Code Ann. §§ 55.52(a)(1).

³⁵ Provided that the child meets the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code Tex. Fam. Code Ann. § 55.52(a)(1)(A).

³⁶ Tex. Fam. Code Ann. § 55.52(a)(1)(B).

³⁷ Provided the child suffers from mental illness. Tex. Fam. Code Ann. § 55.52(a)(2).

³⁸ ...and the child meets the commitment criteria for civil commitment under Subtitle C, Title 7, Health and Safety Code...

³⁹ ...and the child meets the commitment criteria for civil commitment under Subtitle D, Title 7, Health and Safety Code...

⁴⁰ Tex. Fam. Code Ann. §§ 55.56 & 55.59.

⁴¹ Tex. Fam. Code Ann. §§ 55.55(a)(1).

⁴² Tex. Fam. Code Ann. §§ 55.55(a)(2).

⁴³ Tex. Fam. Code Ann. §§ 55.55(b).

⁴⁴ Tex. Fam. Code Ann. §§ 55.55(d).

⁴⁵ Tex. Fam. Code Ann. §§ 55.55(e).

mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.” This definition would include wards subject to a probate guardianship. Later references in the Texas Penal Code to the term “disabled individual” refer back to the definition established in § 22.04. After defining the term “disabled individual”, Tex. Pen. Code § 22.04 creates an offense for causing serious bodily injury; serious mental deficiency, impairment, or injury; or bodily injury to a “disabled individual”. The next Texas Penal Code provision criminalizing activities directed towards disabled individuals is found in Tex. Pen. Code § 32.53, which creates a third degree felony offense for exploitation described as “the illegal or improper use of a child, elderly individual, or **disabled** individual or of the resources of a child, elderly individual, or **disabled** individual for monetary or personal benefit, profit, or gain.”

Lastly, but of particular interest to probate judges is Tex. Pen. Code § 25.10 which makes it a felony offense if a person takes, retains, or conceals a ward when the person knows that the person's taking, retention, or concealment interferes with a possessory right with respect to the ward. A judge considering injunctive relief for a pending guardianship wherein the non-movant resides outside Texas may be advised to enter orders of temporary guardianship pending contest in lieu of a restraining order. If a litigant removes the proposed ward from the state, jurisdictional problems will arise with enforcing the injunctive order; however, TEX. PEN. CODE § 25.10 can be used to present the situation to a grand jury for criminal prosecution. Unfortunately, law enforcement officers are sometimes unfamiliar with the provisions

of TEX. PEN. CODE § 25.10. A call from the judge or court investigator to supervising officers to explain guardianship and TEX. PEN. CODE § 25.10 will help in these situations. With very few provisions in the Texas Penal Code to protect disabled individuals it is reassuring to take a look at other types of laws that protect disabled individuals.

2. Laws Enhancing Penalties: Some code provisions, in lieu of creating a criminal offense, enhance the punishment for existing criminal acts when the victim is a disabled individual. Tex. Pen. Code § 12.47 acts in concert with Tex. Code Crim. Proc. Ann. art. 42.014, which may be better recognized as part of the *hate crimes* statutes, that provide for harsher punishment if the actor is found to have “selected the person against whom the offense was committed...because of the defendant's bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference...” Also providing for harsher punishment are the Tex. Pen. Code provisions enhancing offenses to the status of “aggravated”. Offenses classified as “aggravated” carry harsher punishment than the same offense with a classification of “aggravated”. Tex. Pen. Code § 22.021 adds “disabled individual” to the list of victims of sexual assaults to elevate the crime to the status of aggravated sexual assault. Likewise, Tex. Pen. Code § 29.03 adds “disabled person” to the list of victims of robbery to elevate the crime to the status of aggravated robbery. This statute further defines “disabled person” to mean “an individual with a mental, physical, or developmental **disability** who is substantially unable to protect himself from harm.”

This definition would include wards under a probate guardianship.

3. Other Procedural Laws: In lieu of enhancing punishment, other procedural laws are used during the pre-trial, trial or investigative phase of criminal prosecution to provide protections for a disabled person/individual who is the victim of a crime. For example, Tex. Code Crim. Proc. Ann. art. 63.001 allows law enforcement to use the information clearinghouse to help recover a victim with a mental disability. Tex. Code Crim. Proc. Ann. art. 39.025⁴⁶ applies to depositions taken in conjunction with a criminal proceeding. Unlike civil litigation, depositions are quite rare in criminal proceedings. Allowing prosecutors to preserve this testimony in advance of trial is important, as many times disabled person/individual has trouble communicating, which can be problematic if the only testimony available is during trial. In the same vein Tex. Code Crim. Proc. Ann. art. 12.01, which sets out the statute of limitations for criminal offenses, includes lengthy limitations of ten years for injury to a disabled individual⁴⁷ and for guardians caught stealing from an estate. This is helpful legislation, because a disabled person/individual who is the victim of these crimes may not recognize the act has occurred, the criminality of the act or may not be able to communicate this information to others. Expanding the limitations period is helpful as it gives more time for these crimes to come to light for prosecution.

⁴⁶ Defining disabled person as a person with a disability as defined by Section 3, Americans with Disabilities Act (42 U.S.C. 12102).

⁴⁷ Punishable as a first degree felony as well as limitations of five years for injury to a disabled individual punishable other than as a first degree felony.

Other procedural laws are created simply for notification purposes. Tex. Code Crim. Proc. Ann. art. 26.13 requires the court to inquire as to whether the state has provided the terms of certain plea offers to the guardian of the victim before it may accept a plea. Also important in the procedural protections afforded disabled persons/individuals is Tex. Code Crim. Proc. Ann. art. 42.03, because it allows the guardian⁴⁸ of a victim to make a victim impact statement to the court. This is of great importance because it gives the disabled person/individual a voice in situations where he may not be able to effectively communicate the impact of the defendant's actions on his life.

4. Laws Specific to Guardians: Of specific interest to guardians are the laws established to include guardians along with parents or custodians. The Texas Code of Criminal Procedure subject probate guardians to many laws including: (1) Tex. Code Crim. Proc. Ann. art. 56.01 which defines "**guardian of a victim**" as a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim; and (2) Tex. Code Crim. Proc. Ann. art. 39.026 which defines "caregiver" as a person, including a **guardian**, who is authorized by law, contract, or familial relationship to care for a recipient. Two laws applicable to guardians of victims are helpful during the criminal investigative process. Tex. Code Crim. Proc. Ann. art. 63.007 allows for a legal guardian to sign a HIPPA release in a missing persons case, and Tex. Code Crim. Proc.

⁴⁸ As defined by Tex. Code Crim. Proc. Ann. art. 56.01.

Ann. art. 63.011 allows for the guardian of a person *or an estate* to request law enforcement to in turn request from the missing children and missing persons information clearinghouse information concerning the missing person or child. Tex. Code Crim. Proc. Ann. art. 49.33 allows for consent by a guardian for an autopsy. Other laws established to include guardians along with parents or custodians for applicability purposes include Tex. Code Crim. Proc. Ann. art. 46C.003 which requires notification to the victim or the victim's guardian upon release of the defendant acquitted on discharge or on a regimen of outpatient care. Tex. Code Crim. Proc. Ann. art. 56.02, 56.021, 56.03, 56.04, and 56.08, 56.12, 56.13 are particularly interesting as they provide protections for a victim and/or victim's guardian via crime victim's rights legislation. In the same vein Tex. Code Crim. Proc. Ann. art. 42.22, in addressing restitution liens, include the guardian of a victim⁴⁹ in the definition of a victim. Finally, Tex. Code Crim. Proc. Ann. art. 42.19 includes guardians in the list of protected individuals for purposes of Interstate Corrections Compact law, which applies to transfer of criminal defendants between states.

5. Shortcomings in Existing Law: The legislative efforts given to the protection of disabled persons/individuals who are victims of crimes is praiseworthy, however, there is still work to be done. For example, despite some legislation addressing enhancing punishment for crimes committed against disabled persons/individuals, other crimes have been ignored. For example if an adult touches the genitals of a 10 year old child, or exposes himself to a 10 year

old child or has the 10 year old child touch his genitals the crime would trigger a felony punishment⁵⁰; however the same criminal acts directed at an adult with the mentality of a 10 year old child would only trigger misdemeanor punishment. This disparity, along with the disabled person/individual's lack of understanding of the criminality of the act and/or lack of ability to communicate makes the disabled person/individual an ideal target for predators. Furthermore, all of the aforementioned laws discussed in this section are applicable to the disabled person/individual as a victim in a criminal prosecution. There are stunningly few statutes designed to protect an adult disabled person/individual as a defendant in a criminal proceeding. The protections afforded a disabled person/individual both as a victim and as a defendant in a criminal proceeding are of paramount importance. The first law worth mention that protects a disabled person/individual during criminal proceedings is Tex. Code Crim. Proc. Ann. art. 43.10 which excludes defendants with mental disabilities from the requirement of performing manual labor at the jail. The broadest legislation that would apply to *some* disabled persons/individuals is that body of law concerned with competence to stand trial. This will be covered later in the paper. The final procedural protections for adult disabled persons/individuals are applicable after guilt has been established. Tex. Code Crim. Proc. Ann. art. 42.12 governs community supervision (probation). This statute provides as follows with regard to adult wards, guardians and the disabled.

⁴⁹ As defined by Tex. Code Crim. Proc. Ann. art. 56.01.

⁵⁰ Tex. Pen. Code § 21.11.

6. Post Correction Laws Governing Mentally Disabled: It prohibits the imposition of community supervision by a judge in an injury to a disabled individual case. A jury, however, does have this ability. If a defendant is convicted of a state jail felony and the sentence is executed, the judge sentencing the defendant may release the defendant to a medical care facility or medical treatment program if the Texas Correctional Office on Offenders with Medical or Mental Impairments identifies the defendant as being mentally ill or mentally retarded or having a condition requiring long-term care; and in cooperation with the community supervision and corrections department serving the sentencing court, prepares for the defendant a medically recommended intensive supervision plan that ensures appropriate supervision of the defendant; and requires the defendant to remain under the care of a physician at the facility or in the program. This provision only applies to criminal defendants on probation.

Finally, oddly enough, Tex. Code Crim. Proc. Ann. art. 64.011 after provides that a "guardian of a convicted person"⁵¹ may submit motions for the convicted person under this chapter and is entitled to counsel otherwise provided to a convicted person. This seems odd, because no such protection is afforded to a guardian *before* conviction.

G. ADULT WARDS AND THE CRIMINAL PROTECTION: Guardians of adult wards will likely soon become disheartened with the criminal prosecution process, as they have NO ability to helpfully participate. This section of the paper is intended to be a simple nuts and bolts conversation about the realities of participation in a *typical*⁵² criminal case.

1. Arrest: The first contact the guardian may have with a criminal prosecution is at the time of

the arrest of the ward. It is not advisable for the guardian to approach the police with all the normal questions he might have as his ward is being removed from his care. Too many questions to police during an arrest situation can be viewed as aggression and may get the guardian arrested for interfering with a police investigation. The quicker the guardian obtains counsel for his ward...the better. Counsel should immediately notify the jail and police that the ward, through his guardian, is represented. Imagine the repercussions and admissions a ward may make if interrogated by the police alone. If the ward does not verbally invoke his right to counsel, and he was *Mirandized*, the admissions will likely be used against him at trial.

2. Jail Visits: If the guardian wished to visit the ward in jail, in the past, the ward would have to place the guardian's name on his "jail visit list". If the ward doesn't do this or cannot mentally do this, no amount of wrangling or waiving letters of guardianship at the jail staff got a guardian in to see his ward. Thanks to Judge Laird, and a host of others supporting a change, Chap. 26 of the Code of Criminal Procedure, specifically Article 26.041 was amended, as was Section 511.009(a) of the Government Code. The amendments (1) allow the guardian to be placed on the visitation list; (2) allow visitation by the guardian; and (30 require the guardian to produce valid letters of guardianship. For the entire Act relating to rights of a guardian of a person in the criminal justice system, *see* Exhibit A. If the ward does not bond out of jail, he will be brought before a magistrate within 48 hours, at which time he will be offered the right to interview for a court appointed lawyer. Again, if the ward does not ask to be interviewed or cannot complete the interview (which is financial in nature) he will not be appointed an attorney. The guardian cannot make this request on his behalf, as inequitable as this seems, which makes the right to visit so vital.

3. Medication in Jail: The guardian will encounter similar obstacles if the ward requires special medical treatment or medication. The jail will likely have its own pharmacy. If the jail does not have the correct medication in the jail pharmacy, they may elect not to go out of the way to find the medication. The jail will not administer narcotics regardless of a pain situation. The jail will often not administer anti-anxiety medications such as Xanax,

⁵¹ Defined as a person who is the legal guardian of the convicted person, whether the legal relationship between the guardian and convicted person exists because of the age of the convicted person or because of the physical or mental incompetency of the convicted person.

⁵² There will be infinite possibilities for deviation from the descriptions herein, criminal cases, as with all cases take on a life of their own.

because this medication is valuable to sell to other inmates (just like a street drug). Similarly, if the jail finds any medication has become something popular to hide and sell amongst inmate population the infirmary will likely not stock nor administer it. If a drug is extremely expensive the jail will likely not stock it, nor because of budgetary restraints will the jail obtain it. Guardians *can* continue to provide the jail with the medications, and the infirmary will administer them to the ward. If the ward is undergoing any extensive medical treatment, the jail will likely be unable to continue the treatment. The jail will do its best, given the resources it has, to take care of the ward. The ability of the jail infirmary to provide in depth care, is unfortunately limited.

4. Housing: The ward most likely will be placed in the regular population. Extremely violent inmates are kept segregated from the rest of the jail population, but the ward is still exposed to anyone who is not considered to be extremely violent. Similarly, if the ward makes suicide threats or acts out in a manner that causes extreme disruption amongst the population, the ward will likely be placed in restraints (possibly naked) until he calms down, or placed alone in a segregated cell.

5. Indigence: The guardian can expect not to be able to participate in pre-trial proceedings. The guardian should not expect to be able to talk to the ward during court appearances. Bailiffs are on elevated alert during criminal dockets, because the court is full of people and they are responsible for the safety and confinement of the defendants. The attorney representing the ward should challenge all admissions made by the ward, arguing the ward does not have the capacity to meaningfully understand and waive his right to remain silent. The attorney representing the ward should prepare to have these challenges overruled. Similarly, the district attorney will likely be unhelpful to the guardian in this process. They are, of course, on the “other side.” Guardians should be cautious in contacting the prosecuting attorney in the case, and should instead go through counsel for the ward. It would not be surprising if the only plea offer a ward may receive on his case would be one involving incarceration. Probation carries with it responsibilities like community service and fines. A typical ward might not be able to pay fines or participate in community service, and would not be looked upon as a good potential candidate for

successful probation. The guardian will not be able to consent to a plea if the ward on his own decides to plead guilty.

H: MENTAL COMMITMENT – QUASI-CRIMINAL: If an incapacitated person fails to take his or her medication or has a mental disease that is untreated or undiagnosed, he or she can become a danger to themselves or others. That is the standard for a mental commitment. The family, friends neighbors or law enforcement are left with no options but a mental commitment and a warrant. It is a temporary fix and is not an adjudication of incapacity. It is a bandaid on an emergency situation. It can be the beginning of a treatment program, but it is rarely a solution.

1. Criminal Charges Pending: It is not uncommon to bail a person out of jail and realize they are a danger. So, a concerned person or family member commits them to a mental facility. The problem is that the crime charged and the mental commitment are incompatible. Texas Health & Safety Code Section 74.034 states:

(h) A judge may not issue an order for temporary inpatient or outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person.

TEX. HEALTH & SAFETY CODE § 74.034.

As to extended mental health services, Texas Health & Safety Code Section 74.035 states:

(i) A judge may not issue an order for extended inpatient or outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person.

TEX. HEALTH & SAFETY CODE § 74.035.

If charges are pending, you may be able to negotiate with the district attorney depending on the nature of

the crime. The district attorney may see the benefit of extended care, as opposed to time in jail.

2. Drug Abuse Issues Alone: Desperate family members do all they can when drugs or alcohol put their family member in a personal prison. They try anything and everything to help the person stay clean and sober. In desperation, they try mental commitment. Because of budgetary issues, facilities usually limit their admits to Axis I issues. That would eliminate purely drug and alcohol issues. It is important to emphasize the mental issues and not the drug and alcohol issues.

3. The Mental Commitment Process: The mental commitment process is a five-step process:

- a. The Application with Affidavit
- b. The detention and warrant
- c. Two physicians' exams
- d. Probable cause hearing and if held,
- e. Final hearing

a. By A Peace Officer: According to Section 573.001 of the Texas Health & Safety Code, a peace officer, without a warrant, may take a person into custody if the officer has reason to believe and does believe that the person is mentally ill and because of such illness, there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained.⁵³ In addition, the officer must believe that there is not sufficient time to obtain a warrant before taking the person into custody. In determining whether the person should be apprehended based upon the above criteria, the officer may rely on representations from a credible person or may form his own opinion based upon the conduct of the person or circumstances under which the person is found.⁵⁴

Once the person is apprehended, the peace officer must transport the person to the nearest appropriate inpatient mental health facility or suitable mental health facility if an appropriate mental health facility

is not available. Only in extreme emergencies will the person be transported to jail.⁵⁵

Once the person is placed with a facility, the officer must prepare a Peace Officer's Application for Detention. In the Application for Detention, the officer must specifically describe: 1) risk of harm; 2) how the officer's beliefs are derived, either from recent behavior, overt acts, attempts, or threats that were either observed or reliably reported to the officer; 3) a description of the behavior, acts, attempts, or threats; and 4) the name and relationship to the apprehended person who reported or observed such behavior, acts, attempts, or threats. In addition, the Application for Detention must state that the officer has reason and does believe that: 1) the person evidences mental illness; 2) the person evidences substantial risk of serious harm to himself or others; and 3) the risk of harm is imminent unless the person is immediately restrained.⁵⁶

b. With a Warrant: Any adult may make Application for Emergency Detention if he reasonably believes that a person is mentally ill and that, because of the mental illness, there is substantial risk of harm to the person or others unless the person is immediately restrained.⁵⁷ Such Application must provide the same information required of a Peace Officer's Application for Detention.⁵⁸

Applications for Emergency Detention are evaluated by a judge or magistrate to determine the credibility of the person seeking emergency detention and whether the Application meets the criteria. It is critical that the applicant is swearing to personal knowledge of specific observations or conversations with the person to be detained. Personal observation and speaking or listening to the person is a requirement or no warrant will issue. You cannot be reiterating other people's concerns or observations.

⁵³ TEX. HEALTH & SAFETY CODE ANN §573.001 (VERNON 2010).

⁵⁴ *Id.*

⁵⁵ TEX. HEALTH & SAFETY CODE ANN §573.002 (VERNON 2010).

⁵⁶ TEX. HEALTH & SAFETY CODE ANN §573.003 (VERNON 2010).

⁵⁷ *See* TEX. HEALTH & SAFETY CODE ANN §573.011 (VERNON 2010).

⁵⁸ *See Id.* as compared to TEX. HEALTH & SAFETY CODE ANN §573.002 (VERNON 2010).

Applications for Emergency Detention containing falsehoods and filed for less than virtuous reasons, though few and far between, represent no surprise to the courts. In the past, mental commitments were illegally used as leverage in lawsuits, particularly custody cases. It should be noted that filing a false report constitutes aggravated perjury and is a third degree felony.⁵⁹

4. Forced Medication:

Every effort is made to do in-patient counseling on the necessity of being compliant with medications. Sometimes the patient fails to comprehend or is so delusional that non-compliance makes more sense to them and no amount of conversation will bring compliance. Forced medication seems the only answer.

a. When Appropriate: Even though a patient is committed for the purpose of receiving mental health services, medication to such patient may not be administered against such person's will unless: 1) the patient is having a medication related emergency; 2) the patient is under an Order Authorizing Psychoactive Medication; or 3) the patient is a ward who is 18 years of age or older and the guardian of the person of the ward consents to the administration of psychoactive medication regardless of the ward's expressed preferences regarding treatment with psychoactive medication.⁶⁰

b. The Forced Medication Process: A physician who is treating a patient may, on behalf of the state, file an Application for an Order to Authorize the Administration of Psychoactive Medication regardless of the patient's refusal if:

- a. The physician believes the patient lacks the capacity to make a decision regarding such treatment;
- b. The physician determines that the medication is the proper course of treatment for the patient;

- c. The patient is under an order for inpatient mental health services; and
- d. The patient, verbally or by other indication, refuses to take the medication voluntarily.⁶¹

The Application must comply with the requirements of the Texas Mental Health Code and state:

- a. That the physician believes the patient lacks the capacity to make a decision regarding administration of psychoactive medication and the reasons for that belief;
- b. Each medication the physician wants the court to compel the patient to take;
- c. Whether an Application for Court-Ordered Mental Health Services has been filed;
- d. Whether a court order for inpatient mental health services for the patient has been issued, and if so, under what authority;
- e. The physician's diagnosis of the patient; and
- f. The proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from the customary method.⁶²

5. Hearing: Before a hearing on the Petition for an Order to Administer Psychoactive Medication may be heard, the patient must be subject to an order for inpatient mental health services or in custody awaiting a trial in a criminal proceeding and was ordered to receive inpatient mental health services in the six months preceding the hearing. The court may

⁵⁹ See TEX. PENAL CODE § 37.03 (Vernon 2012).

⁶⁰ See TEX. HEALTH & SAFETY CODE ANN §573.012 (VERNON 2010).

⁶¹ TEX. HEALTH & SAFETY CODE ANN §573.021 (VERNON 2010).

⁶² TEX. HEALTH & SAFETY CODE ANN §573.022 (VERNON 2010).

issue an order authorizing the administration of psychoactive medication if the court finds by clear and convincing evidence after a hearing on the matter that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient. In making the finding that treatment with the proposed medications is in the best interest of the patient, the court shall consider:

- a. The patient's expressed preferences regarding treatment with psychoactive medication;
- b. The patient's religious beliefs;
- c. The risks and benefits, from the perspective of the patient, of taking psychoactive medication;
- d. The consequences to the patient if the psychoactive medication is not administered;
- e. The prognosis for the patient if the patient is treated with psychoactive medication;
- f. Alternative, less intrusive treatments that are likely to produce the same results as treatment with psychoactive medication; and
- g. Less intrusive treatments likely to secure the patient's agreement to take the psychoactive medication.⁶³

Both mental commitment and forced medication have their benefit, as they can be the beginning of a treatment plan. Again, this is a bandaid to a dangerous situation. The facility will map out a treatment plan if one is recommended, but it is up to the individual or their guardian to see to its implementation. Many incapacitated persons cycle in and out of the mental commitment process over and over again.

I. MENTAL EXPLOITATION: This concept is not easy to describe. It is a little like describing pornography—you know it when you see it. If an older person lives alone and far from family, or has infrequent visits from family, an unscrupulous person or persons can move in their life with an agenda.

Little by little, there are ways these predators poison the mind of an already partially impaired or lonely person for their own benefit.

1. **Predatory Behavior:** Predatory behavior is usually a gradual coup, a takeover, or the obtaining of power over another who seeks physical help, social interaction, and/or emotional support. Physical harm is not always present, although it can become a threat or an actual risk.

a. **Spiritual Predator:** This type of predatory behavior seems so nurturing in the beginning. The predator may take the person to church, have them join Bible study, and actually do good and improve the person's life. Charities are good at maintaining close ties with their donors, but this goes way beyond a welfare check. As the role changes, the person cannot justify the amount of a check to a certain type of "charity." They become defensive and do not want to discuss a total change in their "giving." The predator may convince the person that his or her spiritual well-being and ultimate death depend on a continued check. You may see less in "outings," but more interaction in the home with the predator.

b. **Moral Predator:** A different kind of predator can take the form of a relative, caregiver, friend or acquaintance. This type of predator feeds on the type of behavior a loved one or heir should be exhibiting toward the intended prey. This type of predator finds an excuse to see the person more and more, sometimes daily. They make their prey seem special and deserving and lament that the person's children or relatives do not treasure them. They differentiate themselves from the "relatives" by never disapproving or disagreeing. These predators manage to get on accounts to "help out" and seem to never be around when the relatives show up. They sometimes urge the person to keep their relationship a secret so as not to upset the relatives. They urge the person to consider their children as not complying with the morals of a good child. They compare themselves as an example of morality and caring.

c. **Anxiety Exploitation:** This type of predatory behavior is particularly cruel. Everyone fears something, but the fear is usually not a mental disorder. As we age, our fear may be to be crippled, to lose our mind, and/or to be placed in a nursing home

⁶³ *Id.*

and forgotten. Many elderly are paralyzed at the thought of being moved from their home. They dwell on being removed to the point of sleepless nights and total anxiety. This type of predator will weave a tale of woe as to what happened in their family and how no one should have that fate. They prey on the anxieties and may drop subtle hints that the person's child or relatives "seem" like they would not leave the person in their home. They express worry that if that person is not there to fight for them, it would end in a bad way.

2. Confronting the Predator: As attorneys, we should be ever vigilant as to any type of exploitation of our elderly or impaired clients. We may notice they are more open to suggestion. We may notice that their relatives, who they have always spoken of fondly, are now the subject of snippy or sarcastic comments and disapproval. We may hear new names interjected as special friends and copies of private documents may be requested for that person. How we intervene to distance the predator and shut off the abuse is crucial.

a. Straight Forward: Our court system needs a deeper understanding of the nuances of elder abuse cases. They need to be prepared to see the wrongdoing when an adult child or other individual who, on the surface might seem innocent or genuinely concerned for the best interest of the senior, in reality is exerting undue influence over him. As Mickey Rooney testified, there's more to the abuse than simply misusing money. Dignity, health, safety and the very basic fabric of life can deteriorate when a senior is confined against his will to circumstances that suit the caregiver or family member more than the senior. By receiving additional training and exposure to real-life examples, the courts can garner a better understanding of the insidious nature of this growing problem and have a greater appreciation of the need to rule appropriately so that the victim can reclaim his dignity and life.⁶⁴

⁶⁴ Barbara Ross and Corky Siemasko, "Brooke Astor's Octogenarian Son Anthony Marshall to Get 1 to 3 Years in Prison for Looting his Mom's Fortune," *New York Daily News* (March 26, 2013), www.nydailynews.com/new-your/brooke-astor-son-spend-1-3-years-prison-article-1.1299336. YouTube video, www.youtube.com/watch?v=W9ikiKP5-s5A and ABC News, Feb. 17, 2011, [http://abcnews.go.com/Health/Wellness/mickey-rooney-90-](http://abcnews.go.com/Health/Wellness/mickey-rooney-90-victim-alleged-elder-abuse/story?id=12934033&page-2#.Uay715WWXkQ)

The "in your face" court approach may ward off exploitation, but going to a court over the perpetrator may have the opposite effect. The door may be shut to family and anyone who speaks ill of the perpetrator. The straight forward approach can lead to further isolation and an affirmation that you are the enemy. It may take a long time to access the abuse.

b. Covert Maneuvers: It may be that the stealth approach works better in learning all you can about the predator. You may want to seem genuinely excited to meet them and get to know them better. Do not discuss the situation by telephone, as they may listen. You might consider showing up without notice and see what is going on in the home. Your client or friend may be afraid of threats or repercussions. Be particularly concerned if the person feels the need to "ask" permission to deal with any particular scenario. It may be that you are able to persuade the individual that they have gone down the wrong path. If so, you can assist in changing locks, changing cellphone numbers, and correcting bank accounts. If the individual acknowledges his mistake, quickly divert all blame to the perpetrator and divert them to a positive solution. Guilt and shame, coupled with possible memory or reasoning issues, are dangerous combinations. Handle the conversations as you would a vicious assault, understanding how fragile and alone the person now feels.

J. FINANCIAL EXPLOITATION: Just as the internet age is improving the way we communicate and the speed of communication; it is also a resource to locate widows and widowers, new inheritance, drug and alcohol abusers with money, and groups for lonely persons to join. Any life changing event to an elderly or mentally ill person can place them at peril to be financially exploited. If the elderly or person suffering loss is internet savvy, schemes to extort money stemming from third world countries are as popular as this spring's fashion lineup. A person does not have to be incapacitated to be exploited, just vulnerable.

1. Opportunity: A predator can find its prey easily. It can be a caregiver when the competent spouse dies, or a distant friend who appears in time of

victim-alleged-elder-abuse/story?id=12934033&page-2#.Uay715WWXkQ.

need. It can be a family member who has been financially supported to a degree, who sees a mental decline and steps up their game.

a. Elderly: The elderly are prime targets for financial exploitation. As their physical and mental health decline, the fear running out of money, losing their home, not being able to pay their bills and all sorts of scenarios, some imagined and some real, becomes the central issue of life. Some elderly persons who are mentally and physically fit can be financially exploited out of sheer loneliness and the desire to be needed.

b. Special Needs: Special needs individuals are usually cared for at home or are in a facility. Some develop to a degree of independence of keeping jobs and living alone. If they have governmental support coming to them they can develop “friends” who will be right there to help them spend the funds. Likewise, the mentally ill are easy targets. Once a predator learns their phobias and fears, they can prey on these fears, telling them, for example, their bank account is being monitored by the government and their funds should be hidden with a friend so the funds will be safe.

c. Family Not Near: When family are not in same city, or when an elderly or mentally ill person is alone and away from close family or family at all, word travels fast. A neighbor talks to a hairdresser, the lonely person has a conversation with a store clerk, and someone may impart too much information. The person may have access to their address or telephone. Once the contact is established, the stage is set to move in and gain control. If the family is not involved or not nearby, it is easy to take control and take assets before anyone discovers the assets are gone.

2. Methods of Exploitation: Anyone who has been through financial exploitation with a loved one expresses shock at the methods employed to get close. They may know or even have trusted the person who steals a person’s life savings. For as many ways as one can do good, so are there ways to do evil.

a. Suggestion: Suggestion is a powerful tool in the hands of a predator. Once they have found their target, they can snoop and discover how large

their estate may be. It may slip out in conversations about charity or paying taxes. If there is a time when the person is “less sharp” the predator will call, visit, or take them to a bank. The impact of the suggestion will last long after the call or visit. The predator may suggest the person is a mother/father/uncle, etc. that they always wanted, and now have.

b. Secrecy: The art of keeping the relationship a secret is easy. You suggest that the relatives who want to put them in a home might react if they knew the predator was on a bank account. Any cash gift becomes a secret between them. It becomes a game to keep the family at bay. It is important in the secret to convince the person that their family is so important that in the very few times they visit, you would never want to take on moment of their precious time. Many times relatives have reported that on visits they never saw one sign that a stranger had been in the home; not a card, note, gift or even a telephone number posted that they did not recognize. The predator has removed any sign of their existence.

c. Discredit of Family: Predators can discredit the family in so many ways. Once they have the trust of the elderly person, and have instilled the idea of secrecy, they share everything. Any slight criticism of a person’s child can be built on and dramatized. In the spirit of truth, explain how awful their family is not to treasure the person as much as the predator does. Sometimes the predator will conspire with the black sheep of the family to disinherit the people who actually care and have taken nothing. As the relationship progresses, families have described the decline of a loved one and the loved one rewriting every good time the family has ever had. The new “history” created by the predator is one of lack of caring, slights, and ulterior motives. If they can make the person hate their family, yet still go to church and socialize with others, it is a huge win.

K. CRIMINAL RAMIFICATIONS OF EXPLOITATION: As you know it is a crime to exploit the elderly or disabled. Texas Penal Code §32.53 reads as follows:

§ 32.53 Exploitation of Child, Elderly Individual, or Disabled Individual

(a) In this section:

(1) "Child," "elderly individual," and "disabled individual" have the meanings assigned by Section 22.04.

(2) "Exploitation" means the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain.

(b) A person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual.

(b) An offense under this section is a felony of the third degree.

(d) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections. Section 3.04 does not apply to criminal episodes prosecuted under both this section and another section of this code. If a criminal episode is prosecuted under both this section and another section of this code and sentences are assessed for convictions under both sections, the sentences shall run concurrently.

(e) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the Medicaid program.

If the offender holds a power of attorney, is a trustee, or is any other kind of fiduciary or in a confidential relationship, they can also be prosecuted as a fiduciary. Texas Penal Code §32.45 reads as follows:

§32.45 Misapplication of Fiduciary Property of Financial Institution

(a) For purposes of this section:

(1) "Fiduciary" includes:

(A) a trustee, guardian, administrator, executor, conservator, and receiver;

(B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code;

(C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 153.001, Tax Code; and

(D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) "Misapply" means deal with property contrary to:

(A) an agreement under which the fiduciary holds the property; or

(B) a law prescribing the custody or disposition of the property.

(b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(c) An offense under this section is:

(1) a Class C misdemeanor if the value of the property misapplied is less than \$20;

(2) a Class B misdemeanor if the value of the property misapplied is \$20 or more but less than \$500;

(3) a Class A misdemeanor if the value of the property misapplied is \$500 or more but less than \$1,500;

(4) a state jail felony if the value of the property misapplied is \$1,500 or more but less than \$20,000;

(5) a felony of the third degree if the value of the property misapplied is \$20,000 or more but less than \$100,000;

(6) a felony of the second degree if the value of the property misapplied is \$100,000 or more but less than \$200,000; or

(7) a felony of the first degree if the value of the property misapplied is \$200,000 or more.

(d) An offense described for purposes of punishment by Subsections (c)(1)-(6) is increased to the next higher category of offense if it is shown on the trial of the offense that the offense was committed against an elderly individual as defined by Section 22.04.

The abuse can be domestic, emotional, financial or even institutional abuse.

1. Duty to Report: Many persons do not realize that the failure to report abuse is also a crime. It is not as serious as the actual crime, but it is still abuse. The Texas Penal Code is not where the duty is found; it is in the Human Resources Code, §48.051 which states:

(a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly or disabled

person is in the state of abuse, neglect, or exploitation, including a disabled person receiving services as described by Section 48.252, shall report the information required by Subsection (d) immediately to the department.

(b) If a person has cause to believe that an elderly or disabled person, other than a disabled person receiving services as described by Section 48.252, has been abused, neglected, or exploited in a facility operated, licensed, certified, or registered by a state agency, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.

(c) The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional.

Many people view the abuse but are concerned of the ramifications of the report and that the predator might come after them. Section 48.052 discusses what happens if you have knowledge of the abuse but decide not to report the abuse. It reads:

(a) A person commits an offense if the person has cause to believe that an elderly or disabled person has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter. An offense under this subsection is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the disabled person was a person with

mental retardation who resided in a state supported living center, the ICF-MR component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the disabled person had suffered serious bodily injury as a result of the abuse, neglect, or exploitation.

(b) This section does not apply if the alleged abuse, neglect, or exploitation occurred in a facility licensed under Chapter 242, Health and Safety Code. Failure to report abuse, neglect, or exploitation that occurs in a facility licensed under that chapter is governed by that chapter.

2. How to Report: If an attorney or individual suspects abuse or exploitation they should call Adult Protective Services at 1.800.252.5400 or use its secured website: <https://www.txabusehotline.org>. If a facility is involved call the abuse hotline for APS Facility Investigation at 1.800.647.7418. You can also call any of the statutory probate courts and speak with a guardianship coordinator. The probate courts will require an "information letter" to be faxed/mailed to the court pursuant to Texas Estates Code Section 1102.003. This Section provides you with the necessary information that should be included in the letter. Upon receipt of the letter, it will be assigned to a court and an investigation will commence. The Court may then appoint a court investigator to conduct a more thorough investigation or in the alternative appoint a guardian ad litem.

In preparing the report to APS or DADS, you should include:

- (i) Name, age and address of the elderly or disabled;
- (ii) The name, address or any person responsible for their care;
- (iii) The nature of the person's conditions, i.e. Dementia;
- (iv) The basis of your knowledge; and
- (v) Anything you believe relevant to assist the abused person. Keep in mind with DADS, when you call the hotline, you can choose to remain

anonymous to anyone but the investigating worker. Even if the records are produced by court order, they will be redacted.

3. Problems When Civil Action Pending:

Many times the family will seek counsel to freeze assets, seek guardianship and/or sue the predator prior to seeking a criminal indictment of the heinous activity. The District Attorney's office may have a person or persons assigned to exploitation and abuse. It is frustrating to be told that you should pursue your civil action first. There is no "Penal Code" section to avoid prosecuting a crime while a civil action is pending. Respectfully continue up the chain of command and seek an indictment. It is helpful to put together a binder of "gifts", forged checks, medical records and any other documents which can assist in making a criminal exploitation case. If a predator believes a civil action will be their only punishment, there is no incentive to not seek out your next victim to help pay your attorney's fees. Civil action alone is little deterrent.

L. SPECIALTY COURTS:

1. Veterans Court: In continuing the discussion with regard to safeguards for accused adult disabled individuals/disabled person another area to evaluate for protections afforded similarly situated individuals are our specialty court programs. When it comes to specialty courts, the first area of comparison is the body of law set forth in Title Seven of the Texas Health & Safety Code Chapter 617, enacted in 2009 applicable to veterans:

Many veterans who suffer from PTSD or TBI turn to alcohol or drugs as a coping mechanism. They can end up in the criminal justice system as a result of the substance abuse. The veterans court program takes a two-pronged approach to treat the substance abuse and its underlying psychological cause.

Veterans are referred to the program in a couple of ways. Some are directly referred by their attorney, but, more often, they come to the program from jail.

This specialty court program was enacted with the understanding that veterans may be suffering with mental health afflictions garnered as a result of military service that which helped to create the situation resulting in criminal prosecution. To be eligible for a veterans court program (if there is one available in the county in which the defendant is being prosecuted) the following criteria must be met:

- a. the attorney representing the state must consent to the defendant's participation in the program and
- b. the court in which the criminal case is pending must find that the defendant:
 - (1) is a veteran or current member of the United States armed forces, including a member of the reserves, national guard, or state guard; and
 - (2) suffers from a brain injury, mental illness, or mental disorder, including post-traumatic stress disorder, that:
 - i. resulted from the defendant's military service in a combat zone or other similar hazardous duty area; and
 - ii. materially affected the defendant's criminal conduct at issue in the case.⁶⁵

The veterans court program must "provide a participant with a court-ordered individualized treatment plan indicating the services that will be provided to the participant."⁶⁶ Any veterans court program, by statute, must also have the following characteristics:

- a. the integration of services in the processing of cases in the judicial system;

- b. the use of a non-adversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
- c. early identification and prompt placement of eligible participants in the program;
- d. access to a continuum of alcohol, controlled substance, mental health, and other related treatment and rehabilitative services;
- e. careful monitoring of treatment and services provided to program participants;
- f. a coordinated strategy to govern program responses to participants' compliance;
- g. ongoing judicial interaction with program participants;
- h. monitoring and evaluation of program goals and effectiveness;
- i. continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
- j. development of partnerships with public agencies and community organizations, including the United States Department of Veterans Affairs.⁶⁷

Upon successful completion of the veterans court program, notice to the state, a hearing and a finding that "a dismissal is in the best interest of justice, the court in which the criminal case is pending shall dismiss the criminal action against the defendant."⁶⁸

2. Drug Court: Another specialty court program that warrants mention is the drug court program. Tex. Gov't Code Chapter 123 creates the drug court program. The drug court is designed for

⁶⁵ Texas Health and Safety Code § 617.002.

⁶⁶ Texas Health and Safety Code § 617.003(a)(3).

⁶⁷ Texas Health and Safety Code § 617.001(a).

⁶⁸ Texas Health and Safety Code § 617.001(b).

addicts. A drug court is characterized by the following:

- a. the integration of alcohol and other drug treatment services in the processing of cases in the judicial system;
- b. the use of a non-adversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
- c. early identification and prompt placement of eligible participants in the program;
- d. access to a continuum of alcohol, drug, and other related treatment and rehabilitative services;
- e. monitoring of abstinence through weekly alcohol and other drug testing;
- f. a coordinated strategy to govern program responses to participants' compliance;
- g. ongoing judicial interaction with program participants;
- h. monitoring and evaluation of program goals and effectiveness;
- i. continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
- j. development of partnerships with public agencies and community organizations.⁶⁹

Like veterans court, drug court may result in a dismissal of charges. If after successful completion of drug court in which a defendant is convicted, after notice to the state and a hearing on whether the defendant is otherwise entitled to the petition and whether issuance of the order is in the best interest of justice; the court shall enter an order of nondisclosure as if the defendant had received a discharge and dismissal.⁷⁰

⁶⁹ Texas Government Code § 123.001(a).

⁷⁰ Texas Government Code § 123.001(b).

M. HELPFUL ORGANIZATIONS AND CONTACTS: There is not an answer for every situation we face where guardians, wards, mentally ill, abused and exploited are concerned. We give the best counsel we can provide and use whatever resources we have at hand. Below are some organizations and contacts which may lend assistance when you need answers and they are not readily available:

1. Social Security 1.800.772.1213
2. National Do Not Call List 1.888.382.1222
3. Credit Reporting Agencies:
 - a. Experian 1.888.397.3745
 - b. Trans Union 1.800.680.7289
 - c. Equifax 1.888.766.0008
4. Adult Protective Agency 1.800.252.5400
5. Attorney General's Consumer Protection Hotline 1.800.621.0508
6. TX Dept. of Aging, Disability, Consumer Rights 1.800.458.9858
7. Mental Health-Mental Retardation (statewide) 1.800.252.8154
8. Alzheimer's Association 1.800.272.3900
9. American Assoc. of Retired Persons (AARP) 1.800.424.2277
10. TX Dept. of Aging & Disability Services 1.800.252.9240
11. Dept. of Veteran's Affairs Hotline 1.800.827.1000

N. CONCLUSION: In conclusion there are ways we can substantially improve the current criminal justice system in its handling of adult disabled persons/individuals and adjudicated adults. A few suggestions are as follows:

1. Statutes criminalizing behaviors should *all* be amended such that they are aggravated for adult disabled person/individual victims if they are aggravated for minor victims.
2. A specialty court program should be created for probate wards and any adult defendant who is competent to stand trial that has a court finding he is a disabled or incapacitated person/individual.
3. Extensive legislation similar to that contained in Title 3 of the Texas Family Code should be enacted for probate wards and any adult defendant who is competent

- that obtains a court finding he is a disabled person/individual.
4. Disabled persons/individuals should be mandatorily segregated from the general jail or prison population for their safety.
 5. Legislation should be enacted requiring the jails and prisons to honor letters of guardianship, allow access to the ward (regardless of whether the guardian is on the visitation list) and allow for communication between jail staff, physicians, medical personnel, and the guardian to facilitate appropriate supervision of the ward and administration of medications.
 6. Legislation should be enacted requiring a jail liaison be appointed and educated to interact with wards and their guardians.
 7. A probate guardian should be able to informally notify the court or indigent defense department, as applicable, of the ward's need for appointed counsel and should be able to complete all financial paperwork needed to verify the indigence of the ward.
 8. At a hearing for civil commitment of a probate ward or disabled person/individual
- a determination should be made as to the likely length of punishment the defendant would receive upon a conviction. The fact finder could receive a proffer of evidence from both parties. This length of time should be the benchmark (along with application of the timeframes for parole eligibility) for release from civil commitment upon a finding from the treatment provider that the defendant has reached his maximum medical improvement and is still not competent to stand trial.
9. A JIMS system update where guardianship orders are entered into the system just as Family Law protective orders are entered. In this fashion, a law enforcement officer could pull up the adjudication just as they pull up an outstanding warrant.
 10. A link to the clerk's office should be on a law enforcement computer so when a name is run, the adjudication and information on the guardian and contact information come up exactly as a family violence order would come up from that jurisdiction or another.

EXHIBIT A

By: _____

_____.B. No. _____

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the rights of a guardian of a person in the criminal
3 justice system.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 26, Code of Criminal Procedure, is
6 amended by adding Article 26.041 to read as follows:

7 Art. 26.041. PROCEDURES RELATED TO GUARDIANSHIPS. (a) In
8 this article:

9 (1) "Guardian" has the meaning assigned by Section
10 1002.012, Estates Code.

11 (2) "Letters of guardianship" means a certificate
12 issued under Section 1106.001(a), Estates Code.

13 (b) A guardian who provides a court with letters of
14 guardianship for a defendant may:

15 (1) provide information relevant to the determination
16 of indigency; and

17 (2) request that counsel be appointed in accordance
18 with this chapter.

19 SECTION 2. Section 501.010, Government Code, is amended by
20 amending Subsection (a) and adding Subsections (a-1) and (b-1) to
21 read as follows:

22 (a) In this section:

23 (1) "Guardian" has the meaning assigned by Section
24 1002.012, Estates Code.

1 (2) "Letters of guardianship" means a certificate
2 issued under Section 1106.001(a), Estates Code.

3 (a-1) The institutional division shall allow the governor,
4 members of the legislature, and members of the executive and
5 judicial branches to enter at proper hours any part of a facility
6 operated by the division where inmates are housed or worked, for the
7 purpose of observing the operations of the division. A visitor
8 described by this subsection may talk with inmates away from
9 institutional division employees.

10 (b-1) The uniform visitation policy must:

11 (1) allow visitation by a guardian of an inmate to the
12 same extent as the inmate's next of kin, including placing the
13 guardian on the inmate's approved visitors list on the guardian's
14 request and providing the guardian access to the inmate during a
15 facility's standard visitation hours if the inmate is otherwise
16 eligible to receive visitors; and

17 (2) require the guardian to provide the warden with
18 letters of guardianship before being allowed to visit the inmate.

19 SECTION 3. Section 507.030, Government Code, is amended by
20 amending Subsections (a) and (b) and adding Subsection (a-1) to
21 read as follows:

22 (a) In this section:

23 (1) "Guardian" has the meaning assigned by Section
24 1002.012, Estates Code.

25 (2) "Letters of guardianship" means a certificate
26 issued under Section 1106.001(a), Estates Code.

27 (a-1) The state jail division shall allow the governor,

1 members of the legislature, and officials of the executive and
2 judicial branches to enter during business hours any part of a
3 facility operated by the division, for the purpose of observing the
4 operations of the division. A visitor described by this subsection
5 may talk with defendants away from division employees.

6 (b) The state jail division shall establish a visitation
7 policy for persons confined in state jail felony facilities. The
8 visitation policy must:

9 (1) allow visitation by a guardian of a defendant
10 confined in a state jail felony facility to the same extent as the
11 defendant's next of kin, including placing the guardian on the
12 defendant's approved visitors list on the guardian's request and
13 providing the guardian access to the defendant during a facility's
14 standard visitation hours if the defendant is otherwise eligible to
15 receive visitors; and

16 (2) require the guardian to provide the director of
17 the facility with letters of guardianship before being allowed to
18 visit the defendant.

19 SECTION 4. Section 511.009(a), Government Code, is amended
20 to read as follows:

21 (a) The commission shall:

22 (1) adopt reasonable rules and procedures
23 establishing minimum standards for the construction, equipment,
24 maintenance, and operation of county jails;

25 (2) adopt reasonable rules and procedures
26 establishing minimum standards for the custody, care, and treatment
27 of prisoners;

1 (3) adopt reasonable rules establishing minimum
2 standards for the number of jail supervisory personnel and for
3 programs and services to meet the needs of prisoners;

4 (4) adopt reasonable rules and procedures
5 establishing minimum requirements for programs of rehabilitation,
6 education, and recreation in county jails;

7 (5) revise, amend, or change rules and procedures if
8 necessary;

9 (6) provide to local government officials
10 consultation on and technical assistance for county jails;

11 (7) review and comment on plans for the construction
12 and major modification or renovation of county jails;

13 (8) require that the sheriff and commissioners of each
14 county submit to the commission, on a form prescribed by the
15 commission, an annual report on the conditions in each county jail
16 within their jurisdiction, including all information necessary to
17 determine compliance with state law, commission orders, and the
18 rules adopted under this chapter;

19 (9) review the reports submitted under Subdivision (8)
20 and require commission employees to inspect county jails regularly
21 to ensure compliance with state law, commission orders, and rules
22 and procedures adopted under this chapter;

23 (10) adopt a classification system to assist sheriffs
24 and judges in determining which defendants are low-risk and
25 consequently suitable participants in a county jail work release
26 program under Article 42.034, Code of Criminal Procedure;

27 (11) adopt rules relating to requirements for

1 segregation of classes of inmates and to capacities for county
2 jails;

3 (12) require that the chief jailer of each municipal
4 lockup submit to the commission, on a form prescribed by the
5 commission, an annual report of persons under 17 years of age
6 securely detained in the lockup, including all information
7 necessary to determine compliance with state law concerning secure
8 confinement of children in municipal lockups;

9 (13) at least annually determine whether each county
10 jail is in compliance with the rules and procedures adopted under
11 this chapter;

12 (14) require that the sheriff and commissioners court
13 of each county submit to the commission, on a form prescribed by the
14 commission, an annual report of persons under 17 years of age
15 securely detained in the county jail, including all information
16 necessary to determine compliance with state law concerning secure
17 confinement of children in county jails;

18 (15) schedule announced and unannounced inspections
19 of jails under the commission's jurisdiction using the risk
20 assessment plan established under Section 511.0085 to guide the
21 inspections process;

22 (16) adopt a policy for gathering and distributing to
23 jails under the commission's jurisdiction information regarding:

24 (A) common issues concerning jail
25 administration;

26 (B) examples of successful strategies for
27 maintaining compliance with state law and the rules, standards, and

1 procedures of the commission; and
2 (C) solutions to operational challenges for
3 jails;
4 (17) report to the Texas Correctional Office on
5 Offenders with Medical or Mental Impairments on a jail's compliance
6 with Article 16.22, Code of Criminal Procedure;
7 (18) adopt reasonable rules and procedures
8 establishing minimum requirements for jails to:
9 (A) determine if a prisoner is pregnant; and
10 (B) ensure that the jail's health services plan
11 addresses medical and mental health care, including nutritional
12 requirements, and any special housing or work assignment needs for
13 persons who are confined in the jail and are known or determined to
14 be pregnant; ~~and~~
15 (19) provide guidelines to sheriffs regarding
16 contracts between a sheriff and another entity for the provision of
17 food services to or the operation of a commissary in a jail under
18 the commission's jurisdiction, including specific provisions
19 regarding conflicts of interest and avoiding the appearance of
20 impropriety; and
21 (20) adopt reasonable rules and procedures regarding
22 visitation of a prisoner at a county jail by a guardian, as defined
23 by Section 1002.012, Estates Code, that:
24 (A) allow visitation by a guardian to the same
25 extent as the prisoner's next of kin, including placing the
26 guardian on the prisoner's approved visitors list on the guardian's
27 request and providing the guardian access to the prisoner during a

1 facility's standard visitation hours if the prisoner is otherwise
2 eligible to receive visitors; and
3 (B) require the guardian to provide the sheriff
4 with letters of guardianship issued as provided by Section
5 1106.001, Estates Code, before being allowed to visit the prisoner.

6 SECTION 5. Not later than December 1, 2015:

7 (1) the Texas Department of Criminal Justice shall
8 revise visitation policies consistent with Sections 501.010 and
9 507.030, Government Code, as amended by this Act; and

10 (2) the Commission on Jail Standards shall establish
11 rules and procedures as required by Section 511.009(a)(20),
12 Government Code, as added by this Act.

13 SECTION 6. Article 26.041, Code of Criminal Procedure, as
14 added by this Act, applies only to a person who is arrested on or
15 after the effective date of this Act. A person arrested before the
16 effective date of this Act is governed by the law in effect on the
17 date the person was arrested, and the former law is continued in
18 effect for that purpose.

19 SECTION 7. This Act takes effect September 1, 2015.