DOES THE GUARDIAN'S ATTORNEY OWE A DUTY TO THE WARD?

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I. INTRODUCTION

Each day applications for the appointment of guardians for incapacitated individuals are filed in the nation's courts.[1] The application for guardianship is generally prepared with the assistance of an attorney who represents the party who seeks to be appointed guardian.[2] If the guardianship is approved, and the applicant is appointed guardian, it is not unusual for the newly appointed guardian to retain the services of an attorney to assist in carrying out his or her duties. It is during this second phase of the guardianship that the question arises as to who is the attorney's client: the guardian who retained the services of the attorney or the ward, or both? While it was clear that during the application process the sole client of the attorney is the applicant, the proposed ward being represented by court-appointed counsel, once the guardianship is in place, does the guardian's attorney assume the additional responsibility of representing the interests of the ward?[3] Does the guardian's attorney now have two clients, and therefore two sets of duties?

The answer to these questions takes on great importance when the guardian's attorney discovers that the guardian is engaged in conduct that is detrimental to the interest of the ward, such as misappropriating estate assets for personal gain. What course of action is the guardian's attorney supposed to take under those circumstances? The answer to this question becomes even more personal to the guardian's attorney when, following the removal of the misappropriating guardian, the successor guardian sues the former guardian and the attorney, alleging as to the attorney, that the attorney was negligent in failing to discover the guardian's misappropriations.

This paper will review the principal theories that address the breadth and scope of the duties of the guardian's attorney in an effort to provide a warning and some guidance to those members of the bar who takes on the representation of guardians.

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[1] Incapacitated in the context of this article means a minor or an adult individual who, because of physical or mental conditions, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs or a person who must have a guardian appointed to receive funds due to the person from government resources. TEX. PROB. CODE ANN. § 3(p) (West Supp. 2000).

[2] In some states the individual who seeks to be appointed to assist an incapacitated individual with his or her property is referred to as the "conservator."

[3] The court-appointed counsel for a proposed ward in Texas is referred to as the "attorney ad litem." TEX. PROB. CODE ANN. § 646.

II. THE PRINCIPAL THEORIES OF LIABILITY AND DEFENSE

In some jurisdictions, a duty is imposed on the guardian′s attorney to exercise his position of trust and superior knowledge to the benefit of the ward based on the belief that on policy grounds there needs to be a careful "balancing of interests" in favor of protecting the ward irrespective of the fact the attorney is not in privity with the ward. A second school of thought subscribes to the belief that in any guardianship proceeding the ward is the "intended beneficiary," and therefore an attorney owes a duty of care to the ward the breach of which will serve as the basis for liability. A third school of jurisprudence looks at the very nature of the guardianship itself and the duties imputed to the guardian and finds that any attorney hired by the guardian to assist with taking care of the interests of the ward, has an attorney-client relationship with, not only the guardian, but also the ward.

As the privity doctrine represents an absolute bar to liability claims by third-party beneficiaries not in privity with the attorney, this doctrine will be addressed first.

III. THE PRIVITY BAR

The privity doctrine holds that an attorney does not owe a duty to third parties the attorney did not represent absent special circumstances such as fraud or collusion with the client.[4] In denying liability of the attorney to one not privy of contract for the consequences of professional negligence, the courts have relied primarily on two arguments: (1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties.[5]

While there are no appellate court decisions that have applied the privity doctrine in the face of an allegation of malpractice against a guardian's attorney, the doctrine remains a viable defense to claims of attorney negligence in the estate and trust planning area, and can be expected to be advanced as a defense in the context of a guardianship.[6]

The application of the privity bar can best be understood by briefly visiting the recent New York State Supreme Court decision in *Conti v. Polizzotto*,[7] which applied the bar to a third party claim of negligent will drafting against an attorney. In *Conti*, the beneficiaries of a will brought an action against the attorney who drafted the will for legal malpractice in addition to a variety of other claims. The plaintiffs in this case had paid for and instructed the defendant attorney to draft a will on behalf of their aunt, Lucia Borrometi, in such a manner that would allow her husband to benefit from certain real property during his lifetime, and that, upon his death, the real property would pass in its entirety directly to the plaintiffs.

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[4] Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879).

[5] 7 AM. JUR .2D *Attorneys At Law* § 249 (1964).

[6] S. B. Hurme, *Attorneys For Guardians Have Duties Toward Incapacitated Persons*, 1997 ELDER LAW FORUM 11-12.

[7] 646 N.Y.S.2d 259 (1996).

Upon the death of Borrometi, her will was probated. At that time the Surrogate's Court of Kings County, New York determined that only two-thirds of the property in question would pass to the plaintiffs, the remaining one-third passing to the estate of the decedent's spouse in which the plaintiffs had no interest. In affirming the judgment dismissing the plaintiffs' cause of action for legal malpractice, the Supreme Court of Kings County, New York applied the privity doctrine stating that "[i]n order for the plaintiffs to sustain a cause of action sounding in negligence, privity must exist between them (the plaintiffs) and the defendant."[8] The court went on to point out that the "[p]laintiffs are clearly the beneficiaries of the will and not the party for whom defendants drafted the will."[9] Even if, the court held, the "...plaintiffs hired and paid the defendants, they are not liable for malpractice to persons other than their client, Lucia Borrometi."[10]

IV. THE "BALANCING TEST" EXCEPTION TO THE PRIVITY DOCTRINE

Although firmly entrenched in New York jurisprudence as well as in the body of jurisprudence of three other states, the trend around the nation is away from the application of the privity rule.[11] The movement started with three decisions out of California: *Biakanja v. Irving*,[12] *Lucas v. Hamm*,[13] and *Heyer v. Flaig*.[14]

In *Biakanja*, the California Supreme Court imposed liability on a notary whose negligent execution of a will caused the will not to be admitted to probate. The court held the notary liable even though the beneficiary under the will was not in privity with the defendant notary. In arriving at its decision, the court announced that the determination of whether it will impose liability on a third person not in privity of contract involves a balancing of six factors:

1. the extent to which the transaction was intended to affect the plaintiff;
2. the foreseeability of harm to the plaintiff;
3. the degree of certainty that the plaintiff suffered the injury;
4. the closeness of the connections between the defendant's conduct and the injury suffered;
5. the moral blame attached to the defendant's conduct; and
6. the policy of preventing future harm.

In *Lucas*, the California Supreme Court extended this balancing test to attorneys. In doing so, the court added a sixth factor to the balancing test. This factor is whether or not the imposition of such liability would impose an undue burden on the legal profession.[15] While the court in *Lucas* in applying the balancing test did not find sufficient facts to impose liability on the attorney, the court reached a different result in *Heyer v. Flaig*.[16]

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[8] *Id*. at 260.
[9] *Id*.
[10] *Id*.
[11] The three states are Texas, Ohio and Missouri. *See* James Howard, *Supreme Court Reverses Trend*, TEX. BAR J., Mar. 1997, at 208.
[12] 320 P.2d 16 (Cal. Ct. App. 1958).
[13] 364 P.2d 685 (Cal. 1961).
[14] 449 P.2d 161 (Cal. 1969).
[15] 364 P.2d at 688.
[16] 449 P.2d at 168-69.

In *Heyer*, the beneficiary under a will sued the drafting attorney for failing to advise the decedent of the effect of a subsequent marriage on the testamentary disposition in his will. The court found that an attorney who undertakes to fulfill a testamentary disposition in fact assumes a "relationship" with the client's intended beneficiaries. The court held that the duty of an attorney in an estate planning context stems from the undertaking to perform service for the client, and such duty extends to protect the intended beneficiary.[17] Stated another way, the duty is determined by reference to the attorney-client relationship, and the duty owed to the beneficiary is that owed to the client, the intended beneficiary.

V. FICKETT'S CHARGE - CARRYING THE BALANCING TEST INTO THE GUARDIANSHIP ARENA

In 1976, the Superior Court of Arizona, in *Fickett v. Superior Court*,[18] was confronted with the question as to whether a guardian's attorney was negligent in failing to discover the misappropriation of assets by the guardian. This was the second of two cases the court was hearing relative to the same guardianship. To fully understand the result in *Fickett*, it is necessary to briefly visit the facts of the companion case of *Guardianship of Styers*.[19]

Styers involved a review of the results of a surcharge action brought by a successor guardian against a former guardian for his misappropriation of the assets of the ward, Lillian Styers. When Styers' health failed, her investment broker became the guardian of her person and her estate, an estate valued at more than $1.3 million. Three years into his appointment, the guardian was removed for having failed to file any accountings. Through an investigation conducted by the successor guardian, it was determined that the guardian used his court authority as guardian for personal gain. More specifically, the former guardian, used the ward's assets to build a building that was used to house his wife's beauty salon. The guardian also lent estate money for the development of a bridal boutique and invested $49,000 of estate funds in a variety of ventures, all without court authority. The guardian also took large sums of money from the estate to pay a building management company which in turn paid money to the former guardian and his wife. If this were not enough, the former guardian co-mingled funds from the sale of securities in his own personal bank account. By the time the successor guardian was appointed, the estate had been depleted.

Following a successful surcharge action against the former guardian,[20] the successor guardian then proceeded to file a separate suit against Fred Fickett, the attorney who represented the former guardian. The successor guardian took the position that Fickett, as attorney for the former guardian, was negligent in failing to discover the misconduct of the former guardian.

Fickett responded to this allegation by asserting two affirmative defenses. First, since there was no allegation of fraud or collusion between the guardian and his attorney, a fact conceded by the guardian, the attorney was not liable for the guardian's misappropriation of the assets of the guardianship estate. Second, the successor guardian had no standing to sue due to the lack of privity of contract between Fickett and the ward.

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[17] *Id*. at 165.
[18] 27 Ariz. App. 793, 558 P.2d 988 (1976).
[19] 24 Ariz. App. 793, 536 P.2d 717 (1976).
[20] *Id*. at 721.

Acknowledging the absence of privity of contract between Fickett and the ward, the court went on to find that "when an attorney undertakes to represent the guardian of an incompetent, he [the attorney] assumes a relationship not only with the guardian but also with the ward."[21] Interestingly, the Arizona court did not refer to the relationship between the ward and the attorney as an "attorney-client" relationship, nevertheless found a "relationship" sufficient to impose a duty on the guardian's attorney.[22]

In arriving at a decision to impose liability on Fickett, the Arizona court emphasized that as between the attorney and the guardian, and the attorney and the ward, "the ward's interests overshadow those of the guardian."[23] Drawing heavily on the reasoning in *Heyer* and quoting extensively from the opinion in *Lucas*, the court explained the origin of the duty to the ward as follows:

> The duty [of the attorney] thus recognized in *Lucas* stems from the attorney's undertaking to perform legal services for the client but reaches out to protect the intended beneficiary. We impose this duty because of the relationship between the attorney and the intended beneficiary; public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interest are certain and foreseeable. Although the duty accrues directly in favor of the intended testamentary beneficiary, the scope of the duty is determined by reference to the attorney-client context. Out of this agreement to provide legal services to a client, the prospective testator, arises the duty to act with due care as to the interest of the intended beneficiary. We do not mean to say that the attorney-client contract for legal services serves as the fundamental touchstone to fix the scope of this direct tort duty to the third party. The actual circumstances under which the attorney undertakes to perform his legal services, however will bear on a judicial assessment of the care with which he performs his services.[24]

With the reasoning in *Lucas* serving as the basis for its opinion, the court then went on to announce the elements of the "balancing test" to be used to determine whether an attorney owed a duty to a third party in the absence of privity. According to the court, "the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity . . . involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[25] The court then proceeded to find that Fickett in fact owed a duty to the ward.

While at least one other state has adopted the reasoning in *Fickett* to impose liability on a

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[21] 558 P.2d at 990.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 990-91.
[25] *Id*. at 990.

guardian's attorney,[26] the state of Florida has rejected the "balancing of factors" test, in favor of the application of a pure "intended beneficiary" exception to the privity doctrine.

VI. THE FLORIDA APPROACH
THE INTENDED BENEFICIARY EXCEPTION TO THE PRIVITY DOCTRINE

In 1996, Thomas E. Penick, Jr., Judge of the Sixth Judicial Circuit in Florida, posed the following question to the Florida Attorney General: "Does an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the Ward's estate for such services assume a duty to the Ward as well as to the guardian?"[27] In responding to this question, the Attorney General of Florida pointed out that the Supreme Court of Florida had rejected the "balancing of factors" test favored in the California case of *Biakanja*[28] as the basis for determining whether liability should be imposed on an attorney not in privity of contract. The Attorney General went on to point out that Florida courts have uniformly limited an attorney's liability for negligence in the performance of his or her professional duties to those with whom her or she is in privity of contract, unless it was the apparent intent of the client to benefit a third party.

As an example of the application of the "intended beneficiary" exception to the privity bar, the Attorney General referred to the Florida case of *Rushing v. Bosse*,[29] which held according to the Attorney General, that an attorney for adoptive parents owed a duty to the child who was the subject of the adoption. As reported by the Attorney General, the court in *Rushing* concluded "that the child was the intended beneficiary of the adoption proceeding and that it was the intent of the adoptive parents to benefit the child by adopting her. Since the adoption proceedings are intended to serve the best interests of the child, the court found that the attorney, although in privity with the adoptive parents and not the child, owed a duty of care to the child to be adopted."[30]

In deciding whether this "intended beneficiary" exception to the privity doctrine applied to a guardianship, the Attorney General looked to the state's guardianship code for guidance. The Florida Attorney General focused its analysis on Section 744.108 of the Florida guardianship statutes which authorize payment of attorney's fees to an attorney who has rendered services to the ward or to the guardian on the ward's behalf. Based on this fee provision, the Attorney General took the position:

> . . . that the statute itself recognizes that the services performed by an attorney who is compensated from the ward's estate are performed on behalf of the ward even though the services are technically provided to the guardian. The relationship between the guardian and the ward is such that the ward must be considered to be the primary or intended beneficiary and cannot be considered an "incidental third-party beneficiary."[31]

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[26] *See* Schwartz v. Hamblen, 276 Ill.App.3d 1018, 659 N.E.2d 61 (1996).
[27] FLORIDA ATT'Y GEN. OPINION 96-94 (Nov. 20, 1996).
[28] *See supra* note 12 and accompanying text.
[29] FLORIDA ATTY'Y GEN. OPINION *supra* note 27.
[30] *Id*.
[31] *Id*. at 2.

Accordingly, it was the opinion of the Florida Attorney General that an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

VII. TEXAS - THE IMPLIED ATTORNEY-CLIENT RELATIONSHIP

Neither the court in *Fickett* nor the Florida Attorney General's Opinion specifically refer to the relationship between the guardian's attorney and the ward as an "attorney-client" relationship." However, this characterization of the relationship does appear in the Texas case of *Daves v. Commission for Lawyer Discipline*.[32]

Daves involved a disciplinary proceeding brought against an attorney for violation of the Texas Disciplinary Rules of Professional Conduct by representing both parents and their minor child, who had conflicting claims to settlement proceeds arising out of injuries suffered by the child. More specifically, the child's parents learned that he had been sodomized and infected with the AIDS virus while the child was being treated in a hospital for behavioral problems. Facing huge medical expenses, the parents hired attorney Jay Harvey to represent them against the hospital and its employees. A tentative settlement was reached with the hospital in the amount of $1,500,000. This settlement did not provide any compensation for the parents' claims.

Disgruntled with the services of Harvey, the parents sent a letter to him requesting termination of his services. In the meantime, Harvey filed a friendly suit in the District Court of Lubbock County, Texas seeking court approval of the settlement and requested the appointment of a guardian ad litem to represent the minor's interest at the settlement conferences.

The parents then retained a new attorney, Russell Daves, to have themselves appointed their child's co-guardians. The application was granted by the County Court of Lubbock County, Texas. An attorney ad litem was appointed to represent the child's interest during the guardianship proceedings. Following their appointment, the parents then applied to the court for and received permission to institute an action on behalf of the child against the same hospital for injuries sustained by the child while at the hospital. The parents received the court's permission and the parents hired the same attorney who they had retained to bring the guardianship application to pursue their child's claim against the hospital. Daves filed an application in the guardianship case, requesting permission for the parents, as co-guardians, to settle the child's claims against the hospital and its employees for the reduced sum of one million, $500,000 less than the original settlement amount negotiated by the first attorney, Harvey. The parents also made an offer to the hospital to settle their claims for $500,000. No settlement was reached.

Daves next filed a petition in the 166th District Court of Bexar County, Texas against the hospital on behalf of the parents individually and as co-guardians of the person and estate of the minor. This second suit was filed in a different county and court than the first suit. Another attorney ad litem was appointed for the child. When negotiations with the hospital failed to be successful, Daves amended the petition to include the hospital as a defendant.

Harvey, the first attorney, along with the original attorney ad litem, filed a grievance against

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[32] 952 S.W.2d 573 (Tex. App. - Amarillo 1997, writ denied).

the second attorney, Daves, with the State of Texas. The Commission for Lawyer Discipline of the State Bar of Texas then filed a disciplinary petition against Daves, alleging his conflict of interest in the representation of the parents and the child. More specifically, the Commission alleged that Daves had committed acts which were in violation of Rules 1.06 and 1.07 (conflict of interest provisions) and Rule 3.02 (minimizing the burdens and delays of the litigation provision) of the Texas Disciplinary Rules of Professional Conduct. A jury returned a verdict in favor of the Commission under both rules.

On appeal, Daves argued that because he had not been appointed by the court with authority over the guardianship to represent the child, he could not have an attorney-client relationship with the child. Dismissing this argument, the court held that "[t]he attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship."[33] In this connection the court noted the following facts as establishing an attorney-client relationship between Daves and the minor ward: Daves took action to assert the claims of the child in the Bexar County lawsuit; Daves negotiated the settlement of the claims with the hospital; Daves entered into a legal services contract with the parents on behalf of the child for Daves to represent the child; and the guardianship court approved the attorney-client fee contract with the parents as co-guardians.[34]

Succinctly stated, the court found that "Daves had a duty not only to the parents as co-guardians, but also to the child whose claims he was asserting and the attorney-client relationship had been established."[35]

Interestingly, Daves did not argue that he was not in privity of contract with the minor. Daves' principal argument (which the court dismissed as baseless) was that under the Disciplinary Rules, he could have no relationship with the child unless he was the court-appointed attorney for the client.

VIII. Special Circumstances of a Guardianship

In *Daves*, the court pointed out that under the Texas Probate Code, the co-guardian parents had the duty to bring suits on behalf of the child.[36] The court further noted that in order to bring suit on behalf of the child, it was necessary to employ an attorney who, once retained for this purpose, owed a duty to the minor ward. As other courts have pointed out under such circumstances, the attorney actually represents the interests of the ward, as the attorney's appointment is solely to implement the guardian's authority to represent those interests.[37]

But what if an attorney is retained by the guardian, not for the purpose of litigation but to provide the guardian with assistance in carrying out other duties such as the preparation and filing of annual accountings? Does the same attorney-client relationship exist under these circumstances

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[33] *Id*. at 577.
[34] *Id*.
[35] *Id*. at 577.
[36] *Id. See also* Mitchell v. McDonald, 114 Mont. 292, 136 P.2d 536 (1943).
[37] Clifton B. Kruse, Jr., *Ethical Obligations of Counsel in Representing Clients Petitioning to be Appointed Guaradians of Others or Of Their Estates or Both,* ACTEC NOTES 49 (1995). *See also* Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?,* 62 FORDHAM L. REV. 1319 (1994).

such that the attorney owes a duty to the ward if the accountings are not properly prepared? Could the advocates of the privity school of thought claim that in the absence of litigation the attorney's sole client is the guardian? Perhaps the answer to this question lies with an understanding of the special nature and circumstances surrounding the creation of a guardianship and the role of the guardian.

The sole purpose for the creation of a guardianship is to protect the interests of an individual who is considered incapacitated. If this condition exists, then the appointment of a guardian is appropriate. When the appointment is made, the guardian assumes a fiduciary relationship with the ward, and, depending upon the scope of the guardian's appointment, the guardian may be given the authority to represent both the ward's person and estate. The actual duties the guardian is to perform are defined by the court's order of appointment and those imposed under the controlling guardianship code. The guardian, as the court's appointee, is responsible for carrying out the duties given by the court and, at all times, the guardian remains accountable to the court.

When a guardian hires an attorney, it is, and can be for only one reason: to assist the guardian in carrying out the guardian's duties and responsibilities to the ward. As such, the attorney's authority to act is derivative of the guardian's authority, and irrespective of the specific purpose for the hiring, it is only logical that an attorney-client relationship with the ward come into existence at the moment the guardian hires the attorney. Furthermore, unlike the attorney who represents a fiduciary in an estate planning context, the guardianship exists in the present to provide for the immediate care and well-being of its sole beneficiary, the ward. The reason for its creation is clear, precise and does not involve some expectancy by a third party as is common to the estate planning area. Additionally, there is no risk that the guardian will be denied the benefit of his or her contract for employment with the attorney, because such a contract can only exist for the benefit of the ward, to help the guardian carry out his or her duties to the ward.

IX. CAN AN ATTORNEY SERVE TWO CLIENTS?

Perhaps the strongest argument against imposing a duty on the guardian's attorney to the ward is advanced by those who raise the issue as to a potential conflict of interest for the attorney.[38] What if the attorney retained by the guardian discovers that the guardian is misappropriating estate assets or placing the ward in inferior housing, thereby placing the ward at risk? Is the attorney free to report his or her concerns to the court? Does the attorney have a duty to report his or her concerns to the court? Where does the attorney's duty of loyalty lie?

Unfortunately, the Model Rules of Professionalism adopted by the American Bar Association (ABA) do not define the specific responsibilities of attorneys who represent guardians. Confusing the situation are at least one ABA opinion which concludes that "the lawyer's duty to preserve the client's confidences under Rule 1.6 is not altered by the circumstances as a fiduciary."[39] Thus, the opinion states that the lawyer may not breach confidences to prevent a wrongdoing by a fiduciary leaving one to believe that the only recourse for a guardian's attorney is to immediately withdraw as attorney of record.

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[38] William J. Brisk, *Ethics for the Elder Law Attorney*, Basics of Elder Law, National Academy of Elder Law Attorney's Symposium (May 6-9, 1998).

[39] ABA Comm. On Ethics and Professional Responsibility, Formal Op. 380 (1994).

X. RECOMMENDATION

In the current environment of uncertainty as to a guardian's attorney's duty to the ward, it would be prudent for an attorney who is about to be retained by a guardian, to clearly define his or her role relative to the guardian and the ward. While perhaps it would be nice to write an employment contract that states that the attorney is only providing services to the guardian and not to the ward, the reality is that, so long as there exist cases such as *Daves* and *Fickett*, and given the fact that the attorney's services are paid out of the ward's assets, it would seem impossible to draft around the attorney's duty to the ward. It would appear that the better course of action is for the attorney is to draft an employment contract that puts the guardian on notice of his or her dual representation, that the attorney views himself as having obligations beyond representing the fiduciary, and then secure prior authorization from the guardian to reveal confidences to the court should the circumstance arise. Hopefully, by such an agreement the attorney will be free to take immediate steps to protect the interests of the ward and thereby minimize the risk of someday standing in the shoes of Fred Fickett.[40]

[40] See discussion at *supra* notes 18-25 and accompanying text.