KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2025

The Honorable Donna Campbell, M.D.
Chair, Senate Committee on Nominations
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0485

Re: Relating to the rights of a mentally incapacitated person who is a ward of a guardianship to represent themself in civil or criminal matters (RQ-0545-KP)

Dear Senator Campbell:

Your request generally asks whether a court with probate jurisdiction can authorize guardians to hire and utilize legal counsel on behalf of a "mentally incapacitated" ward—that is, "a person for whom a guardian has been appointed," TEX. EST. CODE § 1002.030—who wishes to act as a pro se defendant in civil or criminal matters.[1] We understand you to first ask whether such a court may authorize guardians to require the ward to use legal counsel in criminal or civil proceedings.[2] Request Letter at 1. We understand you to further inquire whether such courts may authorize the ward's guardians to proceed pro se on the ward's behalf and whether an attorney who aids guardians in that endeavor improperly assists in the unauthorized practice of law. *Id.* at 2. You do not inform us whether the guardians possess full or limited authority over the ward's person, estate, or both.[3] *Id.* at 1–2. While we cannot determine the rights and duties in any particular guardianship, we can advise you generally about the issues we understand to be fundamental to your concerns.

[1] *See* Letter from Hon. Donna Campbell, M.D., Chair, S. Comm. on Nominations, to Hon. Ken Paxton, Tex. Att'y Gen. at 1–2 (June 13, 2024), https://www.texasattorneygeneral.gov/sites/default/files/request-files/request/2024/RQ0545KP.pdf ("Request Letter").

[2] You also ask about a next friend's authority. *Id.* Under Rule 44 of the Texas Rules of Civil Procedure, however, a next friend may represent certain individuals "who have no legal guardian." TEX. R. CIV. P. 44. Given that you present circumstances in which a guardian has been appointed, we do not address the authority of a next friend.

[3] You do, however, refer to a "[g]uardianship [t]eam." Request Letter at 1–2. This term does not appear in any Texas statute of which we are aware, including the Estates Code. We presume that the term "guardianship team" is meant to convey that a guardian of the person and a guardian of the estate have both been appointed, each of whom agreeing that the ward should be required to use legal counsel.

Title 3 of the Estates Code sets forth the framework for establishing and administering a guardianship for a mentally incapacitated person.

Title 3 of the Estates Code generally establishes the legal framework governing guardianships. *See generally* TEX. EST. CODE §§ 1001.001–1357.102. A court with probate jurisdiction "may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the incapacitated person." *Id.* § 1001.001(a). Where appropriate, such a court appoints a guardian by a court order that specifies "whether the guardian is of the person or estate of the ward, or both." *Id.* § 1101.153(a)(1)(C). A qualified appointee subsequently receives letters of guardianship, *id.* § 1106.001, after which "[t]he court order that appoints the guardian is evidence of the authority granted to the guardian and of the scope of the powers and duties that the guardian may exercise," *id.* § 1106.005(b).

A court order establishing a full-authority guardianship must expressly state "that the guardian has full authority over the incapacitated person." *Id.* § 1101.151(b)(2). Conversely, creation of a limited-authority guardianship requires a finding "that the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property with or without supports and services." *Id.* § 1101.152(a). Limited-authority guardianship orders must include, among other things, "the specific powers, limitations, or duties of the guardian with respect to the person's care or the management of the person's property by the guardian," "the specific rights and powers retained by the person," whether the person requires "supports and services" for those retained rights and powers, and "whether the person is incapacitated because of a mental condition." *Id.* § 1101.152(b)(2), (2-a), (4).

Chapter 1151 of the Estates Code generally sets forth the rights, powers, and duties of both a ward and guardian. *See id.* §§ 1151.001–.351. A guardian of the person, for example, receives authority to maintain physical possession of the ward, establish the ward's legal domicile, and consent to most forms of medical, psychiatric, and surgical treatment of the ward.[4] *Id.* § 1151.051(c)(1), (4). On the other hand, a guardian of the estate is entitled to "possess and manage all property belonging to the ward" and "bring and defend suits by or against the ward," although "management of a ward's estate" is "governed by" and remains "[s]ubject to" the other provisions of the Estates Code. *Id.* § 1151.101(a)(1), (4), (b). If a single person serves as a guardian of the person and the estate, that guardian "has all the rights and powers and shall perform all the duties of the guardian of the person and the guardian of the estate." *Id.* § 1151.004.

Notably, this chapter also repeatedly counsels that a ward retains all rights and powers not specifically granted to a guardian. Section 1151.001, for example, provides that "[a]n incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian." *Id.* § 1151.001. Likewise, the "Bill of Rights for Wards" provides that "[a] ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where

[4] We note that, under limited circumstances, a guardian of the person may also have limited access to a ward's funds. *See, e.g.*, TEX. EST. CODE § 1151.0525 (allowing court-ordered access where there is no guardian of the estate).

otherwise lawfully restricted." *Id.* § 1151.351(a). A ward retains the authority "to exercise full control of all aspects of life not specifically granted by the court to the guardian" as well as the right "to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met" except where "limited by a court or otherwise restricted by law." *Id.* § 1151.351(b)(8), (14).

The determination of mental incompetence by a court with probate jurisdiction does not obviate a trial court's responsibility to decide whether a ward may exercise the right to self-representation in a criminal proceeding.

With the above statutory framework in mind, we first address whether a court with probate jurisdiction can vest limited-authority guardians with the power to mandate legal representation of a mentally incapacitated ward in criminal proceedings.[5] This implicates the ward's right to self-representation under the Sixth Amendment to the United States Constitution.[6] *See Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that "the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the [Sixth] Amendment"). When appointing a guardian, a court with probate jurisdiction must specify whether the ward is incapacitated because of a mental condition. TEX. EST. CODE §§ 1101.151(b)(4) (full-authority guardianship), .152(b)(4) (limited-authority guardianship). Generally, the court also may authorize guardians to exercise a ward's legal rights if such rights are "specifically granted to the guardian" as "designated by . . . order" of the court establishing the guardianship. *Id.* § 1151.001. But the right to self-representation in the criminal context is unique in that its assertion requires waiver of a coordinate constitutional right.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This express guarantee also "implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *Faretta*, 422 U.S. at 814 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)). Assistance of counsel and self-representation therefore "are separate rights depicted on the opposite sides of the same Sixth Amendment coin," and invoking one "obviously" forgoes the other. *Osorio-Lopez v. State*, 663 S.W.3d 750, 756 (Tex. Crim. App. 2022) (quoting *United States v. Purnett*, 910 F.2d 51, 54 (2d Cir. 1990)). Given this close connection, a defendant who wishes to proceed pro se must not only "clearly and unequivocally" assert the right to self-representation but also demonstrate that the waiver of "many of the traditional benefits associated with the right to counsel" is made "knowingly and intelligently." *Faretta*, 422 U.S. at 835; *see also Brown v.*

[5] As a practical matter, we presume your question about criminal proceedings does not concern full-authority guardians of the person and estate where the mentally incapacitated ward has been determined to be "totally without capacity to care for himself or herself, manage his or her property, operate a motor vehicle, make personal decisions regarding residence, and vote in a public election." TEX. EST. CODE § 1101.151(a).

[6] While you reference "inalienable [c]onstitutional or legislative rights," including the "constitutional right to assert a wholly [p]ro [s]e representation," your request mentions the Texas Constitution but not the United States Constitution. Request Letter at 1–2. The Texas Constitution provides that "[i]n all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both." TEX. CONST. art. I, § 10. However, this provision "was not intended to encompass the right to self-representation as delineated in *Faretta v. California*." *Tracy v. State*, 597 S.W.3d 502, 509 (Tex. Crim. App. 2020). We thus apply the Sixth Amendment to the United States Constitution in response to your question about self-representation in criminal fora. *See* U.S. CONST. amend. VI.

Wainwright, 665 F.2d 607, 610 (5th Cir. 1982) ("While the right to counsel is in force until waived, the right of self-representation does not attach until asserted.").

It follows that the right to self-representation cannot be divorced from waiver of the right to counsel. But a guardian generally "may not waive legal rights on behalf of his ward, surrender or impair rights vested in the ward or impose any legal burden thereon." *Young Men's Christian Ass'n of Metro. Fort Worth v. Com. Standard Ins. Co.*, 552 S.W.2d 497, 505 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.); *cf. Lowery v. Berry*, 269 S.W.2d 795, 797 (Tex. 1954) ("Neither the next friend nor the parent of a minor child is authorized to agree to a judgment which throws away [the child's] substantial rights."); *Wright v. Jones*, 52 S.W.2d 247, 251 (Tex. Comm'n App. 1932, holding approved) ("The guardian ad litem or next friend can make no concessions, nor can he waive or admit away any substantial rights of the infant or consent to anything which may be prejudicial to him."). Instead, waiver requires a voluntary, knowing, and intelligent act of the ward. *See Faretta*, 422 U.S. at 835 (stating that "*the accused* must 'knowingly and intelligently' forgo those relinquished benefits" associated with the right to counsel (emphasis added)); TEX. CODE CRIM. PROC. art. 1.051(g) (requiring that "the waiver is voluntarily and intelligently made" where the accused "wishes to waive the right to counsel for purposes of . . . proceeding to trial").

Ultimately, determining the validity of a ward's assertion of self-representation rights and waiver of the right to counsel falls on the trial court. *See Indiana v. Edwards*, 554 U.S. 164, 177–78 (2008) (observing that a trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant"); *Lewis v. State*, 532 S.W.3d 423, 431 n.4 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) ("The discretion of the trial court to deny self-representation based on severe mental illness is well-established."). This inquiry takes "realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Edwards*, 554 U.S. at 177–78. In turn, there is no Sixth Amendment impediment where a trial court "insist[s] upon representation by counsel for those competent enough to stand trial" but mentally incapable of "conduct[ing] trial proceedings by themselves."[7] *Id.* at 178.

To summarize, a court would likely conclude that a mental incapacity determination by a court with probate jurisdiction would not prevent a ward from asserting self-representation rights in a criminal proceeding. Whether a ward can exercise those rights depends on the trial court's assessment of the ward's competence to conduct their own defense as well as the ward's capacity to knowingly and intelligently waive the coordinate right to counsel.

[7] Competence to stand trial presents a separate question from competence to conduct one's own defense and is subject to a different legal standard. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (setting forth the Constitution's mental competence standard for standing trial); *see also Lewis*, 532 S.W.3d at 433 ("A finding of competence to stand trial does not automatically qualify a defendant to also conduct his own defense; neither does a denial of self-representation disqualify a defendant from being found competent to stand trial.").

A court with probate jurisdiction does not violate a ward's rights by authorizing guardians to utilize legal counsel to defend the ward in a civil suit.

You also ask whether a court with probate jurisdiction can empower guardians to use legal counsel when defending a mentally incapacitated ward in civil proceedings. Request Letter at 1. A guardian of the estate generally "is entitled to[] . . . defend suits . . . against the ward." TEX. EST. CODE § 1151.101(a)(4); *see also Taylor ex rel. Gordon v. Livingston*, No. CV H-06-2790, 2007 WL 9662162, at *4 (S.D. Tex. Aug. 17, 2007) (recognizing that a guardian of the person is not statutorily authorized to defend against suit while "[t]he rights given a guardian of the estate . . . do clearly include such rights"). The express authority to defend against lawsuits includes an implied authority to hire counsel for such a purpose. *See Breaux v. Allied Bank of Tex.*, 699 S.W.2d 599, 602 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (holding that "[t]he ability to contract for legal services was incident to the other powers granted to" a guardian of the estate in that instance); *cf. Kriegel v. Scott*, 439 S.W.2d 445, 446 (Tex. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.) (finding that the express authority of a temporary administrator to "determine, collect, hold, protect and preserve all assets and properties of the Estate" included the "inferred power" to bring suit for trespass to try title). Where counsel is validly retained pursuant to powers granted to the guardians by a court exercising probate jurisdiction, such counsel may look to the guardians for decisions on the ward's behalf that fall within the scope of representation. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.17 cmt. 3, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A ("If a guardian or other legal representative has been appointed for the client [who suffers from diminished capacity], . . . the law may require the client's lawyer to look to the representative for decisions on the client's behalf.").

You suggest that requiring the use of attorneys in civil defense matters may violate a ward's rights. Request Letter at 1. Generally, "[o]ne has a right to represent oneself in civil litigation in Texas courts." *Windsor v. Round*, 591 S.W.3d 654, 673 (Tex. App.—Waco 2019, pet. denied) (quoting *Hosey v. Cnty. of Victoria*, 832 S.W.2d 701, 705 (Tex. App.—Corpus Christi-Edinburg 1992, no writ)). However, this right differs significantly from the right to self-representation in criminal proceedings. The right to represent oneself in civil matters is not derived from the Sixth Amendment and thus does not require the waiver of any concomitant right to counsel. *See Smith v. Smith*, 22 S.W.3d 140, 152 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (stating that the Sixth Amendment "does not apply to civil cases"); *In re State*, 556 S.W.3d 821, 827 (Tex. 2018) ("Civil litigants are generally not entitled to be represented by counsel absent a legislative mandate."). Instead, the entitlement to proceed pro se in civil litigation stems from the Texas Rules of Civil Procedure. *See In re S.V.*, 599 S.W.3d 25, 44 (Tex. App.—Dallas 2017, pet. denied) (relying on Rule 7 to conclude that "[i]n civil cases, a party is entitled to represent himself"); TEX. R. CIV. P. 7 ("Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."). Because the right to represent oneself in civil matters does not involve the waiver of other rights, a court would likely conclude that a court with probate jurisdiction may authorize a ward's guardians to decide whether the ward should proceed pro se or utilize legal counsel.[8]

[8] That is not to say, however, that a ward would be without recourse if a guardian has interests adverse to those of the ward. *See generally* TEX. R. CIV. P. 173.1–.7 (providing for the appointment of a guardian ad litem).

Non-attorney guardians may not proceed pro se on a ward's behalf and attorneys may not assist such guardians in the unauthorized practice of law.

You last inquire about authority to "hire . . . attorneys to assist" guardians with efforts to "review, manage, and negotiate with the judiciary [o]n behalf of the . . . [w]ard's interest." Request Letter at 2. You ask whether guardians can be "aided by" attorneys in this manner "while not violating the unauthorized practice of law statu[te] for Texas."[9] *Id.*; *see also* TEX. GOV'T CODE § 81.102(a) (stating that, with certain exceptions not relevant here, "a person may not practice law in this state unless the person is a member of the state bar"). We understand your question to involve non-attorney guardians attempting to defend a ward in court by acting as the ward's pro se alter ego while relying on legal advice from retained counsel.[10]

"[A]t common law, non-attorneys could not litigate the interests of others." *Raskin ex rel. JD v. Dall. Indep. Sch. Dist.*, 69 F.4th 280, 283 (5th Cir. 2023). Granted, "statutes can modify or abrogate common law rules, but only when that was what the Legislature clearly intended." *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 51 (Tex. 2015). However, the Legislature has not generally authorized non-attorneys to proceed pro se on another's behalf. *See, e.g.*, *Swain v. Dobbs*, 692 S.W.3d 720, 728 (Tex. App.—Corpus Christi-Edinburg 2023, no pet.) ("Rule 7 of the Texas Rules of Civil Procedure allows a person to represent himself or herself pro se only to litigate rights on his or her own behalf, not to litigate rights in a representative capacity." (citation omitted)); *Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, order) (per curiam) (holding an independent executor could not appear pro se because "he is litigating rights in a representative capacity rather than on his own behalf"). Absent such authorization, a non-attorney litigating on another's behalf engages in the unauthorized practice of law. *Rodriguez v. Marcus*, 484 S.W.3d 656, 657 (Tex. App.—El Paso 2016, no pet.) ("A non-lawyer may not[] . . . represent another party in litigation or on appeal because it constitutes the unauthorized practice of law."); *see also* TEX. GOV'T CODE § 81.101(a) (defining the "practice of law").

No court of which we are aware has decided whether Texas law allows court-appointed guardians to step into the shoes of their ward by proceeding pro se on the ward's behalf. However, the Fifth Circuit's recent parental-rights decision in *Raskin* is instructive. In addressing a parent's right "to represent the child in legal action" under Family Code subsection 151.007(a)(7), the court reasoned that "[j]ust because a *represented* guardian can sue on behalf of a child in Texas state court does not mean that the guardian can proceed *pro se* on behalf of the child." *Raskin*, 69 F.4th at 285 n.5 (quoting TEX. FAM. CODE § 151.001(a)(7)). Judge Oldham partially dissented, treating "represent" as the statute's "key word" and concluding that subsection 151.007(a)(7) assigns non-attorney parents the right to legally represent their children in court. *Id.* at 297–98 (Oldham, J., dissenting in part and concurring in the judgment); *accord In re A.G.*, 195 S.W.3d 886, 887 (Tex. App.—Waco 2006, no pet.) (per curiam) (citing subsection 151.007(a)(7) to support the

[9] You do not specify which statute you believe might be implicated. *See* Request Letter at 1–2. Because you provide no indication that non-attorney guardians are acting "with intent to obtain an economic benefit" for themselves, we do not consider the potential application of the criminal offense for the unauthorized practice of law. TEX. PENAL CODE § 38.123.

[10] An attorney may serve as guardian and "also provide[] legal services in connection with the guardianship." TEX. EST. CODE § 1155.052(a). In such circumstances, there is no concern with the unauthorized practice of law.

conclusion that a nonindigent juvenile whose counsel withdraws "may pursue the appeal without the assistance of counsel 'through a parent, legal guardian, next friend, or guardian ad litem'" (quoting *In re D.A.S.*, 973 S.W.2d 296, 299 (Tex. 1998))). This followed from the very nature of the parent-child relationship itself, Judge Oldham explained, which "is a sacred, pre-political bond that preexists both the United States and Texas, and which is uniquely enshrined into state and federal law." *Raskin*, 69 F.4th at 298 (Oldham, J., dissenting in part and concurring in the judgment).

Unlike subsection 151.007(a)(7), however, the Estates Code does not provide an appointed guardian the right to "represent" a ward in a legal action. Instead, "the guardian of the estate of a ward is entitled to[] . . . bring and defend suits by or against the ward." TEX. EST. CODE § 1151.101(a)(4). Our analysis therefore focuses on the term "defend" in subsection 1151.101(a)(4). The authority of guardians to "defend" suits has remained unchanged since its adoption in 1876. *See* Act of Aug. 18, 1876, 15th Leg., R.S., ch. 112, § 1, 1876 Tex. Gen. Laws 175, 181 ("The guardian of the estate is entitled . . . to bring and defend suits by or against [the ward]."). We thus consult relevant legal definitions of "defend" from the time this statutory authority was established. *See El Paso Indep. Sch. Dist. v. Portillo*, 661 S.W.3d 512, 524 (Tex. App.—El Paso 2023, pet. denied) (recognizing that "dictionary definitions may vary over the years, and therefore, in construing the Legislature's intent in using a statutorily undefined term, it is appropriate to consider how the term was defined in dictionaries published as close in time to the enactment of the statute as possible" (citing *Chamul v. Amerisure Mut. Ins. Co.*, 486 S.W.3d 116, 125 (Tex. App.—Houston [1st Dist.] 2016, pet. denied))); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (2012) ("And when the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning.").

Contemporary definitions of the word "defend" do not indicate that it included legal representation. One source defined the term as "[t]o forbid or deny; to oppose or resist; to contest an action, suit or other legal proceeding." STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 364 (1883). Another dictionary similarly defined "defend" as follows: "To prohibit or forbid. To deny. To contest and endeavor to defeat a claim or demand made against one in a court of justice. To oppose, repel, or resist." HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 344 (1891). In this context, the term "defend" connotes that a represented guardian possesses the legal capacity to coordinate a ward's defense against suit rather than to mount a pro se defense on the ward's behalf. *Cf. Raskin*, 69 F.4th at 285 n.5. Nor does the nature of guardianships call this into question; the guardian-ward relationship is a creature of statute that does not involve a "sacred, pre-political bond" like that of a parent and child.

Accordingly, a court would likely conclude that the Legislature did not clearly intend to abrogate the common law rule that non-attorney guardians may not litigate the interests of wards by authorizing guardians to "defend suits." And while this office "cannot conclusively determine whether particular conduct constitutes the practice of law," Tex. Att'y Gen. Op. No. GA-0936 (2012) at 3, such litigation efforts by non-attorney guardians may provide a basis for the court to conclude that the unauthorized practice of law has occurred.

Finally, we briefly touch upon the ethical implications of an attorney providing legal advice in support of guardians that themselves represent a ward in court. *See* Request Letter at 1 (referencing "the compulsory Texas Bar Rules . . . for the unauthorized practice of law"). Rule 5.05 of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer shall not[] . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.05(a)(2). A comment on the rule clarifies that "a lawyer may counsel nonlawyers who wish to proceed pro se, since a nonlawyer who represents himself or herself is not engaged in the unauthorized practice of law." *Id.* R. 5.05 cmt. 3. However, that comment is inapplicable if a non-attorney guardian may not proceed pro se on behalf of a ward. Accordingly, if a court concluded that non-attorney guardians proceeding pro se on a ward's behalf constitutes the unauthorized practice of law, it would also likely conclude that an attorney who facilitates such actions violates Rule 5.05.

S U M M A R Y

A court with probate jurisdiction may establish a guardianship for an incapacitated person who is substantially unable to perform certain essential functions because of a mental condition. The court may appoint a guardian with either full or limited authority over the ward's person, the ward's estate, or the ward's person and estate. The court order appointing a guardian provides evidence of the scope of the guardian's powers and duties. A ward retains all rights and powers not specifically granted to a guardian by the appointing court.

The Sixth Amendment to the United States Constitution provides criminal defendants a limited right to self-representation and its assertion requires waiver of the right to assistance of counsel. While a court with probate jurisdiction must determine whether a ward is mentally incapacitated, a ward seeking to proceed pro se may assert the right to self-representation in the trial court conducting criminal proceedings. The trial court then determines whether the ward is competent to conduct trial proceedings on his own behalf and whether waiver of the right to counsel is voluntary, knowing, and intelligent.

Guardians may be authorized by a court with probate jurisdiction to hire counsel to defend a ward in civil litigation because assertion of the right to defend oneself in that context does not require the waiver of other rights.

A court with probate jurisdiction may not authorize non-attorney guardians to proceed pro se on a ward's behalf. A non-attorney guardian that represents a ward in litigation could be found to have engaged in the unauthorized practice of law. An attorney that assists non-attorney guardians in performing an activity that constitutes the unauthorized practice of law violates the Texas Disciplinary Rules of Professional Conduct.

Very truly yours,

Ken Paxton

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