

Presented:

Estate Planning, Guardianship and Elder Law Conference

August 8-9, 2013
Galveston, Texas

Attorney's Fees in Probate Court

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Fees for Attorneys and Ad Litems

A. *Attorney's Fees in Temporary and Permanent Guardianships*

A temporary or permanent guardian is entitled to reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the ward's estate. TPC §§ 665A-669 (EC 1155.002-1155.151) (*The new Texas Estates Code – hereinafter, EC – takes effect January 1, 2014. Each TPC citation in this paper will have its EC successor cited parenthetically. N.B., because of 2013 legislative changes, the Estates Code successor statute may be substantively different - as will be seen, for example, in the next paragraph.*) If the ward's estate is insufficient to pay for the reasonable and necessary attorney's fees, fees may be paid from the county treasury – but “only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services from any other source.” TPC § 665B(c) (EC § 1155.054(e)).

The legislature made a change in the 2013 session long sought by bench and some of bar – by enacting § 1155.054(d). Here, in full:

“If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.”

And in § 1155.151(a), the Lege defined “court costs” to include “costs of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals and interpreters...”, and provided these costs shall be paid out of the guardianship estate (or the county treasury if the estate is insufficient), “except as provided by Subsection (c)”:

“If the court finds that a party in a guardianship proceeding acted in bad faith in prosecuting or objecting to an application in a proceeding, the court may order the party to pay all or part of the costs of the proceeding. If the party found to be acting in bad faith or without just cause was required to provide security for the probable costs of the proceeding under Section 1053.052, the court shall first apply the amount provided as security as payment for costs ordered by the court under this subsection.

If the amount provided as security is insufficient to pay the entire amount ordered by the court, the court shall render judgment in favor of the estate against the party for the remaining amount.”

This provision brings guardianship litigation more in line with TRCP 141 in giving courts power to assess costs against a party acting in bad faith.

Section 1155.151(d) also forecloses the argument that the parties to a guardianship proceeding could not be required to make a deposit for costs because they could not be ordered to pay the costs in a final order – the costs having to be borne by the ward's estate. *See, e.g., In re: Mitchell (Tx.App.-El Paso, 2011, no writ).*

These changes upend over a century of Texas practice in which attorney's fees and costs were paid by the ward's estate, with no bad faith exception.

1. **Payment of Attorney's Fees to Certain Attorneys**

TPC 665B was modified slightly but crucially during the 2013 legislative session as it transitioned to EC 1155.054 (a):

“A court that creates a guardianship or creates a management trust under Chapter 1301 [formerly TPC § 867] for a ward, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for creation of the management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just [new language, emphasis supplied], to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether the management trust is created....”

In telling courts to consider what attorney's fees are reasonable and necessary **and** whether that amount is also equitable and just, it seems plain a court is meant to consider such factors as the size of the ward's estate in making an attorney's fees award, and gives a court the power to adjust accordingly.

2. **Proof**

Before a court awards attorney's fees, the court must find that the applicant acted in good faith and

for just cause. TPC § 665B (EC §1155.054 (c)). Section 665B requires proof that the attorney's services were reasonable and necessary for the preservation, management, and safekeeping of the estate. In *Woollett v. Matyastik*, 23 S.W.3d 48 (Tex. App. – Austin 2000, pet. denied), the appeals court reversed the trial court's approval of attorney's fees and expenses because the fees were not supported by any evidence or proof and did not meet the requirements of TPC § 667. The application submitted by the temporary guardian was not verified, not itemized, not based on expert testimony, and it failed to detail the work, hourly rate or number of hours expended. It further failed to state that the rate was reasonable and customary in the county.

3. Hearing on Temporary Guardianship

Attorney's fees resulting from representation of a party in a hearing to determine the necessity for temporary guardianship may be assessed under TPC § 669 (EC § 1251.013) against the estate or against the county if the estate is insufficient.

4. Attorney's Fees to Non-prevailing Party When Guardianship Created

An attorney for an unsuccessful applicant where a guardianship is created may receive attorney's fees when the applicant has acted in good faith and for just cause in the attorney's representation of the person filing the application. TPC § 665B (EC § 1155.054 (a)). If there is no money in the estate, the county can reimburse the attorney, assuming there are funds available for this purpose. EC §1155.054 (b)(2).

B. Compensation When Guardian and Attorney are the Same Person

1. An attorney serving as both attorney and guardian may receive compensation for both roles. Specifically, TPC § 665D (EC § 1155.052) provides:

- An attorney who serves as guardian and also provides legal services in connection with the guardianship may not receive compensation for either service unless the attorney files with the court a detailed description of the services performed, identifying which of the services are guardianship services and which are legal services.
- An attorney providing both guardianship and legal services is not entitled to

attorney's fees for guardianship services that are not legal services.

- Compensation for guardianship services provided by an attorney serving as both attorney and guardian must be set by a court in accordance with TPC § 665 (EC § 1155.003) regarding compensation of guardians and temporary guardians. Attorney's fees for legal services provided by an attorney serving as both attorney and guardian must be set by a court in accordance with TPC §§ 665A, 665B and 666 (EC §§ 1155.054 & 1155.101).

2. Historically, many courts did not allow a guardian to be compensated both as an attorney and as personal representative because of the difficulty in segregating legal work from guardian work. Some courts have permitted this dual compensation. See *Henderson v. Viesca*, 922 S.W.2d 553, 558 (Tex. App. – San Antonio 1996, writ denied); *Burton v. Bean*, 549 S.W.2d 48 (Tex. Civ. App. – El Paso 1977, no writ). Although § 665D (EC § 1155.052) now provides a basis for dual compensation, a historical perspective on when dual compensation was allowed may be illuminating. Dual compensation was usually restricted to situations where:

- There was full disclosure of the guardian-attorney's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made after appointment. If the request was after the time of appointment, notice of the motion and hearing should be given to all interested parties who have made an appearance in the case.
- The guardian-attorney sought only guardian's compensation for guardian's services and sought attorney's fees only for legal services.
- The guardian-attorney keep meticulous records, carefully segregating legal and non-legal work, and applications for attorney's fees gave a detailed account of the legal services rendered to the estate.
- Attorney-fiduciaries were not paid attorney's fees for fiduciary services. For example, they should not be paid at their Court-approved attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the Court. If the attorney believes that the statutory compensation formula as applied

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First appeared as part of the conference materials for the
15th Annual Estate Planning, Guardianship and Elder Law Conference session
"Attorney's Fees in Probate Court"