

PRESENTED AT

23rd Annual Estate Planning, Guardianship and Elder Law Conference

August 5-6, 2021

Live Webcast

The Role of the Guardian

Craig Hopper

Author Contact Information:

Craig Hopper

Hipper Mikeska, PLLC

Austin, TX

chopper@hoppermikeska.com

Contents

I.	SCOPE OF OUTLINE.....	1
II.	QUALIFICATION OF THE GUARDIAN	1
	A. Filing Oath and Bond	1
	B. Criminal Background Checks for Family Members Serving as Guardian	1
	C. Requirements and Amount of Bond.....	2
	D. Safekeeping Agreements.....	2
III.	POWERS AND DUTIES OF GUARDIAN OF THE PERSON	3
	A. General Powers and Duties	3
	B. Consent to Administration of Psychoactive Medication and Electroconvulsive Therapy	3
	C. Creation of Trust	4
	D. Case Law Limitations on Authority	4
IV.	GENERAL DUTIES OF GUARDIAN OF THE ESTATE.....	4
V.	NOTICES TO CREDITORS	4
	A. General Publication Notice	4
	B. Notice to Unsecured Creditors	5
	C. Notice to Secured Creditors	5
	D. Notice to Comptroller	5
	E. Penalty for Failure to Give Notice	5
VI.	INVENTORY, APPRAISEMENT AND LIST OF CLAIMS	6
	A. General Requirements	6
	B. Court Action on Inventory	6
	C. Supplemental Inventory	6
	D. Failure to File	6
	E. Importance of Inventory.....	6
VII.	TAKING POSSESSION OF PROPERTY AND PAPERS	7
	A. General Rule.....	7
	B. Exceptions	7
	1. Social Security Benefits.....	7
	2. Revocable Trusts	7
	3. Estate Planning Documents	7
	4. Community Property	7
	C. Segregation of Assets.....	8
	D. Proper Accounting Procedures.....	8
VIII.	COLLECTION OF CLAIMS AND RECOVERY OF PROPERTY	9
	A. General Rules	9

B.	Limitations on Contingent Fee Contracts.....	9
C.	Power to Bring Suits	9
IX.	INVESTMENTS.....	9
A.	General Rules.....	9
B.	Special Rules.....	10
1.	Standard for Management and Investments	10
2.	Safe Harbor Rule for Investments	10
3.	Modification of Guardian’s Duty	10
4.	Retention of Assets.....	10
5.	Court-Ordered Investment Plan.....	11
6.	Testamentary Gifts and Survivorship Property	11
7.	Other Investments.....	11
8.	Reporting Loans	12
9.	Tax-Motivated Gifts; Contributions	12
X.	DISTRIBUTIONS FOR THE WARD’S SUPPORT.....	12
A.	General Rule Requiring Court-Ordered Monthly Allowance	12
B.	Special Rules.....	12
1.	Payment of Allowance if Multiple Guardians	12
2.	Parental Support Obligation	13
3.	Support of Ward’s Spouse or Dependents.....	13
4.	Ratification of Certain Expenditures	13
XI.	SALE OF CERTAIN PERSONAL PROPERTY	14
XII.	OTHER SALES OF PROPERTY	14
A.	Real Estate.....	14
B.	Personal Property	15
C.	Special Sale Provisions	16
XIII.	NATURAL DEATH ACT ISSUES.....	16
XIV.	DISPUTING WARD’S TITLE.....	16
XV.	PURCHASING ESTATE PROPERTY.....	17
XVI.	CLAIMS AGAINST THE ESTATE	17
XVII.	ANNUAL ACCOUNTS.....	18
A.	Guardian of the Estate.....	18
1.	Filing Requirements	18
2.	Contents.....	18
3.	Court Action on Account.....	19
B.	Guardian of the Person.....	19
XVIII.	COURT APPROVAL NECESSARY FOR CERTAIN ACTIONS	20
A.	Powers Limited by Court Order	20
B.	Certain Actions Do Not Require Prior Court Approval	20

C.	Many Actions Require Court Approval	20
D.	Court Approval Always Possible	21
XXIX.	LIABILITY FOR WARD’S ACTIONS	22
XX.	HEARING BY SUBMISSION.....	22
XXI.	COMPENSATION	22
A.	Guardian of the Estate	22
B.	Guardian of the Person.....	22
C.	Five Percent Limitation.....	23
D.	Important 2009 Legislative Changes.....	23
XXII.	GUARDIAN’S EXPENSES.....	23
XXIII.	FEDERAL INCOME TAXES.....	23
XXIV.	ANNUAL REVIEW OF GUARDIANSHIP	24
XXV.	FINAL ACCOUNT	24
A.	Grounds for Closing the Estate	24
B.	Duties of the Guardian of the Estate	25
1.	Filing Final Account.....	25
2.	Notice Requirements	25
3.	Court Action on Account.....	26
C.	Duties of Guardian of the Person	26
D.	Duty to Provide Information about Ward.....	26
E.	Failure to File Final Account	27
XXVI.	EXPENDITURES BY GUARDIAN OF PERSON ENTITLED TO RECEIVE GOVERNMENTAL FUNDS	27
XXVII.	COMMON LAW DUTIES.....	27
XXVIII.	CONCLUSION.....	27
XXIX.	ACKNOWLEDGMENTS	27

THE ROLE OF THE GUARDIAN

I. SCOPE OF OUTLINE

This outline discusses the duties and responsibilities of a guardian under Texas law. The discussion covers all aspects of guardianship administration from the initial qualification of the guardian to the closing of the guardianship, based on the laws in effect after September 1, 2021. Although this outline discusses the statutory duties and common law fiduciary obligations of a guardian, it is important to note that a guardian may also be required to take certain actions under local court rules. Since these rules can vary greatly from county to county and court to court, a consideration of these rules is beyond the scope of this outline. However, the cautious practitioner will review any applicable local rules before providing the guardian with any advice regarding their duties and responsibilities in administering the guardianship.

II. QUALIFICATION OF THE GUARDIAN

A. Filing Oath and Bond

A guardian must “qualify” before they are authorized to act as guardian. To qualify, the guardian must file their oath of office or unsworn declaration and any required bond with the probate court, and the bond must be approved by the Court. Texas Estates Code § 1105.002. These steps should be taken within twenty (20) days after the date of the order granting letters of guardianship. Texas Estates Code § 1105.003. The twenty (20) day time period for qualification does not apply when a guardian is appointed for a minor ward under Texas Estates Code § 1103.001 and the guardianship will not take effect until after the ward’s eighteenth birthday. Texas Estates Code § 1103.003. The probate court can revoke the appointment of a guardian who fails to qualify within the time period prescribed by law. Texas Estates Code §§1105.003, 1105.111, 1203.051(a)(1). These provisions apply to a guardian of the person and a guardian of the estate.

B. Criminal Background Checks, Registration and Certification

Since 2015, there have been several legislative and policy changes regarding the creation and tracking of guardianships. The Judicial Branch Certification Commission (JBCC) oversees the registration and certification of guardians, and has a wealth of information at its website: <https://www.txcourts.gov/jbcc/guardianship-certification/>. The JBCC requires each guardian to register online, and each guardian must become certified by completing an online training module. Texas Estates Code §1104.003. Criminal background checks area also now required of each guardian who is not a corporate guardian or an attorney; criminal background checks have been required for several years for private professional guardians, each person who represents the interests of a ward as a guardian on behalf of a private professional guardian, certain employees of private professional guardians, and employees/volunteers of guardianship programs. Texas Estates Code §1104.402. The criminal background check should be completed prior to hearing for the appointment of a guardian. Although Texas Estates Code § 1104.402 prescribes that it is the duty of the court’s clerk to obtain this information, § 1104.403 provides that any person may submit this information to the clerk not later than the 10th day before the date of the hearing. Additional requirements related to the backgrounds checks are found in Texas Government Code Chapter 155, including the requirement that a fingerprint based record be provided for a guardian applicant who will be in control of a liquid estate exceeding \$50,000. Guidance on all aspects of the registration and certification process is found at the JBCC website.

C. Requirements and Amount of Bond

Texas Estates Code § 1105.101 provides that the filing of a bond is mandatory in all guardianship proceedings unless:

1. The guardian is a corporate fiduciary, as defined in Texas Estates Code § 1002.007;
2. The guardian is a guardianship program operated by a county; or
3. The bond requirement for a guardian of the person has been waived by the ward's surviving parent in a will that has been admitted to probate by a Texas court, or in a written declaration other than a will.

The probate court is required to fix the bond for a guardian of the estate "in an amount sufficient to protect the guardianship and the guardianship's creditors." Texas Estates Code § 1105.152(a). This amount is defined by statute as the estimated value of the ward's personal property, plus the ward's anticipated revenue for the next twelve (12) months from designated sources other than federal social security payments. Texas Estates Code § 1105.154(a). If the bond is for a guardian of the person and there is no guardian of the estate, the court will consider a number of different factors in determining the amount of the guardian's bond, including the familial relationship between the guardian and the ward, the guardian's ties to the community, the guardian's financial condition, the guardian's past history of compliance with the court, and any reasons the guardian may have previously been denied a corporate surety bond. Texas Estates Code § 1105.102(c). Any interested person may apply to increase the amount of the guardian's bond if the bond is insufficient or defective, or if the bond and its record have been lost or destroyed. Texas Estates Code § 1105.251(b). The probate court can require the guardian to file a new bond for the same reasons, either with or without an initial hearing. Texas Estates Code § 1105.252(a).

D. Safekeeping Agreements

The amount of the guardian's bond can be reduced if cash or other assets of the ward's estate are deposited with a financial institution (as that term is defined in Section 201.101 of the Texas Finance Code) having its main office or a branch office in this state, subject to a safekeeping agreement. Texas Estates Code § 1105.156(a), (c). The terms of such an agreement must be approved by the probate court, and the agreement must provide that the funds or other assets in safekeeping cannot be withdrawn or released without an order of the court. Texas Estates Code § 1105.156(a), (d). The guardian's bond may also be reduced if the probate court allows the guardian to deposit his own cash or securities with a qualified depository subject to a safekeeping agreement. Texas Estates Code § 1105.157.

In 2015, the Texas legislature specifically authorized the use of safekeeping agreements prior to the guardian's qualification in order reduce the initial bond amount. Section 1101.156 was added to the Texas Estates Code, and provides as follows:

Sec. 1101.156. DEPOSIT OF ESTATE ASSETS.

- (a) At the time or after an order appointing a guardian is signed by the court but before letters of guardianship are issued, a court may, on the request of a party, require the deposit for safekeeping of cash, securities, or

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Role of the Guardian

Also available as part of the eCourse

[2021 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the
23rd Annual Estate Planning, Guardianship and Elder Law Conference session
"Role of the Guardian"