

PRESENTED AT

ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE

August 10-11, 2023

Galveston, Texas

THE ROLE OF THE GUARDIAN UNDER TEXAS LAWSTEPHEN JODY HELMAN, *AUSTIN**UPDATED BY:*MAITE ELORDUY GOMEZ, *Austin*

VICTORIA D. SEYBOLD

Osborne, Helman, Scott, Knisely & Stanton, LLP

*PRESENTED BY:*HON. POLLY JACKSON SPENCER, *San Antonio*

Senior Statutory Probate Judge, Retired

Author Contact Information:

Maite Elorduy

Osborne, Helman, Scott, Knisely &
Stanton LLP

Austin, Texas

melorduy@ohsks.com

512.542.2000

Contents

I.	SCOPE	1
II.	PRELIMINARY ISSUES BEFORE APPOINTMENT	1
	A. Required Training and Registration with the Judicial Branch Certification Commission	1
	Effective June 1, 2018, all guardianships in the State of Texas must be registered with the Judicial Branch Certification Commission (“JBCC”). Additionally, any guardian being appointed after June 1, 2018 must complete a training course with the JBCC prior to the hearing for the appointment of a guardian. There is no fee associated with registering the guardianship or taking the training course. While a paper registration form is available for guardians and proposed guardians to complete, the training course must be completed online. The required training course is available in both English and Spanish.	1
	Registration is what will prompt the JBCC to send the required criminal background check to the clerk. Therefore, if a proposed guardian seeks to be appointed in two separate matters, the guardian will need to submit two registration forms. Additionally, if seeking to appoint co-guardians, each co-guardian will need to submit a registration form. It should be noted, guardians should not register with the JBCC prior to an application being filed, as the registration form will ask for the case’s cause number, the name of the court in which the matter is pending, and the name of the presiding judge.	1
	It is advised that proposed guardians register the guardianship and complete the training course early in the process to ensure there are no delays when it comes time to set the case for a hearing. Once the proposed guardian completes the required training course a certificate of completion will generate, which should be filed into the matter. Should issues arise during the registration and training process the JBCC can be contacted via email or telephone.	1
	B. Criminal Background Checks for Proposed Guardians	2
III.	QUALIFICATION OF THE GUARDIAN	3
	A. Filing Oath and Bond	3
	B. Requirements and Amount of Bond	3
	C. Safekeeping Agreements	4
IV.	POWERS AND DUTIES OF GUARDIAN OF THE PERSON	4
	A. General Powers and Duties	4
	B. Consent to Administration of Psychoactive Medication and Electroconvulsive Therapy	5
	C. Creation of Trust	5
	D. Case Law Limitations on Authority	6
V.	GENERAL DUTIES OF GUARDIAN OF THE ESTATE	6
VI.	NOTICES TO CREDITORS	6
	A. General Publication Notice	6
	B. Notice to Unsecured Creditors	6
	C. Notice to Secured Creditors	7
	D. Notice to Comptroller	7
	E. Penalty for Failure to Give Notice	7

VII.	INVENTORY, APPRAISEMENT AND LIST OF CLAIMS	8
	A. General Requirements.....	8
	B. Court Action on Inventory	8
	C. Supplemental Inventory	8
	D. Failure to File	9
	E. Importance of Inventory	9
VIII.	TAKING POSSESSION OF PROPERTY AND PAPERS	9
	A. General Rule.....	9
	B. Exceptions.....	9
	1. Social Security Benefits.....	9
	2. Revocable Trusts.....	9
	3. Estate Planning Documents	9
	4. Community Property.....	10
	C. Segregation of Assets	11
	D. Proper Accounting Procedures.....	11
IX.	COLLECTION OF CLAIMS AND RECOVERY OF PROPERTY	12
	A. General Rules	12
	B. Limitations on Contingent Fee Contracts.....	12
	C. Power to Bring Suits	12
X.	INVESTMENTS	13
	A. General Rules	13
	B. Special Rules.....	13
	1. Standard for Management and Investments.....	13
	2. Safe Harbor Rule for Investments.....	13
	3. Modification of Guardian’s Duty.....	13
	4. Retention of Assets	14
	5. Court-Ordered Investment Plan	14
	6. Testamentary Gifts and Survivorship Property.....	15
	7. Other Investments	15
	8. Reporting Loans.....	15
	9. Tax-Motivated Gifts; Contributions.....	15
XI.	DISTRIBUTIONS FOR THE WARD’S SUPPORT	15
	A. General Rule Requiring Court-Ordered Monthly Allowance	15
	B. Special Rules.....	16
	1. Payment of Allowance if Multiple Guardians	16

2.	Parental Support Obligation.....	16
3.	Support of Ward’s Spouse or Dependents	16
4.	Ratification of Certain Expenditures.....	17
XII.	SALE OF CERTAIN PERSONAL PROPERTY.....	17
XIII.	OTHER SALES OF PROPERTY	17
A.	Real Estate	17
B.	Personal Property	19
C.	Special Sale Provisions	19
XIV.	NATURAL DEATH ACT ISSUES	19
XV.	DISPUTING WARD’S TITLE.....	20
XVI.	PURCHASING ESTATE PROPERTY.....	20
XVII.	CLAIMS AGAINST THE ESTATE	20
XVIII.	ANNUAL ACCOUNTS.....	22
A.	Guardian of the Estate.....	22
1.	Filing Requirements.....	22
2.	Contents	22
3.	Court Action on Account.....	23
B.	Problems Determining What is Income.....	23
C.	Guardian of the Person	24
XIX.	COURT APPROVAL NECESSARY FOR CERTAIN ACTIONS.....	24
A.	Powers Limited by Court Order.....	24
B.	Certain Actions Do Not Require Prior Court Approval	24
C.	Many Actions Require Court Approval.....	25
D.	Court Approval Always Possible.....	26
XX.	LIABILITY FOR WARD’S ACTIONS.....	26
XXI.	HEARING BY SUBMISSION.....	26
XXII.	COMPENSATION	27
A.	Guardian of the Estate.....	27
B.	Guardian of the Person	27
C.	Five Percent Limitation.....	27
D.	Other Important Compensation Issues.....	28
XXIII.	GUARDIAN’S EXPENSES	28
XXIV.	FEDERAL INCOME TAXES	28
XXV.	ANNUAL REVIEW OF GUARDIANSHIP	28
XXVI.	FINAL ACCOUNT	29

A.	Grounds for Closing the Estate	29
B.	Duties of the Guardian of the Estate	29
	1. Filing Final Account	29
	2. Notice Requirements.....	30
	3. Court Action on Account	31
C.	Duties of Guardian of the Person	31
D.	Duty to Provide Information about Ward	31
E.	Failure to File Final Account	32
XXVII.	EXPENDITURES BY GUARDIAN OF PERSON ENTITLED TO RECEIVE GOVERNMENTAL FUNDS	32
XXVIII.	EXPENDITURES BY GUARDIAN OF THE PERSON	32
XXIX.	CLIENT IDENTIFICATION ISSUES	33
XXX.	PROBLEMS INCIDENT TO SALES AND PURCHASES OF PROPERTY	34
XXXI.	COMMON LAW DUTIES	35
XXXII.	CONCLUSION	35

THE ROLE OF THE GUARDIAN¹

I. SCOPE

This article 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. Forms are also provided to assist the practitioner in drafting some of the documents that must be prepared or filed by the guardian. 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 paper. However, the cautious practitioner will review any applicable local rules before providing the guardian with advice regarding his or her duties and responsibilities in administering the guardianship.

II. PRELIMINARY ISSUES BEFORE APPOINTMENT

A. Required Training and Registration with the Judicial Branch Certification Commission

Effective June 1, 2018, all guardianships in the State of Texas must be registered with the Judicial Branch Certification Commission (“JBCC”). Additionally, any guardian being appointed after June 1, 2018 must complete a training course with the JBCC prior to the hearing for the appointment of a guardian. There is no fee associated with registering the guardianship or taking the training course. While a paper registration form is available for guardians and proposed guardians to complete, the training course must be completed online. The required training course is available in both English and Spanish.

Registration is what will prompt the JBCC to send the required criminal background check to the clerk. Therefore, if a proposed guardian seeks to be appointed in two separate matters, the guardian will need to submit two registration forms. Additionally, if seeking to appoint co-guardians, each co-guardian will need to submit a registration form. It should be noted, guardians should not register with the JBCC prior to an application being filed, as the registration form will ask for the case’s cause number, the name of the court in which the matter is pending, and the name of the presiding judge.

It is advised that proposed guardians register the guardianship and complete the training course early in the process to ensure there are no delays when it comes time to set the case for a hearing. Once the proposed guardian completes the required training course a certificate of completion will generate, which should be filed into the matter. Should issues arise during the registration and training process the JBCC can be contacted via email or telephone.

¹ This paper was originally prepared – and presented for many years – by Stephen Jody Helman, with the law firm of Osborne, Helman, Knebel & Scott, LLP. After a distinguished, successful, and eventful career, Jody retired from the practice of law at the end of 2014. Several attorneys have helped update the paper over the years, including notably, Associate Judge Tom Ruffner, Probate Court Number One of Travis County, Texas and Jody’s former law partners, Jason S. Scott and Michael B. Knisely. Their respective contributions are greatly appreciated. The paper has been most-recently updated by Maite Elorduy Gomez and Victoria D. Seybold, with invaluable input from Emma Jane Hopper.

B. Criminal Background Checks for Proposed Guardians

As noted above, registration will trigger the JBCC to complete the required criminal background check. In guardianship cases where the value of the proposed ward's liquid estate exceeds \$50,000 or the proposed guardian resides out-of-state or out-of-country, the proposed guardian will be required to complete a digital fingerprint background check. Once the guardianship registration information is received, the JBCC will send an email to the proposed guardian with a service code and instructions for the proposed guardian to obtain digital fingerprints. After receiving the email and instructions, the proposed guardian will be responsible for scheduling an appointment to have the digital fingerprints taken. It is important to note that even if you are not seeking to appoint a guardian of the estate due to less restrictive alternatives, if the liquid estate exceeds \$50,000, the proposed guardian will be required to complete a digital fingerprint background check.

The criminal background check should be completed prior to the hearing for the appointment of a guardian. Although Texas Estates Code Section 1104.402 prescribes that it is the duty of the court's clerk to obtain this information, Section 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.²

C. Service of Citation on Proposed Ward for Application for Guardianship

Notice by personal citation must be made to any proposed ward who is twelve (12) years of age or older. Citation must be served by the sheriff, constable, or other officer. Texas Estates Code §§ 1051.051. In *Fairley*, the Supreme Court of Texas clarified that Texas Estates Code 1051.051, not 1051.103(a), is the controlling statute when looking to determine who is authorized to serve the proposed ward with an application for guardianship. *Guardianship of Fairley*, 650 S.W.3d 372, 384 (2022). The Court notes that 1051.103(a) "identifies those individuals who must receive personal service on an application for guardianship" while 1051.051 specifies "who may serve when personal service is required and how service must be effected." *Id.* at 383. The Court goes on to indicate they read the term "other officer" to refer "to those persons who are authorized to serve citation elsewhere in the Estates Code." *Id.* at 384.

² Currently there appears to be a conflict between the Texas Estates Code and Texas Government Code as it relates to the manner in which criminal background checks are to be obtained by the clerk. As noted above, Texas Estates Code 1104.402 and 1104.403 allow for either the clerk or the proposed guardian to obtain the criminal background check. However, the Texas Government Code 155.205 states that, "in accordance with the rules adopted by the Texas Supreme Court under Section 155.203 of the Government Code, *the (Judicial Branch Certification Commission) shall obtain criminal history record information* that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division relating to the individual seeking appointment as guardian or temporary guardian" (emphasis added). The commanding language of Section 155.205 seems to override the option of the clerk or proposed guardian independently acquiring a criminal background check set forth in the Estates Code, hence the existing conflict.

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 \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Role of the Guardian

Also available as part of the eCourse

[Answer Bar: Elder Law and Medicaid Essentials](#)

First appeared as part of the conference materials for the
25th Annual Estate Planning, Guardianship and Elder Law Conference session
"Role of the Guardian"