UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

Estate Planning, Guardianship and Elder Law Conference
August 4-5, 2022
Live

The Duty of Investment for Guardians of the Estate

John B. Henry, III

Author Contact Information:
John B. Henry, III
Law Office of John B. Henry, III, PLLC
Bellaire, Texas 77401

jbhenry@johnhenrylaw.com
832.464.5767

Table of Contents

1) Introduction
2) Guardian of the Estate – Defined
3) Powers of the Guardian of the Estate (***with*** Court Order)
4) Powers of the Guardian of the Estate (with***out*** Court Order)
5) Standard of Care Owed by Guardian of the Estate (re: collecting or recovering property of the ward's estate)
6) Possession of Ward's Property
7) Pre-Screen proposed guardians for suitability, "bondability," and reality
8) Statutory Duties and Procedures Related to Investment
9) Common Law Duties
10) Decision Tree

"POLICY; PURPOSE OF GUARDIANSHIP
a) A court 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.
(b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence." TEX. EST. CODE § 1101.001(a) and (b).

1) Introduction.

A guardianship of the estate is a powerful and possibly plenary tool to manage the estate of another. Though family members may be appointed as the guardian of their next of kin, the Texas Estates Code does not provide a general exculpation or limitation to the fiduciary duties owed by a guardian to their ward if family serves in such a role. Therefore, a guardianship practitioner should be prepared to properly advise and consult with their client about the nature and purpose of the guardian's role and their liability for breach of their duties, including family member guardians. The focus of this paper is to provide the guardianship practitioner with an understanding of the landscape of the common law and statutory duties and liabilities of a guardian of the estate as they pertain to the duty of investment. This paper will begin with a discussion about the general nature of what a guardian of the estate is and powers of the guardian of the estate as defined by the Texas Estates Code. Next, the paper will explore practical barriers and important discussions that should be had with the client before the application is filed and certainly after. From there, the paper will discuss the statutory duties of investment applicable to a guardian of the estate. Thereafter, the paper will explore the applicable common law duties to a guardian

of the estate. Lastly, the paper will attempt to provide a decision tree for analyzing the investment requirement of the guardian of the estate.

2) Guardian of the Estate – Defined

A ward's estate or guardianship estate is that property that existed originally and as changes in form by sale, reinvestment or otherwise, including augmentation by growth or additions or decreases or distributions.[1]

In Texas, there are two principal kinds of guardians – a guardian of the person and a guardian of the estate.[2] Though a person may serve in both roles and if appointed in both, has all rights and powers, and shall perform the duties of both guardian of the person and estate[3], a guardian of the estate is a distinct fiduciary relationship with applicable powers and duties. Subject to Subsection (b), a guardian of the estate is entitled to:

(1) possess and manage all property belonging to the ward;
(2) collect all debts, rentals, or claims that are due to the ward;
(3) enforce all obligations in favor of the ward;
(4) bring and defend suits by or against the ward; and
(5) access the ward's digital assets as provided by Chapter 2001.[4]

Subsection (b) provides that, "In the management of a ward's estate, the guardian of the estate is governed by the provisions of this title."[5] Paying particular attention to debts, rentals, or claims, that are due to the ward, the Texas Estates Code prescribes a level of ordinary diligence for collecting the same if there is a reasonable prospect of collection or recovery.[6] Failure to do so would result in liability for the guardian and their sureties for "…the amount of the claims, or the value of the property that has been lost due to the guardian's neglect."[7]

3) Powers of the Guardian of the Estate (with Court Order)

There are certain actions that a guardian of the estate may exercise under court order, including:

(a) The guardian of the estate may renew or extend any obligation owed by or to the ward on application and if authorized by order.
(b) On written application to the court, a guardian of the estate may take an action described by Subsection (c) if:

[1] Tex. Est. Code § 1002.010.
[2] Tex. Est. Code § 1002.012(b).
[3] Tex. Est. Code § 1151.004.
[4] Tex. Est. Code § 1151.101(a).
[5] Tex. Est. Code § 1151.101(b).
[6] Tex. Est. Code § 1151.105(a).
[7] Tex. Est. Code § 1151.105(b).

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

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)

Title search: The Duty of Investment for Guardians of the Estate

First appeared as part of the conference materials for the
24th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Duty of Investment for Guardians of the Estate"