

**PRESENTED AT**

19<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference

August 3-4, 2017  
Galveston, TX

## **The Role of the Guardian**

**Paper prepared by Stephen Jody Helman  
Updated by various lawyers over the years**

**Presented by:  
Hon. Polly Jackson Spencer  
Senior Statutory Probate Judge  
San Antonio, TX**

# 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 .....	4
	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.....	7
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.	Problems Determining What is Income .....	19
C.	Guardian of the Person.....	20
XVIII.	COURT APPROVAL NECESSARY FOR CERTAIN ACTIONS .....	20
A.	Powers Limited by Court Order .....	20

B.	Certain Actions Do Not Require Prior Court Approval .....	21
C.	Many Actions Require Court Approval .....	21
D.	Court Approval Always Possible .....	22
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.....	23
C.	Five Percent Limitation.....	23
D.	Important 2009 Legislative Changes.....	23
XXII.	GUARDIAN’S EXPENSES .....	24
XXIII.	FEDERAL INCOME TAXES .....	24
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 .....	26
3.	Court Action on Account.....	26
C.	Duties of Guardian of the Person .....	26
D.	Duty to Provide Information about Ward.....	27
E.	Failure to File Final Account .....	28
XXVI.	EXPENDITURES BY GUARDIAN OF PERSON ENTITLED TO RECEIVE GOVERNMENTAL FUNDS .....	28
XXVII.	CLIENT IDENTIFICATION ISSUES .....	28
XXVIII.	PROBLEMS INCIDENT TO SALES AND PURCHASES OF PROPERTY .....	30
XXIX.	COMMON LAW DUTIES.....	30
XXX.	CONCLUSION.....	31
XXXI.	ACKNOWLEDGMENTS .....	31

## **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. 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 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 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. Forms for a guardian’s oath and bond are attached to this outline as Exhibits 1 and 2, respectively.

#### **B. Criminal Background Checks for Family Members Serving as Guardian**

In 2015, the Texas legislature amended Texas Estates Code § 1104.402(a) and 1104.409 to remove the exemption from criminal background checks for family members serving as guardians. See H.B. 1438 (84<sup>th</sup> Regular Session). The criminal background check should be completed prior to hearing for the appointment of a guardian; however, depending on the county in which you practice, the clerk’s office may not be ready yet to perform these checks for all proposed guardians. 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 10<sup>th</sup> day before the date of the hearing. As this new requirement is implemented across the state, the process of qualifying as guardian (i.e. filing of oath and bond) may involve an applicant’s attorney obtaining this information and submitting it to the clerk’s office. The requirement of a criminal background check was already in place 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.

### **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. A form that can be used to deposit funds or other assets of the ward's estate in safekeeping is attached to this outline as Exhibit 3.

In 2015, the Texas legislature specifically authorized the use of safekeeping agreements prior to the guardian's qualification in order to 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

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

[2018 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the  
20<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"Role of the Guardian"