

BONDS, INVENTORIES & ACCOUNTINGS

22ND ANNUAL ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE

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BONDS, INVENTORIES & ACCOUNTINGS

INTRODUCTION

The qualification of the personal representative (the 'PR'), the return of an inventory and the accounting process are all integral parts of an ongoing process. They are the initial planning and periodic reports from the PR on the journey, keeping the court informed as to the whereabouts and progress of the travelers.

By keeping the court well informed as to the status of the estate, the clients will be better served, the ward, heirs or creditors will be better protected and, most importantly, the PR will have fewer headaches.

The administration of a guardianship must be considered in a different light from the administration of a decedent's estate. A guardianship must be viewed as more of an ongoing enterprise which is expected to continue for a lengthy period providing income for the maintenance and support of a person, while administration of a decedent's estate is intended to last only as long as necessary to wind up and distribute the estate.

Other fiduciaries uniformly have a duty to disclose, either under the common law or statute.

Note: Judicial Bonds

The judge of a statutory county court who hears guardianship or probate cases must execute a bond, payable to the county treasurer, of at least \$100,000 if the county has a population of 125,000 or less; or \$250,000 if the county has a population of more than 125,000 and conditioned that the judge will perform the duties required by the Estates Code. In lieu of this bond, a county may elect to obtain insurance against losses caused by the gross negligence of a county judge in performing the duties of office. The commissioners court of a county shall pay the premium for the insurance out of the general funds of the county.

If the judge of a statutory county court does not hear guardianship or probate cases, the bond is to be not less than \$1,000 nor more than \$10,000 and conditioned that the judge will faithfully perform all duties of office. The county judge's bond must be approved by the commissioners court. Tex. Govt Code § 25.006.

These provisions do not apply to

- a judge of a statutory county court who does not preside over guardianship proceedings,

- a judge of a statutory probate court who executes a bond, obtains insurance, or self-insures pursuant to Tex. Govt. Code § 25.00231 or

- a judge who presides over a county criminal court. Tex. Govt. Code § 25.006(a-4).

A constitutional county judge who hears guardianship or probate cases must execute a bond, payable to the county treasurer, of at least \$100,000 if the county has a population of 125,000 or less; or \$250,000 if the county has a population of more than 125,000 and conditioned that the judge will perform the duties required by the Estates Code. In lieu of this bond, a county may elect to obtain insurance against losses caused by the gross negligence of a county judge in performing the duties of office. The commissioners court of a county shall pay the premium for the insurance out of the general funds of the county.

If the constitutional county judge does not hear guardianship or probate cases, the bond is to be not less than \$1,000 nor more than \$10,000 and conditioned that the judge will faithfully perform all duties of office. The county judge's bond must be approved by the commissioners court. Tex. Govt Code § 26.001.

A judge affected by this act who is serving on September 1, 2017 must comply with these bond requirements not later than November 1, 2017. S. B. No.40 § 3.

I. BONDS AND OATHS - After appointment, the PR must **qualify** by 1) posting a **surety bond** (§§ 305.101, 1105.101) 2) **approval** by the Court of the bond (§§ 305.002, 1105.002, and 3) taking and filing the proper **oath**. (§§ 305.051ff, 1105.051).

A. Nature - Unlike an **oath**, which is a promise to properly handle estate assets, the **bond** is a written pledge which allows the County Judge to recover an amount (the face amount or "penalty" of the bond) for damage to the estate caused by neglect or malfeasance of the PR. (§§ 351.003, 1155.152).

If the PR is found to be liable for a breach of duty or mismanagement of an estate, the surety can be called upon to satisfy any liability. The liability could include the damage to the estate resulting from the PR's wrongful acts, reasonable attorney's fees, costs incurred in removing the PR from his position and the expenses incurred in obtaining compliance with a neglected duty. (§§ 351.003, 1155.152).

B. Purpose - The whole reason for a bond is to protect the estate and its creditors. It is much easier for a successor PR to settle with a corporate surety than for a removed PR to come up with the funds to make good a defalcation. From the court's standpoint, there is no substitute for an adequate corporate surety bond for

protection of the estate assets and the benefit of the ward or estate distributees. Ad litem who argue with the court to set a low bond are seldom acting in their ward's best interest.

C. Bonding Guidelines: Before setting the bond, the court is to hear evidence as to:

1. the amount of all estate cash and personal property,
2. the amount estimated to be needed for expenses of administration (including the operation of any business owned by the estate) for one year,
3. the anticipated revenue to the estate for one year (anticipate upcoming sales!), and
4. the estimated amount of debts due and owing by the estate or ward.

D. Examples:

1. SUPERVISED (GUARDIANSHIP AND DEPENDENT DECEDENT'S) ESTATES - the bond should equal the value of all personal property (*realty doesn't usually disappear without some court input*) **plus anticipated revenue** for one (1) year

Cash on hand	\$ 55,000.00
Automobiles	18,500.00
Stock	34,500.00
Household items	<u>5,000.00</u>
Total Bondable Property	\$113,000.00

Plus anticipated Income or potential compliance costs $x \underline{\quad 1.10}$ **\$124,300.00**
Set Bond at: \$125,000.00
(rounded up to next thousand)

2. DECEDENT'S ESTATE WHERE THE PR IS SOLE DEVISEE OR HEIR - § 305.151(b) - the bond may be set in an amount equal to debts (plus ten per cent for ad litem's fees in case of a compliance action).

3. COURT-CREATED INDEPENDENT ADMINISTRATION - § 401.003 - here the PR will not be coming back into court, even to sell real property. If there are devisees or distributees that are unrelated to the PR or who live far away, it is better to protect all parties that a conservative bond be set. However, you may wish to bond only to protect creditors. If there are no known debts, and the family situation appears stable (no minors, everyone in close contact) you may choose to waive bond. The Judge is specifically exempted from personal liability considerations (otherwise applicable under § 351.354) for waiving bond under these circumstances by § 401.007.

E. Safekeeping or "Freeze" Agreements (§§

305.154 & 1105.155 where the PR deposits estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order. (Appendix Two)

The amount of the bond of the PR may then be reduced in proportion to the cash or other assets placed in safekeeping. This arrangement has several excellent benefits to the Estate:

1. Lower surety bond amount.
2. Reduces surety's exposure.
3. Increases security and stability of estate assets.
4. Decreases the court's concerns regarding adequacy of bond.
5. Secures estate funds without additional bond premiums.

Estate with \$300,000 in cash. \$100,000 is placed under safekeeping in each of three separate institutions, with each depository directed to pay all interest monthly to an interest-bearing account at a fourth institution. The interest account could be used as the operating account for the Estate, or could also itself be under a safekeeping agreement. The bond amount can be then kept to a minimum

F. Types of Sureties §§ 305.201, 1105.160 - Personal sureties and corporate sureties are both authorized by the Code. With personal sureties (two or more required) each must satisfy the court they own non-exempt property of at least twice the amount of the bond and execute an affidavit to that effect (§§ 305.203, 1105.201) or deposit cash or other securities with a qualified corporate depository. §§ 305.156ff, 1105.157

It is much more common that the surety is an *authorized corporate surety*: "a domestic or foreign corporation authorized to do business in Texas for the purpose of issuing surety, guaranty or indemnity bonds guaranteeing the fidelity of executors, administrators and guardians" §§ 22.002, 1002.003

G. Advantages of Corporate Sureties over Personal Sureties:

1. Only one corporate surety is generally required rather than two individual sureties (court may require two corporate sureties if the bond is greater than \$50,000 §§ 305.202, 1105.161.
2. The bond premium is payable by the Estate. §§ 305.202, 1105.161.

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