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MANAGEMENT PLANS: GETTING THE MOUNTAIN BACK INTO A MOLEHILL

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MANAGEMENT PLANS

GETTING THE MOUNTAIN BACK INTO A MOLEHILL

I. INTRODUCTION

1. **New Laws** - Effective September 1, 2003, the Texas Legislature enacted significant changes affecting guardianships of the estate. These changes

A. accelerate the deadline for filing the inventory,

B. require the filing and approval of a monthly allowance,

C. require the filing of an investment (or management) plan and

D. change the rules for how guardianship property is invested.

2. **Why Do We Care?**- Unlike a decedent's estate, which has presumptively capacitated people waiting in line as distributees or creditors, a guardianship estate is primarily administered for the benefit of a person who cannot act for his or herself.

Also unlike a decedent's estate, which is typically administered to collect the assets, pay the debts and distribute the leftovers, a guardianship usually has to be more of an ongoing enterprise: expected to continue for some time and expected to provide income (if possible) to maintain and support the ward.

Distributees and creditors are always anxious to receive their due, but a ward often has to live on the assets being managed in the estate.

3. **On The Job Training** - Guardians seldom get a lot of opportunity to learn how to be a guardian other than "on-the-job" training. However, it is not an area in which mistakes can be well-tolerated. A novice guardian and an attorney who only rarely handles guardianships can be a perilous combination – both for themselves and for the ward.

4. What Are We Planning For?

We are really good at getting things inventoried and perhaps not so versed in laying out for the client/guardian what it will take to actually run a guardianship estate.

This was intended to be really a "management" plan, rather than an investment plan. The main reason for a management plan is to get the guardian to focus on and think through what will be needed during the coming year to get and keep the ward's estate on track.

Because the plan in a new guardianship doesn't have to be filed for the first six months, the lawyer has the opportunity to get things straightened out before the plan has to be filed, then the plan can become the vehicle to get the court's blessing on getting thing straightened out in an orderly manner. It also gives the lawyer a chance to better advise the client on not getting ahead of his/her permission/authority to act.

5. **Protecting The Lawyer** – Also, nothing is sadder than an inexperienced lawyer who fails to plan on how to get paid while advising the guardian on how to administer the estate. It is not unusual to see an attorney coming in to close down a guardianship of the estate where everything has been spent, but no funds are left in the estate to pay the lawyer's fees.

It should go without saying that the client will nor appreciate having to come out of pocket for fees where there "used to be" money in the estate to pay those fees.

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II. OLD LAW/NEW LAW

1. Old Law- Prior to September 1, 2003, a guardian was authorized to retain assets on hand at the inception of the guardianship and was required to invest any money on hand beyond what was necessary to educate and maintain the ward. TEX. PROB. CODE ANN. § 854 (Vernon 2003, *now repealed*) The guardian could make “safe haven” investments without court approval. These were essentially no-risk assets (such as T-Bill, municipal bonds, and federally-insured demand deposits).

2. New Law: Effective September 1, 2003, a number of new sections were adopted in the Texas Probate Code that regulate and mandate investment of the ward’s assets and the ability to retain assets.

A. REQUIRED INVESTMENT - TEX. PROB. CODE ANN. § 854 - A guardian of the estate is now required to “invest any other funds and assets available for investment unless the court orders otherwise” or the funds are “immediately necessary for the education, support, and maintenance of the ward or others the ward supports, if any.”

B. RETENTION RIGHTS - TEX. PROB. CODE ANN. § 855A - Assets on hand at the time of the guardianship or later received by gift, devise, inheritance, etc., may be retained by the guardian of the estate for one year from the date of receipt of the property without additional court approval. This property may be retained without regard to diversification of investments or liability for depreciation or loss resulting from the retention.

The guardian may also seek authority to retain the property beyond the initial year if the retention can be justified as part of an investment plan. TEX. PROB. CODE ANN. § 855A(b)

C. PRUDENT MAN STANDARD - TEX. PROB. CODE ANN. § 855(a) - The new sections adopt a “prudent man” standard for

investment, rather than a “prudent investor” standard:

In acquiring, investing, reinvesting, exchanging, retaining, selling, supervising, and managing a ward’s estate, a guardian of the estate shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, considering the probable income from as well as the probable increase in value and the safety of their capital. The guardian shall also consider all other relevant factors, including:

- (1) the anticipated costs of supporting the ward;*
- (2) the ward’s age, education, current income, ability to earn additional income, net worth, and liabilities;*
- (3) the nature of the ward’s estate; and*
- (4) any other resources reasonably available to the ward.*

[I]n determining whether a guardian has exercised the standard of investment required by this section with respect to an investment decision, the court shall, absent fraud or gross negligence, take into consideration the investment of all the assets of the estate over which the guardian has management or control, rather than taking into consideration the prudence of only a single investment made by the guardian.

D. REQUIRED INVESTMENT PLANS - TEX. PROB. CODE ANN. § 855B – The guardian of the estate must file an

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