PRESENTED AT

ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE

August 4-5, 2022

Galveston, Texas

THE ROLE OF THE GUARDIAN UNDER TEXAS LAW

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THE ROLE OF THE GUARDIAN[1]

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. 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.

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. However, it is important to complete the registration as soon as possible after the guardianship application is filed and you have a cause number as registration is what prompts the JBCC to send the required criminal background check to the clerk. If a proposed guardian is seeking to be appointed in two separate matters, the guardian will need to submit two registration forms. Additionally, if you are seeking to appoint co-guardians, each co-guardian will need to submit a registration form.

Proposed guardians should 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 online, which should be filed in the guardianship matter. Should issues arise during the registration and training process, the JBCC can be contacted via email or telephone.

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[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 partner, Michael B. Knisely. Their respective contributions are greatly appreciated. The paper has been most-recently updated by Maite Elorduy Gomez and Jason S. Scott, with invaluable input from Victoria Seybold.

B. Criminal Background Checks for 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 be complete a digital fingerprint background check.[2] 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 proposed ward's 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.[3]

III. 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 or declaration of guardian 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.

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[2] Otherwise, the JBCC will automatically run the criminal background check without the need for a guardian to be fingerprinted or take any further affirmative steps to initiate the background check.

[3] 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 155.204 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, but practitioners should be aware of these potentially conflicting statutes.

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2022 Texas Guardianship Essentials (Replay) session
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