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## **A GUIDE FOR THE NEWLY-APPOINTED GUARDIAN OF THE PERSON & ESTATE**

This guide is intended as an orientation to your responsibilities as guardian. You may receive or have received a brief checklist from the judge advising you of your most important responsibilities, which this guide will discuss in more detail.

If the information provided is overwhelming or just “too much”—don’t panic. Just be aware of the potential issues, and pay special attention to the things in **bold** print. Your attorney will help you take care of the essentials and is always a resource for any questions you may have.

There are two types of guardianships: those of the Person and those of the Estate. A guardian of the person has custody and control of the person who has been declared incapacitated (called the “ward”) and responsibility for their physical safety and welfare. A ward’s money and property are referred to as their “estate”. The guardian of the estate has custody and control of this money and property.

Your appointment as guardian is an important responsibility that imposes on you a strict **fiduciary duty** to protect the ward and his or her interests. Put simply, a fiduciary duty means you have a legal responsibility to act for the benefit of another. At times, this duty may even require to act in a manner contrary to your own interests. If you fail to carry out your fiduciary duty properly, you can be subject to **personal liability**, removal as guardian, and in extreme cases, to criminal prosecution.

### **GETTING STARTED AS GUARDIAN**

#### **Qualification**

Even though the judge has signed an order appointing you as guardian, you still must “qualify” before you have power to act as guardian. To qualify, you must file an oath of office and any required fiduciary **bond** with the court clerk, both **within 20 days** after the order is signed. The bond is an amount of money which may be forfeited in the event the court finds wrongdoing by the guardian. The bond may be in the form of cash or a surety agreement from a third party or parties (usually an insurance or bonding company) promising to pay the bond amount in the event of wrongdoing.

For a guardian of the person and estate, the bond must be set at an amount equal to the value of the ward's non-real estate assets plus the ward's anticipated income for the next 12-month period. The bond may be reduced by obtaining court approval to deposit assets with a financial institution for safekeeping, so that the guardian may not withdraw them without a court order.

Our office will assist you in getting the necessary bond document filed and approved by the court.

### **Letters of Guardianship**

The **Letters of Guardianship** ("Letters") received from the clerk is the certificate that shows your authority to act as guardian. You may need to present it at various times, such as when authorizing medical treatment, establishing a new residence for the ward, or managing estate assets. Whenever possible, you should show the original certified document (with the embossed seal) and leave a photocopy rather than the original.

Letters **expire** after 16 months unless renewed by the court. This requirement exists because the guardian must file an Annual Report of the ward's condition and an Annual Account of the ward's assets (both described below), which the court must review and approve prior to renewal of the Letters.

### **DUTIES AND POWERS OF GUARDIAN OF THE PERSON**

As guardian of the person, you have a general responsibility to manage the ward's **health, safety, and welfare**, much like a parent is responsible for his or her minor child. This responsibility includes (1) the right to have physical custody of the ward and to establish his or her legal residence; (2) the duty to provide physical care, supervision, and protection for the ward; (3) the duty to provide food, clothing, shelter, and medical care to the ward; and (4) the power to consent to medical and surgical care on the ward's behalf.

A guardian has the power to consent to psychiatric treatment, but not to inpatient psychiatric treatment. If inpatient psychiatric treatment is necessary, the guardian may transport the ward to an inpatient mental health facility for an examination, as a preliminary step to court-ordered inpatient treatment. A psychoactive medication may be administered to an adult ward with the guardian's consent, regardless of the ward's expressed preferences.

You may be liable if you negligently allow the ward to injure another person or damage property. This would depend upon your failing to exercise reasonable control over your ward. An example of this might be allowing a ward to have access to a car when he has lost his license, or access to a gun when he does not understand the dangerous nature of the weapon. You might want to seek insurance to cover you against the liability you might incur as guardian. An insurance agent should be able to advise you.

A guardian of the person must file an **Annual Report** that describes the ward's general condition, including: changes in his or her health; medical care received; occupational, education, and recreational activities; how often the guardian has visited the ward in the past year; living arrangements; and various other matters, which are all described in section 1163.101 of the Texas Estates Code. If you receive **Social Security benefits** on the Ward's behalf, your annual report must include a copy of the most recent Representative Payee Report you filed with the Social Security Administration.

The guardian is permitted to prepare and file the annual report without the assistance of an attorney, but we recommend that you retain our services to assist you with this duty.

As guardian of the person, you are entitled to compensation for your time, upon court approval. The compensation cannot exceed five percent of the ward's gross income. Attorney fees and other costs can and should be paid out of the ward's income, upon court approval.

### **DUTIES AND POWERS OF GUARDIAN OF THE ESTATE**

The rules governing guardianships of an estate make the guardian's job very time-consuming and sometimes difficult. They are intended to prevent financial abuse and to protect both the ward's interests and those of certain third parties, such as creditors. The rules are too technical for a non-lawyer to learn and understand without the assistance of an attorney. It is very important that you work closely with your attorney and to communicate promptly with him or her if there is any doubt in your mind about your responsibilities.

The following is a basic list of guidelines, which will be discussed in more detail below.

- **AS A GENERAL RULE, *EVERYTHING* YOU DO WITH YOUR WARD'S MONEY OR PROPERTY MUST HAVE *PRIOR* COURT APPROVAL.**

This rule is so simple that it's easy to forget. Don't let that happen. A guardian can be held *personally liable* for any transaction made without the court's approval.

- **Make sure all non-cash assets are secured and properly insured.**
- **Set up a new bank account (FDIC-insured checking account) for the guardianship estate. Use it to deposit all income and for all routine transactions.**
- **Keep receipts for all estate transactions.**
- **Do not mix estate property or funds with your own or with anyone else's.**
- **Do not borrow money from the estate.**
- **Do not lend money from the estate.**
- **Do not make cash withdrawals from the estate account.**

Write a check for expenses, with its purpose noted on the memo line, or obtain a cashier's check or money order with an identified payee written on it.

- **Maintain complete, accurate, and up-to-date records of all funds received or disbursed, assets sold or purchased, and all other matters related to the guardianship.**

Even if you provide your attorney with copies, it is *your* responsibility to maintain complete and accurate records.

- **Do not engage in any self-dealing, including the purchase of estate assets, unless you have discussed this with your attorney first.**
- **Engage the services of a qualified tax professional to assist you with any federal tax questions affecting the ward.**
- **If you are unsure about your powers or responsibilities in a particular situation, contact your attorney before acting.**

### **Taking Control**

If you or anyone else has previously managed the ward's money or property under a power of attorney, that document is now void and revoked by operation of law. Everything must now go through the guardian and the guardianship court.

To take control of the ward's assets, examine all of the ward's papers (bank statements, tax returns, checkbook registers, etc.) to search for assets. Take physical possession or control of personal property (such as cars, furniture, jewelry, books or tools). Make sure you have keys to the ward's residence and other secured buildings. It may be necessary to change the locks to prevent unauthorized access. Jewelry and other valuable personal property should be put into a safe deposit box opened in your name as guardian ("[guardian's name], guardian of the estate of [ward's name]"). All personal property must remain in Texas unless the court approves otherwise. You must maintain adequate insurance against damage on all property under your care.

Existing bank accounts in the ward's name should be closed and the funds deposited in a new FDIC-insured account, opened in your name as guardian but using the ward's Social Security number. You should get copies of the signature cards for those old accounts, at the time you close them. We suggest that the new guardianship account be titled as "[your name], guardian of the estate of [ward's name]." If the ward held an account jointly with a third party, you will need to determine what amount belongs to each joint owner.

**You must record the purpose and amount of each and every expenditure and receipt of guardianship funds. This is most easily done by routing all of the ward's income into a guardianship checking account, and using this account for all routine transactions.**

**Never** mix the ward's money with your own. Also, **never** borrow money from the estate or make gifts (even gifts to a charity or religious institution) from the estate without prior court approval.

Once an account for the guardianship estate is opened, you may endorse and deposit any checks payable to the ward. You must carefully track all amounts spent or received, and have good documentation for all expenditures, as discussed below under “Annual Account”.

If the estate contains insurance policies, you should try to locate original policies, and contact the insurer to determine the status of the policy, including whether the premiums are up to date.

Any securities should be changed to your name as guardian. Be sure the company has the correct address to which dividends and interest payments may be sent.

Real property (land) should be left in the ward’s name. You must be sure that adequate insurance is maintained on all of the ward’s real property.

Take steps to direct all of the ward’s mail to your address. You may find a separate post office box helpful for this. Contact all credit card companies by phone to immediately cancel cards, and follow up in writing. Cancel unneeded utilities to the home if the ward has moved out.

Guard against unauthorized use of the ward’s car, even by the ward. It is usually in the ward’s best interests to sell his or her cars and motor vehicles. If so, you should seek pro rata refunds of any insurance that can be canceled. If you decide to store the car, be sure that it is adequately insured.

This memorandum cannot address all possible asset scenarios, so let us know if you are unsure about how to act in a particular situation. There are also procedures for recovering assets if you learn of their existence but cannot get them back from whoever is holding them. We can talk about this as needed.

### **The Inventory**

While taking control of the ward’s assets, you will need to provide your attorney with information to prepare an **Inventory, Appraisal, and List of Claims (Inventory)** for the assets of the estate. The Inventory must be filed with the court **within 30 days** of your qualification as guardian, unless an extension is granted by the Court. Make a listing of all estate assets, and provide an estimated fair market value for each asset. Please provide us with all of the information needed for the Inventory immediately after you receive your Letters so that we may have time to prepare the Inventory and obtain additional information from you as needed.

The purpose of the Inventory is (1) to inform the court and all interested parties (such as family members and creditors) of the size of the estate and of the resources available for the ward’s support; (2) to help determine the sufficiency of the bond; and (3) to set the initial amount for which the guardian is held accountable and on which the subsequent Annual Account is based (discussed below).

The original Inventory should list all the assets owned by the ward, and their fair market value, as of the date of your appointment. If you later find assets that should have been listed on the original Inventory, we can file a supplement. Any funds received after the date of appointment will be listed either on a supplemental Inventory, or on the Annual Account. The Inventory will not list expenditures; instead, expenditures will continue to be tracked and listed on the Annual Account.

Although the ward's **debts** are not reported on the Inventory, it is very important that you provide us with this information as well at the time we prepare the Inventory. We need to know whether any debts are secured by a lien, such as a mortgage on real estate, and of any creditors that you become aware of. We must notify all creditors of your appointment, and some creditor claims can be cut off by certain procedures. Some debts may also be voidable because of the ward's mental condition even before the guardianship.

### *Monthly or Annual Allowance*

The **allowance** is a specified amount of the ward's money that the guardian may spend without further court approval. Typically, the court will approve a monthly or annual allowance at the time you were appointed guardian. But if not, an application requesting an allowance must be filed **within 30 days** of your qualification.

### *Investment Plan*

The guardian of the estate has a **duty to invest** the ward's assets that are not immediately necessary for the support of the ward's or the ward's dependents. The assets must be invested as a **prudent person** would. Texas law allows certain "safe harbor" investments that do not require court approval, including federally-insured bank accounts and government bonds. Any other investment requires court approval, and the application for such approval must be filed **within 180 days** after qualification.

### *Managing the Estate*

As guardian, there are certain powers exercisable without prior court approval, such as insuring estate property against fire, theft, and other hazards, and paying taxes and bond premiums. Such expenses must be documented and reported on the Annual Account. To be safe, however, you should **assume that you must always get prior court approval** for all expenditures of guardianship funds.

If you spend guardianship funds without court approval, you may seek ratification from the court of the expenditure, provided that the expenditure was (1) reasonable in amount, (2) necessary, and (3) proven by a receipt. But if the court does not ratify the expenditure, you will have to re-pay it to the estate from your personal funds.

Guardianship expenses should be paid from guardianship funds. If you must spend your own money to pay expenses, you should try to get prior court approval. Otherwise, the court

may approve reimbursement to you, but only if you can meet the reasonable-necessary-receipt standard.

If possible, the amount that you spend in the guardianship should be limited to the income of the guardianship estate. We suggest that you establish a budget for maintenance and support, so that we can petition the court in advance for authority to spend up to that amount. With prior court approval you may get authorization to pay a small allowance directly to the ward for personal use; you would then not have to account for those sums except to show they were paid to him or her.

Whenever there are unusual circumstances that may require an expenditure of the ward's money that is not part of a pre-approved spending plan, you should check with us to obtain prior court approval. If you spend the ward's money in a way that the court disagrees with, then you will be personally responsible to reimburse the ward's estate for that amount.

The most efficient way to keep track of the ward's finances is to **use the guardianship account for all routine transactions**. Deposit all of the ward's income into this account, and pay all expenses from this account. (An **exception** to this may apply if the Ward receives **federal benefits**, which should be kept separate – see “Federal Benefits” below.) You may open the account at any Texas bank or any insured savings and loan association or credit union. It is best to limit the amount in any one institution to the limit of their FDIC insurance. Be sure to keep all records you receive relating to the ward's finances, including bills, invoices, receipts, and bank statements. We will want to review these items when helping you prepare each Annual Account to be filed with the court.

You must keep track of who payments are made to, and for what purpose (such as “electric bill”, “lawn care”, or “groceries”). You will have to provide this information for each Annual Account, along with a canceled check or receipt for the payment. Again, a guardianship account with regular statements showing cancelled checks, and the purpose of the disbursement written in the memo line and in the checkbook register, is the simplest way to keep track of this information.

As previously mentioned, you must have an investment plan for the ward's property that is approved by the court or by statute. As much as possible, you should keep the cash of the estate in income-earning accounts, except for what you reasonably need to keep in a checking account to meet the ward's day-to-day needs. Discuss the investment plan with your attorney.

You may wish to **sell estate property** at some point, because the income of the estate is insufficient for support, to pay debts, or the sale is otherwise in the ward's best interest. All sales of property, real or personal, require prior court approval. Because detailed requirements for sale must be met in order to obtain court approval, do not enter into any agreements to sell property without first consulting your attorney. (See “Sales of Estate Property”, below.)

If the ward is a **creditor** to someone, you should act to collect the debt, and bring a lawsuit at the expense of the guardianship estate if necessary. Your attorney can assist you in determining the best action to take to collect debts as needed.

If the ward is a **debtor** to someone, talk to your attorney about paying or settling these debts. Certain creditors must be given special notice of the guardianship. There are also special procedures available that may cancel debts altogether.

You should make sure that all necessary **taxes** are paid on income or property, including for years prior to the guardianship. You can get copies of past local and federal tax documents by requesting them from the tax authorities. These returns should be carefully reviewed, especially if the ward prepared them, since they might be able to be amended in a way that would result in a refund to the ward's estate. You will need to file the ward's income tax returns, which are due April 15 of each year just like other individuals' returns. **We advise you to retain a qualified accountant to assist you with preparing and filing federal tax returns, and with all federal tax matters.** This firm does not generally render advice on federal tax matters.

### **Federal Benefits (Social Security, Veterans Pension)**

If your Ward receives benefits from the Social Security Administration (SSA), make sure to **keep the SSA benefits separate** from the Ward's other income and resources, by depositing them into a separate bank account. This is necessary because the SSA requires a separate accounting that shows how the Social Security income has been spent. You will also have to account for such funds to the guardianship court, in the Annual Account (described below). In addition, just like other funds, the court's permission is required before you spend any of the Social Security income.

The SSA has the discretion to make an independent, internal determination that a person is incapacitated and that their benefits should be paid to a "Representative Payee" (RP) on their behalf. This determination is completely separate from the jurisdiction of the guardianship court. It may result in appointment of an RP that is different from the guardian of the estate.

Similar rules can apply to a veteran's pension, except that the term "Legal Custodian" is used instead of "Representative Payee", and the required annual report to the Veterans Administration is more detailed. If your Ward receives a veteran's pension, talk to your attorney about how to handle this situation. VA benefits also need to be kept separate from other income sources.

### **Sales of Estate Property**

There are several reasons why it may be necessary or advisable to sell the ward's property; for example, to obtain cash for the ward's expenses, or to convert an unproductive asset.

**Do not** attempt to sell any estate property without discussing the matter first with your attorney. The procedure for selling estate property is especially complicated. The court must approve not only the attempt to sell an asset, but also the price, before the sale may be completed.

Here is a summary of the sales procedure:

1. File an *Application* for permission to sell, stating the reasons why the sale is necessary. The permissible reasons are defined by statute.
2. After a mandatory waiting period, the court may consider the application. If the application is approved, the court will sign an *Order of Sale*, which permits the guardian to place the asset on the market and to negotiate terms for its sale with potential buyers.
3. The guardian negotiates a written contract of sale with a buyer. The contract must identify the seller as “[guardian], guardian of the estate of [ward]”, and must explicitly make the sale conditional on approval by the guardianship court.
4. After the guardian has negotiated the contract of sale, s/he should give a copy to the attorney for review. If there are no apparent problems with the contractual language, the attorney will file a *Report of Sale* with the court, attaching a copy of the contract.
5. After a second waiting period, the court may consider and approve the Report of Sale. If approved, the court signs an *Order Confirming Sale*, which provides the guardian with authority to complete the transaction, as by delivering the purchased asset and taking the purchase money.

**REMEMBER:** As a general rule, the guardian must not accept the purchase money or deliver the asset to the buyer until the court signs the Order Confirming Sale.

### *Annual Account*

Each year within 60 days of the anniversary of the date you qualified as guardian, you must file a sworn **Annual Account**. Your attorney will prepare the Account using information you provide. Generally, in this document you must account to the court for all receipts and disbursements of cash and all property on hand. The total value of the original Inventory, plus all receipts of funds, minus all disbursements, must equal the value of the property on hand at the time of Account.

The Annual Account must include the following specific information:

- Confirmation that you have paid your **bond premium** for the next accounting period.
- Confirmation that you have filed all **tax returns**, and have **paid all taxes** due, with the date, amount, and government entity to whom the taxes were paid.
- All **receipts and disbursements of cash**, with the source and purpose of each receipt and disbursement identified, and a **verification** of account balances, as by a bank statement dated on the ending date of the accounting period.

- The **status of claims** owed by or against the estate.
- If you receive **Social Security benefits** on the Ward's behalf, you must attach to your Annual Account a copy of the most recent Representative Payee Report you filed with the Social Security Administration.

It is essential that you keep accurate and detailed records, showing not only the amount of all receipts but also the source of the funds. (Very often guardians have difficulties accurately reporting receipts, because they forget to write down from whom they received checks: for example, health insurance refunds, or other occasional-type receipts). Your Account also should show the purpose of all amounts spent. **As previously stated, the best and easiest way to do this is by maintaining a guardianship checking account through which all routine transactions are routed. You can then provide your attorney with copies of your monthly statements, checkbook register, and check / deposit-slip images for that account.**

If the ward is a **beneficiary of the Department of Veterans Affairs**, the guardian must send notice to the Department when an Annual Account is filed and when any claim is made against the Ward's estate.

### *Fees and Costs*

A guardian of the estate is entitled to **compensation**, as may be approved by the court. Typically the petition for compensation is filed around the time the annual account is filed each year. Generally, compensation to the guardian of the estate cannot exceed five percent of the ward's gross income plus five percent of all money paid out of the estate (excluding gifts or loans).

Be advised that if you pay yourself compensation, the money is taxable income that must be reported on your personal income tax return to the IRS.

As previously discussed, the guardian can obtain reimbursement for out-of-pocket expenses incurred in the course and scope of service as guardian, if the expenses are properly documented. Expenses incurred for attorney fees and other professional advice should be paid out of the estate, upon court approval.

### *Conclusion*

Being a guardian is a difficult task and it can even feel overwhelming at times. If you have concerns or questions, please call to ask us for help. You are not expected to know all of the answers, but you should use care to ask questions to avoid making mistakes. It is much easier to avoid making mistakes than to correct mistakes after they are made.

Our office will assist you in fulfilling all of your duties. We will work hard to make your duties as guardian less confusing and difficult for you. So, please call us whenever you need our

help or have questions. One phone call can save time, money, and many problems in the long run.

With that, we wish you the very best as you act in your capacity as guardian for your ward. We look forward to working with you.

Yours sincerely,

HARRELL, STOEBNER & RUSSELL, P.C.