

Liability of Fiduciaries: That Bond Doesn't Protect Me?

Judge Brooke Allen
Probate Court No. 2, Tarrant County, Texas



Thank You National Guardianship Association

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Mr. Smith and Ms. Wills

► Insert photo here

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Fiduciary Duties

- ▶ Duties
- ▶ Litigation
- ▶ Presumptions
- ▶ Shifting burdens
- ▶ Incentives

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Bonds versus Insurance

- ▶ Contracts
- ▶ Duty to defend
- ▶ Duty to indemnify
- ▶ Bond language

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Bond Language

The principal, “for themselves, their personal representatives, successors and assigns, jointly and severally” agrees as follows:

... to “reimburse ... [the Surety] **upon demand** for all payments made for and **to indemnify Surety** from: a) all loss, liability, and **contingent liability**, claim, expense, including attorneys’ fees and **claims adjusting fees**, for which Surety will pay, become liable by reason of such surety, whether or not Surety shall have paid same at time of demand; and b) to pay Surety advance premium ... c) upon written demand, to **deposit with Surety a sum of money requested by Surety to cover any claim, suit, expense or judgment that Surety determines necessary** and the deposit shall be pledged as collateral security on any bond or other bonds the Surety may have for the undersigned.”

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Bond Language

Indemnitor agrees to:

... “**exonerate and Indemnify** Surety from and against all claims, losses, liability damages of any type (including punitive damages), costs, fees, expenses, suits, orders, judgments, or adjudications whatsoever which Surety may incur in connection with the extension of surety credit, including the enforcement of the agreement contained herein (collectively “LOSS”) ... that Surety shall have the right, at its sole discretion, to pay, adjust, settle or compromise any LOSS ... whether Surety was liable therefore or not, shall be prima facie evidence of the Indemnitor’s liability ... [Indemnitor shall] pay the Surety immediately **upon demand**, in the **amount the Surety deems necessary to protect the Surety from LOSS or potential LOSS**, whether or not Surety has made payment ... Surety may bring separate suits to recover hereunder....”

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Bond Risks

- ▶ **Upon demand**
- ▶ **Contingent liability**
- ▶ **Fees**
- ▶ **Surety liability**
- ▶ **Deposit money or collateral**

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Revisiting Mr. Smith

Photo here

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Case Law

- ▶ Texas – the judge, county, and guardian are sued
- ▶ Tennessee – no discharge in bankruptcy
- ▶ Florida – the guardian's attorney owed a fiduciary duty to the ward
- ▶ Minnesota – failure to strictly comply with statutory bond requirements does not void bond
- ▶ Washington – reduction of bond was void

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Tips for Guardians

- ▶ Find the assets and keep detailed notes and receipts of transactions.
- ▶ Publish notices to creditors and service providers.
- ▶ Avoid conflicts of interest.
- ▶ Do not reimburse or pay yourself, nor anyone else, without court approval.
- ▶ Do not convert the ward's assets!

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Tips for Attorneys of Guardians

- ▶ Research your proposed client before signing the engagement agreement.
- ▶ Explain the fiduciary relationship (and the bond or insurance policy) and the ramifications for alleged malfeasance to your client and gauge their response.
- ▶ Calendar deadlines and be timely with accountings.
- ▶ Read the statutes relevant to investments, accountings, monthly allowances, expenditures, and any other action filed with the court and fully comply.
- ▶ Do not accept the ward's assets for reimbursement, payment, or any other reason without a court order!

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Thank you!



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