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

By Judge Brooke Allen[1]

July 2019

"Do you, Joe Smith, solemnly swear or affirm, you will faithfully execute the duties of Guardian of the Estate of Deborah Wills in accordance with the laws of this state?"

"I do." Then Mr. Smith and the judge sign the $2,500,000.00 bond for which he has already signed a contract with the bond company.

Hopefully, Mr. Smith is an excellent and detailed guardian[2], hires a great attorney, and prudently cares for Ms. Wills' estate. Thus, other than paying the bond premiums, Mr. Smith never hears from the bond company again. But what if Mr. Smith is a successor guardian and the previous guardian was removed for cause? What if Mr. Smith's attorney is not reading the statutes (much less complying)? What if the court is signing off on everything without a thorough review? What if Mr. Smith is delegating his obligations to a third party and/or his attorney and merely signing the documents placed in front of him?

In these situations, who is liable? Who does the bond protect? Are you liable to the ward, the ward's heirs or beneficiaries, the bond company, the judge? What exactly does the bond contract say? This paper should provide you with an overview of fiduciary litigation, the difference between bonds and insurance, the potential liability of several different parties, and some tips to avoid you, or your client, becoming a defendant.

Fiduciary Litigation

Fiduciary litigation seems to be a rising form of litigation in the United States.[3] Most, if not all, states have a cause of action for breach of fiduciary duty. Typically, it requires the existence of a fiduciary relationship, a breach of a duty by the defendant which causes injury to the plaintiff or

[1] Special thanks to many of the staff members of Probate Court No. 2 in Tarrant County, Texas for their contributions to this paper including Associate Judge Lynn Kelly and attorneys Steve Fields, Jeffery Arnier, and Francine W. Hudson. In addition, the research of then-interns of my Court, Sara Murdock (now a graduate of Texas A&M School of Law) and Summer Smith (now a 2L at Texas A&M School of Law) was especially helpful.

[2] This paper uses "guardian", "guardianship", and "ward", but please note that some states use "conservator", "conservatorship", and "incompetent person". This paper also focuses primarily on the guardianship of persons over 18, not minors, although many of the same cases, statutes, and rules are applicable to minor trusts and guardianships of the estate of minors.

[3] Based on the fact the majority of states and the federal government have enacted some type of tort reform. *See generally*, *Which States Have Tort Reform: Where to Practice?* Doug Bennett, Jan. 17, 2018, Merritt Hawkins Physician Staffing Blog, https://www.merritthawkins.com/news-and-insights/blog/healthcare-news-trends/which-states-have-tort-reform-where-to-practice/ (recognizing that as of 2016, at least 33 states have imposed a cap on damages allowed in medical malpractice lawsuits). However, typically tort reform has little or no impact on fiduciary litigation. Moreover, per conversations with counsel, it is also believed that the theories of aiding and abetting and conspiracy to breach fiduciary duties are on the rise.

results in a benefit to the defendant. *E.g.*, *Johnston v. Dexel*, No. H-16-3215, 2018 WL 2215865 at *5 (S.D. Tex. May 15, 2018); *Smallwood v. Lupoli*, 107 A.D.3d 782, 784 (N.Y.S.C. 2013).

It is clear a guardianship creates a fiduciary relationship between the guardian and the ward. *E.g.*, *Persson v. Smart Inventions, Inc.*, 125 Cal.App.4th 1141, 1160 (Cal. 2nd Dist. 2005); *In re Munsell's Guardianship*, 31 N.W.2d 360, 366 (Iowa 1948). In addition, trustees and personal representatives of estates owe fiduciary duties to the heirs or beneficiaries. *E.g.*, *Montgomery v. Kennedy*, 669 S.W.2d 209, 213 (Tex. 1984); *Persson*, 125 Cal.App.4th at 1160. Moreover, it is undisputed attorneys owe fiduciary duties to their clients. *E.g.*, *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988); *Saadeh v. Connors*, 166 So.3d 959, 962 (Fla. 4th DCA 2015).

Fiduciaries owe the duty of loyalty and good faith. *E.g.*, *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 80 (Tex. 2015). They owe candor. *E.g.*, *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex. App.—Beaumont 1996, writ denied). They may not self-deal and this extends to self-dealing with the fiduciary's spouse, employees, or others close to the fiduciary. *See e.g.*, *KCM Fin.*, 457 S.W.3d at 82. Fiduciaries must act with strict integrity, and owe the duty of full disclosure. *E.g.*, *Montgomery*, 669 S.W.2d at 313.

In addition to common law duties, guardians, trustees, and personal representatives often have specific fiduciary duties imposed on them by statute. *E.g.*, TEX. PROP. CODE §§ 113.051 et seq. (dealing with trustees); TEX. ESTATES CODE § 351.101 (setting standards for investments by estate administrators). For example, there are many statutes regarding the management of assets, investments, and the payment or incurring of debt. *E.g.*, TEX. ESTATES CODE § 351.101. And, it is a relationship in which the fiduciary agreed to serve and thus, knew, or at the very least, should have known of these high standards and obligations. Are you advising your client as to their duty as a fiduciary? How about the risks of signing a bond?

As we turn to the issue of breach it is important to note the presumptions and burden shifting in some states. In many states there is be a presumption of unfairness when a fiduciary enters into a relationship with themselves. *E.g.*, *Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974); *In re Munsell's Guardianship*, 31 N.W.2d at 365. Thus, once the plaintiff proves there was a transaction which involved the fiduciary instead of an unrelated third party, the burden of evidence and persuasion shifts to the defendant. *E.g.*, *In re Munsell's Guardianship*, 31 N.W.2d at 365; *Moore v. Tex. Bank & Trust Co.*, 576 S.W.2d 691, 695 (Tex. App.—Eastland 1979) *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980). Also, in some states regardless of whether the fiduciary engaged in self-dealing, the burden of proof may shift to the fiduciary to justify his or her actions. *E.g.*, *In re Munsell's Guardianship*, 31 N.W.2d at 365; *Moore*, 576 S.W.2d at 695. The presumptions and burden shifting can be powerful tools for a plaintiff. It is certainly another reason fiduciaries should be cautious when entering into the relationship and strictly comply with all of their duties.

Whether the plaintiff must prove a breach, or the defendant must overcome a presumption, the next element is to prove breach was the cause of the plaintiff's injuries or the defendant's benefit. Typically, in a financial case this is not too difficult as we can "follow the money." But, what about

when a guardian of the person has placed the ward in harm's way? What if the guardian has "preserved the estate" for his inheritance? It is worth looking into before filing a petition or answer.

Finally, as to fiduciary duty litigation, and perhaps most important to plaintiffs and those considering becoming a fiduciary, are the remedies and damages. Most states not only allow for actual damages, but they also allow for mental anguish and exemplary damages. *E.g.*, TEX. CIV. PRAC. & REM. CODE § 41.003(a); *Douglas v. Delp*, 987 S.W.2d 879, 884-85 (Tex. 1999). While mental anguish and exemplary damages may require more evidence or a higher burden of proof, they can be a significant incentive for plaintiffs to sue or threaten a lawsuit, or a deterrent for persons to serve as fiduciaries. TEX. CIV. PRAC. & REM. CODE § 41.003(a); *Douglas v. Delp*, 987 S.W.2d at 884-85.

Back to Mr. Smith… He agreed and became a fiduciary. Ms. Wills lived happily and comfortably. Her other children never visited, but they sent cards and called occasionally. Then, approximately three and a half years after begin placed under guardianship, Ms. Wills passed away. All her children appeared for the funeral and were anxious to speak with Mr. Smith, their half-sibling. Interestingly, Mr. Smith began hearing from his half-siblings' attorney as well. And, Ms. Wills died intestate. Trouble was brewing. But, Mr. Smith thought, "I have an attorney. The court approved my expenditures, payment requests, and accountings. I am bonded. There is nothing to worry about, is there?"

Bonds versus Insurance

Most attorneys and their clients are familiar with insurance. For example, many people have auto insurance to protect themselves[4] should they be in a car accident. Insurance policies typically pay for injuries and property damage of the insured as well as any injuries and property damage of the person struck by the insured. *See generally*, *e.g.*, *D.R. Horton-Tex., Ltd. V. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 740, 743 (Tex. 2009) (recognizing insurance policies generally include the insurer's duty to defend and indemnify the insured). In addition, most policies have a "duty to defend" clause meaning the insurance company will hire an attorney to defend a covered lawsuit against its insured. *See generally*, *e.g.*, *id*. The "duty to defend" and "duty to indemnify" are typically present in many legal malpractice insurance policies, errors and omissions insurance policies, and commercial general liability (CGL) policies. But, does your legal malpractice insurance policy cover alleged malfeasance in your duty as a fiduciary other than as an attorney? Does you or your client's error and omissions or CGL policy cover guardians? Does the bond?

Similarly, both insurance policies and bonds are governed by general contract law at least as to the principal and insurer or surety. Most attorneys encourage people to read contracts before they sign. After you sign, you are presumed to have read and understood the contract and its terms. *E.g.*, *Associated Employers Lloyds v. Howard*, 294 S.W.2d 706, 708 (Tex. 1956). Have you read the

[4] I once represented a client who was not at fault in an auto collision. She continued to believe that the at-fault driver's insurance was to protect her (my client). A fundamental change in her mindset occurred during the litigation. Most people purchase insurance to protect themselves and their property or simply to protect themselves from litigation and damages, not the third party they may injure or the damage they may cause to the third party's property.

bond contract? Do your clients read it, specifically the indemnification language? Do you advise them on it or even discuss it in detail? Do you explain the risks they may be incurring by signing?

Common 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."

Others may include within the indemnity agreement that the 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…."

Any risks with the phrases, "upon demand", "contingent liability" or "potential loss", "claims adjusting fees", "whether or not the surety becomes liable" or "whether or not surety has made payment", or "deposit money" (and many agreements say "money or collateral") that the "surety determines necessary" in "its sole discretion"?

Do you or does your client have the assets to "upon demand" place money or their collateral with the surety merely because the surety determines it may have some liability? Are you or your client wiling to release all decision making and control on whether a case is settled, and for how much, or litigated? Clearly, this bond is not protecting you or your client. In fact, it is most likely protecting the ward, the ward's beneficiaries or heirs, and possibly the judge.[5]

[5] In some states, such as Texas, the judges are bonded in order to protect the County. Being a Texas Statutory Probate Judge (SPJ) and a former insurance defense attorney, I understand (all too well) the difference between a bond and insurance. Thus, I searched for an insurance policy as allowed by Texas statute. I could not find any company that offered one or was willing to write a policy. When I asked the other Texas SPJs if anyone had insurance, no one

Another interesting clause in some bond language is that the principal assigns any interest in any insurance policy insuring the principal to the surety. Thus, if an attorney is bonded as a guardian, but the attorney also carries legal malpractice insurance which insures the attorney acting as a fiduciary other than for legal services, the surety may now step into the attorney's place and argue for payment from the insurance proceeds to prevent its loss (or "contingent" or "potential loss"). Now, the attorney (or other person with an insurance policy covering fiduciary actions) has paid for a bond which will ultimately rely on the insurance policy. Has this been a waste of the guardianship estate?

And Mr. Smith… all he wanted to do was to assist his mother. He thought he was doing everything right, but as his half-siblings' attorney begins digging into the guardianship, some things pop up – the first guardian, his step-dad, made a loan to himself with Ms. Wills' separate property. No court order was obtained. Step-dad failed to repay the loan and no one knew about the loan when step-dad's estate was probated. Mr. Smith's attorney filed annual accountings, but his attorney never read the statutes (nor complied with them) as to the securities held by the estate. Mr. Smith just signed everything without reading it per his attorneys' instructions. This included the bond application with the indemnity agreement within the application.

Of course, the half-siblings' attorney sent a copy of the nasty demand letter accusing Mr. Smith of breaching his fiduciary duties to Mr. Smith's surety. The surety company then demanded Mr. Smith place money or collateral with them in the amount of the alleged liability (which the surety solely determined), in this case, $500,000.00. While Mr. Smith has a good job, works hard, and has a nice house and some savings, he refuses to place his home as collateral and he, unfortunately, does not have that amount of money in savings. Now what? Does the surety sue him for breach of contract even before the half-siblings have filed a lawsuit or provided evidence of Mr. Smith's alleged breaches? Mr. Smith is attempting to handle all of this with the surety while continuing to work with his own attorney to defend his actions to his half-siblings.

The Case Law

Not surprising, there is not a plethora of case law regarding the fiduciary liability of guardians. Nor are the cases discussed below all the relevant material. These cases are meant to be an overview of different jurisdictions and issues and to show that guardians, and their sureties, are being held liable for their breaches of fiduciary duties. In addition, at least one court has held the liability incurred as a guardian is not dischargeable in a Chapter 7 bankruptcy. *Ohio Casualty Ins. Co. v. Hryhorchuk*, 211 B.R. 647, 652-53 (Bankr. W.D. Tenn. 1997). What is unknown is whether the sureties are asking the principles to place money or collateral into their possession when a claim is filed or alleged. Moreover, are sureties actually suing the principals for indemnification

responded they did. Not able to find an insurance policy, I was successful in finding a surety that allowed me to negotiate language more favorable and to provide me some decision making power. For example, my bond only says "money" and not "collateral". In addition, it states that the deposited amount of money is subject to the Surety "and the public official's" (emphasis added) determination of necessity. Remarkably, the surety's attorney who negotiated with me stated that any person who actually reads the language of the bond is taking it seriously and entitled to some compromise.

when the surety pays a judgment? Sureties are certainly obtaining judgments as they should, but do they collect?

California

Price v. Fireman's Fund Ins. Co., 193 Cal.App.3d 1536 (Cal. 1st Dist. 1987) – Ward brought suit against the guardian and the guardian's surety, but the surety was dismissed. In California, an action against a surety on a probate or guardian's bond cannot be commenced until there has been a prior accounting and surcharge order determining the liability of the administrator or guardian. The guardian failed to show an exception that the accounting was impossible or unnecessary. Thus, the surety was dismissed from the case.

Iowa

In re Munsell's Guardianship, 31 N.W.2d 360 (Iowa 1948) – Mabel Munsell resigned as guardian of the estate (GOE) of Sophronia Munsell. The successor guardian objected to Mabel's final report for failure to include a bank account jointly owned by Mabel and Sophronia. Not shocking, after Mabel resigned, Mabel attempted to withdraw the money from the joint bank account. The trial court found that Sophronia was incompetent when the joint bank account was opened, but that the parties intended for it to be for Sophronia's benefit during her lifetime and then pass to Mabel. It was ordered Mabel account for several withdrawals and a judgment was rendered for $1219.75 against Mabel and the surety on her bond.

The Iowa Supreme Court recognized Iowa law that presumes a transaction is invalid when the superior party in a fiduciary and confidential relationship receives a benefit. It was Mabel's burden to rebut the presumption of overreaching and prove Sophronia acted with full knowledge of the facts and not under duress. The appellate court affirmed the trial court, but added to the judgment for a total of $1633.05.

The court also addressed issues raised by Mabel's surety. It held that regardless of Mabel's solvency, the surety was liable for the guardian's malfeasance. In addition, the court found that although the surety was not a party to the proceedings, the surety was interested in all phases of the litigation even allowing one of its attorneys to testify the surety was assisting in the defense of Mabel knowing that in many instances the judgment would be res judicata on the matter of the bond. It also participated in the accounting voluntarily, was the only party alleging insolvency of Mabel, and participated in the appeal. (In reviewing the evidence, the court noted the financial statement prepared by Mabel to her surety should not have been excluded as it was prepared for a third-party, the surety. This was true regardless of the fact that her attorney was also the agent for the surety company.) The Iowa Supreme Court upheld the judgment against the surety as well.

Florida

Saadeh v. Connors, 166 So.3d 959 (Fla. 4th DCA 2015) – Saadeh, a wealthy man, and widow, met a younger woman and loaned her money alarming his adult children. The children contacted an attorney who worked with a private profession guardian (PPG). The PPG filed for guardianship over Saadeh and a temporary guardianship was granted with a 90-day duration. Although two members of an examining committee found Saadeh competent and all parties agreed the

guardianship would be dismissed after Saadeh executed a trust in lieu of guardianship, the trial court never dismissed the temporary guardianship and the parties and court continued to conduct themselves as if it was never dismissed. When it finally ended, Saadeh sought a court order setting aside the trust. The court agreed. Saadeh then sued the PPG, the PPG's attorney, and his own court-appointed attorney.

This appellate case concerned the claims of professional negligence and breach of duty against the PPG's attorney. (The trial court dismissed holding as a matter of law the attorney owed no duty to the former ward.) Saadeh argued that the guardian's attorney met with his children in an attempt to force him into the trust. The attorney was aware Saadeh was elderly, lacked a formal education, and spoke English as a second language. However, the attorney advised Saadeh of the mechanics of the trust and led him to believe he would remain in control of the trust and its assets and be the decision maker. Later, he learned the trust was irrevocable and all control had been transferred to his children. Moreover, the attorney omitted to advise Saadeh of the negative tax impact of establishing the trust. The appellate court reversed the trial court holding Saadeh was clearly an intended third party beneficiary. Saadeh argued that as a ward, by definition, he was the intended beneficiary of everything connected with the underlying guardianship. In addition, Saadeh pointed out his estate was the one compensating both the PPG and the PPG's attorney. The court looked to the Florida guardianship statutes. As allowed and was done, the trial court appointed an emergency temporary guardian for Saadeh. Thus, a fiduciary relationship was created between Saadeh and the PPG, and the court held the PPG's attorney owed a duty to the temporary ward, Saadeh. They bolstered the holding by acknowledging the PPG was appointed to protect Saadeh and at Saadeh's expense and should never knowingly take any action adverse to the ward. The case was remanded to determine whether there was an actual breach of the duty of care owed to Saadeh.

Minnesota

In re Guardianship of Hampton, 374 N.W.2d 264 (Minn. 1985) – Ward receiving payments from the VA petitioned and was successful in having his sister, Brenda Hampton, appointed as his guardian to manage his estate. Brenda was ordered to file a $5,000 bond for court approval, and she did so the same day. However, she failed to file an accounting and at a hearing on the same, the court was informed an additional bond $21,000 was needed because Brenda had $26,000 of the ward's funds. Brenda contacted the agent for the surety and testified he said he would "take care of it." Shortly thereafter, the surety's agent issued the additional bond and placed it in the mail. Brenda never received the mail. Subsequently, Brenda resigned, but neither she nor her surety had been discharged at the time the trial court issued judgment. The trial court held the surety was not liable because the additional bond had not been signed by the principal, acknowledged, filed, or approved by the court as required by Minnesota Statute Section 574.01. The appellate court reversed. The Minnesota Supreme Court held the bond company could not raise technical noncompliance with statutory guardianship bond requirements, such as the guardian not signing a bond nor filing it with the court, as a defense in an action by the ward to recover for malfeasance of the fiduciary. The court's finding was based on the fact the person meant to be protected by the bond, the ward, was the one suing instead of the principal or surety. Thus, because

the ward did not have a duty to ensure Brenda met her statutory obligations, the signature and filing requirement were not intended to protect Brenda or the surety, and because the essence of the agreement between Brenda and surety was to discharge her duties (not sign and file the bond), the noncompliance of these statutory bond requirements did not affect the liability of the surety. The bond was held to be enforceable. The case was remanded to determine whether the surety was even liable on the bond and if so in what amount.

In re Guardianship of Hampton, 359 N.W.2d 740, 743 (Minn. Ct. App. 1984) *aff'd in part and rev'd in part*, 374 N.W.2d 264 (Minn. 1985) – This case is the intermediate appellate court case to the case explained *supra*. Here, the court notes that fidelity bonds issued by bonding companies are now regarded as insurance policies in substance. Thus, bonds issued in guardianships are governed for the most part by insurance law rather than suretyship law.

North Carolina

Duckett v. Pettee, 273 S.E.2d 317 (N.C. 1980) – Jack Pettee was appointed guardian for Maude Duckett and filed a $6,000 bond. However, the inventory filed listed Duckett's assets of $124,571.42 in personal property and $6,000 in real property, and the bond was never increased. Companies in which Pettee owned an interested were loaned money from the ward's funds and prepared the accountings which showed the loans. On behalf of Duckett, both Pettee and the clerk of the court that only required a $6,000 bond were sued. Cross summary judgments were filed. Judgment was entered in the amount of $126,000 against Pettee and $42,000 against Pettee's surety. On appeal, the Court limited the surety's liability to $6,000 total holding the bond was continuous and not for a single year, reasoning annual premiums do not create a series of yearly contracts. The court also denied the surety's three-year statute of limitations argument reasoning that the ward, being incompetent, could not bring suit and no one would expect a guardian breaching his fiduciary duties would sue himself. Because the plaintiff was appointed successor guardian within three years of filing of this suit, it was timely. Although the court noted the clerk had clearly not set an appropriate bond, this issue was not before the court.

New York

Matter of Brancato, 139 A.D.3d 847 (N.Y. 2nd Dept. 2016) – In 2002, Charles Benton was appointed guardian of the property of Joseph Brancato and obtained a bond in the sum of $500,000. It was reduced in 2004 to $207,000. In 2006, the GOE resigned and was relieved. In 2008, the ward passed. The executor of Brancato's estate sued Benton and obtained a judgment for $664,338 for Benton's breach of fiduciary duties, and then obtained leave to file this lawsuit against the surety on Benton's bond.[6] The Surrogate Court limited the surety's liability to a total of $500,000.

[6] New York's Surrogate Court's Procedure Act Section 809(1)(a) states an action on a fiduciary's bond may be commenced upon leave of court by motion on notice to the surety if a judgment remains unsatisfied 10 days after entry, and the lawsuit may be initiated by the successor fiduciary, or if none, by the aggrieved person. The statue also allows any person favored by the original judgment to request a summary determination of the surety's liability in lieu of filing an action.

Smallwood v. Lupoli, 107 A.D.3d 782 (N.Y.S.C. 2013) – Matthew Lupoli was appointed guardian of the estate (GOE) over the real property of two minor wards. The wards' guardian of the person sued the GOE for breach of fiduciary duty for allegedly ignoring offers and instead selling the property to pre-selected bidders (who then resold the properties for a substantial profit). The complaint also alleged breach of fiduciary duty, conspiracy, violation of a judiciary law[7], prima facie tort[8], and conversion against the GOE and his attorneys. The Court granted summary judgment as to the attorneys on all claims. The only claims remaining after the summary judgment were the breach of fiduciary duty against the GOE, and his alleged coconspirators which included the buyers of the real property.

Matter of O'Leary, *Deceased*, 124 A.D.2d 915 (N.Y. Sup. Ct. 3rd Dept. 1986) – Mom of minor was appointed guardian of the estate (GOE) of her minor son's property. The administration of the estate with the court was dispensed upon the filing of a bond. The GOE used the property for unnecessary purchases and son, once he became an adult, moved for summary judgment on his mother's bond. The surety admitted the withdrawals and purchases were without court approval, but argued the son was estopped from collecting on the bond because as a minor he benefited from the GOE's spending. Summary judgment was granted and upheld on appeal. The appellant court noted that the legislature saw fit to protect minors from wasteful spending by requiring a bond. It continued by recognizing the bond company accepted the risks of misuse, the GOE spending without court approval, and that the GOE may allow the minor to dissipate the estate.

Ohio

Ohio Casualty Group of Ins. Co. v. Cochrane, 586 N.E.2d 257 (Ohio 9th Dist. 1990) – Successor guardian sued the surety on the original guardian's bond to recover funds allegedly converted by the original guardian. The surety and successor guardian filed summary judgment motions. The appellate court held the surety could not unilaterally revoke the fiduciary bond. It stated the failure to pay the bond premium was a breach of the bond contract by the guardian, but not a basis to render the bond unenforceable. The appellate court also reversed the trial court's granting of judgment for the successor guardian against the surety reasoning the trial court failed to identify the wrongful act which made the debt uncollectible[9].

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[7] Allegations included a violation of New York Judiciary Law Section 487 which states:

> An attorney or counselor who: (1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, (2) Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

[8] Under New York law, a *prima facie* tort occurs when there is an intentional infliction of harm resulting in special damages without excuse or justification by an act or series of acts which are otherwise legal. *Smallwood*, 968 A.D.3d at 785.

[9] Ohio law R.C. 2109.17 "Sureties" requires the debt to be deemed uncollectible, presumably from the fiduciary, prior to the surety being held liable. The statute states:

Tennessee

Ohio Casualty Ins. Co. v. Hryhorchuck, 211 B.R. 647 (Bankr. W.D. Tenn. 1997) – Hryhorchuk (Dad) was appointed legal guardian of his two minor children and had control of their assets. Dad obtained a bond for $50,000 for each of the two estates. The bonds were increased to approximately $260,000 each. Based on evidence of personal gain from the funds, the court ordered Dad to cease any further expenditures. Dad then withdrew virtually all of the funds and used it in an attempt to save his business and gamble. The surety paid $348,938.84 on the bonds pursuant to the court orders. In turn, the surety sued Dad for indemnification and subrogation. Dad filed bankruptcy and the surety filed summary judgment seeking a nondischargeable judgment against Dad for the payment on the bonds. The bankruptcy court held Dad was collaterally estopped from relitigating the validity of the surety's claim, and it was to provide full faith and credit to the judicial proceedings of the state court (also noting the doctrine of issue preclusion). In addition, because Tennessee required the principal to be liable prior to the surety being liable, it was determined the state court necessarily determined the extent of the liability of Dad.

The bankruptcy court continued by addressing whether the debt owed to the surety was dischargeable in a Chapter 7 bankruptcy proceeding. Noting 11 U.S.C. § 523(a)(4) excepting from discharge any debt incurred in a fiduciary capacity for fraud or defalcation, the court held the judgment was not dischargeable.

Texas

Johnston v. Dexel, 373 F.Supp.3d 764 (S.D. Tex. 2019) – This opinion deals with a summary judgment filed by a Texas statutory probate judge on the one surviving claim against the judge that the judge grossly neglected to use reasonable diligence in the performance of her duties under the guardianship subchapter. (Please see the 2018 case summary for the pertinent background.)

The Court rejected the argument that only the ward, Willie Jo Mills, had a claim (and thus her Estate since she was now deceased) to sue the judge pursuant to Section 1201.003 of the Texas Estates Code reciting the Section saying the judge was liable on the bond "to those damaged". Thus, the allegations supporting the Section 1201.003 claim included that the judge allegedly: (1) took no action in response to her emergency-relief requests; (2) turned a blind eye to Mills' danger after receiving information of Mills' deteriorating health and medical conditions; (3) failed to require the successor guardian to perform her guardian duties; and (4) conducted ex parte communications with the guardian and successor guardian without notifying Johnston or her sisters; survived.

The federal judge stated, "the [probate] judge's failure to act on a motion could support a finding of 'gross neglect of the judge to use reasonable diligence.'" She went on to recite the Texas standard of gross negligence is that lack of care which would raise a belief that the act or failure

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A surety on the bond of a fiduciary shall not be held liable for any debt of the fiduciary to the estate represented by the fiduciary existing at the time the fiduciary was appointed; but the surety shall be liable to the extent that the debt has been made uncollectible by wrongful act of the fiduciary after appointment.

to act was the result of conscious indifference to the right or welfare of the person(s) affected. He focused on the defendant's state of mind in order to separate ordinary and gross negligence.

However, after reviewing the evidence, the actions taken by the judge, and relevant law, the federal district judge held the judge did not act unreasonable, let alone with gross neglect in the guardianship proceeding. The evidence showed the judge acted with conscientiousness towards Mills' well-being, ordered a guardian ad litem to investigate, heard evidence, and responded to the parties' disputes. Because the court did not find any inference the guardianship judge acted with gross neglect, summary judgment was granted. Thus, all claims against the statutory probate judge were dismissed.

The Court also considered the summary judgment by the guardian, David Drexel, concerning alleged breaches of fiduciary duty. Drexel challenged the claims based on claim preclusion, Sherry Johnston's capacity, and Johnston's failure to identify evidence to support an inference of the alleged breach.

As to capacity, it was agreed Johnston was not a personal representative of Mills' estate. However, she was an heir, as Mills' daughter. The dispute was whether the independent administration of Mills' estate was closed which would then allow an heir to bring a causes of action on behalf of the deceased ward. The Court found a fact issue as to whether the estate was open or closed and thus denied summary judgment on these grounds.

Next, the court addressed claim preclusion. It noted Johnston was an "interested party" in the guardianship proceeding and failed to object to Drexel being appointed guardian or his fee requests. While the court addressed the factors to be considered in this argument, it ultimately punted on a decision and remanded the case to state court. In reviewing whether there was a factual dispute as to a breach of fiduciary duty concerning the allegation of billing at an attorney rate for guardian work, the court held there was enough evidence to preclude summary judgment.

As of mid-July 2019, it does not appear the state court has made a ruling on the applicability of claim preclusion.

Johnston v. Dexel, No. H-16-3215, 2018 WL 2215865 (S.D. Tex. May 15, 2018) – Willie Jo Mills, a ward of the state of Texas pursuant to a guardianship order of a Harris County statutory probate court died in a nursing home. Her daughter, Sherry Johnston, alleged Mills received improper and negligent care that contributed or caused her death. Johnston sued numerous defendants including the guardian, successor guardian, guardian ad litem, the judge, and the county. All claims against the judge were dismissed in the first motion to dismiss except the claim pursuant to Texas Estates Code Section 1201.003[10]. Interestingly, the Court allowed leave to amend on the Section 1983 claim against Harris County. Johnson alleged breach of fiduciary duty against the guardian, David

[10] This Section creates a limited waiver of judicial immunity for losses directly linked to a judges' duties under the guardianship subchapter. TEX. ESTATES CODE § 1201.003. The duties include the use of reasonable diligence to determine whether an appointed guardian is performing the required duties, to at least annually examine the well-being of each ward and the solvency of the appointed guardian's bond, to require new bonds from appointed guardians when necessary, and to request the production of identifying information. *Id.* at §§ 1201.001-004.

Drexel, and successor guardian, Ginger Lott, in addition to conspiracy allegations and fraud claims. Lott was also sued for wrongful death. Johnston filed a second amended complaint to cure the deficiencies.

In hearing the second motion to dismiss, the Court recited some of the facts (which are taken as true in reviewing a Federal dismissal motion): In 2013 Mills fell from her wheelchair and broke several bones in her right leg. Drexel discontinued physical therapy during Mills' recuperation. This same month Drexel allegedly made an ex parte request for a guardian ad litem (GAL), Clarinda Comstock, and filed his request three days later. He did not notify Johnston.[11] Comstock was appointed. Mills' condition continued to deteriorate. Johnston demanded Drexel move Mills to a different nursing home and threatened to ask the Court to remove Drexel. Drexel resigned.

A successor guardian, Lott, was appointed allegedly in another ex parte meeting. At a status conference, the parties reached an agreement on several medical items and reinstated Johnston's visitation rights. The GAL filed a report. However, in 2014, Johnston alleged Lott failed to set up medical appointments advised by a doctor. Johnston's allegations against Lott continued, Johnston filed an application for guardianship with the Court, and in September of 2014, Mills passed away.

The Court ruled the breach of fiduciary duty claim against Drexel move forward. However, he left the argument of claim preclusion (that Drexel's alleged breaches for charging an attorney rate for guardian duties and "slipping Lott" into the guardian position were barred by the probate court's orders) for another day.

The Court ruled Comstock, the GAL, who was also sued for breach of fiduciary duty, was immune from civil damages arising from her duties as GAL pursuant to Texas Estates Code Section 1054.056.[12]

In defending the lawsuit, the guardianship judge alleged judicial immunity. The Court recognized that Texas Estates Code Section 1201.003 creates a limited waiver of judicial immunity for losses directly linked to a judges' duties under the guardianship subchapter.[13] However, this is only for "gross neglect of the judge to use reasonable diligence in the performance" of the duties and only in as much as the bond ($500,000 in Texas for statutory probate judges). The Court held a plausible complaint had been tendered against the judge's bond.

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[11] It is not clear whether at this time Johnston had made a formal appearance in the guardianship or was simply still considered an interested person per statute. Once a formal appearance was made (which seems to have occurred based on the motions and documents Johnston filed with the statutory probate court), she was entitled to be sent copies of all filings and notice of all settings per Texas Rule of Civil Procedure 21.

[12] Texas Estate Code Section 1054.056 exempts court-appointed guardians ad litem from civil liability for their recommendations or opinions in a guardianship proceeding unless the recommendation or opinion is wilfully wrongful, grossly negligent, or is given in malice, bad faith, or conscious indifference or reckless disregard for the safety of another.

[13] *See supra*, n. 10.

Johnson's claim against all the Defendants for allegedly engaging in illegal disability discrimination and retaliation violating the Americans with Disabilities Act were dismissed for failure to state a claim.

Washington

In re Deming's Guardianship, 73 P.2d 764 (Wash. 1937) – Wife, Helen and husband Clarence Deming, had three children. Helen died when the children were minors. Clarence was appointed executor of her estate and her will left her property to him, but did not mention her children.[14] Clarence had considerable debt. He drove Helen's car several years and then turned it over to one of his creditors to settle a debt. Later he became guardian of the person and estate of the minor children. He hired counsel and obtained a $500 bond. Over the years, Clarence received approximately $70,000 for his children. His bond was increased to $100,000. Clarence failed to file an inventory, but filed petitions showing various amounts received and obtained approval of what he called an annual account in 1922. During the guardianship, Clarence did not separate the funds for each child. He used the funds for living expenses and the oldest son's schooling. He also employed a housekeeper for the two younger children and the home. During the guardianship, the bond was reduced to $1,000 and Clarence was ordered to deposit the securities with Union National Bank. Clarence was removed as guardian and the Seattle Trust Company was appointed with a bond of $1,000. Clarence filed an account which resulted in a trial. The judge entered an order against Clarence's surety for $1,000 (believing this to be the current bond and extent of the liability) which was promptly paid and the surety was released from further liability by court order.

Several years later, the oldest son, Robertson, became an adult. He filed objections to Seattle's reports. Clarence was ordered to appear in court and a guardian ad litem (GAL) was appointed for the two children who were still minors. The accountings were in disarray and it appeared Clarence had misappropriated considerable amounts. Ultimately, the court entered judgment against Clarence for approximately $45,000, with six percent interest totaling approximately $30,000 and damages of just over $7,000 for a total judgment against Clarence and his surety of $82,493.25 (to be split among the three children). The Court further ordered payments to the guardian and the guardian's attorneys for the litigation concerning the malfeasance of Clarence and the audit of the Seattle accounts. Clarence's surety appealed these orders as to the two minors (Robertson accepted and received a settlement).

The surety first argued it was not provided a fair trial because the judge sympathized with the minor children left destitute if a judgment was not granted. The appellate court quickly dismissed this argument based on the lengthy hearing and participation of the parties, sureties, and numerous counsel. Second the surety argued the previous orders of the court were prima facie correct and the court agreed. However, the appellate court continued by noting the orders were within the control of the court and could be set aside, modified, or corrected if justice so demanded. This lead

[14] Washington law generally considers children not mentioned in the will who were born after the will was executed, as having rights as if their parent died intestate. RCW 11.12.091 Omitted child.

to the appellate court upholding the trial court's decision the $100,000 bond was still in effect despite the previous court orders in the guardianship and actions of the parties.

Next, the surety argued the order releasing it from liability on the bond (after tendering the $1,000 payment) was in full satisfaction of its obligations. However, because the trial court set aside the order of release and credited the surety for the $1,000 payment, the surety was not entitled to more. The court recognized Washington Statute 28 C.J. 1300 Section 506, "[t]he probate court has no inherent power to discharge the bond of a guardian from liability upon terms other than a compliance with the conditions thereto; its power in the premises is limited to such as is conferred by statute."[15] Continuing its review of alleged error, the appellate court found the $7000 in damages assessed was arbitrary, unjust, and not based on a reasonable theory of compensation so as to be considered a taking without due process. Thus, the court reversed the trial court's judgment of what amounted to a penalty. The appellate court also dealt with several expenditures, support and maintenance allowances for the children, and alleged inadequate credits. The case was remanded to determine the amount of the final judgment. Finally, the appellate court recognized the judgment should include that once the surety satisfied the judgment for the minors, it was entitled to judgment against Clarence, the guardian.

Tips for Avoiding "Alleged" Breaches of Fiduciary Duty

Top Five Tips for Guardians:

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

Top Five Tips for Attorneys of Guardians:

5. Research your proposed client before signing the engagement agreement.
4. Explain the fiduciary relationship (and the bond or insurance policy) and the ramifications for alleged malfeasance to your client and gauge their response.
3. Calendar deadlines and be timely with accountings.

[15] The Washington Court also cited three cases from other jurisdictions with similar holdings. *Clark v. Am. Surety Co.*, 49 N.E. 481, 484 (Ill. 1897) (reversing the trial and appellate courts, the Illinois Supreme Court remanded with instructions to set aside the orders approving a verified account, releasing the surety on one bond, and setting a new bond of an administrator). *Bookhart v. Younglove*, 218 N.W. 533, 535 (Iowa 1928) (noting in the absence of a statute, the court is without authority to release or discharge a surety, except with the interested parties' consent). *Commonwealth to Use of Shaffner's Adm'r v. Rogers*, 53 Pa. 470 (Penn. 1866) (holding that the bond was to secure an heir his share of the estate and the court could not annihilate the heir's rights without notice to him, and was simply void (even if the court releasing the bond had actually possessed the power to do so)).

2. Read the statutes relevant to investments, accountings, monthly allowances, expenditures, and any other action filed with the court and fully comply.

1. Do not accept the ward's assets for reimbursement, payment, or any other reason without a court order!

Although these tips seem general and of common sense, setting expectations, knowing the relevant statutory scheme, and avoiding any appearance of impropriety are key to avoiding trouble for fiduciaries which could result in more than just headaches for attorneys. The precedent set in *Saadeh* and several other cases discussed, along with the strong contractual language favoring sureties, should be enough to prompt all fiduciaries and their attorneys to revisit their obligations often and ensure strict compliance.