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PROBATE LAW JOURNAL OF OHIO

JULY/AUGUST 2024 | VOLUME 34 | ISSUE 6

WHAT YOU NEED TO KNOW: HOW TO USE THE GUARDIAN'S BOND IN FURTHERANCE OF A MAXIMIZING RECOVERY IN A SURCHARGE MOTION

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With the rise in plaintiffs seeking redress for wrongdoing, whether intentional or unintentional, by fiduciaries in general, this article will provide an overview of Ohio law relating to the process of obtaining a surcharge against a former fiduciary acting as

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guardian of the estate (throughout this article referred to as "guardian").

The essence of the rule of law is this: when a wrong is done, a remedy should be available. Wrongs are not to be left free and untethered, allowed to grow and fester with speed, but, instead, they are to be circumvented, controlled, and ultimately discouraged. That is why the old adage that "there is no right without a remedy" rings true, as rights, those protections against wrongs, are hollow unless the rule of law provides an appropriate remedy for their breaches. Thankfully, when a wrong is committed by a fiduciary, whether handling an estate, a trust, or a guardianship, Ohio probate courts are vested with the authority to surcharge a fiduciary for the mismanagement of funds pursuant to R.C. 2109.42 and R.C. 2101.24 and the losses sustained by such mismanagement.

In fact, for over 150 years, Ohio courts have awarded a surcharge against those fiduciaries who stole from their clients, wards, estates, beneficiaries, and the like.[1]

The Guardianship Inventory and/or Account—Breach of Fiduciary Duty

The guardian's inventory is a filing required to be reviewed with a close eye. R.C. 2111.14(A)(1) requires a guardian's inventory to itemize the ward's real and personal property, including, but not limited to, checking accounts, savings accounts, investment accounts, and retirement accounts, and their corresponding values. A guardian's inventory also lists the location and contents of any safety deposit box owned by the ward and the location of the ward's last will and testament. While a pattern of misconduct may not be evident from a guardian's inventory, it may still provide an opportunity to conceal guardianship assets from the court. For this reason, an inventory must be closely reviewed.

Another guardianship filing requiring scrutiny is a guardian's account. A guardian's account is an itemized statement of all receipts, disbursements, and distributions made by the guardian during the accounting period. Proof of each disbursement and distribution must be attached to the account. The account period begins either with the date of the guardian's inventory of assets or with the listing of guardianship assets on hand from the ending date of the prior account. In addition to all receipts, disbursements, and distributions, a guardian's account details all gains and/or losses on the guardianship assets. Lastly, a guardian's account will state the remaining guardianship assets on hand at the end of the account period.[2] A guardian's account is required at least biennially or upon order of the court.[3] A guardian's account requires careful review and may expose a guardian's misconduct and breach of fiduciary duty.

Breach of fiduciary duty-just an occupational variation of the centuries-old rule of negligence, that is, breaching of the duty of care toward one who is owed a duty-is a right to be zealously protected. In the case of *Guardianship of Zimmerman*,[4] the Ohio Supreme Court stressed that the "Probate Court has a plain duty and plenary power to require [guardians] to account fully for their care or lack of care of the assets belonging to the estates of these wards. It is the duty of the Probate Court to fix the liability, if any, to the wards of these guardians . . . and their bondsmen."[5]

This holding from 80 years ago remains fully consistent with the subsequently enacted R.C. 2101.24(A)(1)(m), which gives probate courts exclusive jurisdiction "to

direct and control the conduct of fiduciaries and settle their accounts." Furthermore, R.C. 2101.24(C) states, "[t]he probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code." As noted above, an accounting embraces the entire conduct of the guardian, both of commission and omission, in respect to the ward's estate.[6]

Protecting the Ward—The Bond and Common Pitfalls

While it is often easier to resolve a motion to surcharge when the fiduciary has a bond, under Ohio law, a bond is not necessarily a prerequisite to surcharge a guardian for misappropriating assets. A party can get a personal judgment against the former guardian's assets.[7]

However, the bond is absolutely crucial in protecting the ward's guardianship assets and providing a financial guaranty that can be utilized if the guardian fails in his or her duties. In lay terms, a guardian's bond is an insurance policy that protects the ward from any misuse of the guardianship assets. Per R.C. 2109.04(A)(1), a guardian's bond must be obtained for double the value of the ward's tangible and intangible personal property listed in the guardian's inventory. However, on occasion, the court will entertain a motion to reduce the bond for one reason or another.[8]

"Surcharge" refers to holding a guardian financially accountable for mismanaging or misappropriating the ward's assets. Even if a bond is in place, the process of surcharging a guardian involves legal action by interested parties (such as other family members or the court-appointed fiduciary), demonstrating that the guardian has breached their fiduciary duty.

Meanwhile, "[s]uretyship is the contractual relation whereby one person, the surety, agrees to answer for the debt, default, or miscarriage of another, the principal, with the surety generally being primarily and jointly liable with the principal debtor. Because the surety's obligation is derived from that of the principal, the liability of the surety is ordinarily measured by the liability of the principal. "As a general rule, a surety on a bond is not liable unless the principal is and, therefore, may plead any defense available to the principal with the exception of defenses which are purely personal to a principal, such as infancy, incapacity, or bankruptcy."[9] This guarantee ensures if the guardian fails to meet their obligations, the surety will fulfill them, either by performing the required act or compensating the obligee/ward financially. However, the surety can use any defense the guardian is entitled to, except for defenses strictly personal to the guardian, such as bankruptcy, infancy, or incapacity.

Yet, this notwithstanding, if the aggrieved party intends to pursue the surety to collect for malfeasance, they should be aware that a surety's liability "is dependent upon, and can be no greater than, that of the principal."[10] Therefore, the surety's liability is measured by the guardian's liability.

Procedurally, the aggrieved party files a motion for surcharge within the same guardianship estate. There is no requirement for a new case to be filed. The motion for surcharge will be against the fiduciary and the surety. The Court will then permit the parties to engage in discovery relating to the alleged misconduct and damages. A hearing will be set on the surcharge motion, with

testimony and exhibits introduced. Following the admission of the evidence, the Court will then issue its decision.

Don't Wait Too Long—The Statute of Limitations

A century ago, Oliver Wendell Holmes, Jr. questioned, "What justifies depriving a man of his rights, which is purely evil in itself, due to the passage of time?"[11] But that is exactly the purpose of a statute of limitations. A statute of limitation is the maximum amount of time a person has to initiate legal action based on a certain event. Every type of legal claim has a statute of limitation—including seeking a surcharge against a guardian and attempting to hold the surety financially responsible.

A small contingent of case law holds that all claims against a surety are subject to a 10-year statute of limitations on a surcharge claim, pursuant to R.C. 2305.12. R.C. 2305.12 provides in part that an action against the bond of an administrator "shall be brought within ten years after the cause thereof accrued." However, the majority case law says otherwise.[12]

Specifically, "Ohio courts have generally held that an action accrues against the surety on a bond when 'some sort of determination or adjudication of the liability of the principal has occurred.' "[13] It is for this very reason that it is always better to prosecute a claim swiftly and file the surcharge motion as soon as reasonably possible.

However, to preserve the statute of limitations and any claims that may exist, parties must be aware that several courts have held that to preserve the right to challenge the guardian's administration of the estate of the ward, the aggrieved party (or their representative) must file exceptions to the guardian's account. Otherwise, it is quite possible that the doctrine of res judicata bars relitigation of whether the guardian property administered the ward's estate. In 2023, one of the authors of this article obtained a unanimous reversal at the Supreme Court of Ohio, where in a landmark decision, the highest court held that once a trial court issues a final order, parties are legally barred from re-litigating the same issue in a subsequent lawsuit.[14] Simply put, if a party believes a mistake has been made (by the court, guardian, or another), it is always best to exhaust available trial court remedies, such as filing exceptions to an accounting or inventory.

The Expenses Are Worth It—Attorneys' Fees and Other Costs are Recoverable in Surcharge Action

Ohio courts have consistently held that costs and experts necessary to trace assets and reconstruct records, attorneys' fees, accountants' fees, and other costs that "are a direct and proximate result of [the prior guardian's] actions in the administration of [her] duties to the estate, as well as [her] failure to file [an accounting] in a timely manner" are valid costs to be assessed.[15]

Since these costs and expenses are likely to be reimbursed, with statutory interest, by the surety, they are worth incurring to ensure the former guardian is held accountable for a breach of fiduciary duty or malfeasance.

Conclusion

In conclusion, Ohio law provides robust mechanisms for surcharging guardians who mismanage guardianship assets. By holding guardians accountable through probate court actions and leveraging statutory authority, the legal framework ensures that wrongs are addressed and remedies are

available. This upholds the integrity of the guardian and fiduciary duties and, most importantly, protects the rights and assets of wards.

ENDNOTES:

[1]See, e.g., *In re Raab's Estate*, 16 Ohio St. 273, 282-284, 1865 WL 22 (1865) (probate court can surcharge fiduciary for money owed estate); *Brown v. Reed*, 56 Ohio St. 264, 270-71, 46 N.E. 982 (1897) (probate court can determine loss in land sale and surcharge fiduciary).

[2]R.C. 2109.302(A).

[3]R.C. 2109.302(A).

[4]*Guardianship of Zimmerman*, 141 Ohio St. 207, 25 Ohio Op. 326, 47 N.E.2d 782 (1943).

[5]*Guardianship of Zimmerman*, 141 Ohio St. 207, 224, 25 Ohio Op. 326, 47 N.E.2d 782, 790-91 (1943).

[6]*Guardianship of Zimmerman*, 141 Ohio St. 207, 226, 25 Ohio Op. 326, 47 N.E.2d 782 (1943).

[7]*Guardianship of Skrzyniecki*, 118 Ohio App. 3d 67, 72, 691 N.E.2d 1105, 1108 (6th Dist. Lucas County 1997) ("We do not dispute that a guardian can be held personally liable for the estate's debts which arose due to his negligence if the issue is properly raised.")

[8]R.C. 2109.04.

[9]*Hopkins v. INA Underwriters Ins. Co.*, 44 Ohio App. 3d 186, 189, 542 N.E.2d 679, 683 (4th Dist. Pickaway County 1988) (citations omitted).

[10]*State v. Herbert*, 49 Ohio St. 2d 88, 128, 3 Ohio Op. 3d 51, 358 N.E.2d 1090, 1112 (1976) (dissent).

[11]See Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 476 (1897) (address delivered by Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the dedication of the new hall of the Boston University School of Law, on January 8, 1897).

[12]See *Board of Educ. of Cleveland City School Dist., Cuyahoga County, Ohio v. United Pacific Ins. Co.*, 1991 WL 117936, *4 (Ohio Ct. App. 8th Dist. Cuyahoga County 1991), appeal dismissed, ordered not precedential, 65 Ohio St. 3d 1214, 1992-Ohio-62, 605 N.E.2d 947 (1992) (holding that "[a] clear reading of the two statutes of limitations *in pari material* indicates the legislature intended the ten year statute of limitations on official bonds to apply in those situations when *no other statute* is applicable.").

[13]*Rothschild v. Eckstein*, 2010-Ohio-4285, ¶ 28, 2010 WL 3528996, *8 (Ohio Ct. App. 9th Dist. Lorain County 2010), quoting *In re Guardianship of Thomas*, 2008-Ohio-2409, ¶ 75, 2008 WL 2081274, *14 (Ohio Ct. App. 7th Dist. Monroe County 2008), quoting *Board of Educ. of Cleveland City School Dist., Cuyahoga County, Ohio v. United Pacific Ins. Co.*, 1991 WL 117936 (Ohio Ct. App. 8th Dist. Cuyahoga County 1991), appeal dismissed, ordered not precedential, 65 Ohio St. 3d 1214, 1992-Ohio-62, 605 N.E.2d 947 (1992).

[14]See *AJZ's Hauling, L.L.C. v. TruNorth Warranty Programs of North America*, 174 Ohio St. 3d 241, 2023-Ohio-3097, 236 N.E.3d 176 (2023).

[15]*In re Guardianship of Cawein*, 1995 WL 653853, *8 (Ohio Ct. App. 1st Dist. Hamilton County 1995); See also *In re Estate of Minella*, 1999 WL 354336 (Ohio Ct. App. 1st Dist. Hamilton County 1999).