



Office of the Attorney General
State of Texas

DAN MORALES
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September 23, 1996

The Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 96-105

Re: Whether, under Probate Code section 887, a debtor may pay money to a county clerk for the benefit of a creditor if the creditor is owed, from all sources, a total greater than \$25,000 and related question (ID# 38724)

Dear Mr. Driscoll:

Under Probate Code section 887, when an incapacitated individual who has no legal guardian is entitled to an amount of money that is \$25,000 or less (hereinafter the "creditor"), a debtor generally may pay the money to a particular county clerk. Rather than the court of that county appointing a guardian to manage the money, the county clerk must invest the money until the creditor's custodian withdraws it. You ask whether section 887 sets a maximum of \$25,000 per creditor or a maximum of \$25,000 per debtor that may be deposited with the county clerk. You also ask whether the county clerk may receive funds on behalf of one creditor from more than one debtor or from one debtor for more than one transaction. In our opinion, the nature of the guardianship proceeding, as well as the apparent legislative purpose for the statutory predecessor to section 887, requires that we construe the \$25,000 maximum to apply to the creditor. We believe, however, that the \$25,000 may come from multiple debtors or from a single debtor for multiple transactions.

A brief examination of the guardianship process will be helpful before we specifically discuss section 887. Statutory provisions relating to guardianship are consolidated in Probate Code chapter XIII.¹ Chapter XIII authorizes a court to appoint a guardian with either full or partial authority over an incapacitated person.² Because

¹The legislature added chapter XIII to the Probate Code in 1993. See Act of May 30, 1993, 73d Leg., R.S., ch. 957, § 1, 1993 Tex. Gen. Laws 4081, 4081-158. The legislature repealed numerous predecessor provisions, apparently consolidating their substance in the new chapter XIII. See *id.* § 75, 1993 Tex. Gen. Laws 4081, 4182.

²Prob. Code § 602.

section 887 pertains only to guardianship of the estate,³ we will concern ourselves only with that kind of partial guardianship.

To ask a court to appoint a guardian, any person may apply to the court having proper jurisdiction and venue.⁴ Among other things, the application must describe and approximately value the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled.⁵ Before appointing a guardian, the court must find by clear and convincing evidence that the appointment will protect the proposed ward's property rights.⁶ Upon making the appropriate findings on this and other matters, the court will issue an order appointing a guardian of the individual's estate.⁷

Generally within ninety days after qualifying as a guardian,⁸ the guardian must file with the clerk a "verified, full and detailed inventory" listing all of the ward's property that the guardian possesses or of which the guardian knows.⁹ The inventory must include all of the ward's real property located within the state and all personal property, wherever it is located.¹⁰ Additionally, the guardian must attach to the inventory a list of all claims the ward is owed.¹¹ As the guardian discovers additional property or claims, he or she must file a supplemental inventory and appraisal with the clerk.¹²

³Probate Code section 601(8) defines the terms "estate" or "guardianship estate" as

the real and personal property of a ward or deceased ward, both as the property originally existed and as has from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions to . . . or substitutions for the property, and as diminished by any decreases to or distributions from the property.

⁴*Id.* § 682.

⁵*Id.* § 682(9).

⁶*Id.* § 684(a)(3).

⁷*Id.* § 693(a).

⁸A guardian qualifies when he or she has taken and filed the oath Probate Code section 700 requires, has made any required bond, has filed the bond with the clerk, and has the bond approved by the judge. *Id.* § 699.

⁹*Id.* § 729(a).

¹⁰*Id.*

¹¹*Id.* § 730.

¹²*Id.* § 734.

The guardian must manage the ward's estate as a prudent person would manage his or her own property.¹³ The guardian's duties include collecting all debts, rents, claims and obligations that are due to the ward.¹⁴ Ultimately, the guardian is accountable for the management of the estate.¹⁵ Consistent with the guardian's purpose as a manager of the ward's estate, Probate Code chapter XIII specifies that a guardian's term ends when the ward is fully capable of managing his or her property or no longer needs a guardian to receive funds due the ward from a governmental source.¹⁶ Furthermore, a court may not appoint a guardian of the estate of a minor generally when the minor is owed \$25,000 or less.¹⁷ Finally, a guardianship of the minor's estate may be terminated when the estate "consists only of cash or cash equivalents in an amount of \$25,000 or less."¹⁸

We come now to Probate Code section 887, about which you specifically ask. Section 887 provides that, when an incapacitated creditor has no guardian, a debtor may pay certain claims to the county clerk of the county in which the creditor resides, unless the creditor is a nonresident:

(a) When a resident person who is a minor or other incapacitated person, or the former ward of a guardianship terminated under [section 745], who are referred to in this section as "creditor," are without a legal guardian of the person's estate, and the person is entitled to money in an amount that is \$25,000 or less, the right to which is liquidated and is uncontested in any pending lawsuit, the debtor may pay the money to the county clerk of the county in which the creditor resides to the account of the creditor, giving the creditor's name, the nature of the creditor's disability, and, if the creditor is a minor, the minor's age, and the creditor's post-office address. . . . The clerk, by letter mailed to the address given by the debtor, shall apprise the creditor of the fact that the deposit was made. On receipt of the payment by the clerk, the clerk shall call the receipt of the payment to the court's attention and shall invest the money . . . in the name and for the account of the minor or other person entitled to the money. Any increase, dividend, or income

¹³*Id.* § 768.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* § 694(b)(2), (5).

¹⁷*See id.* § 684(d).

¹⁸*Id.* § 745(c).

from an investment made under this section shall be credited to the account of the minor or other person entitled to the investment.

...

(c) The father or mother, or unestranged spouse, of the creditor, with priority being given to the spouse who resides in this state or if there is no spouse and both father and mother are dead or are nonresidents of this state, then the person who resides in this state who has actual custody of the creditor, . . . , may withdraw the money from the clerk for the use and benefit of the creditor, . . . to be conditioned . . . that the custodian, when legally called on to do so, will faithfully account to the creditor and the creditor's heirs or legal representatives for the money and any increase to the money.

...

(e) When a nonresident minor, a nonresident person who is adjudged by a court of competent jurisdiction to be incapacitated, or the former ward of a guardianship terminated under [section 745] who has no legal guardian qualified in this state is entitled to money in an amount that is not more than \$25,000 owing as a result of transactions within this state, the right to which is liquidated and is uncontested in any pending lawsuit in this state, the debtor in this state may pay the money to the guardian of the creditor who is duly qualified in the domiciliary jurisdiction or to the county clerk of any county in this state in which real property owned by the nonresident person is located. If the person is not known to own any real property in any county in this state the debtor has the right to pay the money to the county clerk of the county of this state in which the debtor resides. In either case, the debtor's payment to the clerk is for the use and benefit and for the account of the nonresident creditor. The receipt for the payment signed by the clerk that recites the name of the creditor and the post office address of the creditor, if known, is binding on the creditor as of the date and to the extent of the payment. The clerk shall handle the money . . . in the same manner as provided . . . under Subsections (a)-(d) of this section.

The substance of this provision has been included in the Probate Code since the code's inception in 1956.¹⁹ At that time, the statute, Probate Code section 144, limited

¹⁹See Act of Mar. 17, 1955, 54th Leg., R.S., ch. 55, § 144, 1955 Tex. Gen. Laws 88, 134; see also Letter Opinion No. 89-77 (1989) at 3.

the amount a debtor might pay a county clerk to \$500.²⁰ In 1969, the legislature raised the amount to \$1,500.²¹ A law review article written contemporaneously with the 1969 bill indicated that the bill would not alter the basic purpose of section 144: "to obviate guardianship proceedings when only a small amount of money is due a minor or incompetent."²² Indeed, the author believed the bill would further the statute's purpose:

[T]he costs of a guardianship action may be substantial. If the expenses of a formal proceeding, *e.g.*, attorney's fees, court costs, guardian's commissions and bond premiums, have to be deducted when the total estate is nominal (between \$500. and \$1,500.), the proportionate amount of funds remaining for the support, maintenance and education of the ward will be greatly reduced. This reduction could easily amount to between twenty-five to fifty percent of the gross estate.²³

Similarly, the bill analysis to the 1969 bill indicated that frequently, when an estate is greater than \$500 but still small, "most of the estate is used up in administrative cost while a guardian is being appointed."²⁴ In 1989 the legislature enacted the current \$25,000 limit.²⁵

Section 887 thus contemplates two types of incapacitated creditors: one who never has had a guardian and one whose guardianship has been terminated, most likely

²⁰See Act of Mar. 17, 1955, 54th Leg., R.S., ch. 55, § 144, 1955 Tex. Gen. Laws 88, 134; see also Letter Opinion No. 89-77 (1989) at 3.

²¹See Act of May 24, 1969, 61st Leg., R.S., ch. 671, § 1, 1969 Tex. Gen. Laws, 1978, 1979; see also Richard Cross, *Opening and Administering the Texas Guardianship*, 11 S. TEX. L.J. 60, 96 (1969).

²²Cross, *supra* note 21, at 97.

²³*Id.* (footnotes deleted).

²⁴See Letter Opinion 89-77 (1989) at 3 (quoting Senate Comm. on Judiciary, Bill Analysis, S.B. 274 (1969)); see also Prob. Code § 622 (regarding costs and security).

²⁵See Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 9, 1989 Tex. Gen. Laws 4162, 4166. The 1989 amendment to what is now Probate Code section 887 actually lowered the amount of money a debtor could deposit with the county clerk from \$30,000 to \$25,000. See *id.*; see also Senate Jurisprudence Comm., Bill Analysis, H.B. 570, 71st Leg. (1989). By the passage of the same bill, the legislature amended what is now Probate Code section 745(c), raising from \$15,000 to \$25,000 the amount of cash or cash equivalents remaining in a minor ward's estate before the guardianship may be terminated. Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 15, 1989 Tex. Gen. Laws 4162, 4169. The legislature believed that the substance of these two provisions should be consistent. See Senate Jurisprudence Comm., Bill Analysis, H.B. 570, 71st Leg. (1989).

because the ward's estate is valued at \$25,000 or less.²⁶ With respect to both types of incapacitated creditors, the legislative history indicates a legislative belief that when the creditor's estate is valued at \$25,000 or less, the costs of a guardian outweigh the benefits even though the purpose of a guardian is to protect a ward's estate. When, on the other hand, the creditor's estate is valued at more than \$25,000, the legislature has determined that a guardian is cost-effective and necessary.

Additionally, with respect to the second type of incapacitated creditor, the court is apprised of the approximate amount of assets in a ward's estate throughout the guardianship process. An estimate is prepared upon application for a guardian; the guardian's first task upon appointment is to inventory the ward's assets and obligations due the ward; and the guardian must account for his or her management of the ward's estate. Consequently, prior to the appointment of a guardian, the court may judge whether the incapacitated individual's estate warrants the protection of a guardian. Also, before a guardianship is terminated, the court is generally aware of the amount of assets remaining in the ward's estate. Furthermore, should the court become aware that an incapacitated creditor has an estate larger than \$25,000 because a debtor or debtors has tried to deposit sums with the county clerk, the court may initiate guardianship proceedings on its own motion.²⁷

Given these salient facts, we must conclude that the \$25,000 limit in section 887 represents the total amount that may be due an incapacitated creditor from all debtors, not the amount one debtor, as opposed to multiple debtors, may owe the creditor or the amount a debtor may owe the creditor for one transaction, as opposed to multiple transactions. We also conclude that the \$25,000 may be composed of claims from multiple debtors or multiple claims from a single debtor, as well as a single claim from a single debtor. This conclusion is consistent with the lone clue the language of section 887 provides. Subsection (e), pertaining to the estates of nonresident, incapacitated creditors without guardians, limits the amount a debtor or debtors may deposit with the county clerk to \$25,000 "owing as a result of transactions within this state." The legislature thus viewed the \$25,000 as the total amount due and owing a creditor, whether or not the amount be from a single debtor or transaction.

You suggest in your brief that the procedure for nonresident, incapacitated creditors without guardians weighs against our interpretation of section 887. Under subsection (e), if an incapacitated nonresident owns real property in the state, the debtor may deposit the money in any county in which the creditor's real property is located. If, on the other hand, the nonresident is not known to own property in this state, the debtor

²⁶While we also may distinguish between resident and nonresident creditors in section 887, that distinction is not germane to the issue you raise.

²⁷See Prob. Code § 683.

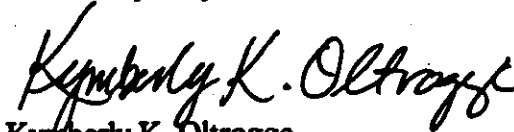
may deposit the money with the county clerk in the county in which the debtor resides. In either of these instances, county clerks in different counties may be collecting money on behalf of the creditor, with no knowledge of the existence or amount of other deposits.

We note, however, that, upon receipt of the debtor's money, the county clerk must notify the creditor using an address provided by the debtor.²⁸ The creditor therefore must be held to have knowledge of each deposit as it is made, and a custodian may institute a guardianship proceeding if the size of the estate warrants it.²⁹ Furthermore, if the problem you cite is a real one, it requires a legislative, not an executive, remedy.

S U M M A R Y

Probate Code section 887 authorizes a debtor or debtors to pay money to a county clerk for the benefit of an incapacitated creditor without a guardian only when the creditor is owed \$25,000 or less from all sources. The \$25,000 may come from multiple debtors or may come from a single debtor as a result of multiple transactions.

Yours very truly,


Kimberly K. Oltrogge
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Opinion Committee

²⁸See *id.* § 887(a); see also *id.* § 887(e) (stating that all applicable provisions of section 887(a) - (d) apply to clerk's handling and disposition of money for nonresident creditor).

²⁹See *id.* § 682.