Surety Bonds in Guardianships

By Lissett Ferreira and Neil P. Pedersen

Reprinted with permission from the *Elder and Special Needs Law Journal*, 2021 Vol. 31 No. 2, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.

One of the duties of attorneys representing fiduciaries, such as guardians, conservators, and estate representatives, is to assist clients in qualifying for the appointment. Often, the court appointing the fiduciary will require them to qualify by, *inter alia*, posting a bond with a surety company. A common occurrence is that a client is appointed as the guardian of a relative and required to obtain a bond in order to receive a commission to serve as guardian. This is the starting point of the bonding process for many fiduciaries.

Lissett Ferreira

Neil P. Pedersen

Bonding Requirements

Mental Hygiene Law Section 81.25 governs a court's imposition (or waiver) of a guardian's posting of a bond in a guardianship proceeding. Such a surety bond effectively insures the Incapacitated Person (IP) against malfeasance by the court-appointed guardian, who is a fiduciary charged with acting in the best interests of the Incapacitated Person. In the event of a financial loss covered under the bond, such as theft or mismanagement of assets, a claim can be made against the surety to cover the loss. "The purpose of the bond is to ensure that the guardian, '. . . will faithfully discharge the powers granted by the court to the guardian . . . obey all directions of the court in regard to the powers, and make and render a true account of all properties received by [the guardian] and the application thereof and a true report of his or her acts in the administration of his or her powers . . .'" (Mental Hygiene Law § 81.25(e), quoted by *Matter of CC*, 27 Misc. 3d 1215(A) [Sup Ct, Bx Co, 4/27/2010]).

The determination of whether to impose a bond upon a guardian—whether special, temporary or permanent—and of the amount of the bond are in the court's discretion. See *Matter of Rosalie O.*, 112 A.D.3d 941 (2d Dep't 2013). While there is no specific deadline set forth for the filing of a bond by a special or permanent guardian, a temporary guardian is statutorily required to file a bond within 10 days of being issued a commission to act as guardian. Generally, the amount of the bond is calculated by doubling the ward's annual income coming into the hands of the guardian and adding to it the value of the ward's liquid assets, but it does not include the value of real property. It is critical that a guardian faithfully comply with any court directive to obtain a bond prior to collecting any assets or income of the IP, as the securing of a bond serves to protect the ward and the ward's property.

The guardian then pays to the surety company, from the assets of the IP, a portion of the bond amount as a premium on an annual basis to maintain the bond in full force and effect. The rates paid for a bond are on a sliding scale depending on the amount of the bond. If a surety needs to hire an attorney to represent it in a proceeding involving its bond, this additional expense is not factored into the bond premium, and must be borne in the first

Lissett Ferreira is a partner and Chair of the Elder Law & Special Needs and Family & Divorce Law practice groups at Meenan & Associates, LLC, a boutique civil litigation law firm. Her primary practice areas are guardianships; estate, long-term care and special needs planning; trusts and estates; Medicaid and supplemental need trusts; matrimonial and ancillary issues; and pre- and post-nuptial agreements.

She entered private practice in 2013, after nearly a decade of public service as a principal court attorney to a New York State Supreme Court judge presiding over matrimonial and then Article 81 guardianship matters. Lissett lectures widely on topics primarily related to guardianship and Medicaid planning.

Neil P. Pedersen, ARM, AFSB (Pedersen & Sons Surety Bond Agency, Inc.). A part of Pedersen & Sons Surety Bond Agency, Inc since its founding in 1992, Neil Pedersen is a second-generation owner of the company.

Neil has co-presented over a dozen CLEs on the topic of Surety Bonds. He has also delivered an expert witness statement with the intention of appearing as an expert witness if required to appear for a matter that was pending in the International Court of Arbitration. Neil co-authored an article for the New York Law Journal titled "Navigating Surety Performance and Payment Bonds: What to Know"

instance by the surety.. The surety will attempt to recoup the additional expense pursuant to the indemnity agreement. Nevertheless, a surety will try to avoid this and similar situations by carefully vetting bond applications.

Evaluating the Bonding Application

The nature of a guardianship bond is a different obligation than other types of surety bonds, such as performance, appeal, or injunction bonds A surety bond is a three-party contract wherein the surety guarantees the obligations of a principal (a guardian) to an obligee (a ward). The surety bond operates similar to insurance, in that the surety will reimburse the obligee for a loss. However, the surety bond differs from an insurance policy since the surety will seek to recoup any and all costs from the bond principal and a guardian must sign an indemnity agreement pledging their assets to reimburse the surety if a claim is made.

The surety considering a guardian's application to be bonded looks at the applicant through several different lenses. The first is the proposed guardian's personal credit history, since a poor credit history strongly suggests that he or she is not handling his or her own finances appropriately and a surety is thus unlikely to guarantee that the proposed guardian can properly manage someone else's finances. Where there are relevant circumstances requiring further explanation, such as a bankruptcy or poor credit history due to a spouse, providing a detailed affidavit to the surety can be helpful. The second is the length of the obligation, since, generally, the longer the obligation, the higher the risk. If a guardian of a minor child is being appointed, this obligation will run until the minor child turns at least 18 years of age and, in some circumstances, until he or she is 21 years of age.

Further, sureties prefer to bond homeowners as compared with renters, due to the fact that home ownership shows ties to the community. Home ownership not only often reflects that the potential guardian has the financial ability to pay for a mortgage, but also the home can serve as a source of equity to reimburse the surety for any funds that are paid out in the event of a claim.

In the case of successor guardians being appointed, there are additional factors that the surety is aware of and considers when evaluating these bond applicants. Why is the previous guardian resigning? Were there problems with the case? If so, what are they? One of the biggest issues with having a successor guardian appointed and bonded is that there are situations where it is difficult to see a clear end and start date for the new bond obligation. Thus, the approval of the previous guardian's final account may only happen a year or two after the new guardian qualifies for the court appointment, a scenario that can be concerning to a surety from a liability standpoint.

In some cases, an individual has been appointed guardian without the court requiring a bond and years later a court order is issued requiring a bond. With respect to a similar type of fiduciary bond (i.e., an administrator's bond) New York caselaw has held that, absent specific language in the bond limiting the surety's liability to future acts, the surety will be liable for acts occurring at any time during the administration, including the period prior to the execution of the bond. *See In re Estate of Camarda* 103 Misc. 2d, 362 (Surr. Ct. Onondaga Co. 1980); *see*, also, *Thompson v. American Surety Company* 170 N.Y. 109 (1902) [where the condition of the bond spoke to future events]; *Greenblatt v. Delta Plumbing & Heating* 68 Fed. 3d 561 (2d Cir. 1995). Accordingly, This situation would be viewed by a surety as high-risk, and it could be difficult for a surety to issue a bond in this scenario.

Another high-risk situation is where family members are contesting the appointment of another relative as a guardian. Surety companies have matters where the family member contesting the appointment of another family member as guardian is already involved in numerous active lawsuits. Even if the pending lawsuits are unrelated to the guardianship, when evaluating these scenarios, the surety attempts to assess the likelihood that this litigious individual will bring a legal action against the guardian and whether the surety will have to retain counsel eventually.

Attorneys representing potential guardians should consider working with a surety company to pre-qualify them for the bond before nominating them to serve as guardian. Pre-qualification can help minimize legal fees and save time in filing potentially unnecessary court documents. Once an individual is preapproved for the bond, the attorney has assurance and confidence that, once appointed, the client can be bonded immediately and obtain their commission expeditiously. Conversely, the attorney has advance notice of and time to address any issues that arise during the bonding process. An attorney representing a petitioner nominating oneself as guardian should inquire whether the client has ever been convicted of a felony or filed for bankruptcy, as "yes" answers to these questions impact the person's ability to be bonded. A bankruptcy or felony conviction does not automatically result in the denial of a bond, but is a factor heavily weighed by the surety in deciding whether to bond.

Ongoing Requirements

It is imperative that a guardian of whom a bond is required renew the bond and pay the premium every year until there is a court order discharging the guardian, even if the guardian has turned over the IP's assets, either to a successor guardian, estate representative or the ward. Any bond requirement continues in effect even *after* a guardian has filed a final account—and perhaps, a successor guardian or estate representative has been appointed and taken over the assets—until a final discharge order has been issued.

The fixing of a bond amount by the court is fluid, rather than static. Thus, if the annual report sets forth a sufficient change in the Incapacitated Person's income or assets, an upward or downward change in the bond amount may be warranted. A guardian has an affirmative duty to report to the court subsequently acquired assets that may impact upon the bond amount. Thus, MHL § 81.25 requires that a guardian who subsequently receives property not covered by the bond immediately have such acquisition approved by the court and file an additional bond.

The surety also should be notified of any issues with the guardianship as they happen, and the sooner the better. When notifying the surety of problems, it is helpful for the surety to be provided a detailed explanation from counsel of how the problems are being addressed as they arise. A general requirement of the guardianship is for the surety to be noticed of any further court proceedings. As a practical matter, it would behoove all parties to serve court filings, including accountings and motions, upon the surety. Practitioners representing guardians filing annual accounts, motions, and especially turnover proceedings pursuant to MLH § 81.43, should advise their clients to make sure to properly and timely notify the surety on these applications. Where a guardian is found to have misappropriated or mishandled a ward's assets, a claim can be made against the surety for payment to the guardianship estate of the amounts determined to have been absconded with or mismanaged, up to the amount of the bond then in full force and effect.

Conclusion

The bonding process can seem like a daunting task but, once it is broken down, it can be fairly straightforward. In many instances, bonds can be obtained quickly and relatively easily. Indeed, some attorneys have declined court appointments based upon the assumption that they could not obtain a bond. Understanding the bonding requirements and practice, and working with a reputable surety bond company with knowledgeable staff, can help streamline the process.