

1984 S.C. Op. Atty. Gen. 234 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-100, 1984 WL 159907

Office of the Attorney General

State of South Carolina

Opinion No. 84-100

August 15, 1984

*1 The Honorable W. R. Douglas

Probate Judge

Cherokee County

P. O. Box 22

Gaffney, SC 29342

Dear Judge Douglas:

You have presented for our consideration and advice three (3) questions concerning the proper legal action to be taken against guardians who have squandered and/or wasted assets held for the benefit of minors and/or incompetents. Each question with our response is presented below.

1. What is the correct procedure for determining if assets held by a guardian are being or have been wasted or misappropriated?

The procedure for determining if assets held by a guardian are being or have been wasted or misappropriated is the inventory and annual return or account required by § 21-19-130 and § 21-19-140, South Carolina Code of Laws, 1976, as amended. Pursuant to § 21-19-130, all guardians (a fiduciary who manages the assets of a minor) and committees (a fiduciary who manages the assets of an incompetent adult) appointed by the probate judge are required within ninety (90) days from the date of their appointment to make a full and complete inventory of all personal and real estate belonging to their wards and to report annually thereafter to the probate judge a full and complete return, itemized and verified under oath, showing the disposition made of all such property, real, personal or mixed. The statute further states that the guardian's failure to comply with these requirements shall result in the same action being taken as in the case of executors and administrators. Any commission the guardian may be entitled to shall be forfeited pursuant to § 21-19-140 and pursuant to the authority of § 21-15-1430, South Carolina Code of Laws, 1976, as amended, governing actions against executors and administrators, the failure of a guardian or committee to make the required inventory and returns shall result in a contempt citation by the probate judge for which the defaulter shall be fined in the sum not exceeding twenty (\$20.00) dollars for each and every day during which the default may continue. Failure to make the required returns may also result in the removal of the guardian or committee. The usefulness of an accounting in monitoring whether assets of a ward are being misused may depend on the ability of the probate judge to call it into use at anytime. It is the general duty of the probate court to see that the ward's interests are not rendered valueless by unauthorized dealings. 39 C.J.S. Guardian and Ward § 70. Every judge of probate has jurisdiction 'to appoint and remove guardians of minors and committees of persons mentally incompetent and to supervise the management and disposition by such guardians of the estate of their wards.' [Section 14-23-1150\(d\), South Carolina Code of Laws, 1976, as amended](#). Arguably, the jurisdiction of the probate court to protect the rights of wards by regulating the conduct of guardians includes the right to compel accountings by guardians. Nevertheless, it is uncertain under the present law whether the probate court on its own motion or upon petition of an interested party can require an accounting at any time it deems necessary. The same, however, is not specifically restricted or prohibited. Under the new Probate Code, Section 5-416, presently under consideration by the legislature, it is specifically provided that any interested party may petition the probate court at any time for an accounting by the guardian or committee.

2. What is the legal procedure for estreating bonds of sureties and for recovering assets from a guardian for wasting, misappropriation, mishandling of assets, and using assets as collateral for obtaining personal loans?

*2 The usual method of enforcing the liability of the surety on a guardian's bond is by an action at law on the bond.¹ The general rules of pleading in civil actions are, of course, applicable to actions upon bonds. The right to recover depends on a breach of the condition of the bond and the breach relied upon must be alleged as well as the damages occasioned thereby. 12 Am.Jur.2d Bonds § 41. Likewise, an action at law against the guardian for breach of the fiduciary duty is the legal procedure for recovering assets from a guardian. The action at law against the surety is usually combined with the action against the guardian for breach and brought in the circuit court. See [Erwin v. Patterson](#), 229 S.C. 188, 92 S.E.2d 464; [Lyerly v. Yeadon, et al.](#), 199 S.C. 363, 19 S.E.2d 648. There is legal precedent in South Carolina for such action to be initiated by the probate judge, the ward who has obtained legal age, or by a subsequent guardian appointed by the probate judge upon removal of the guardian whose actions are in question. (See cases cited in South Carolina Digest under Guardian and Ward). The probate judge may pronounce a decree against the guardian upon final account and remove the guardian, thus clearing the way for an action to be brought on the bond in circuit court. See § 21–19–170, South Carolina Code of Laws, 1976, as amended, and [Smith v. Moore](#), 109 S.C. 196, 95 S.E. 351. However, it is the law in South Carolina that a judgment of the probate court establishing a devastavit or breach of the guardianship bond is not a prerequisite to maintaining an action against the surety on the bond in the circuit court. [Beatty v. National Security Co.](#), 132 S.C. 45, 128 S.E. 40; [Morris v. Maryland Casualty Co.](#), 187 S.C. 150, 197 S.E. 505; [Andrews v. U. S. Fidelity & Guaranty Co.](#), 154 S.C. 456, 151 S.E. 745.²

3. Under what conditions, if any, should such matters be referred to the Solicitor for prosecution of a guardian for breach of trust?

Pursuant to an accounting, if information is discovered which the probate court reasonably believes constitutes a breach of trust, the matter should be referred to the Solicitor. Breach of trust is generally defined as the conversion of personal property of appreciable value placed in one's trust for the benefit of another to one's own use which the intention to permanently deprive the owner of the use of that property.³

I trust I have adequately addressed your concerns. If I can be of any further assistance, please let me know.

Sincerely,

B. J. Willoughby
Assistant Attorney General

Footnotes

- ¹ The term 'estreating bonds' is applicable only to the statutory procedure for recovering on bail or recognizance bonds in criminal matters and is not applicable to the recovery on bonds in civil matters. (See § 17–15–170, [South Carolina Code](#) of Laws, 1976, as amended.)
- ² This letter does not express an opinion or give advice as to whether an action at law on a guardian's bond can be brought in probate court. It should be noted, however, that upon surveying the case law in South Carolina dealing with actions on guardian's bond, there appears to be no precedent for such an action being brought in the probate court.
- ³ Simple negligence or irresponsibility on behalf of a guardian or committee absent any evidence of wilful or intentional wrongdoing may not be sufficient to constitute a breach of trust.

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