

PJC 215.9 Joint Managing Conservators

“Joint managing conservatorship” means the sharing of the rights and duties of a parent by *two parties*, even if the exclusive right to make certain decisions is awarded to one party. If joint managing conservators are appointed, the court will specify the rights and duties of a parent that are to be exercised by each parent independently, by the joint agreement of the parents, and exclusively by one parent.

Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators. If joint managing conservators are appointed, you will be asked to decide which joint managing conservator will have the exclusive right to designate the child’s primary residence, whether a geographical restriction should be imposed on that residence, and, if so, what that geographical restriction will be.

A geographic restriction restricts the child’s primary residence to a specified geographic area and prohibits the parties from relocating the child from the specified area for the purpose of changing the child’s primary residence. If no geographic restriction is imposed, the joint managing conservator awarded the exclusive right to designate the child’s primary residence has the sole discretion to change the child’s primary residence without a court order or the agreement of the other joint managing conservator.

The appointment of joint managing conservators does not impair or limit the authority of the court to order one joint managing conservator to pay child support to the other.

COMMENT

Source. The first paragraph of the foregoing instruction is based on [Tex. Fam. Code §§ 101.016, 153.071](#). The second paragraph is based on [Tex. Fam. Code §§ 105.002\(c\)\(1\)\(D\)–\(F\), 153.134\(b\), 153.135](#). The third paragraph is based on [Lenz v. Lenz, 79 S.W.3d 10 \(Tex. 2002\)](#). The ~~third-fourth~~ paragraph is based on [Tex. Fam. Code § 153.138](#).

Nonparents. If *only* nonparents seek joint managing conservatorship, the last paragraph of the instruction should be omitted. If at least one parent and at least one nonparent seek joint managing conservatorship, that paragraph should be reworded as appropriate in view of the fact that only parents, not nonparents, can be ordered to pay child support.

Two parties. The foregoing instruction refers to “two parties,” following the language of [Tex. Fam. Code § 101.016](#). The appointment of more than two persons as joint managing conservators has been approved, however. *See Brook v. Brook, 881 S.W.2d 297* (Tex. 1994). In an appropriate case, the phrase *two parties* in the instruction may be changed, and the last word in the third paragraph should be changed to [conservators](#).

Primary residence. The second sentence in the second paragraph and the third paragraph should be omitted if all parties agree not to seek a jury verdict on the designation of the child’s primary residence.

PJC 235.15 Exculpatory Clause

If you answered [“Yes”] [“No”] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *TRUSTEE* engage in the *conduct inquired about in Question _____ [PJC 235.9–235.12 (breach of duty)] in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY?*

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. This submission is to be used only if the trust agreement has an exculpatory clause and should be conditioned on a finding that the trustee breached his duty as trustee.

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a “Yes” answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a “No” answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be worded as follows:

If you answered “Yes” to any item in Question _____, then answer the following question. Otherwise, do not answer the following question.

If no breach question submitted. If the trust instrument contains an exculpatory provision but no question on breach of duty with regard to a particular transaction is submitted because there is no evidence rebutting the presumption of unfairness or the transaction is expressly prohibited by [Tex. Prop. Code §§ 113.052–.055](#), omit the conditioning instruction and submit the question as follows:

Did *TRUSTEE* engage in [*describe self-dealing transaction*] *in bad faith, or intentionally, or with reckless indifference to the interests of BENEFCIARY?*

Rewording of question. The wording *in bad faith, or intentionally, or with reckless indifference to the interests of BENEFCIARY* in the foregoing question reflects the language of [Tex. Prop. Code § 114.007](#), which was taken from *Restatement (Second) of Trusts, § 222 (1959)*. If the trust document provides greater exculpation than section 114.007—for example, that the trustee is not liable for any breach of duty or not liable for conduct in bad faith—use the statutory language as shown in the question above. If the trust document provides less exculpation than section 114.007—for example, that the trustee is not liable for honest mistakes in judgment—the question should be adapted in accordance with the terms of the instrument.

Rewording question if PJC 235.9 liability question submitted. If damages are sought based on PJC 235.9 (breach of duty by trustee—other than self-dealing) and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the words *conduct inquired about in Question _____* in the question should be replaced with *conduct about which you answered “Yes” in Question _____*.

Source. Even if the trustee has been found to have committed a breach of duty, he may nonetheless be protected from liability for his acts if the trust agreement contains language exculpating him from liability. *Texas Commerce Bank v. Grizzle*, [96 S.W.3d 240](#) (Tex. 2002). The foregoing submission is based on [Tex.](#)

Prop. Code § 114.007, which sets the public policy limits on the scope of an exculpatory clause such that conduct that is in “bad faith,” “intentional,” or “with reckless indifference to the interest of the beneficiary” may not be excused by the terms of the trust.

Intentional conduct. If intentional conduct is alleged, the following instruction, which is ~~based on~~adapted from *Restatement (Second) of Trusts* § 222 cmt. a. (1959) ~~Tex. Penal Code § 6.03(a)~~, may be used:

~~A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or cause the result if he does or omits to do an act when he knows the act or omission is a breach of his duty as trustee.~~

Bad faith. ~~The Committee has found no case providing a specific definition of bad faith in the context of exculpation of a trustee. The following definition, which may be used if bad faith is alleged, is based on *InterFirst Bank Dallas, N.A., v. Risser*, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, no writ) (citing *King v. Swanson*, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ), and *Ford v. Aetna Insurance Co.*, 394 S.W.2d 693, 698 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.)) (improper motive); and *Black’s Law Dictionary* (2d ed.) (“the opposite of ‘good faith’ ”).~~

~~“Bad faith” means an action or omission that is prompted by some improper motive rather than by an honest mistake or a reasonable belief that the action was probably correct.~~

PJC 250.8 Attorney’s Fees—Guardianship—Reimbursement of Attorney’s Fees

QUESTION

Did PARTY act in bad faith or without just cause in prosecuting the application for appointment of a guardian of the person of PROPOSED WARD?

“Bad faith” means an action that is prompted by some improper motive rather than by an honest mistake or a reasonable belief that the action was probably correct.

“Just cause” means that the action was based on reasonable grounds and there was a fair and honest cause or reason for the action.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. A party in a guardianship proceeding who acts in bad faith or without just cause in prosecuting or objecting to the application may be ordered to reimburse the ward’s estate for all or part of the attorney’s fees awarded under Tex. Estates Code § 1155.054.

Source. The foregoing submission is based on Tex. Estates Code § 1155.054(d).

Definitions. The Committee has found no case providing a specific definition of “bad faith” in the context of reimbursement of attorney’s fees. The definition above is based on *InterFirst Bank Dallas, N.A., v. Risser*, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, no writ) (citing *King v. Swanson*, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ), and *Ford v. Aetna Insurance Co.*, 394 S.W.2d 693, 698 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.)) (improper motive); and *Black’s Law Dictionary* (2d ed.) (“the opposite of ‘good faith’ ”). The definition of “just cause” is derived from *Ray v. McFarland*,

97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.), and *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Rewording. In an appropriate case, the words *objecting to* should be substituted for the word *prosecuting*, and the phrase *of the estate* or *of the person and the estate* should be substituted for the phrase *of the person*.

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