

TEXAS ASSOCIATION OF COUNTY AUDITORS
On the Road Area Training

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REGISTRY OF THE COURT

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INTRODUCTION

History

Prior to 1997 statutes did not give clear direction to clerks regarding registry funds. S.B. 1304, which became effective September 1, 1997, gave additional guidance concerning the management and investment of registry funds. The bill also renamed “trust funds” to “registry funds” and stated that the clerk is only a custodian of the funds.

Training

The Legislature recognized the importance of registry funds by requiring at least one of the 20 hours of the clerks’ continuing education to be on registry funds described in Chapter 117, Local Government Code. (Govt. Code §51.605)

Registry Defined

In 1973, Attorney General John Hill stated, “We believe that any money deposited in court to satisfy the result of a legal proceeding or to await the result of a legal proceeding falls within the scope of §11 (now, §§ 117.052, 117.053, LGC)... Any funds fitting this definition are trust funds and, if in the possession of the county or district clerk, may be deposited in the county depository for trust funds.” (H-183 pp 846, 848)

Nature and Ownership of Registry Funds (Letter Opinion No. 96-023)

“A sum of money placed in the county trust fund depository is not owned by the county but is only held in trust for the litigant who establishes his or her right to it. The funds are controlled by the clerk subject to the orders of the court.”

Section 117.001, Local Government Code, defines registry funds as “funds tendered to the clerk for deposit into the registry of the court.” Registry generally means a place where a written record is maintained. Black’s Law Dictionary defines “registry” as the act of recording or writing in the register or depositing in the place of public records. In this case clerks must separately record and track money or any asset of value paid to the court that the court will hold for the benefit of others. These include, but are not limited to, deposits belonging to minors and incapacitated persons, funds tendered in an interpleader action, funds paid to satisfy a judgment, child support, cash bonds, cash bail bonds, and money put up in condemnation (eminent domain) proceedings.

Registry Contents

Although, some clerks would prefer a court order before accepting registry funds, Chapter 117 does not require a court order. Statutory provisions and rules of court governing deposits in court often provide for the deposit not only of money but also anything able to be delivered to the clerk.

a. Tangible Items

The registry may contain any tangible items such as documents, coins or other property. For example, Civil Practice and Remedies Code Section 7.002 LIABILITY FOR DEPOSITS PENDING SUIT provides that an officer who has custody of a sum of money, a debt, an instrument, or other property paid to or deposited with a court pending the outcome of a cause of action, shall

- seal the property in a secure package in a safe or bank vault that is accessible and subject to the control of the court,
- hold these items for safekeeping until further order,
- keep an itemized inventory of the property deposited and its disposition, and
- transfer all property and the inventory list to the officer's successor in office (The successor shall give a receipt to the outgoing officer),

The clerk could require an appraisal of the property (e.g. jewelry, art, etc.) before taking custody if he or she thinks there may be a question as to its value for purposes of insuring and safekeeping.

b. Money

Moneys deposited into the registry of court are defined in the following section Types of Funds. Court costs, fines and fees belonging to the state or the county are not registry funds.

Accounts Defined

“Special account” means an account in a depository bank in which registry funds are placed. Money is usually commingled in the “special” account and the clerk must record each owner’s share separately. A special account may be interest-bearing or non-interest bearing. The clerk will need special software to track each share; especially if the account is interest-bearing and there are many owners.

“Separate account” means funds of a specific owner transferred by court order from a special account into a separate investment or interest-bearing account. (LGC § 117.001)

Custodian vs. Trustee Responsibilities

Although custodian and trustee are similar terms, a trustee is more than a custodian because a trustee must manage funds for the benefit of the beneficial owner, thus creating additional liability. The following definitions from Dictionary.com illustrate the increased responsibility of a trustee.

Custodian: *One that has charge of something; a caretaker: the custodian of a minor child's estate; the custodian of an absentee landlord's property.*

Trustee: *One, such as a bank, that holds legal title to property in order to administer it for a beneficiary.*

LGC § 117.0521. CUSTODIANSHIP. *A clerk shall act only in a custodial capacity in relation to a registry fund, a special account, or a separate account. A clerk is not a trustee for the beneficial owner and does not assume the duties, obligations, or liabilities of a trustee for a beneficial owner.*

As custodian of registry funds of the court, the clerk is primarily responsible for safeguarding assets and maintaining a separate accounting for each owner whether the owner is a child, a defendant, a law firm, a business, or other entity. This responsibility is especially important when cash is commingled in one account. The clerk is required to maintain an itemized inventory of property whether it is tangible property or cash. (Civil Practices and Remedies Code §7.002)

The clerk is also responsible for determining when unclaimed registry funds are subject to transfer to the state as abandoned property as required by Chapters 72, 73, or 75 of the Property Code. (LGC § 117.002)

Clerk's Liability

a. Money

If a depository has been selected by the county under Chapter 117, LGC, and if the clerk is going to have legal custody of any money deposited in the registry for more than 3 days, the clerk must deposit the money in the depository bank. (LGC §117.052)

The clerk is relieved of liability after depositing the money in the county's depository bank.

Although clerks are not responsible for the loss of registry funds resulting from the failure or negligence of a depository, they are not relieved from:

- (1) liability for a loss of registry funds resulting from the clerk's official misconduct, negligence, or misappropriation of the funds; or
- (2) responsibility for keeping funds safe until the clerk deposits them in a properly selected depository. (LGC §117.081)

If the depository loses the funds, the county is still liable to the rightful owner of the funds for the full amount. (§117.083)

b. Tangible Property

Sometimes the clerk will receive tangible property such as documents, debts, instruments, coins, or jewelry. These items must be sealed in a secure package in a safe or bank vault that is accessible and subject to the control of the court. (Civil Practices and Remedies Code §7.002).

c. Investments

Often the court will order the clerk to invest funds in separate accounts. These orders give the clerk a slightly more involved role than that of a normal "custodian." Remember as custodian, the clerk's primary responsibility is to safeguard assets. **Therefore, the clerk should sacrifice the opportunity for enhanced income in favor of protecting the investment.** The clerk must always be careful to invest only upon a proper court order. (LGC § 117.053).

As a custodian, it seems that clerks would be less vulnerable to lawsuits seeking compensation because the clerk did not deposit funds into an interest-bearing account.

This is supported by Attorney General Opinions JM-1162 and DM-282. "...statutes that delineate the liability of county and district clerks in regard to their handling of trust funds deposited in court do not identify the failure to deposit in separate accounts or in interest bearing accounts as a source of liability for the clerks." LGC §§ 117.081, 117.082: Civ. Prac. & Rem. Code § 7.002.)

d. Bonds and Insurance (LGC §82.003 County Clerk; Govt. Code §51.302 District Clerk)

In addition to a surety bond, state law requires Clerks to obtain **errors and omissions** insurance in the performance of their official duties in an amount equal to the maximum amount of fees collected in any year (County Clerks \$10,000-\$500,000, District Clerks \$20,000-\$700,000). The commissioners

court of a county shall pay out of the general fund of the county the premiums for a bond or insurance policy required by this chapter.

In addition, District Clerks must obtain insurance or similar coverage to cover losses from **burglary, theft, robbery, counterfeit currency, or destruction**. Surety bonds provide protection against **illegal or fraudulent** acts of elected officials and employees. Errors and omissions insurance provides coverage for inadvertent mistakes by the clerk or the clerk's employees in the performance of their official duties. In lieu of the bonds required, the county may self-insure against losses that would have been covered by the bond. The county may also establish a contingency fund to provide coverage normally provided by insurance, if it is determined that insurance coverage is unavailable at a reasonable cost.

TYPES OF FUNDS

The Local Government Code specifically identifies the following sources of registry funds.

(c) A clerk is responsible for funds deposited into the registry fund from the following sources:

- (1) funds of minors or incapacitated persons;*
- (2) funds tendered in an interpleader action;*
- (3) funds paid in satisfaction of a judgment;*
- (4) child support funds held for more than three days;*
- (5) cash bonds;*
- (6) cash bail bonds;*
- (7) funds in an eminent domain proceeding; and*
- (8) any other funds tendered to the clerk for deposit into the registry of the court.(LGC §117.052)*

Custodial Funds

This category of registry funds includes money awarded under the Property Code to a minor or an incapacitated person who has no legal guardian. It also includes money held in certain probate cases.

Attorney General Opinion JM-1162. We find no statutory provisions relating to “**minor’s trust funds**.” However, under the terms of chapter 142 of the Property Code, funds awarded to a minor are paid into the registry of court. *Silber v. Southern Nat'l Life Ins. Co.*, 326 S.W.2d 715 (Tex. Civ. App. -- San Antonio 1959, writ ref'd). These trust funds are also within the scope of chapter 117 of the Local Government Code.

Property Code § 142.001. MANAGEMENT BY DECREE. (a) In a suit in which a minor or incapacitated person who has no legal guardian is represented by a next friend or an appointed guardian ad litem, the court, on application and hearing, may provide by decree for the investment of funds accruing to the minor or other person under the judgment in the suit.

Probate funds owed to minors, incapacitated persons or certain inmates without a legal guardian may also be paid to the county clerk to satisfy payment. (Probate Code §887).

Funds Held in Civil Cases (Interpleader Funds)

When there is a dispute about the ownership of specific property and an innocent holder of the property wants to avoid potential double or multiple liabilities, the holder can pursue a judicial determination through an interpleader action and deposit the disputed property with the court pending resolution of the competing claims. Sometimes the court will require rent or other income to be paid to the clerk pending outcome of a case. For those clerks who serve family courts, they may also hold property pending distribution in divorce cases.

Funds Paid in Satisfaction of a Judgment

Judgments may be paid through the registry of the court by court order or by statute. Often the court will order payment be made into the registry to provide for a court record that proper payment has been made. In some instances the judgment debtor wishes to clear his/her credit or title to property and must pay a judgment to accomplish this. A judgment debtor is allowed to pay to the court that rendered the judgment the amount owed to a creditor whose location is unknown. The judgment debtor must comply with notification requirements of the Civil Practice and Remedies Code §31.008.

“We note that funds paid in satisfaction of a judgment may not be paid into court without the order of the court. *Iowa Mutual Ins. Co. v. Burmester*, 313 S.W.2d 897 (Tex. App. – Houston 1958); *Texas & P.R. Co. v. Walker*, 57 S.W. 568 (Tex. 1900).” (A.G. Opinion JM-1162).

Child Support Funds

For those child support cases still handled locally, clerks use one of two systems for handling payments. In the first, the clerk receives checks and money orders made out to the ultimate recipient and then delivers them to the recipients. In the second system, checks and money orders are made out to the clerk, who deposits them in his/her account, and writes a check on that account to the recipients. Under each system, the clerk must be able to demonstrate accountability for the receipt and timely disbursement to the appropriate party. Child support receipts held more than three days must be deposited into the county’s depository for registry funds. (LGC § 117.052).

Cash Bonds Required in Civil Cases

These include bonds required in civil cases such as those requiring specific performance, injunctions, sequestrations, temporary restraining orders, and others.

“...supercedas deposits are paid to suspend the execution of a judgment pending appeal, which is also a legal proceeding and thus within chapter 117 of the Local Government Code.” A.G. Opinion JM-1162).

Cash Bail Bonds

Who deposits cash bail bonds and where?

A Texas State Attorney General's opinion, H-183 (1973), states specifically that "[a] peace officer receiving a cash bail bond should deliver it to the custodian of funds of the appropriate court." This opinion affirmed a prior attorney general's opinion, C-740, (1966) stating, "The sheriff or other peace officer accepting the cash bond should simply receipt the bond to the defendant and then turn the money over to the clerk of the court or the justice of the peace, whichever is the appropriate officer. ...The court has no authority to designate the sheriff to be the custodian of the funds."

However, a later opinion, JC-195 (2000), states that the sheriff is the holder of cash bail bonds until a case is filed. Until that time, the sheriff **may** retain bonds and deposit the cash into a separate bank account in the county's depository bank (not necessarily the trust depository). The sheriff **may** choose to deposit in an interest-bearing account. If so, the sheriff must allocate the interest to each bond separately so that when the sheriff returns the bond to the defendant or transfers it to the clerk, he or she also pays out that bond's share of interest earnings.

In counties with a population of 190,000 or more:

"A sheriff's authority to maintain the separate interest bearing account may be limited by the county auditor, who "may adopt and enforce regulations . . . that the auditor considers necessary for the speedy and proper collecting, checking, and accounting of the revenues and other funds and fees that belong to the county or to a person . . . for whose use or benefit the [county or precinct] officer holds or has received funds." Tex. Loc. Gov't Code Ann. § 112.002(b)." (JC-0195). This is supported also by opinions DM-282 (1994) at 4-5, JM-1162 (1990) at 3 and H-183 (1973) at 9.

When the prosecutor files a case, the sheriff should deliver cash bail bonds to the clerk as soon as reasonably possible.

JC-0195 does not prohibit the sheriff from sending cash bail bonds to the clerk of the court before a prosecutor files a case. Since the sheriff accepts bail bonds after normal business hours and on weekends, the sheriff should hold cash bail bonds overnight in the safe and transport them along with appropriate documentation to the clerk's office the following business day. Transferring bonds immediately could eliminate the need for a separate bail bond account for the sheriff and preclude the need for sheriff's employees to allocate interest to defendants and prepare reports for transferring abandoned funds to the Comptroller. This accounting can easily get out of hand for even the most efficient office. However, transferring cash bail bonds immediately could cause extra work for the clerk if the prosecutor does not file a case.

Who is authorized to return bonds to defendants?

In instances where the prosecutor declines to file a case, the sheriff should refund the bond plus any interest earned to the defendant without deducting a fee. The prosecutor's no-file letter is authorization to process the refund.

If cash bail bonds are in the hands of the clerk before a case is filed, they are considered registry funds and the clerk should refund these plus any interest earned. Clerks may no longer deduct an administrative fee on cash bail bonds.

Fees on Cash Bail Bonds

AG Opinion (GA-0960)

Due to the recent legislative amendment to article 17.02 of the Code of Criminal Procedure, a county is no longer entitled to deduct a fee for accounting and administrative expense from the refund of a cash bail bond. Attorney General Opinions JC-0163 and GA-0436 are superseded due to legislative enactment.

To whom are cash bail bonds returned?

Code of Criminal Procedure Art. 17.02 Bail Bonds (as amended in 2011)

Any cash funds deposited under this article shall be receipted for by the officer receiving the funds and, on order of the court, be refunded, after the defendant complies with the conditions of the defendant's bond, to: (1) any person in the name of whom a receipt was issued, in the amount reflected on the face of the receipt, including the defendant if a receipt was issued to the defendant; or (2) the defendant, if no other person is able to produce a receipt for the funds.

AG Opinion GA-0960 didn't answer the following questions raised by the Denton County Criminal District Attorney in his request letter dated March 8, 2012

- Does [article] 17.02(1) require the person named in the receipt (defendant or other named person) to produce his own receipt before the refund will be issued? Or, may the clerk issue a refund to the person named in the (state's copy of the) receipt? If so, what identification, if any, must the clerk require of the named person before issuing the refund?
- (5) How may the clerk determine when a person is "unable to produce a receipt?" For example, is the person entitled to notice of the refund order and an opportunity to claim his refund within a certain time?

Who is authorized to transfer abandoned bail bonds?

County and district clerks should be the holders of cash bail bonds as soon as the prosecutor files a case. However, the Comptroller's Unclaimed Property Division will accept abandoned bonds from any holder (sheriff or clerk) without regard to whether or not the official should be holding the bonds. The actual holders are responsible for transferring abandoned bonds to the state. If the sheriff is a holder of bonds and has been unable to locate the defendants and the three-year dormancy period has expired, the sheriff should adhere to the provisions of Chapter 74, Property Code, regarding transfer of abandoned cash bail bond funds to the state. Tex. Att'y Gen. Op. No. JC-195 (2000). The comptroller does not require a court order for bonds transferred by a sheriff.

Cash bail bonds held by clerks are "registry" funds whether a case has been filed or not. Clerks may refund them or transfer them to the State Comptroller only upon a written court order. This is to comply with Article 17.02 of the Code of Criminal Procedure. The holder of cash bail bonds, usually the county or district clerk, must review them as of June 30 every year to see which have met the three-year

dormancy period. The clerk must then arrange for a judge to sign an order directing their disbursement to the State Comptroller on November 1 along with other property subject to the Property Code. A Texas Supreme Court opinion, *Melton v. State*, 993 S.W.2d 95 (1999) determined that “given the nature of the comptroller's powers and responsibilities, we agree that the comptroller is the proper party to seek court orders releasing cash bail bonds that are presumed abandoned.” *Melton*, 993 S.W.2d at 102.

That same Supreme Court opinion affirmed the following:

1. unclaimed cash bail bonds become abandoned property subject to Chapter 74 [Property Code] three years from the date of final judgment in the underlying criminal prosecutions;
2. the county clerk is a "holder" obligated to report and deliver the bonds to the comptroller;
3. a court order is necessary to trigger the clerk's duty to deliver abandoned cash bail bonds to the comptroller, but not to trigger the clerk's duty to report the abandoned bonds; 993 S.W.2d at 97.

Therefore, although a clerk cannot release bonds to the Comptroller without a court order, the clerk is still required to report them after three years and to seek an order from the court to release them. If not, the Comptroller has authority to seek their release. Certainly, the Comptroller will not know of their existence without proper reporting by the clerk.

Proceeds from Eminent Domain Cases

These are funds held either because the parties involved are contesting the amount or they are held pending distribution.

‘Eminent domain proceedings are also "legal proceedings," cash deposited to reimburse a property owner is generally included in chapter 117 of the Local Government Code. See *City of San Antonio v. Burke*, 65 S.W.2d 408 (Tex. Civ. App. - San Antonio 1933, no writ). However, the condemnor of real property may, under section 21.021(d), direct that the eminent domain deposit be placed in an account of its own choosing.’ (JM-1162)

Other Funds Tendered to the Clerk for Deposit into the Registry

Funds from Forced Sales

Excess Tax Sales Proceeds

These include undistributed funds from forced sales of property for delinquent taxes and any unclaimed proceeds in excess of the liability. These funds are required to be turned over to the clerk of the court issuing the order of sale (TRCP Rule 712, Tax Code 34.02 (d)) for safekeeping for a period of two years after the date of the sale unless otherwise ordered by the court. If within those two years, no claimant establishes entitlement to the proceeds, they are to be distributed to the taxing entities in the same proportion as their relative taxes, penalties and interest (Tax Code §34.03). This would not include other costs awarded each entity. They are not subject to Chapters 72-76 of the Property Code because of the specific instructions provided in the Tax Code.

Excess Tax Resale Proceeds

When a taxing unit does not sell a property at a tax auction, because it did not receive a bid equal to the lower of the amount owed or the actual value, it may purchase the property. The taxing unit acquires the title along with all the interest of the prior owners. The taxing unit may resell the property and distribute proceeds (including excess proceeds) to all the taxing units. In this scenario, proceeds and excess proceeds (which is rare) from a resale are not returned to prior owners and the owners have no recourse other than their right of redemption. There is no waiting period.

Escheat Funds

If an individual dies intestate (without a valid will) and without heirs, the real and personal property of that individual is subject to escheat or transfer to the state. Chapter 71 of the Property Code deals with estates subject to escheat. "Escheat" means the vesting of title to property in the state in an escheat proceeding under Chapter 71. (Tex. Property Code § 71.001 (b)).

There is no waiting period. As soon as the court renders its judgment for the state finding that an intestate died without heirs, the property escheats to the state and title to the property is considered to pass to the state on the date of death of the owner as established by the escheat proceeding, and the state may begin proceedings to acquire the property. (Tex. Prop. Code § 71.107)

The real property is held in trust by the Commissioner of the General Land Office for the use and benefit of the Foundation School Fund and the other property will be sold and the proceeds deposited along with other cash assets with the Comptroller, less court costs. (Tex. Prop. Code §§ 71.201, 71.202).

Probate Funds

Unclaimed probate funds are governed by the Probate Code. These are different than escheat funds. In this case, a valid will has been submitted to a probate court but one of the heirs cannot be located.

If any person entitled to a portion of an estate, except a resident minor without a guardian, does not demand his portion within six months, the court must by written order require the executor or administrator to pay that portion that is in money to the comptroller. (Probate Code § 427). The court must order the executor or administrator to sell; on terms the court thinks best, that portion that is in other property. When the proceeds of the sale are collected, the court must order them to be paid to the comptroller. In all cases the executor or administrator is allowed reasonable compensation for his or her services.

The start of the six month period is issuance of an order of the court approving the report of commissioners of partition, or within six months after the settlement of the final account of an executor or administrator. (Probate Code Section 427).

DEPOSITORY FOR REGISTRY FUNDS (LGC 117 Subchapter B)

The clerk is relieved of most liability after depositing registry funds in the clerk's depository bank for registry funds. Local Government Code Chapters 116 and 117 govern registry depositories. Chapter 117 applies specifically to registry depositories listing requirements for applications, notices, selection, and qualification.

When is a Depository Contract Needed?

If the accounts at the bank are in the clerk's (county's) EIN number then the clerk must have a depository agreement.

If the accounts are in a bank and in the individual's SSN and they exceed the FDIC insurance, they must be secured – therefore they will need a depository agreement.

The County Clerk and the District Clerk can have as many depository banks as they wish – and if all they have in a bank is one CD and if it is less than the FDIC insurance and if it is a social security number other than the county's then a separate depository agreement is not required. If clerks have 50 CDs at one institution and all are less than the FDIC insurance (individually) and there are none in the County's EIN then a depository agreement is not required. **However, even if the owner's registry accounts are less than the FDIC insurance, the clerk must be sure there are no other accounts in that bank using the same SSN; otherwise, the balances could exceed the FDIC coverage.**

FDIC Insurance - <http://www.fdic.gov/deposit/deposits/insured/basics.html>

What does FDIC deposit insurance cover?

1. FDIC insurance covers all types of deposits received at an insured bank, including deposits in a checking account, negotiable order of withdrawal (NOW) account, savings account, money market deposit account (MMDA) or time deposit such as a certificate of deposit (CD).
2. FDIC insurance covers depositors' accounts at each insured bank, dollar-for-dollar, including principal and any accrued interest through the date of the insured bank's closing, up to the insurance limit.
3. The FDIC **does not** insure money invested in stocks, bonds, mutual funds, life insurance policies, annuities or municipal securities, **even if these investments are purchased at an insured bank.**
4. The FDIC **does not** insure safe deposit boxes or their contents.
5. The FDIC **does not** insure U.S. Treasury bills, bonds or notes, but these investments are backed by the full faith and credit of the United States government.

How much insurance coverage does the FDIC provide?

- The standard deposit insurance amount is \$250,000 per depositor, per insured bank, for each account ownership category.
- The FDIC insures deposits that a person holds in one insured bank separately from any deposits that the person owns in another separately chartered insured bank. For instance, if a person has a checking account at Bank A and has a checking account at Bank B, the accounts would each be insured separately up to \$250,000. Funds deposited in separate branches of the same insured bank are not separately insured.
- The FDIC provides separate insurance coverage for funds depositors may have in different categories of legal ownership. The FDIC refers to these different categories as “ownership categories.” This means that a bank customer who has multiple deposits may qualify for more than \$250,000 in insurance coverage if the customer’s accounts are deposited in different ownership categories and the requirements for each ownership category are met.

Ownership Categories

1. How can I qualify for more than \$250,000 in FDIC insurance coverage?

<http://www.fdic.gov/deposit/deposits/insured/faq.html>

The FDIC provides separate insurance coverage for a depositor’s funds at the same insured bank if the deposits are held in different ownership categories. To qualify for this expanded coverage, the requirements for insurance coverage in each ownership category must be met.

The example below illustrates how a family of four – a husband and wife with two children – could qualify for up to \$3 million in FDIC coverage at one insured bank. This example assumes that the funds are in qualified deposit products at an insured bank and these are the only accounts that the family has at the bank.

Example: Insurance coverage for a family of four with deposit accounts in multiple ownership categories				
Account Title	Account Ownership Category	Owner(s)	Beneficiary(ies)	Maximum Insurable Amount
Husband	Single Account	Husband		\$ 250,000
Wife	Single Account	Wife		250,000
Husband IRA	Certain Retirement Account	Husband		250,000
Wife IRA	Certain Retirement Account	Wife		250,000
Husband & Wife	Joint Account	Husband & Wife		500,000
Husband POD	Revocable Trust Account	Husband	Wife	250,000*
Wife POD	Revocable Trust Account	Wife	Husband	250,000*
Husband & Wife Living Trust	Revocable Trust Account	Husband & Wife	Child 1 Child 2	1,000,000*
Total				3,000,000
Amount Insured				3,000,000
Amount Uninsured				\$ 0

Explanation:

Single Account Ownership Category: The FDIC combines all single accounts owned by the same person at the same bank and insures the total up to \$250,000. The Husband’s single account deposits do not exceed \$250,000 so his funds are fully insured. The same facts apply to the Wife’s single account deposits. Both accounts are fully insured.

Certain Retirement Account Ownership Category: The FDIC adds together all certain retirement accounts owned by the same person at the same bank and insures the total up to \$250,000. The Husband and Wife each have an IRA deposit at the bank with a balance of \$250,000. Because each account is within the insurance limit, the funds are fully insured.

Joint Account Ownership Category: Husband and Wife have one joint account at the bank. The FDIC combines each co-owner’s shares of all joint accounts at the bank and insures each co-owner’s total up to \$250,000. Husband’s ownership share in all joint accounts at the bank equals ½ of the joint account or \$250,000, so his share is fully insured. Wife’s ownership share in all joint accounts at the bank equals ½ of the joint account or \$250,000, so her share is fully insured.

Revocable Trust Account Ownership Category: To determine insurance coverage of revocable trust accounts, the FDIC:

1. First, determines the amount of the trust's deposits belonging to each owner. In this example:
 - Husband's share = \$750,000 (100% of the Husband's POD account naming Wife as beneficiary and 50% of the Husband and Wife Living Trust account identifying Child 1 and Child 2 as beneficiaries)
 - Wife's share = \$750,000 (100% of the Wife's POD account naming Husband as beneficiary and 50% of the Husband and Wife Living Trust account identifying Child 1 and Child 2 as beneficiaries)
2. Second, the FDIC determines the number of beneficiaries for each owner. In this example, each owner has three different beneficiaries (Spouse, Child 1 and Child 2). When a revocable trust owner names **five or fewer different beneficiaries**, the owner is insured up to \$250,000 for each different beneficiary. Husband's share of the revocable trust deposits is insured up to \$750,000 (\$250,000 times three beneficiaries = \$750,000). Wife's share of the revocable trust deposits is insured up to \$750,000 (\$250,000 times three beneficiaries = \$750,000).

Items to Include in the Depository Contract

The best time to request banking services is prior to publishing a notice for applications. Whether the requirements are stated in the notice or are later negotiated, is not as important as knowing what the clerk wants and needs from its banks. Examples of important issues to include in the contract are:

1. Ability to track and apply interest to multiple "accounts" within the clerk's account (assumes the clerk has a SSN for each).
2. Ability to prepare and mail 1099's for each account.
3. Collateral in compliance with Chapter 116.
4. Interest earnings rate and penalties on early withdrawals from Certificates of Deposit.
5. Service fees.
6. On-line reports and management options.

Registry funds that are not separately invested should be styled as a **special account** in the name of the clerk making the deposit; for example "Janet Doe, Big County, County Clerk." Special accounts are usually commingled therefore the clerk should use the county's Tax ID.

When a court order requires the clerk to invest registry funds separately, the clerk must set up **separate accounts** bearing the Tax ID of the owner (usually a Social Security Number). The Local Government Code §117.001 defines a "separate account" as "funds transferred from a special account into a separate interest-bearing account." Usually these should be styled in the following form "Johnny Minor by Janet Doe, Big County, County Clerk."

Requirements for Interest-bearing Registry Accounts

If a clerk wants an interest-bearing registry account, he or she must submit a request, in writing, to commissioners court no later than the 30th day before the date the county gives notice under Section 117.022. This request must be entered in the minutes of the court. Though not clearly stated in the law, the assumption is that this interest provision will be noted in the advertisement for applications and in the subsequent depository contract. (Local Government Code 117.021)

Before sending the notice, it is important that the clerk study the interest issue to determine if the account should or should not earn interest. Issues to consider are a depository contract with a set interest amount or a variable interest amount. A set interest amount may be easier to calculate than an interest rate that changes daily when computing the 10% of the interest administrative fee.

Bank Applications and Contracts

Notice: (that the commissioners court intends to receive applications from which to select a depository bank) (LGC 116.022, 117.022):

- County Judge must advertise in a county newspaper with general circulation once each week for at least 20 days before the date to submit an application
- A notice shall also be posted at the courthouse door of the county.
- If a newspaper is not published in the county, the newspaper notice shall be placed in a newspaper published in the nearest county.

Meeting: Commissioners court has:

- flexibility to meet at a date of its choosing
- flexibility to specify the application deadline,
- ability to enter into a 2 or 4 year contract
- ability to negotiate new interest rates and terms for the last 2 years of a four year contract
- ability to renew original contract for an additional 2 years and negotiate new rates and terms, and
- authority to use a negotiated bid in addition to the process of evaluating applications and selecting one or more.

The application of a bank that seeks to become the registry depository must be accompanied by a certified check or cashier's check for at least one-half of one percent of the average daily balance of the registry fund held by the clerk during the preceding calendar year. **The clerk must calculate this amount and be ready to provide same before the 10th day before the application is required to be filed.** (Tex. Local Gov't Code § 117.021 (c)) If the application is filed early without a check, the law seems to give the bank at least 10 days to provide one. The clerk should calculate this amount earlier and include it in the initial application notice required by 117.022 and 116.022.

Designation of Depository

After commissioners court selects a depository bank and the bank qualifies by putting up security for the registry funds, the court must designate the bank or banks by an order entered in its minutes. (Local Gov't Code §§ 116.051, 117.023, 117.024, 117.025)

Collateral for Registry Funds

The provisions of Chapter 116 of the Local Government Code relating to county depositories also apply to a depository selected for registry funds, unless otherwise expressly stated (Local Gov't Code § 117.028). Therefore, the type and amount of security or collateral for registry funds must be the same as for county funds as described in Chapter 116. .

a. Type of Collateral.

“The depository or subdepository may secure these funds, at the option of the commissioners court, by:

(1) personal bond; surety bond; bonds, notes, and other securities; first mortgages on real property; real property; certificates of deposit; or a combination of these methods, as provided by this subchapter; or

(2) investment securities or interests in them as provided by Chapter 726, Acts of the 67th Legislature, Regular Session, 1981 (Article 2529b-1, Vernon's Texas Civil Statutes)” (LGC.§ 116.051)

b. Amount of Collateral

Personal or surety bonds must be in an amount equal to the estimated highest daily balance of the county, as determined by the commissioners court. However, the commissioners court may not estimate the highest daily balance at an amount that is less than 75 percent of the highest daily balance of the county for the preceding year, less the amount of bond funds received and expended.

Securities must be in an amount equal to the amount of deposits. (LGC §116.058).

Timing of Deposits

If a depository has been selected, a clerk who is to have for more than three days legal custody of money deposited in the registry of the court pending the result of a legal proceeding shall deposit the money in the depository. (LGC §117.052)

Communication with Treasurer

It is very important that the clerk and the county treasurer (or whoever performs the duties of the treasurer) formulate procedures for notification of the treasurer concerning large deposits by the clerk. The treasurer should notify the depository of the additional funds because the depository may need to purchase additional securities for collateral. This communication between the clerk and the treasurer will ensure that all funds are properly secured.

Failure to Select a Depository Bank

If the commissioners court has not selected a depository, a clerk holding money, an evidence of debt, an instrument of writing, or any other article deposited into the registry of the court pending the result of a legal proceeding must seal the article in a secure package and deposit the package in an iron safe or a bank vault. (LGC §117.027)

DISBURSEMENTS AND ADMINISTRATIVE EXPENSES OF CLERK

Withdrawals require a written court order.

Unless otherwise provided for by statute or rule, every withdrawal from registry funds, including refunds of cash bail bonds, are to be made by the clerk only upon a written court order. Payments may be made only to the person entitled to the funds or to transfer for investment in a separate account. (Local Gov't Code § 117.053)

Withdrawals may require the county auditor's signature.

The county auditor need not countersign and commissioners court need not approve disbursement of registry funds since they are not county funds. (AG Opinion JM-882, 1988). However, the county auditor, in counties with a population 190,000 or more may require his or her countersignature on registry fund disbursements. This authority derives from the auditor's authority to prescribe a system of accounting, and adopt and enforce regulations concerning registry funds. (Brooks §14.11, AG Opinion H-183, LGC §112.002).

Sec. 112.002. ACCOUNTING SYSTEM IN COUNTY WITH COUNTY AUDITOR AND POPULATION OF 190,000 OR MORE.

*(b) The county auditor may adopt and enforce regulations, not inconsistent with law or with a rule adopted under Section 112.003, that the auditor considers necessary for the speedy and proper collecting, checking, and accounting of the revenues and other funds and fees that belong to the county **or to a person for whom** a district clerk, district attorney, county officer, or precinct officer has made a collection or for whose use or benefit **the officer holds or has received funds.***

Exceptions to a written court order:

Transferring Funds to a New Depository

If a commissioners court selects a new depository, as soon as the depository qualifies, the clerk must transfer the funds in a special account from the old depository to the new depository, and may draw checks on the accounts for this purpose (without court order). (LGC §117.053 (a))

Appeal Bonds and Certain Probate Funds

An appeal bond shall be paid without a written order on receipt of mandate or dismissal. (LGC §117.053 (b))

The county clerk may disburse probate funds to custodians of minors and incapacitated persons who have no guardians. The custodians must apply to the clerk and post a bond in double the amount of money. (Probate Code Section 887) (LGC §117.053 (b))

Abandoned Registry funds

“Any funds deposited under this chapter, except cash bail bonds, that are presumed abandoned under Chapter 72, 73, or 75, Property Code, shall be reported and delivered by the county or district clerk to the comptroller without further action by any court.” (LGC §117.002) See a fuller discussion of abandoned funds later in this document.

Payment to the IRS for Taxes due On Investment Earnings

“The district or county clerk is authorized to pay any or all of the interest earned on funds deposited under this chapter, without court order, to the Internal Revenue Service to satisfy tax withholding requirements.” (LGC §117.003)

Minor’s Next Friend Accounts. (Property Code § 142.002)

If a minor is represented by a next friend, the court may authorize the next friend or other person to take possession of the money. The next friend or other person *may not* take possession of the property until he has executed a bond of at least double the value of the property or, if the surety is a licensed, solvent surety company, a bond equal to the value of the property. The bond must be payable to the county judge and be conditioned on the obligation to use the property under the direction of the court for the benefit of its owner and to return the property with interest to the person entitled when ordered by the court to do so.

Time of Disbursement

Registry funds are held by the clerk, under the direction of the court, and can be disbursed at anytime as directed by the court.

Since judgments have differing requirements for disbursement, the clerk must read the judgment before writing a check. Frequently an additional order may be necessary. Proper identification including a copy of a birth certificate for age verification may be prudent at disbursement. Many clerks require the recipient to sign a receipt showing name, date of receipt and amount of disbursement.

Administrative Expenses Deducted

Deductions for administrative expenses:

- are not optional,
- must be deducted from every payment. This includes payments to custodians of minors or incapacitated persons and payments to others on behalf of the minor for legal, medical or educational expenses approved by the court.
- must be charged whether the accounts earned interest or they did not.
- apply equally to special accounts in the depository and to separately invested accounts.

a. Administrative Expenses Paid from Interest.

When funds are deposited in an interest-bearing account, the clerk must transfer 10 percent of the interest earned to the county’s general fund to compensate the county for the accounting and administrative expenses of maintaining the account. This applies to all withdrawals on or after September 1, 1997. (LGC § 117.054, Attorney General Letter Opinion No. 98-106-Dated: 11-12-98)

§ 117.054. COUNTY EXPENSES PAID FROM INTEREST. (a) If a special or separate account earns interest, the clerk, at the time of withdrawal, shall pay in a manner directed by a court with

proper jurisdiction the original amount deposited into the registry of the court and any interest credited to the account in the manner calculated in Subsection (b).

(b) The interest earned on a special account or a separate account **shall be paid** in the following amounts:

(1) 10 percent of the interest shall be paid to the general fund of the county to compensate the county for the accounting and administrative expenses of maintaining the account; and

(2) 90 percent of the interest shall be credited to the special or separate account.

(Emphasis added)

Exempt Account

A structured settlement account for minors or incapacitated persons is not subject to this interest calculation. (Property Code §142.008 (c)). However, all other Family Code cases earning interest are subject to the fee.

b. Administrative Expenses Paid from Fees

If registry funds are deposited in a non-interest-bearing account, the clerk must deduct, at the time of withdrawal, 5 percent of the amount of the withdrawal, but no more than \$50 and deposit the fee to the county's general fund as compensation for administrative and accounting expenses. The \$50 fee limit applies to each withdrawal from a non-interest-bearing account and not to the total account balance. (LGC § 117.055)

§ 117.055. COUNTY EXPENSES PAID FROM FEES. (a) To compensate the county for the accounting and administrative expenses incurred in handling the registry funds **that have not earned interest**, including funds in a special or separate account, the clerk **shall**, at the time of withdrawal, **deduct** from the amount of the withdrawal a fee in an amount equal to five percent of the withdrawal but that may not exceed \$50. **Withdrawal of funds generated from a case arising under the Family Code is exempt from the fee deduction provided by this section.**

(b) A fee collected under this section shall be deposited in the general fund of the county.

(Emphasis added)

Exempt Account

Withdrawal of funds generated from a case arising under the Family Code is exempt from this fee deduction.

Per Bonnie Wolbrueck, former Williamson County District Clerk, "The main reason for the legislative action on the Family Code exemption was for cash bail bonds paid to get out of jail for non-support. These cash bonds usually go toward child support. But, because of the legislation, funds such as temporary restraining order bonds, attorney ad litem fees, and guardian ad litem fees are all now exempt from the fee - which is very common. And, on occasion the clerk may have funds deposited pending final action on a divorce (e.g. the sale of a house) which would also be exempt. So, under the list in LGC 117.052, #3 funds paid in satisfaction of a judgment, #4 child support funds held for more than three days, #5 cash bonds, #6 cash bail bonds and #8 any other funds tendered to the clerk for deposit into the registry of the court could apply --- and, maybe in some incidences, also #1 or #2 in some of our more "creative" divorces."

Calculating the Administrative Fee

The timing and amount of the deduction for administrative expense are dependent upon interpreting the phrase “at the time of withdrawal.”

When the law requires or the court orders funds disbursed all at one time, it is relatively simple to calculate the fee. This is true whether the funds were deposited in an interest-bearing account or a non-interest-bearing account.

1. Scenario 1 – Distribution to a Single Owner

For example, assume that the court orders the clerk to disburse a \$10,000 account to the plaintiff in a lawsuit. Here is the calculation under both scenarios:

Non-interest-bearing:

Admin. Fee = 5% times \$10,000 = \$500

However, the amount is limited to \$50 “at the time of withdrawal”

Original account balance	\$10,000
Less Admin. Fee	<u>- 50</u>
Net Distribution	\$ 9,950

Interest-bearing

Assume the account earned interest at 4.85% compounded for 2 years.

Interest earned in year 1 ($\$10,000 \times .0485$) = 485.00
Interest earned in year 2 ($\$10,485 \times .0485$) = 508.52

Total interest earned = 993.52

Admin. Fee = ($\$993.52 \times 10\%$) 99.35

Original account balance	\$10,000.00
Plus Interest Earned	993.52
Less Admin. Fee	<u>- 99.35</u>
Net Distribution	\$10,894.17

2. Scenario 2 - Distributions to Multiple Owners

Assume that the court orders the clerk to disburse a \$10,000 account to 5 plaintiffs in a lawsuit in the following amounts:

Mr. Green	\$ 5,000
Mrs. White	2,500
Col. Plum	1,250
Mr. Gatsby	625
Miss Scarlet	<u>625</u>
Total	\$10,000

Non-interest-bearing:

Admin. Fee =

5% times \$5,000 = \$250 (NTE \$50)	\$50.00	Mr. Green
5% times \$2,500 = \$125 (NTE \$50)	\$50.00	Mr. White
5% times \$1,250 = \$62.50 (NTE \$50)	\$50.00	Col. Plum
5% times \$625 = \$31.25	\$31.25	Mr. Gatsby
5% times \$625 = \$31.25	<u>\$31.25</u>	Miss Scarlet
Total Fee	\$212.50	

<u>Payout</u>	<u>Original</u>	<u>Less Fee</u>	<u>Net Distribution</u>
Mr. Green	\$ 5,000	\$50.00	\$4,950.00
Mrs. White	2,500	\$50.00	2,450.00
Col. Plum	1,250	\$50.00	1,200.00
Mr. Gatsby	625	\$31.25	593.75
Miss Scarlet	<u>625</u>	<u>\$31.25</u>	<u>593.75</u>
Total	\$10,000	\$212.50	\$9,787.50

Interest-bearing

Assume the account earned the same interest as in Scenario 1. The clerk should allocate the \$993.52 interest among each of the recipients based on their proportional distribution. The fee would then be 10% of the interest earned by each person.

<u>Payout</u>	<u>Original</u>	<u>%</u>	<u>Interest</u>	<u>Less Fee</u>	<u>Distribution</u>
Mr. Green	\$ 5,000	50	\$496.75	\$49.67	\$ 5,447.08
Mrs. White	2,500	25	248.38	24.84	2,723.54
Col. Plum	1,250	12.5	124.19	12.42	1,361.77
Mr. Gatsby	625	6.25	62.10	6.21	680.89
Miss Scarlet	<u>625</u>	<u>6.25</u>	<u>62.10</u>	<u>6.21</u>	<u>680.89</u>
Total	\$10,000	100	\$993.52	\$99.35	\$10,894.17

Conclusion

Notice there was no difference in the fee and the total distribution under Scenario 1 and 2 when using an interest-bearing account. **The recipient always comes out ahead using the interest-bearing account because the fee is deducted from interest earned.**

The non-interest bearing method penalizes those receiving smaller distributions because those receiving distributions over \$1,000 have their fee capped at \$50 (i.e. \$1,000 x 5%).

Under scenarios 1 and 2 for *non-interest-bearing* accounts the amounts deducted would have been the same whether the distributions were made in year 1, year 18 or staggered throughout. The longer the county holds funds in non-interest bearing accounts, the more the county and owner lose in interest earnings and fees. The county could have held the account for 18 years and only received \$50 for its fee under Scenario 1 and \$212.50 for Scenario 2.

Under “normal” interest rates, the county usually comes out ahead by using the interest-bearing accounts. Recently, it is difficult to earn 1.5%. Therefore, in some cases, the 5% non-interest bearing method, even when capped at \$50 may produce a larger fee. Of course low interest rates can still out-perform the non-interest bearing method if the principal is a large amount or if it stays in the account for many years.

Calculating the Administrative Fee with Payments of Expenses

The following three scenarios show what happens when the court orders payment of expenses prior to distribution.

Assume the \$10,000 principal is deposited in January on behalf of a one-year old child born the previous January. The child will reach 18 at the end of the 17th year. On December 31 of year four, the judge approves the following disbursements on behalf of the child. The clerk makes one payment to each professional (i.e. there are 3 payments).

Doctor's Bill	\$ 400
Attorney's Bill	1,000
Daycare Expenses	<u>2,500</u>
	\$ 3,900

There are no more expenses paid prior to distribution in year 17

Scenario 3 – Non-interest-bearing (Fee Deducted when Expenses Paid):

In this case, the three payments would also require the assessment of an administrative fee of 5% NTE \$50. The fee is \$120 calculated as follows:

	<u>Bill</u>	<u>Fee</u>
Doctor's Bill	\$ 400	\$ 20
Attorney's Bill	1,000	50
Daycare Expenses	<u>2,500</u>	<u>50</u>
	\$ 3,900	\$120

On December 31, the clerk would pay the \$120 administrative fee to the County's General Fund and deduct the total payments of \$4,020 (\$3,900 + \$120) from the \$10,000 principal.

Original Principal	\$ 10,000
Less expenses	(3,900)
Less Fee	<u>(120)</u>
Remaining to Distribute \$	5,980

In year 17, the clerk would calculate the final distribution like this.

Remaining to Distribute	\$ 5,980
Admin. Fee (NTE \$50)	<u>(50)</u>
Distribution to 18 year old	<u>\$ 5,930</u>

Scenario 4 – Interest-bearing (Fee Deducted when Expenses Paid)

Assume the same interest rate as earlier (4.85%) compounded annually. Total interest earned through the 4th year is \$2,085.75. The Fee is 10% or \$208.58.

On December 31, the clerk should pay the \$208.58 administrative fee to the County's General Fund and deduct the total payments of \$4,108.58 (\$3,900 + \$208.58) from the interest earned to date (\$2,085.75) and the remainder (\$2,022.83) from principal.

In year 17, the clerk would calculate the final distribution like this.

Remaining Principal to Distribute	\$7,977.17
Interest to Distribute (Earned since Year 4)	6,788.01
Admin. Fee (10% of Interest)	<u>(678.80)</u>
Distribution to 18 year old	\$ 14,086.38

***Total Fees collected is \$887.38 (\$208.58 + \$678.80)**

Scenario 5 – Interest-bearing (Fee Deducted at Final Distribution)

Assume all the same elements as in Scenario 4 except that in year four the clerk deducts \$3,900 from principal but does not deduct the 10% interest fee. The clerk waits until year 17 to deduct all fees at final distribution.

Total interest earned from year one through year 17 is \$9,051.25. In this case, the clerk deducts an administrative fee of \$905.13 or 10%. In year 17, the clerk would calculate the final distribution like this.

Remaining Principal to Distribute	\$6,100.00
Interest to Distribute (Earned since Year 4)	9,051.25
Admin. Fee (10% of Interest)	<u>(905.13)</u>
Distribution to 18 year old	\$ 14,246.12

Conclusion

Scenario 3 is the correct way to handle the payment of expenses prior to distribution from a non-interest bearing account. **Fees on non-interest bearing accounts should be deducted at the time of withdrawal.**

Scenario 4 is the correct way to handle the payment of expenses prior to distribution from an interest-bearing account. However, it is quite involved. Even with a computer, it would be very difficult to calculate interest up to a payment date and then calculate interest following the payment. Therefore, Scenario 5 is the most practical way to calculate the fees on interest-bearing accounts and it yields the same results.

The difference between fees earned in Scenarios 4 and 5 is only \$17.75. Actually, there is no difference, because the \$208.58 fee transferred to the General Fund in year 4 under Scenario 4 would also have earned interest. Therefore, the county receives virtually the same amount of fees and interest whether the clerk collects the fee at the time payments are made or at final distribution.

The clerk should collect fees on interest-bearing accounts at final disposition. However, the clerk must be aware of the total amount of interest earned over the life of the account to be able to calculate the total fee and to make certain it retains enough in the account to pay the county’s fee at final distribution.

It is advantageous to the County and the Owner of the account to invest in interest-bearing accounts. Look at the differences in the fees and the final distributions below.

Summary Comparison

Scenario	Principal	Total Interest Earned	Fee	Expenses	Final Distribution
3	\$10,000.00	-	(170.00)	(3,900.00)	(5,930.00)
4	\$10,000.00	8,873.76	(887.38)	(3,900.00)	(14,086.38)
5	\$10,000.00	9,051.25	(905.13)	(3,900.00)	(14,246.12)

INVESTMENTS

Investment of Registry Accounts

Often the court will order the clerk to invest funds in separate accounts. These orders give the clerk a slightly more involved role than that of a normal “custodian.” Many times the order simply requires that funds be invested “at the highest interest rate.” These funds may be invested outside of the depository thus creating potential additional liability for the clerk. As long as the funds are in the depository, the law protects the clerk if they are lost. That protection is not as clear for separately invested funds. If the order does not designate the type of investment or specify an institution, the clerk must make the determination. If an additional depository agreement is needed do not invest without one. (see **When is a Depository Contract Needed?**)

All types of investments should be styled with proper identification to prevent improper withdrawal or recording errors. Do not use the word “trustee” or “trust” which would imply additional procedures and reporting under the trust statute.

Local Government Code § 117.053(c.) allows the clerk to invest in

- interest bearing accounts, including certificates of deposit (CD), insured by the FDIC (currently only \$100,000),
- U.S. Treasury bills,
- public funds investment pools, and
- certain no-load money market mutual funds.

Authorized Investments - Local Government Code § 117.053 (c)

1) Interest-bearing Accounts

Interest-bearing deposits in a financial institution doing business in this state and insured by the Federal Deposit Insurance Corporation (FDIC) including savings accounts and certificates of deposit.

Certificates of deposit are issued by state and national banks, which must be domiciled in Texas, and guaranteed by the FDIC and are secured by obligations of the US Government or other collateral authorized by law.

2) United States Treasury Bills

Treasury bills are obligations (debt instruments) of the United States government, issued by the U. S. Treasury, that are used to finance the operations of the federal government and to redeem maturing obligations.

Treasury bills may be purchased directly through the Treasury, a government securities broker or dealer; a Federal Reserve Bank, or a financial institution. They are purchased at auction. For information on purchasing a Treasury bill call Treasury Direct in Dallas at 800-722-2678 or check the U. S. Treasury web site for detailed information and answers to all questions at <http://www.treasurydirect.gov/govt/govt.htm>.

3) Public Funds Investment Pools

An eligible interlocal investment pool that meets the requirements of Sections 2256.016, 2256.017 and 2256.019, Government Code which is part of the Texas Public Funds Investment Act.

Local government investment pools (LGIPs) were established to allow small investing local governments (municipalities, counties, school districts) a means of pooling resources (capital and investment experts) so they can participate in the capital markets. Pool participation usually requires the execution of interlocal agreements between the pool and the investing entity; so many pools are also known as interlocal pools. In Texas, LGIP's were created in conformity with the Interlocal Cooperation Act, and operate under the Texas Public Funds Investment Act.

The specific requirements are that

- LGIPs function as money market mutual funds,
- they seek to maintain a \$1.00 net asset value; that is, the portfolio market value divided by its book value must fall within .995 and 1.005 and if the book value is less than .995 or greater than 1.005, portfolio holdings shall be sold as necessary to maintain the set ratio,
- their weighted average maturity is no greater than 90 days, and
- they are continuously rated no lower than AAA or AAA-m or at an equivalent rating by at least one nationally recognized rating service.

4) No-load Money Market Mutual Funds - If the fund:

- A) is regulated by the Securities and Exchange Commission;
- B) has a dollar weighted average stated maturity of 90 days or fewer; and
- C) includes in its investment objectives the maintenance of a stable net asset value of \$1 for each share.

A money market mutual fund is a pool of money invested in various money market securities (short-term debt instruments). Interest compounds daily and pays out (or reinvests) dividends to shareholders monthly. Investment companies, brokerage firms, and other institutions such as insurance companies sponsor these funds that are managed by either a single manager or a management team. Some funds charge a load (commission for sales force) and others are no-load funds that charge no commission. The objective of the money market mutual fund is to contain \$1.00 net asset value (NAV) per share; therefore, the amount you invest is the NAV of your shares (\$1000.50 buys 1000.5 shares).

The statute requires the fund to be regulated by the Securities and Exchange Commission (SEC) and have a dollar-weighted average maturity of 90 days or less and investment objectives of a stable net asset value of \$1 for each share. Many money market mutual funds provide availability for unlimited separate accounts and monthly reporting.

Additional Investments for Accounts of Minors and Incapacitated Persons

Funds managed by the clerk for minors under Chapter 142 of the Property Code are registry funds as stated in Local Government Code §117.052(c)(1). Minor accounts have the same provisions for investment as registry funds in Local Government Code § 117.053 except for one additional

investment provision in the Texas tomorrow fund (now the Texas Guaranteed Tuition Plan). (Property Code §142.004 (a)(2)(A). Interest is paid in the same manner as Local Government Code §117.054.

In a suit in which a minor or incapacitated person is represented by a next friend, the court may direct the clerk to deliver any funds to a trust company or a bank having trust powers. The decree shall provide for the creation of a trust with certain mandatory provisions outlined in the statute. (Property Code § 142.005). In this case, it appears the clerk has no further liability or duty unless the court brings it back into the registry.

Structured Settlement: Texas Property Code § 142.008, § 142.009

A structured settlement is an account that provides for periodic payments in a suit in which a next friend or an appointed guardian ad litem represents a minor or incapacitated person who has no legal guardian. The court may order a structured settlement providing for periodic payments funded by (a) an obligation guaranteed by the United States government or (b) an annuity contract meeting the requirements of Property Code §142.009, containing strict provisions for an annuity and the insurance company providing the annuity. In approving the insurance company, the court may consider several provisions in the statute. The person obligated to fund a structured settlement shall provide to the court: (1) a copy of the instrument that provides funding for the structured settlement; or (2) an affidavit from an independent financial consultant that specifies the present value of the structured settlement and the method by which the value is calculated.

It is unlikely the clerk will have much involvement in this situation, except for disbursing the amount held in the registry account to the insurance company after approval by the court.

Section § 142.008 of the Property Code clearly states that a structured settlement is not subject to the administrative fee deducted from interest in Local Government Code § 117.054.

Risks

Every investment has inherent risks. For example, there is the possibility that the holder won't be able to sell when needed (liquidity risk), or the value of the investment declines (market risk), or the safety of the investment is not adequately protected (security risk), or this type investment simply doesn't make sense for these types of funds (strategy risks). Even though registry funds are not "public funds", it would be wise to adopt the investment objectives outlined in state law for public funds. In order of priority, they are

- 1) preservation and safety of principal;
- 2) liquidity; and
- 3) yield.

Many clerks invest in CDs at the depository, probably because it is the easiest way to invest and because the yield is comparable to some investment pools. Before investing in CDs the clerk should ask the bank to search for other accounts with the owner's Social Security Number to determine that they are adequately covered by FDIC insurance. If not, the clerk will need to establish a depository agreement with the institution requiring additional collateral to cover the investment. Also, the

liquidity risk is higher for CDs than for other investments unless the bank has waived all penalties for early withdrawal.

Before making an investment decision, the clerk should obtain two or three quotes to determine the best yield available. The clerk should document this information and retain it with other documentation for the account so that it will be available if someone should question the choice. Usually these documents should be retained until final distribution.

ACCOUNTING, REPORTING, AND AUDITING

Accounting and Reconciliation

To demonstrate proper segregation of commingled registry funds by owner, the clerk must be able to prove that the detail records in the system can be reconciled with the cash in the bank. For each registry account, the clerk must periodically produce a report by owner from the system where the detail records are maintained. This report must contain a grand total that can then be reconciled to the bank statement. If this detail cannot be reconciled to the bank statement and all differences identified by some unique number such as case number, the detail in the system will be unreliable the rightful owners will not be known. The potential for unidentified errors is great without this reconciliation.

Clerks must record all information needed for each type of fund. If the account is for a minor, it is important to receive the date of birth so that the account can be invested until the minor reaches majority to prevent any penalty for early withdrawal. Deciding what to record is very important and requires thoughtful planning, especially when designing a computer database to capture the data.

Following are some data fields to consider:

- case number
- style of the case
- dates and amounts of deposits and withdrawals
- name of the person
- investment type
- place of investment
- list of quotes obtained before investing
- identifying number of the investment
- style of the invested account
- date of investment
- social security or tax identification number
- address for tax purposes
- date of birth if minor
- any other information that will be helpful in the management of the account

Interest Allocation

If a clerk chooses an interest bearing account for commingled funds, he or she must allocate the interest to each subaccount on a proportional basis. This may be almost impossible without a

computer program if there are many subaccounts with a high level of activity and if the interest rate fluctuates daily. Another way to allocate interest is to calculate it at the time of disbursement. This requires the use of historical interest rates applied to the principal during the time it was in the clerk's custody. This can be done with spreadsheets.

Regardless, the clerk must attempt to allocate on an equitable and consistent basis. Some have transferred interest earnings to the general fund and this is illegal.

County Auditor Requirements

a. Counties Under 190,000

In a county with a population of 190,000 or less, a county and a district clerk must keep a statement of the money received as deposits in the registry of a court. The county auditor must examine the records and accounts each year and report the findings to the next grand jury or district court.

§ 114.041. STATEMENT OF FEES, COMMISSIONS, AND OTHER MONEY RECEIVED BY OFFICERS. (a) In a county with a population of 190,000 or less, a district, county, or precinct officer shall keep, a statement of...**trust fund deposits in the registry of a court...****The county auditor or, if the county does not have a county auditor, the commissioners court shall annually examine the records and accounts of each officer** and report the findings of the examination to the next grand jury or district court. (emphasis added)

b. Counties Over 190,000

In counties with a population of 190,000 or more, the county auditor may:

1. Audit registry funds.
“All money held by a county officer in an official capacity, whether or not such money belongs to the county, is **subject to audit by the county auditor** under article 1651...” (H-1185)
2. Adopt and enforce rules and regulations for the proper collecting, checking and accounting of county funds and funds collected for the use and benefit of a person (LGC § 112.002). In addition to requirements for check-writing and reporting, this may include banking requirements.

“Conceivably, the county auditor could require that trust funds be placed in separate accounts "for the speedy and proper collecting, checking, and accounting" of the funds...we believe that the clerk of court has no duty to deposit such funds in separate accounts or in interest bearing accounts, except as such duty may be imposed by the court or other authority.” (JM-1162) (“other authority” includes the county auditor. PL)
3. Establish check writing procedures, which may include counter-signature by the county auditor. (LGC §117.058 (c), AG Opinion H-183 (1973) and David Brooks §14.11 p. 770)
4. Require the clerk to furnish monthly reports, annual reports or other reports regarding any money received or disbursed and “all money remaining on hand at the time of the report.” The county auditor shall prescribe the form and frequency of the report (LGC §114.043 and §117.058(b)).

The preceding gives the auditor authority to prescribe for the clerk a method of reporting and reconciling commingled account balances.

Auditing by Independent CPA

Attorney General Opinion H-460, 1974, states that minors' trust funds which had been invested pursuant to district court orders under V.T.C.A. Property Code, § 142.001, were to be included in the annual independent audit of county funds conducted under V.T.C.A. Local Government Code § 115.045. Although 115.045 only applies to annual audits in counties of 350,000 or more, the same wording is used to prescribe biennial audits in counties of 239,000 to 242,000 (§ 115.044) and in counties without a county auditor (§ 115.041). This is a good idea and one that the clerk should welcome.

Counties over 1.3 Million (Harris, Dallas, Tarrant and Bexar Counties) LGC 117.123

(a) In addition to the regular auditing procedures of the county auditor, the registry funds shall be audited at the end of each county fiscal year by an independent certified public accountant or a firm of independent certified public accountants of recognized integrity and ability selected by the commissioners court.

(b) A written report of the audit shall be delivered to the county judge, each county commissioner, and a clerk within 90 days after the last day of the fiscal year. A copy of the audit shall be kept at the clerk's office and shall be open to inspection by any interested person during normal office hours. The cost of the audit shall be paid by the county.

IRS—1099 Requirements

State law allows, but does not require, clerks to deposit registry funds in interest-bearing accounts. If registry accounts earn interest, the clerk must allocate the interest to each owner.

If the clerk invests funds using the county's tax identification number, the clerk is required to issue a 1099-INT to the owner for interest earned. Any person with a taxable interest in registry funds must submit appropriate forms and address information to the clerk for reporting interest to the IRS. Banks should prepare 1099s for separately invested funds using the owner's social security number.

Time for Reporting Interest

The IRS does not normally require banks or clerks to report income from invested funds until its distribution to the owner. For custodial funds of minors, this is normally after the child turns 18. However, in recent years, the IRS has instructed some clerks to provide 1099s annually. Sometimes the requirement applies to accounts of minors who have reached 18 but cannot be located, other times it is for all custodial accounts. In other cases, the IRS garnished bank accounts for individuals (usually high dollar accounts) without notifying the clerk. The clerk only received a notice from the bank that it produced a 1099 at the direction of the IRS and transferred a portion of the interest earnings as backup withholding (now 31%).

The IRS has also attempted to require some counties to report on interpleader accounts in the registry where the final decision of the court has not been rendered. This is a difficult situation for the clerk.

The clerk should consult with its attorney before doing this since the court could change ownership of the funds and the related earnings after issuance of the 1099.

Tax Treatment and Clerk's Liability

The rule of “constructive receipt” means income is taxable only when the taxpayer has access to it. Therefore, it seems a minor does not have “constructive receipt.” However, some CPAs think the clerk should still issue 1099s every year for all registry funds. Banks already issue 1099s every year for separately invested funds (including those of minors).

In almost all situations, it is preferable for a taxpayer to report interest earnings yearly. Depending on the amount of interest earned and the amount of the minor's other income there may be no tax due. However, since the clerk is a “custodian” and not a “trustee,” the clerk should not be liable if a taxpayer sues for the extra tax liability caused by not reporting interest yearly.

Payment of Taxes

After receiving a 1099, the taxpayer must report the income and pay taxes if applicable. If taxes are not withheld from earnings, some guardians complain they don't have the money to pay the tax. In these cases, the Local Government Code authorizes the county or district clerk to pay any or all of the interest earned, without a court order, to the Internal Revenue Service to satisfy tax withholding requirements. (LGC 117.003 (b).)

Calculating the amount of the 1099

The clerk should show the full amount of earnings and not reduce it by the amount of the administrative fee. This fee may or may not be deductible by the client on his or her income tax return.

UNCLAIMED PROPERTY

RESOURCES

- For holder information and forms, see Texas Comptroller publications listed below, and <http://www.window.state.tx.us/up/>
- <http://www.window.state.tx.us/up/reporting.html>
- Texas Comptroller publication “Unclaimed Property Reporting Instructions”
- Texas Comptroller publication “Unclaimed Property Texas Statutes—Title 6-Property Code Chapters 72-76”

Critical Deadlines

March 1 – deadline to review unclaimed property

May 1 – deadline for mailing of due diligence notifications

July 1 – deadline for submission of reports and unclaimed property to the State Comptroller. No report is filed with the Comptroller when there is no unclaimed property.

August 31 – deadline for submission of reports to County Treasurer.

CREATE YOUR OWN AUDIT PROGRAM

1. Know the Rules
2. Know the Risks
 - Rank the Risks
3. Identify Compensating Controls to Minimize the “Riskiest” Risks
 - Develop Tests of Controls
4. Evaluate Results
5. Make Recommendations
6. Report Results
7. Follow up on Recommendations