

*Role of Guardian and Attorney Ad
Litem In Guardianship Proceedings*

By:

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*“If you can’t explain it simply,
you don’t understand it
well enough”*

Albert Einstein

Overview

Guardian and Attorney ad Litem

- ❖ Attorney ad litem: Represents proposed ward or ward.
- ❖ Guardian ad litem: Considers ward's best interests in making recommendations to court
- ❖ Caution: Same titles are used in Texas Rules of Civil Procedure, Texas Estates Code, Texas Family Code, and other statutes, each for positions whose duties are substantially different.

*“Whatever you are,
be a good one.”*

Abraham Lincoln

Requirement for Appointment Attorney ad Litem

- ❖ Attorney appointed by Court to *represent* and *advocate* for proposed ward, incapacitated person or person with legal disability, or unborn person in guardianship proceeding. TEX. ESTATES CODE § 1002.002.
- ❖ Must be certified by State Bar of Texas after taking 4 hour CLE, including 1 hour devoted to alternatives. TEX. ESTATES CODE § 1054.202.
- ❖ Re-certification every 2-4 years.
- ❖ Court should be provided copy of certification.

Uncertificated Attorney ad Litem

- ❖ An uncertificated attorney has no authority to represent proposed ward or ward.
- ❖ An uncertificated attorney lacks standing to file an appeal. *Guardianship of Wehe*.
- ❖ Complaint about attorney ad litem who is not properly certified is not basis for writ of mandamus, but could be raised by direct appeal or statutory bill of review. *In Re: Cunningham*

When Attorney ad Litem Appointment Required

- ❖ Must be appointed for every application seeking appointment of guardian. TEX. ESTATES CODE §1054.001.
- ❖ Must be appointed for every application to create guardianship management regardless of creation of guardianship. TEX. ESTATES CODE §1301.051.
- ❖ Must be appointed for ward in restoration or modification proceeding. TEX. ESTATES CODE §1202.101

Statutory Duties of Attorney ad Litem

- ❖ Review application for guardianship/courthouse file.
- ❖ Request/receive relevant history records:
 - Certificates of physical, mental and intellectual exams;
 - Medical;
 - Psychological;
 - Intellectual testing records; and
 - If needed, enter order directing release of records.

Statutory Duties of Attorney ad Litem

- ❖ Be an advocate.
- ❖ Meet proposed ward or ward and discuss:
 - Law and facts of case;
 - Legal options regarding disposition of case;
 - Grounds on which guardianship is sought;
 - Whether alternatives to guardianship exist to meet needs and avoid need for guardian.

Statutory Duties of Attorney ad Litem

- ❖ Before hearing, shall discuss with proposed ward the attorney ad litem's opinion regarding:
 - Whether guardianship is necessary for proposed ward; and
 - If guardianship is necessary, specific powers or duties of guardian that should be limited if proposed ward receives supports and services.

Other Duties of Attorney ad Litem

- ❖ Conduct reasonable investigation.
- ❖ Engage in appropriate discovery.
 - Hire and designate medical expert.
 - Interview witnesses.
- ❖ Review/discuss Ward's Bill of Rights. Tex. Estates Code § 1151.351.
- ❖ Interview applicant to confirm qualifications.
- ❖ Confirm all notices have been given.

Attorney ad Litem Role in Contest

- ❖ Consider requesting independent medical examination.
- ❖ Consider requesting security for costs.
- ❖ Consider closing hearing.
- ❖ Consider demanding jury.
- ❖ Arrange for proposed ward to attend hearing(s).
- ❖ Verify assets for bond purposes.
- ❖ Appeal adverse ruling/verdict if believe valid grounds for appeal.
- ❖ Appropriate coordination with private counsel.

Compensation of Attorney ad Litem

- ❖ Court shall order payment of attorney ad litem fee set by court as compensation. TEX. ESTATES CODE §1155.151.
- ❖ If proposed ward's assets are insufficient, county is responsible for cost of those services.
- ❖ If party in guardianship proceeding is found to have acted in bad faith or without just cause in proceeding, court may order party to pay for costs of proceeding, including ad litem fees.

Removal of Attorney ad Litem

- ❖ Attorney ad litem can be removed for ineffective assistance counsel. *In Ex Parte Parker*.
- ❖ Must show:
 - Counsel's assistance fell below objective standard of reasonableness; and,
 - Ad litem's deficient assistance prejudiced Ward's case. Such allegations must be firmly founded in and affirmatively demonstrated by court's record.

Term of Attorney ad Litem

- ❖ Unless Court determines continued appointment of appointed ad litem under Section 1054.001 is in ward's best interests, attorney's term of appointment expires, without court order, when Court:
 - Appoints guardian in accordance with Subchapter D, Chapter 1101;¹
 - Appoints successor guardian; or
 - Denies application for appointment of guardian.
- ❖ Term of appointment of attorney ad litem appointed under Section 1054.001 continues after court appoints temporary guardian under Chapter 1251 unless court order provides for termination or expiration of attorney ad litem's appointment.

Requirement for Appointment Guardian ad Litem

- ❖ No certification.
- ❖ Not required to be attorney.
- ❖ Any party may request.
- ❖ Court may appoint on its own motion.
- ❖ Attorney ad litem may be appointed but if attorney is appointed as both attorney ad litem and guardian ad litem, he or she is faced with inherent conflict of interest.

Statutory Duties of Guardian ad Litem

- ❖ Officer of court.
- ❖ Protect incapacitated person in manner that will enable court to determine action that will be in person's best interests.
- ❖ Investigate whether guardianship is necessary.
- ❖ Evaluate alternatives to guardianship and supports and services available to proposed ward that would avoid need for appointment of guardian.

Statutory Limits of Guardian ad Litem

- ❖ Given statutory immunity when appointed to represent interests of incapacitated person in guardianship proceeding involving creation, modification, or termination of guardianship.
- ❖ Information gathered subject to examination by Court.

Statutory Limits of Guardian ad Litem

- ❖ Cannot be held liable for civil damages arising from recommendation unless opinion or recommendation:
 - Willfully wrongful; or
 - Given with conscious indifference to or reckless disregard for safety of another or with malice or in bad faith; or
 - Grossly negligent.

Possible Actions of Guardian ad Litem

- ❖ File a report of investigation and recommendations (some courts require).
- ❖ Initiate temporary guardianship proceedings if advisable.
- ❖ Initiate permanent guardianship proceedings if advisable.
- ❖ Seek other temporary relief if advisable.
- ❖ Contest appointment of one or more applicants.
- ❖ File cross-application for guardianship.

Appointment of Guardian ad Litem: Conflict of Interest

- ❖ Person whose parent is party to lawsuit concerning or affecting welfare of proposed ward may not be appointed guardian unless Court:
 - Determines lawsuit of person who has applied to be appointed guardian is not in conflict with proposed ward's claim; or
 - Appoints guardian ad litem to represent interests of proposed ward throughout litigation of ward's lawsuit claim;

Basic Duties of Guardian ad Litem: Restoration Proceeding

- ❖ Meet proposed ward or ward.
- ❖ Review courthouse file.
- ❖ Investigate continued need for guardianship.
 - Alternatives; and
 - Supports and services.
 - Request an independent medical examination if advisable.

Compensation of Guardian ad Litem

- ❖ Entitled to reasonable compensation for services provided in amount set by Court, to be taxed as costs in proceeding. Tex. Estates Code §1054.055(a).
- ❖ Fees and expenses of guardian ad litem appointed under Texas Estates Code Section 1104.354(1) (guardian ad litem appointed to cure conflict with guardian) are costs of litigation proceeding that made appointment necessary. Tex. Estates Code §1054.055(b).

Term of Guardian ad Litem

- ❖ Unless Court determines that continued appointment of guardian ad litem appointed in proceeding for appointment of guardian is in ward's best interests, guardian ad litem's term of appointment expires, without court order, on date Court:
 - Appoints guardian; or
 - Denies application for appointment of guardian.

Tex. Estates Code § 1054.053

*“Important principles may,
and must, be inflexible.”*

Abraham Lincoln

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Tex. Estates Code § 1054.053.

Resources

- ❖ [HTTPS://WWW.TARRANTCOUNTY.COM/EN/PROBATE-COURTS/PROBATE-COURT-1.HTML](https://www.tarrantcounty.com/en/probate-courts/probate-court-1.html)
- ❖ STATE BAR OF TEXAS GUARDIANSHIP MANUEL (4TH Ed.)
- ❖ [HTTPS://WWW.DISABILITYRIGHTSTX.ORG/RESOURCE/DADS-GUARDIANSHIP-SERVICES-HANDBOOK](https://www.disabilityrightstx.org/resource/dads-guardianship-services-handbook)
- ❖ [HTTP://WWW.TXCOURTS.GOV/PROGRAMS-SERVICES/GUARDIANSHIP-COMPLIANCE-PROJECT/GUARDIANSHIP-RESOURCES](http://www.txcourts.gov/programs-services/guardianship-compliance-project/guardianship-resources)
- ❖ WEST PUBLISHING TEXAS PROBATE PRACTICE GUIDE

Questions