

Thursday, September 19, 2024
1:30 p.m. Breakout session
Texas Guardianship Association Annual
Conference

Effective Presentation of Guardianships in the Courtroom: A Retrospective From 5 Years on the Bench

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Guardianship Hearings

- LWK – experience
- (AAL; then as AJ)
- This presentation focuses on guardianship application hearings.



Do we have to conduct a formal hearing?

- Texas Estates Code Sec. 1055.051. HEARING BY SUBMISSION
 - (a) A court may consider by submission a motion or application filed under this title unless the proceeding is:
 - (1) contested; or
 - (2) an application for the appointment of a guardian.
- Texas Estates Code Sec. 1055.052. TRIAL BY JURY
 - A party in a contested guardianship proceeding is entitled to a jury trial on request.
- Texas Estates Code Sec. 1053.103. RENDERING OF DECISIONS, ORDERS, DECREES, AND JUDGMENTS
 - The court shall render a decision, order, decree, or judgment in a guardianship proceeding in open court, except as otherwise expressly provided.



Where should the hearing be held?

- Texas Estates Code Sec. 1055.053. LOCATION OF HEARING
 - (a) Except as provided by Subsection (b), the judge may hold a hearing on a guardianship proceeding involving an adult ward or adult proposed ward at any suitable location in the county in which the guardianship proceeding is pending. The hearing should be held in a physical setting that is not likely to have a harmful effect on the ward or proposed ward.
 - (b) On the request of the adult proposed ward, the adult ward, or the attorney of the proposed ward or ward, the hearing may not be held under the authority of this section at a place other than the courthouse.
 - * Note – only for **adult** wards



How can participants be more effective in guardianship hearings?

* Main focus of this presentation is **uncontested** guardianships...but a few points regarding contested cases:

If guardianship is **contested**, zero in on the contested issues to decide best and most persuasive witnesses.

Texas Estates Code Sec. 1055.101 APPLICABILITY OF CERTAIN RULES RELATING TO WITNESSES AND EVIDENCE

The rules relating to witnesses and evidence that apply in the district court apply in a guardianship proceeding to the extent practicable.

Consideration: *Should you invoke "the rule?"*



Who are the Participants?

- Applicant
- Applicant's attorney
- Attorney ad litem
- Guardian ad litem
- Court Investigator/social worker
- Physician or other medical provider
- Facility representative
- Proposed private professional guardian (Person/Estate)
- Attorney for private professional guardian (Person/Estate)



Applicant's Attorney

- Have a script (but pay attention to the conversation)
- Pre-Mark Exhibits (CME; report of court investigator/social worker; any documents to show incapacity such as bank records but have redacted in advance and copies for everyone)
- Worksheet for expenses/requested monthly allowance
- Worksheet for requested bond
- Arrange for bond in advance if possible
- Problem: court wants all documents filed several days prior to hearing; information changes right before hearing—especially financial information



Applicant

- The applicant's attorney is responsible for preparing the applicant to present **the elements of the application** and qualification as guardian.
- Suggestion: have a clear question for each element.
- Zoom practice run the day before the hearing is a great idea!
- Problems:
 - The ad-libber
 - Emotion



Attorney Ad Litem

- Texas Estates Code Sec. 1002.002. ATTORNEY AD LITEM
 - *“Attorney ad litem” means an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, an unborn person, or another person described by Section 1054.007 in a guardianship proceeding.*
- Texas Estates Code Sec. 1054.001. APPOINTMENT OF ATTORNE AD LITEM IN PROCEEDING FOR APPOINTMENT OF GUARDIAN
 - *“In a proceeding under this title for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the proposed ward’s interests.”*
- Texas Estates Code Sec. 1054.004. DUTIES
 - 1. interview proposed ward within a reasonable time before the hearing and discuss, to the greatest extent possible, the following:
 - law and facts of case;
 - proposed ward’s legal options regarding disposition of case;
 - the grounds on which guardianship is being sought;
 - whether alternatives to guardianship would meet needs and avoid need for guardianship.
 - 2. Before hearing, review application, CMEs, and all of proposed ward’s relevant medical, psychological and intellectual testing records.
 - 3. Before hearing, shall discuss with proposed ward the AAL’s opinion regarding whether guardianship necessary and if it’s necessary, “the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.”
- Does court require a written report, and if so, what does the court want to see in the report (keep in mind attorney-client privilege);
- Mistakes:
 - Picking up issues applicant’s attorney has omitted (proving their case);
 - Veering into what’s best for client (this is a tough one);
 - Risky: calling the proposed ward as a witness



Guardian Ad Litem

- Texas Estates Code Sec. 1002.013. GUARDIAN AD LITEM
 - *“Guardian ad litem” means a person appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding.*

Texas Estates Code Sec. 1054.051. APPOINTMENT OF GUARDIAN AD LITEM IN GUARDIANSHIP PROCEEDING

- *“The judge may appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding.”*
- *Note “may” appoint. Cases say within discretion of the court.



Guardian Ad Litem, continued

- What are the duties of the guardian ad litem?
- Texas Estates Code Sec. 1054.054.DUTIES
 - (a) *A guardian ad litem is an officer of the court.*
 - (b) *A guardian ad litem shall protect the incapacitated person whose interests the guardian has been appointed to represent in a manner that will enable the court to determine the action that will be in that person's best interests.*
 - (c) *The guardian ad litem shall:*
 - (1) *investigate whether a guardianship is necessary for the proposed ward; and*
 - (2) *evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.*
 - (d) *the information gathered by the guardian ad litem under Subsection (c) is subject to examination by the court.*



Guardian Ad Litem, continued

- This assignment is to assist the court with what is in the client's best interest. Is a written report required? Again, be mindful of attorney-client privileged information and also sensitive information if filed as a public document in the case file.
- Call proposed ward as a witness?



Court Investigator/Court Visitor/Social Worker

- Texas Estates Code Sec. 1002.009 COURT INVESTIGATOR
 - “Court investigator” means a person appointed by the judge of a statutory probate court under Section 25.0025, Government Code, or a judge under Section 1054.156.
- Texas Estates Code Sec. 1054.151. INVESTIGATION OF GUARDIANSHIP APPLICATION
 - On the filing of an application for guardianship under Section 1101.001, a court investigator shall investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate.
- Texas Estates Code Sec. 1054.152. GENERAL DUTIES
 - 1. supervise court visitor program if court has one, and serve as chief court visitor;
 - 2. investigate a complaint received from any person about a guardianship and report to the judge, if necessary; and
 - 3. perform other duties as assigned by the judge or required by this title.
- Texas Estates Code Sec. 1054.153. INVESTIGATION REPORT
 - Court investigator shall file with the court report containing findings and conclusions of investigation.



Court Investigator/Court Visitor/Social Worker, continued

- Tarrant County Probate Court 2 – has such a great system in place, in my opinion. Judge Pat Ferchill and continued by Judge Brooke Allen. I very much relied on this while on the bench and now as an applicant’s attorney in multiple jurisdictions, I appreciate the procedures/personnel in this court so much!
- See attachment for areas of questioning/items to be covered in report. May want to call as witness, especially if there have been recent developments.
- If no person in this role, how can your witnesses cover this information?



Physician or Other Medical Provider

- Rare to have physician or other medical provider testify live, particularly in uncontested case;
- As a practical matter, the physician's diagnosis and opinions will be presented via the Certificate of Medical Examination (practical tip: be sure they have used the current form!)
- Is the CME legible?
- Are the responses consistent (for instance, boxes checked)?
- Has the provider used numerical codes rather than medical terminology?



Facility Representative

- If you're going to call a facility representative (for instance, nursing home administrator) do you want them to bring their medical and/or billing/administrative files? If so, will they require a subpoena?
- What is your purpose for calling the representative? If it is to testify about family members relationships or behaviors, can you elicit this testimony without inadmissible hearsay?
- If there is a Court Investigator/Social Worker's report, is there really a need for this witness?



Texas Department of Family and Protective Services (or other investigator)

- What prompted your investigation?
- What did you do to investigate?
- Findings?
- Status of your investigation?
- Referral for criminal charges?



Detour to Contested Cases

What if alleged “bad actor” shows up?



Proposed Private Professional Guardian (of the Person)

- What is a Private Professional Guardian?
 - Texas Estates Code Sec. 1002.025.PRIVATE PROFESSIONAL GUARDIAN
 - *“Private professional guardian” has the meaning assigned by Section 155.001, Government Code.*
- Texas Government Code Sec. 155.001 (6)
 - *“Private professional guardian” means a person, other than an attorney or a corporate fiduciary, who is engaged in the business of providing guardianship services.*
 - *Advisory Board;*
 - *Regulations;*
 - *Certification;*
 - *Annual Disclosure required.*



Proposed Private Professional Guardian (of the Estate)

- Individual vs. Corporate (bank)
- What documents and/or records have been reviewed?
- To whom has PPG spoken to?
- Is PPG qualified under Texas Estates Code?
- What are PPG's credentials and experience?
- How does PPG usually handle assignments such as this?
- Foresee any particular difficulties or challenges?
- Is PPG willing to take this assignment?
- If appointed, what is your plan?



APPENDIX

- (1) SAMPLE FORM OF QUESTIONS FOR APPLICANT
- (2) AREAS OF QUESTIONING FOR COURT INVESTIGATOR/COURT VISITOR/SOCIAL WORKER
- (3) SAMPLE MONTHLY EXPENSES WORKSHEET FOR MONTHLY ALLOWANCE REQUEST
- (4) SAMPLE BOND WORKSHEET



Thank You

Let's Connect!

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