

The Role of the Guardian *Ad Litem* in Custody Cases

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As family law practitioners who try custody cases, we found inconsistencies in the role of guardians *ad litem* after interviewing family law practitioners throughout the Commonwealth and in other jurisdictions. This was not a scientific sampling, but an overview to illustrate the need for standardization of the guardian's role.

The role of the guardian differs greatly across the Commonwealth. This article is designed to address issues facing guardians as they struggle with defining their role and to make our suggestions on how the role of the guardian can be better defined.



Black's Law Dictionary currently defines a guardian *ad litem* as "a guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."¹ In prior years, *Black's* had defined a guardian *ad litem* as "a special guardian appointed by the court to prosecute or defend, in (sic) behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation."²

Rule 8:6 of the *Rules of the Supreme Court of Virginia* defines the roles of counsel and of guardian *ad litem* when representing children as follows:

The role of counsel for a child is the representation of the child's legitimate interests. When appointed for a child, the guardian *ad litem* shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian *ad litem* shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian *ad litem* as to what is in the child's interest and welfare.³

It is the opinion of these authors that the *Code of Virginia* and the *Rules of the Supreme Court of Virginia* provide generalized guidance as to the role and duties of the guardian.

Guardians appointed in custody cases may have up to three roles in a particular case: attorney for the child, investigator and witness. Currently, other than the general guidance given in the relevant statutes and Rule 8:6, the role remains undefined and seems to evolve with each particular case and each particular jurisdiction. There also are different roles for guardians based upon which judge will preside. It appears that it would be helpful to guardians, attorneys for the parties and litigants to have a standard set of guidelines for the guardian that can be modified by the court when needed to address the needs of an individual case.

Appointment of the Guardian *Ad Litem*

The order appointing the guardian should be clear in reciting the duties of the guardian and the information sought from the guardian.⁴ In many custody cases, the duties may be generalized and relate to the fact that the guardian is charged with determining the "best interests of the child" in determining which parent should be the primary custodian. However, as any attorney knows, no two cases are alike, and often there are unique intricacies with a particular case. In those cases—and especially where a given judge has questions—the order appointing the guardian should be specific. The order should also give the guardian the authority to speak with the child's teachers, health care providers or other individuals who may otherwise be precluded due to confidentiality requirements.

Examples are where a guardian is called upon to supervise visitation or make recommendations regarding interim visitation.

Other examples may relate to abuse and the guardian's interaction with mental health professionals that would exceed the normal investigative process.

The Pre-interview and Interview Process

The guardian should first notify the parties of his or her representation. A good practice for a guardian is to also include a questionnaire for the party to fill out prior to a first meeting. Guardians often use a questionnaire that is comprehensive, at least several pages long. There are questions about the party's family history, the background of the current marriage or current family dynamics, the litigants' goals, details regarding the children (including school and medical information) and the party's opinion of the other parent. This information can be invaluable to the guardian. For example, how one party views the other parent can alert the guardian to issues of alienation and programming of the child. This could lead the guardian to request testing of the parents or child.

The initial interview with the party and the guardian usually takes place at the guardian's office. Most guardians said that they always offer to have the attorney for the party present at the initial interview. As a practical matter, most would prefer to speak with the litigants without the attorney present, but would not deny an attorney the right to be present if the attorney or litigant so requested. If there is a criminal matter (or quasi-criminal matter, such as an allegation of abuse) pending that is related to the custody action, it would be appropriate to have the attorney present at each meeting with the guardian.

The Home Visit

There should be at least one home visit with each litigant and the child(ren)—barring extraordinary circumstances. This is not always done. Judges told us that there are instances in contested custody cases where there were no home visits, and interviews with the children were completed at the eleventh hour, often on the courthouse steps. While it is not the guardian's responsibility to address the grandeur (or lack thereof) of the home environment, the home visit was essential in most cases. Guardians said that children are more forthcoming in a familiar environment.

Interview of Collateral Sources

We believe that the guardian also has a duty to contact other appropriate witnesses, such as school personnel (including counselors and therapists if the child is in counseling) and, in some cases, health care providers. The order appointing the guardian in the Juvenile and Domestic District Court provides that

[u]pon presentation by the *Guardian ad litem* of this order, the *Guardian ad litem* shall have access to any records relating to the child held by any state or local agency, department, authority or institution and any school, hospital, physician or other health or mental health provider who shall permit the *Guardian ad litem* to inspect and copy such records without the consent of the child or his parents. Upon request of *Guardian ad litem*

made at least seventy-two hours in advance, a mental health provider shall make himself available to conduct review and interpretation of the child's treatment records which are specifically related to the investigation. Such a request may be made in lieu of or in addition to inspection and copying of such records.⁵

The drafters of the order anticipated that contact with schools, mental health care providers and physicians might be necessary for the guardian to perform his or her duties. Therefore, the guardian, at a minimum, should contact the schools, counselors and doctors. It is a good practice to contact other appropriate witnesses.

The Requirement of a Written Report

Should a written report be required in every case and how should the court address the potential issue of hearsay? It can be helpful to the attorneys and litigants to have a written guardian report at least 10 days before trial. This allows the attorneys and litigants to prepare for trial or to discuss potential settlement terms. Written reports are rarely required and usually are only prepared at a judge's request. Some judges will not read the report until the conclusion of the evidence, due to the likelihood of hearsay evidence or due to their desire to be objective by not seeing any recommendations made by the guardian. Other judges may read the report before the trial—prior to hearing the evidence. A number of judges, however, have been known to change the burden of proof (in effect) after reading the recommendation—saying that one party should convince the judge not to follow the guardian's recommendation.

If a written report is required, it should be so stated in the order, and the deadline for the filing of the report should be in the order as well. The report should be filed no later than 10 days before the trial date, with copies provided by the guardian directly to the counsel. There may be cases in which the report contains a significant amount of hearsay evidence. It will then be up to the attorneys to move that the hearsay be redacted. One solution to such a dilemma might be to have the report divided into two sections, one with general background about the family dynamics and goals, and the other containing information from witnesses and the guardian's recommendations. The first part of the report should be provided to the court to be read by the judge prior to the hearing and the second part provided "under seal" to be read by the court at the conclusion of the evidence. It is the opinion of these authors that the court should be precluded from reviewing the recommendations until the completion of all evidence. Under this scenario, the second part of the report would be available to the attorneys prior to the hearing to facilitate settlement discussions.

The Necessity for Written Standards

Currently, the order appointing the guardian in the Juvenile and Domestic Relations District Courts within the Commonwealth gives some direction to the guardian regarding his or her role. The order provides that the guardian is "[o]rdered to perform the following duties on behalf of the child to:

In accord with the child's best interest, the guardian, whenever possible, may urge that the child not be asked to testify unless such testimony is necessary.

- Represent the child in accordance with Rule 8:6 of the Rules of the Supreme Court of Virginia,
- Advise the court relative to the following: the results of the guardian's investigation of the case; the guardian's recommendation related to any testing necessary to make an effective disposition of the case; the guardian's recommendation regarding placement of the child and the disposition of the case; the results of the guardian's monitoring of the child's welfare and of the parties' compliance with the court's orders; the guardian's recommendation related to the services available to the child and family or household members, and
- File appropriate petitions, motions and other pleadings and appeals on behalf of the child⁶

The Richmond Juvenile and Domestic Relations District Court has promulgated written standards for guardians. The standards also address the court's role as it related to the guardian. The relevant Richmond standards are as follows:

The judges of the Oliver Hill Courts Building have determined that a list of written standards for Guardians *Ad Litem* would be beneficial in establishing uniform guidelines that would be useful to all participants in the juvenile courts. Not only will the guidelines be helpful for new attorneys practicing in this area, they will provide all guardians with a consistent foundation of the court's expectations.

Not every guideline is relevant to every case. The guardian should consider each standard in the context of the particular proceeding and should apply those standards which are relevant and appropriate to the specific case.

General Guardian *Ad Litem* Standards

Absent special circumstances, in every case the guardian shall:

- Have face to face contact with the child within a reasonable time after appointment to ascertain the detailed facts relevant to: custody, . . . the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief,

- Obtain and review any relevant records, including school reports, medical records, court records and case records, and
- Interview the parties of the dispute and any other person with relevant knowledge of the child or the parties, for example, clergy, caretakers, neighbors, relatives, school personnel, coaches, mental health professionals, physicians and child protective workers.

The guardian shall attend treatment, placement, administrative hearings and other proceedings involving legal, educational, and therapeutic issues when a child's circumstances renders the same reasonable and appropriate.

The guardian is responsible for advising the child, in terms the child can understand, of:

- The nature of the proceedings, the child's rights, the role and responsibility of the guardian, the attorney-client privilege, the court process, the possible consequences of the legal action and how the child may contact the guardian at any time during the course of the proceeding,
- Developments in the case and the actions of the court or the parties involved, and
- The court's determination and its consequences, the rights and responsibilities of each of the parties, including the child and the possibility of future modifications of the court order.

If the home environment is a factor the court would consider when determining the custody or placement of the child, and there is insufficient information from independent sources concerning the home, then the guardian should visit the child's home and any proposed home. If the home environment is at issue, then the guardian should visit the child's home and any proposed home regardless of information from independent sources

In accord with the child's best interest, the guardian, whenever possible, may urge that the child not be asked to testify unless such testimony is necessary. If the testimony is necessary, the guardian should consider requesting, in accord with *Virginia Code* Section 63.1-248:13.1, that the testimony be taken by closed circuit television in his/her presence after the guardian has advised the child of the purpose of such testimony

The guardian shall appear in court on the date and time scheduled with his/her independent recommendation. The court may require the guardian to prepare a written report of the child's situation. A copy of the report should be filed with the court 72 hours prior to the hearing. Copies of the report may also be provided directly to any lawyers in the proceeding.

If the guardian believes that the court's determination is contrary to the child's best interests, after considering the wishes of the child, a notice of appeal shall be filed and measures undertaken to assure that the appeal is perfected expeditiously.

Enforcement of the Guardian *Ad Litem* Guidelines

The court recognizes guardians *ad litem* as officers of the court and expects all to adhere to the standards set forth above. The court reserves the right to remove and/or suspend guardians from the list as appropriate and will take into account the guidelines and guardian's compliance therewith in making such decisions.

The Court's Role

In an effort to ensure that guardians will be able to comply with the standard outlined above, absent special circumstances, the courts will:

- Give a timely notice of appointment,
- Allow access to any relevant court records, and

- Make every consideration to reappoint the same guardian in situations where a child has been represented by a guardian in the past⁷

While the order appointing the guardian, Rule 8:6 and the relevant statutes provide some guidance, the written guidelines promulgated by the Richmond Juvenile and Domestic Relations Court are, in our opinion, the type of guidelines that should be adopted by courts statewide.

Guidelines and Standards from Outside the Commonwealth

Other authors have explored the issues raised by this article. For example, the *Journal of American Academy of Matrimonial Lawyers* published an article in 1995 entitled “The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective.” The author, Martin Guggenheim, suggests that each time a court appoints a guardian, that the court specify in writing:

the purposes of the assignment; the role of the child’s representative; the particular tasks expected to be performed by the representative; the time frames, if any, within which to complete the tasks; the fee arrangement for the representative’s services, including the rate, payment schedule, and who is responsible for paying; and whether the appointment is only for trial-level matters or includes responsibilities through any appeal that may be prosecuted.⁸

While such a procedure might add to the time the judge spends at the beginning of a case involving a guardian, it would certainly provide guidance to the guardian as to his/her role during the case.

Florida, apparently, has adopted a very intricate guardian *ad litem* statutory scheme. While we do not advocate adopting the code sections of sister states, the state of Florida has suggested a form order for the appointment and duties of the guardian that provides clear and concise direction. The order specifies that the guardian is a party to the proceedings and is to “be provided with copies of all pleadings, notices, stipulations and other documents filed in this action and is entitled to reasonable notice before any action affecting the child(ren) is taken by either of the parties, their counsel or the court” The guardian’s report may address the following areas: parental responsibility of child(ren); residence of child(ren); visitation, including times and locations, appearance of child(ren) at depositions or hearings; relocation, best interests of the child(ren) regarding scientific tests and other criteria that the Court may specifically designate.⁹

The South Carolina Bar has promulgated guidelines for guardians involved in custody cases. Their publication addresses not only the role of the guardian, but also the qualifications, training, experience and responsibilities. The South Carolina guidelines call for the guardian to conduct an independent investigation, interview the parties, parents and caretakers of the

child, communicate with the child, consult with the child and inform the court of the relevant wishes of the child.¹⁰

Conclusion

This article was designed to generate discussion on the issues facing guardians and practitioners as they prepare to try custody cases. Prior to conducting interviews and research for this article, our impressions were that guardian roles vary not only from jurisdiction to jurisdiction, but often from courtroom to courtroom within the same jurisdiction. We found that our first impressions were correct.

While formal standards may not address each issue or problem, we believe that standards will eliminate much of the present confusion and concerns.

We advocate the use of a written guardian’s report, and we found that the use of hearsay continues to be a problem. We believe that a two-part report as discussed above can address those concerns.

The Virginia Bar Association’s Commission on the Needs of Children and Guardian Ad Litem Advisory Committee recently met to begin to determine the need for and the content of standards for guardians *ad litem*. It is hoped that these organizations will use our findings for their study, and we invite interested members of the bar to contact members of these organizations to add their comments and insights. [↗](#)

Endnotes are available on the following page.



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ENDNOTES

- 1 *Black's Law Dictionary* 713 (7th ed. 1999).
- 2 *Black's Law Dictionary* 635 (5th ed. 1979).
- 3 *R. Sup. Ct. Va.* 8:6; *See also, Va. Code Ann.* §§ 8.01-9 and 16.1-266.1 (1950, as amended).
- 4 There are some general guidelines on the back of the Juvenile and Domestic Relations District Court Order appointing the guardian which are addressed in the Section entitled "The Necessity for Written Standards" set forth below.
- 5 *Virginia Juvenile and Domestic Relations District Court Form DC-514*
- 6 *Virginia Juvenile and Domestic Relations District Court, Form DC-514*
- 7 *See generally, Richmond Juvenile and Domestic Relations District Court Guardian Standards*
- 8 Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. Am. Ac. Mat. L. 7 (1995)
- 9 *Florida Family Law Forms*, Form 12.942(b).
- 10 *Guidelines for Guardians Ad Litem for Children in Family Court*, S. C. Bar 1998.