

ROLE OF GUARDIAN AD LITEM IN DECEDENT'S ESTATES

The role of a guardian ad litem in the context of the administration of a decedent's estate differs from the probate proceedings involving minors or adults who are alleged to be disabled persons in that the role of the guardian ad litem does not involve issues involving the physical care or well being of the minor or disabled person but, rather, the protection of a minor's or disabled person's interests in the administration and distribution of a third party decedent's estate. The guardian ad litem's role in a decedent's estate is to protect the minor or disabled person's interests as an heir or legatee and to serve as an advocate, where necessary, for the minor or disabled person during the administration of the third party decedent's estate. Guardians ad litem can also be involved as the representatives of persons who are currently unknown but have future interests established through a will document or a trust (whether testamentary, revocable, or irrevocable).

A. Overview of Applicable Statutes:

The statutory basis for the appointment of a guardian ad litem as part of the administration of a decedent's estate is derived from §§6-12, 20-5(d), 27-3, and 27-5 of the Illinois Probate Act, §2-501 of the Code of Civil Procedure, and §16.1(a) of the Trust and Trustees Act .

1. Appointment of Guardian ad Litem for Purposes of Probating a Will

§6-12 of the Probate Act provides that the court may appoint a guardian ad litem for a minor or disabled person to protect the interests of the ward when a decedent's will is presented for probate if the court finds that (a) the interests of the ward are not adequately represented by the personal fiduciary or by another party having a substantially identical interest in the proceedings and (b) the appointment of a guardian ad litem is necessary to protect the ward's interests.

The appointment of a guardian ad litem to represent a minor or disabled person most frequently occurs when the minor or disabled person is an interested party when a will is presented for probate. A common situation in which a guardian ad litem is named to represent the interests of a minor as part of proceedings to determine the validity of a will being presented for probate is found in the case of *Flynn v. Flynn*, 283 Ill. 206, 119 N.E. 304 (1918). In *Flynn*, the Illinois Supreme Court was asked to address whether or not the mark on a will document was that of the testator and if the attestation of the decedent's alleged mark was proper. One of the heirs of the decedent was a minor, a Louise Flynn. The court ruled that because Louise Flynn, although a minor, had an interest in the will contest proceedings, she was properly made a party to the will contest and that court was required, under the facts of that case, to appoint a guardian ad litem to protect her interests.

2. Procedure for sale or mortgage of real estate

§20-5(d) of the Probate Act provides that court shall appoint a guardian ad litem for a minor, disabled person, or person not yet in being in a probate proceeding involving the sale or mortgaging of real estate if it appears that the ward or person not yet in being has an interest in the real estate or has standing to may make a claim or defend against any interest in real estate which the estate seeks to sell or mortgage.

There is little case law on point which pertains to the position of a guardian ad litem in this aspect of a probate proceeding. The most common situation in which a guardian ad litem appointment would involve real estate would be if a parcel of real estate was left to heirs of the decedent, some of whom were minors or disabled persons and a petition was filed to sell or mortgage the real estate in question. However, there is case law which states that the failure to appoint a guardian ad litem is not required where the disabled person already had a conservator and counsel of record. See *In Re. Devereux's Estate*, 63 Ill.App.2d 1, 211 N.E.2d 19 (1st Dist. 1965). This decision is consistent with the reason for the appointment of a guardian ad litem in a decedent's estate proceeding which is to protect and represent the interests of minors and unborn persons whose interests cannot otherwise be adequately represented.

3. Duties of Guardian ad Litem

§27-3 of the Probate Act provides that a guardian ad litem appointed under the Probate Act shall file an answer, appear and defend on behalf of the ward or person not in being whom he represents.

There is no case law in the annotations of this code section on point which speaks to what the duties of a guardian ad litem are. There is case law, however, which states that the failure of a guardian ad litem to file an answer, once appointed, does not divest the court of jurisdiction over the ward. See *Gage v. Schroder*, 73 Ill. 44 (1874), a case taken on appeal from a Lake County probate proceeding, and *Goudy v. Hall*, 36 Ill. 313 (1865).

4. Selection of guardian ad litem or special administrator.

§27-5 of the Probate Act provides that a person appointed as guardian ad litem or special administrator under this Act may not be selected upon the recommendation of any person having an interest adverse to the person represented by the guardian ad litem or special administrator or by the attorney for the adverse party.

There is no case law in the annotations of this code section on point which speaks to or otherwise interprets this provision of the Probate Act as the provision, on its face, is self-explanatory.

5. Appointment of Guardian ad Litem for Persons Not In Being

§2-501 of the Code of Civil Procedure provides for the appointment of a guardian ad litem for persons not yet in being who have a future interest in any real or personal property when the court deems it necessary for the proper and complete determination of a court proceeding. In situations in which a guardian ad litem is appointed as part of some civil action any judgment or order entered in such action shall be binding and effectual for all purposes as though such person or persons were in being and were parties to such action.

The codification of the rights of persons not yet in being in §2-501 stems from a line of Illinois cases which established what is generally known as the Doctrine of Representation. The Illinois Doctrine of Representation dealt with issues created when a conveyance of land in equity or the administration of an testamentary estate involved determining the rights of persons not yet in being. In situations where a guardian ad litem was appointed to represent the interests of the persons not yet in being, any orders of court were held to be binding upon the persons not yet in being. In situations where a guardian ad litem was not appointed and the persons not yet in being were not adequately represented, any prior orders of court were found to be voidable as to those persons not yet in being. For instance, in the case of *Weberpals v. Jenny*, 300 Ill. 145, 133 N.E. 62 (1921), the Illinois Supreme Court held that the conveyance of farmland in Kane County was binding upon the after-born children and grandchildren who had a future interest in the farmland, where those after-born children and grandchildren had been represented by a guardian ad litem in the probate administration of their ancestor's estate. See also *Hopkins v. Patton*, 257 Ill. 346, 100 N.E. 992 (1913).

6. Appointment of Guardian ad Litem of Contingent Remainder Beneficiaries for Purposes of Entering into a Virtual Representation Agreement

§16.1(a)(1) of the Trust and Trustees Act provides for the appointment of a guardian ad litem in a trust proceeding when a contingent remainder beneficiary who is a minor, disabled person, or unborn person is not represented in the trust action and there are no other persons involved in the proceeding who have a substantially identical interest as the ward or unborn person. The appointment of a guardian ad litem in these circumstances causes the decision of the court to be binding upon the ward or unborn person as part of the trust proceeding.

There is no case law in the annotations of this code section on point which speaks to or otherwise interprets this provision of the Probate Act as the provision, on its face, is self-explanatory. The typical scenario in which this statutory provision would apply would be where the parties involved in an estate dispute determine that the interests of a minor, disabled adult, or unborn person are not substantially identical to the interests of other parties, petition for the appointment of a guardian ad litem for the minor, disabled adult, or unborn person, and then enter into a virtual representation agreement as part of a probate, trust construction, or other declaratory proceeding.

A fact pattern in which virtual representation can apply is when a present interest beneficiary who typically holds only a life estate or something less than all of a trust's future interests (such as in a dynasty trust, for instance) seeks to accelerate or otherwise modify trust distributions for tax or other trust administration purposes. Because future interest beneficiaries, either minors or unborn heirs or descendants have an interest in any trust modification which may be proposed, the trust modification by means of a virtual representation agreement through a guardian ad litem on behalf of the minors or unborn heirs or descendants is often required before the trust modification can be binding on all parties in interest.

7. Compensation of a Guardian ad Litem

§27-4 of the Probate Act provides that a guardian ad litem or special administrator is entitled to such reasonable compensation as may be fixed by the court and that fees approved are to be charged as costs in the probate proceeding and paid in due course of administration.

There is, as you might suspect, an abundance of case law as to what reasonable compensation for a guardian ad litem is and Judge Vorderstrasse will more fully explain her views of what reasonable compensation is within her section of this outline. However, as guardian ad litem, you may want to consider to whom your costs as guardian ad litem are to be charged. Although the fees and costs payable to a guardian ad litem in the administration of a decedent's estate would normally be charged against the share payable to the minor, disabled or unborn person whose interests are represented, there is case law which charges the fees payable to a guardian ad litem to the co-guardians (and presumably to an estate executor or administrator) where the appointment of a guardian ad litem was necessitated by the failure of the co-guardians to account and to distribute the estate to minors once they reached the age of majority in a timely manner. See *Matter of the Estate of Dyniewicz*, 271 Ill.App.3d 616, 848 N.E.2d 1076, 208 Ill.Dec. 154 (1st Dist. 1995).

B. How to Proceed After Appointment

Because the role of a guardian ad litem as part of the administration of a decedent's estate typically involves representing the rights of a minor, disabled adult, or unborn person whose property interests are either adverse to persons otherwise responsible for their care or who are otherwise not properly represented before the court, once you have been appointed as a guardian ad litem in a decedent's estate, your role is to represent the interest of the person or persons whose interest you have been named to represent and protect. As guardian ad litem, it is incumbent upon you to answer or otherwise plead to various court proceedings which may be involved in the administration of the decedent's estate, and to otherwise represent the interests of those for whom you have been appointed.

Of primary importance after you have been appointed is your responsibility to review and analyze the decedent's will, trust, or other relevant documents which are at the core of the proceeding. Often, this information can be obtained directly from the court file or from the executor or administrator of the estate. As with any other guardian ad litem appointment, it is usually in the best interests of those for whom you have been appointed for you to discuss the relevant issues involved in the estate administration proceeding with the estate's counsel and with other counsel who may be actively involved in the estate administration proceeding.

Because your appointment has been made by the court, you are subject to both the court and are responsible for advocating the interests of the persons for whom you have been named guardian ad litem. This can, from time to time, create a certain degree of tension between the minor or unborn person for whom you have been named guardian ad litem, and the parents of the minor who may

have interests which are adverse to the minor or unborn person. From time to time, your appointment can also lead to the need to open a minor's estate to hold and administer property which the minor is receiving from the decedent's estate and to request a guardian of the estate for administration of the same.

It is hard in a brief outline such as this to discuss all the various scenarios that you may find yourself involved in as guardian ad litem as part of a decedent's estate administration proceeding. Certainly, where the appointment is made as part of a will contest proceeding, you have the same need to ascertain the validity of the will document being presented for probate as any other legatee or heir of the estate. Similarly, if your appointment is for purposes of construing the provisions of a trust, whether within the probate proceeding, as part of a declaratory proceeding, or for purposes of entering into a virtual representation agreement, you have the same need to try to understand the grantor's intention and to work through the consequences of that intention, once ascertained. Where your appointment is for purposes of determining some aspect of the disposition of a parcel of real estate, you will need to investigate and analyze whether the proposed sales price or other disposition of the real estate at issue is proper and whether the administration of the subject real estate is consistent with the requirements of Article 20 of the Probate Act.

Although the (somewhat) ancient case law does not require the filing of an answer or other pleadings by the guardian ad litem, once appointed, it is good practice and highly recommended that you tender to the court and to all other parties of record your report, as guardian ad litem, of how the proceeding before the court impacts the person(s) you have been appointed to represent and what your recommendation(s) are regarding the same. Any judge assigned to hear the proceedings you are involved in will certainly appreciate your filing a report and providing an advance copy to all parties of record in advance of any hearing which may be scheduled on the matter and the record of your report may be valuable in the future once the minor or unborn person(s) for whom you have been appointed reach the age of majority.

Within the context of guardians ad litem involved in virtual representation agreements, typically your role as guardian ad litem is to insure that the interests of the persons you represent, often unborn persons, are protected in what is typically the administration of a trust agreement. Here, you may become involved in the determination of what an ascertainable standard of income or principal distribution from a trust beneficiary should be, what types of trust investments are appropriate, or how the various transfer tax provisions of federal or Illinois tax law impact the persons or interests for whom you have been appointed.

There are also situations which require the appointment of a guardian ad litem as part of the administration of a decedent's estate to represent the interests of persons who are not necessarily adverse in a non-legal setting but who may benefit from post-mortem tax planning such as a disclaimer, an election under the applicable provisions of federal or Illinois tax law to defer the payment of estate taxes, the incumbrance of real estate with special use (typically farm use) or conservation easements for estate tax planning purposes, or even for purposes of presenting a petition for a statutory award under Section 15 of the Probate Act (spouse's and minor's

awards). This type of an appointment typically calls for the guardian ad litem to use their technical knowledge of probate and tax law for the benefit of not only the persons for whom the guardian ad litem has been appointed but also, secondarily, for the benefit of others involved in the administration of the decedent's estate.

C. Conclusion

As you can see from the statutory scenarios described above, the role of a guardian ad litem in as part of decedent's probate estate or trust proceeding involves the determination of a variety of financial interests of minors, disabled persons, and unborn persons who have standing in the probate or trust administration proceeding but are not legally able, without the appointment of a guardian ad litem, to have their interests properly represented. Whether the proceeding for which the appointment of a guardian ad litem is made involves the determination of whether a will should be admitted to or denied being admitted to probate, for the purpose of protecting a ward when the sale or refinancing of real estate is at issue, for purposes of trust construction or administration including declaratory actions, or as part of a virtual representation agreement among trust beneficiaries, the guardian ad litem serves a valuable function as a court appointed advocate in assisting the court and the ward or unborn person whose interests would otherwise not be fully and properly represented. Occasionally, the role of the guardian ad litem in the administration of a decedent's estate can cause the guardian ad litem to take on powers more familiar to many of you as a special administrator for the benefit of the ward or unborn person. Whatever role you may be called upon to serve in when working as a guardian ad litem in a decedent's probate or in a trust proceeding, the work is typically very rewarding, can be technically challenging, and will definitely benefit persons, both born and unborn, who would otherwise not receive the full financial benefits of an estate or of a trust to which they are entitled.

FORMS

There are no forms which have been developed in the form packet provided by the Clerk of the Courts which specifically address the appointment of or which outline the duties of a guardian ad litem within the context of the administration of a decedent's estate. The Order allowing compensation for a guardian ad litem is set forth separately in that section of the outline which discusses fees in guardian ad litem proceedings.

The following form, although not adopted by the Circuit Court, is at least a sample which can be used or modified when the appointment of a guardian ad litem is made as part of the administration of a decedent's estate.

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS**

In Re. The Estate of _____)
)
) Case No. _____
)
Deceased.)

This cause coming before the Court on petition of _____:

- a. for probate of the Last Will and Testament of _____, Deceased; or
- b. for sale of mortgage of real estate held by the decedent as of his/her date of death which has been inventoried and/or listed as an asset of the probate estate; or
- c. for _____

the Court having been advised that certain minor(s), disabled person(s), or person(s) not yet in being [strike out all which do not apply] are interested parties in these proceedings and are, therefore, in need of representation before this Court and being otherwise advised in the premises

It is Hereby Ordered:

1) That _____, is appointed Guardian Ad Litem for _____, a minor(s)/disabled person(s)/person(s) not yet in being [strike out all which do not apply].

2) That the *guardian ad litem* is hereby directed to represent the interests of those persons in being or not yet in being for whom this appointment of a *guardian ad litem* in these proceedings has been made, to file with the Court a written report which addresses the issues before the Court which caused the appointment of a *guardian ad litem* to be made, to provide copies of any report filed with the Court in a timely manner to all parties of record in these proceedings, and to be present at any and all hearings in Court which pertain to the interests of those persons for whom the appointment of a *guardian ad litem* has been made.

ENTER:

Judge

Dated this ____ day of _____, 20 ____.

Prepared by:

Name: _____

Attorney's Name: _____

Address: _____

City: _____ State: _____

Phone: _____ Zip Code: _____

Fax: _____

ARDC#: _____

STATUTES

The relevant statutes set forth in this section of the outline, by reference to the section within the text of the materials, are as follows:

1. Appointment of Guardian ad Litem for Purposes of Probating a Will

755 ILCS 5/6-12 of the Probate Act provides as follows:

Appointment of guardian ad litem. When an heir or legatee of a testator is a minor or disabled person who is entitled to notice under Section 6-10 at the time an order is entered admitting or denying admission of a will to probate or who is entitled to notice under Section 6-20 or 6-21 of the hearing on the petition to admit the will, the court may appoint a guardian ad litem to protect the interests of the ward with respect to the admission or denial, or to represent the ward at the hearing, if the court finds that (a) the interests of the ward are not adequately represented by the personal fiduciary acting or designated to act pursuant to Section 28-3 or by another party having a substantially identical interest in the proceedings and the ward is not represented by a guardian of his estate and (b) the appointment of a guardian ad litem is necessary to protect the ward's interests.

2. Procedure for sale or mortgage of real estate

755 ILCS 5/20-5(d) of the Probate Act provides as follows:

(d) The court shall appoint a guardian ad litem for any party to the proceeding who is a ward and who is not represented by a guardian. If it appears that any person not in being upon coming into being is or may become or may claim to be entitled to any interest in the property sought to be sold or mortgaged, the court shall appoint some competent and disinterested persona guardian ad litem to appear for and represent such interest in the proceeding and to defend the proceeding on behalf of the person not in being, and any judgment or order rendered in the proceeding is as effectual for all purposes as though the person were in being and were a party to the proceeding.

3. Duties of Guardian ad Litem

755 ILCS 5/27-3 of the Probate Act provides as follows:

Duties of a guardian ad litem. A guardian ad litem appointed under this Act shall file an answer, appear and defend on behalf of the ward or person not in being whom he represents.

4. Selection of guardian ad litem or special administrator.

755 ILCS 5/27-5 of the Probate Act provides as follows:

Selection of guardian ad litem or special administrator. The person appointed as guardian ad litem or special administrator under this Act may not be selected upon the recommendation of any person having an interest adverse to the person represented by the guardian ad litem or special administrator or by the attorney for the adverse party.

5. Appointment of Guardian ad Litem for Persons Not In Being

735 ILCS 5/2-501 of the Code of Civil Procedure provides as follows:

Guardians for persons not in being. In any action, whether a trust is involved or not, any person or persons not in being are or may become entitled to, or may upon coming into being claim to be entitled to, any future interest, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise in any property, real or personal, involved in such action, the court may, whenever it may deem it necessary for the proper and complete determination of such cause, appoint some competent and disinterested person as guardian ad litem of such person or persons not in being; and any judgment or order entered in such action shall be binding and effectual for all purposes as though such person or persons were in being and were parties to such action. By such appointment, the person so appointed guardian ad litem, shall not be rendered liable to pay costs of the action; and shall be allowed a reasonable fee for the services as such guardian, to be fixed by the court.

6. Appointment of Guardian ad Litem of Contingent Remainder Beneficiaries for Purposes of Entering into a Virtual Representation Agreement

760 ILCS 5/16.1(a)(1) of the Trust and Trustees Act provides as follows:

Virtual Representation.

(a) Representation by persons having substantially identical interest; contingent remainder beneficiaries.

(1) To the extent there is no conflict of interest between the representative and the person represented, a minor, disabled, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another individual having a substantially identical interest with respect to the particular question or dispute; provided, however, that such person is not otherwise represented by a court appointed guardian as provided in the next sentence. If a person is represented by a court appointed guardian of the estate or, if none, by a court appointed guardian of the person, the actions of such guardian shall represent and bind that person for purposes of this subsection (a)(1).

7. Compensation of a Guardian ad Litem

755 ILCS 5/27-4 of the Probate Act provides as follows:

Compensation of Guardian ad Litem or Special Administrator.

A guardian ad litem or special administrator is entitled to such reasonable compensation as may be fixed by the court to be taxed as costs in the proceedings and paid in due course of administration.