

Over the years, it has become apparent that a crossover between the personal injury practice of our members and the areas of probate and public benefits exists. Our very own Bridget O'Brien Swartz spearheads this column which highlights issues of relevance and importance in these areas to our members. If you have issues of particular interest you would like addressed, please notify Bridget at boswartz@dbfazlaw.com



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Guardian Ad Litem... Yes or No?

*In a personal injury case,
when may the appointment
of a guardian ad litem for a
minor or incapacitated adult
be necessary or appropriate?*

by Bridget O'Brien Swartz, Esq. and Robert L. Beckett, Esq.

Both the Arizona Civil Rules of Procedure (hereinafter "ACRP") and the Arizona probate statutes/rules provide for the appointment of a guardian ad litem for a minor or an incapacitated adult under certain circumstances.

Let's first look at ARCP Rule 17(f) - Minor or Incompetent Person

ARCP Rule 17(f) provides as follows:

- (1) **With a representative.** The following representatives may sue or defend on behalf of a minor or an incompetent person:
 - (A) a general guardian
 - (B) a conservator
 - (C) a similar fiduciary
- (2) **Without a Representative.**
 - (A) *Generally.* A minor or an incompetent person who does not have a fully appointed representative may sue by a next friend of or by a guardian ad litem. The court must appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person who is unrepresented in an action.
 - (B) *Consent.* No person may be appointed guardian ad litem unless that person files a written consent to the appointment.
 - (C) *Bond.* If a next friend or guardian ad litem brings an action on behalf of a minor, that person may not receive any of the minor's money or property without filing a bond or security in an amount and under such terms as the court approves.
 - (D) *Liability for Costs.* Unless the court orders otherwise, a next friend or guardian ad litem may not be held liable for costs.

(E) *Compensation.* The Court may award reasonable compensation to a next friend or a guardian ad litem for their services, which must be taxed as part of the action's costs.

In most cases involving a minor or an "incompetent"¹ adult, the personal injury attorney is engaged by a "next friend" as provided for in ARCP 17(f)(2)(A). The next friend is typically a close relative, e.g., parent of the minor or incompetent adult. This next friend enters a contingent fee agreement. The next friend represents the minor or incompetent adult in the personal injury litigation. The settlement terms, including the validity and reasonableness of the contingent fee agreement², are subject to probate court approval. See A.R.S. § 14-5424(D).

Sometimes, rather than relying on the authority of a next friend, the personal injury attorney decides to petition the probate court for the appointment of a conservator to serve as the representative pursuant to ARCP Rule 17(f)(1)(B). The Petition requests that the conservator be authorized to enter a contingent fee agreement and to pursue the claim of the minor or the incapacitated adult.³ The Order appointing conservator usually expressly states that the conservator must seek court approval of any settlement.⁴

The personal injury attorney may take this step to appoint a conservator as opposed to relying on a next friend for varying reasons:

1. There is no obvious, suitable next friend;
2. to ensure there is no doubt as to the validity of the contingent fee agreement;
3. there are conflicts between the relative who might be next friend and the minor/incompetent adult.

See Guardian Ad Litem, page 17

Guardian Ad Litem

Continued from page 7

And occasionally, the personal attorney may seek the appointment of a guardian ad litem pursuant to ARCP Rule 17(f)(2)(A). This situation may arise when:

1. The next friend has a conflict with the minor/incompetent person. For instance, a parent has a loss of consortium claim derivative to the minor/incompetent's claim. Any settlement below the full value of both claims will require an allocation between these two claims,
2. In preparing for court proceedings, including discovery, trial, settlement/mediation, the personal injury attorney is concerned that the next friend:
 - a. may not be a suitable representative;
 - b. even if suitable, may not present well;
 - c. may not be able to convey that the award/settlement will be duly protected by probate court proceedings.

In such cases, the personal injury attorney may seek out a professional willing to be appointed guardian ad litem. Such professionals include the private fiduciaries

licensed by the Arizona Supreme Court or attorneys in the private practice of law.

Now let's look at the appointment of a guardian ad litem in a proceeding to obtain approval of the probate court of a settlement for a minor or incapacitated adult in accordance with A.R.S. § 14-1408 - Appointment of Guardian Ad Litem (NOTE: EFFECTIVE DATE SEPTEMBER 29, 2021)

Senate Bill 1390 was enacted by the Legislature in 2021 and approved by the Governor on April 15, 2021. The effective date is September 29, 2021.

Prior to the enactment of Senate Bill 1390, the probate statute used the words "statutory representative" to describe a person appointed to represent a person who the Court determined was not adequately represented. Senate Bill 1390 deleted all references in the probate statutes to "statutory representative" and substituted "guardian ad litem" instead.

A.R.S. § 14-1408, effective September 29, 2021, now states:

At any point in a proceeding brought under this Title, the Court may appoint a Guardian Ad Litem to represent the interest of a minor or incapacitated person ... if the court determines that representation of the interest otherwise would be inadequate ... In its Order appointing the Guardian Ad Litem, the Court shall state the basis for the appointment.

How might the appointment of a guardian ad litem arise in a personal injury matter⁵

1. The most common situation is one in which there are questions as to the adequacy of the representation of the minor or incapacitated adult by the next friend/petitioner in the conservatorship proceeding.
2. Another circumstance is that a settlement has been reached and it is now time to allocate the settlement among the parties such as between a minor or incapacitated person who has suffered serious injuries

See Guardian Ad Litem, page 19

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Guardian Ad Litem

Continued from page 17

and the loss of consortium claims of the parents. Or the person petitioning to be appointed conservator may also have been injured and the damages must be allocated. The personal injury attorney, who represented all parties in reaching a successful settlement/award, may be in an untenable position of representing parties with different interests relative to allocation of the gross settlement/award. Even if the personal injury attorney believes he/she can walk this line, the Court may believe appointment of a guardian ad litem is necessary to achieve adequate representation.

While the selection of a guardian ad litem under ARCP Rule 17(f) may be substantially under the control of the personal injury attorney, such control is not permitted by the probate court in Maricopa County. In Maricopa County, the probate court appoints a guardian ad litem from a list of attorneys maintained by the Office of Public Defense Services. The practices of other counties vary and the personal injury attorney should look to local practice.

The current Arizona Rules of Probate Procedure (hereinafter “ARPP”) covers the process for appointing a statutory representative and the duties of a statutory representative.

AARP Rule 32 currently defines a “statutory representative” as

A person appointed under A.R.S. § 14-1408 and includes the role traditionally described as a guardian ad litem.

A rule change is currently pending to *R-21-0034 Probate Rules 2, 8, 13, 32, 33, 34 and 53* that would change the nomenclature of “statutory representative” to “guardian ad litem” throughout the Arizona Rules of Probate Procedure. However, the below discussion of the ARPP will use the current language of “statutory representative” with the assumption that it applies to a “guardian ad litem” as well as the assumption that the pending rule amendments will be adopted.

ARPP Rule 53 specifically provides for the appointment of a statutory representative

for a minor or adult in need of protection in personal injury cases.

- (c) Appointment of a Statutory Representative or Master. The court may appoint a statutory representative pursuant to A.R.S. § 14-1408 or a master pursuant to Civil Rule 53, with instructions to address specific terms, including any of the following:
- (1) The reasonableness of the settlement proposal;
 - (2) the attorney fees to be paid from the minor’s or adult’s settlement proceeds;
 - (3) the cost of litigation and apportionment of future costs;
 - (4) the effect of the settlement on eligibility for public benefits or other resources that might be available;
 - (5) the proper apportionment of settlement proceeds among the various litigants.

ARPP Rule 32(c) covers the process for the appointment of a statutory representative

See Guardian Ad Litem, page 21

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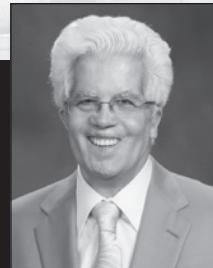
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Guardian Ad Litem

Continued from page 19

stating that when a party seeks the appointment of a statutory representative, the party must file a verified petition stating why the interests of the minor or incapacitated adult are not adequately represented under A.R.S. §§ 14-1404 through -1407. ARPP Rule 32(d) requires that the petition for appointment of a guardian ad litem be noticed for hearing. Notice must be given to a minor as set forth in A.R.S. § 14-5207(A). Notice must be given to an incapacitated adult person as set forth in A.R.S. § 14-5309.

The Order entered appointing a statutory representative must state:

- (A) The basis for the appointment;
- (B) the appointment's scope and duration;
- (C) whether the representative will represent the person or the best interests of the person;
- (D) any applicable terms of compensation.

With respect to compensation under (D) above, the guardian ad litem is entitled to reasonable compensation from the estate of the minor or incapacitated person. A.R.S. § 14-5414(A). Note: To be compensated from the estate, the guardian ad litem must strictly comply with the provisions of A.R.S. §§ 14-5109 and -5110. A.R.S. § 14-5109 requires that the guardian ad litem file a notice of intent to seek compensation from the estate at the same time a notice of appearance is filed. A.R.S. § 14-5110 requires that the guardian ad litem submit his invoices to the estate within four months of the date the service is rendered.

The Order may also grant the statutory representative immediate access to the minor or incapacitated person and to the medical and financial records of the minor or incapacitated person. ARPP Rule 32(f).

Concluding thoughts or, rather, considerations:

Is representation by a next friend adequate in the civil litigation? In most cases, yes but raise your antennas to sense when a guardian ad litem under ARCP Rule 17 might be needed and beneficial.

Does the personal injury attorney want a conservator to be appointed with specific authority to enter a contingent fee agreement as well as pursue the claim?

Once a settlement is reached and probate court approval is on the horizon, are there any conflicts between the petitioner and the minor or incapacitated adult that would warrant the appointment

See Guardian Ad Litem, page 23

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Guardian Ad Litem

Continued from page 21

of a guardian ad litem?

Sometimes what this author has to offer are questions for the trial lawyer to contemplate rather than answers. The questions should lead to the most appropriate answer given the circumstances of an individual case. The fact that the questions are being asked is evidence in and of itself that the trial lawyer is doing his or her due diligence. ■

Endnotes

- 1 "Incompetent" is not defined in the Arizona Rules of Civil Procedure.
- 2 For a discussion regarding the reasonableness of a contingent fee agreement in the context of a protective proceeding in probate court, see the March/April 2021 issue of the *Advocate*.
- 3 A.R.S. § 14-1501(3) defines "incapacitated person" as any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.
- 4 See the January/February 2021 article in the *Advocate* regarding the "Top Ten Tips" to getting a settlement approved in probate court.
- 5 Do not confuse the appointment of a guardian ad litem with the appointment of an attorney to represent an adult subject to probate protective proceedings (whether incapacitated or in need of protection) aka Court-Appointed Counsel. Pursuant to A.R.S. §§ 14-5303.C and -5407.B, the court is required to appoint an attorney for the incapacitated adult or adult in need of protection. This representation is not the equivalent of that of a statutory representative or guardian ad litem. The former is to represent the individual's position to the extent discernable and the latter is to represent his best interests. In many personal injury matters, it will be sufficient to rely on the appointment of Court-Appointed Counsel; however, in some cases, the additional appointment of a statutory representative or guardian ad litem may be necessary or advisable, e.g., the incapacitated adult or adult in need of protection disagrees with the petition.

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