
THIRD READING

Bill No: SB 1279
Author: Ochoa Bogh (R)
Amended: 5/5/22
Vote: 21

SENATE JUDICIARY COMMITTEE: 10-0, 5/3/22
AYES: Umberg, Borgeas, Caballero, Durazo, Gonzalez, Hertzberg, Jones, Laird,
Stern, Wiener
NO VOTE RECORDED: Wieckowski

SUBJECT: Guardian ad litem appointment

SOURCE: Executive Committee of the Trusts and Estates Section of the
California Lawyers Association

DIGEST: This bill (1) modifies the definition of a person who lacks legal capacity to make decisions, for purposes of when the court should appoint a guardian ad litem in a civil case; (2) requires, when a party in a civil case already has a guardian or conservator of the estate, that the party shall appear through the guardian or conservator of the estate; (3) requires a proposed guardian ad litem to disclose any known or actual conflicts of interests in advance of the appointment and to make reports at least annually on all actions taken on the ward's behalf that affect the wards interests; and (4) requires an order appointing a guardian ad litem to set forth the specific powers of the guardian, thereby prohibiting the guardian ad litem from exercising any powers not set forth in the order.

ANALYSIS:

Existing law:

- 1) Provides that when a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party in a civil action, that person shall appear through a guardian or conservator of the estate, or by a guardian ad litem appointed by the court in which the action or

proceeding is pending, or by a judge thereof, in each case. (Code Civ. Proc., § 372(a)(1).)

- 2) Provides that a guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, person lacking legal capacity to make decisions, or person for whom a conservator has been appointed, notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate. (Code Civ. Proc., § 372(a)(1).)
- 3) Provides that the guardian ad litem appearing for any minor, person who lacks legal capacity to make decisions, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise. (Code Civ. Proc., § 372(a)(1).)
- 4) Does not define, for purposes of a guardian ad litem, “a person lacking legal consequence to make decisions,” but includes in the term “a person for whom a conservator may be appointed.” (Code Civ. Proc., § 372(a)(2).)
- 5) Provides specific exceptions to the requirement that a minor who appears through a guardian ad litem. (Code Civ. Proc., §§ 372(b), (c); 373.)
- 6) Provides that, in an action under the Probate Code, the court may, on its own motion or at the request of a personal representative, guardian, trustee, or other interested person, appoint a guardian ad litem at any stage of the proceeding to represent the interest of any of the following persons, if the court determines that the representation of that person’s interest would otherwise be inadequate:
 - a) A minor.
 - b) An incapacitated person.
 - c) An unborn person.
 - d) An unascertained person.
 - e) A person whose identity or address is unknown.
 - f) A designated class of persons who are not ascertained or are not in being. (Prob. Code, § 1003(a).)

- 7) Provides that, if not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests under 6). (Prob. Code, § 1003(b).)
- 8) Provides that the reasonable expenses of a guardian ad litem appointed under 6), including compensation and attorney fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved, by the petitioner, or from such other source as the court orders. (Prob. Code, § 1003(c).)

This bill:

- 1) Makes consistent, within the Code of Civil Procedures provisions for the appointment of a guardian ad litem, references to “a person who lacks legal capacity to make decisions.”
- 2) Adds, to the definition of “a purposes who lacks legal capacity to make decisions,” the following:
 - a) A person who lacks capacity to understand the nature or consequences of the action or proceeding; or
 - b) A person who lacks capacity to assist the person’s attorney in the preparation of the case.
- 3) Provides that, when a minor or a person for whom a guardian or conservator has been appointed is a party to an action, that person shall appear either by a guardian or conservator of the estate.
- 4) Provides that the reasonable expenses of a guardian ad litem, including compensation and attorney fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from any other source as the court orders.
- 5) Provides that, before a guardian ad litem is appointed, the proposed guardian ad litem must disclose to the court and all interested persons and any known potential or actual conflicts of interest arising from appointment in the matter, including any familial or affiliate relationship of the guardian ad litem to any of the parties.
- 6) Requires an order appointing a guardian ad litem to specify the powers of the guardian ad litem, and limits the guardian ad litem’s powers to those specified in the order.

- 7) Requires, unless otherwise ordered by the court, a guardian ad litem to report, at least annually, all actions taken by the guardian ad litem on behalf of the ward that affect the ward's interests.
- 8) Makes the same changes set forth in 2) and 5)-7) to Probate Code Section 1003, which provides for the appointment of a guardian ad litem in probate cases.

Comments

Current law authorizes a court in a civil case to appoint a guardian ad litem to represent the interests of certain persons in court. A guardian ad litem—literally a guardian “for the suit”—is distinct from a party’s attorney in that an attorney can only carry out the wishes of their client, whereas a guardian ad litem is empowered to make the underlying decisions in a case on their ward’s behalf. Existing law generally authorizes the appointment of a guardian ad litem for a minor or an person who lacks legal capacity to make decisions, with additional categories being covered in estate matters under the Probate Code.

This bill recasts the definition of “a person who lacks legal capacity to make decisions” for purposes of determining whether a court should appoint a guardian ad litem in a civil case. As originally drafted, this bill would have authorized the appointment of a guardian ad litem for a person with a disability, as defined. After discussions with stakeholders, including Disability Rights California (DRC), the author agreed to remove the reference to a person with a disability and instead clarify that the term applies to any of three conditions: (1) a person who lacks legal capacity to understand the nature or consequences of the proceeding; (2) a person who lacks capacity to assist the person’s attorney in preparing a case; or (3) a person for whom a conservator may be appointed pursuant to Section 1801 of the Probate Code. While item (3) is already in the statute, items (1) and (2) are not; these come from case law interpreting the circumstances in which guardian ad litem may be appointed.¹

This bill also makes several changes the procedures relating to the appointment of a guardian ad litem. Specifically, this bill:

- Requires, where a party to an action already has a guardian of the estate or a conservator of the estate, the person’s interests shall be represented by the preexisting guardian or conservator.

¹ E.g., *In re Sara D.* (2001) 87 Cal.App.4th 661, 667.

- Requires, prior to the appointment of a guardian ad litem, the proposed guardian ad litem to disclose any known potential or actual conflicts of interest arising from appointment in the matter, including any familial or affiliate relationships with any of the parties.
- Requires an order appointing a guardian ad litem to specify the powers of the guardian ad litem, and provides that the guardian has only the powers specified in the order.
- Requires a guardian ad litem to report to the court all actions taken on behalf of the ward that affect the ward's interests at least annually, unless otherwise specified by the court.
- Requires that a guardian ad litem's reasonable expenses, including compensation and attorney fees, be determined by the court and from the source ordered by the court.

This bill also modifies Probate Code Section 1003, which controls the appointment of a guardian ad litem in probate cases, to match the changes set forth above.

While the most recent amendments removed the "disability" category that DRC objected to in its opposition letter, DRC has indicated that it has additional concerns about the bill and therefore has not removed its opposition. The author and sponsor have pledged to continue working with DRC and other stakeholders as this bill progresses.

Still Opposition? The opposition letter was submitted prior to the amendments taken by the author that removed the inclusion of "person with a disability" in the list of persons for whom a guardian ad litem may be appointed. DRC has indicated in discussions that they have concerns with the bill as currently in print, but has not submitted a letter discussing those concerns.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 5/5/22)

Executive Committee of the Trusts and Estates Section of the California Lawyers Association (source)

OPPOSITION: (Verified 5/5/22)

Disability Rights California

ARGUMENTS IN SUPPORT: According to the sponsor of this bill, the Executive Committee of the Trusts and Estates Section of the California Lawyers Association:

SB 1279 will strengthen and codify several aspects of guardian ad litem appointments that often occur informally or without clear guidance for litigants and their lawyers. This bill will also resolve ambiguities in the statutes as to when appointment of a guardian ad litem is appropriate. Through these clarifications, the court will better ensure that those provided a guardian ad litem are properly represented and protected in pending litigation.

Although the purpose of a guardian ad litem is to ensure the rights of the ward (the person whose interests are being represented by the guardian ad litem) are protected in litigation, often guardians ad litem are appointed by the court without clear parameters around their powers or what their reporting responsibilities are to the court. In addition, although the Judicial Council form requires disclosure of conflicts of interest by the proposed guardian ad litem, that is not currently required by statute. These ambiguities have led to uneven practice across the state, confusion among litigants, and abuses by guardians ad litem.

ARGUMENTS IN OPPOSITION: According to Disability Rights California, writing in opposition:

There are several reasons why this definition [of a person with a disability, for purposes of appointing a guardian ad litem] causes problems and why disability should not be used at all in this bill. The definition includes people with physical disabilities or any other disabilities that might or might not have a direct impact on the person's decision-making ability...

The use of the term "disability" is unnecessary. There is already a section for people who are incapacitated, and although there are occasions when people might be temporarily incapacitated or otherwise unable to make decisions for themselves or process the impact of a [guardian ad litem], we do not believe that adding the category of disability is the best way to do it.

Prepared by: Allison Meredith / JUD. / (916) 651-4113
5/6/22 15:41:57

**** END ****