What the guardian should expect from the attorneys/What attorneys should expect from the guardian

by Gregory Forman

A lot of the bickering between attorneys and guardians is because, outside of the private guardian ad litem statute, neither has set rules regarding how they should engage the other. The private guardian ad litem statute offers vague guidelines on how guardians are to undertake their investigation and one outright prohibition: no written custody recommendations in a final report (but what about a temporary report?). Outside of these vague guidelines, however, there are no clear directions.

Yet, in the past decade, by following clear procedures in engaging with the guardian, I have never had to seek removal of a guardian and rarely had to impeach a guardian’s credibility. While I do not do much guardian work, by following clear procedures in engaging with attorneys, I have rarely had complaints about my guardian work, investigation, or reports. These procedures are mostly items of “thou shalt” and “thou shalt not.” Followed with some rigor, I find they minimize conflict. Starting with what the guardian should expect from the attorney:

▸ Thou shalt strive to make the guardian’s job as easy as possible

This is the meta rule for attorneys dealing with guardians. This doesn’t mean the guardian cannot be provided difficult tasks. It does mean the attorney should make it as easy as possible for the guardian to complete these tasks. All other rules for attorneys are simply a subset of this rule.

▸ Thou shalt give the guardian a list of issues to investigate rather than a list of witnesses to interview

The guardian is a tool to assist the court in making proper custody or visitation determinations. The guardian has unique abilities that the attorneys, the court, and the parties lack. Those abilities include: meet with the child and discuss case related issues with the child; go into parties’ homes, often unscheduled, and observe the home situation and the parties’ interaction with the child; discuss conflicts between the parties with the parties at the time the conflicts arise (and have a reasonable expectation of cooperation from the parties); interview care providers for the child that might be otherwise reluctant to get involved. Uniquely, the guardian can be the eyes and ears of the court.

An attorney, as soon as the guardian is appointed, should provide the guardian a list of issues to investigate. Those issues should be ones the attorney hopes the guardian’s investigation will result in information favorable to the client. As part of these issues, the attorney should suggest witnesses the guardian might talk to or steps the guardian might take.

▸ Thou shalt provide the guardian relevant documents

Any attorney who is not routinely turning court documents into PDF files should start doing so immediately. Upon a guardian’s appointment, he or she should be emailed every filed document dealing with child related custody issues, along with prior court orders involving custody. The guardian should also be provided all discovery responses that relate to custody issues.

▸ Thou shalt not ask the guardian to interview every witness

The guardian is not there to talk to every potential witness for each party. That’s the job of the attorneys. Neighbors, friends, and family members can be helpful witnesses at trial but does the guardian really need to interview them? Obviously such witnesses will praise one parent (and might indicate problems with the other parent) but an attorney should consider whether it is necessary for the guardian to talk to every last witness. It might be noteworthy when a party doesn’t have friends, neighbors or family willing to praise his or her parenting ability–but that’s an issue to point out to the judge.

The guardian should probably talk to folks who provide regular care for the child: teachers, counselors, coaches, pediatricians. If there are a few witnesses who have particular insight into the child–the parent of a child’s close friend can often provide tremendous insight–it can be useful to have the guardian talk to those few witnesses.

▸ Thou shalt provide the guardian all contact information for any witness he or she is asked to interview

If you want the guardian to talk to a witness, make it easy on the guardian. Provide the full name, cell number, and email address. And, since the guardian’s report will require the guardian to list the address of all witnesses interviewed, provide the guardian those addresses. There is no reason to make the guardian track down this information, which will unnecessarily increase the guardian’s fee.

▸ Thou shalt counsel thy client to cooperate with the guardian

I believe a party’s lack of cooperation with the guardian is per se relevant: if a party will not assist an officer of the court in his or her investigation, how invested can that party be in the result? This does not mean a party needs to do everything the guardian asks. If a party believes the guardian is being unreasonable, and the attorney concurs, it is appropriate to resist the guardian’s request. Such refusal, however, should be communicated, in writing, to the guardian with an explanation provided. The guardian can then provide further explanation on the basis of the request, back down on the request, or seek court assistance. Stonewalling the guardian on his or her requests is simply rude.

▸ Thou shalt counsel thy client to pay the guardian the fees as ordered

Guardians need to make a living and cannot be expected to wait until the end of the case to get paid. In a few circumstances I might ask the guardian to forgo collecting his or her whole fee until the case resolves, but the guardian should always be paid the ordered initial retainer and should be advanced costs when required to travel as part of the investigation.

▸ Thou shalt not sandbag the guardian

To err is human. When I discuss the guardian’s obligations, I will note my belief in preliminary reports. One reason I want preliminary reports is to give me the opportunity to suggest errors that might be corrected in the report or additional investigation that might be undertaken to correct misperceptions.

The guardian statute requires periodic (typically monthly) billing functions to allow the parties to observe the guardian’s bill regularly. Waiting until trial to complain about items in the bill or complain about work the guardian billed for does not give the guardian the opportunity to correct or develop a defense.

Often attorneys remain silent in the face of error, misperceptions, or omissions in the preliminary report or issues in the guardian’s bill. They wait to ambush the guardian at trial regarding these failings. A smart guardian, being so ambushed, will testify, “if you had let me know about your concerns when I had time to address them, I would have happily addressed them.” A smart judge hearing such testimony will believe the attorney/party preferred to undermine the guardian rather than have the guardian do a complete investigation.

▸ Thou shalt not ask the guardian to mediate disputes between the parties

While the guardian statute prevents the guardian from being a mediator in the case, attorneys will often ask the guardian to help the parties resolve disputes on minutia (such as pick up and drop off locations or visitation beginning and ending times) when the attorneys don’t have the time or desire to get involved.

No matter how detailed the agreement the parties reach or the court imposes on custody, issues will arise that the order will not address. The time for the parties to begin to learn to cooperatively resolve these issues is while the case is ongoing. Having the guardian “mediate” these disputes hinders the parties from learning these skills.

▸ Thou shalt not ask the guardian to weigh in on ultimate issues

A guardian can certainly weigh in on what the investigation has uncovered in assisting the parties to resolve disputes and on the child’s preferences. A guardian should not weigh in on the actual resolution.

Unless there are factual circumstances unique to the case that give the guardian particularized insight, I don’t need the guardian to tell me his or her belief on how many weeks of summer visitation a parent should get, when weekend visitation should begin and end, and what amount of mid-week visitation might be appropriate.

A guardian who tells me that both parents are fit and actively involved with the child (and has undertaken a sufficient investigation to substantiate it) doesn’t need to tell me that the non-custodial parent should get more than every-other-weekend visitation. However, when there is a dispute over whether that parent should get four or five nights every two weeks, having the guardian render an opinion will render the guardian ineffective: whichever side doesn’t like the guardian’s opinion will discount every future recommendation as biased.

▸ Thou shalt not rely on the guardian to make one’s case

One reason attorneys complain about incompleteness or bias in the guardian’s report is that they are relying upon the guardian to make their case at trial. However, if one prepares for trial with the expectation of presenting all favorable evidence in one’s case-in-chief, any failings in the guardian’s investigation or report become immaterial. While one can complain that a guardian failed to investigate certain issues or talk to certain witnesses, there is greater impact if one simply presents these witnesses and issues at trial. Rather than complain about a guardian’s bias, present evidence that demonstrates the guardian’s bias.

At trial the guardian isn’t the meat. The guardian isn’t even the potatoes. Think of the guardian as the gravy on the potatoes and one’s evidence and witnesses as the meat and potatoes. Doing so greatly lessens the impact of any failings by the guardian.

Now for the guardian’s obligations:

▸ Thou shalt investigate and report on material issues affecting the best interest of the child

If “thou shalt try to make the guardian’s job as easy as possible” was the meta rule for attorneys, this is the meta rule for guardians. The guardian’s job is to make the court “fully informed about the facts of the case…” See, S.C. Code § 63-3-810(A)(1). A guardian cannot fulfill this duty without investigating and reporting material issues.

Typically a guardian will not investigate undisputed issues. However, there are times a guardian must investigate undisputed issues. Litigants will sometimes tacitly agree to hide information from the court in what I label “mutually assured dysfunction.” Perhaps both parties have serious fitness issues which they chose not to raise in the hope that, if neither side raises them, the court won’t consider third-party custody. A guardian’s task is to uncover these hidden issues and note them to the litigants, attorneys, and the court.

▸ Thou shalt not mediate disputes between the parties

Reasoning above.

▸ Thou shalt send the parties periodic billing statements

The statute requires it; it reduces disputes about the fairness and adequacy of the guardian’s investigation; it allows the parties to note problems in an ongoing investigation. Guardians are often having their fees reduced by the court for failing to provide periodic billing statements. Pick a date every month (the 1st of each month seems pretty logical) and send out billing statements.

▸ Thou shalt conduct the investigation requested by the parties/attorney unless the guardian explicitly refuses to conduct part of the investigation

A guardian is entitled, nay required, to exercise independent discretion in his or her investigation. A guardian may be asked to undertake tasks he or she is unwilling to investigate. As a guardian, I am unwilling to show up announced at parties’ homes late at night, undertake surveillance, or talk to scores of witnesses.

However, attorneys and litigants have the right to assume the guardian will undertake the requested investigation unless the guardian informs them otherwise. By informing the parties that the guardian is not undertaking a requested task, the parties have the opportunity to respond, either by developing other evidence of this issue or asking the guardian to reconsider. Blithely ignoring the investigation request and then excusing the disregard as an exercise of professional judgment is simply rude and counterproductive.

▸ Thou shalt inform the parties/attorneys what one has learned

Too often guardians will not reveal (or will downplay) what they have learned because that knowledge will upset one or both parties. These guardians fear that an angry litigant will refuse to further cooperate in the investigation. Some guardians also fear personal (verbal, not physical) attack. They hope that by waiting until the final report, or even trial, to present this damaging information, they can obtain continued cooperation and reduce any animosity directed at them.

As for a fear that an unhappy litigant will stop cooperating: let them. This lack of cooperation is relevant on numerous issues: that party’s maturity, that party’s respect for the legal process, and that party’s ability to handle conflict and get along with others. If a litigant refuses to cooperate with the guardian, that simply needs to be noted in the report (with the guardian prepared to substantiate that assertion at trial).

A guardian who won’t reveal what he or she knows is doing everyone a disservice. Many cases would settle earlier and easier if the guardian was willing to note serious concerns. I’ve had one case in which a guardian was aware of a parent’s excessive alcohol use and physical confrontations with the children, but downplayed the extent of the problem until he encountered this drunken parent physically pulling a teenage child down a flight of stairs.

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Further a failure to note such concerns until the final report sets the guardian up for impeachment at trial. “Why weren’t these concerns noted earlier if they were so problematic?” is a legitimate question that no guardian should want to answer. Further, if the guardian is mistaken in his or her concern, a guardian’s failure to note it in a timely manner leaves no opportunity for that party to educate the guardian. Better to be corrected than impeached.

A guardian shouldn’t be rude, but a guardian shouldn’t worry about being liked. That’s not the guardian’s role.

▸ If asked, thou shalt issue a preliminary written report

Some guardians remain reluctant to issue preliminary reports due to the concerns noted above. However, preliminary reports enable the parties to learn what the guardian knows in time to address the guardian’s concerns and correct any misunderstandings. Again, better to be corrected than impeached. To the extent a preliminary report is mostly thorough and accurate, it can be a very useful tool for settlement. If a guardian’s preliminary report indicates one parent has clearly been the primary caretaker and is doing a good (or better than good) job, or that one parent has serious fitness issues, smart litigants/attorneys will begin negotiating.

▸ Thou shalt report the facts and keep silent on opinions

The guardian should have investigated material issues affecting the child’s best interests. The report should indicate what the guardian learned. However, the guardian’s opinion on what these “facts” mean is less than worthless–it’s counterproductive.

Admittedly, a guardian’s opinion can be helpful when there is a pro se litigant or the parties have attorneys who are unwilling to try a custody case. For those situations, a guardian’s opinion can push settlement–but the guardian should be aware that the resulting settlement will leave at least one litigant/attorney very unhappy with the guardian.

However, when both parties are represented by competent counsel a guardian’s opinion is counterproductive. Competent counsel are aware that the guardian’s opinion is ultimately immaterial–only the judge’s opinion matters. Most often, the guardian won’t even be able to express that opinion at trial. But when litigants hear that opinion they harden their settlement positions.

My most recent custody trial occurred, in large part, because a guardian (and later a mediator) rendered an opinion on whether my client should have three or four weeks of summer visitation. The other side saw no reason to offer more than three weeks because that was the guardian’s opinion. I thought my client would get more than four weeks at trial and told her not to take the offer if she was willing to pay my trial retainer (the court ultimately awarded her eight weeks). The guardian actually did a fine job in his investigation and report, but his opinion hindered resolution.

▸ Thou shalt present independent evidence at trial on the child’s best interests

While the guardian doesn’t need to be prepared to offer all evidence that may be relevant on the child’s best interests, the guardian should determine what witnesses the parties intend to call at trial and be prepared to elicit what he or she considers relevant testimony from these witnesses if the parties fail to elicit that testimony. Further, if there are witnesses the guardian believes are vital to the court’s understanding of the child’s best interests, the guardian should subpoena these witnesses to trial if the parties do not intend to call.

A guardian should not passively accept the testimony and evidence the parties intend to elicit as being the sole relevant evidence on the child’s best interests. A guardian who has conducted an independent and thorough investigation should exercise his or her own judgment on what evidence the court needs to determine the child’s best interests. While the guardian does not need to duplicate what the parties present at trial, the guardian should fill in gaps in the parties’ presentations.