

How to Serve Process in a Guardianship Proceeding

Elisa Reiter and Daniel Pollack | March 18, 2022



Let's say your father is increasingly forgetful. He had a number of car accidents over the last year. He's on a number of prescription medications, but when asked if he took his medicine, and the dosage, he cannot recite the details about his meds. It may be time for a guardianship proceeding. If so, how to serve process in that guardianship proceeding may be an issue.

The Texas Supreme Court delivered an opinion on March 4, 2022 regarding the unique issues pertaining to service of process in

guardianship cases in In the Guardianship of James E. Fairley. Mauricette Fairley filled the role of guardian for her husband during the last three years of his life. Mr. Fairley's daughter, Juliette, asked the Supreme Court of Texas to "void all orders entered in the guardianship proceeding because the proposed ward, her now-deceased father, was personally served by a process server." Juliette contends that the probate court did not have jurisdiction over matters pertaining to her father's guardianship, asserting that "Chapter 1051 of the Estates Code requires a proposed ward in Texas to be personally served by a sheriff, constable, or other elected officeholder."

As Justice Huddle notes, the case "has a tortured procedural history and has spanned a decade." Juliette sought a guardianship of her 81-year-old father in 2011 in Bexar County. The probate court appointed a guardian ad litem who concluded that a guardianship was not necessary. The probate court closed the case, with Mauricette asserting that there were powers of attorney in place with which to protect James' interests. Juliette again filed for guardianship the following year, seeking permanent guardianship of her father, only to nonsuit her application following certain agreements as to James' care, and Juliette's access to her father. The second proceeding was dismissed in September, 2014.

One month after the second proceeding was dismissed, Juliette removed her father from the assisted care facility where he was living in San Antonio, and moved him to New York, where Juliette resided. Mauricette then sought relief from a Bexar County probate court, seeking to be appointed as her husband's temporary guardian pursuant to TEX. EST. CODE Section 1251.001. Mauricette contended that Juliette acted unlawfully in removing James from assisted care in San Antonio, and also

that James' daughter had committed fraud in the course of obtaining powers of attorney authorizing Juliette to withdraw sums from accounts held in James' name. James was personally served in New York with the (Bexar County) temporary-guardianship case in November, 2014. Proof of service was provided by Sara M. Clark, via an Affidavit of Service, recounting the details of effectuating service on James with the application for temporary guardianship and citation in New York.

The race to the courthouse did not end there. Three days after Mauricette filed her temporary-guardianship application in Bexar County, Juliette filed a petition in state court in New York, requesting that Juliette be appointed as James's guardian. Mauricette opposed the New York case; a hearing was held Dec. 1, 2014, but once the New York judge determined that James was "able and willing to attend," the New York state judge recessed the hearing so that James could appear at the courthouse proceeding. The New York court-appointed evaluator personally observed a "warm and affectionate greeting" between Mauricette and her husband. The New York state judge appointed Mauricette and Juliette "special temporary co-guardians" for the limited purpose of assuring that James would be returned to Texas, deferring any further rulings to the Bexar County probate court. However, the New York state court also voided the powers of attorney granted by James to his daughter, and put the powers of attorney naming Mauricette as the person who had authority to act on behalf of James back into effect.

One week later, Mauricette filed an application for permanent guardianship of James — in the same case in which she had filed her application for temporary guardianship. Mauricette contended that James was not only incapacitated, but that Juliette presented a threat to

her father's welfare, per TEX. EST. CODE Section 1101.151. A hearing was held at which James was represented by a court-appointed attorney ad litem ("AAL"). The same attorney had served as James's AAL in the 2012 proceeding. As a result of the hearing, the Bexar County probate court appointed Mauricette as James's temporary guardian, pending ruling on Juliette's challenge to Mauricette's application for permanent guardianship. The AAL was to continue to represent the proposed ward pending resolution of Juliette's contest.

One month following the hearing, James was served by a licensed private process server with the application for permanent guardianship at the assisted care facility in San Antonio to which he had returned. Through much of 2015, Mauricette served as her husband's temporary guardian. In November, 2015, following a hearing, the probate court appointed Mauricette as James' permanent guardian, finding that he was "totally incapacitated" and that his best interests would be served by having Mauricette appointed as his permanent guardian.

Juliette challenged the appointment order through appeal and mandamus. In re Guardianship of Fairley, No. 04-16-00096-CV, 2017 WL 188103 (Tex. App. – San Antonio Jan. 18, 2017, pet. denied). In Re Guardianship of Fairley, No. 04-18-00190-CV, 2018 WL 1610924 (Tex. App. – San Antonio Apr. 4, 2018, orig. proceeding). In the former, Juliette argued that the probate court abused its discretion by requiring her to submit \$20,000 as security for probable costs of the guardianship proceeding, and then dismissing her case when she failed to comply. In the latter, Juliette sought relief pro se, arguing that the probate court's ruling that she deposit \$20,000 violated "the Texas Rules of Civil

Procedure, the 8th Amendment, the Due Process and Equal Protection Clause [and] the Texas Estates Code.”

Juliette then filed for mandamus relief in the Supreme Court of Texas in June, 2018. There was a new judge in the Bexar County probate court by that time, so the Supreme Court of Texas abated the mandamus to allow the new judge to reconsider the prior orders. Juliette filed a new pleading with the Bexar County probate court, contending that all of the probate court’s orders issued after September 2014 were void, due to a failure of jurisdiction over James, as private process servers had served Mauricette’s applications for guardianship, in contravention of Tex.Est. Code Section 1051.103(a)(1). The probate court found that service was proper, and further, that it had jurisdiction over the pending guardianship. The Supreme Court of Texas reinstated the mandamus; Juliette filed a pleading contending that all orders issued by the Bexar County probate court were void, relying on her argument that without proper service, there was no jurisdiction.

James died. Mauricette contended that James’ death rendered any guardianship dispute moot. The Texas Supreme Court denied Juliette’s mandamus in January 2019.

Juliette then filed a wrongful-death suit against Mauricette and Mauricette’s other daughter (James’s stepdaughter), Dorothy. As part of her relief, Juliette sought injunctive relief to preclude the cremation or embalming of James’ body. The wrongful death case was transferred to the Bexar County probate court. More legal wrangling ensued.

The Texas Supreme Court does not accept that James’s death in December 2018 mooted Juliette’s appeal. Instead, the Texas Supreme

Court notes that “Juliette’s appeal thus presents a live controversy notwithstanding James’s death: whether the district court is the proper court to adjudicate her wrongful-death suit.” The Texas Supreme Court also looks to TEX. EST. CODE Section 1022.002 for definition of when a guardianship begins and concludes. Filing of the initial guardianship case by Mauricette provided the probate court with subject matter jurisdiction over the guardianship proceeding. However, the Texas Supreme Court adds that “The guardianship proceeding does not automatically terminate on the ward’s death. Instead, the probate court’s jurisdiction continues until the court settles and closes the guardianship and discharges the guardian.”

The Texas Supreme Court also grapples with the issue of whether TEX. EST. CODE Section 1051.103 or Section 1051.051 controls the issue of who is authorized to serve citation in a guardianship proceeding. The former (Section 1051.103) authorizes service by a sheriff or other officer where a proposed ward is aged 12 or older. The latter (Section 1051.051) speaks to persons who must receive personal service in a guardianship proceeding, as well as who may serve, and how service is to be effectuated. The latter is more specific.

James’s general appearance in the guardianship proceeding through the actions of his AAL constituted consent to the probate court’s personal jurisdiction. The AAL’s appearance constituted a waiver of any technical defects regarding service of process on James. In a footnote, Justice Huddle notes that:

[i]f anyone had alerted the probate court to a defect in service in a timely manner, the probate court could have and no doubt would have

remedied the defect ... because the Estates Code contemplates that personal jurisdiction attaches in a variety of ways that do not involve physical service on the ward by *anyone*, we cannot, in the absence of text signaling such an intent, conclude that the Legislature intended to attach jurisdictional significance to whether ‘the right person’ serves a ward.

Should a technical defect in the manner in which process is served result in the voiding of all orders pertaining to a ward? No — at least not in the Fairley case, or at least not if no one noticed and complained of the issue after the proposed ward was initially served. The Supreme Court of Texas holds that “a technical defect in personal service on the ward does not deprive the probate court of subject matter jurisdiction or personal jurisdiction over the ward where the ward is personally served and participates in the proceedings through counsel without objection.” If you are going to complain about a defect in jurisdiction, do so early and properly. If there is a guardianship proceeding, read the rules, and take appropriate precautions regarding how you handle service of process.

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