

**THE
AD LITEM MANUAL**

**FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TARRANT COUNTY PROBATE COURT NUMBER ONE**

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The Ad Litem Manual

I. INTRODUCTION

A. Attempted Ends Hopefully, this manual will assist you to:

1. become aware of the various types of probate proceedings in which ad litem may be appointed,
2. the varying role(s) of the ad litem in each area, and
3. some pointers on actually fulfilling the varying responsibilities of the attorney ad litem or guardian ad litem in the different proceedings.

While there is some discussion on contesting a guardianship, for a more developed discussion of contested issues in guardianship and other ad litem appointment areas, see Pacheco and Gardner, *Things I've Learned in the Guardianship Trenches*, 26th Annual Advanced Estate Planning and Probate Course (2002), State Bar of Texas, Knebel, *Procedural and Evidentiary Issues in Guardianship Litigation*, Guardianship 2003, State Bar of Texas, and the entire Litigation Breakout Sections for the last several Texas State Bar Advanced Estate Planning and Probate Courses.

All references to the Texas Probate Code are referenced "TPC §XXX."

B. Semantics and Definitions:

An "*ad litem*", meaning "for the proceeding" or "for the suit" (Black's Law Dictionary [4th ed. Rev. 1968]), whether designated as an Attorney Ad Litem or Guardian Ad Litem, is a person, usually an attorney, appointed by the court, to represent and/or advocate on behalf of another, typically a minor, incapacitated person, or person whose whereabouts are unknown. The appointment is for the immediate proceeding and not intended to be a permanent appointment.

For many years, the terms "Attorney Ad Litem" and "Guardian Ad Litem" had been used fairly interchangeably. The confusion of the two titles and their respective roles led to the appointment of a task force to examine judicial appointments by the Texas Supreme Court in 1993. Other than evidence of unnecessary and improper appointments and a compensation system subject to abuse, the task force identified a lack of sufficient training and sufficient guidance on the law regarding the scope of an appointee's duties for both judges and appointees to enable the process to function properly. *Brownsville Valley*

Regional Medical Center v. Gamez, 894 S.W.2d 753 (Tex. 1995); REPORT OF THE SUPREME COURT TASK FORCE TO EXAMINE JUDICIAL APPOINTMENTS, March 1, 1993.

With the advent of the massive revisions to the guardianship sections of the Probate Code in 1993 and the literally hundreds of changes which have followed in the intervening decade, the legally-defined roles of the attorney ad litem and guardian ad litem made the definitions of each term more distinguishable, at least in guardianship and probate law.

CAVEAT: Pay particular attention in reading cases from areas other than post-1993 guardianship matters in attempting to apply precedent regarding the ad litem's duties, i.e.: the District Courts (especially Family Courts) and Appellate Courts still don't always make the same distinctions as do (some of) the Probate Courts. Make sure you learn of any "local rules," whether written or not.

C. Certification Requirements

Eligibility for Attorney ad litem appointments under the Texas Probate Code requires: (1) A current law license and (2) certification by the State Bar of Texas of successful completion of a State Bar-sponsored three hour CLE course on guardianship law and procedure. TEX. PROB. CODE ANN. §647A These are available on videotape, in live presentations and via internet.

Once certification is obtained, a copy of the certificate should be forwarded to the appropriate courts. If a certificate has expired, a new certificate must be obtained for an attorney to be eligible for appointment as an attorney ad litem. TEX. PROB. CODE ANN. §646(c) Re-certification is required every two (2) years until the attorney has been certified for four years, and then the certification is effective for a four (4) year period. TEX. PROB. CODE ANN. §647A(c) and (e).

D. Liability and Immunity

The issue of liability of the ad litem to the ward is seldom far beneath the surface. The few available Texas cases seem to be all over the board, from a finding of no derived judicial immunity for a guardian ad litem appointed to review and approve a settlement in district court, *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.,

Dallas - 1994 , writ denied) to a finding of absolute derived judicial immunity for both a court-appointed psychiatrist and a Guardian ad litem in a custody battle in family court. *Delcourt v. Silverman*, 919 S.W.2d 777(Tex. App.-Hous. (14 Dist.) 1996, writ denied) (cert denied, 117 S.Ct. 1698, 2472).

§645A of the Probate Code was amended in 2003 to provide for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 645, 683, or 694A) from recommendations made or opinions given as a Guardian Ad Litem. Exceptions: willfully wrongful, reckless, bad faith, malicious and grossly negligent statements.

In addition, TRCP 173 was completely rewritten in October, 2004 to govern ad litem appointments other than pursuant to a specific statute, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.

Effective February 1, 2005, the rules contemplate appointment of a guardian ad litem when a party's next friend or guardian appears to have an adverse interest because of the division of settlement proceeds. The responsibility of the guardian ad litem under these circumstances is very limited, and the guardian ad litem is specifically not to participate in the underlying litigation (even reviewing the discovery or litigation files) except to the limited extent of the division of settlement proceeds. See Jocson v. Crabb, 133 S. W. 3d 268 (2004) (per curiam). A guardian ad litem may, of course, choose to actively participate in the litigation and discovery, but compensated is not to be awarded for such activity.

Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem

As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity. Though an officer and adviser to the court, a guardian ad litem must not have ex parte communications with the court. See Tex. Code Jud. Conduct, Canon 3. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited,

compensation, if any is sought, should ordinarily be limited. A violation of this rule is subject to appropriate sanction

173.1 Appointment Governed by Statute or Other Rules

This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules

173.2 Appointment of Guardian ad Litem

(a) When Appointment Required or Prohibited. The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

(1) the next friend or guardian appears to the court to have an interest adverse to

the party, or

(2) the parties agree.

(b) Appointment of the Same Person for Different Parties. The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

173.3 Procedure

(a) Motion Permitted But Not Required. The court may appoint a guardian ad litem on the motion of any party or on its own initiative.

(b) Written Order Required. An appointment must be made by written order.

(c) Objection. Any party may object to the appointment of a guardian ad litem.

173.4 Role of Guardian ad Litem

(a) Court Officer and Advisor. A guardian ad litem acts as an officer and advisor to the court.

(b) Determination of Adverse Interest. A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) When Settlement Proposed. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) Participation in Litigation Limited. A guardian ad litem:

(1) may participate in mediation or a similar

proceeding to attempt to reach a settlement;

(2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest

(3) must not participate in discovery, trial, or any other part of the litigation unless:

(A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and

(B) the participation is directed by the court in a written order stating sufficient reasons.

173.5 Communications Privileged

Communications between the guardian ad litem and the party, the next friend or guardian, or their attorney are privileged as if the guardian ad litem were the attorney for the party.

173.6 Compensation

(a) Amount. If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.

(b) Procedure. At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(c) Taxation as Costs. The court may tax a guardian ad litem's compensation as costs of court.

(d) Other Benefit Prohibited. A guardian ad litem may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule

Rule 173.7 Review

(a) Right of Appeal. Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.

(b) Severance. On motion of the guardian ad litem

or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.

(c) No Affect on Finality of Settlement or Judgment. Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment. Misc. Docket No. 04-9224

Also be aware that if you exceed the scope of your appointment, i.e., a guardian ad litem attempting to act as attorney for a minor, you exceed the scope of those things for which you can be paid. *Roark v. Mother Francis Hosp.*, 862 S.W.2d 643 at 647 (Tex. App. Tyler - 1993, no writ).

Look at Round, *Virtual Representation: Role of Ad Litem in Non-Guardianship Cases*, 26th Annual Advanced Estate Planning and Probate Course (2002), State Bar of Texas, for an excellent discussion of the issues of the liability of the ad litem.

Ad litem appointments are no less work than representing a client as retained counsel. It is just as critical to be aware of your responsibilities and the expectations placed upon you by the appointment. If anything, the performance of the ad litem is subjected to more, rather than less scrutiny than retained counsel. Here endeth the lesson.

II. AREAS IN WHICH AD LITEMS ARE APPOINTED

A. Appointment of a Guardian

1. Attorney Ad Litem

A. Defined: An Attorney Ad Litem, as defined by TEX. PROB. CODE ANN. §601(1), is "an attorney who is appointed to represent and advocate on behalf of a proposed ward, an alleged incapacitated person or an unborn person in a guardianship proceeding." The appointment of an Attorney Ad Litem is mandatory in every application for the appointment of a guardian. TEX. PROB. CODE ANN. §646

B. Duties: The duties of the Attorney Ad Litem, as prescribed by TEX. PROB. CODE ANN. §647 and other relevant sections, are as follows:

(1) Review the Application for Letters of Guardianship, the certificates of physical, medical and intellectual examination and all the relevant financial, medical, psychological and intellectual testing records of the Proposed Ward;

(2) Personally interview the Proposed Ward within a reasonable time before the hearing;

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