

**THE
AD LITEM MANUAL
2012**

**FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TEXAS PROBATE COURTS**

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FORT WORTH, TEXAS
REVISION DATE – JULY 2012**

GUARDIANSHIP
(From the Ad Litem's Perspective)

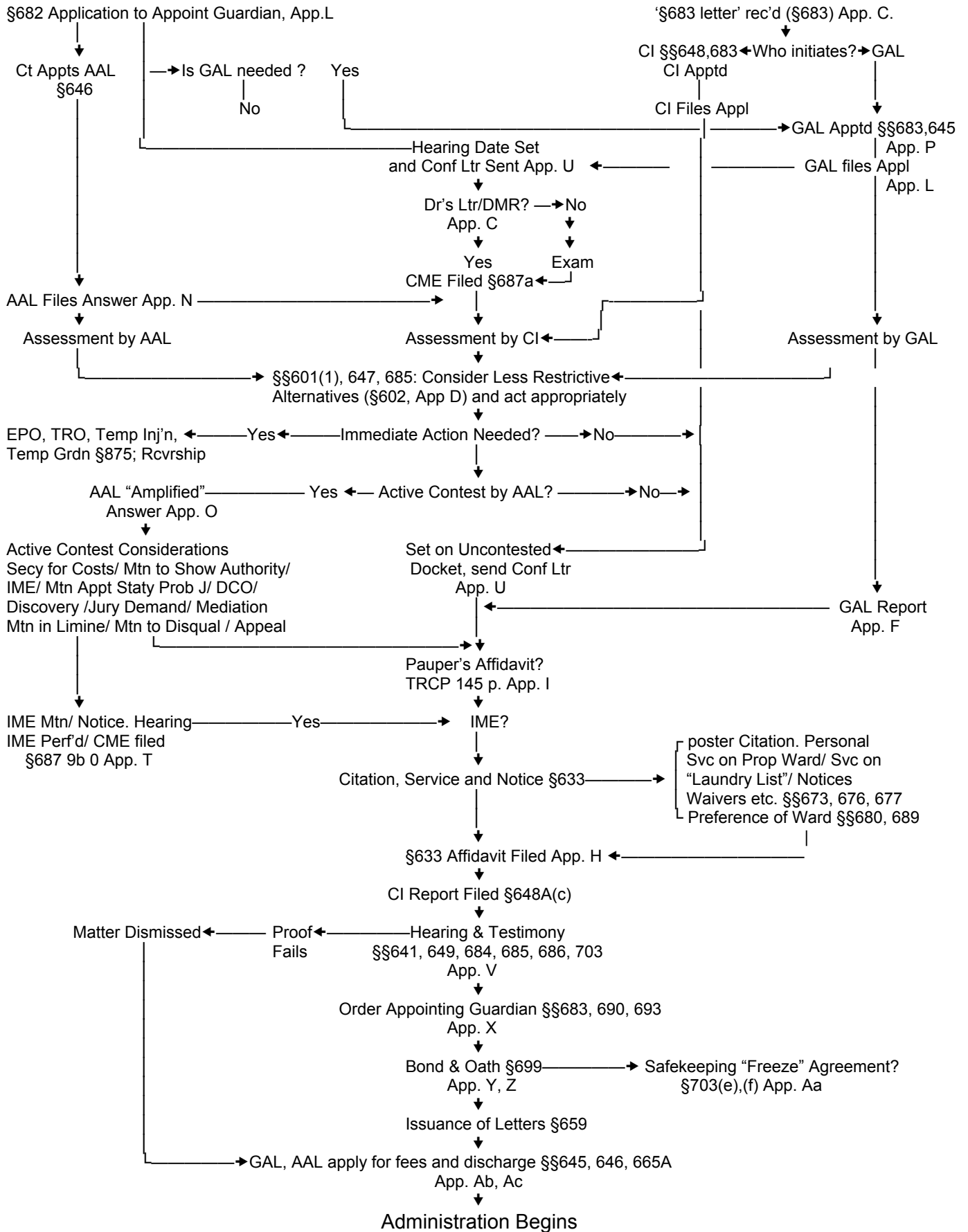


TABLE OF CONTENTS

GUARDIANSHIP (From the Ad Litem’s Perspective)	<i>Frontispiece</i>
I. INTRODUCTION	7
A. Initial Query	7
B. Certification Requirements	7
C. Liability and Immunity	7
II. AREAS IN WHICH AD LITEMS ARE APPOINTED	8
A. Appointment of a Guardian	8
B. Restoration/Modification of Guardianship- Attorney Ad Litem	8
C. Removal of Community Administrator – Attorney Ad Litem	10
D. Heirship Determinations – Attorney Ad Litem	10
E. Trust Construction or Modification Actions – Guardian Ad Litem	10
F. Mental Health Commitments – Attorney Ad Litem	10
G. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem	10
H. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem	10
I. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem	10
J. Judicial Bypass Proceedings– Guardian Ad Litem and Attorney Ad Litem	10
K. Family Code Appointments - Guardian Ad Litem and Attorney Ad Litem	10
L. “Utility Outfielder” Appointments - Attorney Ad Litem	10
III. ELECTRONIC RESOURCES - Learn the Law/Embrace the Technology	11
A. Electronic Resources	11
B. It’s All Geek to Me!	11
IV. AD LITEM BOOT CAMP: PRACTICAL POINTERS	11
1. Read this Manual Cover to Cover	11
2. Guardianship Summary	11
3. Know Where you Are	11
4. Fundamentally Understand Your Job	11
5. Less Restrictive Alternatives: Learning the Ropes	12
6. Local Rules	12
7. Secrets for Getting More Appointments	12
8. What Documents to Expect	12
9. Is Immediate Action Required	12
10. Temporary Guardianships	13
Caveat: Private Process Servers	13
11. AAL: File an Answer	14
12. Investigate: What’s the Stuff?	14
Note on Representative Payees	15
13. Is The Application Timely?	15
14. Who Picks Up the Tab? Pauper’s Affidavits	15
V. THE DOCTOR’S LETTER (“CME”)	15
A. Basics: Incapacitated Proposed Ward	15
B. Basics: Mentally Retarded Proposed Ward	16
C. Independent Medical Exam	16
D. Evidentiary Considerations	17
E. HIPAA (A Hippo-Sized Headache)	17
F. Defensive Considerations: The Answer May Depend on Who You Ask	17
VI. CAPACITY ASSESSMENT	18
A. The Capacity Assessment Handbook for Judges	18
B. The How-To	19
C. Access to Medical Records	19
D. Visit With the Applicant (If There is One)	19
E. Interview the Proposed Ward	19
F. Interview the Proposed Ward (Again)	19

G. Perform Your Assessment.....	19
H. Not Quite There Yet.....	20
I. Play Lawyer, Not Doctor	21
J. Make a Threshold Determination (“The Ad Litem’s Dilemma”)	21
K. No Summary Dismissals	21
VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING	21
A. Your Best Allies	21
B. Settings.....	21
C. Working the File	21
D. Ad Litem Reports	22
E. Notices: A Jurisdictional Foundation and the Laundry List.....	22
F. Paperwork to Have on Hand	23
G. The Proposed Order: Powers of the Guardian. Limitations of the Ward	24
H. Appointment of Resident Agent.....	24
I. Copies.....	24
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS	25
A. Generally	25
B. Decorum.....	25
C. The Hearing at the Bench.....	26
D. Burden(s) of Proof.....	26
E. Bench Instructions and Training	26
F. Contested Hearings	26
G. Trainwrecks	27
H. Clerk’s Follow-Up Duties	27
I. Say the Words, Take the Money, Go Home	27
J. Selling the Follow-Through	27
IX. ACTIVELY CONTESTING THE GUARDIANSHIP	28
Threshold Consideration	28
A. File an Answer!	28
B. Determine If Immediate Action is Necessary	28
C. Set the Hearing on the Contested Docket.....	28
D. Calling for Backup	28
E. “Rule 12:” Motion to Show Authority	28
F. Request a Statutory Probate Judge	29
G. Consider Seeking Security for Costs.....	29
H. Ask for a Jury Trial	31
I. Pursue Adequate Discovery	32
J. Advocate for Mediation	32
K. Shutting the Gate: TROs, Temporary Guardianships and Notice of Lis Pendens	32
L. “Interesting Challenge” – Interest for Stranding vs. Adverse Interest	32
M. Challenging the Applicant – Disqualification	33
N. If Advantageous – Try to Have Your Client Appear at the Hearing.....	33
O. Consider Requesting a Closed Hearing.....	34
P. Negotiate a Tactical Retreat	34
Q. An Appealing Thought?.....	34
R. Potential Ancillary Litigation.....	34
S. More Practice Pointers	34
X. FEE CONSIDERATIONS	34
A. Introduction	34
B. Basic Premise	35
C. Burden of Proof.....	35
D. Question of Fact	35
E. Reasonableness	35
F. Guidelines, Not Elements.....	35
G. Evidence Required	36

H. Expert Testimony	36
I. No “Bonus” Factors	36
J. No Prior Objections Required	36
K. Limited Duties.....	36
L. Non-Compensable Activities	36
M. Going It Alone.....	36
N. Fee Applications.....	37
O. County-Pay Cases	37
P. Private Pay Cases	37
Q. Hourly Rates.....	37
R. Expenses.....	37
S. Do Not Bill For:	37
T. When to File	37
U. What to Do with the Fee Application.....	37
V. Separate Order Required	37
W. Specific Areas of Concern on Fee Applications	38
XI. CLOSING THOUGHTS	38
A. Removal of an Ad Litem	38
B. Back in the Saddle Again: Re-Activation of the Ad Litem.....	39
XII. HEIRSHIP PROCEEDINGS	39
A. Introduction	39
B. Statutory Bases for Ad Litem in Heirship Proceedings	39
C. Scope of “Heirship Determination”	41
D. Duty and Standing of the Attorney Ad Litem	41
E. Pointers on Different Types of Cases: “Plain Jane” or “Mystery”	41
F. Due Diligence.....	42
Note on Distribution Charts	42
SSA Letter Forwarding on Missing Persons.....	43
G. Time Records and Fee Applications	43
H. Particular Areas of Concern	44
I. Job Skills	46
XIII. EPILOGUE: TAKING OVER THE REINS	46

APPENDICES:

A. Guardianship Summary	48
B. Policy for Court-Initiated Guardianships	51
C. §683 Letter & Physician’s Certificate of Medical Exam (with DMR)	53
D. Less Restrictive Alternatives to Guardianship	60
E. Tips for Finding the Elusive Person (Living or Otherwise).....	68
F. Report of Guardian Ad Litem	69
G. Waiver of Citation and Consent to Appointment.....	70
H. Affidavit Regarding Notice under §633(d-1).....	71
I. Affidavit of Inability to Pay Costs (“Pauper’s Affidavit”)	72
J. Application for Temporary Guardianship/ Fiat for Hearing	73
K. Order Appointing Temporary Guardian	77
L. Application for Appointment of a Guardian of the Person (and Estate).....	78
M. Powers Requested by Proposed Guardian (Illustrative).....	80
N. Original Answer (Attorney Ad Litem).....	81
O. Original Answer (“Contest”)	82
P. Application & Order For Authority To Utilize Attorneys And Staff Of Appointee’s Law Firm ..	83
Q. Motion for Appointment of Guardian Ad Litem and Order	86
R. Motion for Security for Costs & Order	88
S. Motion to Show Authority & Order.....	90

T.	Motion in Limine and to Dismiss Application.....	92
U.	Motion for Independent Medical Examination, Fiat & Order	93
V.	Letter Confirming Setting.....	96
W.	Proof of Facts	97
X.	Suggested Cross-Examination Questions for the Ad Litem	98
Y.	Order Appointing Guardian of the Person (and Estate).....	99
Z.	Personal Surety Bond.....	100
Aa.	Oath of Guardian.....	101
Ab.	Safekeeping (“Freeze”) Agreement	102
Ac.	Fee Application & Order - County Pay (“Set Fee”)	103
Ad.	Fee Application & Order – Private or County Pay in Excess of Set Fee.....	104
Ae.	Practice Tips from the Probate Court One Investigators	106
Af.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish)	107
Ag.	Initial Report of the Guardian of the Person.....	115
Ah.	Heirship Ad Litem Answer.....	119
Ai.	Heirship Ad Litem Report and Distribution Chart.....	120
Aj.	Heirship Ad Litem Fee Application & Order	122
Ak.	Intestacy Chart	123
Al.	Probate Code Index 2012.....	124

The Ad Litem Manual 2010

I. INTRODUCTION

Since September 1, 1993, the appointment of ad litem in guardianships has become a fact of life for the probate courts and a source of training and income to young (and sometimes not so young) Texas lawyers.

Hopefully, this manual will help the reader to:

1. become familiar with the types of proceedings in which ad litem may be appointed;
2. appreciate the varying role(s) of the ad litem in each area;
3. understand the requirements of fulfilling the responsibilities of these varying roles in the different proceedings;
4. gain some insight in how to conduct one's self in non-contested hearings and in dealing with court personnel; and
5. learn some specifics on fee applications.

This manual only briefly addresses the contested aspects of a guardianship. Excellent treatments of this topic may be found in the State Bar of Texas Seminars on

- Advanced Estate Planning and Probate (Litigation Breakout Section)
- Advanced Guardianship Course
- Fiduciary Litigation Course

Additionally, every other fall, the Tarrant County Probate Bar Association sponsors a Probate Litigation Seminar in Fort Worth.

For a very insightful commentary on dealing with ad litem, see Hopper, Craig, *Call in the Sheriff: Handling Overzealous Ad Litem and Other Outlaws*, State Bar of Texas Advanced Guardianship Course 2010.

A. Initial Query:

Why does the Probate Judge seem to be overly concerned about how the guardianship is conducted? By definition, probate courts are where people come in to ask for permission to handle the affairs of other who cannot act for themselves. Personal Representatives, even when bonded, and represented by good counsel, still sometimes commit acts of misfeasance, malfeasance or nonfeasance. (They steal.)

TEX. PROB. CODE §671(d) provides that "If damage or loss results to a guardianship or ward because of gross neglect of the judge to use reasonable diligence in the performance of the judge's duty under this section, the judge shall be liable on the judge's

bond to those damaged by the judge's neglect." While this is not the same as personal liability (See *Twiligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App. Houston 14th District 2004) (pet. denied)), judges with probate jurisdiction, especially statutory probate judges, do not like having a target on the back of their robe.

Active judicial oversight, and requiring guardians to timely account, and employing ad litem to assist the court in enforcing the probate code, is the best defense the courts have in minimizing loss to the wards and eventual distributees in probate.

B. Certification Requirements:

An attorney ad litem must be certified to obtain appointments in guardianship proceedings, a guardian ad litem need not be certified. Certification is 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 §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 §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 §647A(c) and (e).

The certification requirement applies during administration of the guardianship as well. When a guardian attempted to resign, it was error for the trial court to appoint an attorney without certification under Tex. Prob. Code Ann. § 647A to ensure that the ward's interests are protected. *Guardianship of Marburger*, 2010 Tex. App. LEXIS 10255 (Tex. App. Corpus Christi, December 30, 2010, no pet. hist.)

No certification is required for Attorneys Ad Litem in other proceedings, such as heirship or trust matters.

C. Liability and Immunity:

TEX. PROB. CODE §645A 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. (Except for willfully wrongful, reckless, bad faith, malicious and grossly negligent statements.) Cf: *Kabbani v. Papadopolous* 2009 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist, February 26, 2009, pet. denied) where the court upheld similar statutory

immunity for a guardian ad litem under the Texas Family Code.

In addition, TRCP 173 (as of October, 2004) governs 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.

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. *Jocson v. Crabb*, 133 S. W. 3d 268 (Tex. 2004) (per curiam), *on remand*, 196 S.W.3d 302 (Tex. App. Houston 1st Dist. 2006). A guardian ad litem may, of course, choose to actively participate in the litigation and discovery, but compensation 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 TEX. RULE CIV. PROC. 44.

II. AREAS IN WHICH AD LITEMS ARE APPOINTED

NOTE: Disregard Government Code §74.092, establishing a requirement for a master attorney ad litem list for the county. By its own terms, this provision does not apply to appointments made pursuant to the Texas Probate Code. Acts 2009, 81st Leg., R.S., Ch. 1224, Sec. 1, eff. September 1, 2009.

A. Appointment of a Guardian

1. ATTORNEY AD LITEM

A. Defined TEX. PROB. CODE §601(1): "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 §646.

In 2009, the Code was amended to make clear that, when a management trust under TPC §867 is to be created, with or without a guardianship being created, an attorney ad litem must be appointed. *Ibid*.

B. Duties TEX. PROB. CODE §647 and other relevant sections:

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;

3. Discuss with the Proposed Ward the laws and facts of the case, the Proposed Ward's legal options regarding disposition of the case and the grounds on which a guardianship is sought;

4. Ascertain whether the Proposed Ward wishes to oppose the proceedings (if the Proposed Ward is unable to communicate, the Attorney Ad Litem is to act in best interests of the Proposed Ward);

5. File an Answer that states whether the Proposed Ward objects to the guardianship, the proposed guardian, or both, as soon as possible (Appendix N,O);

6. Visit with the Applicant's attorney, the Guardian Ad Litem and/or the Court Investigator concerning the Application;

7. Consider suggesting mediation or other appropriate ADR technique;

8. Represent and advocate on behalf of the Proposed Ward at the hearing, bearing in mind the requirements of the Texas Disciplinary Rules of Professional Conduct Rule 1.14 which states:

a. *When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*

b. *When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.*

c. *When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.* and

9. File an application for payment of fees and an order (Appendices Ab, Ac).

C. Access to Medical Records: The order appointing the Attorney Ad Litem should specifically authorize the Attorney Ad Litem to be given access to all of the relevant financial, medical, psychological and

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First appeared as part of the conference materials for the
14th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Role of the Attorney Ad Litem"