

**18<sup>th</sup> Annual  
Estate Planning, Guardianship and Elder Law Conference  
August 11-12, 2016  
Galveston, Texas**

**The  
AD LITEM MANUAL  
for  
2016**

**for  
Guardianship & Heirship Proceedings  
In Texas Probate Courts**

**Steve M. King  
Judge**

**Revision Date – June 2016**

<http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html>

Author Contact Information:  
Steve M. King, Judge  
**Tarrant County Probate Court One**  
Fort Worth, Texas

[probatecourt1@tarrantcounty.com](mailto:probatecourt1@tarrantcounty.com)  
817-884-2028

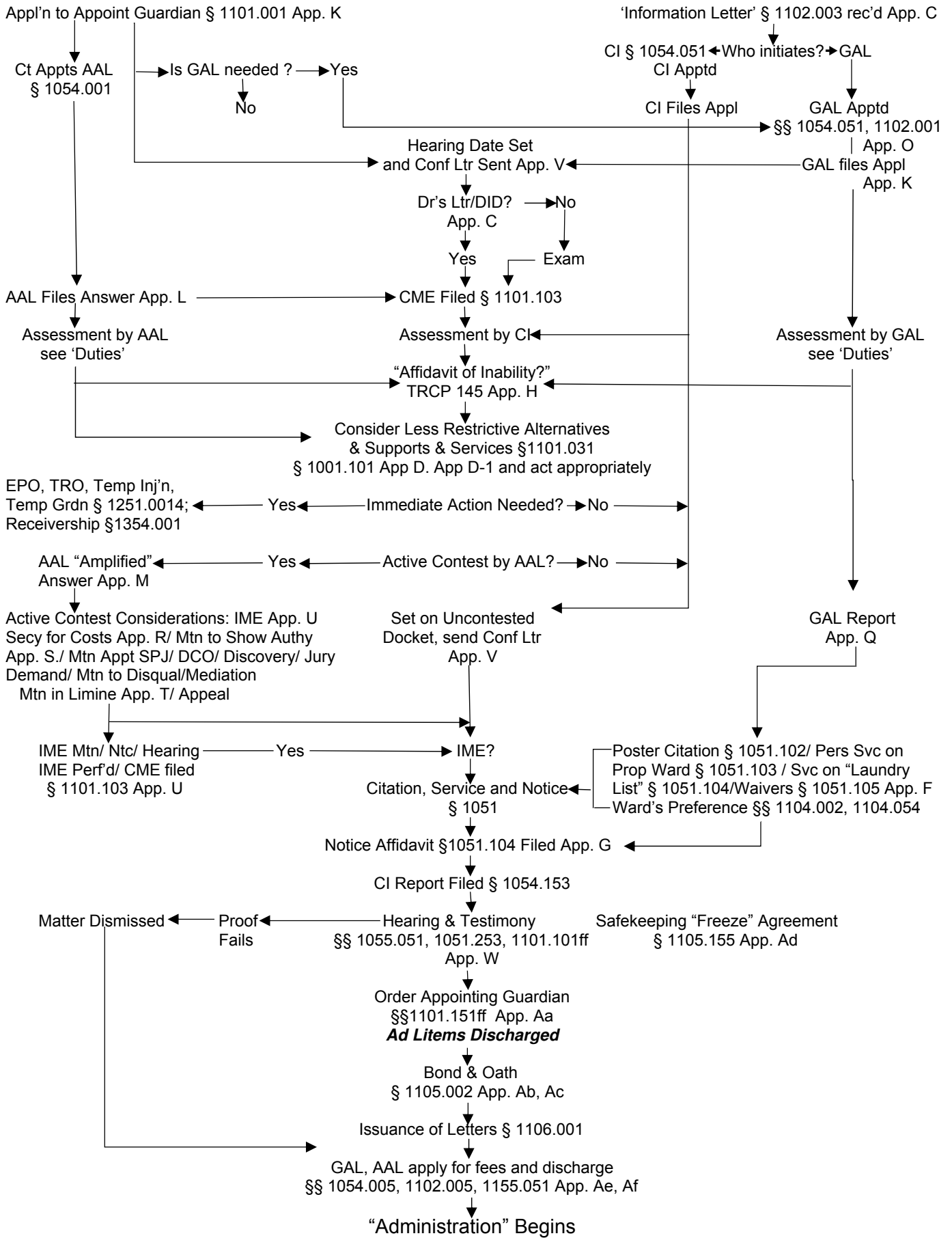
**THE  
AD LITEM MANUAL  
FOR  
2016**

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

STEVE M. KING  
JUDGE  
TARRANT COUNTY PROBATE COURT NUMBER ONE  
FORT WORTH, TEXAS  
REVISION DATE – JUNE 2016

[HTTP://ACCESS.TARRANTCOUNTY.COM/EN/PROBATE-COURTS/PROBATE-COURT-1.HTML](http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html)

**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: Why Should the Judge Care?.....	7
B. Certification Requirements .....	7
C. Liability and Immunity .....	7
D. Ineffective Assistance of Counsel .....	8
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 .....	8
D. Heirship Determinations – Attorney Ad Litem.....	9
E. Disclaimers – Guardian Ad Litem.....	9
F. Probate of Will After Four Years – Attorney Ad Litem .....	9
G. Partition Actions – Guardian Ad Litem .....	9
H. Trust Construction or Modification Actions – Guardian Ad Litem.....	9
I. Mental Health Commitments – Attorney Ad Litem.....	9
J. Purchase of Estate Property by Guardian – Attorney Ad Litem .....	9
K. Sale of Minor’s Interest in Property.....	10
L. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem .....	10
M. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem.....	10
N. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem.....	10
O. Proper Investment by Guardian – Guardian Ad Litem .....	10
P. Establishment of Pooled Trust Subaccount – Attorney Ad Litem .....	10
Q. Final Settlement of Guardianship Estate - Attorney Ad Litem.....	10
R. Judicial Bypass Proceedings– Guardian Ad Litem and Attorney Ad Litem.....	10
S. Family Code Appointments - Guardian Ad Litem and Attorney Ad Litem.....	10
T. “Utility Outfielder” Appointments - Attorney Ad Litem .....	10
U. “Utility Outfielder” Appointments - Guardian Ad Litem .....	10
III. ELECTRONIC RESOURCES - Learn the Law/Embrace the Technology .....	10
A. Electronic Resources.....	10
B. E-Filing & E-Notice.....	11
IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS.....	11
A. Study this Manual .....	11
B. Guardianship Summary.....	11
C. Can You Get There From Here? .....	11
D. Mechanics of Appointment: The Ad Litem Wheel.....	11
E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services .....	11
F. Local Rules.....	12
G. Standing Orders.....	12
H. What Documents to Expect.....	12
I. Fundamentally Understand Your Role.....	12
<i>MAJOR CAVEAT: Scope of Appointment</i> .....	12
1. The Role of the Attorney Ad Litem .....	12
a. Legal Counsel .....	12
b. The Prime Directive.....	12
c. “ <i>But I don’t want a guardian</i> ” .....	12
d. Duties.....	13
Notes on Medical Records .....	13
2. The Role of the Guardian Ad Litem.....	13
a. Defined.....	13
b. Personal Representative.....	13
c. Assess & Recommend .....	13
d. Basic Scenarios: Jiminy Cricket or Quarterback? .....	13
e. Duties .....	14

J. Is Immediate Action Required?.....	15
K. Temporary Guardianships.....	15
L. AAL: File an Answer.....	16
M. Investigate: Finding the Black Box.....	16
N. Assess Capacity.....	17
O. Independent Medical Exam.....	18
P. The Ad Litem’s Dilemma.....	19
Q. Is the Application Timely Filed?.....	18
R. Who Picks Up the Tab? – Affidavit of Inability to Pay.....	19
V. MEDICAL RECORDS.....	19
A. Federal and State Confidentiality Laws.....	19
B. The Physician’s Certificate of Medical Examination.....	20
1. Basics: Incapacitated Proposed Ward.....	20
2. Modification and /or Restoration: CME to consider Supports and Services.....	20
3. Basics: Intellectually Disabled Potential Ward.....	20
4. Independent Medical Exam.....	21
5. Evidentiary Considerations.....	21
6. Maintenance of Guardianship Orders by Care Facilities.....	22
7. Defensive Considerations: The Answer May Depend on Who You Ask.....	22
VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING.....	23
A. Your Best Allies.....	23
B. Settings.....	23
C. Working the File.....	23
D. Ad Litem Reports.....	24
E. Citation and Notice: A Jurisdictional Foundation and the Laundry List.....	24
F. Paperwork to Have on Hand.....	26
G. The Proposed Order: Powers of the Guardian. Limitations of the Ward.....	27
H. Appointment of Resident Agent.....	28
I. Copies.....	28
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS.....	28
A. Generally.....	28
B. Decorum.....	28
C. The Hearing at the Bench.....	29
D. Burden(s) of Proof.....	29
E. Bench Instructions and Training.....	30
F. Contested Hearings (with a Court Reporter).....	30
G. Trainwrecks.....	30
H. Clerk’s Follow-Up Duties.....	30
I. Say the Words, Take the Money, Go Home.....	31
J. Selling the Follow-Through.....	31
IX. ACTIVE CONTEST OF THE APPLICATION.....	31
Threshold Consideration.....	31
A. File an Answer!.....	31
B. Determine If Immediate Action is Necessary.....	31
C. Set the Hearing on the Contested Docket.....	31
D. Calling for Backup.....	32
E. Retained Counsel.....	32
F. Request a Statutory Probate Judge.....	32
G. Intervention.....	33
H. Consider Seeking Security for Costs.....	33
I. Ask for a Jury Trial.....	35
J. Pursue Adequate Discovery.....	35
K. Advocate for Mediation.....	35
L. Shutting the Gate: TROs, Temporary Guardianships and Notice of Lis Pendens.....	36
M. “Interesting Challenge” – Interest for Standing vs. Adverse Interest.....	36
N. Challenging the Applicant – Disqualification.....	37
Criminal Back ground Checks.....	37

O. If Advantageous – Try to Have Your Client Appear at the Hearing.....	38
P. Consider Requesting a Closed Hearing.....	38
Q. The Order: Negotiate a Tactical Retreat.....	38
Note on Disclosure Requirement: Right to Physical Possession of Ward.....	38
R. An Appealing Thought?.....	38
S. Potential Ancillary Litigation.....	38
T. More Practice Pointers.....	39
X. FEE CONSIDERATIONS.....	39
A. Introduction.....	39
B. Basic Premise.....	39
C. Burden of Proof.....	39
D. Question of Fact.....	39
E. Reasonableness.....	39
F. Guidelines, Not Elements.....	40
G. Evidence Required.....	40
H. Expert Testimony.....	40
I. No “Bonus” Factors.....	40
J. No Prior Objections Required.....	40
K. Limited Duties.....	40
L. Non-Compensable Activities.....	41
M. Going It Alone.....	41
N. Fee Applications.....	41
O. County-Pay Cases.....	41
P. Private Pay Cases.....	42
Q. Hourly Rates.....	42
R. Expenses.....	42
S. Do Not Bill For:.....	42
T. When to File.....	42
U. What to Do with the Fee Application.....	42
V. Separate Order Always Required.....	42
W. Specific Areas of Concern on Fee Applications.....	42
XI. CLOSING THOUGHTS.....	43
A. Removal of an Ad Litem.....	43
B. Re-Activation of the Ad Litem.....	43
XII. HEIRSHIP PROCEEDINGS.....	44
A. Introduction.....	44
B. Statutory Bases for Ad Litem in Heirship Proceedings.....	44
C. Scope of “Heirship Determination”.....	46
D. Duty and Standing of the Attorney Ad Litem.....	46
E. Pointers on Different Types of Cases: “Plain Jane” or “Mystery”.....	46
F. Due Diligence.....	47
G. Time Records and Fee Applications.....	48
H. Areas of Particular Concern.....	48
1. Shares of the Estate – Fractions, Not Decimals.....	48
2. How Did We Get Here? Show Your Work!.....	48
3. Imbedded Heirships.....	48
4. Per Stirpes and Per Capita Distributions.....	49
5. Half-Blood and Whole-Blood Distributions.....	49
6. Heirship and Disclaimers.....	50
7. Adult Adoptees.....	50
8. Deadbeat Dads.....	50
9. The Slayer’s Rule.....	51
10. DNA Evidence and Heirship.....	51
11. Surviving Spouse’s Interest.....	51
I. Job Skills.....	51
XIII. EPILOGUE: TAKING OVER THE REINS.....	51

APPENDICES:

A.	Guardianship Summary .....	52
B.	Policy for Court-Initiated Guardianships .....	56
C.	Information Letter & Physician’s Certificate of Medical Exam (with DID) .....	58
D.	Less Restrictive Alternatives to Guardianship .....	65
D-1.	Supports & Services .....	74
E.	Investigator’s Checklist .....	75
F.	Waiver of Citation, Consent to Appointment & Request for Notification .....	76
G.	Affidavit Regarding Notice under § 1051.104(b) .....	77
H.	Affidavit of Inability to Pay Costs .....	78
I.	Application for Temporary Guardianship/ Fiat for Hearing .....	80
J.	Order Appointing Temporary Guardian .....	84
K.	Application for Appointment of a Guardian of the Person (and Estate) .....	87
L.	Original Answer (Attorney Ad Litem) .....	89
M.	Original Answer (“Contest”) .....	90
N.	Application & Order for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm .....	91
O.	Motion for Appointment of Guardian Ad Litem and Order .....	94
P.	Entry of Appearance of Guardian Ad Litem .....	96
Q.	Report of Guardian Ad Litem .....	97
R.	Motion for Security for Costs & Order .....	98
S.	Motion to Show Authority, Show Cause Citation & Order .....	100
T.	Motion in Limine and to Dismiss Application .....	103
U.	Motion for Independent Medical Examination, Fiat & Order .....	104
V.	Setting Confirmation .....	107
W.	Proof of Facts (Guardianship) .....	108
X.	Exhibit: Evidence in Support of Requested Bond .....	109
Y.	Exhibit: Evidence in Support of Requested Monthly Allowance .....	110
Z.	Suggested Cross-Examination Questions for the Ad Litem .....	111
Aa.	Order Appointing Guardian of the Person (and Estate) .....	112
Ab.	Personal Surety Bond .....	116
Ac.	Oath of Guardian .....	117
Ad.	Safekeeping (“Freeze”) Agreement (Pre-Appointment) .....	118
Ae.	Fee Application & Order - County Pay (“Set Fee”) .....	119
Af.	Fee Application & Order – Private or County Pay in Excess of Set Fee .....	120
Ag.	Practice Tips from the Probate Court One Investigators .....	122
Ah.	Roster: Texas Court Investigators .....	123
Ai.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish) .....	125
Aj.	Ward’s Bill of Rights (English/Spanish) & Information to Be Furnished .....	133
Ak.	Initial Report of the Guardian of the Person .....	136
Al.	Affidavit/Certificate regarding Citation in Heirship .....	139
Am.	Answer by Attorney Ad Litem in Heirship Proceeding .....	141
An.	Report by Attorney Ad Litem in Heirship Proceeding and Distribution Chart .....	142
Ao.	Sworn Statement of Services & Expenses by Atty Ad Litem In Heirship Proceeding & Order .....	144
Ap.	Intestacy Chart .....	145

# The Ad Litem Manual 2016

## I. INTRODUCTION:

To help the reader to become familiar with:

1. the types of proceedings in which ad litem may be appointed;
2. the varying roles of the ad litem in different proceedings;
3. fulfilling the responsibilities of an attorney ad litem or guardian ad litem in the different proceedings;
4. how to before the bench and in dealing with court personnel; and
5. some specifics on fee applications.

This manual deal primarily with the uncontested aspects of a guardianship and only briefly with contests.

For more information on guardianship litigation, see:

1. State Bar of Texas Seminars on:
  - Advanced Estate Planning and Probate (Litigation Breakout Section)
  - Advanced Guardianship Course
  - Fiduciary Litigation Course
2. Tarrant County Probate Bar Association Probate Litigation Seminar in Fort Worth (every other fall).

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 Should the Judge Care?

TEX. EST. CODE § 1201.003 provides that “A judge is liable on the judge’s bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge’s duty under this subchapter.”

While this is not the same as personal liability (See *Twilligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App. Houston 14<sup>th</sup> District 2004) (pet. denied)), judges with probate jurisdiction, especially statutory probate judges, do not relish having a target on the back of their robes.

Active judicial oversight, requiring guardians to timely account, and employing ad litem to assist the court in enforcing the probate code, are the best defenses 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 so certified. Additionally, the attorney for the Applicant must be so certified. TEX. EST. CODE §1054.201.

Certification requires completion of a State Bar of Texas-sponsored four ~~three~~ hour CLE course on guardianship law and procedure, including one hour on alternatives to guardianship and supports and services available to proposed wards. TEX. EST. CODE § 1054.201(b). These courses 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. 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. EST. CODE § 1054.202.

When a certificate has expired, a new certificate must be obtained for the attorney to be eligible for appointment as an Attorney Ad Litem. TEX. EST. CODE § 1054.203.

The certification requirement applies during administration of the guardianship as well. In *Guardianship of Marburger*, 2010 Tex. App. LEXIS 10255 (Tex. App. Corpus Christi, December 30, 2010, no pet.).

An uncertified attorney has no authority to represent the Ward and lacks standing to bring an appeal. *Guardianship of Wehe*, 2012 Tex. App. LEXIS 8931 (Tex. App. Corpus Christi, October 25, 2012, no pet.)

A complaint about an attorney ad litem who is not properly certified is not a basis for a writ of mandamus, but could be raised by direct appeal or a statutory bill of review. *In Re: Cunningham*, 2014 Tex. App. LEXIS 13682 (Tex. App. Texarkana December 19, 2014)

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

### C. Liability and Immunity:

TEX. EST. CODE § 1054.056 provides for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 1054.051, 1102.001, or 1202.054) 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 1<sup>st</sup> 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, TEX. RULES CIV. PROC. 173 governs ad litem appointments of Guardians Ad Litem



other than pursuant to a specific statute, such as the Family Code and the Estates 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, no pet.). 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.

#### **D. Ineffective Assistance of Counsel**

In *Ex Parte Parker*, 2014 Tex. App. LEXIS 36 (Tex. App. Amarillo, January 3, 2014, no pet.), the appeals court noted that allegations of ineffective assistance of an appointed attorney ad litem would be reviewed under the same standard as in cases regarding termination of parental rights.

The standard (applied by both the Texas Supreme Court and the U. S. Supreme Court) requires a complainant to demonstrate 1) the counsel's assistance fell below an objective standard of reasonableness and 2) that the ad litem's deficient assistance prejudiced the Ward's case. Such allegations must be firmly founded in, and affirmatively demonstrated by, the court's record.

## **II. AREAS IN WHICH AD LITEMS ARE APPOINTED**

### **A. Appointment of a Guardian**

#### **1. ATTORNEY AD LITEM**

A. Defined § 1002.002 - "an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person or an unborn person in a guardianship proceeding."

B. Mandatory - The appointment of an Attorney Ad Litem is mandatory in every application for the appointment of a guardian. §1054.001.

C. Guardianship Management Trust - Also, if a guardianship management trust is to be created, with or without the creation of a guardianship, an Attorney Ad Litem must be appointed. §1304.054(c).

D. Term of Appointment - Unless the court determines that the continued appointment of the attorney ad litem appointed is in the ward's best interests, the attorney ad litem's term of appointment expires, without a court order, upon the appointment of a guardian, the appointment of a successor guardian, or upon the court's denial of an application for appointment of a guardian. §1054.002.

The term of appointment of an attorney ad litem appointed in a temporary guardianship continues after the court appoints a temporary guardian unless an order of the court provides otherwise. § 1054.002(b).

#### **2. GUARDIAN AD LITEM**

A. Defined § 1002.013 - "a person appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding."

B. Discretionary - The appointment of a Guardian Litem is within the discretion of the trial court. §1054.051.

C. Dual Appointment Possible - In the interest of judicial economy, the court may appoint the person who has been appointed attorney ad litem (either under in the guardianship proceeding or who is serving as an ad litem for the ward's benefit in any other proceeding) as guardian ad litem. §1054.052

D. Term of Appointment - Unless the court determines that the continued appointment of the guardian ad litem appointed is in the ward's best interests, the guardian ad litem's term of appointment expires, without a court order, upon the appointment of a guardian or upon the court's denial of an application for appointment of a guardian. §1054.053.

### **B. Restoration/Modification of Guardianship - Attorney Ad Litem** TEX. EST. CODE § 1202ff.

If the ward or any person interested in the ward's welfare seeks a complete restoration or modification of the guardianship, a Guardian Ad Litem can be appointed under TPC § 1202.054(b) to investigate the possible restoration or modification. The Guardian Ad Litem can later be appointed as Attorney Ad Litem if an application for restoration or modification is filed.

### **C. Removal of Community Administrator - Attorney Ad Litem** TEX. EST. CODE § 1353.151

In a proceeding to remove a community administrator serving under § 1353, the court shall appoint an Attorney Ad Litem for the incapacitated spouse. The Attorney Ad Litem may demand an inventory or accounting from the community administrator. The community administrator must comply within 60 days of receiving the demand.

### **D. Heirship Determinations - Attorney Ad Litem**

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: The Ad Litem Manual for 2016

Also available as part of the eCourse

[2016 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the  
18<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"The Role of the Ad Litem"