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**THE
AD LITEM MANUAL
2018**

FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TEXAS PROBATE COURTS

STEVE M. KING, JUDGE
TARRANT COUNTY PROBATE COURT ONE
100 W. WEATHERFORD ST, RM 260A
FORT WORTH, TEXAS 76196

SMKING@TARRANTCOUNTY.COM
817-884-2028

FOR CURRENT REVISION - SEARCH FOR:
"THE AD LITEM MANUAL FOR TARRANT COUNTY"

GUARDIANSHIP
(From the Ad Litem's Perspective)

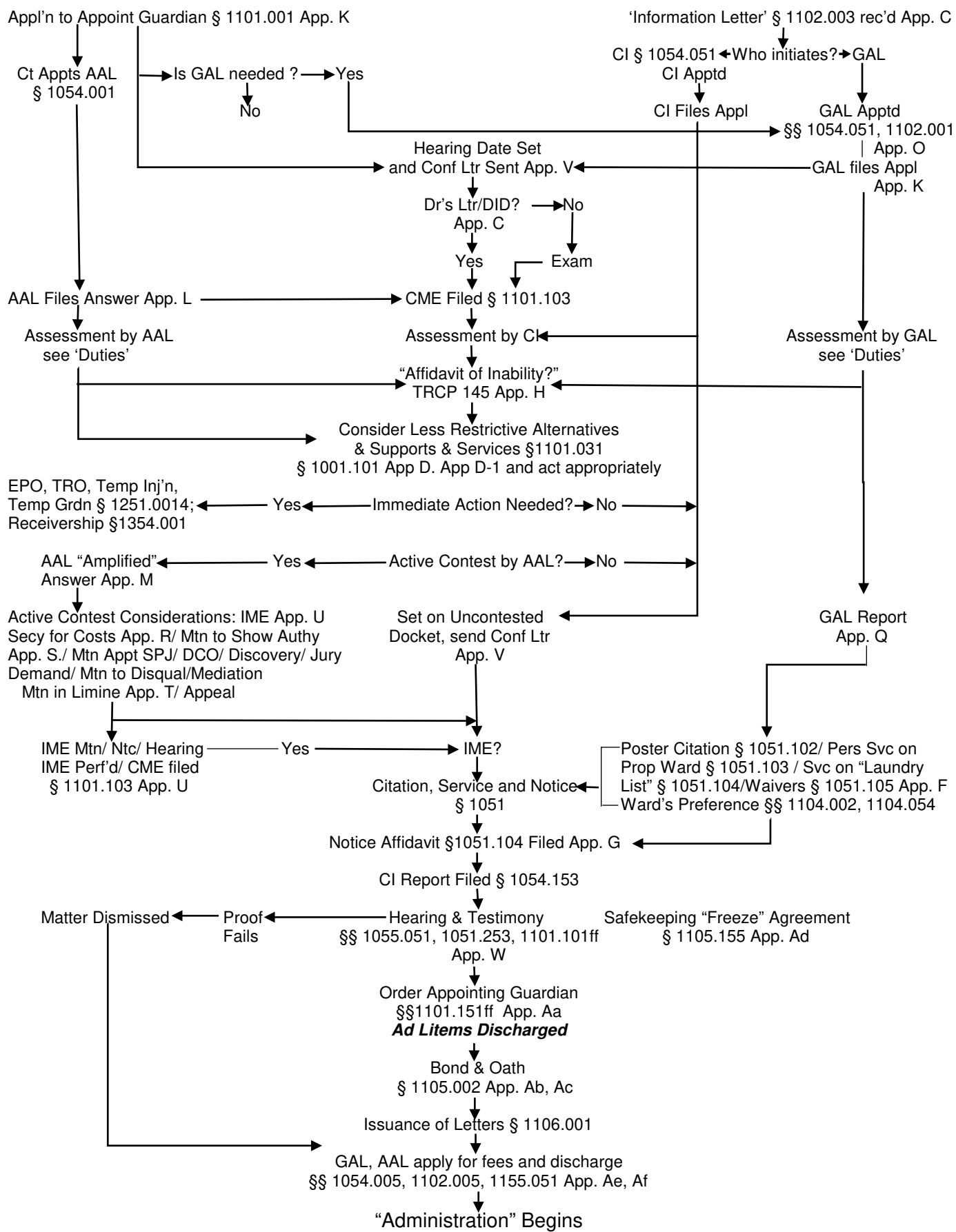


TABLE OF CONTENTS

GUARDIANSHIP (From the Ad Litem’s Perspective).....	<i>Frontispiece</i>
I. INTRODUCTION.....	7
A. Initial Query: Why Should the Judge Care?	7
<i>Judicial Bonds</i>	7
B. Certification Requirements	7
C. Liability and Immunity	7
II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE.....	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.....	9
L. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem.....	9
M. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem	9
N. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem	9
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. EMBRACE THE TECHNOLOGY	10
A. Electronic Resources	10
B. E-Filing & E-Notice	12
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 Where You Are?.....	11
D. Mechanics of Appointment: The Ad Litem Wheel.....	11
E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services.....	11
<i>New! The PRACTICAL Tool</i>	12
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
Notes on Medical Records	13
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> ”	13
D. Duties	13
2. The Role of the Guardian Ad Litem.....	13
A. Defined.....	13
B. Personal Representative.....	14

C. Assess & Recommend.....	14
D. Duties: Jiminy Cricket or Quarterback?.....	14
E. Additional 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
Mandated Abuse Reporting.....	18
O. Independent Medical Exam.....	18
P. The Ad Litem’s Dilemma.....	18
Q. Is the Application Timely Filed?.....	19
R. Who Picks Up the Tab? – Statement of Inability.....	19
First Responder and Veterans Exception.....	19
V. MEDICAL RECORDS.....	20
A. Federal and State Confidentiality Laws.....	20
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.....	21
3. Basics: Intellectually Disabled Potential Ward.....	21
4. Independent Medical Exam.....	21
5. Evidentiary Considerations.....	22
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.....	24
C. Working the File.....	24
D. Ad Litem Reports.....	24
E. Citation and Notice: A Jurisdictional Foundation and the Laundry List.....	25
F. Getting Ahead of the Curve: Registration, Background Checks and Training.....	25
G. Paperwork to Have on Hand.....	27
H. The Proposed Order: Powers of the Guardian/ Limitations of the Ward.....	29
Digital Assets.....	29
I. Appointment of Resident Agent.....	29
J. Copies.....	30
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS.....	30
A. General Comments and Decorum.....	30
B. The Hearing at the Bench.....	30
C. Burden(s) of Proof.....	31
D. Bench Instructions and Mandatory Training.....	31
E. Contested Hearings (with a Court Reporter).....	32
F. Trainwrecks.....	32
G. Clerk’s Follow-Up Duties.....	32
H. Say the Words, Take the Money, Go Home.....	32
I. Selling the Follow-Through.....	32
IX. ACTIVE CONTEST OF THE APPLICATION.....	33
Threshold Consideration.....	33
A. File an Answer!.....	33
B. Determine If Immediate Action is Necessary.....	33
C. Set the Hearing on the Contested Docket.....	33
D. Calling for Backup.....	33
E. Retained Counsel.....	33
F. Request a Statutory Probate Judge.....	34

G.	Intervention by ‘Interested Person’	34
H.	Consider Seeking Security for Costs	34
I.	Jury Demand	37
J.	Pursue Adequate Discovery	37
K.	Advocate for Mediation	37
L.	Shutting the Gate: TROs, Temporary Guardianships, Notices of Lis Pendens & Receivers	38
M.	“Interesting Challenge” – Interest for Standing vs. Adverse Interest	38
N.	Challenging the Applicant – Disqualification	39
	Criminal Background Checks/ Registration & Database	39
O.	If Advantageous – Try to Have Your Client Appear at the Hearing	40
P.	Consider Requesting a Closed Hearing	40
Q.	The Order: Negotiate a Tactical Retreat	40
	Disclosure Requirement: Right to Physical Possession of Ward	40
R.	An Appealing Thought?	40
S.	Potential Ancillary Litigation	41
T.	More Practice Pointers	41
X.	FEE CONSIDERATIONS	41
	A. Introduction	41
	B. Basic Premise	41
	C. Burden of Proof	41
	D. Question of Fact	41
	E. Reasonableness	42
	F. Guidelines, Not Elements	42
	G. Evidence Required	42
	H. Expert Testimony	42
	I. No “Bonus” Factors	42
	J. No Prior Objections Required	42
	K. Limited Duties	42
	L. Non-Compensable Activities	43
	M. Going It Alone	43
	N. Fee Applications	43
	O. County-Pay Cases	44
	P. Private Pay Cases	44
	Q. Hourly Rates	44
	R. Expenses	44
	S. Do Not Bill For:	44
	T. When to File	44
	U. What to Do with the Fee Application	44
	V. Separate Order	44
	W. Specific Areas of Concern on Fee Applications	44
XI.	HEIRSHIP PROCEEDINGS	46
XII.	CLOSING THOUGHTS	53
	A. Removal of an Ad Litem	45
	B. Re-Activation of the Ad Litem	45
	C. Changing Hats – Make an Appearance	45
	D. (Yet More) Practice Pointers	45
	E. <u>Real</u> Continuing Education	45

APPENDICES:

A.	Guardianship Summary.....	48
B.	Policy for Court-Initiated Guardianships.....	51
C.	Information Letter & Physician’s Certificate of Medical Exam (with DID).....	53
D.	Less Restrictive Alternatives to Guardianship.....	60
D-1.	Supports & Services	69
E.	Investigator’s Checklist.....	70
F.	Waiver of Citation, Consent to Appointment & Request for Notification.....	71
G.	Affidavit Regarding Notice under § 1051.104(b)	72
H.	Statement of Inability to Afford Payment of Court Costs or an Appeal Bond.....	73
I.	Application for Temporary Guardianship/ Fiat for Hearing.....	75
J.	Proof of Facts (Temporary Guardianship).....	79
K.	Order Appointing Temporary Guardian	80
L.	Application for Appointment of a Guardian of the Person (and Estate).....	83
M.	Original Answer (Attorney Ad Litem)	85
N.	Original Answer (“Contest”).....	86
O.	Application & Order for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm.....	87
P.	Motion for Appointment of Guardian Ad Litem and Order	90
Q.	Entry of Appearance of Guardian Ad Litem	92
R.	Report of Guardian Ad Litem	93
S.	Motion for Security for Costs & Order.....	94
T.	Motion to Show Authority, Show Cause Citation & Order.....	96
U.	Motion in Limine and to Dismiss Application	99
V.	Motion for Independent Medical Examination, Fiat & Order	100
W.	Handout: Registration, Criminal History Background Checks and Training.....	102
X.	Setting Confirmation	103
Y.	Proof of Facts (Guardianship)	104
Z.	Exhibit: Evidence in Support of Requested Bond	105
Aa.	Exhibit: Evidence in Support of Requested Monthly Allowance	106
Ab.	Suggested Cross-Examination Questions for the Ad Litem	107
Ac.	Order Appointing Guardian of the Person (and Estate).....	108
Ad.	Personal Surety Bond	112
Ae.	Oath of Guardian.....	113
Af.	Safekeeping (“Freeze”) Agreement (Pre-Appointment)	114
Ag.	Fee Application & Order - County Pay (“Set Fee”)	115
Ah.	Fee Application & Order – Private or County Pay in Excess of Set Fee.....	116
Ai.	Practice Tips from the Probate Court One Investigators	118
Aj.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish)	119
Ak.	Ward’s Bill of Rights (English/Spanish) & Information to Be Furnished.....	127
Al.	Initial Report of the Guardian of the Person.....	130

The Ad Litem Manual 2018

I. INTRODUCTION:

GOALS: 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*, 2010 Advanced Guardianship Course, State Bar of Texas. For an excellent discussion of the responsibilities of ad litem in areas outside of guardianship, see Smith, Dani D., *Attorney Ad Litem and Guardian ad Litem: An Overview of the Roles and Liabilities in Non-Guardianship Cases*, 2018 Advanced Estate Planning and Probate Course, State Bar of Texas.

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 *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 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.

Judicial Bonds – as of November 1, 2017, any county-level judge (Constitutional County Court or County Court at Law) who handles probate or guardianship matters must furnish a surety bond - In counties with a population of 125,000 or less, this bond must be \$100,000.00.

- In counties with a population of more than 125,000, this bond must be \$250,000.00.

- Judges of Statutory Probate Courts must furnish a bond of \$500,000.00, mandated by Tex. Govt Code § 25.00231 .

- The bond is to be conditioned that the judge will perform the duties required by the Texas Estates Code (i.e. follow-up on Inventories and Accountings, monitor guardianships)

- The bond is to provide coverage for losses caused by the gross negligence of county-level judge.

- In lieu of a bond, the county may elect to obtain insurance instead.

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 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:

1. Attorney Ad Litem - Like any other attorney, an Attorney ad Litem must exercise the same due diligence and vigor and astuteness required of an attorney as in any other representation. *Estate of Tartt*, 531 S.W.2d at 698. Otherwise, there is the potential for a claim for legal malpractice.

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.

In *Guardianship of Humphrey*, 2009 Tex. App. LEXIS 1100 (Tex. App. Tyler, Feb. 18, 2009, pet. denied), the appellants were required to raise the issue of the Attorney ad Litem's ineffective assistance to the trial court.

2. Guardian Ad Litem - 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 1st Dist, February 26, 2009, pet. denied) (court upheld similar statutory immunity for a Guardian Ad Litem under the Texas Family Code) and *Wilz v. Sanders*, 2005 Tex. App. LEXIS 1503, (Tex. App. -

Waco 2005, no pet.) February 23, 2005 (Memorandum) (Immunity of Guardian Ad Litem upheld where appointed under federal statute).

In addition, Tex. R. 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. R. Civ. Proc. 44.

Unlike the immunity conferred for a Guardian ad Litem in a guardianship proceeding, there is no statutory immunity for a Guardian ad Litem appointed under the non-guardianship provisions of the Texas Estates Code or for a Guardian ad Litem appointed under the Trust Code (Tex. Prop. Code § 115.014). In those cases, the issue of possible derived judicial immunity must be examined. Derived judicial immunity affords an officer of the court the same immunity as a judge acting in his or her official capacity being absolute immunity for judicial acts performed in the scope of jurisdiction. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). For an extended analysis of the issue of derived judicial immunity for ad litem, see Smith, *op. cit.* at 10.

II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE

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

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