

**PRESENTED AT**

24<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference

August 4-5, 2022

Galveston, Texas

## **The Ad Litem Manual 2022 (The Role of the Ad Litem)**

**Presented by**

**Judge Guy Herman**

**Presiding Judge, Travis County Probate Court No. 1**

**Presiding Statutory Probate Judge of Texas**

Author Contact Information:

Judge Steve M. King

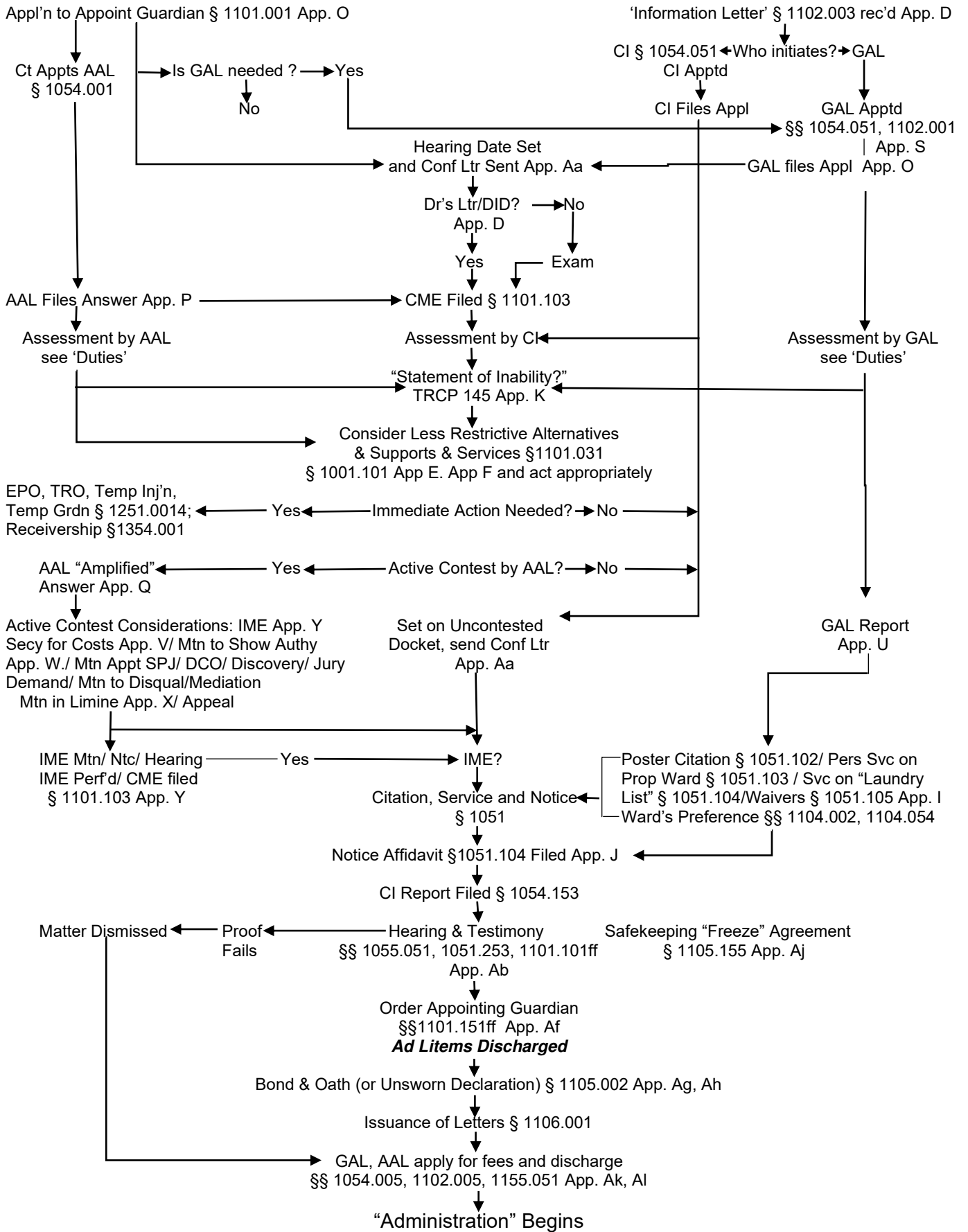
Senior Probate Judge

Fort Worth, TX

Copyright © 2022 Judge Steve M. King

All rights reserved

**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 .....	8
D. The Backdrop: Fraud, Abuse and Exploitation of the Elderly and Disabled .....	9
II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE.....	9
A. Appointment of a Guardian.....	9
B. Restoration/Modification of Guardianship- Attorney Ad Litem.....	9
C. Removal of Guardian – Attorney Ad Litem and Guardian Ad Litem.....	9
D. Removal of Community Administrator – Attorney Ad Litem .....	9
E. Heirship Determinations – Attorney Ad Litem.....	9
F. Disclaimers – Guardian Ad Litem .....	10
G. Probate of Will After Four Years – Attorney Ad Litem .....	10
H. Partition Actions – Guardian Ad Litem .....	10
I. Trust Construction or Modification Actions – Guardian Ad Litem .....	10
J. Mental Health Commitments – Attorney Ad Litem.....	10
K. Purchase of Estate Property by Guardian – Attorney Ad Litem .....	10
L. Sale of Minor’s Interest in Property .....	10
M. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem .....	10
N. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem .....	10
O. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem .....	10
P. Proper Investment by Guardian – Guardian Ad Litem .....	10
Q. Establishment of Pooled Trust Subaccount – Attorney Ad Litem .....	10
R. Final Settlement of Guardianship Estate - Attorney Ad Litem .....	11
S. Judicial Bypass Proceedings– Guardian Ad Litem and Attorney Ad Litem.....	11
T. Family Code Appointments - Guardian Ad Litem and Attorney Ad Litem.....	11
U. “Utility Outfielder” Appointments - Attorney Ad Litem .....	11
V. “Utility Outfielder” Appointments - Guardian Ad Litem .....	11
III. EMBRACE THE TECHNOLOGY .....	11
A. Electronic Resources (Zoom).....	11
B. E-Filing & E-Notice .....	11
IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS.....	12
A. Study this Manual .....	12
B. Guardianship Summary .....	12
C. Can You Get There From Where You Are?.....	12
D. Mechanics of Appointment: The Ad Litem Wheel.....	12
E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services .....	12
F. Local Rules.....	13
G. Standing Orders.....	13
H. What Documents to Expect.....	13
I. Fundamentally Understand Your Role.....	13
<i>MAJOR CAVEAT: Scope of Appointment</i> .....	14
Notes on Medical Records.....	14
1. The Role of the Attorney Ad Litem .....	14
A. Legal Counsel .....	14
B. The Prime Directive .....	14
C. “ <i>But I don’t want a guardian</i> ” .....	14
D. Duties .....	14
2. The Role of the Guardian Ad Litem.....	15
A. Defined .....	15
B. Personal Representative .....	15
C. Assess & Recommend .....	15

D. Duties: Jiminy Cricket or Quarterback? .....	15
E. Additional Duties .....	16
J. Is Immediate Action Required?.....	16
K. Temporary Guardianships .....	16
L. AAL: File an Answer .....	17
M. Investigate: Finding the Black Box .....	18
N. Assess Capacity.....	18
Mandated Abuse Reporting .....	19
O. Independent Medical Exam.....	20
P. The Ad Litem’s Dilemma .....	20
Q. Is the Application Timely Filed?.....	20
R. Who Picks Up the Tab? – Statement of Inability .....	21
First Responder and Veterans Exception.....	21
V. MEDICAL RECORDS .....	21
A. Federal and State Confidentiality Laws .....	21
B. The Physician’s Certificate of Medical Examination.....	22
1. Basics: Incapacitated Proposed Ward .....	22
2. Modification and /or Restoration: CME to consider Supports and Services.....	22
3. Basics: Intellectually Disabled Potential Ward .....	23
4. Independent Medical Exam.....	23
5. Evidentiary Considerations .....	23
6. Maintenance of Guardianship Orders by Care Facilities .....	24
7. Defensive Considerations: The Answer May Depend on Who You Ask .....	24
VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING .....	25
A. Your Best Allies .....	25
B. Settings.....	25
C. Working the File .....	26
D. Ad Litem Reports .....	26
E. Citation and Notice: A Jurisdictional Foundation and the Laundry List.....	26
F. Getting Ahead of the Curve: Registration, Background Checks and Training .....	29
G. “Paperwork” to Have on Hand.....	30
H. The Proposed Order: Powers of the Guardian/ Limitations of the Ward .....	32
Digital Assets.....	32
I. Appointment of Resident Agent.....	33
J. Copies.....	33
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS .....	33
A. General Comments and Decorum .....	33
B. The Hearing at the Bench.....	33
C. Burden(s) of Proof.....	34
D. Bench Instructions and Mandatory Training.....	34
E. Contested Hearings (with a Court Reporter).....	34
F. Trainwrecks .....	35
G. Clerk’s Follow-Up Duties .....	35
H. Say the Words, Take the Money, Go Home.....	35
I. Selling the Follow-Through .....	35
IX. ACTIVE CONTEST OF THE APPLICATION .....	36
NEW! <u>Required Disclosures</u> .....	36
Threshold Consideration .....	36
A. File an Answer! .....	36
B. Determine If Immediate Action is Necessary .....	36
C. Set the Hearing on the Contested Docket.....	36
D. Calling for Backup .....	36
E. Retained Counsel .....	36
F. Request a Statutory Probate Judge .....	37
G. Intervention by ‘Interested Person’ .....	37

H.	Consider Seeking Security for Costs.....	38
I.	Jury Demand .....	40
J.	Pursue Adequate Discovery .....	40
K.	Advocate for Mediation .....	40
L.	Shutting the Gate: TROs, Temporary Guardianships, Notices of Lis Pendens & Receivers.....	41
M.	“Interesting Challenge” – Interest for Standing vs. Adverse Interest .....	41
N.	Challenging the Applicant – Disqualification.....	42
	Criminal Background Checks/ Registration & Database .....	43
O.	If Advantageous – Try to Have Your Client Appear at the Hearing.....	43
P.	Consider Requesting a Closed Hearing.....	43
Q.	The Order: Negotiate a Tactical Retreat.....	43
	Disclosure Requirement: Right to Physical Possession of Ward.....	43
R.	An Appealing Thought? .....	43
S.	Potential Ancillary Litigation.....	44
T.	More Practice Pointers .....	44
X.	FEE CONSIDERATIONS .....	44
	A. Introduction .....	44
	Deposit of Funds for Court Costs.....	44
	B. Basic Premise .....	45
	C. Burden of Proof.....	45
	D. Question of Fact .....	45
	E. Reasonableness .....	45
	F. Guidelines, Not Elements.....	46
	G. Evidence Required .....	46
	H. Expert Testimony .....	46
	I. No “Bonus” Factors .....	46
	J. No Prior Objections Required.....	46
	K. Limited Duties.....	46
	L. Non-Compensable Activities .....	46
	M. Going It Alone.....	47
	N. Fee Applications.....	47
	O. County-Pay Cases .....	47
	P. Private Pay Cases .....	47
	Q. Hourly Rates.....	48
	R. Expenses.....	48
	S. Do Not Bill For: .....	48
	T. When to File.....	48
	U. What to Do with the Fee Application.....	48
	V. Separate Order.....	48
	W. Specific Areas of Concern on Fee Applications .....	48
XI.	HEIRSHIP PROCEEDINGS .....	49
XII.	CLOSING THOUGHTS .....	49
	A. Removal of an Ad Litem.....	49
	B. Re-Activation of the Ad Litem.....	49
	C. Changing Hats – Make an Appearance .....	50
	D. (Yet More) Practice Pointers.....	50
	E. <u>Real</u> Continuing Education .....	50
	F. Think About Your Client .....	50
	G. Clients with Diminished Capacity and New Rule 1.16.....	50
	<i>John Stewart: Last Week Tonight June 3, 2018 – Watch it on YouTube!</i> .....	51

APPENDICES:

A.	Instructions for Video Conferences and Hearings .....	52
B.	Guardianship Summary .....	54
C.	Policy for Court-Initiated Guardianships.....	57
D.	Information Letter & Physician’s Certificate of Medical Exam (with DID).....	59
E.	Less Restrictive Alternatives to Guardianship.....	66
F.	Supports & Services.....	76
G.	Statutory Changes Regarding Fraud Abuse & Exploitation of the Elderly and Disabled .....	77
H.	Investigator’s Checklist .....	78
I.	Waiver of Citation, Consent to Appointment & Request for Notification.....	79
J.	Affidavit Regarding Notice under § 1051.104(b).....	80
K.	Statement of Inability to Afford Payment of Court Costs or an Appeal Bond .....	81
L.	Application for Temporary Guardianship/ Fiat for Hearing.....	83
M.	Proof of Facts (Temporary Guardianship).....	87
N.	Order Appointing Temporary Guardian .....	88
O.	Application for Appointment of a Guardian of the Person (and Estate).....	91
P.	Original Answer (Attorney Ad Litem).....	93
Q.	Original Answer (“Contest”) .....	94
R.	Application & Order for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm .....	95
S.	Motion for Appointment of Guardian Ad Litem and Order .....	98
T.	Entry of Appearance of Guardian Ad Litem.....	100
U.	Report of Guardian Ad Litem .....	101
V.	Motion for Security for Costs & Order.....	102
W.	Motion to Show Authority, Show Cause Citation & Order.....	104
X.	Motion in Limine and to Dismiss Application.....	107
Y.	Motion for Independent Medical Examination, Fiat & Order .....	108
Z.	Handout: Registration, Criminal History Background Checks and Training .....	110
Aa.	Setting Confirmation.....	111
Ab.	Proof of Facts (Guardianship).....	112
Ac.	Exhibit: Evidence in Support of Requested Bond .....	113
Ad.	Exhibit: Evidence in Support of Requested Monthly Allowance .....	114
Ae.	Suggested Cross-Examination Questions for the Ad Litem .....	115
Af.	Order Appointing Guardian of the Person (and Estate).....	116
Ag.	Personal Surety Bond.....	120
Ah.	Oath of Guardian.....	121
Ai.	Unsworn Declaration of Guardian .....	122
Aj.	Safekeeping (“Freeze”) Agreement (Pre-Appointment).....	123
Ak.	Fee Application & Order - County Pay (“Set Fee”) .....	124
Al.	Fee Application & Order – Private or County Pay in Excess of Set Fee.....	125
Am.	Practice Tips from the Probate Court One Investigators .....	127
Am.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish) .....	128
Ao.	Ward’s Bill of Rights (English/Spanish) & Information to Be Furnished.....	138
Ap.	Initial Report of the Guardian of the Person .....	141
Aq.	Final Report of the Temporary Guardian of the Person.....	144
Ar.	Rule 11 Agreement Regarding Initial Disclosures .....	145

# The Ad Litem Manual 2022

## 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 *Twilligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App.—Houston [14<sup>th</sup> Dist.] 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:

Effective September 1, 2021, any attorney representing any person in a guardianship proceeding must have a State Bar Guardianship Education Certification - Tex. Est. Code § 1054.201. The certification requirement no longer applies to just the applicant's attorney and any court-appointed attorneys.

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.

If an attorney must enter an appearance without the certification, they are required to complete the course requirements within 14 days and prior to the filing of any substantive pleading.

The State Bar is mandated to provide the course at a low cost and throughout the state, including an internet version - Tex Govt Code § 81.114. Tex. Est. Code § 1101.153(a)(2).

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*, 329 S.W.3d 923 (Tex. App.—Corpus Christi 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*, 454 S.W.3d 139 (Tex. App.—Texarkana 2014, orig. proceeding).

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 [1<sup>st</sup> 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.



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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Role of the Ad Litem

Also available as part of the eCourse

[2022 Estate Planning, Guardianship and Elder Law eConference](#)

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