

**THE
AD LITEM MANUAL**

**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)

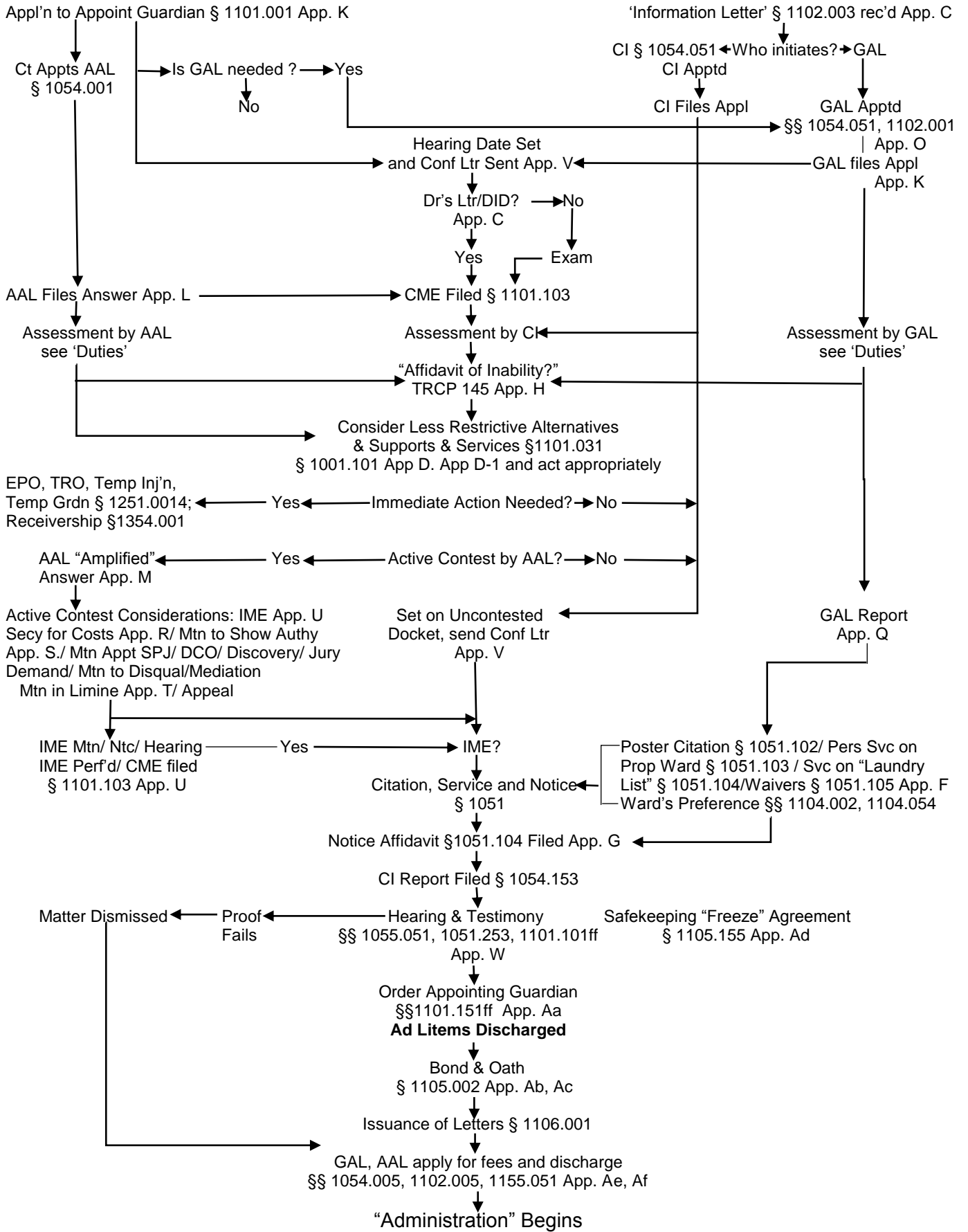


TABLE OF CONTENTS

GUARDIANSHIP (From the Ad Litem’s Perspective).....	Frontispiece
Major Caveat	
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
MAJOR CAVEAT: Scope of Appointment	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

Major Caveat:

Because of the extensive changes in the statutes affecting guardianship enacted by the 85th session of the Texas Legislature, this manual will not be fully updated to reflect these changes until shortly before the effective date of the majority of the enactments.

Pleased consult the webpage of Tarrant County Probate Court One to download the latest version of this manual on or after September 1, 2017.

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 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.

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: *Kabani 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, 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

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 Guardianship & Heirship Proceedings in Texas Probate Courts

First appeared as part of the conference materials for the
19th Annual Estate Planning, Guardianship and Elder Law Conference session
"The Role of the Ad Litem"