

**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
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GUARDIANSHIP
(From the Ad Litem's Perspective)

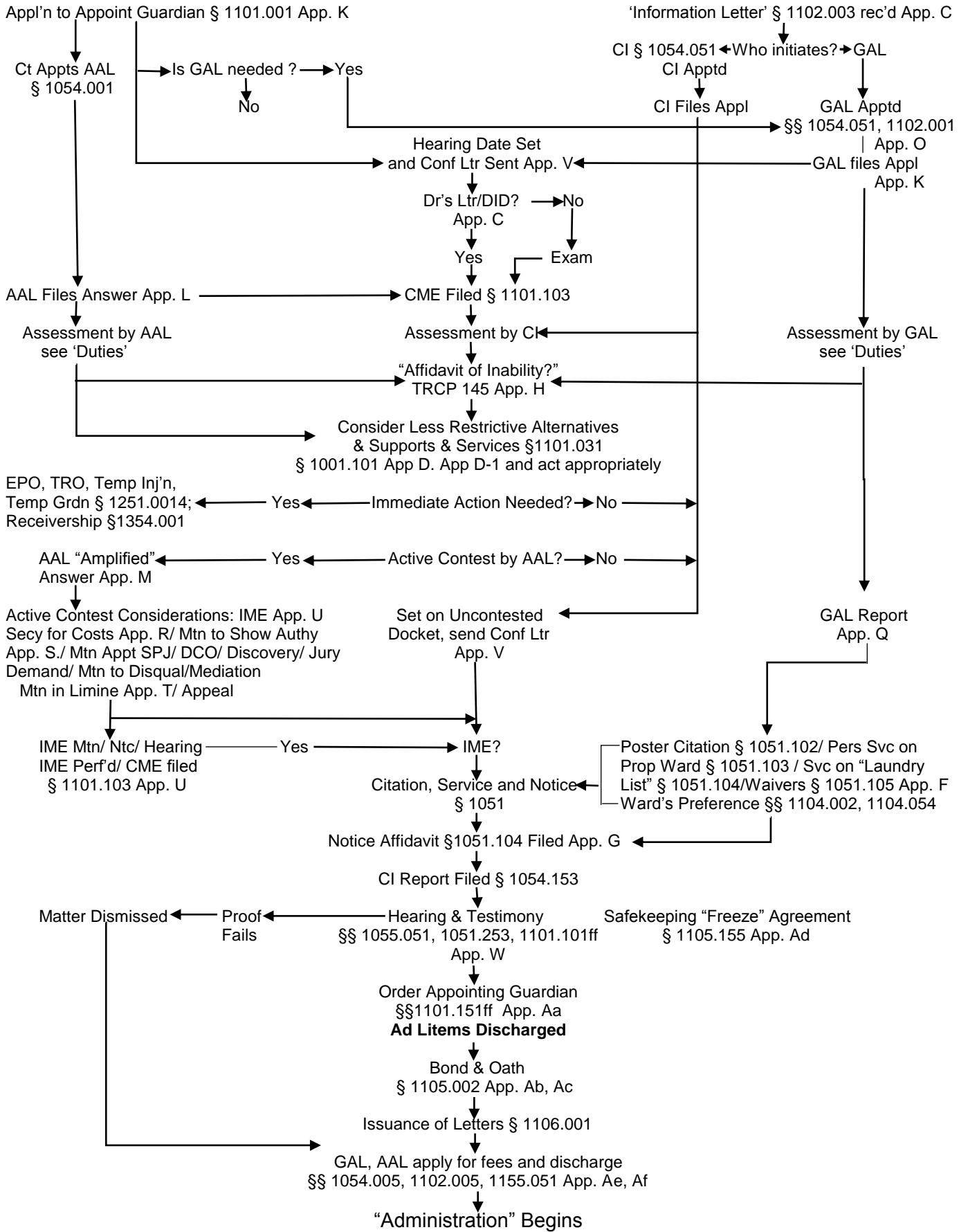


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The Ad Litem Manual 2016

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

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