

**“A Guardian and/or Attorney Ad Litem and Amicus Attorney Involvement
in the Family Mediation Process “**

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The job of an ad litem whether a guardian or attorney ad litem or Amicus is not only challenging and rewarding, it can have a long lasting effect on the children or party we are appointed to represent.

A guardian ad litem and attorney ad litem are defined in Texas Family Code Section 107.001 and the presumed dual role where an in governmental entity is petitioner is clarified in TFC section 107.0125. A guardian ad litem may be appointed by the court or upon Motion of a party and the court shall appoint a guardian ad litem and attorney ad litem in governmental cases where termination or Conservatorship are sought, Texas Family Code Sec 107.011 and 107.012.I

Sec. 107.001. DEFINITIONS. In this chapter:

- (1) "Amicus attorney" means an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child 's best interests rather than to provide legal services to the child.
- (2) "Attorney ad litem" means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.
- (3) "Developmentally appropriate" means structured to account for a child 's age, level of education, cultural background, and degree of language acquisition.
- (4) "Dual role" means the role of an attorney who is appointed under Section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.
- (5) "Guardian ad litem" means a person appointed to represent the best interests of a child. The term includes:
 - (A) a volunteer advocate appointed under Subchapter C;
 - (B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child 's best interests;
 - (C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or
 - (D) an attorney ad litem appointed to serve in
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the dual role.

An attorney ad litem shall be appointed for a parent when an indigent parent responds in opposition to the termination; a parent is served by publication; an alleged father fails to register with the registry under Chapter 160 and whose identity and address are unknown and where an alleged farther registers but the citation cannot be served at that or any other location known to petitioner. TFC 107.013.

Once appointed the guardian ad litem has the charge and the duty to be the personal representative of the child and to protect the child's best interest. The duties and specifics of the duties are clearly stated in Texas Family Code Sec 107.002. The duties are restated in different language as of September 1, 2003. A thorough reading of the new TFC Section 107 needs to be done to make sure your duties and responsibilities as guardian ad litem or attorney ad litem are being performed in the proper manner.

The Guardian Ad litem has the duty to interview the child, if over four years old, and others who are likely to have significant information into a child's history and condition This investigation should be to the extent to determine the best interest of the child including the review of medical, psychological and school records. TFC107. 002;

Sec. 107.002. POWERS AND DUTIES OF GUARDIAN AD LITEM FOR

CHILD. (a) A guardian ad litem appointed for a child under this chapter is not a party to the suit but may:

- (1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child; and
- (2) obtain and review copies of the child 's relevant medical, psychological, and school records as provided by Section 107.006.

(b) A guardian ad litem appointed for the child under this chapter shall:

- (1) within a reasonable time after the appointment, interview:
 - (A) the child in a developmentally appropriate manner, if the child is four years of age or older;
 - (B) each person who has significant knowledge of the child 's history and condition, including any foster parent of the child; and
 - (C) the parties to the suit;
- (2) seek to elicit in a developmentally appropriate manner the child 's expressed objectives;
- (3) consider the child 's expressed objectives without being bound by those objectives;
- (4) **encourage settlement and the use of alternative forms of dispute resolution; and**
- (5) perform any specific task directed by the court.

(c) A guardian ad litem appointed for the child under this chapter is entitled to:

- (1) receive a copy of each pleading or other paper filed with the court in the case in which the guardian ad litem is appointed;
- (2) receive notice of each hearing in the case;
- (3) participate in case staffings by an authorized agency concerning the child;
- (4) **attend all legal proceedings in the case but may**

not call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed in the dual role;

(5) review and sign, or decline to sign, an agreed order affecting the child; and

(6) explain the basis for the guardian ad litem 's opposition to the agreed order if the guardian ad litem does not agree to the terms of a proposed order.

(d) The court may compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit.

(e) Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem 's recommendations relating to:

- (1) the best interests of the child; and
- (2) the bases for the guardian ad litem 's recommendations.

(f) In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian 's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative.

(g) In a contested case, the guardian ad litem shall provide copies of the guardian ad litem 's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

- (1) the date required by the scheduling order; or
- (2) the 10th day before the date of the commencement of the trial.

(h) Disclosure to the jury of the contents of a guardian ad litem 's report to the court is subject to the Texas Rules of Evidence.

Added by Acts 1995, 74th Leg., ch. 20, Sec. 1, eff. Sept. 1, 1995.

Amended by Acts 1995, 74th Leg., ch. 943, Sec. 10, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1294, Sec. 2, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 262, Sec. 1, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 172, Sec. 1, eff. September 1, 2005.

The attorney ad litem role is different although both are charged with the task of encouraging settlement and the use of alternative forms of dispute resolution TFC 107 .002 (5) and TFC 107.003(F).

Sec. 107.003. POWERS AND DUTIES OF ATTORNEY AD LITEM FOR CHILD AND AMICUS ATTORNEY. An attorney ad litem appointed to represent a child or an amicus attorney appointed to assist the court:

- (1) shall:
 - (A) subject to Rules 4.02, 4.03, and 4.04, Texas Disciplinary Rules of Professional Conduct, and within a reasonable

time after the appointment, interview:

(i) the child in a developmentally appropriate manner, if the child is four years of age or older;

(ii) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and

(iii) the parties to the suit;

(B) seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation;

(C) consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court;

(D) investigate the facts of the case to the extent the attorney considers appropriate;

(E) obtain and review copies of relevant records relating to the child as provided by Section 107.006;

(F) participate in the conduct of the litigation to the same extent as an attorney for a party;

(G) take any action consistent with the child's interests that the attorney considers necessary to expedite the

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proceedings;

(H) **encourage settlement and the use of alternative forms of dispute resolution; and**

(I) review and sign, or decline to sign, a proposed or agreed order affecting the child;

(2) must be trained in child advocacy or have experience determined by the court to be equivalent to that training; and

(3) is entitled to:

(A) request clarification from the court if the role of the attorney is ambiguous;

(B) request a hearing or trial on the merits;

(C) consent or refuse to consent to an interview of the child by another attorney;

(D) receive a copy of each pleading or other paper filed with the court;

(E) receive notice of each hearing in the suit;

(F) **participate in any case staffing concerning the child conducted by an authorized agency; and**

(G) attend all legal proceedings in the suit.

Added by Acts 1997, 75th Leg., ch. 1294, Sec. 3, eff. Sept. 1, 1997.

Amended by Acts 2003, 78th Leg., ch. 262, Sec. 1, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 172, Sec. 2, eff. September 1, 2005.

Sec. 107.004. ADDITIONAL DUTIES OF ATTORNEY AD LITEM FOR

CHILD. (a) Except as otherwise provided by this chapter, the attorney ad litem appointed for a child shall, in a developmentally appropriate manner:

(1) advise the child;

(2) represent the child's expressed objectives of representation and follow the child's expressed objectives of representation during the course of litigation if the attorney ad

litem determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem; and

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(3) as appropriate, considering the nature of the appointment, become familiar with the American Bar Association 's standards of practice for attorneys who represent children in abuse and neglect cases, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the American Bar Association 's standards of practice for attorneys who represent children in custody cases.

(b) An attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 shall complete at least three hours of continuing legal education relating to child advocacy as described by Subsection (c) as soon as practicable after the attorney ad litem 's appointment. An attorney ad litem is not required to comply with this subsection if the court finds that the attorney ad litem has experience equivalent to the required education.

(c) The continuing legal education required by Subsection (b) must:

(1) be low-cost and available to persons throughout this state, including on the Internet provided through the State Bar of Texas; and

(2) focus on the duties of an attorney ad litem in, and the procedures of and best practices for, a proceeding under Chapter 262 or 263.

(d) Except as provided by Subsection (e), an attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 shall meet before each court hearing with:

(1) the child, if the child is at least four years of age; or

(2) the individual with whom the child ordinarily resides, including the child 's parent, conservator, guardian, caretaker, or custodian, if the child is younger than four years of age.

(e) An attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 is not required to comply with Subsection (d) before a hearing if the court finds at that hearing that the attorney ad litem has shown good cause why the attorney ad litem 's compliance with that subsection is not feasible or in the best interest of the child. Additionally, a court may, on a showing of good cause, authorize an attorney ad litem to comply with Subsection (d) by conferring with the child or other individual, as appropriate, by telephone or video conference.

Added by Acts 2003, 78th Leg., ch. 262, Sec. 1, eff. Sept. 1, 2003.
Amended by:

Acts 2005, 79th Leg., Ch. 172, Sec. 3, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 268, Sec. 1.04(a), eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 310, Sec. 1, eff. June 15, 2007

Additional duties of the Amicus Attorney

Sec. 107.005. ADDITIONAL DUTIES OF AMICUS ATTORNEY.

(a) Subject to any specific limitation in the order of

appointment, an amicus attorney shall advocate the best interests of the child after reviewing the facts and circumstances of the case. Notwithstanding Subsection (b), in determining the best interests of the child, an amicus attorney is not bound by the child's expressed objectives of representation.

(b) An amicus attorney shall, in a developmentally appropriate manner:

- (1) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court;
- (2) explain the role of the amicus attorney to the child;
- (3) inform the child that the amicus attorney may use information that the child provides in providing assistance to the court; and
- (4) become familiar with the American Bar

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Association's standards of practice for attorneys who represent children in custody cases.

(c) **An amicus attorney may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child.**

Added by Acts 2003, 78th Leg., ch. 262, Sec. 1, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 172, Sec. 4, eff. September 1, 2005.

An ad litem appointed to be both guardian ad litem and attorney ad litem enter into mediation looking after the best interest of the child and protecting those interests. This ad litem not only signs off on the mediated settlement agreement or may decline in signing the agreement. They also have the obligation to help craft the agreement to protect the child's rights. The guardian ad litem is also entitled to explain the basis for the guardian's opposition to an agreed order if the guardian ad litem does not agree with the terms of the proposed order. TFC Section 107.002(c) 6

The involvement and ultimate recommendations of a guardian ad litem tragically sometimes had life or death consequences. Because the recommendations have life-altering implications, a judge relies largely on trust in deciding whom to appoint as a guardian ad litem. The judge, as the decision-maker, must trust the guardian ad litem to contribute to a consensus finding that would be in the child's best interest. Because trial judges have been allowed complete discretion regarding whom to appoint as a guardian ad litem and no mandatory list of qualifications now exists, each trial judge is left to his or her own judgment in deciding whom to appoint. Our local judges appoint guardian ad litem who had attended our court's continuing legal education program for guardians on a biannual basis. All judges who must utilize a guardian /attorney ad litem come to know the lawyers practicing in their courts and the skills and motivation to be an ad litem for the children and even the appointed attorney ad litem for a parent in some family law matters.

In Texas, civil trial judges and guardians have been instructed that the guardian must "participate in the case to the extent necessary to protect the child," *American Gen. Fire & CAS. Co. v. Vandewater*, 907 S.W.2d 491, 493 n.2 (Tex. 1995) (emphasis added), and that "the guardian ad litem should be allowed considerable latitude in determining what ... activities are necessary to that effort," *Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 647 (Tex. App.--Tyler 1993, writ denied). The road map is easier to follow as these duties and obligations are set out in TFC Chapter 107.

A child becomes involved in a court action because of an injury to himself or herself, due to a divorce or S.A.P.C.R. Action, a CPS case or where a termination Action is sought. When negotiations between the parents or parties may be involved a guardian ad litem may be needed. All areas in which a guardian ad litem is involved in behalf of the child are areas of possible conflict that could benefit from the mediation process.

All of the other parties in the dispute may have their opinions of what is best for the child; however the guardian ad litem is the personal representative who has the responsibility to express the interests of the child.

The obligation to know your client, the child, is especially true when the ad litem is participating in the Mediation Process. Usually a client has to be present at the mediation because they are the final decision makers to the mediated settlement agreement. This is not the norm when a child is a party, or has an interest in the outcome, therefore, the guardian ad litem, as the personal representative becomes the expression of the interests, perceptions, and feelings of the child. The guardian ad litem should be familiar with the circumstances, even the emotions of the child, for through the ad litem the child is heard in the mediation. Since the child is usually not present at the mediation, the ad litem is in the unique position to relay the child's viewpoint while protecting their best interests.

The ad litem can be a positive force in the mediation by knowing the child's needs, reviewing pleadings, discovery, medical records or counseling reports, and reviewing discovery, if necessary, so that the guardian ad litem is ready to discuss and express the child's interests during mediation. The court's order allows this information to be given to an attorney ad litem or guardian ad litem as found in the new section TFC section 107.006.

The ad litem should participate in the Opening or joint session, state the beliefs or the appropriateness of the negotiations as the mediation progresses and affects the child so that the mediated agreement reflects a

child's best interests. The ad litem should be involved so that the parties understand how their negotiations ultimately will or will not meet the needs of the child.

The ad litem should actively participate in the mediation and listen to the viewpoints so the interests and concerns and goals of the other parties are known and considered while the ad litem expresses the best interests of the child.

The mediation, from the ad litem's viewpoint, may focus on how to provide the child the proper access to either parents or care givers if there is a family or kinship placement, in a manner that is best for the child. The ad litem should remain flexible in the mediation process so that the needs, the age, the relationship of the parents and possibly other parties are all reviewed and considered while the ad litem protects the child's interests. The ad litem should consider the risks of protracted litigation, and the effects of trial and the presentation of the child before the trier of the facts. These are important factors to consider in mediation.

The review of expert reports, medical records, school records, the effect the current circumstances of the parents and the child just prior to mediation help the ad litem to express the most current needs of the child they are obligated to protect. The child cannot speak for himself or herself; therefore the ad litem should be prepared to speak for them.

The child can still intelligently relate their needs, desires, and interests even if they are not present in the mediation. A guardian ad litem then could decide whether to have the child, depending on age and maturity, present and involved in the mediation. Again the ad litem should know the child/ client well enough to determine how the child could participate in the mediation.

An adult child that has a diagnosis of mental illness still has many rights as allowed under the Texas Constitution and under the Mental Health and Safety Code. An ad litem may be involved in a variety of circumstances where marital relations are involved. All of these areas are, certainly, legal circumstances where the ad litem may be participating in a mediation process to protect the child's interests and allowed for closure of the factors in dispute. The ad litem may have been appointed under T.R.C.P. #173, Family code 107.0013 or Probate Code #683.

Confidentiality and the guardian ad litem report:

A guardian ad litem needs to remember that the mediation process is a confidential process when stating reasons to oppose the agreed

settlement in report to the court and when testifying in court. **The Attorney ad litem does not file a report with the court nor can they testify even if serving in the dual role of the guardian/attorney ad litem; however an attorney ad litem is a participant in the mediation and is bound the confidentiality rules. Civil Practice and Remedies Code 154.073ⁱⁱ**

The confidentiality allowed in mediation is one of the cornerstones of why mediation is so successful in Texas. The guardian ad litem, if a report to the court is being prepared after mediation, should be aware of the confidentiality practiced in the mediation and should be careful in crafting the Court Report when making the report and recommendations to the court whether the Mediation lead to a mediated settlement agreement or to an impasse.

The ad litem's job is an important one that can be challenging and rewarding. When the guardian ad litem knows the child, reviews the pleadings, discovery, expert reports, medical records, school records and interviews the appropriate witnesses or parents the participation can aid in the parties in arriving at a mediated settlement agreement. The child will be protected and the appointed guardian ad litem duties and responsibility can be well performed and understood by the adults involved.

When the fees are submitted for payment, in the case of a private suit out side of a CPS termination case the party responsible for paying the ad litem, TFC 107.015 might even consider the fees reasonable, fair and necessary.

The guardian ad litem can be very helpful and beneficial to the mediation process by adding a third prospective into the process and by presenting options that meet the child's needs,

The attorneys for the parties are obligated to pursue their client's interests which may not always align with the best interest of the child, The ad litem can help the parties focus on the effects an agreements has on a child and can help the mediator "reality check" the parents/parties to focus on including the child on an equal or higher plain than just expressing their own needs and positions.

Accept the duty and responsibility of an guardian ad litem help the child or children and fully participate in the mediation process to obtain a settlement result that is in the child's best interest while still considering the concerns and view points of the parents/ parties involved.

The Amicus is the attorney appointed by the court as the friend of the court and to assist the court and does not represent the child. TFC107.003.

ii CIVIL PRACTICE AND REMEDIES CODE

Title 7. ALTERNATE METHODS OF DISPUTE RESOLUTION

Chapter 154. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Subchapter D. MISCELLANEOUS PROVISIONS

Current through End of 2007 Regular Session

Sec. 154.073. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS. (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Amended by Acts 1999, 76th Leg., ch. 1150, Sec. 30, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 1352, Sec. 6, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1034, Sec. 13, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1420, Sec. 21.001(6), 21.002(3), eff. Sept. 1, 2001.