

Guidelines for Guardians *ad Litem* for Children in Family Court

Preamble

The following are guidelines for attorneys and non-lawyer **volunteers** appointed as guardians *ad litem* for children in most family court cases such as child protection and adoption. **For private custody and visitation cases, see additional statutory requirements.** It is emphasized that these are guidelines and not standards of conduct for guardians *ad litem* in all proceedings. To begin with, decisions to be made on behalf of children by a guardian *ad litem* are always affected by the particular facts and circumstances. Moreover, such decision-making by definition calls for a guardian *ad litem* to exercise judgment and discretion, functions that are not easily standardized.

These guidelines are offered to orient attorneys and non-attorneys to the roles they are called upon to play as a guardian *ad litem* for a child in court proceedings. They are also offered to guide decision-making by a child's guardian *ad litem* and help formulate the relationship between the child and the guardian *ad litem*. Because they are guidelines, however, they are not intended to serve as a basis for a standard of care or to create a legal duty.

Finally, these guidelines are not intended to supplant the rules of professional conduct for lawyers appointed as attorneys to represent children. Reference is made to Rule 1.14 of the Rules of Professional Conduct, at Rule 407 of the South Carolina Appellate Court Rules. Counsel appointed as an attorney for a child is governed by the rules of professional conduct in ways that might depart from these guidelines. For example, while neither South Carolina law nor these guidelines recognize the existence of a client privilege for the benefit of a child with a guardian *ad litem*, an attorney will be guided by the rules of professional conduct, which recognizes such a privilege.

I. Qualifications

A. A guardian *ad litem* must be an adult who:

1. is able to make independent, mature decisions on issues involved in the case.
2. employs impartiality, open-mindedness and fairness in determining what is in the best interest of the child.
3. has not represented a person or party in pending or past litigation involving the child.
4. has not been convicted of any crime listed in Chapter 3 of Title 16, Offenses Against the Person; in Chapter 15 of Title 16, Offenses Against Morality and Decency;

in Article 3 of Chapters 53 of Title 44, Narcotics and Controlled Substances; or for the crime of contributing to the delinquency of a minor, provided for in Section 16-17-490.

5. has received appropriate training.

II. Training

A. Appropriate training of the guardian *ad litem* includes instruction in these subjects:

1. the court process, including alternative dispute resolution and testifying
2. interviewing techniques
3. support services available to guardians *ad litem*
4. report drafting
5. recordkeeping
6. investigation and assessment skills
7. attorney/guardian *ad litem* roles and duties including ethical issues
8. negotiation skills
9. methods for minimizing the potential stress to the child or the child's family caused by the court process
10. cultural, ethnic, economic and social differences
11. social, emotional, physical, developmental, educational, vocational and psychological stages and needs of children
12. services and benefits available for children, i.e., school related issues; special education; health care issues; and government benefits
13. role and procedures of relevant agencies
14. relevant statutes, i.e., Child Welfare Reform and Adoption Act.

B. The appointing judge may waive the training qualifications if a finding is made that the person being appointed is qualified due to prior experience as a guardian *ad litem*, or is otherwise competent. Such finding shall be reflected in the appointment order.

III. Role

A. A guardian *ad litem* for a minor child is a special guardian appointed by the court in particular litigation. The guardian *ad litem* is lawfully invested with the power and charged with the duty of protecting the child's interests in the litigation.

B. A child becomes a party by virtue of the appointment of the guardian *ad litem*. The guardian *ad litem* is subject to all the rules of the court and shall receive all pleadings, notices, discovery, correspondence relating to the child, orders and notices of appeal.

IV. Process and Duties

A. A guardian *ad litem* should conduct an independent assessment to determine what is in the best interest of the child.

B. A guardian *ad litem* should interview the parties, parents and caretakers of the child, unless it would be contrary to the child's interests or otherwise inappropriate under the circumstances. Consent of the parents' attorneys, if any, should be obtained by the guardian *ad litem* before communicating with the parents. Unless the parents' interests conflict with those of the child, the guardian *ad litem* should give deference to their wishes, absent a good reason to do otherwise.

C. A guardian *ad litem* should communicate with the child as appropriate in light of the child's age and maturity. The guardian *ad litem* should explain the role that he or she will play in the particular litigation and the nature of the relationship the child should expect to have with the guardian *ad litem*. The guardian *ad litem* should be careful not to raise false hopes or unreasonable expectations, and keeping in mind the temporary nature of the relationship, should not facilitate overdependence. A guardian *ad litem* should keep the child informed about the status of the litigation and the child's interests that may be affected by the litigation. A guardian *ad litem* should explain what he or she thinks is best for the child, even if it conflicts with the child's wishes.

D. A guardian *ad litem* should strive to protect confidential communications with the child and should help the child understand that anything that the child tells the guardian *ad litem* may be revealed. A guardian *ad litem* should carefully explain to a child under what circumstances he or she is allowed, or may be compelled, to disclose the child's confidences. Prior to disclosure, the guardian *ad litem* should discuss with the child any intention to disclose a confidential communication and the reasons for doing so. A guardian *ad litem* should give deference to the wishes of the child in deciding whether to disclose a confidential communication, absent an appropriate reason for doing otherwise.

E. A guardian *ad litem* should consult with the child and make decisions with the child about the outcome of the proceedings affecting the child, commensurate with the child's age, experience, maturity and judgment. A guardian *ad litem* should recognize that children have varying degrees of competence and, to the extent a child is able to articulate an opinion about the ultimate outcome of the proceeding, the child's opinion is entitled to weight. In any case in which the guardian *ad litem* must make important decisions on behalf of the child, the guardian *ad litem* should consider all the surrounding circumstances and act with care to safeguard and advance the best interest of the child.

F. When circumstances suggest the need for independent legal representation of the child, for example, when a child of sufficient age and maturity disagrees with the position of the guardian *ad litem* regarding the proceedings, the guardian *ad litem* should move for a hearing on the issue. If the court finds that the child is capable of mature and independent decisions, the guardian *ad litem* should be dismissed and an attorney appointed for the child. The guardian *ad litem* duties shall continue in addition to the child's attorney in cases where required by statute. (§ 20-7-110)

G. A guardian *ad litem* should inform the court of the relevant wishes of the child, irrespective of the child's age. If the child does not have his or her own attorney, the guardian *ad litem* should assist the child in conveying the child's wishes to the court through appropriate means, such as testimony or the introduction of evidence. This is a responsibility of the guardian *ad litem* regardless of whether the child's expressed wishes coincide with those of the guardian *ad litem*'s opinions of the best interest of the child.

H. A guardian *ad litem* should perform assigned duties competently and should be prompt, diligent and attentive to details to assure that the matter undertaken is completed without avoidable harm to the child's best interest.

I. A guardian *ad litem* should recognize areas of expertise beyond his or her competence and make efforts to obtain sufficient information, training or assistance in those areas.

J. If an attorney is appointed or hired to represent the guardian *ad litem*, the guardian *ad litem* is the client and is owed the same duties and has the same rights as any other client, including the right to determine the objectives of the litigation, to receive legal advice and counseling and to guide the efforts of the attorney. It is the responsibility of the guardian *ad litem* to request the appointment of an attorney.

K. In judicial proceedings involving issues affecting a child's interest, a guardian *ad litem* should (through counsel unless the guardian *ad litem* is an attorney) introduce evidence, examine and cross-examine witnesses, and present the child's positions to the court. The guardian *ad litem* should otherwise participate in the proceedings to the degree necessary to protect the child's interest. If the guardian *ad litem* becomes aware of benefits and services to which the child is entitled, the guardian *ad litem* should bring these issues to the attention of the court.

L. A guardian *ad litem* may advocate a position in court on any issue concerning the interests of the child. Any recommendation to the court must be based on evidence in the record. A guardian *ad litem* may submit briefs, memoranda, affidavits or other documents on behalf of the child the same as any other party. Any report or recommendation of a guardian *ad litem* must be submitted in a manner consistent with the rules of evidence.

M. In child protection cases, written reports including recommendations should be submitted to the court pursuant to the statute. In other types of cases, a guardian *ad litem* should submit a written report only when required to do so by the court or by statute.

N. In some types of cases, a guardian *ad litem* shall be paid the fees ordered by the court or agreed upon between the parties and the guardian *ad litem*. At the earliest possible time, the guardian *ad litem* should notify the parties of the proposed fee. A guardian *ad litem* should submit itemized statements based on the time and

expense records schedule. In child protection cases, the volunteer guardians *ad litem* do not receive fees.

O. In dealing with an unrepresented party, the guardian *ad litem* should take steps to assure that the party understands the guardian *ad litem*'s purpose and that he or she is not serving as an attorney for any party. A guardian *ad litem* should not give advice to unrepresented parties but may answer questions about resources and procedures for obtaining an attorney. If the guardian *ad litem* believes that an unrepresented party may be incompetent this suspicion should be brought to the attention of the court as soon as reasonably possible with notice to the other parties.

P. The duties of the guardian *ad litem* continue until relieved by the court or upon an unappealed final order. The guardian *ad litem* should be mindful that the litigation may not be concluded until all appeals and subsequent proceedings are final. The level of participation in the appeals process is to be determined by the guardian *ad litem* based on the facts and circumstances and in light of the best interest of the child.

Q. Guardians *ad litem* should recognize the need for continuity of representation in a child's life and be prepared to serve throughout all stages of the case. Guardians *ad litem* who are unable to continue to serve should cooperate fully with successor guardians *ad litem*.

6/15/06

Statutory Requirements for Guardians *ad Litem* in Private Custody and Visitation Cases

Although the qualifications, responsibilities and processes revolving around private guardians ad litem are similar in many ways to those of other types of guardians ad litem, there are distinct and specific statutory differences and requirements. These special instructions are provided to interested persons to enable them to understand the full scope of the qualifications and responsibilities.

§ 20-7-1545 Private Guardians *ad Litem*

Guardians *ad litem* are appointed by court order in private action before the family court in which custody or visitation of a minor child is an issue only when the court determines that:

- (1) without a guardian *ad litem*, the court will likely not be fully informed about the facts of the case, and there is a substantial dispute which necessitates a guardian *ad litem*; or
- (2) both parties consent to the appointment of a guardian *ad litem* who is approved by the court.

The court has absolute discretion in determining who will be appointed as a guardian *ad litem* in each case.

§ 20-7-1547 Qualifications

A guardian *ad litem* may be either an attorney or a layperson and must have the following qualifications:

- (1) must be 25 years of age or older.
- (2) must possess a high school diploma or its equivalent.
- (3) an attorney guardian *ad litem* must annually complete a minimum of six hours of family law continuing legal education credit in the areas of custody and visitation; however, this requirement may be waived by the court.
- (4) for initial qualification, a lay guardian *ad litem* must have completed a minimum of nine hours of continuing education in the areas of custody and visitation and three hours of continuing education related to substantive law and procedure in family court. The courses must be approved by the Supreme Court Commission on Continuing Legal Education and Specialization.
- (5) a lay guardian *ad litem* must observe three contested custody merits hearings prior to serving as a guardian *ad litem*. The lay guardian must maintain a certificate showing that observation of these hearings has been completed. This certificate, which shall be on a form approved by Court Administration, shall state the names of the cases, the dates and the judges involved and shall be attested to by the respective judge.
- (6) lay guardians *ad litem* must annually complete six hours of continuing education courses in the areas of custody and visitation.
- (7) must not have been convicted of any crime listed in Chapter 3 of Title 16, Offenses Against the Person; in Chapter 15 of Title 16, Offenses Against Morality and Decency; in Chapter 25 of Title 16, Criminal Domestic Violence; in Article 3 of Chapter 53 of Title 44, Narcotics and Controlled Substances; or convicted of the crime of contributing to the delinquency of a minor, provided for in Section 16-17-490.
- (8) must not have ever been on the Department of Social Services Central Registry of Abuse and Neglect.
- (9) Upon appointment to a case, a guardian *ad litem* must provide an affidavit to the court and to the parties attesting to compliance with the statutory qualifications. The affidavit must include, but is not limited to, the following:
 - (i) a statement affirming that the guardian *ad litem* has completed the training requirements;

(ii) a statement affirming that the guardian *ad litem* has complied with the requirements of this section, including a statement that the person has not been convicted of a crime; and

(iii) a statement affirming that the guardian *ad litem* is not nor has ever been on the Department of Social Services Central Registry of Child Abuse and Neglect.

Appointment of an Attorney for the Lay Guardian

A party or the guardian *ad litem* may petition the court by motion for the appointment of an attorney for the guardian *ad litem*. This appointment may be by consent order. The order appointing the attorney must set forth the reasons for the appointment and must establish a method for compensating the attorney.

§ 20-7-1549 Responsibilities and Duties

The responsibilities and duties of a guardian *ad litem* include, but are not limited to:

(1) representing the best interest of the child.

(2) conducting an independent, balanced and impartial investigation to determine the facts relevant to the situation of the child and the family. An investigation must include, but is not limited to:

(i) obtaining and reviewing relevant documents, except that a guardian *ad litem* must not be compensated for reviewing documents related solely to financial matters not relevant to the suitability of the parents as to custody, visitation or child support. The guardian *ad litem* shall have access to the child's school records and medical records. The guardian *ad litem* may petition the family court for the medical records of the parties.

(ii) meeting with and observing the child on at least one occasion.

(iii) visiting the home settings if deemed appropriate.

(iv) interviewing parents, caregivers, school officials, law enforcement and others with knowledge relevant to the case.

(v) obtaining the criminal history of each party when determined necessary.

(vi) considering the wishes of the child, if appropriate.

(3) advocating for the child's best interest by making specific and clear suggestions, when necessary, for evaluation, services and treatment for the child and the child's family. Evaluations or other services suggested by the guardian *ad litem* must not be ordered by the court, except upon proper approval by the court or by consent of the parties.

(4) attending all court hearings related to custody and visitation issues, except when attendance is excused by the court or the absence is stipulated by both parties. A guardian must not be compensated for attending a hearing related solely to a financial matter if the matter is not relevant to the suitability of the parents as to custody, visitation or child support. The guardian must provide accurate, current information directly to the court, and that information must be relevant to matters pending before the court.

(5) maintaining a complete file, including notes. A guardian's notes are his work product and are not subject to subpoena.

(6) presenting to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the child's best interest. The final written report may contain conclusions based upon the facts contained in the report. The final written report must be submitted to the court and all parties no later than 20 days prior to the merits hearing, unless that time period is modified by the court, but in no event later than 10 days prior to the merits hearing. The 10-day requirement for the submission of the final written report may only be waived by mutual consent of both parties. The final written report must not include a recommendation concerning which party should be awarded custody, nor may the guardian *ad litem* make a recommendation as to the issue of custody at the merits hearing unless requested by the court for reasons specifically set forth on the record. The guardian *ad litem* is subject to cross-examination on the facts and conclusions contained in the final written report. The final written report must include the names, addresses and telephone numbers of those interviewed during the investigation.

(7) A guardian *ad litem* may submit briefs, memoranda, affidavits or other documents on behalf of the child. A guardian *ad litem* may also submit affidavits at the temporary hearing. Any report or recommendation of a guardian *ad litem* must be submitted in a manner consistent with the South Carolina Rules of Evidence and other state law.

§ 20-7-1551 Guardian *ad Litem* as Mediator

A guardian *ad litem* must not mediate, attempt to mediate or act as a mediator in a case to which he has been appointed. However, nothing in this section shall prohibit a guardian *ad litem* from participating in a mediation or a settlement conference with the consent of the parties.

§ 20-7-1553 Compensation

At the time of appointment of a guardian *ad litem*, the family court judge must set forth the method and rate of compensation for the guardian *ad litem*, including an initial authorization of a fee based on the facts of the case. If the guardian *ad litem* determines that it is necessary to exceed the fee initially authorized by the judge, the guardian must provide notice to both parties and obtain the judge's written authorization or the consent of both parties to charge more than the initially authorized fee.

A guardian appointed by the court is entitled to reasonable compensation, subject to the review and approval of the court. In determining the reasonableness of the fees and costs, the court must take into account:

- (1) the complexity of the issues before the court;
- (2) the contentiousness of the litigation;
- (3) the time expended by the guardian;
- (4) the expenses reasonably incurred by the guardian;

- (5) the financial ability of each party to pay fees and costs; and
- (6) any other factors the court considers necessary.

The guardian *ad litem* must submit an itemized billing statement of hours, expenses, costs and fees to the parties and their attorneys pursuant to a schedule as directed by the court. At any time during the action, a party may petition the court to review the reasonableness of the fees and costs submitted by the guardian *ad litem* or the attorney for the guardian *ad litem*.

§ 20-7-1555 Disclosure

When a guardian *ad litem* is appointed, he or she must provide written disclosure to each party of the nature, duration and extent of any relationship the guardian *ad litem* or any member of the guardian's immediate family residing in the guardian's household has with any party. He or she must also disclose any interest adverse to any party or attorney that might cause the impartiality of the guardian *ad litem* to be challenged and any membership or participation in any organization related to child abuse, domestic violence or drug and alcohol abuse.

§ 20-7-1557 Removal of the Guardian *ad Litem*

A guardian *ad litem* may be removed from a case at the discretion of the court.