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## Guide for lawyers appointed in child protection cases

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# Guide for Lawyers Appointed in Child Protection Cases

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The Children's Law Office serves as a statewide resource center for attorneys and other professionals involved in judicial proceedings related to child protection. The Children's Law Office is a special grant-funded program of the USC School of Law. Staff of the Children's Law Office are available to discuss legal issues and strategy with attorneys appointed to represent a guardian ad litem or those who are appointed to serve as a guardian ad litem in a child protection case. The Children's Law Office also offers general assistance to attorneys appointed to represent other parties including parents in these cases. Newsletters and other publications are also available.

For more information, or to schedule a training session, contact the Children's Law Office at (803) 777-1646 or <http://childlaw.sc.edu>.

The Children's Law Office is funded in part by the SC Bar Foundation



School of Law  
University of South Carolina

The Children's Law Office, USC School of Law has prepared this information to assist attorneys appointed in child protection cases in family court. The appointments are made pursuant to Rule 608, SCACR.

The child protection statutes require that attorneys be appointed to represent indigent parents and the guardian ad litem for the children. Attorneys may be appointed to represent parents, the guardian ad litem, or as a guardian ad litem. Rule 17, SCRCP requires that attorneys may also be appointed as a guardian ad litem for parents who are incompetent, under the age of 18, or incarcerated.

Attorneys may receive reimbursement for their court appointed cases. They should contact the Office of Indigent Defense at (803) 734-1343, [www.scoid.state.sc.us](http://www.scoid.state.sc.us) or the Office of the Statewide Guardian Ad Litem Program at (803) 734-1695 for information.

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**Part One** of this publication presents the definitions applicable in child abuse and neglect cases. **Part Two** presents a flow chart and checklists for the following types of hearings in a child protection case:

- Probable Cause
- Removal
- Permanency Planning
- Termination of Parental Rights (TPR)
- Intervention

**Part Three** presents practice tips for attorneys who are appointed to represent parents. **Part Four** reprints the Guidelines for Guardians Ad Litem that were previously produced by the South Carolina Bar. These guidelines introduce the lawyer to the role responsibilities of the guardian ad litem.

## **Part One: Definitions**

*Following are definitions from the Child Protection Act, S.C. Code Ann. § 20-7-490 and 20-7-736(Supp. 2005):*

1. Child means a person under the age of eighteen.
2. Child abuse or neglect, or harm occurs when the parent, guardian, or other person responsible for the child's welfare:
  - a) inflicts or allows to be inflicted upon the child physical or mental injury or engages in acts or omissions which present a substantial risk of physical or mental injury to the child, including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which:
    - (i) is administered by a parent or person in loco parentis;
    - (ii) is perpetrated for the sole purpose of restraining or correcting the child;
    - (iii) is reasonable in manner and moderate in degree;
    - (iv) has not brought about permanent or lasting damage to the child; and
    - (v) is not reckless or grossly negligent behavior by the parents.
  - b) commits or allows to be committed against the child a sexual offense as defined by the laws of this State or engages in acts or omissions that present a substantial risk that a sexual offense as defined in the laws of this State would be committed against the child.
  - c) fails to supply the child with adequate food, clothing, shelter, or education as required under Article 1 of Chapter 65 of Title 59, supervision appropriate to the child's age and development, or health care though financially able to do so or offered financial or other reasonable means to do so and the failure to do so has caused or presents a substantial risk of causing physical or mental injury. However, a child's absences from school may not be considered abuse or neglect unless the school has made efforts to bring about the child's attendance, and those efforts were unsuccessful because of the parents' refusal to cooperate. For the purpose of this chapter "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law.
  - d) abandons the child.
  - e) encourages, condones, or approves the commission of delinquent acts by the child and the commission of the acts are shown to be the result of the encouragement, condonation, or approval.

3. Person responsible for a child's welfare: A person responsible for a child's welfare includes the child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by Section 20-7-2700, of a public or private residential home, institution, agency, or child daycare facility, or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child. A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.

4. Physical injury means death or permanent or temporary disfigurement or impairment of any bodily organ or function.

5. Mental injury means an injury to the intellectual, emotional, or psychological capacity or functioning of a child as evidenced by a discernible and substantial impairment of the child's ability to function when the existence of that impairment is supported by the opinion of a mental health professional or medical professional.

6. Substance abuse: it is presumed that a newborn child is an abused or neglected child as defined in S.C. Ann. § 20-7-490(Supp. 2005) and that the child cannot be protected from further harm without being removed from the custody of the mother upon proof that:

- a) a blood or urine test of the child at birth or a blood or urine test of the mother at birth shows the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite is the result of medical treatment administered to the mother of the infant or the infant, or
- b) the child has a medical diagnosis of fetal alcohol syndrome; and
- c) a blood or urine test of another child of the mother or a blood or urine test of the mother at the birth of another child showed the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite was the result of medical treatment administered to the mother of the infant or the infant, or
- d) another child of the mother has the medical diagnosis of fetal alcohol syndrome.

This presumption may be rebutted by proof that the father or another adult who will assume the role of parent is available and suitable to provide care for the child in the home of the mother. The father or the other adult must be made a party to the action and subject to the court's order establishing the conditions for maintaining the child in the mother's home. This statutory presumption does not preclude the court from ordering removal of a child upon other proof of alcohol or drug abuse or addiction by the parent or person responsible for the child who has harmed the child or threatened the child with harm. S.C. Code Ann. §20-7-736 (Supp. 2005).

## Part Two: Hearings Checklists

*Following are checklists outlining the requirements of each proceeding in a family court child protection case.*

### **Probable Cause Hearing** **(Also known as the EPC Hearing)** S.C. Code Ann. § 20-7-610 (Supp. 2005)

*Similar to a preliminary hearing in a criminal case. Defendant can only submit affidavits and cross-examine witnesses.*

*Time Frame: To be held within 72 hours after the emergency removal of the child from the home.*

1. The court must determine whether there was probable cause for emergency protective custody and assumption of legal custody by DSS.
  - a) The law authorizes removal if there is substantial and imminent danger to the child's life, safety, or health.
  - b) A rebuttable presumption favors removal of a newborn in certain circumstances involving drug or alcohol abuse by the mother. S.C. Code Ann. § 20-7-736(G) (Supp. 2005).
  - c) Only the injured child, in an excessive corporal punishment situation, may be removed from the home, unless there is a history of domestic violence, alcohol or drug abuse, or other circumstances that indicate danger to the other children.
2. The court must determine whether reasonable efforts were made to prevent removal and whether return of the child to the home at the time of the hearing would be contrary to the welfare of the child.
3. The court must appoint an attorney and guardian *ad litem* for the child. Indigent parents are entitled to appointed counsel. S.C. Code Ann. § 20-7-110(Supp. 2005).
4. The written order must specify reasonable efforts made to prevent the removal of the child. S.C. Code Ann. § 20-7-610(N)(Supp. 2005):
  - a) Services made available to the family before DSS assumed legal custody;
  - b) Efforts to provide services to the family prior to removal;
  - c) Why services did not eliminate need for removal;
  - d) Outcome of family meeting or reasons meeting was not held;
  - e) Whether efforts were reasonable, including availability, timeliness, adequacy of services, and reasonableness of efforts to place with relative or in other familiar environment;
  - f) What efforts were made to place a child in a family member's home or other familiar environment.

It is possible to find that nothing could have been done to allow the child to remain safely in the home or that removal without services or further services was reasonable.

5. The court may direct expedited relative placement.
  - a) The court shall require DSS to conduct records checks;
  - b) The court may hold the court record open for 24 hours to receive reports.
6. The court must set the time and date for the hearing on the merits.

**Removal Hearing**  
**(Also known as the Merits Hearing)**

S.C. Code Ann. § 20-7-736 (Supp. 2005)  
*Child is removed from the home*

*Time Frame: Held within 35 days of receipt of removal complaint by family court.*

1. The court must assure DSS has complied with due process requirements, including service of the summons, complaint, right to counsel, hearing notice and notice to noncustodial parent. No responsive pleading is required.
2. The court must determine by a *preponderance of the evidence*:
  - a) Whether the child has been subjected to, or is threatened with a substantial risk of harm as defined by S.C. Code Ann. § 20-7-490 (Supp. 2005) of physical injury, mental injury, lack of supervision, neglect, abandonment, or a sexual offense.  
*Note:* The court may authorize treatment, but not enter a finding of abuse by the parent, in cases where the caregiver failed to obtain medical care due to religious beliefs or an exercise of parental judgment concerning what treatment would be in the child's best interests. S.C. Code Ann. § 20-7-652(Supp. 2005).
  - b) Whether return of the child to the home would place the child at unreasonable risk of harm to his or her life, physical health or safety, or mental well-being, and
  - c) Whether the child can reasonably be protected from this harm through measures short of removal.
3. The court must make specific findings concerning whether the agency has made reasonable efforts to prevent the child's removal from the home, including findings regarding:
  - a) The types of services offered to the family before the removal and how these services related to the needs of the family;
  - b) The agency's efforts to provide services to the family before DSS removed the child from the home;
  - c) The reason the agency's efforts to provide the services to the family did not prevent the child's removal from the home;
  - d) The court must review the agency's efforts to provide services and determine whether the agency's efforts were timely, available, adequate and realistic under the circumstances;
  - e) Whether reasonable efforts to preserve or reunify the family are required pursuant to S.C. Code Ann. § 20-7-763 (Supp. 2005).
4. If the child is to be removed from the home, the court must advise the parents verbally on the record, and include in the written order, that failure to comply with the placement plan can result in termination of parental rights. S.C. Code Ann. § 20-7-764(E)(Supp. 2005).
5. The court must approve a placement plan, if the plan appropriately addresses all issues required by statute. S.C. Code Ann. § 20-7-764(Supp. 2005). At a minimum, the placement plan is a written document, which must address the following:
  - a) Specific reasons for the removal and the specific changes that must be made before the child is returned home;
  - b) Other conditions in the home that warrant state intervention which would not alone justify removal, and the changes that must be made before intervention is terminated;
  - c) Specific time frames for the parents to accomplish the objectives of the plan, and the means for measuring when the objectives have been met;
  - d) Goals of the plan must relate to the problems, which resulted in the removal;
  - e) Social and other services to be made available to the parents or other relevant adult;
  - f) Financial responsibility of the parents;

- g) Visitations between the child and the child's parents, siblings and other close relatives;
  - h) Nature and location of child's placement unless disclosure would be contrary to the child's best interests;
  - i) Child's placement should be as close to the child's home as possible;
  - j) Preference for kinship placement or placement of the child with another responsible adult who has a constructive and caring relationship with the child;
  - k) Specify the number of contacts the caseworker or member of the casework team will have with the child, at a minimum of once per month. The court can order more frequent contacts;
  - l) Social and supportive services to benefit the child and the foster parents; and
  - m) The parent's participation or lack of participation in the development of the plan.
6. The placement plan must be submitted to the court at the removal hearing, or within 10 days after the hearing. If the plan is not submitted at the removal hearing, a hearing on the plan must be held if requested by a party.
7. If the conditions, which justified removal, include the parent's addiction or abuse of controlled substances, then the court may require that the plan address the substance abuse issues pursuant to S.C. Code Ann. § 20-7-765(Supp. 2005).
8. Continuances
- a) Continuances are to be granted only in *exceptional circumstances*. If continued, the merits hearing must be completed within 65 days of the filing of the removal complaint.
  - b) If the hearing is to be held beyond 65 days and the child is not returned home, the court must issue a written order finding: (i) the child should remain in the custody of DSS because there is probable cause to believe return home would endanger the child; (ii) the hearing is set for a date and time certain not more than 30 days from the date hearing was to be held; and (iii) exceptional circumstances support a continuance or the parties and guardian *ad litem* agree to a continuance.
  - c) The case may be continued due to absence of a witness only if the testimony of the witness is necessary to the court's decision and the party exercised due diligence to secure attendance of witness and the court cannot start the hearing and have the witness testify at a later date or by deposition.
  - d) When a continuance is granted the court shall ensure that the hearing is rescheduled within the time frames and give the hearing priority over other matters except: probable cause hearings, detention hearings, and other custody cases if there are compelling reasons to do so. S.C. Code Ann. § 20-7-610(M)(Supp. 2005).

## Initial Permanency Planning Hearing

S.C. Code Ann. § 20-7-766 (Supp. 2005)

*Child has remained out of the home*

*Time Frame: To be held no later than one year after child enters foster care. The child may have entered foster care by emergency protective custody, a relinquishment for adoption or by a removal action.*

DSS must initiate this hearing by filing a motion, with a supplemental report, and serving it on all parties at least ten days prior to the hearing. If the child entered foster care by way of a relinquishment for adoption, with no other case pending in the court, the case may be initiated by the filing of a summons and petition for review. No responsive pleading is required.

The court shall review the permanent plan for the child offered by DSS. If the plan is one other than that listed below, the court must find **compelling reasons** for approval of the plan and that the plan is in the **best interests** of the child.

### **The court must order one of the following:**

1. *Return home.* If the court determines there would not be unreasonable risk of harm to the child's life, physical health or safety, or mental well being, the child must be returned home. In determining whether unreasonable risk exists, the court shall consider all evidence including whether the parent substantially complied with the placement plan. Following the child's return home, agency supervision and services may be ordered for a specified time up to one year.
2. *Extension for reunification.* If the child is likely to be returned home if additional services are provided to the parents, the court can extend the placement plan or order compliance with a modified plan. The plan can be extended for a reasonable time not to exceed **18 months** after the child came into foster care. The court must find, at the time of the hearing, that termination of parental rights is not in the best interests of the child and that the best interest of the child will be served by extending the plan.
3. *Termination of Parental Rights (TPR).* If the child cannot be returned to parents, the court must order DSS to file a TPR complaint within 60 days of receipt of the order. DSS shall exercise every reasonable effort to promote and expedite the adoptive placement and adoption of the child, including thorough adoption assessment and child-specific recruitment for all children including those with "special needs." An adoption may not be delayed or denied just because a child has special needs.
4. *Relative or non-relative custody/guardianship.* After assessing the viability of adoption, if DSS demonstrates that TPR is not in the child's best interests and the court finds that the best interests of the child would be served, the court may award legal guardianship or custody or both to a suitable, fit and willing relative or non-relative; a home study must be conducted prior to the award of custody or legal guardianship or both. The court may order a period of visitation or trial placement prior to receiving the home study and may order supervision and services for up to one year.



**If the child is not returned home at the permanency planning hearing, the court must include the following specific findings in its order:**

- a) Facts supporting the selection of a plan other than return home;
- b) What services were provided/offered to parents to facilitate reunification;
- c) The compliance or lack of compliance with placement plan by all parties;
- d) Extent to which parents have visited or supported the child and any reasons why visitation or support has not occurred or been infrequent;
- e) Whether previously ordered services should continue and whether additional services are needed. If any, specify the expected date of completion which must be no longer than 18 months from the date the child was placed in foster care;
- f) Whether return of the child is expected and identify changes parent must make in circumstances, conditions, or behavior;
- g) Whether foster care will continue and specify time;
- h) If child is 16 or older, services needed for transition to independent living;
- i) Whether child's current placement is safe and appropriate;
- j) Whether DSS has made reasonable efforts to assist parents in remedying causes of child's placement or retention in foster care, and
- k) The steps the department is taking to promote and expedite adoptive placement and to finalize the adoption of the child, including documentation of child specific recruitment efforts.

## Additional Permanency Planning Hearings

S.C. Code Ann. §20-7-766 (Supp. 2005)

*Child continues to be out of the home*

1. If the child remains in foster care at the initial permanency planning hearing, future permanency planning hearings must be held.
2. The pendency of an appeal does not deprive the family court of jurisdiction to hear a case. The court retains jurisdiction to review the status of the child and can act on matters not on appeal.
3. A named party, child's guardian *ad litem*, or local foster care review board may file a motion for review at any time. Any other party in interest (individual or agency with custody or placement, foster parent, etc.) may move to intervene and, if granted, move for review. The notice of motion and motion for review must be served on the parties at least 10 days prior to the hearing.
4. Criteria for additional permanency planning hearings:
  - a) If termination of parental rights (TPR) case is initiated, the TPR hearing can serve as the next permanency planning hearing; but only if it is held no later than one year from the date of the previous permanency planning hearing.
  - b) If the court ordered extended foster care for the purpose of reunification at the first permanent planning hearing, an additional hearing must be held on or before the completion date specified in the plan, but no later than **six months** from the date of the last court order or **18 months** from the date the child entered foster care. A different permanent plan other than extension for reunification purposes must be selected at the subsequent permanency planning hearing.
  - c) Permanency planning hearings must be held annually after a termination of parental rights hearing. No further permanency planning hearing is required after the filing of a decree of adoption.
  - d) If the court grants custody or guardianship to a parent, relative, or suitable nonrelative with a period of supervision, the services and supervision automatically terminate on the date specified in the court order. During that period, DSS or the guardian *ad litem* can file a motion for a review hearing, which stays the termination of the case. If the court finds by clear and convincing evidence that the child will be threatened with harm if services or supervision do not continue, the court can extend the period of services or supervision for a specified time. The court order must specify the services and supervision necessary to reduce or eliminate the risk of harm to the child.
  - e) Future permanency planning hearings must be held at least annually for every child in foster care.

## **Termination Of Parental Rights Hearing**

S.C. Code Ann. § 20-7-1560 et seq.(Supp. 2005)

1. DSS or any interested party may file for TPR.
2. A summons and complaint for termination of parental rights must be filed and served on the child, the parents, and the agency having placement.
3. The court must assure that counsel has been appointed as required. S.C. Code Ann. § 20-7-1570(Supp. 2005)
  - a) Counsel for the volunteer guardian *ad litem* must be appointed if the case is contested, otherwise if the volunteer guardian *ad litem* finds the appointment of counsel necessary one must be appointed.
  - b) If the guardian *ad litem* is an attorney, the appointment of another attorney is on a case-by-case basis.
  - c) Appointment of counsel for indigent parents is required unless the parents are in default.
4. To terminate parental rights, the court must find by *clear and convincing evidence* that TPR is in the best interest of the minor child and that one of the following grounds exists:
  - a) Severity or repetition of the abuse or neglect, and the home cannot be made safe within twelve months;
  - b) Parent has not remedied the conditions, which resulted in the child's removal and the child has been out of the home for six months following adoption of a placement plan by court order or by agreement between DSS and parent.
  - c) Willful failure to visit for six months;
  - d) Willful failure to support for six months;
  - e) Presumptive legal father is not the biological father of the child and the welfare of the child can be best served by terminating the legal father's rights;
  - f) Diagnosable condition of alcohol or drug addiction, mental deficiency or mental illness, which is unlikely to change in a reasonable time period and the condition makes the parent unlikely to provide minimally acceptable care of the child. There is a presumption that the diagnosable condition of alcohol or drug addiction is unlikely to change in a reasonable time if the parent as required by the department or family court has been required to participate in a treatment program, and the parent has failed two or more times to complete the program successfully or has refused in two or more separate meetings with the department to participate in a treatment program;
  - g) The child is abandoned. S.C. Code Ann. § 20-7-490(19)(Supp. 2005);
  - h) The child has been in foster care for 15 of the most recent 22 months;
  - i.) The child or another child of the parent—as a result of the physical abuse—has died or is admitted to the hospital for in-patient care and the parent has been convicted, pled guilty or nolo contendere to an offense against a person S.C. Code Ann. § 16-3-10 (et seq.), criminal domestic violence S.C. Code Ann. §16-25-20, CDV of a high and aggravated nature S.C. Code Ann. § 16-25-65, or assault and battery of a high and aggravated nature.
  - j) The parent of the child pleads guilty or nolo contendere to or is convicted of the murder of the child's other parent.
  - k) Conception of a child as a result of criminal sexual conduct, unless the sentencing court makes a specific finding that the criminal sexual conduct conviction is based upon consensual sex where neither the victim nor the actor were younger than 14 years nor older than 18 years.
5. The court issues an order forever terminating parental rights to the child and granting custody to the plaintiff or child-placing agency for adoption. A permanent placement plan

must be submitted to the court and the guardian *ad litem* within 30 days after close of the proceedings. S.C. Code Ann. § 20-7-1574(Supp. 2005).

6. The court can deny the TPR complaint, but must specify a new permanent plan or order a hearing on a new permanent plan. S.C. Code Ann. § 20-7-1574 (Supp. 2005).
  - a) If a hearing is required, it must be held within 15 days of the denial of the TPR complaint and before the same judge if possible.
  - b) If the court determines that an additional permanency hearing is not needed, the court may: (a) grant custody to the parents, if they have counterclaimed for custody and there is not an unreasonable risk to the child, with supervision by the agency for up to one year; or (b) order another permanent plan pursuant to S.C. Code Ann. § 20-7-766(E)(Supp. 2005).

## Intervention Hearing

S.C. Code Ann. § 20-7-738 (Supp. 2005)  
*Child is not removed from the home*

*Time Frame: Held within 35 days of receipt of the complaint by family court.*

DSS may file for the authority to intervene and provide protective services if it determines by a preponderance of the evidence that the child has been abused or neglected, and that the child cannot be adequately protected without intervention. Removal from the home is not required. An Intervention Hearing is to be held within 35 days of receipt of the complaint by the family court.

1. The court must assure that the agency has complied with due process requirements, which include service of a summons, complaint, and notification of right to counsel and hearing date. No responsive pleading is required.
2. The court must find by a *preponderance of the evidence* that (1) the child is abused or neglected as defined by S.C. Code Ann. § 20-7-490(Supp. 2005), and (2) the child cannot be protected from further harm without intervention.
3. The family court will review and approve a treatment plan, and include the terms of the plan in the court order. The plan must:
  - a) Detail changes in parental behavior or home conditions that must be made;
  - b) Detail services which will be provided to the family;
  - c) Be prepared with the participation of parents, the child, and other agencies or individuals that will provide services;
4. The plan must be submitted to the court at the hearing. If changes are ordered, a revised plan must be submitted to the court and parties within two weeks. S.C. Code Ann. § 20-7-762(A) & (B)(Supp. 2005).
5. The court shall set a specific date when the treatment goals must be achieved. The court by order may set a date for a review hearing.
6. If services are not to be terminated within 12 months the department must schedule a review hearing. S.C. Code Ann. § 20-7-762(C)(Supp. 2005).
7. The court shall set a specific date when the court's jurisdiction will end, which is not to exceed 18 months. Jurisdiction can be extended if, on motion of any party, the court finds there is clear and convincing evidence that the child is threatened with harm unless services continue. S.C. Code Ann. § 20-7-762(C)(Supp. 2005).

# Child Abuse and Neglect Court Timelines (child has been removed from home)

Within 72 hours  
of emergency removal

**PROBABLE CAUSE HEARING**

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Within one business day of start of  
abuse or neglect investigation

**FILING OF COMPLAINT FOR REMOVAL**

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Within 35 days of filing of  
removal petition

**REMOVAL/MERITS HEARING**

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Within 12 months of the child's  
placement in foster care

**PERMANENCY PLAN HEARING**

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Within 60 days of receipt of court order  
finding termination of parental rights  
(TPR) is permanent plan

**FILING OF COMPLAINT FOR TPR**

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Time set for hearing

**TPR HEARING**

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Within 30 days of close of TPR  
proceedings

**PLAN FOR PERMANENT PLACEMENT OF THE  
CHILD TO COURT AND GUARDIAN AD LITEM**

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Within 60 days of close  
of the TPR proceedings

**PLAN FOR IMPLEMENTATION OF THE  
PERMANENT PLAN FOR THE CHILD TO COURT  
AND GUARDIAN AD LITEM**

## **Part Three: Practice Tips for Attorneys Representing Parents**

- Meet with your client as early as possible in the process.
- Meet with your client occasionally during the process.
- In Removal and Intervention proceedings, you are not required to file and serve responsive pleadings.
- In TPR proceedings, you must counterclaim for custody if your client desires to have the child return home.
- Make sure the DSS caseworker and the agency attorney know you are representing a parent.
- Be aware of all contacts, interactions, and conversations your client has with DSS caseworkers.
- Request to be notified of all meetings and hearings to which your client is invited.
- Attend all meetings and hearings with your client.
- If you are to represent a parent at a probable cause hearing, remember that parents are not allowed to testify or present witnesses. Prepare affidavits.
- Along with your client, participate in the development of placement/treatment plans.
- Before merits, permanency planning, and TPR hearings, request a review of the caseworker's records or ask DSS to provide you with a copy.
- Determine whether your client has criminal charges as a result of the alleged abuse or neglect. Contact your client's defense attorney to discuss the charges and the implications of the case in family court.
- To avoid a child remaining in foster care, collect from your client the names of suitable relatives and friends who might be able to care for the child temporarily (or permanently).
- If you identify a suitable relative or friend, ask DSS to perform a home study.
- Remember that if the family court finds that your client abused or neglected a child, your client's name could be entered in the Central Registry of Child Abuse and Neglect.
- After a child is removed, the family court must conduct a permanency planning hearing to review the case within 12 months. However, any party may petition the court for earlier review.
- Monitor your client's progress and the agency's services.
- Petition for early review if your client has substantially complied with the placement plan and is ready to regain custody.
- If your client fails to complete the placement plan, DSS may file an action to terminate parental rights.
- To help educate your client about his/her rights, contact the Children's Law Office to obtain a copy of [Child Abuse, Child Neglect: What Parents Should Know If They Are Investigated](#).

## **Part Four: Guidelines for Guardians *ad litem* For Children in Family Court**

### **Preamble**

The following are guidelines for lawyers and non-lawyer professionals appointed as guardians *ad litem* for children in most family court cases. It is emphasized that these guidelines are 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 of the case and the type of litigation. 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 lawyers and non-lawyers to the roles they are called on to play as guardians *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 lawyers to represent children or to contradict the South Carolina Rules of Civil Procedure, South Carolina Rules of Family Court, South Carolina Rules of Evidence or South Carolina law.

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 a lawyer 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*, a lawyer appointed as counsel will be guided by the Rules of Professional Conduct, which recognize such a privilege.

### **Guidelines**

#### **Qualifications**

1. A guardian *ad litem* must be an adult who should:
  - a) be able to make independent, mature, and informed decisions on issues involved in the case;
  - b) employ impartiality, open-mindedness and fairness in determining what is in the best interest of the child
  - c) have not represented a person or party in pending or past litigation involving the child;
  - d) have not been convicted of any crime listed in Chapter 3 of Title 16, Offenses Against the Person; Chapter 15 of Title 16, Offenses Against Morality and Decency; Article 3 of Chapter 53 of Title 44, Narcotics and Controlled Substances; or for the crime of contributing to the delinquency of a minor, provided for in S.C. Code Ann. 16-17-490; and
  - e) have received appropriate training or experience.



## **Training/Experience**

1. Appropriate training or experience of the guardian *ad litem* would include the following areas:
  - a) the court process, including alternative dispute resolution and testifying
  - b) interviewing techniques
  - c) resources available to guardians *ad litem*
  - d) report drafting
  - e) record keeping
  - f) investigation skills
  - g) lawyer/guardian *ad litem* roles and duties including ethical issues
  - h) negotiation skills
  - i) methods for minimizing the potential stress to the child or the child's family caused by the court process
  - j) cultural, ethnic, economic and social differences
  - k) social, emotional, physical, developmental, education, vocational and psychological stages and needs of children
  - l) services and benefits available for children (i.e., school related issues; special education; health care issues; and government benefits)
  - m) role and procedures of relevant agencies
  - n) relevant statutes (i.e., S.C. Code Ann. 20-7-121 et seq.) Child Welfare Reform and Adoption Assistance Act.
2. The court may waive the training qualification upon finding the person being appointed is qualified due to prior experience as a guardian *ad litem* or is otherwise competent. This finding should be reflected in the order of appointment.

## **Role**

1. 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.
2. The guardian *ad litem* is subject to all the rules of the court and shall receive all pleadings, notices, discovery, and correspondence relating to the child, orders and notices of appeal.

## **Responsibilities**

1. A guardian *ad litem* should conduct an independent investigation to determine what is in the best interest of the child.
2. 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. If the parties are represented by counsel, the guardian *ad litem* should respect the attorney-client relationship and obtain the consent of the parties' lawyer before the interview. 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.
3. 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, which the guardian 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 unreasonable expectations and, keeping in mind the temporary nature of the relationship, should maintain objectivity. A guardian *ad litem* should keep the child generally 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 to the child what he or she thinks is best for the child, even if it conflicts with the child's wishes.

4. A guardian *ad litem* should strive to protect confidential communications with the child and help the child understand that anything that he or she tells the guardian *ad litem* may be revealed. A guardian *ad litem* should carefully explain to a child under what circumstances the guardian is allowed, or may be compelled, to disclose the child's confidences. A guardian *ad litem* should give appropriate deference to the wishes of the child in deciding whether to disclose a confidential communication, absent an appropriate reason for doing otherwise.
5. Commensurate with the child's age, experience, maturity and judgment the guardian *ad litem* should consult with the child about the proceedings and other issues affecting the child. 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, that the child's opinion is entitled to varying degrees of 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 interests of the child.
6. In rare circumstances, independent legal representation of the child may be appropriate—for example, when a child of sufficient age and maturity has a substantial and material conflict with the position of the guardian *ad litem* regarding the proceedings. If the conflict is unresolvable, 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* may be dismissed and a lawyer appointed for the child. The guardian *ad litem* must continue in addition to the child's lawyer in cases where required by statute. (See, e.g. S.C. Code Ann. S.C. Code Ann. 20-7-110)
7. A guardian *ad litem* should inform the court of the relevant wishes of the child, irrespective of the child's age. This is a responsibility of the guardian *ad litem* regardless of whether the child's expressed wishes coincide with the opinions of the guardian *ad litem* regarding the best interests of the child. If the child does not have a lawyer, 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.
8. 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 interests.
9. If a lawyer is appointed or retained to represent the guardian *ad litem*, the guardian *ad litem* is the client. The guardian *ad litem* is owed the same duties and has the same rights as any other client, including the right to determine the objectives of the litigation and to receive legal advice and counseling. It is the responsibility of the guardian *ad litem* to request the appointment of a lawyer when necessary.
10. In judicial proceedings involving issues affecting a child's interest, a guardian *ad litem* should through counsel (unless the guardian *ad litem* is a lawyer) 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.

11. 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 and other South Carolina law.
12. In child protection cases, written reports including recommendations should be submitted to the court pursuant to 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.
13. A guardian *ad litem* appointed by the court shall be paid the amount assessed by the court or agreed upon between the parties and the guardian *ad litem*. A guardian *ad litem* should submit itemized statements based on time and expense records. At the earliest possible time the guardian *ad litem* should notify the parties of any proposed fee schedule. Fee arrangements among private parties are not precluded by these guidelines and should be set forth in writing.
14. In dealing with an un-represented party, the guardian *ad litem* should take steps to assure that the party understands the guardian *ad litem's* purpose and that the guardian is not serving as a lawyer for any party. A guardian *ad litem* should not give advice to un-represented parties but may answer questions about resources and procedures for obtaining a lawyer. If the guardian *ad litem* believes that an un-represented 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.
15. The duties of the guardian *ad litem* continue until relieved by the court or upon entry of a final judgment. 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 of the case and the child's best interests.
16. Guardians *ad litem* should recognize the need for continuity of representation 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*.

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