

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: ORDER ESTABLISHING TENNESSEE SUPREME COURT RULE
40A, APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY
PROCEEDINGS**

ORDER - Filed - February 17, 2009

In response to requests from parties in court proceedings involving child custody issues, the Standing Committee on Children and Family Affairs of the Tennessee House of Representatives held hearings concerning the appointment of guardians ad litem in such proceedings. As a result of these hearings, the Committee referred the issue of guardian ad litem appointment to the Tennessee Supreme Court for further study and for consideration of a rule governing such appointments. With the able assistance of judges and practitioners experienced in court proceedings involving child custody issues, the Court has considered the issue referred by the Committee. Rule 40A represents the culmination of the Court's study.

Accordingly, it is hereby ORDERED that the rule set forth in attached Exhibit A be and hereby is adopted as Rule 40A of the Rules of the Supreme Court of Tennessee.

It is further ORDERED that Rule 40A is a provisional rule that shall govern all custody proceedings, as defined in Section 1(a), from May 1, 2009 through April 30, 2010. At an appropriate time during this one-year period, the Court may solicit comments regarding the operation, effect, and efficacy of this rule and, if warranted, will circulate revisions of this rule for review and comment and eventual adoption.

FOR THE COURT:

JANICE M. HOLDER, CHIEF JUSTICE

Rule 40A. Appointment of Guardians Ad Litem in Custody Proceedings

SECTION 1. DEFINITIONS

(a) “Custody proceeding” means a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.

(b) “Abuse or neglect proceeding” means a court proceeding for protection of a child from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) “Guardian Ad Litem” means a person appointed to represent the best interests of a child or children in a custody proceeding. Persons eligible to serve as guardian ad litem include:

- (1) a specially trained Court-Appointed Special Advocate;
- (2) an attorney; or
- (3) 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;

SECTION 2. APPLICABILITY

This Rule applies to all custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, and to all custody proceedings pending on or commenced after the effective date of this Rule.

SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a guardian ad litem when the court finds that the child’s best interests are not adequately protected by the parties and that separate representation of the child’s best interests is necessary. Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court’s discretion to appoint guardians ad litem shall be exercised sparingly. In most instances, the child’s best interests will be adequately protected by the parties.

(c) In determining whether appointing a guardian ad litem is necessary, the court shall consider:

- (1) the fundamental right of parents to the care, custody, and control of their children.
- (2) the nature and adequacy of the evidence the parties likely will present;

- (3) the court's need for additional information and/or assistance;
- (4) the financial burden on the parties of appointing a guardian ad litem and the ability of the parties to pay reasonable fees to the guardian ad litem;
- (5) the cost and availability of alternative methods of obtaining the information/evidence necessary to resolve the issues in the proceeding without appointing a guardian ad litem; and
- (6) any factors indicating a particularized need for the appointment of a guardian ad litem, including:
 - (i) the circumstances and needs of the child, including the child's age and developmental level;
 - (ii) any desire for representation or participation expressed by the child;
 - (iii) any inappropriate adult influence on or manipulation of the child;
 - (iv) the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child from the processes of litigation;
 - (v) any higher than normal level of acrimony indicating the parties lack of objectivity concerning the needs and best interests of the child;
 - (vi) any interference, or threatened interference, with custody, access, visitation, or parenting time, including abduction or risk of abduction of the child;
 - (vii) the likelihood of a geographic relocation of the child that could substantially reduce the child's time with a parent, a sibling, or another individual with whom the child has a close relationship;
 - (viii) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child during periods of custody, visitation, or parenting time with that party;
 - (ix) any special physical, educational, or mental-health needs of the child that require investigation or advocacy; and

(x) any dispute as to paternity of the child.

(d) If the court concludes that appointing a guardian ad litem is necessary, the person appointed shall possess the knowledge, skill, experience, training, or education that enables the guard ad litem to conduct a thorough and impartial investigation and effectively represent the best interests of the child.

SECTION 4. APPOINTMENT ORDER

(a) Appointment of a guardian ad litem shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

(1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;

(2) the specific duties to be performed by the guardian ad litem in the case;

(3) the deadlines for completion of these duties to the extent appropriate;

(4) the duration of the appointment; and

(5) the terms of compensation consistent with Section 12 of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties and authority. Providing such specificity will assist the parties in understanding the guardian ad litem's role, will enable the court to exercise effective oversight of the guardian ad litem's powers and duties, and will facilitate meaningful appellate review.

(d) A guardian ad litem shall immediately disclose any relationships or associations between the guardian ad litem and any party which might reasonably cause the guardian ad litem's impartiality to be questioned. This disclosure must be made no later than fifteen (15) days after appointment.

(e) There is no right to a peremptory change of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be addressed by trial courts through motion practice. Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

SECTION 5. DURATION OF APPOINTMENT

Appointment of a guardian ad litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment,

the appointment shall terminate automatically when the trial court order or judgment disposing of the custody proceeding becomes final.

SECTION 6. ROLE OF GUARDIAN AD LITEM

(a) The role of the guardian ad litem is to represent the child's best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence.

(b) The guardian ad litem shall not function as a special master for the court or perform any other adjudicative responsibilities.

(c) The guardian ad litem shall represent the child's best interests and not the child's wishes or preferences.

SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD

(a) Subject to subsections (b) and (c), when the court appoints a guardian ad litem in a custody proceeding, the court shall issue an order, with notice to all parties, authorizing the guardian ad litem to have access to:

(1) the child; and

(2) confidential information regarding the child, including the child's educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the child, any delinquency records involving the child, and other information relevant to the issues in the proceeding.

(b) A child's record that is privileged or confidential under law other than this Rule may be released to a guardian ad litem only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records. Information that is privileged under the attorney-client relationship may not be disclosed except as otherwise permitted by law of this state other than this Rule.

(c) An order issued pursuant to subsection (a) must require that a guardian ad litem maintain the confidentiality of information released, except as necessary for the resolution of the issues in the proceeding. The court may impose any other condition or limitation on an order of access which is required by law, rules of professional conduct, the child's needs, or the circumstances of the proceeding.

SECTION 8. DUTIES/RIGHTS OF GUARDIAN AD LITEM

(a) The guardian ad litem shall satisfy the duties and responsibilities of the appointment in an unbiased, objective, and fair manner.

(b) A guardian ad litem 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 7.

(c) A guardian ad litem appointed in a custody proceeding shall:

- (1) 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;
- (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 of the issues related to the child and the use of alternative forms of dispute resolution; and
- (5) perform any specific task directed by the court.

(d) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:

- (1) fully investigate all of the circumstances relevant to the child's position and identify all of the factual support for the child's position;
- (2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.
- (3) if the guardian ad litem is of the opinion that the child's best interests and the

child's wishes conflict, the guardian ad litem shall advise the court of the child's wishes and direct the court's attention to any available information supporting the child's position.

SECTION 9. PARTICIPATION IN PROCEEDING

(a) A guardian ad litem appointed in a custody proceeding is entitled to:

- (1) receive a copy of each pleading or other record filed with the court in the proceeding;
- (2) receive notice of and attend each hearing in the proceeding;
- (3) participate in case staffings by an authorized agency concerning the child; and
- (4) attend all legal proceedings in the case, but a guardian ad litem may not take any action that may be taken only by an attorney representing a party, including making opening and closing statements, examining witnesses in court, and engaging in formal discovery pursuant to the Tennessee Rules of Civil Procedure.

(b) Unless all parties consent, a guardian ad litem shall not engage in ex parte communications with the court concerning the custody proceeding except for scheduling and other administrative purposes when circumstances require and as otherwise may be authorized by law other than this Rule.

(c) A guardian ad litem may communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication should not occur outside the attorney's presence.

(d) In the event a guardian ad litem prepares a report, copies of the report shall be provided to the attorneys for the parties by a deadline that shall be established by the court. Unless all parties consent, the guardian ad litem's report shall not be provided to the court.

(e) The guardian ad litem's report, if any, shall include:

- (1) a description of the guardian ad litem's investigation, including who was interviewed and what records were reviewed;
- (2) an analysis of the facts that the guardian ad litem believes will be presented;
- (3) recommendations regarding the best interests of the child;
- (4) the reasons for the guardian ad litem's recommendations, utilizing the applicable statutory factors;

(5) any conflict between the guardian ad litem's recommendations and the child's preferences; and

(6) any other information the guardian ad litem believes to be appropriate.

(f) Any party may call the guardian ad litem to testify as a witness. The admissibility of the guardian ad litem's testimony is subject to the Tennessee Rules of Evidence.

(g) The guardian ad litem's report shall not be admitted into evidence; however, the parties may use the guardian ad litem's report in preparing for an evidentiary hearing as it may allow the parties to determine which issues are contested and alert the parties to the identity of potential witnesses who may be interviewed.

(h) The court or the parties may compel a guardian ad litem to attend a trial or hearing relating to the child and to testify as necessary for the proper disposition of the custody proceeding.

SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which guardians ad litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The appointment order shall specify the hourly rate to be paid the guardian ad litem, the maximum fee that may be incurred without further authorization of the court, the allocation of the fee among the parties, and when payment is due. In setting the hourly rate, the maximum fee, and the allocation, the court shall consider the financial hardship to the parties of imposing further costs in the proceedings. Consideration of this factor is particularly appropriate where the parties to the custody proceeding are the child's parents who are already represented by counsel.

(b) The guardian ad litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the guardian ad litem's fees and expenses are reasonable, the court shall consider the following factors:

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

- (5) the financial ability of each party to pay fees and costs;
- (6) the fee customarily charged in the locality for similar services; and
- (7) any other factors the court considers necessary.

(c) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

- (1) equitably allocate fees and expenses among the parties;
- (2) order a deposit to be made into an account designated by the court for the use and benefit of the guardian ad litem;
- (3) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (2) to be paid into the account.

(d) The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. Any order authorizing the guardian ad litem to hire expert witnesses must specify the hourly rate to be paid the expert witness, the maximum fee that may be incurred without further authorization from the court, how the fee will be allocated between the parties, and when payment is due.

(e) To receive payment under this section, the guardian ad litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and expenses charged and supported by an affidavit in accordance with Tennessee Rule of Civil Procedure 5.

(f) Any objection to the guardian ad litem's fee claim shall be filed within thirty days after the claim is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(i) If the initial allocation of guardian ad litem fees and/or expenses among the parties has become inequitable as a result of the income and financial resources available to the parties at the conclusion of the custody proceeding, the conduct of the parties during the custody proceeding, or any other similar reason, the court may reallocate the fees and expenses. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.

SECTION 12. EFFECTIVE DATE

This rule is adopted as a provisional rule for one year. It governs all custody proceedings as defined in Section 1(a) from May 1, 2009 through April 30, 2010. At an appropriate time during this one-year period, the Court will solicit comments regarding the operation, effect, and efficacy of this rule and, if warranted, will circulate revisions of the rule for review and comment and eventual adoption.