

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PROPOSED RULE GOVERNING APPOINTMENT OF
GUARDIANS AD LITEM FOR MINOR CHILDREN IN
DIVORCE AND POST-DIVORCE PROCEEDINGS**

Filed:

ORDER

The Court is considering the adoption of a new Rule of the Supreme Court governing the appointment of guardians ad litem for minor children in divorce and post-divorce proceedings. The Court hereby solicits written comments from judges, lawyers, bar associations, members of the public, and any other interested parties, concerning the proposed new rule set out in the attached Appendix A. The deadline for submitting written comments is June 30, 2008. Written comments should be addressed to:

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

The Clerk shall provide a copy of this order, including Appendix A, to LexisNexis and to Thomson-West. In addition, this order, including Appendix A, shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX A

RULE ____, RULES OF THE TENNESSEE SUPREME COURT

GUIDELINES FOR GUARDIANS AD LITEM APPOINTED FOR MINOR
CHILDREN IN DIVORCE AND POST-DIVORCE PROCEEDINGS

(a) Application.

This rule shall apply to all courts conducting divorce and post-divorce proceedings.

(b) Definitions.

As used in this Rule, unless the context otherwise requires:

(1) "Guardian ad litem" means an attorney, licensed to practice law in the state of Tennessee and in good standing, appointed by the court to assist the court in making a determination for the parenting and best interests of the child, including child support, allocation of parenting responsibilities, and establishment of residential schedule.

(2) "Divorce proceeding" refers to an action brought pursuant to Tennessee Code Annotated Title 36 wherein a party seeks the dissolution of marriage. For purposes of this Rule, a "divorce proceeding" also includes an action in which a party seeks a legal separation.

(3) "Post-divorce proceeding" refers to an action brought by a former spouse against another former spouse after the granting of divorce wherein a party seeks modification of the final decree of divorce in some manner which involves the order regarding a minor child or minor children. For purpose of this Rule, a "post-divorce proceeding" also includes an action brought by anyone who has standing, seeking to modify the final decree of divorce in some manner which involves the order regarding a minor child or minor children.

(4) "Appointing court" refers to the judge of the court in which the divorce proceeding or post-divorce proceeding is pending, and a judge who enters an order of appointment of a guardian ad litem. In rare cases where parts of the case may be determined by more than one trial judge, all those who hear portions of the case are contemplated within the term "appointing court."

(c) General Guidelines.

(1) In deciding whether to appoint a guardian ad litem, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations, or concerns:

(i) Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;

(ii) Relocation that could substantially reduce the child's time with a parent or sibling;

(iii) The child's concerns or views;

(iv) Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;

(v) Disputed paternity;

(vi) Past or present child abduction or risk of future abduction;

(vii) Past or present family violence;

(viii) Past or present mental health problems of the child or a party;

(ix) Special physical, educational, or mental health needs of a child that require investigation or advocacy;

(x) A high level of acrimony;

(xi) Inappropriate adult influence or manipulation;

(xii) Interference with custody or parenting time;

(xiii) A need for more evidence relative to the best interests of the child;

(xiv) A need to minimize the harm to the child from the processes of family separation and litigation;

(xv) Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.

(2) The guardian ad litem shall represent the child or children in accordance with the Tennessee Rules of Professional Conduct and such other rules promulgated by this Court.

(3) Notwithstanding the foregoing, a guardian ad litem may testify at a trial or hearing as a fact witness pursuant to the Tennessee Rules of Evidence, and shall be subject to cross examination.

(4) Evidence in a divorce proceeding or post-divorce proceeding as defined herein, shall include only the testimony of witnesses duly sworn, such exhibits as are admissible under the

rules of evidence, and any stipulations to which the parties have entered. A guardian ad litem shall submit a report to assist the parties. Such a report shall be prepared no later than ninety days after a guardian's appointment, unless a shorter or longer time is ordered by the court. A report prepared by a guardian shall be provided only to the parties; the report shall not be filed with the court, nor is it admissible at a hearing or trial.

(d) Orders of Appointment

(1) When a Court determines that it is necessary to appoint a guardian ad litem in a divorce or post-divorce proceeding, that Court shall enter a written order of appointment which shall state the following:

(i) Findings of fact which support the Court's determination that appointment of a guardian ad litem is necessary in order to make a determination for the parenting and best interests of the child or children;

(ii) The duties of the guardian ad litem, to the extent that all of the duties contemplated by part (f) of this rule are not required, and to the extent that additional duties other than those contemplated by part (f) are required, and the order should further address optional duties stated within part (f) of this rule;

(iii) The scope of the guardian ad litem's access to the child or children;

(iv) The duration of the appointment of the guardian ad litem, in accordance with Rule (c)(6) herein; and

(v) Provisions for payment of the costs and fees associated with the guardian ad litem pursuant to this rule.

(2) The executed order of appointment shall be provided to the guardian ad litem and to each of the other parties or their counsel, and shall be made a part of the record.

(3) In making the appointment, the Court should consider the extent to which the parties have been able to afford significant and protracted litigation, and the extent to which further proceedings are contemplated. Further, the appointing court shall consider the abilities of the parties to pay the guardian appointed, and, where the parties are not able to pay the guardian or attorney for the full amount of those services which are contemplated, and where the circumstances of the case so justify, the court should solicit the services of an attorney who is willing to serve pro bono.

(4) The order of appointment shall state an hourly fee which will initially be allowed as compensation for the performance of the services provided. The court, in its discretion may modify the rate of compensation for guardians involved in cases which present novel or difficult legal or factual issues, and in accordance with the provisions of section (g) below. In all cases, the provisions of Rule 8, RPC 1.5, shall apply.

(5) The order shall require each of the parties to make payment directly to the guardian ad litem or into the office of the Clerk of the Court in which the case is pending, a sum which the appointing judge contemplates will be necessary to compensate the guardian ad litem, except in such cases as the order provides that the appointed guardian or attorney will serve pro bono, in which case a more limited deposit shall be made for expenses, or, in the discretion of the trial judge, payment may be waived totally when the appointing judge determines that guardian will serve pro bono and there are no material expenses anticipated.

(e) Conflicts of Interest of the Guardian ad Litem.

In the appointment of a guardian ad litem, the appointing court must determine, prior to the entry of the order of appointment that the guardian is either mutually satisfactory to the parties, or, is a person that the court finds to be appropriate and who has no conflicts of interest under the Rules of Professional Conduct. Where, after appointment, the Court learns of any potential conflict of interest, or learns that for some other reason, the guardian, having been appointed, cannot zealously represent the child or children, the Court must act very promptly to relieve that person and to appoint another person to serve as guardian.

Further, to insure that those appointed have no conflicts of interest, the appointing court shall:

(1) Insure that no party to the proceedings, no party's employer or employee, and no party's other representative is appointed to serve as guardian ad litem; and that the guardian has no other conflict of interest.

(2) Any party who, at any time perceives a conflict of interest between the guardian ad litem and any party to the proceeding or knows of any other reason why such person should not be appointed or should not continue to serve as guardian ad litem may file a motion with the court setting forth the nature of the conflict or other reason and a request that the guardian ad litem be disqualified from appointment or from further service in the case. Such motion shall then be set by the clerk of the court promptly, and at least within fifteen days of filing.

(3) Without limitation, a conflict of interest includes any matter in which the guardian ad litem has a direct or indirect interest that is in conflict or gives the appearance of conflict with the discharge of the duties of the guardian ad litem or attorney ad litem.

(f) Duties of the Guardian ad Litem.

The guardian ad litem shall have the responsibility for the following:

(1) Appearance at all proceedings in the case that affect the interests of the minor child or children, and to participate in those proceedings to the extent necessary in order to protect the interests of the minor child or children, by filing pleadings and briefs as required, by making arguments, questioning witnesses, and as otherwise required by the circumstances of the hearing;

(2) Conduct in-person interviews with the child or children, when the child's or children's age or ages are appropriate for the interview, and, to the extent the guardian deems it necessary in the representation of the client or clients, interview each parent, guardian, or other person having custody or legal rights or claims then pending with regard to the child or children, to the extent that these persons are available for interview;

(3) Where the guardian deems it appropriate to do so, and where the order of appointment so prescribes, the guardian shall visit the home of the child or children and any other home which is proposed by one of the parties to the proceeding to become the residence of the child or children or a home where it is proposed that the child or children visit, or, to the extent it is an issue, where child care is being provided;

(4) Otherwise, to investigate the case in accordance with the various rules of professional conduct required by attorneys; and

(5) To subpoena such witnesses as may be necessary for the proper representation of the child or children to such proceedings as may be appropriate.

(g) Compensation for the Guardian ad Litem.

Compensation for guardians ad litem be set by the appointing Court. In compensating the guardian, the appointing court must abide by the following guidelines:

(1) The fees awarded must be proper under the provisions of Rule 8 of these Rules, and specifically, RPC 1.5, which are incorporated herein.

(2) Fees for guardians should never be assessed as alimony or child support.

(3) Compensation should never be allowed to a guardian for performance of duties which do not relate to the proceeding before the court, and should not include, without limitations, such matters as supervision of visitation, providing of transportation, and similar matters not generally within the scope of the duties of an attorney.

(4) Except where a guardian ad litem is appointed to serve pro bono, the reasonable fees awarded by the court for payment of the guardian ad litem shall be borne by the parties equally, or in a manner that the court determines to be equitable.

(5) Inasmuch as the representation of minor children before a court in a divorce proceeding or a post-divorce proceeding is not a right guaranteed constitutionally or by any law, guardians so appointed may not be paid by the state.

(6) When questions are raised by a party as to the amount of fees which a guardian ad litem seeks to be paid, the court shall conduct a hearing upon the amount of those fees. Proof may be presented with regard to the reasonableness and necessity of the fees charged, and facts may be presented demonstrating the degree to which the costs of representation of the party or parties should be greater or lesser under the provisions of Rule 8 of this court. When appropriate, fee disputes should be conducted by a judge other than the appointing court. Such

hearings shall be conducted promptly. The fact that the amount of fees to be awarded to a guardian ad litem may be in dispute or may not yet have been determined by the court shall not affect the finality of the order relating to the remaining issues in the divorce proceeding or post-divorce proceeding for purposes of appeal, or otherwise.

(h) Appointment of other special advocates.

This rule applies only to the appointment of guardians ad litem, and does not restrict the authority of the Court to appoint non-attorneys to serve in the role of special advocates for a child or children, in divorce proceedings or post-divorce proceedings, except that those persons must serve as volunteers and without compensation, and further to the extent that those persons are limited in their role in that they may not act in a manner which other rules or statutes reserve for licensed members of the bar. Such volunteers may be invaluable to the Court in order to assist appointed attorneys in investigation of the case, or may assist the child or children in adjustment to changed circumstances or surroundings, and may perform any number of other necessary duties which do not require the knowledge, skill, and ability of an attorney. Further, to the extent that these persons gain first-hand knowledge which is not of a hearsay nature, those persons may be called as witnesses, and may testify as to facts within their knowledge to the extent not prohibited by other rules. Such witnesses should not be allowed to present opinions, however, and may only testify as to facts which they have observed.