

Guardians ad Litem for Children in Family Court

This information packet provides an overview of the different types of guardians ad litem appointed for children in family court proceedings in South Carolina. It is designed for professionals and parties involved in the family court to enhance their understanding of the purpose and responsibilities of guardians ad litem. This document is organized by type of proceeding and serves as a reference; reading from beginning to end may be repetitive. South Carolina statutes, court rules, and case law governing the qualifications, roles, and duties of guardians ad litem are referenced where applicable.

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Introduction

Guardians ad litem are appointed for the limited purpose of litigation for persons who, because of age or other legal disability, may not be able to protect their own rights. Although parents might be expected to fill this role for their children, in certain types of cases the parents' interests may conflict with the children's interests. In such cases, a guardian ad litem must be appointed to protect the child's interests.

The guardian ad litem must function independently, with allegiance to the child and not to any other party. The guardian ad litem assists the family court and promotes the best interests of the child by conducting an impartial assessment of the facts and by submitting recommendations or conclusions on behalf of the child.

Volunteers, attorneys, and private or lay persons serve as guardians ad litem for children in various types of family court cases. The court must appoint all guardians ad litem, although the initial selection process varies. A guardian ad litem's duty is always to protect the child's best interests, but the specific focus of the guardian may vary by type of proceeding. An order of appointment authorizes the guardian ad litem to obtain information, meet with the children involved, file motions and seek relief, and make recommendations or report conclusions to the court. These responsibilities continue until the court formally relieves the guardian ad litem.

The court is responsible for assuring that guardians ad litem are capable and discharge their duties competently. The South Carolina Court of Appeals held that:

The trial judge's duty to assure the child's best interests are protected requires as a minimum that: (1) he select a competent person to serve as guardian ad litem; (2) he select a person with no adverse interests to the minor; and (3) the person so selected is adequately instructed on the proper performance of his duties. Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (S.C. Ct. App. 1990).

Guardians ad litem are accountable to the court. They are subject to cross-examination about their conclusions or recommendations and the methods used to develop them, and any reports they submit to the court. Upon good cause, a party to a proceeding may file a motion to have a guardian ad litem dismissed. Additional accountability measures vary by type of guardian ad litem and are discussed in subsequent sections.

The following chart illustrates the types of guardians ad litem appointed in various types of proceedings:

	<i>Volunteer GAL</i>	<i>Attorney GAL</i>	<i>Private or Lay GAL</i>	<i>Other*</i>
Abuse & Neglect Cases	X	X		
Termination of Parental Rights	X	X		
Private Custody or Visitation		X	X	
Adoption		X		X
Name Changes		X		X
Actions Related to Paternity		X		
Abortion Consent		X		X

* As further explained in the sections on adoptions, name changes, and abortion consent, guardians ad litem in those proceedings may be non-attorneys acquainted with the family and may serve for a minimal or no fee.

Abuse and Neglect Cases

Federal and state law requires the appointment of a guardian ad litem for children in child protection cases that involve the court. CAPTA, 42 USCA §5106a. S.C. Code Ann. §63-7-1620 (2008). A volunteer is usually appointed in this capacity, and family courts are encouraged to utilize the volunteer guardian ad litem program rather than appoint lawyers unnecessarily. Rule 608 G(3), S.C. Appellate Court Rules.

The South Carolina statute also requires the appointment of an attorney for the child when the guardian ad litem is a volunteer. The general practice in South Carolina is to construe the attorney's role as representing the guardian ad litem. *Brode v. Brode*, 278 S.C. 457, 298 S.E.2d. 443 (S.C. 1982).

When an attorney is appointed as guardian ad litem, the attorney must serve as both guardian ad litem and legal counsel for the child unless extraordinary circumstances exist. S.C. Code Ann. §63-7-1620 (I)(2008).

Volunteers in Abuse and Neglect Cases

Volunteer guardians ad litem serve without compensation in child protection and termination of parental rights cases involving the Department of Social Services. Either the South Carolina Guardian ad Litem Program or the Richland County CASA (Court Appointed Special Advocates) supervises these guardians. The use of volunteers in this role reflects a national trend that began in 1977 and is endorsed by the National Council of Juvenile and Family Court Judges.

The South Carolina Guardian ad Litem Program, a division of the Governor's Office, was developed in 1984 as one of the first state-supported programs in the nation. It became operational in 45 counties in all 16 circuits in 1988. State statute authorizes this program, defines specific duties, establishes confidentiality requirements, provides qualified immunity, and sets forth those persons who may not be appointed. S.C. Code Ann. §63-11-500 *et.seq.* (2008).

Richland County CASA, which is independent of the state program, operates as a department within Richland County government. This program was established in 1983 through the efforts of the Junior League and later moved under the auspices of Richland County. A public/non-profit partnership, the program is funded through a combination of county funds, grants, and donations.

The provisions of S.C. Code Ann. §63-11-500 *et seq.* also apply to the Richland County program. S.C. Code Ann. §63-11-500(B)(2008).

Selection of volunteers is handled by circuit or county coordinators in the volunteer program. Volunteers are accepted into the program following a process involving a criminal records check, a S.C. DSS central registry check, character references, and a personal interview. Persons who have been convicted of certain offenses are prohibited from being appointed. S.C. Code Ann. §63-11-520 (2008). Program staff assign accepted volunteers who have completed their training requirements to particular cases based on availability, experience, and other relevant factors.

Training requirements include an initial 30-hour, pre-service session that addresses child development, child maltreatment, permanency needs of children, the legal system, and other topics. Volunteers are also expected to participate in ongoing continuing education.

Duties of volunteer guardians ad litem, specified in S.C. Code Ann. §63-11-510 (2008), include:

- (1) represent the child's best interests;
- (2) advocate for the child's welfare and rights;
- (3) conduct an independent assessment of the facts, the child's needs, and the available resources within the family and community to meet those needs;
- (4) maintain accurate, written case records;
- (5) provide the family court with a written report, which should include evaluation and assessment of the relevant issues and recommendations for the case plan, the child's wishes, if appropriate, and subsequent disposition of the case;
- (6) monitor compliance with the court orders and make the motions necessary to enforce the orders or seek judicial review; and
- (7) protect and promote the child's best interests until formally relieved.

Volunteers are also expected by program policy to visit the child monthly while monitoring a case and submit monthly reports to their coordinator.

Volunteer guardians ad litem are authorized by S.C. Code Ann. §63-11-530 (2008) to:

- (1) conduct an independent assessment of the facts;
- (2) meet with and observe the child involved;
- (3) interview persons involved in the case;
- (4) participate on any multi-disciplinary evaluation teams for the case;
- (5) make recommendations to the court concerning the child's welfare;
- (6) make motions necessary to enforce the orders of the court, seek judicial review, or petition the court for relief on behalf of the child;

(7) through counsel, introduce, examine, and cross-examine witnesses and participate in the proceedings to any degree necessary to represent the child adequately.

Accountability is provided through the volunteer program. Questions or concerns about the conduct of a volunteer guardian ad litem in Richland County may be reported to Richland County CASA at (803) 576-1724. In other areas of the state, concerns may be reported to the county office of the S.C. Guardian ad Litem Program or to the state office at (803) 734-1695.

Liability is limited by statute. After completion of the training program, a volunteer is not liable for any civil damages for personal injury resulting from acts or omissions, provided that the volunteer is acting in good faith and is not grossly negligent. S.C. Code Ann. §63-11-560 (2008).

Fees are not applicable. Volunteers serve without compensation or reimbursement for expenses they incur.

Attorneys in Abuse and Neglect Cases

When a volunteer is not available, or when a conflict arises, an attorney is appointed as guardian ad litem.

Selection is in accordance with Rule 608, S.C. Appellate Court Rules, which requires active members of the South Carolina Bar to accept appointments for indigent persons. Under this rule, the next available attorney is taken from the civil appointment list maintained by the Clerk of Court in each county.

Training specific to the function of guardian ad litem is not required for appointment in abuse and neglect cases. Attorneys in South Carolina must attend 14 hours of continuing legal education every year and maintain their licenses to practice law in order to remain eligible for appointments.

Duties for volunteers serving as guardians ad litem in abuse and neglect cases are delineated in S.C. Code Ann. § 63-11-510 (2008), but that statute does not specifically delineate the duties of attorneys serving as guardians ad litem in abuse and neglect cases. Attorneys are obligated to protect the best interests of the child and that obligation may be fulfilled by meeting the responsibilities and duties set forth in S.C. Code Ann. § 63-11-510. The South Carolina Supreme Court has approved an optional form that family court judges may use to appoint a guardian ad litem and an attorney. This form lists specific duties and, when it is used, or, if the court directs other specific functions, the attorney is required to perform all functions ordered by the court. (The optional court order form may be obtained from the Children's Law Center's website <http://childlaw.sc.edu> .)

Accountability for lawyers appointed as guardians ad litem in abuse and neglect cases is the same as for attorneys practicing law. All attorneys are required to follow the Rules of Professional Conduct regardless of their role. Complaints may be made in writing to the Commission on Lawyers' Conduct, P.O. Box 11330, Columbia, S.C. 29211. Correspondence should include the lawyer's full name, the specific complaint about what the lawyer did or did not do, and any supporting documents that would help the investigation.

Liability does not apply as long as the attorney is acting within the scope of the duties of a guardian ad litem. The South Carolina Supreme Court found that guardians ad litem have immunity in a private custody case, and the reasoning in their decision does not appear to exclude abuse and neglect cases. *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (S.C. 1997). This immunity does not protect an attorney who is acting outside of the scope of the duties of a guardian ad litem. *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (S.C. Ct. App. 2000).

Fees are authorized by Rule 41(a), S.C. Rules of Family Court. Appointed attorneys may file for reimbursement through the South Carolina Commission on Indigent Defense. Payments are set at an hourly rate and may not exceed a set limit unless the court orders additional reimbursement. The Commission may be contacted at (803) 734-1343.

Termination of Parental Rights Cases

A guardian ad litem must be appointed for the child in a termination of parental rights action. S.C. Code Ann. §63-7-2560 (2008).

If a volunteer guardian ad litem finds that appointment of counsel is necessary to assist the volunteer in protecting the rights of the child, an attorney must be appointed to represent the volunteer guardian. In contested cases, appointment of an attorney for the volunteer guardian is required. When the guardian ad litem is an attorney, the judge determines on a case-by-case basis whether counsel is required for the guardian. S.C. Code Ann. §63-7-2560 (2008).

Selection of a guardian ad litem is the same as selection in abuse and neglect cases. Either volunteers or attorneys may be appointed in termination cases. When a termination action is filed subsequent to a child protection case, appointment of a different guardian ad litem is not required by statute. The guardian ad litem from the previous case may be re-appointed in the termination of parental rights case. A guardian ad litem may choose not to serve in the termination case, and the court may choose to appoint a new guardian ad litem for the termination case.

Training requirements are the same for either volunteers or attorneys in child abuse and neglect cases. No additional training is required for appointment in termination cases.

Duties are not delineated in statute, but the guardian ad litem is always required to advocate for the best interests of the child. Family court judges generally expect the guardian ad litem to determine whether termination of the parents' rights would be in the best interests of the child. Although the plaintiff (usually DSS) must prove a ground for termination and demonstrate best interests, the guardian ad litem focuses on the child's perspective.

In addition to submitting recommendations to the court, the guardian ad litem may initiate an action for termination of parental rights. *Joiner v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (S.C. 2000).

Liability and accountability are the same as in abuse and neglect cases. (See page 3-5 for volunteers and 5-6 for attorneys.)

Private Custody and Visitation Disputes

In actions between private parties involving custody of or visitation with a child, the court may appoint a guardian ad litem only when without a guardian: the court will likely not be fully informed about the facts and there is a substantial dispute which necessitates a guardian; or both parties consent to appointment of a guardian who is approved by the court. S.C. Code Ann. §63-3-810 (2008).

The South Carolina Private Guardian ad Litem Reform Act took effect January 15, 2003, and governs private guardians ad litem appointed in custody or visitation cases on or after that date.

Guardians ad litem in private custody cases are attorneys or other qualified persons who seek such appointments for a fee. Guardians ad litem in these cases who are not attorneys are commonly known as lay guardians ad litem.

The court may appoint an attorney for a lay guardian ad litem. A party or the guardian ad litem may petition the court by motion for appointment of an attorney, or the appointment may be by consent order. An order appointing an attorney for the guardian ad litem must set forth the reasons for the appointment and method for compensation. S.C. Code Ann. §63-3-820 (2008).

Selection of a guardian ad litem may be recommended by an attorney in the case, but the court has absolute discretion in determining whom is appointed. S.C. Code Ann. §63-3-820 (2008). Private guardians must be at least 25 years old and have a high school diploma or its equivalent. They cannot have been convicted of certain crimes, or ever been on the DSS Central Registry. S.C. Code Ann. §63-3-820 (2008).

Once appointed, a guardian ad litem must provide an affidavit to the court and parties attesting to compliance with the statutory qualifications and training

requirements. Guardians must also provide written disclosure to each party of any relationship the guardian has with any party, or any adverse interest to any party, and of any membership or participation in any organization related to child abuse, domestic violence, or drug and alcohol abuse. S.C. Code Ann. §63-3-820 (2008).

Training is required for both attorneys and lay guardians. For initial qualification, a lay guardian must complete a minimum of 9 hours of training in the areas of custody and visitation and 3 hours related to substantive law and procedure in family court. The training must be approved by the Supreme Court Commission on Continuing Legal Education and Specialization. Observation of 3 contested custody hearings is also required before lay persons can be appointed. Lay guardians ad litem must also complete 6 hours of continuing education in the areas of custody and visitation each year. S.C. Code Ann. §63-3-820 (2008).

Attorneys appointed as guardians ad litem in private custody cases must annually complete a minimum of 6 hours of family law continuing legal education in the areas of custody and visitation, although this requirement may be waived by the court. S.C. Code Ann. 63-3-820 (2008).

Duties are defined by statute, and apply to both attorneys and lay guardians. S.C. Code Ann. §63-3-830 (2008). Guardians are required to:

- (1) represent the child's best interest;
- (2) conduct an independent investigation to include reviewing relevant documents, meeting with the child, visiting the homes if appropriate, interviewing relevant persons, obtaining criminal histories, and considering the wishes of the child when appropriate;
- (3) advocate for the child's best interests by making suggestions for evaluation, services, and treatment;
- (4) attend all court hearings unless excused;
- (5) maintain a complete file;
- (6) present to the court and all parties clear and comprehensive written reports including a final written report regarding the child's best interests.

Reports must be submitted in a manner consistent with the South Carolina Rules of Evidence and state law. S.C. Code Ann. §63-3-830 (2008). The final written report must include the names, addresses, and telephone numbers of persons interviewed during the investigation. The final report must be submitted 20 days prior to the hearing, unless the court reduces the time period. However, the time period cannot be decreased to less than 10 days prior to the hearing unless all parties consent in writing. S.C. Code Ann. §63-3-830 (2008).

Guardians ad litem must not offer a recommendation concerning which party should be awarded custody either in their report or at the hearing. The guardian may only make a recommendation as to custody at the hearing if requested to do so by the court for reasons specifically set forth on the record.

Guardians are prohibited from acting as mediators in cases to which they have been appointed, but may participate in mediation or settlement conferences with consent of the parties. S.C. Code Ann. §63-3-840 (2008).

A guardian ad litem may submit briefs, memoranda, affidavits, or other documents on behalf of the child, including affidavits at the temporary hearing. S.C. Code Ann. 63-3-830 (2008).

Accountability for attorneys serving as guardians ad litem in private custody and visitation cases is the same as for attorneys practicing law. All attorneys are required to follow the Rules of Professional Conduct regardless of their role. Complaints may be made in writing to the Commission on Lawyers' Conduct, P.O. Box 11330, Columbia, S.C. 29211. Correspondence should include the lawyer's full name, the specific complaint about what the lawyer did or did not do, and any supporting documents.

Accountability for lay guardians is largely limited to that provided by the appointing court. There is no oversight organization for lay guardians in South Carolina.

Actions such as examining or cross-examining witnesses in court and preparing legal pleadings, if performed by a non-attorney, might be considered the unauthorized practice of law. Complaints about the unauthorized practice of law may be made to any of the following: (1) Office of the Attorney General, Unauthorized Practice of Law Division, P.O. Box 11549, Columbia, S.C. 29211; or (2) S.C. Bar, Unauthorized Practice of Law Committee, P.O. Box 608, Columbia, S.C. 29202.

Complaints against lay guardians ad litem who maintain a professional license issued by the state of South Carolina, such as a licensed social worker, professional counselor, or psychologist, may be reported through the appropriate board of the S.C. Department of Labor, Licensing, and Regulation (LLR). Complaint forms can be obtained by calling LLR at (803) 896-4300 and asking for the appropriate board. Complaint forms are also available on LLR's website, www.llr.state.sc.us.

Liability is limited by the South Carolina Supreme Court's ruling that guardians ad litem have common law immunity in private custody cases, as long as they are acting within the scope of their duties. *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (S.C. 1997).

This immunity only applies when acting within the scope of the duties of a guardian ad litem. A recommendation by a guardian ad litem, even when against one party, cannot be the basis for a cause of action against the guardian ad litem. *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (S.C. Ct.App. 2000).

Fees are set by the court in accordance with the statute for both attorney guardians and lay guardians in private custody matters. S.C. Code Ann. §63-3-850 (2008). Reasonable compensation is determined by the court which must consider the complexity of the issues, the contentiousness of the litigation, time spent and reasonable expenses incurred by the guardian, each party's financial ability, and any other relevant factors.

At the time of appointment, the judge sets the hourly rate the guardian may charge, the amount each party is to pay the guardian to begin the investigation, and the total amount the guardian may charge in the case. If the guardian finds it necessary to exceed the total amount determined by the judge, the guardian must notify both parties and ask the judge to increase the total amount a guardian may charge. A guardian may seek the consent of the parties for an increase in the total amount a guardian may charge. The guardian must submit an itemized billing statement of hours, expenses, fees and costs to the parties and to the court pursuant to a schedule as directed by the court. A party may petition the court to review the reasonableness of the fees and costs submitted by the guardian. S.C. Code Ann. § 63-3-850 (2008).

Adoptions

Selection and appointment of a guardian ad litem is required to represent the interests of the adoptee in an agency, private, relative, or stepparent adoption. The guardian ad litem in adoption cases is usually an attorney whose appointment is sought by the adoptive parents. Guardians ad litem in adoption actions are sometimes non-attorneys acquainted with the family who serve for a minimal or no fee.

In adoption actions, certified adoption investigators are also required to complete background investigations prior to the final adoption hearing.

Training of a specific type is not required.

Duties are not set forth in the statute, but the court generally expects the guardian ad litem to submit a recommendation at the final hearing as to whether adoption is in the best interests of the child. The guardian ad litem may accept service of pleadings for children 14 or younger. S.C. Code Ann. §63-9-720 (2008).

Fees are typically paid by the adoptive parents.

Name Changes

Selection and appointment of a guardian ad litem is required when a parent petitions the court to change the name of a child. S.C. Code Ann. §15-49-10(B)(Supp. 2006). Guardians ad litem in name change actions are usually attorneys, but are sometimes non-attorneys acquainted with the family who serve for a minimal or no fee.

Training: There are no specific training requirements.

Duties may include, in the discretion of the court, recommending whether the proposed name change would be in the child's best interests.

Fees are typically paid by the petitioning parent.

Actions Related to Paternity

Actions to establish paternity may be brought by the child, the mother, a caretaker, a putative father, or an authorized agency. In any action that may have the effect of making a child illegitimate, a guardian ad litem must be appointed for the child.

Selection and appointment may not include the child's mother or presumed or putative father who are prohibited by statute from serving as guardian. S.C. Code Ann. §63-17-10 (2008).

Abortion Consent

Through a procedure called judicial bypass, a minor may petition the family or circuit court for an order granting her the right to obtain an abortion without parental consent. In these circumstances, a guardian ad litem must be appointed for the minor. S.C. Code Ann. §44-41-32(3)(Supp. 2006).

Selection and appointment of an attorney as guardian ad litem is the usual practice. The guardian may be a family member or acquaintance of the petitioner. The minor's preference is taken into consideration in this appointment.

Duties are not delineated in statute. Courts generally expect the guardian ad litem to make a determination as to whether authorizing an abortion would be in the minor's best interests; or that the minor understands the ramifications of the decision and is capable of making the decision on her own. The court may grant a minor the right to consent to an abortion on her own behalf upon finding that the abortion would be in her best interests or that she is mature and well-

informed enough to make the decision on her own. S.C. Code Ann. §44-41-32(5)(Supp. 2006).

Definitions

Best Interests: Statutes require that guardians ad litem represent the best interests of the child. While “best interests of the child” is the statutory standard, the definition of “best interests of the child” may be complicated. Professor Roy Stuckey in his *Marital Litigation in South Carolina* offers a useful working definition: “what combination of factors this child needs in a custody and/or access arrangement that will sustain his or her adjustment or development.” South Carolina appellate court cases concerning child custody and visitation require an analysis of the totality of circumstances to determine the best interests of the child. Circumstances of the child include all aspects of the child’s life: physical; psychological; spiritual; educational; familial; emotional; and recreational. Circumstances of the person seeking custody and/or visitation include character, fitness, and attitude as those factors impact the child.

Central registry: A statewide data system maintained by DSS which identifies abused and neglected children, their parents and guardians, and those responsible for a child’s welfare. The Central Registry of Child Abuse and Neglect is not a public record. Information concerning an individual in the Central Registry can be disclosed only when screening of an individual’s background is required by statute or regulations for employment, licensing, or other statutorily specified reason.

Child: A person under the age of 18.

Disability: Incapacity in the eyes of the law; a person under 18, a person in prison, and a person adjudged incompetent have a legal disability.

Good faith: An honest and sincere intention to fulfill one’s obligations; absence of any intention to defraud or seek an unfair advantage.

Gross negligence: Failure to exercise even slight care for the protection of others against unreasonable risk of harm.

Guardian ad litem: A person appointed by the court to protect the interests of a minor or legally incompetent person in a lawsuit.

Rules of Professional Conduct: General rules for attorneys governing their practice and behavior.

References

South Carolina Code Ann. (2008)

§15-49-10(B)	Name change
§63-7-1620	Appointment in abuse and neglect cases
§63-11-500 through §63-11-570	S.C. Guardian ad Litem Program
§63-17-10	Actions related to paternity
§63-3-810 through §63-3-820	Private custody and visitation
§63-7-2560	Termination of parental rights
§63-9-720	Adoptions
§44-41-32	Abortion consent (judicial by-pass)

Black's Legal Dictionary, Sixth Edition

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