

NOTICE OF COMMENT PERIOD

On August 16, 2016, the Commission on Guardianships and Conservatorships submitted to the Nebraska Supreme Court proposed rules creating practice standards for guardians ad litem for guardianships, conservatorships, protective proceedings, or probate proceedings as directed by 2016 Neb. Laws, L.B. 934. The Nebraska Supreme Court directed that the proposed practice standards be published for a public comment period.

The Nebraska Supreme Court invites interested persons to comment on the proposed practice standards. Anyone desiring to comment on the proposed practice standards should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to jill.machacek@nebraska.gov, no later than November 15, 2016.

The full text of the proposed practice standards is available below, or a hard copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

Article 14: Uniform County Court Rules of Practice and Procedure.

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§ 6-1469. Practice standards for guardians ad litem for guardianships, conservatorships, protective proceedings or probate proceedings.

(A) Purpose.

The purpose of these practice standards is to ensure that the legal and best interests of persons under disability or alleged disability who come before the court in guardianship, conservatorship, protective proceedings, or probate proceedings are effectively represented by their court-appointed guardians ad litem.

(B) Appointment.

(1) In accordance with the Nebraska Probate Code, specifically Neb. Rev. Stat. § 30-4202, only a lawyer duly licensed by the Nebraska Supreme Court may be appointed to serve as a guardian ad litem in a probate, guardianship, and conservatorship proceeding.

(2) When feasible, the duties of a guardian ad litem should be personal to the appointed lawyer and should not normally be delegated to another person, or lawyer.

(3) Prior to appointment as guardian ad litem, the attorney shall fulfill the training requirements for guardians ad litem in probate, guardianship, and conservatorship proceedings as set forth in subsection (G) of these standards.

(C) Role of Guardian Ad Litem.

(1) Neb. Rev. Stat. § 30-4202(3) allows a guardian ad litem in probate, guardianship, and conservatorship proceedings to fulfill a “dual role” with respect to the allegedly incapacitated person, ward, protected person, or minor ward, that is, to serve as:

(a) An advocate for the best interests of allegedly incapacitated person, ward, protected person, or minor and charged with a duty to investigate, gather information regarding, and make an assessment of the condition of such person and report to the court the condition of such person and take all necessary steps to protect and advance the allegedly incapacitated or incapacitated person’s, ward’s, protected person’s, or minor’s best interests; and

(b) Legal counsel for the person who is the subject of the guardianship, conservatorship, or protective proceeding or whose interest is involved in a probate proceeding.

(2) Where a lawyer has already been appointed to represent the legal interests of the allegedly incapacitated person, ward, protected person, or minor, or where such person has already hired his or her own attorney, the guardian ad litem for the allegedly incapacitated person, ward, protected person, or minor shall function only in a single role as guardian ad litem concerning the allegedly incapacitated or incapacitated person’s, ward’s, protected person’s, or minor’s best interests, and shall be bound by all of the duties and shall have all of the authority of a guardian ad litem, with the exception of acting as legal counsel for such person.

(3) Accordingly, the following shall apply:

(a) In serving as advocate for the allegedly incapacitated or incapacitated person, ward, protected person, or minor, to protect his or her best interests, the guardian ad litem shall make an independent determination as to the allegedly incapacitated or incapacitated person's, ward's, protected person's, or minor's interests, by considering all available information and resources. The guardian ad litem's determination as to best interests is not required to be consistent with any preferences expressed by the allegedly incapacitated person, ward, protected person, or minor.

(b) Upon making such determination, the guardian ad litem shall make such recommendations to the court and shall take the necessary actions to advocate and protect the best interests of the allegedly incapacitated person, ward, protected person, or minor.

(c) As legal counsel for the allegedly incapacitated or incapacitated person, ward, protected person, or minor, the guardian ad litem shall be entitled to exercise and discharge all prerogatives to the same extent as a lawyer for any other party in the proceeding.

(d) Where the allegedly incapacitated or incapacitated person, ward, protected person, or minor expresses a preference which is inconsistent with the guardian ad litem's determination of what is in the best interests of such person, the guardian ad litem shall assess whether there is a need to request the appointment of a separate legal counsel to represent the allegedly incapacitated or incapacitated person's, ward's, protected person's, or minor's legal interests in the proceeding.

(e) After making such assessment, the guardian ad litem shall request that the court make a determination whether special reasons exist for the court to appoint separate legal counsel to represent the legal interests of the allegedly incapacitated or incapacitated person, ward, protected person, or minor. The guardian ad litem shall provide with specificity in his or her request to the court the factors considered by the guardian ad litem in making such assessment.

(f) In any situation where the guardian ad litem has been appointed to represent more than one person within the same case, the guardian ad litem shall ascertain throughout the case whether the guardian ad litem's advocacy of the legal and best interests of any one person would be adverse to or conflict with the legal and best interests of any other person represented by the same guardian ad litem. Where the guardian ad litem reasonably believes that to continue as guardian ad litem for all of the persons would be problematic in this specific regard, the guardian ad litem shall apply to the court for the appointment of a separate guardian ad litem and/or legal counsel for the person(s).

(g) If the court exercises its statutory authority to appoint separate legal counsel for the incapacitated person, protected person, ward, or minor, such counsel shall represent the incapacitated person's, protected person's, ward's, or minor's interests. The guardian ad litem shall continue to advocate and protect the incapacitated person's, protected person's, ward's, or minor's social, economic, safety, and best interests as defined under the Nebraska Probate Code.

(D) Authority of Guardian Ad Litem.

(1) Access to information and access to the allegedly incapacitated or incapacitated person, ward, protected person, or minor.

(a) The guardian ad litem is entitled to receive all pleadings; notices, to include timely notices of change of address or location of the allegedly incapacitated or incapacitated person, ward, protected person, or minor; and orders of the court filed in the proceeding, and should make reasonable efforts to obtain complete copies of the same.

(b) The guardian ad litem is entitled to receive copies of any report which resulted from any evaluation ordered by the court and which was used for evaluating the status of the person who is the subject of the guardianship, conservatorship, protective proceeding, or probate proceeding.

(c) The guardian ad litem is entitled to obtain, informally or by subpoena: (1) a report from any medical provider, provider of psychological services, law enforcement, adult protective services agency, or financial institution and (2) any account or record of any business, corporation, partnership, or other business entity which such person owns or in which such person has an interest.

(d) The guardian ad litem is authorized to make announced or unannounced visits to the allegedly incapacitated or incapacitated person, ward, protected person, or minor at his or her home or at any location at which such person may be present.

(e) A guardian ad litem shall not have indirect or direct physical control over a person for whom the guardian ad litem has been appointed, nor shall a guardian ad litem have indirect or direct control over the property or affairs of a person for whom the guardian ad litem has been appointed.

(f) The court should facilitate the guardian ad litem's authority to obtain information regarding the allegedly incapacitated person, ward, protected person, or minor by including the following language, or language substantially similar thereto, in its initial order of appointment of the guardian ad litem:

"The guardian ad litem appointed herein by this Court shall have full legal authority to obtain all information which relates to the above-named party.

"To that end, the guardian ad litem is hereby authorized by this Court to communicate verbally or in writing with any agency, organization, person, or institution, including, but not limited to, any school personnel, counselor, or drug or alcohol treatment provider; or police department or other law enforcement agency; any probation, parole, or corrections officer; any physician, psychiatrist, psychologist, therapist, nurse, or mental health care provider; or any hospital, clinic, group home, treatment group home, residential or mental health treatment facility, any social worker, case manager, or social welfare agency, including the Nebraska Department of Health and Human Services and its employees and administrators; any person, or agency or institution charged with caring for the allegedly incapacitated or incapacitated person, ward, protected person, or minor; or any family member, guardian, or any other person.

"The guardian ad litem is further hereby authorized to obtain from all persons, organizations, or entities, including, but not limited to, those described in the paragraph above, all information, including, but not limited to, the inspection of, and obtaining of complete copies of records, reports, summaries, evaluations, correspondence, written documents, medical records, financial records or other information, orally or in any media form, which relate to the above-named allegedly incapacitated or incapacitated person, ward, protected person, or minor, protected person, minor, disabled and/or allegedly disabled person even if such information concerns his or her parents, or any other person, or any situation that the guardian ad litem deems necessary in order to properly represent the allegedly incapacitated or incapacitated person's, ward's, protected person's and/or minor's interests."

(E) Duties of Guardian Ad Litem.

(1) The guardian ad litem shall have a consultation with the allegedly incapacitated or incapacitated person, ward, protected person, or minor within two weeks after the appointment for such person.

(a) The phrase “consultation with the allegedly incapacitated or incapacitated person, ward, protected person, or minor,” as used in the Nebraska Probate Code, generally means meeting in person with the allegedly incapacitated or incapacitated person, ward, protected person, or minor, unless prohibited or made impracticable by exceptional circumstances, as set forth in § 6-1469(E)(1)(e) below.

(b) The guardian ad litem should consult with the allegedly incapacitated or incapacitated person, ward, protected person, or minor when reasonably possible and at those times and intervals as required by the Nebraska Probate Code.

(c) In addition to the statutorily required intervals for consulting with the allegedly incapacitated or incapacitated person, ward, protected person, or minor when possible, the guardian ad litem should consult with the allegedly incapacitated or incapacitated person, ward, protected person, or minor when:

(i) The allegedly incapacitated or incapacitated person, ward, protected person, or minor makes a reasonable request that the guardian ad litem meet with him or her;

(ii) The guardian ad litem has received notification of any emergency, or other significant event or change in circumstances affecting the allegedly incapacitated or incapacitated person, ward, protected person, or minor, including a change to the allegedly incapacitated or incapacitated person’s, ward’s, protected person’s, or minor’s address or location; and

(iii) Prior to any hearing at which substantive issues affecting the allegedly incapacitated or incapacitated person’s, ward’s, protected person’s, or minor’s legal or best interests are anticipated to be addressed by the court.

(iv) The guardian ad litem should make every effort to see the allegedly incapacitated or incapacitated person, ward, protected person, or minor in his or her home or current living environment at least once.

(d) Where an unreasonable geographical distance is involved between the location of the allegedly incapacitated or incapacitated person, ward, protected person, or minor and the guardian ad litem, the guardian ad litem should explore the possibility of obtaining from the court an advance determination that the court will arrange for the payment or reimbursement of the guardian ad litem’s reasonable expenses incurred in connection with the travel to meet with the allegedly incapacitated or incapacitated person, ward, protected person, or minor.

(e) “Exceptional circumstances” generally include, but are not limited to, those situations where an unreasonable geographical distance is involved between the location of the guardian ad litem and the allegedly incapacitated or incapacitated person, ward, protected person, or minor. Where such exceptional circumstances exist, the guardian ad litem should attempt consultation with the allegedly incapacitated or incapacitated person, ward, protected person, or minor by other reasonable means, including, but not limited to, telephonic means, assuming that the allegedly incapacitated or incapacitated person, ward, protected person, or minor is of sufficient capacity to participate in such means of communication and there are no other barriers preventing such communication. Where consultation by telephonic means is also not feasible, the guardian ad litem should seek direction from the court as to any other acceptable method by which to accomplish such consultation with the allegedly incapacitated or incapacitated person, ward, protected person, or minor.

(f) The guardian ad litem shall consider any information that is warranted by the nature and circumstances of each guardianship, conservatorship, or other protective proceeding.

(g) The guardian ad litem shall defend the social, economic, and safety interests of the person and provide objective and independent assessment of the person's situation, including economic, social, mental, physical, emotional, and other relevant factors as defined by Neb. Rev. Stat. § 30-4203.

(2) Inquiry and consultation with others.

(a) The guardian ad litem is required to make inquiry of others directly involved with such person as to such person's condition, including, but not limited to, any physician, psychologist, care provider, clergy member, financial institution, corporation, business entity, or other person with which such person has done or is doing business. The guardian ad litem should also make inquiry of any other persons who have knowledge or information relevant to the allegedly incapacitated or incapacitated person's, ward's, protected person's, or minor's best interests. The guardian ad litem may obtain such information through the means of direct inquiry, interview, or the discovery process.

(b) The guardian ad litem has a duty to read and comprehend medical records, reports prepared by the Nebraska Department of Health and Human Services, and reports from all other persons or providers who prepare and present such reports to the court.

(3) Report and recommendations to court.

(a) The guardian ad litem is required to submit a written report to the court as required by Neb. Rev. Stat. § 30-4205 or otherwise ordered by the court. The report shall be provided to the court at least one week prior to the hearing. A copy of the report shall be provided to all interested persons.

(b) The information contained in the report of the guardian ad litem should include, but is not limited to, the following information:

(i) Dates and description of the type of contact and communication with the allegedly incapacitated or incapacitated person, ward, protected person, minor and/or others.

(ii) Listing of documents reviewed;

(iii) The guardian ad litem's concerns regarding any specific matters or problems which, in the opinion of the guardian ad litem, need special, further, or other attention in order to protect or facilitate the allegedly incapacitated or incapacitated person's, ward's, protected person's, or minor's best interests;

(iv) The guardian ad litem's assessment and recommendations regarding the allegedly incapacitated or incapacitated person's, ward's, protected person's, or minor's needs and best interests;

(v) Recommendations to the court regarding a temporary or permanent guardianship, conservatorship, or other protective order;

(vi) Shall address whether the person for whom the guardianship is sought is an incapacitated person;

(vii) If the person is incapacitated, the guardian ad litem shall make recommendations as to whether the court should order a limited or full guardianship;

(viii) If the guardian ad litem recommends a limited guardianship, the report shall include recommendations on the authorities and responsibilities the guardian will have and the authorities and responsibilities the allegedly incapacitated or incapacitated person, ward, protected person, or minor shall have; and

(ix) If a full guardianship is recommended, the report shall specifically address why a full guardianship is necessary to protect the best interests of the allegedly incapacitated or incapacitated person, ward, protected person, or minor.

(c) To assist the guardian ad litem in preparing the written report, the guardian ad litem shall use the "Report of Guardian Ad Litem" forms found on the Nebraska Supreme Court Web site.

(4) Participation in court proceedings.

(a) The guardian ad litem shall attend all hearings unless expressly excused by the court.

(b) The guardian ad litem may testify only to the extent allowed by the Nebraska Rules of Professional Conduct.

(c) Where the guardian ad litem is unable or unavailable to attend a hearing due to reasons such as personal illness, emergency, involvement in another court hearing, or absence from the jurisdiction, such guardian ad litem may make proper arrangements for another attorney to attend the hearing as long as no other party objects and as long as the hearing is not anticipated to be a contested evidentiary hearing. In such a situation, the guardian ad litem does not need to be excused from attendance at the hearing.

(5) Duty to provide quality representation.

(a) Any attorney appointed by the court to serve as a guardian ad litem for an allegedly incapacitated or incapacitated person, ward, protected person, or minor, or to provide guardian ad litem services to such person is expected to provide quality representation and advocacy for the allegedly incapacitated or incapacitated person, ward, protected person, or minor whom he or she is appointed to represent, throughout the entirety of the case.

(b) Attorneys should not accept caseloads or appointments to serve as a guardian ad litem or to provide guardian ad litem services that are likely to, in the best professional judgment of the appointed attorney, lead to the provision of representation or service that is ineffective to protect and further the interests of the allegedly incapacitated or incapacitated person, ward, protected person, or minor, or likely to lead to the breach of professional obligations of the guardian ad litem.

(F) Termination of Authority of Guardian Ad Litem.

(1) The authority of the guardian ad litem shall commence upon appointment by the court and shall continue in that case until such time as the court allows the guardian ad litem to withdraw, terminates the appointment of the guardian ad litem, removes or suspends the guardian ad litem, or appoints the guardian ad litem to serve in another capacity.

(2) The guardian ad litem may voluntarily withdraw from representation in any case where the guardian ad litem files a motion to withdraw, and the court, in its discretion, enters a corresponding order granting such withdrawal.

(3) A guardian ad litem may be removed from a case by the court for cause, where the court finds that the guardian ad litem's performance is inadequate; that the guardian ad litem has substantially failed to discharge duties or act to protect the best interests of the allegedly incapacitated or incapacitated person, ward, protected person, or minor for whom the guardian ad litem was appointed; or that any other factor or circumstance prevents or substantially impairs the guardian ad litem's ability to fairly and fully

discharge his or her duties. In determining whether removal of the guardian ad litem is warranted in a particular case, the court should assess the guardian ad litem's performance under the requirements and standards of practice imposed upon a guardian ad litem by both the Nebraska Probate Code, as well as § 6-1469.

G. Education Requirements.

To be considered a candidate for appointment as a guardian ad litem in a probate proceeding, an attorney shall have completed six (6) hours of specialized training provided online by the Administrative Office of the Courts Judicial Branch Education Division prior to an initial appointment. Thereafter, in order to maintain eligibility to be appointed and to serve as a guardian ad litem, an attorney shall complete one (1) hour of specialized training per year as provided by the Administrative Office of the Courts Judicial Branch Education Division. Courts shall appoint attorneys trained under § 6-1469 in all cases when available; provided, however, that if the judge determines that an attorney with the training required herein is unavailable within the area, he or she may appoint an attorney without such training and the attorney must agree to complete the six-hour online training within seven (7) days of the appointment.