

GUARDIAN AD LITEM AMENDMENTS

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Lyle W. Hillyard

This act modifies the Judicial Code by amending provisions related to guardians ad litem.

The act modifies the duties of the guardian ad litem director. The act gives the court discretion to appoint a private attorney guardian ad litem in visitation and custody cases.

The act authorizes the courts to recover costs of guardians ad litem from defendants convicted of crimes or from the parties in visitation and custody cases. The act provides exceptions to recovery of costs for impecunious persons. The act defines the duties of private attorney guardians ad litem and grants limited immunity to guardians ad litem. The act provides an effective date.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

78-3a-911, as last amended by Chapter 13, Laws of Utah 1998

78-3a-912, as last amended by Chapter 194, Laws of Utah 1997

78-7-9, as last amended by Chapter 194, Laws of Utah 1997

ENACTS:

78-7-36, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-3a-911** is amended to read:

78-3a-911. Office of Guardian Ad Litem Director.

(1) There is hereby created the Office of Guardian Ad Litem Director under the direct supervision of the Judicial Council in accordance with Subsection 78-3-21(13).

(2) (a) The Judicial Council shall appoint one person to serve full time as the guardian ad litem director for the state.

(b) The director shall be an attorney licensed to practice law in this state and selected on



the basis of:

(i) professional ability;

(ii) experience in abuse, neglect, and dependency proceedings;

(iii) familiarity with the role, purpose, and function of guardians ad litem in both juvenile and district courts; and

(iv) ability to develop training curricula and reliable methods for data collection and evaluation.

(c) The director shall be trained in the United States Department of Justice National Court Appointed Special Advocate program prior to or immediately after his appointment.

(3) The guardian ad litem director shall:

(a) establish policy and procedure for the management of a statewide guardian ad litem program;

(b) manage the guardian ad litem program to assure that minors receive qualified guardian ad litem services in abuse, neglect, and dependency proceedings in accordance with state and federal law and policy;

(c) develop standards for contracts of employment and contracts with independent contractors, and employ or contract with attorneys licensed to practice law in this state, to act as attorney guardians ad litem in accordance with Section 78-3a-912;

(d) develop and provide training programs for attorney guardians ad litem and volunteers in accordance with the United States Department of Justice National Court Appointed Special Advocates Association standards;

(e) update and develop the guardian ad litem manual, combining elements of the National Court Appointed Special Advocates Association manual with specific information about the law and policy of this state;

(f) develop and provide a library of materials for the continuing education of attorney guardians ad litem and volunteers;

(g) educate court personnel regarding the role and function of guardians ad litem;

(h) develop needs assessment strategies, perform needs assessment surveys, and ensure that guardian ad litem training programs correspond with actual and perceived needs for training;

(i) design and implement evaluation tools based on specific objectives targeted in the needs assessments described in Subsection (3)(h); ~~[and]~~

(j) prepare and submit an annual report to the Judicial Council and the Health and Human Services Interim Committee regarding the development, policy, and management of the statewide guardian ad litem program, and the training and evaluation of attorney guardians ad litem and volunteers[-];

(k) hire, train, and supervise investigators; and

(l) administer the program of private guardians ad litem established by Section 78-7-36.

(4) A contract of employment or independent contract described under Subsection (3)(c) shall provide that attorney guardians ad litem in the second, third, and fourth judicial districts devote their full time and attention to the role of attorney guardian ad litem, having no clients other than the children whose interest they represent within the guardian ad litem program.

Section 2. Section **78-3a-912** is amended to read:

78-3a-912. Appointment of attorney guardian ad litem -- Duties and responsibilities -- Training -- Trained staff and court appointed special advocate volunteers -- Costs -- Immunity.

(1) The court may appoint an attorney guardian ad litem to represent the best interest of a minor involved in any case before the court and shall consider only the best interest of a minor in determining whether to appoint a guardian ad litem.

(2) An attorney guardian ad litem shall represent the best interest of each minor who may become the subject of a petition alleging abuse, neglect, or dependency, from the date the minor is removed from his home by the Division of Child and Family Services, or the date the petition is filed, whichever occurs earlier.

(3) The Office of the Guardian Ad Litem Director, through an attorney guardian ad litem, shall:

(a) represent the best interest of the minor in all proceedings;

(b) be trained in applicable statutory, regulatory, and case law, and in accordance with the United States Department of Justice National Court Appointed Special Advocate Association guidelines, prior to representing any minor before the court;

(c) conduct or supervise an independent investigation in order to obtain first-hand, a clear understanding of the situation and needs of the child;

(d) personally or through a trained volunteer, paralegal, or other trained staff, determine the extent of contact the minor or his family has had with the Division of Child and Family

90 Services;

91 (e) personally or through a trained volunteer, paralegal, or other trained staff, assess
92 whether kinship placements have been adequately explored and investigated by the Division of
93 Child and Family Services, and make recommendations to the court regarding the best interests
94 of a child in kinship placements;

95 (f) personally or through a trained volunteer, paralegal, or other trained staff, assess
96 whether there are alternatives to continued removal of the minor, including in-home services or
97 removal of the perpetrator;

98 (g) personally or through a trained volunteer, paralegal, or other trained staff, review the
99 Division of Child and Family Services' records regarding the minor and his family, and all other
100 necessary and relevant records pertaining to the minor, including medical, psychological, and
101 school records;

102 (h) personally meet with the minor, personally interview the minor if the minor is old
103 enough to communicate, determine the minor's goals and concerns regarding placement, and
104 personally assess or supervise an assessment of the appropriateness and safety of the minor's
105 environment in each placement;

106 (i) file written motions, responses, or objections at all stages of a proceeding when
107 necessary to protect the best interest of a minor;

108 (j) either personally or through a trained volunteer, paralegal, or other trained staff,
109 conduct interviews, if appropriate and permitted by the Rules of Professional Conduct, with the
110 minor's parents, foster parents, caseworkers, therapists, counselors, school personnel, mental health
111 professionals, where applicable and, if any injuries or abuse have occurred or are alleged, review
112 photographs, available video or audio tape of interviews with the minor, and contact appropriate
113 health care facilities and health care providers;

114 (k) either personally or through a trained volunteer, paralegal, or other trained staff,
115 identify appropriate community resources and advocate for those resources, when appropriate, to
116 protect the best interest of the minor;

117 (l) personally attend all court hearings, and participate in all telephone conferences with
118 the court unless the court waives that appearance or participation;

119 (m) personally or through a trained volunteer, paralegal, or other trained staff, attend all
120 administrative and foster care citizen review board hearings pertaining to the minor's case;

- 121 (n) prepare for hearings;
- 122 (o) present witnesses and exhibits when necessary to protect the best interest of the minor;
- 123 (p) participate in all appeals unless excused by order of the court;
- 124 (q) calculate the schedule for administrative or foster care citizen review board hearings
- 125 and other hearings required by state and federal law and regulation, and notify the Division of
- 126 Child and Family Services if those hearings are not held in accordance with those requirements;
- 127 (r) conduct interviews with potential witnesses and review relevant exhibits and reports;
- 128 (s) make clear and specific recommendations to the court concerning the best interest of
- 129 the minor at every stage of the proceeding, including all placement decisions, and ask that clear
- 130 and specific orders be entered for the provision of services, treatment provided, and for the
- 131 evaluation, assessment, and protection of the minor and his family;
- 132 (t) be familiar with local experts who can provide consultation and testimony regarding
- 133 the reasonableness and appropriateness of efforts made by the Division of Child and Family
- 134 Services to maintain a minor in his home or to reunify a minor with his parent;
- 135 (u) to the extent possible, and unless it would be detrimental to the minor, personally or
- 136 through a trained volunteer, paralegal, or other trained staff, keep the minor advised of the status
- 137 of his case, all court and administrative proceedings, discussions, and proposals made by other
- 138 parties, court action, and psychiatric, medical, or other treatment or diagnostic services that are to
- 139 be provided to the minor;
- 140 (v) review proposed orders for, and as requested by the court, prepare proposed orders with
- 141 clear and specific directions regarding services, treatment, and evaluation, assessment, and
- 142 protection of the minor and his family;
- 143 (w) personally or through a trained volunteer, paralegal, or other trained staff, monitor
- 144 implementation of a minor's treatment plan and any dispositional orders to determine whether
- 145 services ordered by the court are actually provided, are provided in a timely manner, and attempt
- 146 to assess whether they are accomplishing their intended goal; and
- 147 (x) inform the court promptly, orally or in writing, if:
- 148 (i) court-ordered services are not being made available to the minor and his family;
- 149 (ii) the minor's family fails to take advantage of court-ordered services;
- 150 (iii) court-ordered services are not achieving their purpose;
- 151 (iv) the division fails to hold administrative hearings or reviews as required by state and

federal law and regulation; or

(v) any violation of orders, new developments, or changes have occurred that justify a review of the case.

(4) (a) An attorney guardian ad litem may use trained volunteers, in accordance with Title 67, Chapter 20, Volunteer Government Workers Act, trained paralegals, and other trained staff to assist in investigation and preparation of information regarding the cases of individual minors before the court. An attorney guardian ad litem may not, however, delegate his responsibilities described in Subsection (3).

(b) All volunteers, paralegals, and staff utilized pursuant to this section shall be trained in and follow, at a minimum, the guidelines established by the United States Department of Justice Court Appointed Special Advocate Association.

(c) The court may use volunteers trained in accordance with the requirements of Subsection (4)(b) to assist in investigation and preparation of information regarding the cases of individual minors within the jurisdiction.

(d) When possible and appropriate, the court may use a volunteer who is a peer of the minor appearing before the court, in order to provide assistance to that minor, under the supervision of an attorney guardian ad litem or trained volunteer, paralegal, or other trained staff.

(5) The attorney guardian ad litem shall continue to represent the best interest of the minor until released from his duties by the court.

(6) (a) The juvenile court is responsible for all costs resulting from the appointment of an attorney guardian ad litem and the costs of volunteer, paralegal, and other staff appointment and training, and shall use funds appropriated by the Legislature for the guardian ad litem program to cover those costs.

(b) (i) When the court appoints an attorney guardian ad litem under this section [~~or Section 78-7-9~~], the court ~~§ [†] may [†] [shall] §~~ assess all or part of the attorney's fees, court costs, and paralegal, staff, and volunteer expenses against the minor's parents [~~or~~], parent, or legal guardian in a proportion that the court determines to be just and appropriate.

(ii) The court may not assess those fees or costs against a **§ LEGAL GUARDIAN, WHEN THAT GUARDIAN IS THE STATE, OR AGAINST A §** parent who is found to be impecunious. If a person claims to be impecunious, the court shall require of that person an affidavit of impecuniosity as provided in Section 21-7-3 and the court shall follow the procedures and make the determinations as provided in Section 21-7-4.

(7) An attorney guardian ad litem appointed under this section, when serving in the scope of his duties as guardian ad litem is considered an employee of the state for purposes of indemnification under Title 63, Chapter 30, Utah Governmental Immunity Act.

(8) (a) An attorney guardian ad litem shall represent the best interest of a minor. If the minor's wishes differ from the attorney's determination of the minor's best interest, the attorney guardian ad litem shall communicate the minor's wishes to the court in addition to presenting his determination of the minor's best interest. A difference between the minor's wishes and the attorney's determination of best interest may not be considered a conflict of interest for the attorney.

(b) The court may appoint one attorney guardian ad litem to represent the best interests of more than one minor child of a marriage.

~~[(b)]~~ (c) An attorney guardian ad litem shall formulate an independent position, after considering all relevant evidence, in accordance with the requirements of Subsection (3). His recommendations to the court shall be a result of his independent investigation.

(9) An attorney guardian ad litem shall be provided access to all Division of Child and Family Services records regarding the minor at issue and his family.

(10) An attorney guardian ad litem shall maintain current and accurate records regarding the number of times he has had contact with each minor and the actions he has taken in representation of the minor's best interest.

(11) (a) Except as provided in Subsection (11)(b), all records of an attorney guardian ad litem are confidential and may not be released or made public upon subpoena, search warrant, discovery proceedings, or otherwise. This subsection supersedes Title 63, Chapter 2, Government Records Access and Management Act.

(b) All records of an attorney guardian ad litem are subject to legislative subpoena, under Title 36, Chapter 14, Legislative Subpoena Powers, and shall be released to the Legislature.

(c) Records released in accordance with Subsection (11)(b) shall be maintained as confidential by the Legislature. The Office of the Legislative Auditor General may, however, include summary data and nonidentifying information in its audits and reports to the Legislature.

(d) Because of the unique role of an attorney guardian ad litem described in Subsection (8), and the state's role and responsibility to provide a guardian ad litem program and, as parens patriae, to protect minors, Subsection (11)(b) constitutes an exception to Rules of Professional

Conduct, Rule 1.6, as provided by Rule 1.6(b)(4). A claim of attorney-client privilege does not bar access to the records of an attorney guardian ad litem by the Legislature, through legislative subpoena.

Section 3. Section **78-7-9** is amended to read:

78-7-9. Appointment of attorney guardian ad litem in child abuse and neglect proceedings.

(1) If child abuse, child sexual abuse, or neglect is alleged in any proceeding in any state court, the court may upon its own motion or shall upon the motion of any party to the proceeding appoint an attorney guardian ad litem to represent the best interest of the child, in accordance with Sections 78-3a-911 and 78-3a-912.

(2) The court may appoint an attorney guardian ad litem, when it considers it necessary and appropriate, to represent the best interest of the child in all related proceedings conducted in any state court involving the alleged abuse, child sexual abuse, or neglect.

(3) The attorney guardian ad litem shall be appointed in accordance with and meet the requirements of Sections 78-3a-911 and 78-3a-912.

(4) If an attorney guardian ad litem has been appointed for the child by any court in the state in any prior proceeding or related matter, the court may continue that appointment or may reappoint that attorney guardian ad litem, if still available, to act on behalf of the child.

(5) The court is responsible for all costs resulting from the appointment of an attorney guardian ad litem and shall use funds appropriated by the Legislature for the guardian ad litem program to cover those costs.

(6) (a) If the court appoints [~~a guardian ad litem attorney~~] the Office of the Guardian Ad Litem in a civil case pursuant to this section [~~or Section 78-3a-912~~], the court ~~§ [†] may [†]~~ [shall] § assess all or part of those attorney's fees, court costs, paralegal, staff, and volunteer expenses against the minor's parent [~~or~~], parents, or legal guardian in an amount that the court determines to be just and appropriate.

(b) The court may not assess those fees or costs against a **§ LEGAL GUARDIAN, WHEN THAT GUARDIAN IS THE STATE, OR AGAINST A** § parent, parents, or legal guardian who is found to be impecunious. If a person claims to be impecunious, the court shall require of that person an affidavit of impecuniosity as provided in Section 21-7-3 and the court shall follow the procedures and make the determinations as provided in Section 21-7-4.

(c) If the court appoints the Office of the Guardian Ad Litem in a criminal case pursuant

to this section and if the defendant is convicted of a crime which includes child abuse or neglect, the court shall include as part of the defendant's sentence all or part of the attorney's fees, court costs, and paralegal, staff, and volunteer expenses of the Office of the Guardian Ad Litem.

(7) An attorney guardian ad litem appointed in accordance with the requirements of this section and Sections 78-3a-911 and 78-3a-912 is, when serving in the scope of duties of an attorney guardian ad litem, considered an employee of this state for purposes of indemnification under the Governmental Immunity Act.

Section 4. Section **78-7-36** is enacted to read:

78-7-36. Private attorney guardian ad litem -- Appointment -- Costs and fees -- Duties -- Conflicts of interest -- Pro bono obligation -- Indemnification -- Minimum qualifications.

(1) (a) The court may appoint a private attorney as guardian ad litem to represent the best interests of the minor in any district court action in which the custody of or visitation with a minor is at issue. The attorney guardian ad litem shall be certified by the Director of the Office of the Guardian Ad Litem as having met the minimum qualifications for appointment, but shall not be employed by or under contract with the Office of the Guardian Ad Litem.

(b) If an attorney guardian ad litem has been appointed for the minor in any prior or concurrent action and that attorney guardian ad litem is available, the court shall appoint that attorney guardian ad litem, unless good cause is shown why another attorney guardian ad litem should be appointed.

(c) If, after appointment of the attorney guardian ad litem, an allegation of abuse or neglect of the minor is made the court shall:

(i) determine whether it is in the best interests of the minor to continue the appointment;
or

(ii) order the withdrawal of the attorney guardian ad litem and appoint the Office of the Guardian Ad Litem.

(2) (a) The court shall assess all or part of the attorney guardian ad litem fees, courts costs, and paralegal, staff, and volunteer expenses against the parties in a proportion the court determines to be just.

(b) If the court finds a party to be impecunious, under the provisions of Sections 21-7-3 and 21-7-4, the court may direct the impecunious party's share of the assessment to be covered by the attorney guardian ad litem pro bono obligation established in Subsection (6)(b).

(3) The attorney guardian ad litem appointed under the provisions of this section shall:

(a) represent the best interests of the minor from the date of the appointment until released by the court;

(b) conduct or supervise an independent investigation in order to obtain a clear understanding of the situation and needs of the minor;

(c) formulate an independent opinion of the best interests of the minor after considering all relevant evidence and make recommendations to the court concerning the best interest of the minor;

(d) interview witnesses and review relevant records pertaining to the minor and the minor's family, including medical, psychological, and school records;

(e) if the minor is old enough to communicate and unless it would be detrimental to the minor:

(i) meet with and interview the minor;

(ii) determine the minor's goals and concerns regarding custody or visitation; and

(iii) counsel the minor regarding the nature, purpose, status, and implications of the case, of hearings, of recommendations, and proposals by parties and of court orders;

(f) conduct discovery, file pleadings and other papers, prepare and review orders, and otherwise comply with the Utah Rules of Civil Procedure as necessary to protect the best interest of the minor;

(g) unless excused by the court, prepare for and attend all mediation hearings and all court conferences and hearings, and present witnesses and exhibits as necessary to protect the best interests of the minor;

(h) identify community resources to protect the best interests of the minor and advocate for those resources; and

(i) participate in all appeals unless excused by the court.

(4) (a) The attorney guardian ad litem shall represent the best interests of a minor. If the minor's wishes differ from the attorney's determination of the minor's best interests, the attorney guardian ad litem shall communicate to the court the minor's wishes and the attorney's determination of the minor's best interests. A difference between the minor's wishes and the attorney's determination of best interests is not sufficient to create a conflict of interest § [under the Rules of Professional Conduct] § .

307 **(b) The court may appoint one attorney guardian ad litem to represent the best interests of**
308 **more than one minor child of a marriage.**

309 **(5) An attorney guardian ad litem appointed under this section is immune from any civil**
310 **liability that might result by reason of acts performed within the scope of duties of the attorney**
311 **guardian ad litem.**

312 **(6) (a) Upon the advice of the Director of the Office of the Guardian Ad Litem, the Judicial**
313 **Council shall by rule establish the minimum qualifications and requirements for appointment by**
314 **the court as an attorney guardian ad litem.**

315 **(b) An attorney guardian ad litem may be required to appear pro bono in one case for every**
316 **five cases in which the attorney is appointed with compensation.**

317 **(7) This section shall be effective in the Second, Third, and Fourth Judicial Districts on**
318 **July 1, 2001, and in the remaining judicial districts of the state on July 1, 2002.**

Legislative Review Note
as of 1-9-01 1:37 PM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel