

SIDE-BY-SIDE

ARTICLE 5- Protection of Persons under disabilities and their property- Part 8

ARTICLE 5: Part 8- EXISTING CODE LANGUAGE	Bill # S. 1243- Article 5- Part 8
Article 5.Part 8. Guardian Ad Litem under Article 5	Article 5.Part 8.
<p>There is no corresponding language in the existing code.</p>	<p><u>SECTION 62-5-810.</u></p> <p><u>The court has discretion in determining who will be appointed as a guardian ad litem in each case, subject to the requirements set forth in Section 62-5-820, and shall issue an order of appointment after obtaining the consent of the proposed guardian ad litem.</u></p> <p>REPORTER’S COMMENTS</p> <p>Prior to the 2012 amendments the previous version of the Article 5, Part 8 required that an attorney be appointed for the alleged incapacitated person and that the attorney have the powers and duties of a guardian ad litem. There was no guidance provided as to what those powers and duties should include and the dual role of attorney and guardian ad litem resulted in potential conflicts of interest. This Part 8 is based on the guardian ad litem statutes found in South Carolina Code of Laws, Title 63, Chapter 3, Article 7, concerning the family court guardian ad litem. This section sets out the basic authority and procedure for the appointment of a guardian ad litem in the probate court.</p> <p><u>SECTION 62-5-820.</u></p> <p><u>(1) To be appointed as a guardian ad litem pursuant to Section 62-5-810, a person must have the requisite knowledge or expertise to perform the required duties and must have completed the required training approved for guardians ad litem by the probate court making the appointment. These training requirements are:</u></p> <p style="padding-left: 40px;"><u>(A) if the guardian ad litem is a non-lawyer:</u></p>

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	<p> <u>(i) for initial qualification, a minimum of six hours; and</u> <u>(iii) every three years after the year of initial qualification, a minimum of six additional hours;</u> <u>(B) if the guardian ad litem is a lawyer:</u> <u>(i) for initial qualification, a minimum of three hours; and</u> <u>(ii) every three years after the year of initial qualification, a minimum of three additional hours.</u> <u>(C) The training requirements of this section may be waived by the court for good cause shown.</u> <u>(2) The training for a guardian ad litem serving in the probate court shall include a review of:</u> <u>(A) Parts 1 through 4 of this article;</u> <u>(B) the qualifications, responsibilities and duties of a guardian ad litem as set forth in this part; and</u> <u>(C) issues commonly encountered by guardians ad litem, including, but not limited to: and</u> <u>(i) resources, such as Social Security, Medicare, Medicaid, VA Benefits; and</u> <u>(ii) probate court procedures.</u> <u>(3) Upon accepting the appointment as guardian ad litem, a guardian ad litem must certify to the court that he meets the statutory qualifications.</u> <u>(4) A person whose eligibility has lapsed may again become eligible for appointment as a guardian ad litem by completing the additional training required after initial qualification.</u> <u>(5) For appointments made in the first year following enactment of this section, the court may waive the initial training requirement.</u> </p> <p> REPORTER’S COMMENTS This revision allows both lawyers and non-lawyers to be appointed as guardian ad litem, specifies the requirements for eligibility and appointment of the guardian ad litem, and is based upon the family court requirements found in 63-3-820(A). </p>

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	<p>Subsection (5) allows the court to waive the training requirement for appointments made in the year after enactment in order to allow time for the creation and dissemination of training programs.</p> <p><u>SECTION 62-5-830.</u></p> <p><u>(1) The responsibilities and duties of a guardian ad litem include, but are not limited to:</u></p> <p style="padding-left: 40px;"><u>(A) acting in the best interest of the primary respondent;</u></p> <p style="padding-left: 40px;"><u>(B) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the primary respondent. An investigation must include, but is not limited to:</u></p> <p style="padding-left: 80px;"><u>(i) obtaining and reviewing relevant documents. The guardian ad litem shall have access to the primary respondent’s medical records (including, but not limited to, hospital records, physician’s records, mental health treatment records, chemical dependency treatment records, and VA treatment records, state and federal tax records, financial records), public benefits records, and any other relevant records. The guardian ad litem shall have, on behalf of the primary respondent, the right to institute or participate in discovery and in any proceedings to the same extent as any party to the action;</u></p> <p style="padding-left: 80px;"><u>(ii) meeting with, observing, and interviewing the primary respondent on at least one occasion;</u></p> <p style="padding-left: 80px;"><u>(iii) conveying to the primary respondent the substance of the petition, the nature, purpose and effect of the proceeding, and the primary respondent’s rights at the hearing;</u></p> <p style="padding-left: 80px;"><u>(iv) informing the primary respondent of the right to retain counsel or request the court to appoint counsel in accordance with the provisions of Section 62-5-303(4) or Section 62-5-403(E), as applicable;</u></p> <p style="padding-left: 80px;"><u>(v) interviewing the petitioner, the proposed guardian, the proposed conservator, and any party who files an answer in the matter;</u></p> <p style="padding-left: 80px;"><u>(vi) visiting the residence of the primary respondent, if deemed</u></p>

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	<p><u>appropriate;</u></p> <p><u>(vii) interviewing caregivers, relatives, and others with knowledge relevant to the case;</u></p> <p><u>(viii) reviewing the criminal history of any individual proposed as guardian or conservator when deemed appropriate; and</u></p> <p><u>(ix) considering the wishes of the primary respondent;</u></p> <p><u>(C) advocating for the best interest of the primary respondent by making specific and clear suggestions, including information and recommendations regarding resources as may be appropriate or available to benefit the primary respondent;</u></p> <p><u>(D) attending all probate court hearings, except when attendance is excused by the court or the absence is stipulated by all parties present at the hearing. The guardian ad litem must provide accurate, current information directly to the court;</u></p> <p><u>(E) making recommendations regarding the appropriateness of the appointment of a guardian or conservator and any limitations to be imposed;</u></p> <p><u>(F) presenting an oral report at the hearing on the information gathered, findings, and recommendations of the guardian ad litem, unless a written report has been submitted pursuant to paragraph (G) and attendance has been excused pursuant to paragraph (D); and</u></p> <p><u>(G) upon request by the court, presenting to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the best interest of the primary respondent. The written report, when requested, must be submitted to the court and all parties by the deadline set by the court, but at least forty-eight hours prior to the hearing, unless otherwise waived by the court. The guardian ad litem is subject to cross-examination on the facts and conclusions contained in the report.</u></p> <p><u>(2) A guardian ad litem may submit reports, recommendations, briefs, memoranda, affidavits, or other documents on behalf of the primary respondent, in a manner consistent with the South Carolina Rules of Evidence and other state law. A guardian ad litem’s notes are his work product and are not subject to subpoena.</u></p>

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	<p>(3) <u>The guardian ad litem shall submit to the court a report that includes:</u></p> <p>(A) <u>the date and place of the meeting of the guardian ad litem with the primary respondent;</u></p> <p>(B) <u>whether the primary respondent approves of:</u></p> <p>(i) <u>the appointment of a guardian or conservator, as requested in the petition;</u></p> <p>(ii) <u>the person to be appointed; and</u></p> <p>(iii) <u>the extent of the requested authority;</u></p> <p>(C) <u>a description of the appearance of the primary respondent;</u></p> <p>(D) <u>a description of the condition of the place of the meeting, if appropriate;</u></p> <p>(E) <u>the diagnosis of the primary respondent;</u></p> <p>(F) <u>any prior action with the Department of Social Services or law enforcement concerning the primary respondent or the proposed guardian or conservator, of which the guardian ad litem is aware;</u></p> <p>(G) <u>a statement as to any prior relationship between the guardian ad litem and the petitioner, primary respondent, or any other party to the action; and</u></p> <p>(I) <u>the signature of the guardian ad litem and the date of the report.</u></p> <p>(4) <u>The court may extend or limit the responsibilities and authority of the guardian ad litem upon good cause shown.</u></p> <p>REPORTER’S COMMENTS</p> <p>The listed responsibilities are adapted from the requirements for a guardian ad litem serving in the family court found in South Carolina Code of Laws Section 63-3-830. Subsection 1 codifies the responsibilities of the guardian ad litem. Subsection 2 specifically allows the guardian ad litem to introduce documents and protects the guardian ad litem’s work. The new reporting requirement in Subsection 3 incorporates information gathered by the guardian ad litem into a minimum of one report, and includes information previously reported by an appointed visitor (the visitor appointment is</p>

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	<p>now optional for the court under the 2012 amendments).</p> <p><u>SECTION 62-5-840.</u></p> <p>(1) <u>At the time of appointment of a guardian ad litem, the court must set forth the rate of compensation for the guardian ad litem based on the factors set forth in subsection (2). The court may set an overall maximum fee or an hourly rate of compensation. If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian ad litem may move the court for additional compensation.</u></p> <p>(2) <u>A guardian ad litem appointed by the court is entitled to reasonable compensation and reimbursement for expenses, subject to the review and approval of the court. In determining the reasonableness of the fees and costs, the court must take into account:</u></p> <ul style="list-style-type: none"> <u>(a) the novelty and difficulty of the issues before the court and the skill requisite to perform the responsibilities properly;</u> <u>(b) the contentiousness of the proceedings;</u> <u>(c) the time expected to be expended by the guardian ad litem;</u> <u>(d) the likelihood that the acceptance of the appointment will preclude other employment of the guardian ad litem;</u> <u>(e) the time limitations imposed by the circumstances;</u> <u>(f) the experience, reputation and ability of the person being appointed by the court;</u> <u>(g) the financial ability of each party to pay fees and costs; and</u> <u>(h) any other factors the court considers necessary.</u> <p>(3) <u>If so directed by the court, the guardian ad litem must submit an itemized billing statement of hours, expenses, costs, and fees to the court.</u></p> <p>(4) <u>At any time during the action, a party may petition the court to review the reasonableness of the fees and costs submitted by the guardian ad litem.</u></p> <p>REPORTER'S COMMENTS</p>

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	<p>This section is based upon Section 63-3-850, which addresses compensation for the guardian ad litem in family court.</p> <p><u>SECTION 62-5-850.</u></p> <p><u>Any guardian ad litem appointed by the court must, upon request of the court or any party, provide written disclosure to each party:</u></p> <p><u>(1) of the nature, duration, and extent of any relationship the guardian ad litem (or any member of the guardian ad litem’s immediate family) has with any party; and</u></p> <p><u>(2) of any interest adverse to any party or any party’s attorney which might cause the impartiality of the guardian ad litem to be challenged.</u></p> <p>REPORTER’S COMMENTS</p> <p>This section is based upon Section 63-3-860, which addresses disclosure for the guardian ad litem in family court.</p> <p><u>SECTION 62-5-860.</u></p> <p><u>(1) A guardian ad litem may resign or be removed from a case at the discretion of the court.</u></p> <p><u>(2) Upon the appointment of a guardian or issuance of a protective order, the appointment of the guardian ad litem automatically terminates unless otherwise specified in the court order.</u></p> <p>REPORTER’S COMMENTS</p> <p>Subsection 1 is based upon Section 63-3-870, which addresses removal of the guardian ad litem in family court. Subsection 2 terminates the responsibilities of a guardian ad litem unless the court requires further action by the guardian ad litem on behalf of the primary respondent.</p>

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	<p><u>SECTION 62-5-870.</u></p> <p><u>A guardian ad litem appointed under this part and acting in the course and scope of the appointment is not liable for damages arising from an act or omission of the guardian ad litem committed in good faith. The immunity granted by this section does not apply if the conduct constitutes willful or wanton misconduct or gross negligence.</u></p> <p>REPORTER’S COMMENTS</p> <p>This addition provides statutory protection for lawyer and non-lawyer guardians ad litem. See <u>Fleming v. Asbill</u>, 326 S.C. 49, 483 S.E.2d 751 (S.C. 1997), and <u>Vaughan v. McLeod Regional Medical Center</u>, 372 S.C. 505, 642 S.E.2d 744 (S.C. 2007).</p>