

N.M. R. Civ. P. Dist. Ct. 1-053.3

Rule 1-053.3 - Guardians ad litem; domestic relations appointments.

A. Appointment. In any proceeding when custody of a minor child is contested under Chapter 40, NMSA 1978 the court may appoint a guardian ad litem on the court's motion or upon the motion of any party, as set forth in this rule. The guardian ad litem serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests.

B. Order. The appointment order shall be written in substantial conformity with Form 4-402 NMRA. The order shall specify the guardian ad litem's role, tasks, duties, any limitations, the reasons for the appointment and the duration of the appointment. The order shall authorize communication between the guardian ad litem and any mental health professional, medical professional, or other individuals providing services to parents, children, or other parties in the case and shall order the parties and minor children over the age of fourteen (14) to sign any releases requested by the guardian ad litem.

C. Designation. The guardian ad litem appointed under this rule is a "best interests attorney" who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations. This rule shall not limit the court's ability to appoint an expert pursuant to Rule 11-706 NMRA or a special master pursuant to Rule 1-053 NMRA.

D. Prohibited delegation. In no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues under Section 40-4-7.2 NMSA 1978.

E. Factors. In determining whether an appointment will be made, the court may consider relevant factors, including the following:

- (1) the wishes of the parents or other parties;
- (2) the age of the child;
- (3) the contentiousness of the parties or other dynamics affecting the child, including past or present mental health issues of a party or a household member;
- (4) the extent to which the appointment will assist the court by providing factual information useful to the court in determining the child's best interest;
- (5) the ability of the parties to pay;
- (6) the views or concerns expressed by the child;
- (7) the requests for extraordinary remedies, including supervised visitation;
- (8) a proposed relocation;
- (9) the likelihood that the child will be called as a witness or be examined by the court in chambers;

- (10) past or present substance abuse, sexual abuse, emotional abuse or domestic abuse by, or to, a party, the child or a household member;
- (11) disputes as to paternity;
- (12) interference, or threatened interference, with custody or parenting time, including abduction;
- (13) special physical, educational or mental health needs of the child;
- (14) inappropriate adult influence on, or manipulation of, the child;
- (15) the extent to which the litigation process is harmful to the child;
- (16) whether the child's needs can be protected through the limitation of the appointment to a specific issue; and
- (17) any other relevant factors.

F. Duties. The guardian ad litem shall have the following duties, in addition to other duties stated in the order:

- (1) if the child is age six (6) or older, interviewing the child face-to-face outside the presence of all parties and counsel; interviewing all parties in conformity with Rule 16-402 NMRA and the order appointing the guardian ad litem; interviewing any therapist for the child; and interviewing other lay persons, mental health professionals, medical professionals, or other individuals providing services to parents, children, or other parties in the case at the guardian ad litem's or court's discretion. If the child is under the age of six (6), the guardian ad litem may interview the child outside the presence of the parties and counsel at the guardian ad litem's discretion;
- (2) determining the child's wishes, if appropriate;
- (3) protecting the best interests of the child or children in the matter in which the guardian ad litem was appointed;
- (4) serving a written report of investigation and separate written recommendations to all parties and counsel at least eleven (11) days before the recommendations are filed with the court, except in the case of emergency; and
- (5) filing the recommendations with the court and providing written notice to the parties of the following:
 - (a) the deadline for submitting a stipulated order adopting the recommendations as provided in Subparagraph (G)(1) of this rule;
 - (b) the deadline for filing objections to the recommendations as provided in Subparagraph (G)(2) of this rule;
 - (c) that a failure to file timely objections shall be deemed a waiver of the right to object; and

(d) if no objections are filed, the court shall, without the necessity of holding a hearing, enter an order adopting the recommendations; and

(5) in the case of an emergency, filing emergency recommendations with the court and requesting a hearing without regard to Subparagraphs (4) and (5) of this Paragraph.

G. Guardian ad litem recommendations.

(1) If the parties agree to adopt the guardian ad litem recommendations, they shall submit a stipulated order adopting the recommendations within eleven (11) days after the recommendations are filed.

(2) If one or both of the parties does not agree to adopt the recommendations, such party may file objections to the recommendations and a request for hearing on the objections within eleven (11) days after the recommendations are filed. Objections must identify the specific portions of the guardian ad litem's recommendations to which the party objects. The court will set a hearing on the objections to be held as soon as practicable after the filing of the objections. If a party files objections to emergency recommendations filed by a guardian ad litem under Subparagraph (F)(6) of this rule, the court shall set a hearing to be held within twenty (20) days of the filing of the objections.

(3) A failure to file timely objections to the recommendations of the guardian ad litem shall be deemed a waiver of the right to object, and the court shall, without the necessity of a hearing, enter an order adopting the guardian ad litem's recommendations.

H. Duties to the child. A guardian ad litem, in a manner appropriate to the child's developmental level, shall:

(1) explain the role of the guardian ad litem to the child;

(2) inform the child that, in providing assistance to the court, the guardian ad litem may use information that the child gives to the guardian ad litem;

(3) keep the child informed of the nature and status of the proceeding;

(4) review and accept or decline to accept any proposed stipulation for an order affecting the child and explain to the court the basis for any opposition; and

(5) consider the child's objectives in determining what to recommend.

I. Privilege; confidentiality.

(1) *Communications.* All communications between the child and the guardian ad litem are privileged as provided in Rule 11-503 NMRA.

(2) *Files.* Any materials in the guardian ad litem's files that are not privileged under Subparagraph (1) of this paragraph,

(a) are confidential and are not subject to public disclosure; and

(b) are considered trial preparation materials and are subject to discovery only as provided in Rule 1-026(B)(5) NMRA.

(3) Who may claim the privilege; waiver.

(a) The guardian ad litem may claim the privilege on behalf of the child.

(b) The guardian ad litem may waive the privilege on a limited basis on behalf of the child when necessary to represent the best interests of the child to the court, the child's parents or legal guardian, a mental health provider, a law enforcement agency, or the Children, Youth and Families Department. The guardian ad litem's limited waiver of the privilege for these purposes does not constitute a waiver of the privilege for any matter not specifically disclosed or to any person or agency to whom the information is not specifically disclosed.

(c) The child's parent or legal guardian may not claim the privilege or interfere with the guardian ad litem's assertion or waiver of the privilege.

(4) Construction. This paragraph shall be construed to protect the best interests of the child.

J. Presentation of report and recommendations; authority to call witnesses. The guardian ad litem may call and examine witnesses at any hearing at the guardian ad litem's discretion. The guardian ad litem may provide a verbal report and recommendations at any hearing or trial in the matter.

K. Fees and costs. The order shall state the guardian ad litem's authorized retainer and hourly rate, provide for itemized monthly statements to the parties, and designate the manner in which the parties bear the fees and costs. Either party or the guardian ad litem may request a hearing on the guardian ad litem fees and costs.

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Provisionally approved by Supreme Court Order No. 06-8300-018, effective August 21, 2006; as amended by Supreme Court Order No. 07-8300-021, effective August 21, 2007; as amended by Supreme Court Order No. 17-8300-017, effective for all cases pending or filed on or after December 31, 2017.

*Committee commentary. - A guardian ad litem's authority to claim or waive the privilege on behalf of the child under Subparagraph (1)(3) extends to any communication with the child that would be privileged if made by an adult. See, e.g., Rule 11-504(C)(2)(d) NMRA (providing that the privilege for communications between a patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist may be claimed by "any other person included in the communication to further the patient's interest"). Paragraph J permits a guardian ad litem to call witnesses and to provide a verbal report and recommendations at any hearing or trial in the matter in which the guardian ad litem is appointed. Such participation does not implicate Rule 16-307 NMRA, which prohibits a lawyer from acting as an advocate in any proceeding in which the lawyer is likely to be a necessary witness. A guardian ad litem is, by definition, a "best interests attorney" who acts as "an arm of the court" and therefore is not an advocate for the purposes of Rule 16-307. If a guardian ad litem chooses to provide a verbal report, facts or data relied on by a guardian ad litem in forming an opinion in the case need not be admissible for the guardian ad litem's opinion to be admitted. See Rule 11-703 NMRA; *Thomas v. Thomas*, 1999-NMCA-135, ¶ 25, 128 N.M. 177, 991 P.2d 7. Guardian ad litem fees and costs under Paragraph K are in the nature of support of the child and therefore are not dischargeable in a bankruptcy proceeding. See, e.g., *In re Miller*, 55 F.3d 1487, 1490 (10th Cir. 1995) ("[D]ebts to a guardian ad litem, who is specifically charged with representing the child's best interests . . . can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents*

in a custody proceeding." (citing In re Jones 9 F.3d 878, 881 (10th Cir. 1993) (holding that attorney's fees in a custody proceeding are not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5)). [Approved by Supreme Court Order No. 17-8300-017, effective for all cases pending or filed on or after December 31, 2017.]

