# THE COURT'S EXPECTATIONS OF APPOINTED LAWYERS

DON DAVIS,
JUDGE OF PROBATE

The Court's Expectations and Objectives - Mental Health Commitment Cases

A. General Themes

3 general points/themes: (1) respondents who meet the criteria for commitment are afforded the opportunity to receive said treatment, (2) public safety concerns as to persons in the community who are under the Court's order for outpatient commitment, and (3) the Court's orders are reasonably being complied with

B. Specific Aspects of Process

1. Cases promptly processed and heard

   A. Respondent's personal safety
   B. Public's safety
   C. Statutory Requirement - Be Resolved in 30 Days
   D. Respondents' individual circumstances (e.g. - are they gainfully employed, attending school, etc.)

2. Evaluations Properly Performed - Recognizing That This Area Of Medical Science/Practice Is Not Definite

   A. The evaluations are performed under the direction of a medical doctor and a medical doctor is making the final decision in terms of diagnosis and recommendation
   B. Legal requirements for inpatient or outpatient commitment are satisfied with clear and convincing evidence
   C. Medical records from other sources are utilized if reasonably available
   D. Information from family members and petitions (if reasonably available) is solicited and utilized
   E. "Outpatient" evaluations - if a respondent is determined to meet the requirements for inpatient or outpatient commitment - appropriate measures are taken concerning initiation of treatment in the proper setting

3. Outpatient Commitments

   A. Continuity of treatment initiated during evaluation process
   B. Material noncompliance with the treatment plan established for the respondent is reported to the Court immediately (as required by statute)

C. Realization of Decrease in Number of Cases on Court's Mental Health Docket as a result of proactive treatment efforts

D. Establishment of Procedure Whereby Specific Cases of Concern Can be Reviewed - the Goal Being to Try to Avoid the Same Situation Occurring Again

E. Appreciation Of Public Relations Aspect Of Relationship Between Court and AHS

# GUIDELINES FOR APPOINTED LAWYERS
# MENTAL HEALTH INVOLUNTARY COMMITMENT CASES

Core constitutional rights of a respondent come into play in mental health involuntary commitment cases. It is the intent of the involuntary commitment process to ensure that citizens with a serious mental illness receive treatment at the appropriate level and in the appropriate setting. **ALL** appointed lawyers have a role in protecting respondents' constitutional rights, the personal safety of respondents and the safety of the general public. **ALL** lawyers have an obligation to protect the integrity of the commitment process by establishing a record that will satisfy the Court in the present hearing and that will be clear if future review of a proceeding ever becomes necessary. To that end, **ALL** appointed lawyers should recognize and appreciate the necessity that there be a solid record of the medical basis for a medical expert's recommendation for inpatient or outpatient commitment or dismissal during merit hearings conducted before the Court.

The Court has ordered the respondent's attending physician at the EastPointe Adult Evaluation Unit (or AltaPointe Adult Outpatient Clinic or Mobile Infirmary Psychiatric Unit) to appear before the Court and to testify at the merit hearing before the Court.

The Court desires for the hearings to be focused on the substantive issues before the Court. However, it is necessary for there to be a solid record to justify the Court's decisions, especially if there is an appeal.

The Court offers the following guidelines to assist lawyers in accomplishing the task of having a solid record of the medical basis for a medical expert's recommendation:

- The educational and professional background of the person being proffered as an expert witness must be in the record in each case. It is permissible after a lawyer has participated in one case on a docket to stipulate to the *educational and professional background* of the proffered witness.

- **ALL** lawyers should share the printed resume of the attending physician with their client(s) **BEFORE THE MERIT HEARING COMMENCES**. Laminated copies are available for this use.

- If a lawyer's client objects to the attending physician's qualifications as an expert witness in advance of the hearing, the lawyer should ask the appropriate questions in direct examination or voir dire (by the guardian ad litem) to seek to qualify the attending physician as an expert.

- **IN ALL CASES** after the attending physician has been accepted as an expert witness, the following points need to be in the record:

  - ▲ The witness is a member of the respondent's evaluation team

  - ▲ The facility's (EastPointe Adult Evaluation Unit, AltaPointe Outpatient Clinic, Mobile Infirmary Medical Center as the case may be) maintains books and records in the ordinary course of its business operations.

  - ▲ The notations in the respondent's medical records are made contemporaneously with the event/matter being noted and charted.

  - ▲ The witness is familiar with the contents of the facility's medical records regarding the respondent

  - ▲ The medical records are available in court for use to refresh the recollection of the attending physician if necessary

  - ▲ The witness has personal knowledge of the respondent's medical history, diagnosis and treatment. The witness should be asked on what occasions did the witness personally interact

with the respondent and the occasion of each such interaction.

- ▲ If the respondent has a history of past treatment for mental illness, what medical records were obtained and if said medical records were available to and utilized by the respondent's attending physician and the respondent's treatment team during the evaluation process. The witness should be asked when the witness last reviewed the respondent's medical records.

- ▲ Interaction and/or communication with members of the respondent's family and the petitioner (if the petitioner is not a member of the respondent's family) during the course of the evaluation to obtain information and medical history relating to the respondent. If the witness didn't directly have such interaction/communication, the witness should be asked what member of the treatment team did and the date of said interaction/communication.

- ▲ If the recommendation being offered to the Court is outpatient commitment, where it is proposed that the respondent will reside while obtaining treatment. If it is proposed that the respondent reside with a family member, inquire if said family member was contacted regarding the proposed treatment recommendation and whether said family member agreed for the respondent to reside with the family member.

- ▲ Review the physician's notes and the nurses' notes in the respondent's current medical record, note any inconsistencies that may be apparent and inquire of the witness how such can be reconciled with the recommendation being proffered to the Court by the witness.

- While the medical records will be available to the physician and the parties during the hearing it is not absolutely necessary that the respondent's file be an exhibit to the hearing.

- Appointed lawyers should go to the facility at which the respondent was evaluated on the *business* day preceding the merit hearing to meet with their clients and/or review medical records and/or confer with members of the evaluation team.

- AltaPointe has requested that appointed lawyers contact the facility at which the respondent was evaluated in advance as to: (A) when the appointed lawyer plans to come to the facility, (B) what medical records the appointed lawyers desires to review, and (C) whether the appointed lawyer desires to review medical records AltaPointe has obtained from other medical providers concerning the respondent. Requests for review of medical records needs to be as specific as possible.

- Make copies of any portion of the respondent's medical record that cause you concern while at the AltaPointe facility or Mobile Infirmary Medical Center.

- Medical records can't be printed instantaneously. AltaPointe has agreed to exert its best efforts to provide copies of medical records as expeditiously as possible on the date the appointed lawyer visits the facility. AltaPointe has advised that with advance notice of an appointed lawyer's visit, an electronic medical record can be prepared and electronically transmitted to the appointed lawyer within one to three hours of the visit.

- If you desire to refer to the respondent's medical records at the merit hearing, said medical records be present at the merit hearing in either electronic format or hard-copy file.

- If you contemplate needing to refer to AltaPointe's medical records at the merit hearing, you should notify the Court's staff of the same no later than the business day preceding the merit hearing to enable the Court's staff to have the appropriate computer equipment set up in the courtroom.

Revised 1/2019

## CONTINUANCES OF MERIT HEARINGS

Alabama (and federal) law require that if commitment is ordered, such commitment for treatment be the least restrictive means of available treatment given a respondent's condition and diagnosis. An overall objective of the Court is for court-ordered treatment to be avoided whenever reasonably possible. There may be circumstances where an evaluation period of two or three weeks can result in the case being concluded with a less restrictive outcome and result, than would occur if the Court ruled on the matter six days following the probable cause hearing. There are also instances, when, given the severity of a respondent's symptoms, AltaPointe Health Systems ("AHS") is unable to complete its evaluation within the usual six day time period. In these types of situations, AHS may recommend that a merit hearing be continued. Because mental health involuntary commitment actions are a "liberty deprivation" action, the Court will conduct a hearing on the continuance request.

## MISCELLANEOUS POINTS TO NOTE

At **ALL** times utilize your good judgment. Don't check your "common sense" at the door of the courtroom. If something doesn't seem correct or if you have a question - speak up - ask the appropriate question of the appropriate party.

Be sure to note the difference between "AltaPointe" (the name of the Mobile-Washington Counties' community mental health provider) and its facilities, such as EastPointe Hospital and BayPointe Hospital.

Be alert to the fact that if the Court orders an independent medical evaluation of a respondent, the medical doctor conducting said evaluation is **NOT** affiliated with AHS. Consequently, the questions legal counsel should pose to said medical doctor in order to qualify the medical doctor to offer an opinion and recommendation differ somewhat from those questions that are posed to AHS affiliated medical doctors.

If you encounter any difficulty in performing your duties and responsibilities in these cases, you should notify the Court's Clerk's Office immediately.

# GUARDIAN AD LITEM - MENTAL HEALTH CASES

## I. A GUARDIAN AD LITEM:

A. Is a lawyer appointed by the Court to protect a Respondent's interests in an involuntary commitment case.
B. Is an officer of the Court.
C. Gives no bond.
D. Does not have charge or take possession of the Respondent's person or property.
E. Has no powers or responsibilities prior to appointment or after the conclusion of the involuntary commitment case.

## II. BEFORE THE PROBABLE CAUSE HEARING, THE GUARDIAN AD LITEM SHOULD:

A. Examine and read the Court's file and all pleadings. Find out who is involved and what the case is about.
B. Contact and discuss the matter with the Respondent, if practicable.
C. Advise the Respondent of the Respondent's legal rights, if practicable.
D. Contact the petitioner's advocate to discuss the matter and ascertain additional information.
E. Where appropriate, research applicable law.
F. Inspect and examine any medical records that may affect the Respondent's interests.
G. Protect the Respondent's interests and assist the Court in solving any problems. Appreciate that the mental health involuntary commitment procedure is a "liberty deprivation" matter and must be approached seriously.
H. Keep records, especially of time expended.
I. Make specific inquiry as to the existence of any assets belonging to or in the custody of the Respondent, which will need management and protection, should the Respondent be detained or committed by the Court. Advise the Court of the same.
J. Understand that the mental health involuntary commitment procedure is NOT to be utilized when a Respondent's primary problem is substance abuse.

## III. AT THE PROBABLE CAUSE HEARING, THE GUARDIAN AD LITEM SHOULD:

A. Be present at the Courthouse at least 45 minutes before the probable cause hearing to meet with Respondent and any witnesses.
B. If you are running late or have a matter in a different court that is going to delay you - notify the Court's Clerk's Office in advance.
C. Know the location, condition and situation of the Respondent.
D. Be prepared for the probable cause hearing and know how the Respondent will be affected by any action taken or decision made.
E. Protect the Respondent's interests and legal rights.

F. Cross examine adverse witnesses as appropriate.
G Be prepared to share with the Court what you have done and how you have helped the Respondent.
H. Advise the Respondent, as appropriate.

## IV. BEFORE THE MERIT HEARING, THE GUARDIAN AD LITEM SHOULD:

A. Contact the facility at which the Respondent is located and advise them of when you plan on reviewing the Respondent's medical record(s) and what records you desire to review.
B. Go to the facility at which the Respondent is being evaluated **on the business day preceding the merit hearing. NOTE: you may have to make an appointment in advance with the facility.**
C. Review the Respondent's medical records (current admission and past records). Obtain copies of any medical records that cause you concern.
D. Meet with the Respondent's evaluation team and obtain their insight and comments concerning the Respondent.
E. Meet with the Respondent. Conduct your own assessment of the Respondent.
F. Review with the Respondent the evaluation team's proposed treatment recommendation to the Court regarding the Respondent. Answer any questions the Respondent may have regarding the recommendation and implementation of the recommendation, if it is accepted by the Court.
G. Satisfy yourself that the Respondent has suitable housing and food is available to the Respondent, should commitment be recommended and the Court accepts said recommendation.
H. If you contemplate needing to refer to the Respondent's medical records at the merit hearing, notify the Court's staff to enable the appropriate equipment to be obtained for the merit hearing.

## V. AT THE MERIT HEARING, THE GUARDIAN AD LITEM SHOULD:

A. Be on time. If you are running late or have a matter in a different court that is going to delay you - notify the Court's Clerk's Office in advance.
B. Know the location, condition and situation of the Respondent.
C. Be prepared for the merit hearing and know how the Respondent will be affected by any action taken or decision made.
D. Protect the Respondent's interests and legal rights.
E. Cross examine adverse witnesses as appropriate.
F. Be prepared to share with the Court what you have done and how you have helped the Respondent.
G. Advise the Respondent, as appropriate.

# PETITIONER'S ADVOCATE - MENTAL HEALTH CASES

## I. THE PETITIONER'S ADVOCATE:

A. Is a lawyer appointed by the Court to represent and protect a Petitioner's interests in an involuntary commitment case.
B. Is an officer of the Court.
C. Has no powers or responsibilities prior to appointment or after the conclusion of the involuntary commitment case.

## II. BEFORE THE PROBABLE CAUSE HEARING, THE PETITIONER'S ADVOCATE SHOULD:

A. Examine and read the Court's file and all pleadings. Find out who is involved and what the case is about.
B. Contact and discuss the matter with the Petitioner.
C. Advise the Petitioner of the Petitioner's and Respondent's legal rights, if practicable.
D. Contact the Guardian Ad Litem to discuss the matter and ascertain additional information.
E. Where appropriate, research applicable law.
F. Inspect and examine any medical records of the Respondent that may affect the Petitioner's interests.
G. Protect the Petitioner's interests and assist the Court in solving any problems.
H. Keep records, especially of time expended.
I. Make specific inquiry as to the existence of any assets belonging to or in the custody of the Respondent, which will need management and protection, should the Respondent be detained or committed by the Court. Advise the Court of the same.
J. Understand that the mental health involuntary commitment procedure is NOT to be utilized when a Respondent's primary problem is substance abuse.

## III. AT THE PROBABLE CAUSE HEARING, THE PETITIONER'S ADVOCATE SHOULD:

A. Be present at the Courthouse at least 45 minutes before the probable cause hearing to meet with Petitioner and any witnesses.
B. If you are running late or have a matter in a different court that is going to delay you - notify the Court's Clerk's Office in advance.
C. Know the location, condition and situation of the Respondent - to the extent possible.
D. Be prepared for the probable cause hearing and know how the Respondent will be affected by any action take or decision made.
E. Present evidence to support the Petitioner's petition.
F. Protect the Petitioner's interests and legal rights.
G. Cross examine adverse witnesses as appropriate.
H. Be prepared to share with the Court what you have done and how you have helped the Petitioner.
I. Advise the Petitioner, as appropriate.

## IV. BEFORE THE MERIT HEARING, THE PETITIONER'S ADVOCATE SHOULD:

A. Contact the facility at which the Respondent is located and advise them of when you plan on reviewing the Respondent's medical record(s) and what records you desire to review.
B. Go to the facility at which the Respondent was evaluated between the hours of 10:00 a.m. and 4:00 p.m. on the business day preceding the merit hearing.
C. Review the Respondent's medical records (current admission and past records). Obtain copies of any medical records that cause you concern.
D. Meet with the Respondent's evaluation team and obtain their insight and comments concerning the Respondent.
E. Review with the Petitioner the evaluation team's proposed treatment recommendation to the Court regarding the Respondent. Answer any questions the Petitioner may have regarding the recommendation and implementation of the recommendation, if it is accepted by the Court.
G. If you contemplate needing to refer to the Respondent's medical records at the merit hearing, notify the Court's staff to enable the appropriate equipment to be obtained for the merit hearing.

## V. AT THE MERIT HEARING, THE PETITIONER'S ADVOCATE SHOULD:

A. Be on time. If you are running late or have a matter in a different court that is going to delay you - notify the Court's Clerk's Office in advance.
B. Know the location, condition and situation of the Respondent.
C. Be prepared for the merit hearing and know how the Respondent will be affected by any action taken or decision made.
D. Inform the Petitioner **BEFORE** the start of the hearing of the recommendation to be offered to the Court. If the Petitioner objects to said recommendation, the Court should be advised of said objection consistent with and utilizing the applicable rules of procedure and rules of evidence.
E. Invite the Petitioner to sit with you at the counsel table during the merit hearing.
F. Present evidence to support the Petitioner's petition.
G. Know how to qualify an expert witness to testify and to utilize medical records (business records exception to the hearsay evidence rule)
H. Know the FULL names of the witnesses you call to testify. If the witness has a professional designation - utilize it.
I. Protect the Petitioner's interests and legal rights.
J. Cross examine adverse witnesses as appropriate.
K. Be prepared to share with the Court what you have done and how you have helped the Petitioner.
L. Advise the Petitioner, as appropriate.

# GOOD PRACTICES AND HELPFUL HINTS FOR LAWYERS IN THE MOBILE COUNTY PROBATE COURT

**Don Davis**
**Judge of Probate**
**Mobile County, Alabama**

**January 2019**

## IN ALL CASES

1. Appointed lawyers (guardians ad litem, administrators ad litem and court representatives) are paid by the Court when court costs are paid (to the Court). DON'T ask the Court to waive court costs - especially where there are appointed lawyers involved - at the end of the case - if you have received a fee for your services.

2. When identified at the time of filing as being a pro bono - volunteer matter - these cases are called first on the docket and we try to set these cases for hearing at 9:00 a.m. if possible on Mondays.

3. Check the Court's Internet web site to ascertain if there are service issues - *before your hearing*. Try to resolve before the docket begins - it will help you get in and out of the court room quicker.

4. The docket call - after known pro bono - volunteer cases are called, typically cases with service issues are called. If the service issue is resolved, the case will be heard that day, but it goes to the end of the docket call.

5. With regard to continuance requests - in the written request the movant must AFFIRMATIVELY STATE that the movant has spoken with all parties in interest (including *pro se* parties) and no one has an objection to the continuance request. If an objection exists, such should also be noted. If this isn't noted, the continuance request will be denied. If all parties consent, the motion will be granted. If a party objects, the continuance request will be set for oral argument. FILE CONTINUANCE REQUESTS BY 5:00 P.M. ON THURSDAY IF YOU HAVE A CASE SET ON THE COURT'S GENERAL DOCKET (MONDAY DOCKET).

6. With regard to continued matters - please notify your clients AND all interested parties (and other lawyers) of the continuance.

7. Understand the Court's jurisdiction. See *Ala. Acts* 1991-131.

A. It is *CONCURRENT* with the Circuit Court in the "administration of the estates of deceased persons, minors, the developmentally disabled, insane, incapacitated, protected or incompetent persons, or the like, and trust estates".

B. The jurisdiction is conferred *WITHOUT* the necessity of the same being specifically invoked.

C. The Probate Court has jurisdiction to conduct a jury trial in a will contest matter, *AFTER* a will has been admitted to probate.

D. The Probate Court has *ORIGINAL* jurisdiction with regard to: mental health involuntary commitment cases, adoptions, eminent domain (land condemnation) cases, real property [Title 35] sale and division real estate cases, trust administration and name changes.

8. Understand that the *Alabama Rules of Civil Procedure* apply to ALL judicial proceedings unless a specific statute provides otherwise in terms of procedure (such as in eminent domain cases).

9. Understand the removal provisions in the Alabama Code.

A. Guardianship and Conservatorship Proceedings - *Ala. Code* § 26-2-2 (1975)

B. Decedent's Estate Proceedings - *Ala. Code* § 12-11-41 (1975)

C. Can't remove a guardianship, conservatorship or decedent's estate (intestate or testate) case until estate opened by Probate Court AND appropriate letters issued.

D. Can't remove once a final settlement petition has been filed and the Probate Court has taken some sort of action concerning said petition (such as conducting a pre-trial conference).

E. In Jefferson and Mobile Counties - certain matters removed to Circuit Court can be returned to Probate Court. See *Ala. Code* §§ 12-11-41.1 [decedents estates] and 26-2-3 [guardianship and conservatorship estates] (1975).

F. Can't remove mental health involuntary commitment, eminent domain/land condemnation, trust, adoption, name change cases to Circuit Court.

10. Pre Trial Conferences - Bring Your Appointment Calendar With You To Court

11. When you have a specially set matter - *it will go to trial.* The Court doesn't set multiple contested cases on the same day at the same time.

12. There's a reason why the Probate Judge and the Probate Court's Staff are "NAZIS" when it comes to service issues and parties accounting for monies.

13. Remember - Guardians ad Litem aren't authorized to accept service of process for their clients - per the Alabama State Bar General Counsel's Office.

14. Expedited Handling Cover Sheet - include with any pleading that you want the Court to handle on an expedited basis or where a hearing is scheduled within 72 hours of the filing of the pleading.

15. Maintain time records of work performed.

## ADOPTIONS

1. In 2008 the Court adopted a new policy - the final - dispositional hearing will not be set until all statutory requirements are met and all necessary pleadings have been filed. This has worked very well and the lawyers who handle a good amount of adoption legal work have responded positively, as we are able to set these hearings quicker than we were under the former policy.

2. One continuing notice issue - notice to Alabama DHR. You should give them notice (by United States Certified Mail, Return Receipt Requested) of the filing of the adoption petition concurrent with the filing of the adoption petition. The Alabama Adoption Code doesn't require that Alabama DHR be furnished the dispositional hearing date and time - only notice of the commencement of the adoption case.

3. In "related" adoption cases - a disinterested character witness is requested. "Disinterested" means that the witness is not related by blood or marriage to the petitioner.

4. In "related" adoption cases - where a grandparent, great-grandparent or other senior members of the child's family are the petitioners - the Court reviews these more closely in an effort to prevent insurance/government benefit fraud from occurring. Be prepared.

5. The dispositional hearings are scheduled in 15 minute increments. Your case will be called once the lawyer AND the petitioners have checked in with the Court's staff.

6. Grandparent Visitation - Note that the Probate Court has jurisdiction to hear/determine - *Ala. Code* § 26-10A-30 (1975)

7. Petitions for Approval of Gifts to Birth Mother - Court is not favorably inclined to lump sum payments. The preference is for monthly payments of approved amount.

8. Interlocutory decree notes that lawyers and parties should not engage in social media platforms about an adoption case - includes posting photographs, FaceBook posts, Twitter, etc. If

a party in interest does engage in such activity, said activity will be a factor considered in terms of what constitutes the best interests of the adoptee. There is a ethical rule regarding such action by lawyers.

## NAME CHANGES

1. Adult cases - these are set for hearing.

2. Minor cases

   A. Set for hearing.

   B. By Father - unless the mother consents - the Father's petition must also include a request to legitimate the minor. The key evidentiary factor - what is in the best interest of the minor

3. See procedures memorandum in the Judicial Form Section of the Court's web site (available only to lawyers).

4. In ALL cases - the person whose name is being changed should appear before the Court.

## DECEDENTS ESTATES

1. Letters of Administration include a restriction that a personal representative is not authorized to settle a claim or sell real or personal property without prior court approval. There are also statutory prohibitions regarding sales of property without prior court approval.

2. Circuit Courts do not have jurisdiction to determine heirship. Probate Courts do. If an estate administration has been opened (testate or intestate) and there is litigation commenced or pending in another judicial forum, Court now requires a sworn pleading (either a petition or affidavit) or sworn testimony as to who the Decedent's heirs are.

3. Estate assets should *NOT* be held in lawyers' trust accounts if exceed $10,000, without prior approval by the Court.

4. Partial and Final Settlements - Guardians/Administrators ad Litem should not rely upon the Court's audit of the settlement - they should perform their own, independent review. However, if a settlement has *NOT* cleared the Court's audit process, the Guardian/Administrator ad Litem should

*NOT* consent to the settlement being passed and allowed and the Guardian/Administrator ad Litem should be present at the court hearing on the settlement.

5. Court's Personal Representative Handbook is available on the Court's Internet web site - Judicial Section.

6. Final Settlements - state the requested distribution (furnish amount and/or percentage) and the name(s) of the distributees.

## GUARDIANSHIP/CONSERVATORSHIP ESTATES

1. Letters of Conservatorship include a restriction that a personal representative is not authorized to settle a claim or sell real or personal property without prior court approval.

2. Petitioner is responsible for perfection of service of process in most instances. File proof of service AS SOON AS POSSIBLE (don't wait until hearing if possible). Note - BY STATUTE alleged incapacitated persons MUST be PERSONALLY served with the initial petition.

3. Guardians ad Litem should be present at hearings on motions for temporary protective orders and the merit hearing on whether a guardian or conservator should be appointed.

4. If at all possible, the minor child or allegedly incapacitated adult should be present at court hearings.

5. In adult incapacity cases where there are limited assets, if in the reasonably foreseeable future governmental benefits are going to be sought, take the necessary steps to utilize what assets the incapacitated adult has to address burial needs, creation of an income trust, etc.

6. In adult incapacity cases where there are limited assets, file the petition for final settlement due to exhaustion of assets before the assets are completely exhausted.

7. Guardians are required to file a care plan for the incapacitated adult within 45 days of appointment. Annual report now required on anniversary month of appointment.

8. Conservators and Guardians are required to notify the Social Security Administration and Veterans Administration of the pendency of a protective proceeding.

8. Conservatorship Handbook and Guardian Care Plan and Guardian Annual Report are available on the Court's Internet web site - Judicial Section.

9. In Mobile County, there is no right to trial by jury in conservatorship cases. However, in a hotly contested case, the Court will entertain using an advisory jury on the issue of whether the adult is incapacitated or not.

## REAL PROPERTY ISSUES

1. Be aware of the title devolution statute - *Ala. Code* § 43-2-830 (1975).

2. Sale For Division - Title 43 [*Ala. Code* § 43-2-441(1975)] and Partition and Sale For Division - Title 35 [*Ala. Code* § 35-6-40 (1975)] and the *Alabama Uniform Partition of Heirs Property Act* [*Ala. Code* §§ 35-6A-1, *et. seq.* (1975)].

3. Rule Against Perpetuities Modified - *Alabama Uniform Statutory Rule Against Perpetuities* [*Ala. Code* §§ 35-4A-1, *et. seq.* (1975)]

## OTHER MISCELLANEOUS MATTERS

CHECK OUT THE COURT'S INTERNET WEB SITE - www.probate.mobilecountyal.gov

REGISTER AS AN ATTORNEY THROUGH THE COURT'S WEB SITE TO REVIEW THE COURT'S CALENDAR AND THE INDIVIDUAL DOCKET OF ALL PENDING CASES (EXCEPT ADOPTIONS AND MENTAL HEALTH COMMITMENT CASES). THERE ARE OVER 90 FORMS AVAILABLE.

QUESTIONS ABOUT COURT COSTS - LISTED IN THE WEB SITE - JUDICIAL PAGE.

GOT A QUESTION - ASK !!!!

NEED A FORM - ASK !!!!

Court Personnel Telephone/Email List - Attached

| EMPLOYEES PHONE NUMBERS & EMAIL ADDRESSES | | | |
|---|---|---|---|
| Renee Clarke | 574-6101 | Accounting | rclarke@probate.mobilecountyal.gov |
| William Cink | 574-6103 | Accounting | wcink@probate.mobilecountyal.gov |
| Michelle Clancy | 574-6105 | Accounting | mclancy@probate.mobilecountyal.gov |
| Heather Dees | 574-6001, 574-6002 | Accounting | hdees@probate.mobilecountyal.gov |
| Jim Frantz | 574-6102 | Accounting | jfrantz@probate.mobilecountyal.gov |
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| Raquel Watt | 574-6009 | Judicial | rlopez@probate.mobilecountyal.gov |
| Stephanie McNally | 574-6020 | Judicial | smcnally@probate.mobilecountyal.gov |
| Tracie Ford | 574-6021 | Judicial | tford@probate.mobilecountyal.gov |
| **Judicial Main Fax** | **574-6005** | **Judicial** | |
| **Judicial Commitment Fax** | **574-6004** | **Judicial** | |
| **Executive Suite Fax** | **574-6003** | **Judicial** | |
| **Probate Court Main Line** | **574-6000** | **Judicial** | |
| Russ Davidson | 574-6043 | Recording | rdavidson@probate.mobilecountyal.gov |
| Bessie Franks | 574-6040, 574-6041 | Recording | bfranks@probate.mobilecountyal.gov |
| Debbie Doggette | 574-6044 | Recording | ddoggette@probate.mobilecountyal.gov |
| Desera Bryant | 574-6040 | Recording | dbryant@probate.mobilecountyal.gov |
| Jennifer Hancock | 574-6040, 574-6041 | Recording | jhancock@probate.mobilecountyal.gov |
| Karis McDuffie | 574-6045, 574-6046 | Indexing/Recording | kmcduffie@probate.mobilecountyal.gov |
| Kim Robinson | 574-6040, 574-6041 | Recording | krobinson@probate.mobilecountyal.gov |
| Tracy McCafferty | 574-6040, 574-6041 | Recording | tmccafferty@probate.mobilecountyal.gov |
| **Recording Fax** | **574-6042** | **Recording** | |
| Dawn Flowers | 574-6073 | Records | dflowers@probate.mobilecountyal.gov |
| Carol Ann Barnes | 574-6070, 574-6071 | Records | cbarnes@probate.mobilecountyal.gov |
| Sandie Burrell | 574-6070, 574-6074 | Records | sburrell@probate.mobilecountyal.gov |
| Cheryl Williams | 574-6070, 574-6071 | Records | cwilliams@probate.mobilecountyal.gov |
| **Records Fax** | **574-6072** | **Records** | |
| | | | |
| Court Website: www.probate.mobilecountyal.gov | | Court Email Address: probatecourt@probate.mobilecountyal.gov | |
| | | | |
| | | | |

IN THE PROBATE COURT OF MOBILE COUNTY ALABAMA

| | | |
|---|---|---|
| PLAINTIFF NAME, | ) | |
| Plaintiff. | ) | |
| | ) | CASE NO.:_____ |
| v. | ) | |
| | ) | |
| DEFENDANT NAME, | ) | |
| Defendant. | ) | |

**NOTICE OF INTENT TO SERVE SUBPOENA ON NON-PARTY**

Take notice that upon the expiration of fifteen (15) days (or such other time as the Court has allowed) from the date of service of this notice, PLAINTIFFS/DEFENDANTS [PLAINTIFF/DEFENDANT NAME], will apply to the Clerk of the Court for issuance of the attached subpoena directed to [PHYSICIAN], who is not a party and whose address is [PHYSICIAN ADDRESS], to produce the documents or things at the time and place specified in the subpoena.

_____

ATTORNEY NAME

Attorney for PLAINTIFF/DEFENDANT

ATTORNEY ADDRESS

ATTORNEY PHONE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon counsel for all parties to this proceeding by mailing the same by United States Mail, first class postage prepaid, on this _____ day of _____, 20___.

_____

ATTORNEY NAME

IN THE PROBATE COURT OF MOBILE COUNTY ALABAMA

| | | |
|---|---|---|
| PLAINTIFF NAME, | ) | |
| Plaintiff. | ) | |
| | ) | CASE NO.:_____ |
| v. | ) | |
| | ) | |
| DEFENDANT NAME, | ) | |
| Defendant. | ) | |

**CIVIL SUBPOENA FOR PRODUCTION OF DOCUMENTS UNDER RULE 45**

TO: CUSTODIAN OF RECORDS
PHYSICAN NAME
ADDRESS
CITY, STATE, ZIP

You are hereby commanded to do each of the following acts at the instance of the PLAINTIFF/DEFENDANT [PLAINTIFF/DEFENDANT NAME], within fifteen (15) days after service of this subpoena:

That the Records Custodian for [PHYSICIAN NAME] produce and permit Defendants to inspect and copy each of the following documents:

Any and all records pertaining to [NAME], date of birth [DOB], Social Security number [SSN].

Records include, but are not limited to, the following:

Patient history, medical charts, notes, correspondence, memoranda, medical reports, written results of any laboratory tests, x-ray reports and/or pathology reports, summaries,

statements of account, payment histories, account detail, insurance records, claims for benefits.

Such production and inspection is to take place at the location where the documents or things are regularly kept or at some other reasonable location designated by you.

You are further advised that other parties to the action in which this subpoena has been issued have the right to be present at the time of such production or inspection.

You have the option to deliver or mail legible copies of said documents or things, on or before the date shown on the subpoena, to the requesting attorney, [ATTORNEY NAME, ADDRESS], but you may condition such activity on your part upon the payment in advance by the party causing the issuance of this subpoena of the reasonable costs of the making of such copies.

You have the right to object at any time prior to the date set forth in this subpoena for compliance. Should you choose to object, you should communicate such objection in writing to the party causing the issuance of this subpoena, and stating, with respect to any item or category to which objection is made, your reasons for such objection.

**HIPAA PRIVACY RULES ASSURANCES**

In accordance with the Federal privacy rules issued pursuant to the Health Insurance Portability and Accountability Act ("HIPAA Privacy Rules"), we are providing you with the following satisfactory assurances:

1. We have made a good faith attempt to provide the Patient, either through his or her counsel or directly, with a copy of this Civil Subpoena.
2. The Civil Subpoena includes sufficient information about the litigation proceeding in which the medical and/or billing information is request to permit the Patient, either through his or her counsel or directly, to raise an objection.
3. As the Court has issued this subpoena, the time for the Patient to raise any objection has lapsed, and no objections were filed, or all objections filed by the Patient have been resolved.

Accordingly, following service of this Civil Subpoena, you may disclose the requested information in compliance with HIPAA Privacy Rules.

The text of Alabama Rules of Civil Procedure, Rule 45(c) and (d), is set forth in this subpoena as "Attachment A."

Dated this ___ day of _____, 20___.

_____

ATTORNEY NAME

Attorney for PLAINTIFF/DEFENDANT

ATTORNEY ADDRESS

ATTORNEY PHONE

ISSUED BY:

_____ _____

DATE C. Mark Erwin, Chief Clerk

RETURN OF SERVICE

Received the subpoena at _____ on this the ____ day of _____, 20___, and I served it on the within named [PHYSICAN NAME], on the ____ day of _____, 20___, by delivering the subpoena to _____.

Dated this ____ day of _____, 20___.

_____

PROCESS SERVER

# ATTACHMENT A

Alabama Rules of Civil Procedure Rule 45, subdivisions (c) and (d)

(c) Protection of person subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty on appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, document or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying at any time before the time specified was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expenses resulting from the inspection and copying commanded. for compliance may serve upon the party or attorney designed in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. “Serve” as used herein means mailing to the party or attorney. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to place more than one hundred (100) miles form the place where that person resides, is employed or regularly transacts business in person, or requires a nonresident of this state who is not a party or an officer of a party to travel to a place within this state more than one hundred (100) miles from the place of service or, where separate from the place of service, more than one hundred (100) miles from the place where that person is employed or regularly transacts business in person, except that, subject to the provision of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expenses to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in responding to subpoena.

(1) A Person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(5) A person responding to a subpoena need not provide discovery of electronically stored information from sources the person identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(B). The court may specify conditions regarding the production of the discovery.

(6) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the person or party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. Any party or the producing person may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

Case No.: _____

**CERTIFICATE**

I hereby certify that the attached is a true and complete copy of the records pertaining to _____, kept in our office in my custody, and I am the legal custodian and keeper of said records. I further certify that said records were made in the regular course of business, and that it was in the regular course of said office for such records to be made at the time of the events, transactions, or occurrences to which they refer or within a reasonable time thereafter.

Signed this _____ day of _____, 20___.

_____

CUSTODIAN OF RECORDS

Subscribed and sworn to before me
this ___ day of _____, 20___.

_____

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:

_____

***Note to responding party***: You are entitled to a fee for copying these documents. At your option, please return a statement/invoice for copying service [not to exceed .25 cents per page for the first twenty-five pages and a $5.00 search fee] to the Court along with the copies and certificate. Such fee will be taxed as cost in this proceeding and remitted to you upon receipt.

**IT IS ORDERED by the court that service of this subpoena be made by:**

**_____.**

**Done this _____ day of _____, 20___.**

_____

**DON DAVIS, Judge of Probate**

# Training Seminar
## Electronic Access to AHS Records

**Marty White**

**Systems Manager, IT**

AltaPointe℠ Health Systems

# About Presenter

**Marty White**
AltaPointe Health
Systems Manager
B.S. Business Administration

Information Technology Professional with 15+ years of experience. I've worked across many industries in the area, Dairy Fresh, Atlantic Marine (BAE), Ascension Health (Providence Hospital) and I've been with AltaPointe Health for over 6+ years. My career spans from entry level help desk, to system(server) administration and now managing the infrastructure team and more.

AltaPointe Help Desk: 251-450-5906

# Access to AHS Records

- Online access – http://citrix.altapointe.org
- On Request - DVDs

# Electronic Access

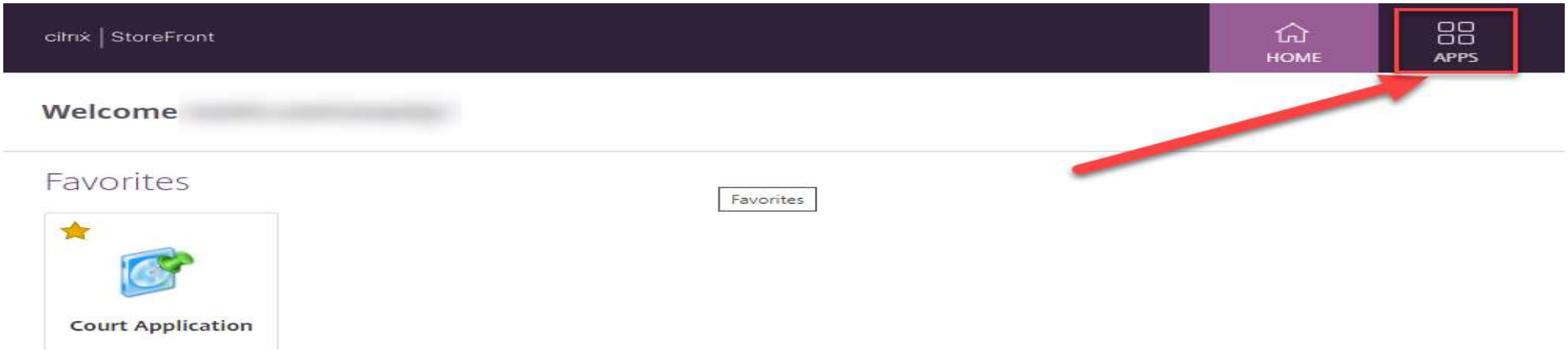
- Pre-requisite
  - Citrix Workspace Client
  - Browser compatibility – Google Chrome, Firefox, Microsoft Edge, Safari
- Citrix installation – **Citrix Workspace**
  - Windows/ Mac Machines
    - Go to https://www.citrix.com/products/receiver
    - Download the latest version of Citrix Workspace
    - Follow the prompts to install Citrix Workspace.
  - iPhone/ iPad/ Android Tablet/ Android Phone –
    - Search for Citrix Workspace in Apple App Store or Google Play Store
    - Download the free Citrix Workspace and install.

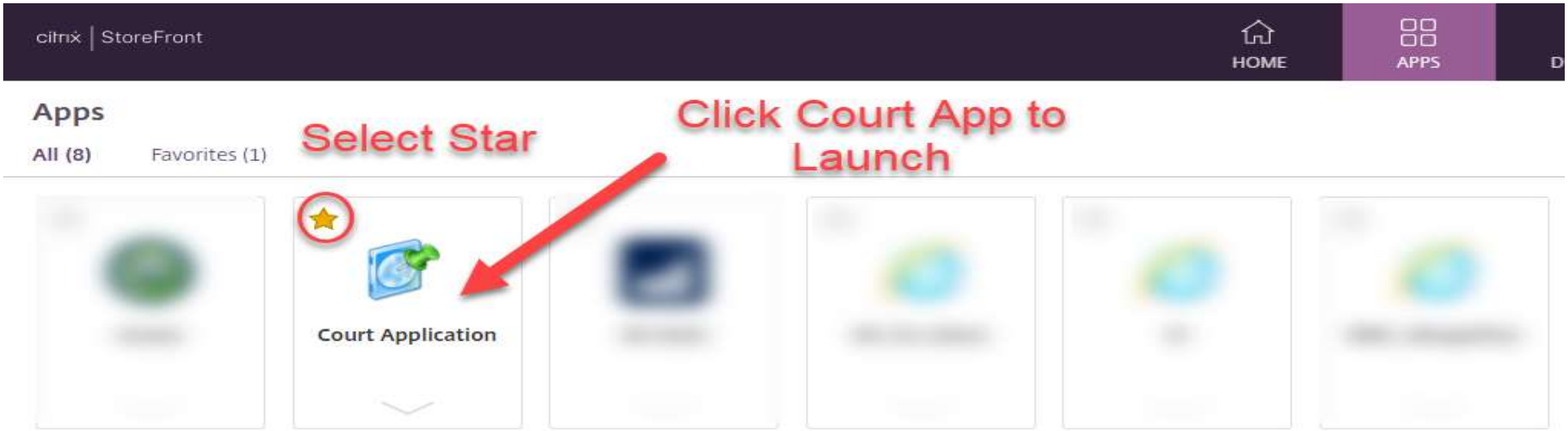
# Electronic Access - continued

- User will receive two emails every Monday on the week of representation.
- First email will have instructions and link to access the site.
- Second email will have the password. You will have a new password every week.
- The username is always user firstname.lastname. EG: john.smith
  **Username will not be sent in any email.**
- Once logged into the site click on the icon – Court Application. 

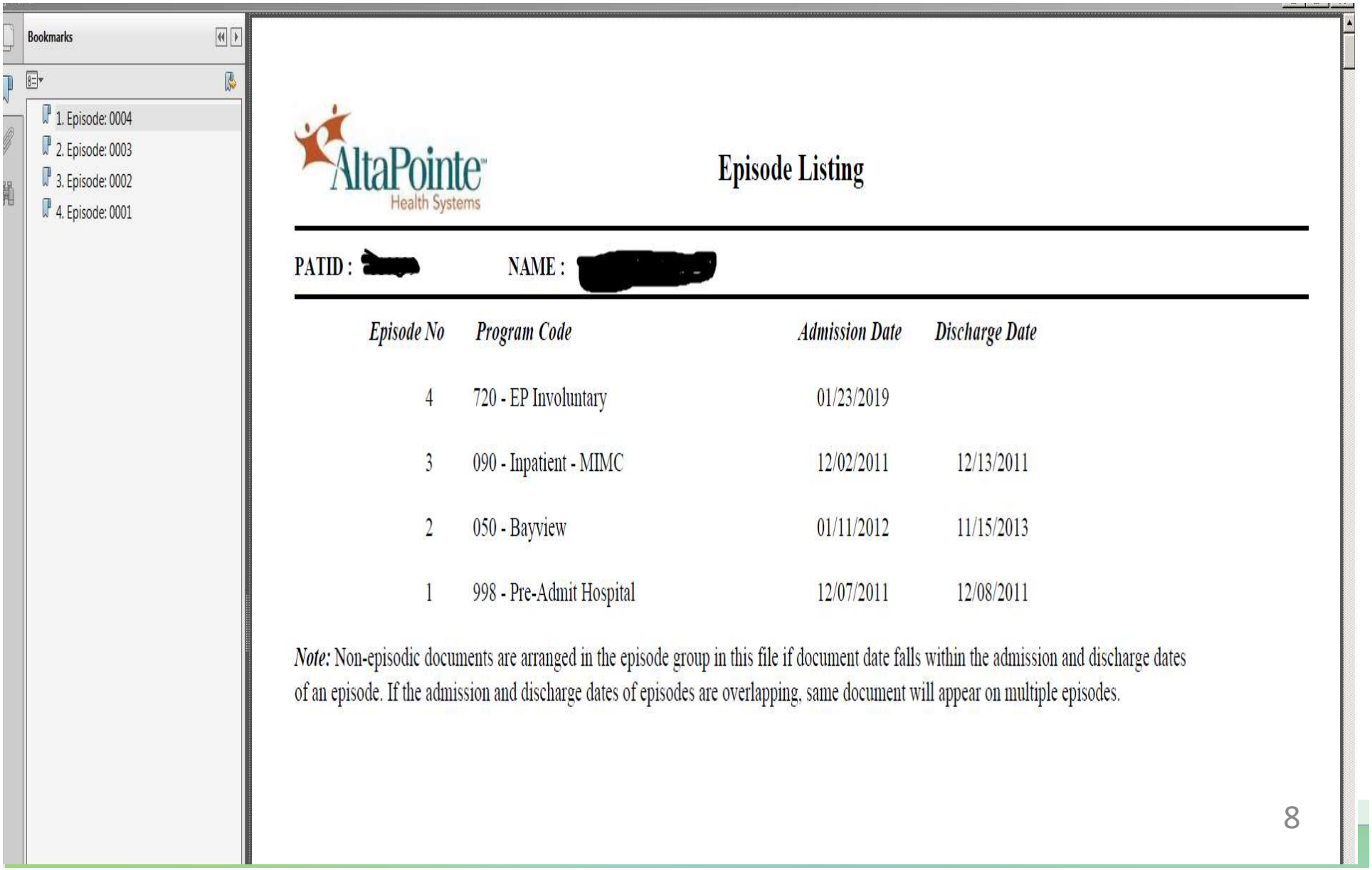
- The app will open and will list individual assigned consumers that you are representing.
- If the consumer is in the hospital for more than a week, the history will have the previous weeks' files.
- Click on the Open File button. This will process and open the file for viewing.
- After viewing make sure to close the application using the **Exit** button.

# Electronic Access - continued



# Electronic Access - continued


Bookmarks
1. Episode: 0004
2. Episode: 0003
3. Episode: 0002
4. Episode: 0001
AltaPointe
Health Systems
Episode Listing
PATID : [redacted]
NAME : [redacted]
Episode No
Program Code
Admission Date
Discharge Date
4
720 - EP Involuntary
01/23/2019
3
090 - Inpatient - MIMC
12/02/2011
12/13/2011
2
050 - Bayview
01/11/2012
11/15/2013
1
998 - Pre-Admit Hospital
12/07/2011
12/08/2011
Note: Non-episodic documents are arranged in the episode group in this file if document date falls within the admission and discharge dates of an episode. If the admission and discharge dates of episodes are overlapping, same document will appear on multiple episodes.

# DVD Instructions

- The dvd will have an encrypted and password protected file.
- The file contains the electronic medical record of a consumer.
- The password to open a file is “alt@” followed by the consumer’s medical record number.
- Consumer medical record is embedded in the file name.
- The numbers before the first “_” in the file name is the client medical record.
- Example – if the file name is - 6301_2015-01-07_04-34-43-PMFinal.pdf then 6301 is the medical record number. The password will be – alt@6301.
- The record is separated by episodes of care.
- The first page lists every episode of care with admit and discharge dates (if applicable).

- Questions?
- AltaPointe Help Desk: 251-450-5906

**Mark Erwin** has been Chief Clerk of the Mobile County Probate Court since April 2017 replacing long-time Chief Clerk Joe McEarchern following his retirement. Mark had previously served the Court five years as the Chief of Staff/Chief Deputy Clerk.

Mark grew up in Saraland, Alabama and graduated from Mobile Christian High School in 1986. He earned an Associate of Applied Science from Faulkner University in Montgomery and a Certificate in Biomedical Equipment Technology from the School of Health Related Professions at UAB. He completed his Bachelor of Arts undergraduate degree in Biblical Studies at Freed-Hardeman University in Henderson, TN. He earned his Juris Doctor degree from the University of Alabama School of Law in 1998.

Mark began his legal career as law clerk to Circuit Court Judge Joseph S. "Rusty" Johnston. After two years as an associate with the Janecky Newell firm he practiced nine years as a founding member and partner of the Satterwhite & Erwin firm. He joined the Probate Court staff fulltime in May 2012. In private practice Mark had represented the Mobile County Commission as retained outside counsel, the City of Creola as City Attorney/Prosecutor, the Mobile County Racing Commission and the Strickland Youth Center. He had also served as a Temporary Judge of Probate for six years and is in his tenth year serving part-time as the Municipal Judge of the City of Saraland.

Mark has been active in the Mobile Bar Association having served on the memorial resolution committee, legislation committee (chair), the CLE committee, three years on the officer nomination committee, and the executive committee. He is member of the Alabama Association of Municipal Judges as well as the Alabama Probate Chief Clerks Association and is a frequent presenter at seminars and conferences.

Mark is a member of the 2015 class of Leadership Mobile. He has served ten years on the Board of Trustees of Mobile Christian School and has served on various other civic boards and committees. Mark and his wife Silvia recently celebrated their 25$^{th}$ anniversary and are the parents of three children, Emma Dixon (21), Sargent (19) and Barton (16).

## Alabama Rules of Civil Procedure

## IV. PARTIES

### Rule 17.

### Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Capacity to sue or be sued.* The capacity of a party, including one acting in a representative capacity, to sue or be sued shall be determined by the law of this state.

(c) *Minors or incompetent persons.* Whenever a minor has a representative, such as a general guardian or like fiduciary, the representative may sue in the name of the minor. Whenever an incompetent person has a representative such as a general guardian or a like fiduciary, the representative may sue or defend in the name of the incompetent person. If a minor or an incompetent person does not have a duly appointed representative, that person may sue by that person's next friend. The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person. When the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest. Moreover, if a case occurs not provided for in these rules in which a minor is or should be made a party defendant, or if service attempted upon any minor is incomplete under these rules, the court may direct further process to bring the minor into court or appoint a guardian ad litem for the minor without service upon the minor or upon anyone for the minor.

(d) *Guardian ad litem; how chosen.* Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint to serve in that

capacity some person who is qualified to represent the minor or incompetent person in the capacity of an attorney or solicitor, and must not select or appoint any person who is related, either by blood or marriage within the fourth degree, to the plaintiff or the plaintiff's attorney, or to the judge or clerk of the court, or who is in any manner connected with such plaintiff or such plaintiff's attorney, or who has been suggested, nominated, or recommended by the plaintiff or the plaintiff's attorney or any person for the plaintiff. If the guardian ad litem is to be appointed for a minor fourteen (14) years of age or over, such minor may, within thirty (30) days after perfection of service upon the minor in such cause, have the minor's choice of a guardian ad litem to represent the minor in said cause certified by an officer authorized to take acknowledgments, but if such minor fails to nominate a guardian ad litem within the thirty- (30-) day period or before any hearing set in the action, whichever is earlier, the court shall appoint a guardian ad litem as before provided. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for services rendered in such cause, to be taxed as a part of the costs in such action, and which is to be paid when collected as other costs in the action, to such guardian ad litem.

(dc) *District court rule*. Rule 17 applies in the district courts except that the thirty- (30-) day time period in Rule 17(d) is reduced to fourteen (14) days.

[Amended eff. 10-1-95; Amended eff. 8-1-2004.]

**Committee Comments on 1973 Adoption**

Subdivision (a). This subdivision omits the Federal Rule 17(a) which deals with statutes of the United States. This subdivision specifically provides that substitution of plaintiffs in order to bring the real party in interest before the court shall have the same effect had the action been commenced in the name of the real party in interest. This, in effect, makes the doctrine in relation back of amendments changing parties applicable to plaintiffs and is the companion to similar treatment for defendants found in Rule 15.

Subdivision (b). Since capacity to sue is governed by substantive law, subdivision (b) clearly states that proposition.

This subdivision has been modified from the Federal counterpart in order to conform with present Alabama practice. It is not possible in Alabama to speak in general terms about actions by and against infants in the same breath with actions by and against incompetents. This subdivision preserves the present

situation wherein the action against an incompetent who has a general guardian can be maintained against the general guardian while an action against an infant who has a general guardian will still require the appointment of a guardian ad litem. Nothing in this subdivision is to be construed to alter present practice wherein an action may be maintained against an infant in his name with a prayer in the Complaint for the appointment of a guardian ad litem.

Subdivision (d). This subdivision, setting out the mechanics for appointment of a guardian ad litem has no counterpart in the Federal Rules. But a number of states, in adapting these rules from state adoption, have thought it desirable to carry over into the rules their prior statutory provisions of the mechanics of appointment. A similar course has been followed here. The subdivision is based on the provisions as to appointment of a guardian ad litem now contained in Tit. 7, §§ 177-181, Code of Ala., which statutes will be superseded by the Rule.

**Committee Comments to October 1, 1995,**
**Amendment to Rule 17**

The amendment changed the word "infant" in the rule to "minor." All other changes are technical. No substantive change is intended.

**Committee Comments to Amendment to Rule 17(a)**
**Effective August 1, 2004**

The second paragraph of Rule 17(a), which never existed in the corresponding Federal Rule, is deleted. Subrogation (e.g., when rights of subrogation arise, and the extent of those rights) is an issue of substantive, not procedural, law. Procedural issues relating to subrogation can appropriately be decided within the confines of Rules 19 and 17(a) (first paragraph), as they are in the federal courts.

**Note from the reporter of decisions:** The order amending Rules 4, 4.1, 4.2, 4.3, 4.4, 6(a), 7(b)(2), 17(a), 22(c), and 26(b), Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.

# The Code of Alabama 1975



**Section 26-2A-52**

**Guardian ad litem.**

At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor or other person if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.

*(Acts 1987, No. 87-590, p. 975, §1-403.)*

**Section 26-2A-102**

## Court appointment of guardian for incapacitated person.

(a) Except as provided by subsection (e), an incapacitated person or any person interested in the welfare of the incapacitated person may petition for appointment of a limited or general guardian.

(b) After the filing of a petition, the court shall set a date for hearing on the issue of incapacity so that notices may be given as required by Section 26-2A-103, and, unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit a report in writing to the court. The person alleged to be incapacitated also shall be interviewed by a court representative sent by the court. The court representative also shall interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the appointment is made and submit a report in writing to the court. The court may utilize the service of any public or charitable agency as an additional court representative to evaluate the condition of the allegedly incapacitated person and to make appropriate recommendations to the court.

(c) A person alleged to be incapacitated is entitled to be present at the hearing in person. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or other qualified person and any court representative, and upon demand to trial by jury as provided in Section 26-2A-35. The issue may be determined at a closed hearing if the person alleged to be incapacitated or counsel for the person so requests.

(d) Any person may apply for permission to participate in the proceeding, and the court may grant the request, with or without hearing, upon determining that the best interest of the alleged incapacitated person will be served thereby. The court may attach appropriate conditions to the permission.

(e) The custodial parent or parents or an adult custodial sibling of an adult child who is incapacitated by reason of an intellectual disability, may file, in lieu of a petition, a written request to be appointed guardian of his or her adult child or his or her adult sibling in order to continue performing custodial and other parental responsibilities or family responsibilities, or both responsibilities, for the child after the child has passed his or her minority. The court may waive any or all procedural requirements of the Uniform Guardianship Act, including notice and service, and appointments, and interviews. The adult child alleged to be incapacitated shall have had an examination by a physician or other qualified person and furnish a written report of the findings to the court.

In lieu of a hearing, the probate court shall hold an informal hearing with the custodial parent or custodial parents or custodial adult sibling requesting the guardianship, the adult child for whom the guardianship is sought, and a guardian ad litem for the adult child chosen by the judge of probate.

Following the interview, the court may do any of the following:

(1) Issue an order appointing the custodial parent or custodial parents or custodial sibling as guardian of the adult child as in any other proceeding pursuant to this section.

(2) Deny the request for appointment as guardian pursuant to the special proceedings allowed only for a custodial parent or custodial parents or custodial sibling.

(3) Delay a determination on the request to gather additional information in compliance with one or more of the usual requirements for appointments, interviews, or examinations by physicians or other qualified persons.

*(Acts 1987, No. 87-590, p. 975, §2-203; Act 2000-711, p. 1507, §1.)*

# The Code of Alabama 1975



**Section 26-2A-136**

**Permissible court orders.**

(a) The court shall exercise the authority conferred in this division to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.

(b) The court has the following powers that may be exercised directly or through a conservator in respect to the estate and business affairs of a protected person:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice, the court may preserve and apply the property of the person to be protected as may be required for the support of the person or dependents of the person.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and business affairs of the minor which are or may be necessary for the best interest of the minor and members of minor's immediate family.

**PROBATE COURT OF MOBILE COUNTY, ALABAMA**

Style: IN THE MATTER OF: ** Case No. **

Matter: **

Hearing: ** Time: ** AM/PM Court Room COURTROOM 1, THIRD FLOOR

## ORDER APPOINTING GUARDIAN AD LITEM

To: **

Please take notice that you are hereby appointed Guardian ad Litem for MIRANDA PHELPS who is interested in the matter referenced and which comes up for hearing on the date set above. Done this 30th day of November, 2021.

It is **ORDERED** that all individuals, medical care providers, and others having custody of information [including, but not limited to, health history, any diagnosis, past or current treatment for any condition, prognosis relating to any past or current condition, behavioral or mental health services rendered in the past or currently being rendered] concerning the alleged incapacitated person shall promptly provide to the Guardian ad Litem any and all such information in their custody that may be requested.

It is further **ORDERED** that any medical information regarding the alleged incapacitated person or minor furnished to the Guardian ad Litem pursuant to this Order shall: (1) remain in the custody of the Guardian ad Litem; (2) not be copied or distributed by the Guardian ad Litem, except for use in a court proceeding concerning the alleged incapacitated person; (3) destroy after conclusion of this proceeding unless ordered otherwise by the Court.

**Acceptance of Appointment:**

Don Davis, Judge of Probate

Guardian ad Litem

**INFORMATION AND INSTRUCTIONS**

**Note 1:** **Counsel of Record is: ** ESQ.**

Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

**Note 2:** Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

**Note 3:** **Written Report -- Must be filed at least THREE [3] BUSINESS DAYS before the hearing date**.

Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. You must state in your report that you have complied with the GAL list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties.

Please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regardilng this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

***Please sign and return this form to the Court at P.O. Box 7, Mobile, Alabama 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.***

Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of $140.00 for 1 hour of service.

**PROBATE COURT OF MOBILE COUNTY, ALABAMA**

Style: IN THE MATTER OF: **
Case No. **
Matter: **
Hearing: **l ,
Time: PM AM Court Room# COURTROOM 1, THIRD FLOOR

## ORDER APPOINTING GUARDIAN AD LITEM

To: **

Please take notice that you are hereby appointed Guardian ad Litem for ** who is interested in the matter referenced and which comes up for hearing on the date set above. Done this 30th day of November, 2021.

**Acceptance of Appointment:**

Don Davis, Judge of Probate

Guardian ad Litem

**INFORMATION AND INSTRUCTIONS**

**Note 1:** **Counsel of Record is: **, ESQ.**

Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

**Note 2:** Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

**Note 3:** Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. Written report must be filed at least three (3) business days before hearing. You must state in your report that you have complied with the GAL list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties. Further, please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regarding this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

***Please sign and return this form to the Court at P.O. Box 7, Mobile, Alabama 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.***

Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of $140.00 for 1 hour of service.

**PROBATE COURT OF MOBILE COUNTY, ALABAMA**

**Style:** IN THE MATTER OF: **
**Case No.** **
**Matter:** **
**Hearing:** **
**Time:** ** AM/PM COURTROOM 1, THIRD FLOOR

## ORDER APPOINTING ADMINISTRATOR AD LITEM

**To:** ** Esq.
**
MOBILE, AL **

**Please take notice** that you are hereby appointed ADMINISTRATOR AD LITEM for **, INTERESTED PARTY, who is interested in the matter referenced and which comes up for a hearing on the date set above. Done this 30th day of November, 2021.

DON DAVIS, Judge of Probate

**Acceptance of Appointment:**

Don Davis, Judge of Probate

ADMINISTRATOR AD LITEM

**INFORMATION AND INSTRUCTIONS:**

**Note 1:** **Counsel of Record is**: **, Esq.**
Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

**Note 2:** The Acceptance of Appointment must be filed with the Court no more than five (5) business days from the date of appointment. The filing of the Acceptance of Appointment will deemed acceptance of service of the petition in accordance with the requirements of § 43-8-165 of the Alabama Code.

**Note 3:** Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

**Note 4:** Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. Written report must be filed at least three (3) business days before hearing. You must state in your report that you have complied with the ADMINISTRATOR AD LITEM list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties. You may fax report to the Court and counsel provided that it is placed in the mail the same day. Further, please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regarding this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

***Please sign and return this form to the Court at P.O. BOX 7, MOBILE, ALABAMA 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.***
Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of $140.00 for 1 hour of service.

**PROBATE COURT OF MOBILE COUNTY, ALABAMA**

**Style:** IN THE MATTER OF: ***
**Case No.** ***
**Matter:** ***
**Hearing:** ***
**Time:** ***AM/PM COURTROOM 1, THIRD FLOOR

## ORDER APPOINTING GUARDIAN AD LITEM

**To:** ***, Esq.
***
MOBILE, AL **

**Please take notice** that you are hereby appointed GUARDIAN AD LITEM for ***, INTERESTED PARTY, who is interested in the matter referenced and which comes up for a hearing on the date set above. Done this 30th day of November, 2021.

DON DAVIS, Judge of Probate

**Acceptance of Appointment:**

Don Davis, Judge of Probate

GUARDIAN AD LITEM

**INFORMATION AND INSTRUCTIONS:**

**Note 1:** **Counsel of Record is**: ***, Esq..**
Unless attached hereto, Counsel has been directed to furnish you with the pleading and other information necessary for you to prepare for this matter. Please contact said attorney directly and make arrangements accordingly.

**Note 2:** The Acceptance of Appointment must be filed with the Court no more than five (5) business days from the date of appointment.

**Note 3:** Any objection/response which you may have to the subject matter should be filed in writing with the Court and other counsel no later than three (3) business days from the scheduled hearing.

**Note 4:** Should you interpose no objections to the granting of the relief sought, you may inform the Court by filing a written statement to that effect. Written report must be filed at least three (3) business days before hearing. You must state in your report that you have complied with the GUARDIAN AD LITEM list of duties and responsibilities as issued by this Court previously and have consulted with counsel and the necessary parties. You may fax the report to the Court and counsel provided that it is placed in the mail the same day. Further, please forward with said report your time sheet form or other time records so that a fee may be set for your services. Please advise if you have any questions regarding this procedure.

Please see the Judicial Forms section in Benchmark WEB on the Court's Website at www.probate.mobilecountyal.gov for the Expense Voucher and the "Why Has A Lawyer Been Appointed In This Case" documentation.

***Please sign and return this form to the Court at P.O. BOX 7, MOBILE, ALABAMA 36601 within five (5) business days. If you will be unable to serve, return form with a proper notation.***
Please be advised that if your time exceeds 3.0 hours as GAL, you must file an itemization. If we do not receive your expense voucher within 48 hours of the final hearing, we will bill at the Court's standard minimum of $140.00 for 1 hour of service.

# ***GUARDIAN AD LITEM [GAL]***

## I. A Guardian ad Litem:

A. Is an attorney appointed by this Court to protect someone else's interest.
B. Is an Officer of this Court.
C. Is appointed for the limited duty of protecting the legal rights of a Minor ward or Incapacitated person in a proceeding.
D. Gives no bond.
E. Does not have charge or take possession of the ward's person or property.
F. Has no powers either prior to the institution or after termination of the proceedings.

## II. Before the hearing the Guardian ad Litem should:

A. Examine and read the court file and all pleadings therein. Find out who is involved and what the case is all about.
B. Contact and discuss the matter with his/her ward, if practicable.
C. Contact the other attorney(s) and find out the facts.
D. Where appropriate, research the law.
E. Inspect and examine any accountings that may affect the ward's interest.
F. Protect the ward's interest and assist the Court in solving any problems.
G. Be prepared for the hearing and know how the ward will be affected by any action taken or decision made.
H. Keep records, especially of his/her time expended.

## III. In conservatorship and guardianship proceedings, the GAL should pay special attention to the following and respond accordingly, viz:

A. The GAL should determine if it is in the best interest of his/her client that the petitioner, or person nominated, is the proper person to be appointed as conservator and/or guardian if the petition is granted. In so doing, the GAL should contact the attorney for the petitioner in advance of the hearing, or speak with the nominee directly, after first consulting with the attorney for the petitioner, as to any convictions of a crime of moral turpitude, any outstanding judgements, or the like, in which the nominee is or has been involved. If there are such, then the GAL should take appropriate action as he/she determines to further investigate the circumstances and file an appropriate pleading or inform the Court at the hearing as determined to be proper by the GAL.

B. **NOTE:** If the evidence supports a finding for the person being incapacitated, the Court will need to address whether said party is also mentally incompetent and should be removed from the voter records. You are to consider this additional issue and offer comments or recommendations as to same in your report. Please note the following, definition for mental incompetency being used by the Court:

> *A mentally incompetent person is one whose mental facilities* have become so impaired as to make him/her incapable of protecting him/herself or properly managing his/her property.

C. The Guardian ad Litem should investigate and determine if the adult alleged/ward is capable of travel, especially outside of the State of Alabama, and if he/she possess the mental ability to determine for or against same. If no general travel restrictions are recommended by the Guardian ad Litem, but certain conditions should be in place, the GAL should inform the Court accordingly and provide details. However, if the GAL determines that travel would not be in the best interest of the ward, the said GAL should inform the Court and provide the basis for such determination.

## IV. At the hearing the Guardian ad Litem should:

A. Know the location, condition and situation of the ward.
B. Protect the ward's interest. Ask questions that are pertinent to protecting the interest of the ward.
C. Define the interests of the ward. Do not admit or waive any position that may sustain an adverse party's claim.
D. Ascertain and assess from the ward and from other sources what are the legal and equitable rights of the ward. Bring these rights to the attention of the Court.
E. Speak up; let the Court know if there are pertinent facts or law in the case that it may be unaware of.
F. Address possible issue of mental incompetency noted above.
G. Be prepared to tell the Court what he/she has done, how he/she has helped the ward and/or Court, and time expended.

## V. After the hearing, the Guardian ad Litem should:

A. Make sure the necessary orders and decrees are issued to carry out all Court decisions.
B. If practical and appropriate, notify ward of the results.

Revised 3/11

# IN THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

In the Matter of :

_____ : Case No.: _____

_____ : Date: _____

## EXPENSE VOUCHER FOR COURT REPRESENTATIVE

Number of hours spent in Court (utilize one-tenth of hour time increment) _____

Number of hours spent in interviews, telephone calls, preparation of case, review of pleadings and documents (utilize one-tenth of hour time increments) _____

***Total Number of Hours*** _____

**Court Representative hourly rate is $140^{00}$.**

**Miscellaneous Expenses:** $ _____ ***Total Due*** _____

(Mileage: .625 as of 7/1/2022)

**Reason:** _____

_____

_____

_____

I do hereby state that the above is true and correct and that I served in the capacity as Court Representative, pursuant to appointment made by the Probate Court of Mobile County, Alabama.

_____
(Signature)

_____
(Print Name)

NOTE: (1) If your time exceeds 4.0 hours or if you anticipate an objection to your fee request, attach an itemization for the time expended with a description of the service rendered. You should not "lump" your time or description of services rendered. Time should be recorded in one-tenth increments. (2) You should turn your expense voucher in at the time a written report is submitted and/or final hearing. (3) If a voucher is not filed within 48 hours, you will be awarded a flat hourly rate of $140 for one hour's time.

# IN THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

In the Matter of :

_____ : Case No.: _____

_____ : Date: _____

## EXPENSE VOUCHER FOR GUARDIAN AD LITEM, ADMINISTRATOR AD LITEM OR SPECIAL ATTORNEY

Number of hours spent in Court (utilize one-tenth of hour time increment) _____

Number of hours spent in interviews, telephone calls, preparation of case, review of pleadings and documents (utilize one-tenth of hour time increments) _____

**Customary hourly rate you receive from other clients for similar services: $ _____**
(If no rate is specified a $140 hourly rate will be utilized)

***Total Number of Hours*** _____

***Total Due*** _____

**Miscellaneous Expenses: $ _____**
(Mileage: .625 as of 7/1/2022)

**Reason:** _____

_____

_____

_____

I do hereby state that the above is true and correct and that I served in the capacity as (mark appropriate box) ☐ Guardian ad Litem, ☐ Administrator ad Litem, or ☐ Special Attorney to appointment made by the Probate Court of Mobile County, Alabama.

Date: _____

_____
(Signature)

_____
(Print Name)

NOTE: (1) If your time exceeds 3.0 hours or if you anticipate an objection to your fee request, attach an itemization for the time expended with a description of the service rendered. You should not "lump" your time or description of services rendered. Time should be recorded in one-tenth increments. (2) You should turn your expense voucher in at the time a written report is submitted and/or hearing if at all possible. (3) If a voucher is not filed within 48 hours, you will be awarded a flat hourly rate of $140 for one hour's time.

Robert E. Lusk, Jr.
Lusk Law Firm, LLC
2108 Airport Boulevard – The Loop
Mobile, Alabama 36606
251-471-8017

Robert received his undergraduate degree from Auburn University at Montgomery and his law degree from The University of Alabama School of Law. He has been a member of the Alabama State Bar since 1987. Robert retired from the Alabama State Bar in February 2013 after serving as Assistant General Counsel since 1995. Prior to joining the Bar's staff, he served as Chief Counsel/Deputy District Attorney for Montgomery County, as Assistant Attorney General for the State of Alabama; and as Law Clerk to Circuit Judge H. Randall Thomas.

Robert currently practices with Lusk Law Firm, LLC. His practice areas include family law, adoption, probate, and representation of lawyers, law firms, judges, and other professionals in the area of ethics, professional responsibility, and licensure. Robert is admitted to practice before the U.S. District Courts in Alabama, as well as the U.S. Court of Appeals for the 11th Circuit. Robert's experience includes serving as the Alabama State Bar staff liaison to the Alabama State Bar Client Security Fund Committee and the staff liaison and professional responsibility advisor to the Alabama State Bar's Family Law Section. He also served on the Alabama Child Custody Laws Revision Task Force, Task Force on Legal Education, Task Force on Admissions, Task Force on Client Security Fund, and Committee on Rules and Disciplinary Enforcement. Currently, Mr. Lusk is serving on the Alabama Law Institute Committee on Family Law and is Chair of the Supreme Court Committee on Rules of Procedure for Collaborative Law.

# Appointment of Guardian Ad Litem/Appointment of Advocate

***Ethical Considerations for the Guardian Ad Litem***

Probate Court of Mobile County
Appointed Lawyer Training
Mobile, Alabama

Robert E. Lusk, Jr.
Lusk Law Firm, LLC
2108 Airport Boulevard
Mobile, Alabama 36606
251-471-8017
rlusk@lusklawfirmllc.com

# OVERVIEW

## The Role of the Guardian Ad Litem

The role of guardian ad litem is ill defined. However, the role and responsibilities of a guardian ad litem are not currently addressed by statute or rule. Alabama case law provides little guidance. It has been said that the guardian ad litem is an advocate for their ward and the role of the guardian ad litem in the adjudicatory process is not different from that of any other advocate. *Formal Opinion of the Disciplinary Commission of the Alabama State Bar,* RO 00-02, citing, *Ala. Code* §15-12-21 (1975, as amended), and *S.D. v. R.D.,* 628 So. 2d 817 (Ala. Civ. App. 1993). In the context of advocacy, the foregoing statement is true. However, in the overall context, the role and responsibilities of a guardian ad litem are much more complex. The general rule is that "[a] guardian ad litem or next friend is always subject to the supervision and control of the court, and he may act only in accordance with instructions of the court." *Stone v. Gulf American Fire & Cas. Co.,* 554 So.2d 346, 361 (Ala. 1989), quoting 43 C.J.S. *Infants* §234, p. 610 (1978). The supervisory role of the court includes not merely the power to appoint a guardian ad litem, but the power and responsibility to see to it that the ward is effectively represented by the guardian ad litem. The guardian ad litem functions as a friend of the court, assigned by the court to investigate and evaluate the facts and circumstances, and to formulate opinions and recommendations for the court, exercising independent professional judgment with the paramount goal to determine, protect, promote, and advocate the best interests of the ward.

Generally, the guardian ad litem has the same ethical responsibilities as any other lawyer. The role of the guardian ad litem has been characterized as advocate, mediator, investigator, protector, promoter, caretaker, and facilitator. The traditional role of a lawyer is that of an advisor, advocate, negotiator, and intermediary. A lawyer must "abide by the client's decisions concerning the objectives of the representation." Rule 1.2(a), Alabama Rules of Professional Conduct. In many cases a guardian ad litem's opinions, recommendations, or judgments may not coincide with the preferences or directives of the ward. This often presents a difficult ethical dilemma and burdens the guardian ad litem with the additional, and often overwhelming, responsibility to exercise judgment and make decisions for the ward/impaired-client that lawyers in an ordinary lawyer-client relationship do not have to make.

The combination of the roles of lawyer-as-advocate and lawyer-as-guardian ad litem is problematic. Often lawyers with the least training and experience are awarded the incomparable responsibility of serving as a guardian ad litem. A guardian ad litem cannot be effective unless they understand their role and responsibilities. Resolving the legal, ethical, social and moral dilemmas presented by the duality of lawyer-advocate and lawyer-guardian is key to effective representation and avoidance of legal and ethical problems.

**The New Juvenile Code is Instructive**

Guardian ad litem - "A licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual." Ala. Code § 12-15-102(10).

Child's attorney - "A licensed attorney who provides legal services for a child, or for a minor in a mental commitment proceeding, and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child or minor as is due an adult client." Ala. Code § 12-15-102(5)

A child's attorney is bound by the child's decisions concerning the objectives of the representation. Rule 1.2(a), Alabama Rules of Professional Conduct. However, a child's guardian ad litem is not bound by the child's expressed interests, but must act to protect the best interests of the child. Thus, the guardian ad litem is saddled with the additional, and often overwhelming, responsibility to exercise judgment and make decisions for the child-client that lawyers in an ordinary lawyer-client relationship do not have to make.

In defining the rights of child in dependency and termination of parental rights proceedings, *The Juvenile Justice Act* sets out minimal duties and responsibilities for the child's guardian ad litem. Ala. Code § 12-15-304(b), provides:

> "(a) In all dependency and termination of parental rights proceedings, the juvenile court shall appoint a guardian ad litem for a child who is a party to the proceedings and whose primary responsibility shall be to protect the best interests of the child.
>
> "(b) The duties of the guardian ad litem include, but shall not be limited to, the following:
>
> > "(1) Irrespective of the age of the child, meet with the child prior to juvenile court hearings and when apprised of emergencies or significant events impacting the child. In addition, the guardian ad litem shall explain, in terms understandable to the child, what is expected to happen before, during, and after each juvenile court hearing.
> >
> > "(2) Conduct a thorough and independent investigation.
> >
> > "(3) Advocate for appropriate services for the child and the family.
> >
> > "(4) Attend all juvenile court hearings scheduled by the juvenile court and file all necessary pleadings to facilitate the best interests of the child.

"(c) Before being appointed by the juvenile court, every guardian ad litem appointed in juvenile dependency or termination of parental rights cases shall receive training appropriate to their role.

"(d) Nothing in this section shall prohibit the juvenile court from appointing trained volunteers in addition to guardians ad litem in promoting the best interests of the child.

"(e) A guardian ad litem may be appointed to protect the best interests of more than one child of the same parent. A guardian ad litem also may be appointed to protect the best interests of both a minor (or otherwise incapacitated) parent and the child."

Comment

"This subsection will mandate that guardians ad litem be appointed to represent children in all dependency and termination of parental rights cases and clarify that the responsibility of a guardian ad litem is to protect the best interests of the child, as required by federal and state law. *See* 42 U.S.C. § 5106a(b)(2)~~(A)(viii)~~ (sic) (B)(xiii)(providing that in order to receive federal funding for child abuse and neglect prevention and treatment programs, a State must provide a certification by the chief executive officer that the State has "provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, . . ., shall be appointed to represent the child in such proceedings . . . (II) to make recommendations to the court concerning the best interests of the child"); Ala. Code § 26-14-11 (2007) ("In every case involving an abused or neglected child which results in a judicial proceeding, an attorney shall be appointed to represent the child in such proceedings. Such attorney will represent the rights, interests, welfare and well-being of the child, and serve as guardian ad litem for said child.").

"This subsection was added to provide some minimum duties for guardians ad litem, based on standards promulgated by the American Bar Association. *See* American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996), at Stds. C-1, C-2, C-3, C-4, and D-1.

"As required by federal law, this subsection will provide that guardians ad litem representing children must receive training appropriate to their role. *See* 42 U.S.C. § 5106a(b)(2)~~(A)(xiii)~~(sic)(B)(xiii) (requiring, as a condition of eligibility for federal funding, that "in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings").

"This subsection will confirm that a juvenile court may appoint trained volunteers, such as Court Appointed Special Advocates ("CASAs"), to assist a guardian ad litem in promoting the best interests of a child.

"This subsection will clarify that a single guardian ad litem ("GAL") may be appointed to protect the best interests of more than one child of the same parent. A single GAL may also be appointed to protect the best interests of both a minor (or otherwise incapacitated) parent as well as his or her child."

## GENERAL DUTIES

- Independent Investigation
    - Court file
    - Applicable law
    - Agency records
    - Law enforcement records
    - School records
    - Medical records
    - Mental health records
    - Financial records
    - Assets/Liabilities
    - Other collateral sources
    - Appropriate Services
    - In-person interviews
        - Counsel for Petitioner/Petitioner
        - Alleged/Child/Ward
        - Parents or guardian
        - Relatives
        - Third parties: neighbors, friends

- Determine Best Interests
    - Advocate the Ward's best interests
    - Maintain objectivity
    - Maintain independence

- Document
    - Time
    - Expenses
    - Contacts
    - Interviews
    - Opinions and recommendations

- Be Present

- Be Prompt

- Last minute vs. current situation

- Communicate
    - Nature of the proceedings
    - Role and responsibilities
    - Legal rights
    - Confidentiality and privilege
    - Contact information
        - Child/Ward
        - Parent or Guardian
        - Other Attorneys
        - Court

- Advocate
    - Immediate needs and services
    - Ward's best interests
    - Future needs and services

## SPECIAL SITUATIONS

**Loyalty and Confidentiality v. Best Interests**

Q: What is the guardian ad litem's ethical responsibility when duties of loyalty and confidentiality collide with the best interests of the child?

A: The Alabama Rules of Professional Conduct recognize that there are times when a lawyer's duties of loyalty and confidentiality collide with the best interests of the client.

Rule 1.14, Ala. R. Prof. C., provides:

"(a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

"(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

"(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest.

"Comment to Rule 1.14

"The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. The fact that a client suffers diminished capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should, as far as possible, accord the represented person the status of client, particularly in maintaining communication. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not the client's family members, to make decisions on the client's behalf. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent the guardian's misconduct. See Rule 1.2(d).

"Taking Protective Action

"If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken and that a normal client-lawyer

relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measure could include: consulting with the client's family members, using a reconsideration period to permit clarification or improvement of circumstances using voluntary surrogate decision-making tools such as valid durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or conservator or the entry of another protective order is necessary to serve the client's best interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. Whether the appointment of a legal representative is justified under the circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

“Disclosure of Client's Condition

“Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b) of this rule, the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

"Emergency Legal Assistance

"In an emergency where the health, safety, or financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise to avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer with respect to a client. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as with any client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible."

**Guardian Ad Litem's Role and Responsibilities**

*M.R.J. v. D.R.B.,* 34 So.3d 1287 (Ala. Civ. App. 2009) (Juvenile Court exceeded its discretion in awarding the guardian ad litem sole discretion in determining the mother's visitation. The trial court order provided: "Mother is awarded liberal visitation, which shall be established by the guardian ad litem and submitted to the court in writing for inclusion in the file." "A guardian ad litem is an attorney entitled to argue his or her client's case to the court as is any other attorney, but he or she is not delegated any special authority of the court. *K.D.H. v. T.L.H.,* 3 So.3d 894, 899-900 (Ala. Civ. App. 2008))

*Pratt v. Pratt,* 56 So.3d 638 (Ala. Civ. App. 2010) (Court's order granting discretion over supervised visitation to Guardian ad litem and visitation supervisor is error)

**Client Objectives or Best Interests?**

Q: Lawyer was appointed as counsel for minor, not guardian ad litem. The minor has been charged with DUI, possession of marijuana and possession of drug paraphernalia. There are jurisdictional problems and fatal errors in the charging documents. The DUI was dismissed because of the errors. However, the prosecutor has offered a 90-day suspended sentence, six-month license suspension on the marijuana and drug paraphernalia charges. The minor does not want to accept the plea offer and wants a trial. Lawyer wants to make sure he is clear on

his role to advocate what his client desires, rather than what he thought, or others thought might be in the best interest of his client.

A: Under the new juvenile justice act, if he was appointed as defense counsel, as opposed to guardian ad litem, then he was responsible to pursue the objectives of his client.

**Duty to Act in Other Proceedings**

Q: What is my duty in a dependency case as the GAL? Child was conceived by two seventeen year olds. Prior to birth of the child father is killed in a car accident and the family receives either life insurance and/or a cash settlement. A trust is established for the child. The grandparents petitioned to be administrators of the estate in the probate court, but nothing has progressed from that point in probate court. Due to various circumstances, DHR filed a dependency petition on behalf of the child and the child's mother since she is also a minor. Child is adjudicated dependent and DHR is given custody. The grandparents apparently have some authority or access to the trust and I have received information that they are "running through" the money. They are not parties to the dependency case but hired a lawyer, supposedly with money taken from the trust, and have filed a petition for custody. My question is since I am not the GAL in the probate court matter, do I have a duty, responsibility, or even jurisdiction to protect the child's trust account or is this DHR's responsibility as the custodian or the probate court's job to appoint a GAL in their matter? Am I liable or responsible in some way, if the grandparents blow all the money in the trust?

A: As guardian ad litem for the child you have a duty to act to protect the best interests of the child. If you have information that indicates that funds held in trust for the benefit of the child are being misappropriated, then you may take protective action, which might include, but need not be limited to, notifying the appropriate court; notifying counsel for DHR; or filing an action with the appropriate court to request an accounting and an order to protect the financial interests of your client.

**Communication With Your Client**

Q: Lawyer is the guardian ad litem in a case. The lawyer for the mother has instructed Lawyer that he cannot meet with his client (the child) without the mother and the lawyer for the mother present.

A: Lawyer has been appointed to represent the child, as guardian ad litem. Lawyer is entitled to meet with his client in private without the presence of others. If the child's mother and mother's lawyer does not cooperate, then file motion with the court asking for assistance.

**Communication With Party Represented by Counsel**

Q: What are the ethical responsibilities of a guardian ad litem who takes an active role in investigating a matter where that investigation necessarily includes interviewing a party represented by counsel?

A: Rule 4.2(a), Alabama Rules of Professional Conduct, provides:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

A guardian ad litem may not communicate with a "person the lawyer knows to be represented" by a lawyer without that lawyer's consent. However, communications merely incidental to the representation that do not concern any substantive matter, such as scheduling, transportation, or notice, etc. would not violate this rule.

**Communication With an Unrepresented Party**

Q: What if the party is not represented by counsel?

A: Rule 4.2 prohibits communication with a person represented by counsel. If the person is not represented by counsel, then the guardian ad litem may communicate with the unrepresented party about the subject of the representation, subject to the provisions of Rule 4.3.

Rule 4.3(a), Ala. R. Prof. C., provides:

> "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

If the role of the guardian ad litem is unclear to lawyers and judges, then the role of the guardian ad litem will easily be misunderstood by a layperson. A guardian ad litem should explain his dual role as an advocate for the ward and as a protector or guardian of the best interests of the ward. A guardian ad litem should also explain that information provided to the guardian ad litem will not be considered confidential, i.e., the guardian ad litem only owes a duty of confidentiality and loyalty to the ward.

**Communication With a Non-Party**

Q: What about communications with persons (non-parties)?

A: Unlike the ABA Model Rules of Professional Conduct, the Alabama rule uses the term "party" rather than "person." There is an argument that Rule 4.2, by its terms, does not apply to prohibit communications by a lawyer with non-parties. However, the comment to the rule provides that the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter. Certainly, if the person is represented by counsel, the guardian ad litem should obtain the permission of counsel before communicating with the person whether or not they are a named party. This same rationale applies to prohibit communications by a lawyer representing a party with a child represented by a guardian ad litem, even where the child is not a party to the proceedings. Communications with non-represented persons are subject to the provisions of Rule 4.3.

**Ex Parte Communications With the Court**

Q: Can the guardian ad litem communicate ex parte with the trial court?

A: No. An attorney who has been appointed a guardian ad litem is ethically prohibited from communicating ex parte with the trial judge concerning any substantive issue before the court. See RO-00-02.

*Ex Parte R.D.N.*, 918 So. 2d 100 (Ala. 2005) (Guardian ad litem admitted in brief to the court that she had private conversations with the trial judge regarding her opinions and recommendations. The Court stated, the "guardian ad litem's recommendation that the child remain with the mother was not presented as evidence produced in open court and was based on information that may or may not have been properly presented to the court." Neither party had had the opportunity to examine the guardian ad litem or to present evidence in support of or contradicting her recommendation. Therefore, the court concluded that it could not say that the father's rights had not been prejudiced and held that the ex parte communication between the guardian ad litem and the trial court had violated the father's rights to procedural due process.)

**Nature and Scope of Advice and Recommendations**

Q: Is the guardian ad litem limited solely to legal analysis in representing and protecting the best interests of the ward?

A: Rule 2.1, Ala. R. Prof. C., provides:

> "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering

> advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

This rule recognizes that a lawyer does not provide legal advice in a vacuum. Moral, economic, social, and ethical considerations affect legal questions and the application of the law. Thus, a lawyer is not limited to the provision of purely technical legal advice. However, this does not allow the guardian ad litem to ignore relevant objective facts or law. The guardian ad litem's conduct and opinions must be rationally related to the facts and circumstances and the applicable law. The dual obligations of a guardian ad litem necessarily impose a higher degree of objectivity on a guardian ad litem than is imposed on a lawyer for a competent adult.

**Guardian Ad Litem as Witness**

Q: Can a guardian ad litem be called as a witness in the proceeding in which they represent the ward?

A: There is no ethical rule that prohibits a guardian ad litem from being called as a witness in a proceeding in which the guardian ad litem represents a ward. Whether the guardian ad litem may be called as a witness is a legal question subject to determination by the court. Rule 3.7, Ala. R. Prof. C., provides:

> "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9."

Rule 3.7 prohibits a lawyer from undertaking representation where facts exist that will make it more likely than not that the lawyer's testimony will be necessary to establish a claim or defense on behalf of the client. The rule does not prohibit a lawyer who is likely to be called as a necessary witness from representing a client in the pre-trial stages of litigation nor does it require disqualification of a lawyer who is called as a witness by the adverse party, as long as the lawyer's testimony is consistent with the client's interest.

Although jurisdictions are split regarding whether a guardian ad litem can be called as a witness, the majority view appears to be that they may be called as a witness. Testimony by guardians ad litem appears to be an accepted practice in Alabama. See e.g., *Scroggins v. Templeton*, 890 So.2d 1017 (Ala. Civ. App. 2003). Certainly, if the guardian ad litem proffers facts, conclusions and opinions in the guardian ad litem's report and recommendation, the adverse parties would be entitled to cross-examine this report and the author as they would any other report offered into evidence or considered by the court.

However, the fact that a guardian ad litem may be subject to cross-examination does not destroy lawyer-client confidentiality or attorney-client privilege. The guardian ad litem walks a fine line in this regard. When a guardian ad litem is placed in the position of advocate/witness, the better practice would be to assert client confidentiality and privilege where appropriate, obtain a ruling from the court, and then make only those disclosures reasonably necessary to comply with the court's order.

*P.D. v. S.S.*, 67 So.3d 128 (Ala. Civ. App. 2011)
*M.J.C. v. G.R.W, et al., etc.*, 69 So.3d 197 (Ala. Civ. App. 2011)

**The Guardian Ad Litem's Report**

Q: What are the ethical considerations concerning the content of the guardian ad litem's report and recommendation?

A: Rule 3.4, Ala. R. Prof. C., provides, in part:

> "A lawyer shall not:
> * * *
> (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; . . . "

A guardian ad litem's report necessarily contains hearsay and other evidence that would generally be inadmissible if offered through the testimony of the guardian ad litem at trial. However, guardians ad litem should be careful not to use or allow the guardian ad litem's report to be used as a vehicle for the introduction of gratuitous, patently inadmissible and highly inflammatory evidence. Prior to submission to the court, the guardian ad litem should provide a copy of the report to counsel for all parties. Upon submission of the report, the guardian ad litem subjects herself and the report to cross-examination by the parties. Additionally, the parties should be allowed the opportunity to call additional witnesses to dispute and correct alleged factual inaccuracies in the report.

The guardian ad litem's report also necessarily includes confidential and privileged information provided by the ward, disclosure of which is impliedly authorized in order to carry out the representation. However, where disclosure of confidential information is not necessary to protect the best interests of the ward or impliedly

authorized, the better practice would be for the guardian ad litem not to disclose this confidential information unless and until directed to do so by the court.

*M. B. v. R. P.*, 3 So. 3d 237 (Ala. Civ. App. 2008) (The father argued that under the authority of *Ex parte R.D.N.*, 918 So.2d 100 (Ala. 2005), the guardian ad litem should not have been allowed to make a recommendation regarding the issues of dependency, custody, and visitation because the guardian ad litem was not present at the final, dispositional hearing. The guardian ad litem was present for the hearings that occurred before the final hearing on the merits. The guardian ad litem had also interviewed the parties and numerous witnesses. However, due to scheduling conflicts, the guardian ad litem was present in the courtroom for only a few minutes of the first day of the October 2007 hearing on the merits, and he missed the entire second day of the final hearing due to illness. The father pointed out to the juvenile court at the close of the hearing, the guardian ad litem had missed the presentation of the father's case and the testimony of the witnesses called to testify on behalf of the father. At the close of the final day of testimony, the juvenile court gave the parties permission to submit written arguments or letter briefs. The maternal grandparents submitted a letter brief to the juvenile court on November 6, 2007, and the father submitted his letter brief on November 7, 2007. The guardian ad litem also submitted a letter, dated November 6, 2007, to the juvenile court in which he opined that the child was dependent and in which he recommended that the maternal grandparents receive custody of the child. The guardian ad litem's recommendation states:

> "As the Court is well aware, I was unable to attend all of the final hearing due to illness. I was made aware by [the maternal grandparents'] counsel that all parties stipulated to going forward with the hearing in my absence. As a result, I cannot give a recommendation based on the merits of the final hearing. However, I have been present at every other hearing conducted by this Honorable Court. I have also had many opportunities to meet with the parties and their attorneys in this matter. I have also conducted my own investigation regarding the best interests of the minor child. I believe I have obtained enough knowledge of this matter to make a recommendation to this Court."

In this case, as in *Ex parte R.D.N.*, the guardian ad litem apparently formed his opinion before the case was presented at trial. In *Ex parte R.D.N.*, our supreme court found that the trial court's reliance on the guardian ad litem's recommendation, which was not based on any consideration of the evidence presented at the final hearing, resulted in a deprivation of the father's“ right to contest the accuracy, substance, impartiality, and quality of the guardian ad litem's recommendation." *Ex parte R.D.N.*, 918 So.2d at 105. On the authority of *Ex parte R.D.N.*, supra, we must similarly conclude that the juvenile court erred in considering the recommendation of the guardian ad litem when the guardian ad litem was not present at, and therefore could not consider the evidence presented at, the final hearing.)

**Conflicts of Interest**

Q: Lawyer is the guardian ad litem in a domestic relations case, which involves three children and has been ongoing for about three years. The case was recently set for review. Lawyer has since accepted employment as a part-time Assistant District Attorney and has recently been assigned to prosecute a criminal case against the mother. Can he prosecute that case?

A: Lawyer cannot simultaneously serve as a GAL for the three children and prosecute the mother in a criminal case.

Q: Lawyer has a contract with DHR and represents DHR on cases in juvenile court, some of which involve termination of parental rights. Lawyer's contract with DHR is not exclusive and, therefore, Lawyer represents other parties in juvenile court. There is presently pending a TPR case, in which DHR is represented by another part-time contract lawyer. Lawyer has been appointed to serve as guardian ad litem. Can Lawyer serve as a guardian ad litem in cases in which DHR is a party when lawyer simultaneously represents DHR in other similar, but unrelated matters?

A: No. Rule 1.7(a), Alabama Rules of Professional Conduct, prohibits a lawyer from representing a client if that representation of the client will be directly adverse to another current client. A part-time lawyer attorney representing the interests of DHR would be prohibited from simultaneously representing any other client whose interests are adverse to DHR. A lawyer engaging in the simultaneous representation of DHR and a ward is presented with a situation that is fraught with conflict. Initially engaging in this dual representation presents a situation where, over the course of the representation, the lawyer may be required to make recommendations to the court that are adverse to DHR.

Q: Lawyer represents County DHR on a routine basis and recently represented County DHR in a termination of parental rights case. In the subsequent adoption proceeding, he has been appointed as guardian ad litem and wanted to know if that was a conflict.

A: Yes. See Rules 1.9 and 1.11, Alabama Rules of Professional Conduct. The proposed representation in the adoption case is substantially related to the former representation of County DHR in the TPR case.

Q: Lawyer represented a child as a guardian ad litem. She is about to graduate from high school and lawyer wants to know if it would be appropriate if he gave her a nominal graduation gift.

A: Certainly.

**Duane A. Graham**, was born in Mobile, Alabama, on February 18, 1959. He received his B.A. degree in 1981 and his J.D. degree in 1984 from the University of Alabama. He is a member of the Order of the Coif, and was Editor in Chief of the Alabama Law Review during 1983-1984. Mr. Graham was admitted to the Alabama Bar in 1984, and served as Chairman of the Real Property, Probate and Trust Section in 1996. He is currently on the Standing Trust Committee of the Alabama Law Institute. He has served on the boards of various local and civic bodies, including as President of Mobile Opera, Inc. and as Vice Chairman of the Board for Wilmer Hall Children's Home. His practice has been concentrated in the areas of estates and trusts, probate administration and litigation, oil, gas, and natural resources, including mineral title and administrative matters, royalty and contractual litigation, oil and gas severance tax, and real estate. Mr. Graham is an adjunct faculty member at the University of South Alabama, where he from time to time teaches a course in real estate law.

PROBATE COURT OF MOBILE COUNTY
APPOINTED LAWYERS SEMINAR

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## 1. SERVICE OF NOTICE ON PARTIES OF INTEREST

### A. Basic Rule is Rule 4, A.R.C.P.

Under Act No. 91-131, which grants the Probate Court of Mobile County statutory equity jurisdiction in cases involving estates and conservatorships, the Rules of Civil Procedure apply, although this does not foreclose application of other statutory probate procedures. Under the 2013 amendment to Rule 1 of the Rules of Civil Procedure, the rules apply in probate courts "so far as the application is appropriate and except as otherwise provided by statutes." Consequently, Rule 4, and its collateral Rules 4.1 – 4.4, are the principal guides for determining how to serve notice. The fundamental concept of constitutional due process is the driving force behind the notice requirement. Even though probate courts frequently function as quasi in rem courts, constitutional requirements dictate that all parties having a legitimate interest in the proceedings should be notified thereof, at least if possible. Due process does not require that each interested party in fact receive notice, but it does require that reasonable efforts be made to provide such notice. It should always be borne in mind that even if the court is effectuating the service of notice, it is ultimately the petitioner or movant, just as it is the plaintiff in circuit court, who bears the burden of making sure interested parties are served.

### B. Service by Sheriff

Under Rule 4(i), service by the sheriff's office on persons who reside in Alabama is the default means of service, and the probate court frequently uses this means, at least initially. Notices are forwarded to the sheriff's office, and a deputy is dispatched to attempt service. For parties in other counties, notices can be forwarded to the sheriff's office in the relevant county. Typically, a deputy attempts service at the stated address for perhaps three times. If unsuccessful, the notice is returned "not found" or with some other message such as "wrong address" and the service had not been completed.

### C. Service by Private Process Server

Under Rule 4(i), service can also be effectuated by a designated person outside the sheriff's office who is at least 19 years of age and not a party or a relative of a party. Typically, this means of service is used when a party has either been difficult to serve or is expected to

refuse service by other means. The petitioner has to pay the private process server for his or her efforts, although charges for this in the Mobile area tend to be quite reasonable.

D. Service by Certified Mail

Under Rule 4(i), service can also be attempted by certified mail, which has the advantage of being sent nationwide. The receipt of the "green card" showing delivery is required before notice is deemed complete. For individuals, the "green card" should be signed by the individual being served.

E. Service by Publication

If all else fails, service can be made by publication in a newspaper under Rule 4.3. An affidavit must be filed with the court attesting to the efforts made to serve the party by other means that have been unsuccessful. Thus, service by publication is never the first type of service attempted. Moreover, in *Lovell v. Costigan*, No. 2140522 (Ala. Civ. App., July 10, 2015), the Court of Civil Appeals held that it was improper to serve a defendant by publication unless the affidavit submitted by the plaintiff alleged specific facts to the effect that the defendant was avoiding service. Specifically, the Court held that it was insufficient to allege merely that the defendant was not found at his last known address and that various internet and telephone efforts to locate defendant's new address had been unsuccessful. The Probate Court upholds the requirements of this case.

Note that some probate proceedings (*e.g.*, petitions for final settlement, petitions to sell real property for payment of debts) require a general publication notice in addition to service on interested parties. These general publications are intended to provide notice to persons who are unknown to the petitioner or to creditors and this does not substitute for notice on interested parties. If an interested party cannot be served by any method but publication, this general publication will not suffice and a separate publication will be required for the specific interest party.

2. <u>IMPORTANT RULES OF CIVIL PROCEDURE IN PROBATE PRACTICE</u>

A. Rule 4 – for purposes of notifying interested parties

The application of Rule 4 in Probate Court has been discussed above.

B. Rule 17(d) – GAL cannot be suggested or nominated by petitioner

Probate Court proceedings are often unique in the frequency with which they involve matters where minors or mentally incapacitated persons have an interest. These persons have to be notified as well as represented in the proceedings. This representation is accomplished by appointment of a guardian ad litem ("GAL") to represent the minor or incapacitated person. Rule 17 addresses the appointment of GAL's. It should be noted that Rule 17(d) specifically

says that a person cannot be appointed as GAL if that person has been suggested or nominated by the petitioner. On the other hand, a minor of 14 years of age or older can nominate his or her own GAL within 30 days of service.

C. Rule 45 – Subpoenas

The methods for obtaining documents from non-parties and for compelling the attendance of witnesses at a hearing is accomplished through subpoenas. Probate Court follows the general rules outlined in Rule 45.

D. Rule 56 – Summary Judgment

In contested matters, motions for summary judgment are often a good vehicle for testing the sufficiency of a claim and perhaps avoiding a trial. Probate Court applies the same rules as circuit courts – specifically the requirements of Rule 56 – in ruling on such motions.

## 3. HOW TO ADMIT DOCUMENTS INTO EVIDENCE

A. Authentication

To be admitted into evidence, documents must be authenticated. Rule 44 and Rules 901 through 903 of the Rules of Evidence generally govern the requirements for how to authenticate a document. Fundamentally, the concept of authentication requires a showing that the document is in fact what it purports to be. The rules dictate numerous ways in which this showing can be made, such as a certification of a governmental or court document, an attestation of a business record custodian for a business, or simply testimony that the document is what it appears to be.

B. Avoidance of Hearsay Rule

Documents constitute potential hearsay almost by definition – they are in fact "out of court" happenings. Fortunately, many exceptions to the hearsay rule exist under which many documents can easily be admitted into evidence notwithstanding their hearsay tendencies. Rules 801 through 806 of the Rules of Evidence specify what is either not considered hearsay to begin with or what constitutes an exception to the hearsay rule. Rules that often can be employed to overcome the hearsay rule for documents include the following:

-admissions by an opponent, which are declared not to constitute hearsay under Rule 801(d), so a relevant document containing "admission" by an opponent is likely to be admissible.

-business records and public records exceptions provided by Rule 803. Rule 803 of the Rules of Evidence contains numerous exceptions to the hearsay rule, many of which apply to documents. The "business record" exception is found in Rule 803(6) and requires a showing that the document was maintained by a business "in the course of a regularly conducted business activity" and that "it was the regular practice of that business entity to make such record." Public records, such as deeds, court orders, and the like are clear exceptions to the hearsay rule.

## 4. IMPORTANT RULES OF EVIDENCE IN PROBATE PRACTICE

### A. Rule 502 – Attorney-Client Privilege

While the attorney-client privilege is important for all legal proceedings, it has some special applications in Probate Court, namely in the exceptions to the rule noted in Rule 502(d). The most significant of these is subsection (2), which provides that an exception to the privilege exists as to the following:

> *Claimants Through the Same Deceased Client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction."

Ala. R. Evid. 502(d)(2). This has particular application in a will contest proceeding or a proceeding in which the meaning of a particular clause of a will or trust agreement is under scrutiny. Rule 502(d)(4) also creates an exception to the privilege as to communications relevant to the intention or competence of a client who executes a document that the attorney attests as a witness.

### B. Rule 601 – Killing the Dead Man's Rule

While Rule 601 of the Rules of Evidence is relatively obscure – providing only that every person is competent to be a witness except as otherwise provided, the comments to the rule make clear that this rule was intended, among other things, to abolish the so-called "dead man's statute" or "dead man's rule." Under that rule, a person was deemed "incompetent" to testify as to certain communications or transactions of a dead person (although there were certain exceptions) on the theory that the dead person was unavailable to contradict such testimony. The thrust of Rule 601 is thus that evidence concerning the statements or actions of a deceased person are, if otherwise relevant, admissible in a Probate Court proceeding notwithstanding the death of the person.

## 5. PROVING A WILL

### A. ELEMENTS

The elements required to constitute a valid will go back to the days of Henry VIII, the most significant of which is that there must be two witnesses. Any person named as executor or beneficiary in the will, any other person interested in the estate, or any person having custody of the will may seek the probate thereof. Ala. Code § 43-8-160. There is a five-year statute of limitations on probating a will that has not otherwise been probated in another state, territory, or country where the decedent resided. Ala. Code § 43-8-161. Notice of the hearing to probate the will must be given to those persons who would constitute the decedent's heirs at law at least 10 days before the hearing, the logic being that these are the persons who may be adversely affected

by the dispositive provisions in the will. Ala. Code § 43-8-164. These are also the persons entitled to contest a will. Ala. Code § 43-8-190. A guardian ad litem must be appointed to represent any minor or incompetent heir. Ala. Code § 43-8-165. An adult heir waive the notice requirement, and this is often done in cases were the interested parties all support the probate of the will.

Once the hearing date has arrived, it must be determined whether the will is self-proving under Ala. Code § 43-8-132. If so, no evidence is required. If not, the testimony of at least one of the witnesses to the will must be procured. Ala. Code § 43-8-167. If the witnesses are dead or reside out-of-state, testimony verifying the handwriting of the testator's signature and that of at least one witness can be provided in substitution of witness' testimony. *Id.* For out-of-state witnesses or those unable to come to court, the court may also issue a "commission" to take the "deposition" of the witness. Ala. Code § 43-8-168. The "commission" is an order appointing some person as a type of notary public who is authorized to place the particular named witness under oath. The "deposition" is a written set of questions that the witness must answer and sign under oath.

When the original will is not available, the will can still be admitted to probate under certain circumstances. Essentially, the proponent of a lost will must (1) prove that a valid will was executed, (2) establish the contents of that will, (3) account for the original, and (4) establish nonrevocation by the testator. *See, e.g., Tyson v. Tyson*, 521 So. 2d 956 (Ala. 1988). If a copy of the will is available, items (1) and (2) can easily be established. Because the absence of the original is presumed to be due to the testator's destruction thereof for purposes of revoking it, adequate evidence must be presented to account for why the original is missing but should be presumed revoked. *Id.*

### B. ASSESSING WHETHER TO CONTEST

Wills can be contested for basically one of three reasons: (1) improper execution; (2) lack of testamentary capacity; and (3) undue influence. Improper execution was basically addressed above.

It is presumed that every person has the capacity to make a will, and the contestant has the burden to prove lack of testamentary capacity. *Johnston v. Johnston*, 57 So. 450, 452 (Ala. 1912). As stated by the Alabama Supreme Court:

> In order to execute a valid will, one must possess mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make—to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other.

*Bolan v. Bolan*, 611 So.2d 1051, 1057 (Ala. 1993) (internal quotations omitted); *Smith v. Vice*, 641 So.2d 785, 786 (Ala. 1994). As such, testamentary capacity is a relative low standard.

The question whether there was testamentary capacity is determined by the testator's mental condition at the time he or she executed the will. *Burke v. Thomas*, 211 So.2d 903 (Ala. 1968).

A contestant bears the burden of proof with respect to her allegation of undue influence. *Kelly v. Donaldson*, 456 So.2d 30, 33 (Ala. 1984). The elements necessary to prove an undue influence claim under Alabama law are:

> (1) that a confidential relationship existed between a favored beneficiary and the testator; (2) that the influence of or for the beneficiary was dominant and controlling in that relationship; and (3) that there was undue activity on the part of the dominant party in procuring the execution of the will.

*Clifton v. Clifton*, 529 So.2d 980, 983 (Ala. 1988). A "favored beneficiary" in this context is "[o]ne who, in the circumstances of the particular case, has been favored over others having equal claim to the testator's bounty." *Cook v. Morton*, 1 So.2d 890, 892 (1941). For purposes of this rule, "[t]he 'equal claim' of others refers not to the laws of descent and distribution but to the facts of the particular case." *Clifton*, 529 So. 2d at 983. In other words, a child does not become a "favored beneficiary" solely because he or she receives something greater than his or her intestate share of an estate.

Any would-be contestant needs to consider that attorneys' fees will likely be assessed against an unsuccessful contestant under the provisions of Ala. Code § 43-8-196.

# Practice Pointers for Guardians ad Litem in Commitment Cases

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I graduated from Mississippi College School of Law in 2007 and have been practicing in and around Mobile County since 2008. My practice has transitioned from mainly criminal defense to primarily practicing in mental health cases in Mobile County Probate Court.

I have a Bachelor of Science in early childhood education and a Master of Education in school counseling. I worked in the Mobile County Public School system ad a teacher and counselor prior to attending law school. Before working in the school system, I worked in a residential treatment facility for mentally ill children under the age of 13 who were violent, aggressive, and had been physically and/or sexually abused.

# Practical Tips for Guardians ad Litem
# Involuntary Commitment Cases

"Involuntary civil commitment has been recognized as a 'massive curtailment of liberty.' *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048 1052, 31 L.Ed.2d 394, 402 (1972)." *Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984)

I. Definitions

A. **Mental Illness:** (§22-52.1) - A psychiatric disorder of thought and/or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. Mental Illness, as used herein, specifically excludes the primary diagnosis of epilepsy, mental retardation, substance abuse, including alcoholism, or a developmental disability.

B. **Serious mental illness:** (SMI) (National Institute of Mental Health) - is defined as a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.

C. **Inpatient treatment:** (§22-52.1.1) - Treatment being provided to a person at a state mental health facility or a designated mental health facility which has been specifically designated by the department for inpatient treatment.

D. **Outpatient treatment:** (§22-52.1.1) - Treatment being provided to a person in a nonresidential setting and who is not admitted for 24-hour-a-day care.

II. What are considered SMIs

A. Bipolar Disorder (I & II)
B. Delusional Disorder
C. Major Depressive Disorder
D. Obsessive Compulsive Disorder
E. Panic Disorder
F. Psychotic Disorder (Brief, Shared, NOS)
G. Schizophrenia
H. Schizoaffective
I. Schizophreniform Disorder

III. Role of Guardian ad Litem in Involuntary Commitment Cases

A. …the probate judge shall appoint a guardian ad litem to ***represent and to protect the rights of the respondent***… §22-52-4

B. "A special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of a guardian ad litem exists only in that specific litigation in which the appointment occurs." Sharp v. Hanceville Nursing Home, Inc., 719 So. 2d 243, 244 (Ala. Civ. App. 1998), quoting Black's Law Dictionary 706 (6th ed. 1990)

IV. Practice Tips

A. Elements

1. Probable Cause: the respondent should be detained temporarily and finds that temporary treatment would be in the best interest of the respondent - **§22-52-4**
2. Outpatient Commitment: §22-52-10.2 - clear and convincing evidence

    a) The respondent is mentally ill;
    b) As a result of the mental illness, the respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently;
    c) The respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable; and
    d) It is the least restrictive environment

3. Inpatient Commitment: §22-52-10.2 - clear and convincing evidence

    a) The respondent is mentally ill;
    b) As a result of the mental illness, the respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently;

c) As a result of the mental illness, the respondent poses a real and resent threat of substantial harm to self and/or others;
d) The respondent is unable to make a rational and informed decision as to whether or not treatment for mental illness would be desirable; and
e) It is the least restrictive environment

B. Waiving Presence: §22-52-9

1. The presence of the Respondent would be dangerous to the Respondent's physical or mental health;
2. The Respondent's conduct could reasonably be expected to prevent the hearing from being held in an orderly manner;
3. The probate judge has judicially found and determined from evidence presented in an adversary hearing that the respondent is so mentally or physically ill as to be incapable of attending such proceedings;

C. Be empathetic and show compassion
D. To Testify or Not?
E. Mobile Metro Jail Clients
F. Medication
G. Weapons
H. Teamwork

# Practice Pointers for Lawyers serving as a Guardian Ad Litem or Advocate in Involuntary Commitment Cases

**By: Chris Estes, Esq.**

**Mobile County Probate Court CLE**

**December 8, 2021**

# ESTES LAW FIRM, LLC

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Chris Estes is a former insurance defense lawyer now dedicated to representing individuals, families and small businesses throughout Alabama and Mississippi who have been injured, harmed, or damaged in any way.

Over the course of the first 16 years of his law practice, Chris represented the insurance industry and corporations - Chris served as the Managing Partner for the Alabama office of a regional defense law firm. Chris is a graduate of Spring Hill College (1995), *cum laude*, and The University of Alabama School of Law (1998), *cum laude*.

In 2014, Chris founded the Estes Law Firm to represent individuals and their families in matters involving wrongful death, serious personal injury, construction defects, product liability, car and big truck accidents, nursing home negligence, medical malpractice, and complex class action litigation. The Estes Law Firm also represents small businesses. Chris has served as a Guardian Ad Litem for Judge John R. Lockett, Judge Michael P. Windom, Judge James T. Patterson, and Judge Don Davis.

Chris has served in Probate Court Involuntary Commitment cases as an Advocate (Petitioner's Counsel) and as a Guardian ad Litem for the Respondent. Further, since 2018 Chris has served as a Temporary Judge for the Probate Court of Mobile County presiding on hundreds of cases.

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# Practice Pointers for Lawyers serving as a Guardian Ad Litem or Advocate in Involuntary Commitment Cases

**By: Chris Estes, Esq.**

In 2019, **47,511** Americans died by suicide making it the 10th leading cause of death in this country.[1] In 2019, there were an estimated **1.38 million** suicide attempts in the United States.[2] In Alabama, on average a person dies by suicide every **11 hours**.[3] However, of note, a 2020 survey found that **93%** of adults surveyed in the U.S. believe that suicide can be prevented.[4] These are quite somber statistics. The Involuntary Commitment process often times is the last resort for families and members of the community faced with intervening to help someone who is suffering from mental illness and potentially life-threatening behaviors. Lawyers serving as a Guardian ad Litem or as an Advocate in this process perform a vital and important function for society. This is important and, if you are taking the time to attend this CLE and read this paper, please know that your time and efforts are crucial to many people at a critical time in their life and in the lives of a loved one. The goal of this CLE is to: (1) set out basic practice pointers for lawyers serving in the appointed roles, (2) outline the procedures, and (3) identify unique situations that a practitioner may be faced with during involuntary commitment hearings.

## I. Petitioner / Advocate Practice Pointers for Probable Cause (PC) Hearings:

a. Review Petition PRIOR to PC hearing and note relevant facts for PC Hearing

b. Call Petitioner PRIOR to PC hearing and go over Petition / Testimony

i. Be prepared to obtain testimony from different types of petitioners, i.e. a family member, a friend, a police officer, a nurse from Metro, a social worker from a nursing home, a nurse, a landlord, a lawyer, etc.
ii. Think about what you need to ask to properly support the Petition
iii. Explain the procedure to the Petitioner and what will likely happen on the day of the hearing
iv. Make sure the Petitioner will be present

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[1] American Foundation for Suicide Prevention, www.afsp.org, citing *General Statistics – Center for Disease Control and Prevention – web based Injury Statistics Query and Reporting System (WISQARS) Fatal Injury Reports* (2020, February 20)(retrieved February 9, 2021 from www.webappa.cdc.gov/sasweb/ncipc/mortrate.html.

[2] *Id.*

[3] American Foundation for Suicide Prevention – Suicide Facts & Figures: Alabama 2020, , www.afsp.org, citing CDC, Fatal Injury Reports (accessed from www.cdc.gov/injury/wisqars/fatal.html).

[4] American Foundation for Suicide Prevention, www.afsp.org, citing *The Harris Poll* (July 22-24, 2020), www.datocms-assets.com/12810/1603916624suicideandmentalhealthpublicperceptionsurveyfinalreportaugust2020.pdf.

c. Petition will be dismissed if the Petitioner is not present – discuss this with your client

d. Probable Cause Hearing (testimony of the Petitioner)

1. Respondent suffering from a mental illness
2. Events and details supporting the petition
3. Whether Respondent poses a threat of harm to self or others and why
4. Does Respondent need to be evaluated and why
5. HEARSAY is allowed
6. Probable Cause standard
7. Advise the Court if you anticipate any disruptive behaviors from the Petitioner or Respondent
8. Advise the Court if you believe there is some situation that warrants having a closed hearing

e. PRIOR to the hearing, talk to the GAL and discuss the status of each case and any UNIQUE ISSUES that may arise:

1. Discuss any stipulations
2. Discuss any potential disruptive behaviors
3. Discuss if GAL thinks evaluation is NOT warranted and why
4. Advise the Court of any stipulations and any Unique Issues
5. Remember, this is NOT about Matlock moments

## II. Petitioner / Advocate Pointers for Merit Hearing (MH):

a. Obtain and review the medical records

b. Call and discuss the recommendation with the Petitioner PRIOR to the hearing

i. If Petitioner disagrees with the recommendation, discuss with GAL and Doctor prior to the hearing
ii. Advise the Court prior to the Merit Hearing if there is disagreement on the Recommendation
iii. If Petitioner moves for an IME (Independent Medical Examination), make sure you make a proffer of proof in support of why the Petitioner requests such an examination
iv. Make sure there is a safe discharge plan in place (Petitioner and GAL) – this usually involves the petitioner and/or other family members

c. Cover all elements contained in the outlines for the Merit Hearing (copies on counsel table)

d. Rules of Evidence apply

e. Hearsay is NOT allowed – be prepared to put in your evidence correctly

f. You must qualify the expert

g. "Clear and Convincing Evidence" Standard

## III. UNIQUE SITUATIONS for ALL Lawyers to consider:

a. Divorce situations / domestic disputes
b. Child custody disputes
c. Social Security Payee disputes
d. Estate, guardianship, conservatorship or money disputes
e. Landlord eviction situations
f. Lawyer as petitioner
g. Petitioner wants to dismiss the petition AFTER PC is found and an evaluation is ordered
h. Petitioner strongly disagrees with recommendation of doctor
i. Petitioner is mentally ill

## IV. General Tips for ALL lawyers:

a. Recognize and embrace the OPPORTUNITY to grow your law practice, to expand your lawyer acquaintances and to let others know what you do.

b. Be positive. Be courteous. Be professional. Be on time. Be positive.

c. Good lawyering is a MUST, but this is NOT the place for Matlock moments.

d. 95% of the cases should NOT be handled in an adversarial manner, but be aware of and prepared for the UNIQUE SITUATIONS discussed above.

## LORI LOWTHERT, M.D.

**AltaPointe Health Systems: Assistant Professor of Psychiatry**

Dr. Lowthert earned her medical degree from the University of South Alabama College of Medicine. She completed residency training in adult psychiatry at the Department of Psychiatry of the Yale University School of Medicine, followed by a fellowship in chronic mental illness research through the Yale Department of Psychiatry. Lowthert joined AltaPointe Health Systems after working five years for the University of Connecticut Correctional Managed Healthcare system, providing psychiatric services to male inmates in the Connecticut Department of Corrections, during incarceration and transition back to the community. She is board certified in adult psychiatry. Her professional interests include community psychiatry, treatment of severe and persistent mental illness, and forensic psychiatry.

# Key points concerning mental illness for lawyers

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## Mental illness in the US

- About 43 million adults experience mental illness in the US in a given year
- 1 in 5 adults in America experience a mental illness
- Nearly 1 in 25 live with a serious mental illness
- One half of chronic mental illnesses begin by age 14; ¾ by the age of 24
- Schizophrenia 1.1% of Americans
- Bipolar Disorder 2.6 %
- Depression 6.9 %
- Anxiety disorders 18.1 %

2

## Inpatient commitment

- A. Respondent is mentally ill
- B. As a result of the mental illness, the Respondent poses a real and present threat of substantial harm to self and/or others
- C. The Respondent will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently
- D. The Respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable
- E. The proposed commitment is the least restrictive and available means of treatment OR if no treatment is presently available, the proposed commitment is necessary to prevent harm to the Respondent and others

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## Outpatient commitment

- A. Respondent is mentally ill
- B. The Respondent will, if not treated, continue to suffer mental distress and experience deterioration of the ability to function independently
- C. The Respondent is unable to make a rational and informed decision as to whether treatment for mental illness would be desirable
- D. The proposed commitment is the least restrictive means of treatment available

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## Serious mental illnesses

- Schizophrenia and other psychotic disorders
  - Schizophrenia (paranoid, disorganized, catatonic, undifferentiated, and residual types)
  - Schizophreniform Disorder
  - Schizoaffective Disorder (bipolar type, depressive type)
  - Delusional Disorder
  - Brief Psychotic Disorder
  - Shared Psychotic Disorder
  - Psychotic Disorder NOS (unspecified psychotic disorder)
- Mood disorders (major)
  - Major Depressive Disorder (single episode, recurrent)
  - Bipolar I Disorder (manic, hypomanic, mixed, depressed, unspecified)
  - Bipolar II Disorder
  - Bipolar Disorder NOS
- Anxiety disorders (severe)
  - Panic Disorder (with and without Agoraphobia)
  - Agoraphobia without history of Panic Disorder
  - Obsessive-Compulsive Disorder

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## Dementia (Major Neurocognitive Disorder)

- One diagnosis that we commonly encounter is dementia, but it is not designated a serious mental illness
- "no treatment is presently available for the respondent's mental illness, but confinement is necessary to prevent the respondent from causing harm to himself and others."

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## Psychotic Disorders

- Schizophrenia (paranoid, disorganized, catatonic, undifferentiated, and residual types)
- Schizophreniform Disorder
- Schizoaffective Disorder (bipolar type, depressive type)
- Delusional Disorder
- Brief Psychotic Disorder
- Shared Psychotic Disorder
- Psychotic Disorder NOS (unspecified psychotic disorder)

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## Psychotic Disorders

- Illnesses that can present with psychosis:
  - Schizophrenia
  - Schizoaffective Disorder
  - Delusional Disorder
  - Major Depressive Disorder with psychotic features
  - Bipolar Disorder (depressed or manic) with psychotic features
  - Dementia (Major Neurocognitive Disorder)
  - Delirium
  - Substance use or withdrawal
  - Other medical issues

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## Common symptoms of psychosis

- Delusions—strong beliefs that are unlikely to be true, and that may seem irrational to others
- Hallucinations—seeing, hearing, or physically feeling things that are not actually present
- Disorganized speech
- Disorganized behavior
- Thought blocking—being unable to complete thoughts, or losing track of thoughts

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## Duration of psychotic symptoms

- Can vary depending on the cause, and the patient
- Psychotic symptoms can last only a few days, and completely resolve, or persist
- Brief psychotic disorder by definition lasts less than 30 days
- Schizophreniform disorder lasts between 30 days and 6 months
- Schizophrenia lasts longer than 6 months
- Even with medication, some psychotic symptoms can persist. The goal is to make the symptoms manageable.
- Psychotic disorders can be chronic, lifelong illnesses

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## Treatment of psychosis

- Antipsychotic medications—medications like Haldol, Prolixin, Risperdal, Abilify, Zyprexa, Invega (and many others).
- May use other medications along with antipsychotics to make them more effective or decrease side effects—Cogentin, Benadryl, antidepressants, mood stabilizers
- Psychotic symptoms caused by drugs or medical problems may subside on their own. May still treat psychotic symptoms like this with medication to make them subside faster, but treatment with medication likely not required long term

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## Other treatments for psychosis

- Therapy
- Family therapy
- Social skills training
- Cognitive skills training
- Vocational rehabilitation
- Supported housing (boarding homes, group homes, independent supported apartments)

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## Mood disorders

- Major Depressive Disorder (single episode, recurrent)
- Bipolar I Disorder (manic, hypomanic, mixed, depressed, unspecified)
- Bipolar II Disorder
- Bipolar Disorder NOS

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## Depression symptoms

- Depressed or sad mood
- Lack of energy
- Decreased or increased sleep
- Decreased or increased appetite
- Poor concentration
- Lack of interest in things
- Hopelessness
- Low self esteem
- Suicidal thoughts
- Psychotic symptoms can be present

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## Mania symptoms

- Increased energy
- Reduced sleep (and feels rested on little sleep)
- Elevated ("too good") or irritable mood
- Grandiose delusions
- Impulsive and unpredictable behavior
- Increased activity
- Increased speech
- Psychotic symptoms
- Hypomania is similar, but less severe, and patients are often able to function more normally

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## Major Depressive Disorders

- Can have only one episode, or many episodes
- Can have psychosis associated with it, which improves when the depressive symptoms improve
- Can become completely symptom free over time ("in remission") or continue to have residual symptoms for years
- Can have associated symptoms or diagnoses (anxiety, PTSD, substance use, personality disorders) which can affect outcome and prognosis

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## Treatment of Major Depressive Disorders

- Antidepressants—SSRI (Prozac, Paxil, Zoloft, Celexa, Lexapro), SNRI (Effexor, Cymbalta, Pristiq), NDRI (Wellbutrin), other types (Remeron, Elavil, Trintellix)
- Treatment for associated psychosis, anxiety, sleep disturbances
- ECT or transcranial magnetic stimulation
- Light therapy
- Therapy
- Family therapy

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## Bipolar I vs Bipolar II

- Bipolar I--both manic and major depressive episodes over the course of the illness (but a single episode of mania can qualify for the diagnosis before a documented depressive episode).
- Bipolar II--major depressive episodes and hypomanic episodes.
- Bipolar I Disorder generally more severe than Bipolar II in the manic or hypomanic symptoms
- Depressive symptoms can be equally severe in Bipolar II. Patients can become so severely depressed that they require hospitalization in Bipolar I or II, but in Bipolar II, the symptoms of hypomania usually are not so severe as to prevent the patient from functioning, and don't usually require hospitalization.

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## Bipolar Disorder NOS

- Also called Unspecified Bipolar Disorder
- Symptoms of both mania/hypomania and depression are present, but don't meet full diagnostic criteria for Bipolar I or Bipolar II
- Treatment is the same
- Over a longer period of time (months to years), Unspecified Bipolar Disorder diagnosis may become more specific

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## Treatment of Bipolar Disorders

- Mood stabilizers (lithium, Depakote, Trileptal, Tegretol, Lamictal)
- Antipsychotics—used to treat associated psychosis, can also be used alone as mood stabilizers
- Medications for associated anxiety, sleep disturbances, side effects
- Therapy
- Family therapy

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## Duration of illness for mood disorders

- These can be EPISODIC disorders, so it is not unreasonable for patients to come off medication under advisement from their physicians after a period of time (6 months to a year)
- Patients may need indefinite treatment if they have many episodes (or a longer duration of treatment before trying to come off medication).

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## Anxiety Disorders

- Panic Disorder—with and without agoraphobia
- Agoraphobia without panic disorder
- Obsessive-Compulsive Disorder

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## Obsessive-Compulsive Disorder

- Obsessions—repetitive, unwanted, intrusive thoughts
  - Ex: thoughts about harming or having harmed someone, doubt that one has performed an important action (locking door, turning off stove), fears of saying inappropriate things in public
- Compulsions—irrational, excessive urges to perform certain actions, temporarily relieve the stress brought on by obsessions
  - Ex: handwashing, counting, checking
  - Symptoms last more than an hour a day

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## Treatment of anxiety disorders

- Antidepressants—SSRI's such as Prozac and Zoloft, and SNRI's such as Effexor are the first line medications for anxiety disorders
- Anti-anxiety medications—benzodiazepines (Klonopin, Ativan, Valium, Xanax; generally used sparingly due to abuse potential and side effects), Benadryl, Vistaril, Buspar
- Therapy

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# Other Impairing Illnesses

……BUT NOT CLASSIFIED AS "SERIOUS MENTAL ILLNESS"

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## Posttraumatic Stress Disorder (and other trauma-related disorders)

- Symptoms of PTSD can resemble mood, anxiety, and psychotic disorders
- Not designated as serious mental illnesses by the state
- Can be quite disabling and require treatment, both inpatient and outpatient
- Patients with PTSD often have comorbid depressive disorders, anxiety disorders, and substance use disorders

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## Intellectual Disability

- Not considered a serious mental illness
- No treatment available for intellectual disabilities
- Medications used to treat serious mental illnesses (antipsychotics, mood stabilizers, antidepressants, anxiety medications) are often used to reduce the behaviors associated with intellectual disabilities, but do not constitute an effective treatment that can alter the course or prognosis

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## Personality Disorders

- Not considered to be serious mental illnesses
- Related to inherent personality structure and tend to be consistent over time
- Can be improved with intensive long-term psychotherapy, but often are made worse by inpatient hospitalization
- Medications used to treat serious mental illnesses (antipsychotics, mood stabilizers, antidepressants, anxiety medications) are often used to reduce the behaviors associated with personality disorders, but do not constitute an effective treatment that can alter the course or prognosis

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## Borderline Personality Disorder

- Pervasive pattern of unstable interpersonal relationships and self-image
- Typically experience severe mood lability and impulsivity with episodes of intense rage
- Can have recurrent self-destructive, self-harming, and suicidal behaviors
- The intensity of inpatient hospitalization can be destabilizing and typically makes symptoms worse, not better

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## Antisocial Personality Disorder

- Pervasive pattern of disregard for and violation of the rights of others
- Prototypic character trait is a lack of empathy for others and lack of remorse for actions
- Can have recurrent violent and criminal behaviors
- Can be very manipulative- either aggressive/annoying or charming
- Incarcerated individuals with disorder may prefer to be at a hospital rather than in jail

30

## Alcohol and Drug Addiction

- Drugs of abuse have different effects, but all have the final pathway of giving us an artificial sensation of pleasure

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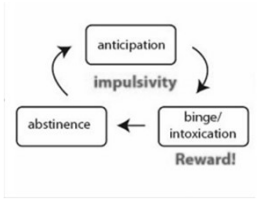


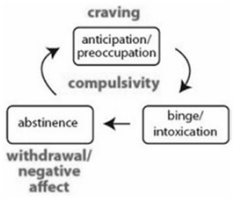


32

## Alcohol and Drug Addiction

- Behaviors such as lying, manipulation, stealing, and ignoring responsibilities are symptoms of the disorder
- Loss of relationships, occupation, financial security, housing, and even life are often outcomes of untreated addiction

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## Alcohol and Drug Addiction

- Effective treatment programs and even medications for some types of addiction are available
- Can be impairing and even life threatening, but we are unable to legally force treatment in Alabama

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## J. LUKE ENGERISER, M.D.

**AltaPointe Health Systems: Residency Program Director, Assistant Professor of Psychiatry, and Deputy Chief Medical Officer**

Dr. Engeriser attended medical school at Northwestern University in Chicago, Illinois. His psychiatry residency training was at Tripler Army Medical Center in Honolulu, Hawaii. During his final year of residency, Dr. Engeriser received the Al Glass Award, the military's highest psychiatry resident research award, for his paper exploring the psychological effects of warfare. Dr. Engeriser served an additional three years in the Army at Fort Benning, Georgia, where he held the position of Chief, Department of Behavioral Health. After separating from the Army, Dr. Engeriser was Medical Director of Mid-Coast Mental Health Center/PenBay Psychiatry in Rockland, Maine. Prior to attending medical school, he completed a Master of Arts in Divinity at the University of Chicago in the History of Religions and worked as a teacher of English at the Teacher Training College in Torun, Poland. He is board certified in Adult Psychiatry.

**BRENDA J. PIERCE, ESQ.**

Brenda Pierce is a partner in the law firm of Pierce & Stone, P.C. She is a graduate of Springhill College and received her J.D. from the University of Alabama. She specializes in Probate law and represents disabled individuals seeking benefits from the Social Security Administration.

**D. BRIAN MURPHY, ESQ.**

Brian Murphy is a founding partner in the law firm Braswell Murphy, LLC. He is a graduate of Auburn University and Cumberland School of Law. He primarily represents victims and their families in serious injury and wrongful death cases.

## QUALIFICATION AND EXAMINATION OF MEDICAL EXPERT WITNESSES

Alabama law provides that the rules of evidence applicable in other judicial proceedings in this state shall be followed in involuntary commitment proceedings. See *Ala. Code* §§ 22-52-9, 22-52-37(a)9 (1975). As such, the key rules you should familiarize yourself with when qualifying and examining medical expert witnesses in involuntary commitment cases are Alabama Rules of Evidence 702, 703, 704 and 705.

Alabama Rule of Evidence 702 was amended in 2011 in response to the Legislature's amendment of Alabama Code § 12-21-160. The legislation amending § 12-21-160, sponsored by then Senator Ben Brooks, was meant to transition Alabama courts, with respect to admissibility of expert testimony, from the use of the *Frye* standard to the *Daubert* standard. The *Daubert* standard, put very simply, requires you to establish an expert's methodology, and show that it is sound, before their testimony may be admitted. However, when Rule 702 was amended, it specifically stated that the *Daubert* portion of the Rule does not apply to cases in the probate courts. Thus, for purposes of involuntary commitment cases, we need only look to Section (a) of Rule 702 (which was the entire 702 prior to the 2011 amendment).

Section (a) of Rule 702 states as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Case law indicates that the questions of whether an individual is qualified as an expert and whether, if so qualified, the witness can give expert opinion testimony on the subject in question, is left to the sound discretion of the trial judge.

Rule 703 (Bases of Opinion Testimony by Experts): "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

This rule was recently amended and became effective October 1, 2013. It now mirrors Federal Rule of Evidence 703.

Rule 704 (Opinion on Ultimate Issue): "Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact."

Expert opinions upon ultimate issues are inadmissible if the opinion involves a legal definition or conclusion but, according to the Advisory Committee, Rule 704 has not abrogated preexisting case law liberalizing the application of the ultimate issue rule.

Rule 705 (Disclosure of Facts or Data Underlying Expert Opinion): "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

This rule allows the expert to give an opinion without the necessity of setting out the supporting facts. The general rule seems to be that because of the length of time it is not necessary to require the expert to do this. It is left to the cross-examiner to elicit whatever facts or data on which the opinion is based and the expert, if asked, must disclose such information.

A. Qualifying the Medical Expert Witness

1) Educational background – undergraduate, medical school, residency

2) Specialized training

3) Board certifications

4) Medical license

5) Length/description of practice

6) Prior expert testimony

B. Basis for Opinions

1) Familiarity with Respondent

2) Review of prior treatment, if any

3) Personal interaction with Respondent

4) Treatment of Respondent

5) Recommendation for further treatment

C. Opinions Regarding Commitment

1) Outpatient Commitment

a. Respondent is mentally ill

b. Treatment is available for Respondent's mental illness

c. Respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently

d. Respondent is unable to make a rational and informed decision as to whether or not treatment for his/her mental illness would be desirable

e. Outpatient commitment is the least restrictive and available form of treatment for Respondent's mental illness

2) Inpatient Commitment

a. Respondent is mentally ill

b. Respondent poses a real and present threat of substantial harm to self and/or others

c. Treatment is available for Respondent's mental illness OR if there is no available treatment, confinement is necessary for Respondent's and the community's safety and well-being

d. Respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently

e. Respondent is unable to make a rational and informed decision as to whether or not treatment for his/her mental illness would be desirable

f. Inpatient commitment is the least restrictive and available form of treatment for Respondent's mental illness

D. Cross Examination

1) Review of all prior medical records

2) Amount of personal interaction with Respondent

3) Exploration of other possible causes for actions described in the Petition

4) Basis for diagnosis/opinions

5) Sufficiency of treatment since probable cause hearing

6) Examples of less restrictive forms of treatment considered