

Dual Role: Guardian *ad Litem*/ Attorney *ad Litem* Forms/Templates Manual

Prepared by the W.W. Caruth, Jr. Child Advocacy Clinic
at SMU Dedman School of Law

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Preface – The Development of and Proper Use of this Manual

This Manual was prepared in furtherance of the mission of the W.W. Caruth, Jr. Child Advocacy Clinic at the SMU Dedman School of Law (“Clinic”) to educate law students, lawyers, and child welfare professionals to provide vital assistance to better the lives of abused and neglected children. The Manual is a practical tool for attorneys appointed by the court to act in the dual role of guardian and attorney *ad litem* for children (“GAL/AAL”) in child welfare cases in Texas where the Department of Family and Protective Services/Child Protective Services is the Petitioner (“CPS”). It primarily consists of templates, forms, or examples of various pleadings, work outlines, and other documents, along with brief descriptions of how to use the documents and some practice pointers. Under my supervision, the student attorneys in the Clinic use these templates in our own representations of children as their GAL/AAL. They also have assisted in developing the templates, compiling them for this Manual, and preparing -- from their own experiences -- the descriptions of how to use them, as well as including helpful hints for the practitioner.

As I always tell the student attorneys in the Clinic, forms and templates are only the starting point. The finished product results from attorney analysis regarding the facts of the particular case, the theory of the case, and the law’s applicability to those facts and that theory. Moreover, the law changes frequently; as such, in using templates, the attorney must review the underlying statutes or legal precedent to determine if amendment of the template is necessary to include elements not in the template, or to exclude elements that are in the template. It is our intention to periodically update this Manual with additional materials and changes in the law, but that does not substitute for the attorney’s own responsibility to competently represent his or her client and stay current with developments in the law. Moreover, local practice may dictate some alterations to these templates and suggestions, and those practices should be accounted for, although they should not substitute for zealous advocacy.

The child advocates of the Clinic and I hope that this Manual will be of use to children’s lawyers across the state of Texas in their efforts to competently, effectively, and zealously represent, and better the lives, of abused and neglected children.

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DESCRIPTIONS OF AND PRACTICE TIPS RELATING TO EACH OF THE EXAMPLES AND TEMPLATES IN THIS MANUAL

I. Documents for Potential Placements

a. Kinship Placement Assessment

- i. A GAL/AAL should conduct a review of a potential kinship placement to gain information about whether the placement is safe and suitable for the child client. This assessment template is a good starting point for an interview of a potential placement. Except in limited circumstances, CPS will conduct its own “home study” before placing a child with family or fictive kin. Home studies for foster families are usually prepared at the direction of foster agencies and are on file with CPS.
- ii. Helpful Link: To fully understand what CPS expects of the kinship provider and determine if the kinship placement is ready to take on this role, the GAL/AAL can look at the following manual and share it with the potential placement:
https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Kinship_Care/documents/KinshipManual.pdf
- iii. *See also* Tex. Fam. Code Ann. § 107.109. This Section of the Code does not strictly apply in the circumstance of a GAL/AAL considering a kinship placement in a child welfare case, but may be informative.

b. Referral Check Outline

- i. This is an outline of issues and questions to address with a person whom the potential placement listed as a reference. You most likely will interview the references by phone.

II. Pleadings/Discovery Requests (listed alphabetically)

a. Affidavit

- i. General form for an affidavit before a notary in Texas containing key legal elements for a viable affidavit. Remember, however, an affidavit can be used as evidence only in limited circumstances, since it generally constitutes hearsay.

b. Affidavit For Authentication of Business Records

- i. Generic form for an authentication of business records before a notary in Texas. *See* Tex. R. Evid. 803(6) and Tex. R. Evid. 902(10).

c. GAL/AAL Report

- i. This is a template for the report that the GAL/AAL should file before every court appearance. It includes reporting on when the GAL had contact with the child-client since the last court appearance; the status of the child’s physical, mental, medical, and emotional well-being; a listing

of any medications the child is taking; the educational goals and needs for the child; and the status of the placement. Monitoring all of these points is a basic duty of a GAL/AAL. Tex. Fam. Code Ann. §107.002 – 107.004.

- ii. Practice Tips: Draft the GAL report after your first visit with the child-client and add to it with each visit. Serve a copy of the final version that will be filed with the court on the attorneys for all parties, the CPS worker, and the CASA, if any. The GAL/AAL report may contain certain recommendations, but many courts will not act on a GAL/AAL's recommendations that require court orders without the GAL/AAL having filed a motion and notified all parties. *See* Motion for Further Orders.

d. Interrogatories to Respondent

- i. Sample form for interrogatories from the GAL/AAL concerning common issues in CPS cases.
- ii. Remember that the discovery control level of a case places limitations on the number of interrogatories that can be served by one party on another. See Tex. R. Civ. P 190. CPS cases generally fall within Level Two discovery, for which 25 written interrogatories are permitted (also counting discrete subparts).
- iii. Also remember that any written discovery must be served within the time limits allowed by court order or to permit the timely response to be filed by the time of the discovery completion deadline. (*e.g.*, if the discovery completion deadline is 30 days before trial, written discovery must be served 60 days before trial – or 63 days if served by certified mail).

e. Jury Charge for Termination

- i. This is a jury charge actually used in one of the Clinic's cases, with language for the Termination of Parental Rights. It outlines the law of termination of parental rights, the rights and duties of a parent, the best interest factors, the burden and standard of proof, and the admissibility of evidence. It also contains an instruction regarding the presumption that attaches to the invocation of the Fifth Amendment privilege in a civil proceeding.

f. Jury Instruction Language Request

- i. This example is a request for an instruction on an adverse inference when a parent refuses to testify based on the Fifth Amendment. There may be other special instructions needed in your case and this template provides a format for submitting those.
- ii. Practice Tip: It is essential for appellate purposes that the court's ruling on including or not including a requested instruction be made on the record and maintained as part of the record.

g. Mother's Denial Of Paternity

- i. Form for mother to deny the asserted paternity of an individual.

h. Motion to Appoint CASA (Tex. Fam. Code Ann. § 107.031)

- i. Court Appointed Special Advocates or CASA is a non-profit organization made up of volunteer advocates that can be appointed by the court to determine and advocate for the best interests of the child. The CASA volunteer gets to know everyone on the case and is a fact-gatherer. In most CASA organizations, he or she has a CASA supervisor who is a staff member and can have child-related education. CASA volunteers make their own recommendations to the court based on a best-interest-type analysis.
- ii. Helpful Links: Texas CASA <http://texascasa.org/> and Dallas CASA <http://dallascasa.org/>
- iii. Practice tip: Not every case gets a CASA, but a particularly appropriate case to ask for a CASA to be appointed is when the child is verbal and in the foster care. The CASA can be your witness regarding facts supporting best the interests. The CASA is also extremely helpful in cases where there is a monitored return since the CASA can help you monitor and can testify as to what occurs during the monitored return period.

i. Motion for Extension of Dismissal Date and for Continuance

- i. The statutory dismissal deadline for CPS cases is on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator (TMC) of the child (Tex. Fam. Code Ann. § 263.401(a)), but the court is allowed to extend the dismissal deadline for 180 days if the court finds extraordinary circumstances necessitate the child remaining in TMC of the Department and that continuing TMC is in the best interest of the child (Tex. Fam. Code § 263.401(b)).
- ii. Practice tip: The law of the State is to end these cases within a year. There are very limited circumstances in which a GAL/AAL should advocate for this extension.
- iii. Note that this template includes an affidavit. Pursuant to Tex. R. Civ. P. 251, no continuance shall “be granted except for sufficient cause supported by affidavit”

j. Motion for Further Orders

- i. This template contains sample language for asking the judge to order something because it is in the child’s best interest. This is a very flexible motion that can be used to address a wide variety of circumstances – whenever the GAL/AAL believes some action is appropriate and not otherwise being provided.

k. Motion for Genetic Testing

- i. Asking for genetic testing to be completed and for the judge to set a hearing on this issue.
- ii. Practice tip: With respect to any effort to determine parentage it is important to also request information from the paternity registry.

l. Motion to Interview a Child in Chambers

- i. A party, an amicus attorney, or the attorney ad litem can move for the judge to interview the child or children in chambers concerning conservatorship in a nonjury trial or hearing. The court **must** interview the child if he or she is over 12 years of age, and it is up to the judge's discretion if the child is under 12. The court can also interview the child on its own motion. Tex. Fam. Code Ann. § 153.009(a).
- ii. Practice Tip: As stated in the statute and because of the best interest factors, a child's wishes expressed in an interview "does not diminish the discretion of the court in determining the best interests of the child." Tex. Fam. Code Ann. § 153.009(c).

m. Motion for Monitored Return (Tex. Fam. Code Ann. § 263.403(a))

- i. This motion may be needed when the parent(s) have been fulfilling the requirements of all of their services and the parties wish for the children to go back to the parent(s) in a "test" period, for the family to continue receiving services, for the continuation of the Department's TMC of the child, and for the court to continue to have jurisdiction over the suit. The court orders a temporary order of a monitored return, which can range in time up to 180 days. After a successful monitored return, the court can dismiss the case and the parental rights remain intact.
- ii. Practice Tip: Keep in mind how the monitored return will interact with the 1 year dismissal deadline—the court will usually set a new date, which cannot be later than 180 days after the original dismissal date. Furthermore, it will likely be necessary to seek an extension of the trial date as well.

n. Motion on Psychotropic Meds

- i. Asking for a psychological evaluation and second opinion medication evaluation on the child.
- ii. Practice Tip: There is a substantial concern in the child welfare community regarding the overuse of psychotropic medications. A GAL/AAL should closely scrutinize the usage of such medications. Because most GAL/AALs do not have expertise regarding such an issue, it is often advisable to seek to obtain an independent expert opinion.

o. Notice of Intent to Claim Paternity

- i. DFPS form to include man in paternity registry as the father of the child.
- ii. The form can be found here: <http://www.dshs.texas.gov/vs/patreg/>

p. Original Answer

- i. For GAL/AAL's response to the District Attorney's Original Petition. This answer is a general denial and requests that the court considers the *Holley v. Adams*, 544 S.W.2d 367, best interest factors.

- ii. Practice Tip: Filing an answer is important for the GAL/AAL, but is often overlooked. It should preclude any attempt to nonsuit without notice to GAL/AAL or an attempt to obtain her approval. Furthermore, because it raises best interest issues, it supports discovery that GAL/AAL may wish to seek.

q. Paternity Registry Inquiry Request

- i. This form should be used in every case where there is no presumed father.
- ii. The form can be found here: <https://www.dshs.texas.gov/vs/reqproc/forms.shtm#paternity>

r. Request for Disclosure to Respondent

- i. Request for respondent's disclosure of the information described in Tex. R. Civ. P. 194.2. A GAL/AAL is entitled to seek discovery to the same extent as any party to the proceeding. Although there may be good reason for a GAL/AAL to not be overly aggressive about serving discovery on the parties, if the case is nearing the trial date without resolution, *e.g.*, 3 months prior to the trial date, it is good practice for the GAL/AAL to seek *at least* this basic discovery from the Respondents to pin down witnesses and experts and to assist the GAL/AAL in conducting her own due diligence in investigating the case. In certain instances, it may also be necessary to seek this discovery from CPS, though CPS should generally voluntarily provide "informal" discovery to the consistency and there may be reasons the GAL/AAL does not want to "pin down" CPS on its witnesses, etc.
- ii. Also remember that any written discovery must be served within the time limits allowed by court order or to permit the timely response to be filed by the time of the discovery completion deadline. (*e.g.*, if the discovery completion deadline is 30 days before trial, written discovery must be served 60 days before trial – or 63 days if served by certified mail).

s. Request for Entry Upon Property

- i. Request made pursuant to Tex. R. Civ. P. 196.7 to enter a parent's home and inspect it. Before agreeing to the return of a child to the parent, it is incumbent on the GAL/AAL to see where the child will be living and ensure that the home is safe and suitable. It also makes clear that the GAL/AAL intends to take photographs.
- ii. Practice Tip: The GAL/AAL should, as with other discovery, ask the parent's attorney to agree to this type of inspection. If the attorney refuses to permit that, the GAL/AAL can serve this request under the rules. If the request still is not granted, the GAL/AAL should seek the court's assistance to enforce the request.

t. Request for Production to Respondent

- i. GAL/AAL's request for production on Respondent pursuant to Tex. R. Civ. P. 196.

- ii. Remember that the discovery control level of a case can place limitations on the number of requests for production that can be served by one party on another. Tex. R. Civ. P 190. CPS cases generally fall within Level Two discovery – allowing a virtually unlimited number of requests for production.
- iii. Also remember that any written discovery must be served within the time limits allowed by court order or to permit the timely response to be filed by the time of the discovery completion deadline. (*e.g.*, if the discovery completion deadline is 30 days before trial, written discovery must be served 60 days before trial – or 63 days if served by certified mail).

u. Subpoena for Medical Records

- i. Medical records are often crucial to a GAL/AAL's investigation of the case and recommendations for the child based on his best interest. For example, a GAL/AAL should request services for the child addressing his or her current medical and related needs.
- ii. Practice tip: Generally, a service provider should disclose medical records upon a showing of your appointment as GAL/AAL without necessity of a subpoena or additional order. However, some providers are still hesitant to do so, citing HIPPA. Accordingly, it is sometimes more expedient to simply serve a subpoena than to work to convince them it is already their obligation.
- iii. Obtaining a parent's medical records through means other than CPS does require the parent's consent under HIPPA or a court order (beyond a subpoena).

v. Subpoena for Witness

- i. Subpoena that can be modified to summon a witness to either a deposition, hearing, or trial. Every subpoena must identify the party at whose instance the subpoena is issued and the party's attorney of record.
- ii. The practitioner should carefully review Tex. R. Civ. P.176 when serving a subpoena to ensure that it is properly issued, served in the proper manner, and contains effective proof of service. Also, it is important to remember to tender the appropriate fee at the time of service to make the subpoena fully effective to have a fine imposed or attachment issued for a witness who fails to comply. The fee currently is \$10 for each day the witness is required to attend trial or discovery. Tex. Civ. Prac. & Rem. Code § 22.001(a).
- iii. Practice Tip: A subpoena must command the person to whom it is directed to do either or both of the following: (1) attend and give testimony at a deposition, hearing, or trial, and/or (2) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person. If the subpoena also seeks documents, it is referred to as a Subpoena Duces Tecum and attaches the Duces Tecum (list of documents requested) as an Exhibit.

- iv. Further Practice Tip: A subpoena that is issued purely for discovery purposes, *e.g.*, a subpoena for a deposition or for production of documents by a non-party, must comply with the other discovery rules, including time limits for response. Tex. R. Civ. P. 176.6(c). A subpoena issued for discovery purposes must also be served on all parties in accordance with Tex. R. Civ. P. 21a; however, with respect to a trial or hearing subpoena, there is no need to serve it on the other parties or provide advance notice of it. *See* Tex. R. Civ. P. 191.5.

III. Sample Orders (listed alphabetically)

Whenever a GAL/AAL files a pleading seeking relief, she should also prepare an order to present to the court through which the court can effectively grant the relief the GAL/AAL sought. Many times, the GAL/AAL can distribute the order to the parties in advance of a hearing and obtain agreement. Then, the order can be submitted as an agreed order. Even if it is not an “agreed order,” the GAL/AAL should distribute the proposed order to all of the parties in advance of presenting it to the court for signature so that the parties can make comments or suggest modifications based on the court’s actual rulings. The sample orders included would accompany the various motions that this manual referenced earlier.

a. Appointment of CASA

- i. Order accompanying motion to appoint a CASA.
- ii. Practice Tip: Dallas CASA has its own form of order approved by the Dallas County Courts. It is also attached.

b. Appointment of a GAL/AAL

- i. This order delineates the rights of a GAL/AAL in a detailed manner. Many court appointment orders are more general/non-specific. In the Clinic, we always request, after allowing review by the other parties, that the court enter this order. We can then show it to service providers and others making clear that we have the authority of the court behind us when we make requests of them for information or access.

c. DNA Genetic Testing Order

- i. Court-ordered paternity test.

d. Decree of Termination

- i. This is language that can be adapted to fit the situation. It is the decree that a judge and the parties, if in agreement, will sign to terminate the parental rights of one or both parents. Remember to include the statutory and best interest grounds for termination in the decree. This kind of order can be used after a termination trial, in a prove-up setting where the parents are in default, or in furtherance of a mediated settlement agreement.

Practice Tip: The list of the grounds is contained in Tex. Fam. Code. Ann. § 161.0

e. Extension of Dismissal Deadline

- i. Order extending the dismissal deadline.

f. Further Orders

- i. Useful for continuing placement while a home study on a different family is completed.

g. Interview of Child in Chambers

- i. Order accompanying motion to interview the child in chambers.

h. Monitored Return

- i. Temporary Order accompanying the motion for monitored return. This order maintains the case. And parties are allowed and encouraged to make unannounced visits during the monitored return time period.

i. Second Opinion Regarding Psychotropic Drug Prescription

- i. Order accompanying motion to reevaluate a drug prescription and paid for by the Department.

IV. Mediation

- a. This is an example of a Mediated Settlement Agreement (“MSA”) with the relinquishment of parental rights for two parents and agreement between the parties that the child will be permanently placed with a relative.
- b. An MSA is binding on the parties if the agreement: (1) provides in a prominent manner that it is not subject to revocation; (2) is signed by each party to the MSA; and (3) is signed by the party’s attorney (if any) who is present at the time the MSA is signed. Tex. Fam. Code Ann. § 153.0071(c). Upon meeting those requirements, a party is entitled to judgment on the MSA – BUT – the court can decline to enter a judgment on the MSA if it finds that: (1) a party was a victim of domestic violence and that circumstance impaired the party’s ability to make decisions; and (2) the agreement is not in the child’s best interest. Tex. Fam. Code Ann. § 153.0071(e-1).

V. Practice Tools

a. Chronology

- i. Utilizing a chronology is helpful to the GAL/AAL in many ways. It can reveal relevant patterns or inconsistencies in stories. When used properly, it helps the GAL/AAL keep track of pertinent facts, the sources from which they were learned, and the evidence that can be used to prove these facts at a hearing or a trial.
- ii. Practice Tip: The Chronology should be started as soon as the GAL/AAL is appointed. The first step is to work through the timeline of events in the Petition/Affidavits in support and record them succinctly in the Chronology, noting the Petition or Affidavit as the source. As the case

proceeds, the GAL/AAL can determine if admissible evidence supports or refutes these factual allegations. The GAL/AAL should continue to add to the Chronology as the case and investigation proceeds.

b. Who's Who

- i. Many people can become involved in or relevant to a case. Keeping a handy alphabetical list of these “players” and how they are involved is crucial.

c. Case-In-Chief Outline

- i. The GAL/AAL should be active in any trial in representing her client and promoting her child client’s best interests. To do this, the GAL/AAL needs to be fully prepared to present relevant admissible evidence. This outline provides a format for thinking through and planning the GAL/AAL’s case presentation.
- ii. Practice Tip: Work on this outline throughout the case rather than waiting until the eve of trial. The outline will help the GAL/AAL see where there are evidence gaps and consider other appropriate investigation or discovery to be conducted to fill those gaps and importantly, learn more information to determine the best interests of the child.

d. Exhibit List

- i. Some courts require submission of an exhibit list prior to a trial and others do not. The GAL/AAL can adapt this form as appropriate for filing or service, but even in the absence of such a requirement, it is good practice to keep a list like this to be organized and prepared for a hearing or trial.
- ii. If the GAL/AAL needs to serve or file the list, the column reflecting pure attorney work product (“how to prove up”) should be deleted in the version that is filed and served, but retained in full as a work product copy for use at trial.

VI. Miscellaneous Documents and Resources

a. Common CPS Acronyms and Glossary

b. Texas Practice Guide for Child Protective Services Attorneys:
https://www.dfps.state.tx.us/Child_Protection/CPS_Attorneys/

- i. Although the referenced guide was created for attorneys representing CPS, it can be useful as guidance for the GAL/AAL as well.