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November 2011

## In Re: Tennessee Supreme Court Rule 40A No. M2009-01926-SC-RL2-RL

The Supreme Court of Tennessee

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### SUPPLEMENTAL MATERIAL

#### **IN RE: TENNESSEE SUPREME COURT RULE 40A No. M2009-01926-SC-RL2-RL**

#### *The Supreme Court of Tennessee*

#### ORDER

On February 17, 2009, this Court adopted Rule 40A of the Rules of the Supreme Court of Tennessee as a provisional rule, effective from May 1, 2009 through April 30, 2010. On April 30, 2010, the Court filed an order extending the effective date of provisional Rule 40A through December 31, 2010, and soliciting written public comments concerning the provisional Rule.

On August 2, 2010, the Court filed an order appointing the Rule 40A Work Group. The order stated that the Work Group was “charged with reviewing and studying provisional Rule 40A and all public comments thereon and providing to this Court by no later than December 15, 2010, a written report containing the Work Group’s recommendations for amendments designed to improve, to clarify, or to refine the language and efficacy of Rule 40A.” On December 15, 2010, the Work Group submitted its report and recommendations to the Court.

On December 21, 2010, the Court filed an order extending the effective date of provisional Rule 40A through April 1, 2011, in order to allow the Court sufficient time to consider the Work Group’s report and recommendations. On January 19, 2011, the Work Group submitted to the Court a supplemental report, as well as several suggested modifications to its proposed revision of Rule 40A.

On January 21, 2011, the Court published the Work Group’s modified revision of Rule 40A and solicited written comments from the bench, the bar, and the public. In that order the Court also extended the effective date of

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provisional Rule 40A until further order of the Court. The deadline for submitting written comments was March 14, 2011.

After considering all of the written comments received during this process, and after considering the Rule 40A Work Group's original report and recommendations, and the Work Group's supplemental report, the Court hereby adopts amended Rule 40A as set out in the attached Appendix to this order. The original version of Rule 40A was adopted as a provisional rule. The revised Rule 40A set out in the Appendix is adopted as a permanent rule. The revised rule shall take effect on September 1, 2011, and shall apply to all proceedings pending on or filed after the effective date.

The Court expresses its gratitude to the members of the Rule 40A Work Group for their invaluable service to the judiciary and to the public in the development of the revised rule. The Court also acknowledges the important contributions made by those who submitted written comments concerning the proposed revisions. Although the Court did not incorporate into the revised rule the substance of all the individual comments submitted during the public-comment periods, all of the comments assisted the Court in its consideration of the various aspects of the proposed revisions.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

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### APPENDIX

#### Amended Rule 40A, Rules of the Tennessee Supreme Court

#### Rule 40A. Appointment of Guardians ad Litem in Custody Proceedings

##### SECTION 1. DEFINITIONS

(a) “Custody proceeding” means a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.

(b) “Abuse or neglect proceeding” means a court proceeding for protection of a child from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) “Guardian Ad Litem” means a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding.

##### Commentary

Under revised Rule 40A it is now possible for the same attorney who is appointed as a Rule 40 guardian ad litem to follow a case and be appointed to represent the child as a Rule 40A guardian ad litem in subsequent proceedings (e.g., a termination of parental rights case in Juvenile Court followed by a contested adoption between competing grandparents in Chancery Court).

##### SECTION 2. APPLICABILITY

This Rule applies to all guardian ad litem appointments in custody proceedings pending on or filed after the effective

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date of this Rule. On or after the effective date of this Rule, licensed attorneys appointed as guardians ad litem under the prior Rule 40A may be re-appointed under the terms of this Rule.

### SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a guardian ad litem when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary. Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint guardians ad litem shall be exercised sparingly. In most instances, the child's best interests will be adequately protected by the parties.

(c) In determining whether appointing a guardian ad litem is necessary, the court should consider:

- (1) the fundamental right of parents to the care, custody, and control of their children;
- (2) the nature and adequacy of the evidence the parties likely will present;
- (3) the court's need for additional information and/or assistance;
- (4) the financial burden on the parties of appointing a guardian ad litem and the ability of the parties to pay reasonable fees to the guardian ad litem;
- (5) the cost and availability of alternative methods of obtaining the information/evidence necessary to resolve the issues in the proceeding without appointing a guardian ad litem; and
- (6) any alleged factors indicating a particularized need for the appointment of a guardian ad litem, including:

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- (i) the circumstances and needs of the child, including the child's age and developmental level;
- (ii) any desire for representation or participation expressed by the child;
- (iii) any inappropriate adult influence on or manipulation of the child;
- (iv) the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child from the processes of litigation;
- (v) any higher than normal level of acrimony indicating the parties' lack of objectivity concerning the needs and best interests of the child;
- (vi) any interference, or threatened interference, with custody, access, visitation, or parenting time, including abduction or risk of abduction of the child;
- (vii) the likelihood of a geographic relocation of the child that could substantially reduce the child's time with a parent, a sibling, or another individual with whom the child has a close relationship;
- (viii) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child during periods of custody, visitation, or parenting time with that party;
- (ix) any special physical, educational, or mental-health needs of the child that require investigation or advocacy;
- (x) any dispute as to paternity of the child; and
- (xi) any other factors necessary to address the best interests of the child.

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(d) If the court concludes that appointing a guardian ad litem is necessary, the court should endeavor to appoint a person with the knowledge, skill, experience, training, education and/or any other qualifications the court finds necessary that enables the guardian ad litem to conduct a thorough and impartial investigation and effectively represent the best interests of the child.

### SECTION 4. APPOINTMENT ORDER

(a) Appointment of a guardian ad litem shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

- (1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;
- (2) the specific duties to be performed by the guardian ad litem in the case;
- (3) the deadlines for completion of these duties to the extent appropriate;
- (4) the duration of the appointment; and
- (5) the terms of compensation consistent with Section 11 of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties. Providing such specificity will assist the parties in understanding the guardian ad litem's role and will enable the court to exercise effective oversight of the guardian ad litem's role.

(d) There is no right to a peremptory challenge of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be raised without delay and should be addressed by trial courts through motion practice. Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

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### Commentary

The omission of the original Section 4(d) (conflicts of interests) from revised Rule 40A does not mean that a guardian ad litem may ignore a conflict of interest. On the contrary, a guardian ad litem who runs afoul of the conflict-of-interest provisions of the Rules of Professional Conduct is subject to appropriate disciplinary action.

### SECTION 5. DURATION OF APPOINTMENT

Appointment of a guardian ad litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment, the appointment shall terminate automatically when the trial court order or judgment disposing of the custody or modification proceeding becomes final.

### SECTION 6. ROLE OF GUARDIAN AD LITEM

(a) The role of the guardian ad litem is to represent the child's best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence. (See Section 8 of this Rule.)

(b) The guardian ad litem shall not function as a special master for the court or perform any other judicial or quasi-judicial responsibilities.

### SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD

(a) Subject to subsections (b) and (c), when the court appoints a guardian ad litem in a custody proceeding, the court shall issue an order, with notice to all parties, authorizing the guardian ad litem to have access to:

- (1) the child, without the presence of any other person unless otherwise ordered by the court, and
- (2) confidential information regarding the child, including the child's educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the



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child, any delinquency records involving the child, and other information relevant to the issues in the proceeding.

(b) A child's record that is privileged or confidential under law other than this Rule may be released to a guardian ad litem only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records. Information that is privileged under the attorney-client relationship may not be disclosed except as otherwise permitted by law of this state other than this Rule.

(c) An order issued pursuant to subsection (a) must require that a guardian ad litem maintain the confidentiality of information released, except as necessary for the resolution of the issues in the proceeding. The court may impose in an order of access any other condition or limitation that is required by law, rules of professional conduct, the child's needs, or the circumstances of the proceeding.

### SECTION 8. DUTIES/RIGHTS OF GUARDIAN AD LITEM

(a) The guardian ad litem shall satisfy the duties and responsibilities of the appointment in an unbiased, objective, and fair manner.

(b) A guardian ad litem shall:

(1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child, which can include, but is not limited, to ascertaining:

- (i) the child's emotional needs, such as nurturance, trust, affection, security, achievement, and encouragement;
- (ii) the child's social needs;
- (iii) the child's educational needs;
- (iv) the child's vulnerability and dependence upon others;

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- (v) the child's need for stability of placement;
  - (vi) the child's age and developmental level, including his or her sense of time;
  - (vii) the general preference of a child to live with known people, to continue normal activities, and to avoid moving;
  - (viii) the love, affection and emotional ties existing between the child and the parents;
  - (ix) the importance of continuity in the child's life;
  - (x) the home, school and community record of the child;
  - (xi) the willingness and ability of the proposed or potential caretakers to facilitate and encourage close and continuing relationships between the child and other persons in the child's life with whom the child has or desires to have a positive relationship, including siblings; and
  - (xii) the list of factors set forth in Tenn. Code Ann. § 36-6-106.
- (2) obtain and review copies of the child's relevant medical, psychological, and school records as provided by Section 7.
- (3) within a reasonable time after the appointment, interview:
- (i) the child in a developmentally appropriate manner, if the child is four years of age or older;
  - (ii) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and
  - (iii) the parties to the suit;

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- (4) if the child is twelve (12) years of age or older, seek to elicit in a developmentally appropriate manner the reasonable preference of the child;
  - (5) consider the child's expressed objectives without being bound by those objectives;
  - (6) encourage settlement of the issues related to the child and the use of alternative forms of dispute resolution; and
  - (7) perform any specific task directed by the court.
- (c) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:
- (1) fully investigate all of the circumstances relevant to the child's position, identify every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;
  - (2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.
  - (3) if, after fully investigating and advising the child, the child continues to urge the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian shall take all reasonable steps to:
    - (i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position; and
    - (ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

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### SECTION 9. PARTICIPATION IN PROCEEDING

A guardian ad litem appointed in a custody proceeding is entitled to all rights and privileges accorded to an attorney representing a party, including but not limited to the right to:

- (a) receive a copy of each pleading or other record filed with the court in the proceeding;
- (b) receive notice of, attend, and participate in each hearing in the proceeding, including alternative dispute resolution proceedings, and take any action that may be taken by an attorney representing a party pursuant to the Rules of Civil Procedure.

#### Commentary

Current Rule 40A differs from the prior rule in that the guardian ad litem now functions as a lawyer, not as a witness or special master. The guardian ad litem does not prepare a report for the parties or the court, nor does the guardian ad litem make a recommendation to the parties or the court concerning custody. Specifically:

- (1) A guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Rule of Professional Conduct 3.7.
- (2) A guardian ad litem is not a special master, and should not submit a “report and recommendations” to the court but may file a pre-trial brief/memorandum as any attorney in any other case. The guardian ad litem may advocate the position that serves the best interest of the child by performing the functions of an attorney, including but not limited to those enumerated in Supreme Court Rule 40(d)(7).
- (3) The guardian ad litem must present the results of his or her investigation and the conclusion regarding the child’s best interest in the same

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manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and responding to other evidence in conformance with the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

### SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which guardians ad litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

### SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The guardian ad litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the guardian ad litem's fees and expenses are reasonable, the court shall consider the following factors:

- (1) the time expended by the guardian;
- (2) the contentiousness of the litigation;
- (3) the complexity of the issues before the court;
- (4) the expenses reasonably incurred by the guardian;
- (5) the financial ability of each party to pay fees and costs;
- (6) the fee customarily charged in the locality for similar services; and
- (7) any other factors the court considers necessary.

(b) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

- (1) order a deposit to be made into an account designated by the court for the use and benefit of the guardian ad litem;

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- (2) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (1) to be paid into the account;
  - (3) equitably allocate fees and expenses among the parties; and
  - (4) reallocate the fees and expenses at the conclusion of the custody proceeding, in the court's discretion, if the initial allocation of guardian ad litem fees and/or expenses among the parties has become inequitable as a result of the income and financial resources available to the parties, the conduct of the parties during the custody proceeding, or any other similar reason. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.
- (c) The appointment order shall specify the hourly rate to be paid to the guardian ad litem. If an initial deposit is deemed appropriate by the trial court, the appointment order shall state the amount of deposit, the date of deposit, and the account or location in which the deposit shall be made. The order shall also state whether periodic payments may be drawn from the initial deposit.
- (d) If an initial deposit is required and the trial court deems that periodic payments may be drawn from the initial deposit, the trial court shall:
- (1) provide the manner in which withdrawals may be made;
  - (2) require notice to the parties of the withdrawal, including a statement of services rendered, supported by an affidavit; and
  - (3) provide a reasonable opportunity to object to the fees charged before the withdrawal is made.
- (e) To receive payment under this section beyond the amount in the initial deposit, if any, the guardian ad litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and

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expenses charged and supported by an affidavit. Any objection to the guardian ad litem's fee claim shall be filed within fifteen days after the claim is filed.

(f) Failure to object to a statement regarding periodic payments does not constitute a waiver of any objection to the reasonableness of the guardian ad litem's total fees. The guardian ad litem shall file a final written claim for payment within thirty days of the entry of the final order. Any objection must be filed within fifteen days after the guardian ad litem's final written claim for payment is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(i) The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. Any order authorizing the guardian ad litem to hire expert witnesses must specify the hourly rate to be paid the expert witness, the maximum fee that may be incurred without further authorization from the court, how the fee will be allocated between the parties, and when payment is due.

### SECTION 12. APPEALS BY GUARDIAN AD LITEM

The guardian ad litem shall not initiate an appeal. Notwithstanding the foregoing sentence, the guardian ad litem may appeal the trial court's ruling on any matter adjudicated under Section 4(d) and also may appeal the trial court's ruling following a hearing specified in Section 11(h). Upon appeal of the matter by one of the parties, however, the guardian ad litem shall have the right to receive notice of the appeal and may participate in the

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appeal as any other party, including but not limited to, filing briefs, motions and making oral arguments.

### SECTION 13. EFFECTIVE DATE

The original version of this rule was adopted as a provisional rule and governed all custody proceedings, as defined in Section 1(a) of the rule, from May 1, 2009, through August 31, 2011. This revised rule is adopted as a permanent rule. The revised rule shall take effect on September 1, 2011, and shall apply to all proceedings pending on or filed after the effective date.



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