

Anatomical gifts, representative ad litem

Number: INFORMAL

Date: August 16, 2002

The Honorable Carole A. Green
Representative, District 75
14248 South Tamiami Trail
Suite 200
Fort Myers, Florida 33908-4207

Dear Representative Greene:

You ask on behalf of a constituent several questions regarding the appointment and qualifications of a "representative ad litem." Attorney General Butterworth has asked me to respond to your letter.

The term "representative ad litem" is used in section 765.512, Florida Statutes, in providing for persons who may make an anatomical gift. Subsection (3) of the statute provides that a member of one of the classes of persons listed therein, in the order of priority stated and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in section 765.510, Florida Statutes. "Representative ad litem" is listed as seventh in a list of seven.

The provisions of section 765.512, Florida Statutes, do not appear to have been the subject of review by the appellate courts. This office has no information as to whether a representative ad litem has even been used in court regarding an anatomical gift.

The term "representative ad litem" is not defined in the statutes nor is the term used elsewhere in the Florida Statutes. Thus, it does not appear that the Legislature has prescribed a definition of, or qualifications for, such a position. Moreover, an examination of Florida Rules of Court failed to reveal the use of such a term in the court rules. While court decisions have used the term, such decisions merely reflect that a representative ad litem was appointed by the court.[1] The Legislature, therefore, may wish to clarify its intent regarding the use of this term.

I would, however, note that the term "administrator ad litem" is used in the probate rules and elsewhere in the statutes. For example, Florida Probate Rule 5.120(a) provides in part:

"When it is necessary that the estate of a decedent or a ward be represented in any probate or guardianship proceeding and there is no personal representative of the estate or guardian of the ward, or the personal representative or guardian is or may be interested adversely to the estate or ward, or is enforcing the personal representative's or guardian's own debt or claim against the estate or ward, or the necessity arises otherwise, the court may appoint an administrator ad litem or a guardian ad litem, as the case may be, without bond or notice for that particular proceeding. . . . The administrator ad litem or guardian ad litem shall file an oath to discharge all duties

faithfully and upon the filing shall be qualified to act. No process need be served upon the administrator ad litem or guardian ad litem, but such person shall appear and defend as directed by the court."

Section 733.308, Florida Statutes, provides that when an estate must be represented and the personal representative is unable to do so, the court shall appoint an administrator ad litem without bond to represent the estate in that proceeding. In *Woolf v. Reed*,^[2] the court stated:

"[A]n administrator ad litem is a court-appointed advocate for the interests of an estate, where those interests are jeopardized, and where the acting representative, if any, will not or cannot defend them. (citations omitted)

An administrator ad litem is an officer of the court, insofar as is every attorney certified to practice therein. However, his primary and overriding duty is to the estate, rather than to the bench; the court may not mandate specific acts through his appointment, such as the holding of hearings, but rather imposes upon the administrator a fiduciary duty to the estate, and so empowers him to minister to specific estate interests, not as a judicial officer making findings of fact and conclusions of law, but as a fiduciary, who owes the highest duty to the estate to safeguard those specific interests he has been commissioned to protect. The appointee becomes solely responsible to the estate for the administration of that portion of its affairs entrusted to him by the court, and thus supplants in that regard the authority of the personal representative, who continues to be responsible for the administration of all other aspects of the estate's business."

Thus it appears that the court has discretion in appointing an administrator ad litem or representative ad litem. Neither the statutes nor Florida Rules of Court set forth specific qualifications for such appointees although there may be local court rules addressing this issue. The length of time of such appointment would appear to depend on resolution of the issue for which he or she was appointed. The compensation for such appointees and the reimbursement for expenses incurred would rest with the judge.

You ask what the term "court of competent jurisdiction" means. Section 765.512(3)(g), Florida Statutes, provides that a representative ad litem who shall be appointed by a court of competent jurisdiction forthwith upon a petition heard ex parte filed by any person. The term refers to those courts authorized to hear such actions.

Regarding the term "actual notice of contrary indications by the decedent," in the absence of a statutory definition, the courts would define each word according to its ordinary usage.^[3] The term "actual" is generally defined as something that exists in fact, something actually received or at hand,^[4] while the term "notice" refers to a warning, announcement or information.^[5] Thus, the term would indicate that there must be some evidence that the decedent did not wish to make an anatomical gift of all or part of his or her body.

This office would suggest that your constituent consult a private attorney on these issues in order to ensure that his or her wishes are carried out. If he or she does not know an attorney specializing in this area of the law, The Florida Bar has a lawyer referral service at 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, toll free telephone (800) 342-8011.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See *In re Estate of Catapane*, 759 So. 2d 9 (Fla. 4th DCA 2000) (personal representative seeking approval of the settlement requested court appoint a personal representative ad litem "to avoid any potential conflicts of interest or the appearance of impropriety;" court appointed an attorney unassociated with the case); *DiProspero v. Shelby Mut. Ins. Co. of Shelby, Ohio*, 400 So. 2d 177 (Fla. 4th DCA 1981) (appellant was substituted as personal representative ad litem); *Jacobs v. Becks*, 355 So. 2d 1241 (Fla. 1st DCA 1978) (personal representative filed claim in the estate for sums loaned and unpaid at the death of the deceased and a representative ad litem was appointed to review claims); *In re Herlan's Estate*, 209 So. 2d 225 (Fla. 1968) (administrator ad litem is an ad litem representative of the estate in all matters related to and arising out of the investigation).

[2] 389 So. 2d 1026, 1028 (Fla. 3d DCA 1980).

[3] *Sieniarecki v. State*, 756 So. 2d 68 (Fla. 2000) (in absence of a statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary); *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000).

[4] Webster's Third New International Dictionary p. 22 (unabridged ed. 1981). *And see* Black's Law Dictionary p. 53 (Revised 4th ed. 1968) (something real in opposition to construction or speculative; something existing in act).

[5] Webster's Third New International Dictionary p. 1544 (unabridged ed. 1981). *And see* Black's Law Dictionary p. 1210 (Revised 4th ed. 1968) (information, knowledge of the existence of a fact or state of affairs).