

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

G & R Feed and Grain Co., INC.

Case No. 13-00001-als7

Debtor

Chapter 7

Deborah L. Petersen, Trustee,

Adv. Pro. 14-30009-als

Plaintiff

v.

Pat Hoffman,
Amy Hoffman,
LH (a minor),
DH (a minor),
WH (a minor),
MH (a minor),
CH (a minor),
Lynn Schmitz,
Jo Schmitz,
SS (a minor),
JS (a minor),

Defendants

**MEMORANDUM OF DECISION
(date entered on docket: July 3, 2014)**

G&R Feed and Grain Co., Inc. filed a voluntary chapter 7 petition on January 1, 2013. Deborah L. Petersen, the chapter 7 trustee, filed this adversary proceeding against the Hoffmans and the Schmitzes (“Adult Defendants”) and their minor children (“Minor Defendants”). The Adult Defendants request that they be designated as the guardians ad litem for their children. The Plaintiff urges the appointment of an independent advocate.

“A guardian ad litem is a person appointed by the court to protect the interests of the ward in specific litigation . . . and need not be an attorney.” Estate of Leonard ex rel. Palmer v. Swift, 656 N.W.2d 132, 139 (Iowa 2003) (citation omitted).

[T]he role of a guardian ad litem is twofold. The guardian ad litem, by filing an answer on behalf of the ward denying all material allegations in the petition prejudicial to the ward, ensures that a default judgment is not rendered against a person who is unable to defend for reasons of incompetency, incarceration, or minority. In addition, as an officer of the court, the guardian ad litem advocates for the best interests of the ward.

Id. at 140. Federal courts follow the federal rules of procedure and the substantive law of the applicable state in appointing guardians ad litem. M.S. v. Wermers, 557 F.2d 170, 174 n. 4 (8th Cir. 1977); Hanna v. Plumer, 380 U.S. 460, 471 (1965). Because the Minor Defendants are unrepresented, Federal Rule of Civil Procedure Rule 17(c)(2), incorporated by Federal Rule of Bankruptcy Procedure 7017 is applicable and provides:

A minor...who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem - or issue another appropriate order - to protect a minor...who is unrepresented in an action.

“[A]n adverse party has no right to make the choice as to whom the guardian ad litem shall be.”
14 Ia. Prac., Probate §32:9.

The relationship between the minor and the potential guardian ad litem is considered in determining the appropriate individual to serve as guardian ad litem. Elliott v. Carcieri, 608 F.3d 77, 91 (1st Cir. 2010); ENK v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997). If the child has no conflict-free close relatives, the court may appoint “a personal friend of the plaintiff or his family, a professional who has worked with the child, or, in desperate circumstances, a stranger

whom the court finds to be especially suitable to represent the child's interests in the litigation.”
ENK v. Brophy, 124 F.3d at 897.

Even though parents are considered the natural guardians of their children, and not the duly appointed guardians, courts generally try to appoint parents as guardians ad litem unless the interests of the minor’s parents conflict with the interests of the minor. Donald K. Kramer, The Parent as the “Duly Appointed Representative”, 1 Leg. Rts. Child. Rev. 2D § 12:3 (2d ed. 2013). An example of a conflict of interest is the general representative being a named defendant in the child’s suit. ENK v. Brophy, 124 F.3d at 895. This exact circumstance exists in this adversary proceeding. In such a case the court may appoint a guardian ad litem for the child. Id. The possibility that the Adult Defendants may be witnesses to the claims against the Minor Defendants only enhances the potential for a conflict of interest to develop. “When there is a potential conflict between a perceived parental responsibility and an obligation to assist the court in achieving a just and speedy determination of the action, parents have no right to act as guardians ad litem.” Matter of Guardianship of Petrik, 544 N.W.2d 388, 391 (S.D. 1996).

Other than the fact that the Adult Defendants are the Minor Defendants’ parents, there has been no argument advanced as to why there is a specific need for them to serve as their guardians ad litem in this case. Based upon the complaint and answer there are a number of legal arguments raised that may be investigated without the necessity of a personal relationship between the guardian ad litem and the Minor Defendants. Instead, the more critical qualification to oversee the best interests of the Minor Defendants is an understanding of the legal basis of the Plaintiff’s claims and the Bankruptcy Code. Upon consideration of the filed documents and the circumstances involved in this adversary proceeding it is hereby ORDERED that:

1. Thomas L. Flynn is designated to serve as Guardian Ad Litem for the Minor Defendants and shall act as an officer appointed by the Court.
2. To accept this appointment the Guardian Ad Litem must file an appearance in this adversary proceeding on behalf of the Minor Defendants no later than July 11, 2014.
3. In the event the Guardian Ad Litem is unable or unwilling to serve in that capacity the Court will designate another Guardian Ad Litem without the necessity of further requests by the parties.
4. The fees and expenses of the Guardian Ad Litem will be subject to Court review and approval, and will be assessed as a cost to be paid by the prevailing party.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding
Thomas L. Flynn