AD LITEMS

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Table of Contents

I. INTRODUCTION

This paper will examine the nuts and bolts of being appointed an ad litem. Which begs the questions, are you an attorney ad litem, a guardian ad litem, or some hybrid of both? The distinction between these roles can become cloudy; however, regardless of the title you receive, your goal is still to protect the same person---a child. In most cases, when an ad litem is appointed in a family matter it is because the parents are in the midst of a custody war with the child being the battleground. It is into this potential minefield that the ad litem steps. The purpose of this paper is to familiarize the reader with the relevant family code statutes and case law governing ad litems: appointment; rights; duties; payment; and liability.

II. DEFINING YOUR ROLE

The place to begin in any examination of ad litems is to understand in just what capacity you have been appointed. There are clearly distinctions between attorney ad litems and guardian ad litems in both the family code and case law. However, many courts blur that line with the practice of appointing an "ad litem" in a dual role. Before venturing off to protect the rights of the innocent, you had better know just what your job title is.

A. Literal Definitions

Since the Texas Family Code provides no definition as to "attorney ad litem" or "guardian ad litem", one must look elsewhere for written definitions.

Black's Law Dictionary defines the subsequent terms as follows:

> Guardian: A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate, or both, of a child during its minority.
>
> Guardian Ad Litem:A special guardian appointed by the court to prosecute or defend, on behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation.
>
> Ad Litem: For the suit; for the purposes of the suit; pending the suit. A guardian ad litem is a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise.

Attorney ad litem is not defined in the most recent editions of Black's Law Dictionary; however, previous editions defined attorney ad litem the same as the current definition of "ad litem" set out above. The Texas Probate Code provides the following definition.

Attorney at Litem: An attorney who is appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding." Tex.Probate Code §601(1) (Vernon 1996).

B. Case Law

The Fort Worth Court of Appeals specifically defined "guardian ad litem" in Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida, 596 S.W.2d 947, 951 (Tex.Civ.App.--Fort Worth 1980). The court held:

> "A guardian ad litem is the personal representative of an individual subject to a disability who is appointed to protect the interests of the disabled person in any lawsuit where that individual is a party. A guardian ad litem is recognized only for specific purposes, and his powers are limited to matters connected with the suit in which he is appointed. In addition, a guardian ad litem should always be appointed by the court in which the action giving rise to the appointment is pending." (Pleasant Hills, 596 S.W.2d at 951).

The court added this last sentence to the definition to clarify the guardian's scope of authority. In the Pleasant Hills case, a custody action, the trial court directed the attorney ad litem[1] to prosecute a federal civil rights lawsuit on behalf of the children he had been appointed to represent. The Court of Appeals held that regardless of the capacity he acted in, attorney or guardian, he exceeded his authority. Pleasant Hills, 596

[1] **The Court of Appeals noted that the order appointing an attorney ad litem could have been a misnomer with the court intending to appoint a guardian ad litem.**

S.W.2d at 951. The court stated "[I]n either event, however, even if the trial court had intended to appoint Kimble as a guardian ad litem instead of an attorney ad litem, we still hold that the trial court exceeded its authority in directing Kimble to prosecute the federal civil rights law suit on the children's behalf. Pleasant Hills, 596 S.W.2d at 951.

Texas case law provides no definition for attorney ad litem, but Texas case law does make a further distinction between guardian and attorney ad litem. In Dawson v. Garcia, 666 S.W.2d 254, 265 (Tex.App.--Dallas 1984, no writ) the court stated that "a guardian ad litem is not an attorney for the infant, but an officer appointed by the court to assist it in properly protecting the infant's interests."

C. Other Distinctions

Houston District Court Judge John Montgomery created a training manual for ad litems and noted some distinctions between attorney ad litems and guardian ad litems. Some of the distinctions he noted are listed below.

1. A guardian ad litem:
   - a. Makes decisions for the child client. A guardian ad litem has duties to the court which may be inconsistent with what the child desires;
   - b. Has the role of protecting the child's needs and interests;
   - c. Has a role similar to a social worker in representing the child's interests. The ad litem's actions and consideration of the child's needs are from the ad litem's viewpoint of the child's best interest;
   - d. Should investigate the circumstances of the case and submit a written report. Holley v. Adams, 544 S.W.2d 367,369 (Tex.1967);
   - e. Cannot waive any substantial rights of the minor. Reasoner v. State, 463 S.W.2d 55 (Tex.Civ.App.--Houston 14th Dist. 1971, writ ref'd n.r.e.).
   - f. Has the authority to hire an attorney to represent the child in court.
2. An attorney ad litem:
   - a. Must be guided and governed by the Preamble, Terminology, and Rules set out in the TDRPC;
   - b. Is appointed to give the child an independent voice and advocate during the proceedings;
   - c. Is appointed to protect and represent the legal interests and rights of the child-client;
   - (1) The approach of the attorney ad litem is as a legal representative of the child;
   - (2) The attorney ad litem insures the child's best interests will be considered;
   - (3) The attorney ad litem must follow the child-client's wishes (within the bounds of law);
   - d. Must zealously promote and protect the legal rights of the child;
   - e. Actively presents the child's case during the legal proceedings. (As and to the extent appropriate, an attorney ad litem should call and examine witnesses, submit evidence, make opening and closing statements, make preemptory strikes, and argue to the jury. Priest v. Priest, 536 S.W.2d 954, 955 (Tex.Civ.App.--Waco 1976, no writ).

D. What's In a Name?

Despite the differences discussed above, does it really make any difference what title you receive when the court appoints you? The short answer is yes, it can make a great deal of difference. Your title can drastically affect: how you are appointed, your duties under the Family Code and case law, how you get paid, and your potential liability. Each of these area will be discussed in turn.

III. GETTING APPOINTED

A. Appointment of Guardian Ad Litems

The Texas Family Code provides for both mandatory and discretionary appointment of guardian ad litems. Section 107.001 of the Texas Family Code provides for mandatory appointment of a guardian ad litem when a termination of parental rights is sought unless additional circumstances are present. Section 107.001 provides in relevant part:

> "(a) In a suit in which termination of the parent-child relationship is requested, the court or an associate judge shall appoint a guardian ad litem to represent the interests of the child immediately after the filing of the petition but before the full adversary hearing to ensure adequate representation of the child, unless:
> (1) The child is a petitioner;
> (2) An attorney ad litem has been appointed for the child; or
> (3) The court or an associate judge finds that the interest of the child will be represented adequately by a party to the suit and are not adverse to that party."
> "(d) A guardian ad litem shall be appointed to represent any other person entitled to service of citation under this code if the person is incompetent or a child, unless the person has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in child containing a waiver of service of citation."

This section provides three (3) circumstances when mandatory appointment of a guardian ad litem is not required. Out of these exceptions, Tex.Fam.Code 107.001(a)(3), and its predecessor Tex.Fam.Code §11.10(a) (Vernon 1986), has been the source of the most litigation. In Chapman v. Chapman, 852 S.W.2d 101 (Tex.App.--Waco 1993, no writ), the Waco Court of Appeals reversed a Decree of Termination and stated "because the court failed to appoint a guardian ad litem to represent the interests of the child, and because the interests of the child were not adequately represented by a party to the suit whose interests were not adverse to those of the child, we reverse the Decree of Termination." The Chapman Court also rejected the position that a finding that "the interests of the child will be represented adequately by a party to the suit and are not adverse to that party" may be implied or presumed. Chapman, 852 S.W. 2d at 101-02 (mother's argument that a finding that "the interests of the child are adequately represented by a party to a suit" should be presumed in support of the judgment in absence of express finding rejected); but cf. Turner v. Lutz, 654 S.W. 2d 57, 59 (Tex.App.--Austin, 1983, no writ)(court stating "Therefore, we cannot hold, even if we were so inclined, that the trial court impliedly found that the interests of [each]. . . child will be adequately represented by a party to a suit and are not adverse to that party" potentially opening the door to an implied finding.)

One case has held that the failure to appoint a guardian ad litem was harmless error when termination was sought but not granted.[2] In Ray v. Burns, 832 S.W. 2d 431 (Tex.App.--Waco 1992, no writ). The court so held. The court based its conclusion on two points:

> (1) A termination was only sought, not actually granted; and
> (2) A court appointed social worker performed the same role as that of a guardian ad litem, she conducted a social study and psychological evaluation of the parties and reported her conclusions and recommendations to the court. Ray, 832 S.W.2d 431.

In any event, in any case involving a termination of parental rights a guardian or attorney ad litem should be appointed to represent the child's interest. Relying on a finding that one of the parties can adequately represent the child's interest is not wise. Heed the words of the Chapman Court when they state "It would be a rare situation where the trial court could properly find that a guardian or attorney ad litem is not needed when one parent is trying to terminate the other parent's parental rights." Chapman, 852 S.W. 2d at 102.

Texas Fam.Code §107.001(b) continues and provides for the discretionary appointment of guardian ad litems. The section provides in relevant part:

> "(b) In any other suit, the court or an associate judge may appoint a guardian ad litem."

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[2] **The court citing Lopez v. Lopez, 723 S.W. 2d 772, 773 (Tex.App. -- El Paso 1986, No Writ) stated that "Appointment of a guardian ad litem is not required, however, when termination of parental rights is not involved."**

This section allows the court to appoint a guardian ad litem upon request by a party or on its own motion. (A copy of a motion for appointment as well as some other suggested pleadings are attached as Appendix "A"). This provision accounting for discretionary appointment can change to a mandatory appointment when the court makes a determination that there appears to be a conflict of interest. Smith v. Smith, 720 S.W. 2d 586 (Tex.App.-- Houston [1st Dist]1986, no writ). (Court basing this determination under the Guardian Ad Litem Statute of Tex.R.Civ.Proc. 173. The same would likely hold true for a guardian ad litem appointed under Texas Fam.Code §107.001(b)), citing Jaynes v. Lee, 306 S.W.2d 182 (Tex.Civ.App.--Texarkana 1957, No Writ).

B. Appointment of Attorney Ad Litems

1. APPOINTMENT OF ATTORNEY AD LITEMS

The Texas Family Code provides for both mandatory and discretionary appointment of attorney ad litems. Section 107.012 of the Texas Family Code provides for mandatory appointment of an attorney ad litem in a suit by a governmental agency requesting termination of the parent-child relationship, or appointment as managing conservator. Section 107.012 provides as follows:

> "In a suit filed by a governmental entity requesting termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the interests of the child immediately after the filing, but before the full adversary hearing, to ensure adequate representation of the child."

The legislature amended this section to ensure that an attorney ad litem was in place before a full adversarial hearing. Texas Fam.Code, §107.013 also mandates the appointment of an attorney ad litem for an indigent parent in a termination case.

Section 107.011 provides for the discretionary appointment of attorney ad litems. Section 107.011 provides in relevant part:

> "(a) An associate judge shall recommend the appointment of an attorney ad litem for any party in a case in which the associate judge deems representation necessary to protect the interests of the child who is the subject matter of the suit.
>
> (b) The court shall appoint an attorney ad litem for any party in a case in which the court deems representation necessary to protect the interests of the child who is the subject matter of the suit."

This section mandates the court to appoint an attorney ad litem when representation is necessary to protect the child's interests. The court has discretion as to when protection of the child's interest warrants representation. The court is not required to appoint an attorney ad litem when a divorce is uncontested or when the issues of possession and access to a child are agreed to by both parents. See Ch. 943 §10 (Vernon 1995).

C. Qualifications for Appointment of Attorney and Guardian Ad Litems

While the Texas Family Code has separate statutes covering the appointment of guardian ad litems and attorney ad litems, the Code provides only a single statute to regulate the qualifications of both sets of ad litems. Section 107.006 of the Texas Family Code was added by the legislature in 1995 in response to the perceived problem regarding the quality of ad litem representation. See comments to the Texas Fam.Code Ann.§107.006 (Vernon 1995); report of the Supreme Court Task Force to examine appointments by the Judiciary, S-6(March 1, 1993). The Task Force identified five problem areas that arise in connection with appointments:

1) Lack of information and training by appointees and the judiciary;
2) Unnecessary appointments;
3) Appointments which involve "appearance of impropriety";
4) Abuse of compensation; and
5) Insufficient guidance regarding the scope of an appointee's duties).

The new legislation attempts to address this.

Section 107.006 lays out the minimum qualification standards for ad litems practicing in certain counties and provides in relevant part as follows:

> "(a) The local administrative district judge in each county in a Department of Protective and Regulatory Services region for child protective services that contains a county having a population of

2.8 million or more shall establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of the county. A local administrative district judge in any other county may establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of that county. To be eligible for a pool established under this subsection, a person must:

(1) Complete training provided by the State Bar of Texas in family law and the responsibilities of ad litems;

(2) Complete as part of the person's annual continuing legal education requirement not fewer than three hours in family law issues; and

(3) Meet other requirements established by the local administrative district judge.

(b) Before appointment as a guardian ad litem or an attorney ad litem, the person must have read, acknowledged by signing, and filed with the local administrative judge a written statement prepared by the local administrative district judge that lists the responsibilities of an ad litem, some or all of which may be appropriate to the person's specific case. The court shall retain a copy of the acknowledgment for two years. To continue to receive appointments under this section, the person must execute a new statement at least every two years.

The eligibility requirements for a pool are only mandatory with respect to the following counties: Harris, Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Liberty, Matagorda, Montgomery, Walker, Waller, and Whorton. With regard to the rest of the state the qualifications are only applicable if the local administrative judge decides to create a pool from which to draw guardian or attorney ad litems.

The specific qualification requirements are similar to those enacted by the Texas Probate Code. See Texas Probate Code §646 (Vernon 1996). Under the Texas Fam.Code the local administrative judge is left discretion to establish additional qualifications. Texas Fam.Code Ann. §107.006(a)(3). Section 107.006(b) appears to require all guardian and attorney ad litems, and not just those in Harris and surrounding counties, to sign a written statement prepared by the local administrative judge detailing the responsibilities of an attorney and guardian ad litem. This statement must be executed every two years. The language of §107.006(b) clearly refers to a single statement listing the responsibilities of an ad litem, with no distinction between guardian and attorney ad litem. Texas case law and the rest of the Texas Fam.Code do not think their responsibilities are the same.

IV. DUTIES AND RESPONSIBILITIES OF AN AD LITEM

A. Duties and Responsibilities of a Guardian Ad Litem

The Texas Family Code does not specifically address what the duties and responsibilities of a guardian ad litem are. A guardian ad litem is an officer of the court, appointed by the court to assist it in properly protecting the infant's interests. Dawson v. Garcia, 666 S.W.2d 254(Tex.App.--Dallas 1984, no writ) citing Stanton v. Sullivan, 62 R.I., 154, 4A.2D 269, 270(1939). So what must a guardian ad litem do to properly protect the child's interest? In Holly v. Adams, 544 S.W.2d 367(Tex. 1976), the father sought to terminate the parental rights of the child's mother. The court appointed a guardian ad litem to represent the child and ordered the guardian ad litem to investigate the circumstances and to submit a written report to the court. Holly, 544 S.W.2d at 367.

The Holly court listed several factors which have been considered by courts in ascertaining the best interest of a child. Because an ad litem's role is to protect the best interest of the child, these factors are extremely relevant to any investigation a guardian ad litem might make. The Holly factors are as follows:

1) The desires of the child;

2) The emotional and physical needs of the child now and in the future;
3) The emotional and physical danger to the child now and in the future;
4) The parenting abilities of the individuals seeking custody;
5) The programs available to assist these individuals to promote the best interests of the child;
6) The plans for the child by these individuals or by the agency seeking custody;
7) The stability of the home or proposed placement;
8) The acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
9) Any excuse for the acts or omissions of the parents.

This list is by no means exhaustive, but does indicate a number of considerations which either have been or would appear to be pertinent. Holly 544 S.W.2d at 372.

In order for the guardian ad litem to address the above factors, it would seem that to investigate the case at a minimum they should: interview the child (if the child is old enough); interview all parties to the action; visit the home of any party seeking custody; interview any psychologist or psychiatrist (whether court appointed or not) who has seen the child; interview any other persons with significant knowledge of the case; and review all of the child's medical, psychological, and school records.

Courts have reversed decrees of termination based upon the failure of a guardian ad litem to properly investigate the case. In Turner v. Lutz, 685 S.W.2d 356, 360 (Tex.Civ.App.Austin 1984, no writ) the court noted what the guardian ad litem failed to do. The guardian ad litem failed to: meet or interview the children; prepare or file a written report; testify; or make an independent investigation in the Holly factors. Turner 685 S.W.2d at 356. While a guardian ad litem is not required to come down on one side or the other of the custody fence, they are required to complete an investigation of the case.

B. Duties and Responsibilities of Attorney Ad Litems

The legislature has now mandated the duties of an attorney ad litem for the representation of a child. Section 107.014 provides as follows:

"(a) An attorney ad litem appointed under this subchapter to represent a child may:
(1) investigate to the extent the attorney ad litem considers appropriate to determine the facts of the case;
(2) obtain and review copies of all of the child's relevant medical, psychological, and school records; and
(3) call, examine, and cross-examine witnesses.
"(b) An attorney ad litem appointed to represent a child shall within a reasonable time after the appointment:
(1) interview the child if the child is four years of age or older; and
(2) interview individuals with significant knowledge of the child's history and condition."

The comments to §107.014 indicate that this listing of common sense responsibilities was in response to complaints about ad litem representation; more specifically, complaints where the attorney ad litem never met the child he represented (attached as Appendix "B" are standards relating to the appointment of counsel and guardian ad litems for children in custody or visitation proceedings). While the Texas Probate Code §647(b) mandates review of relevant medical psychological reports, it is only a discretionary duty under the Texas Family Code. Compare Tex.Prob.Code §647(b) (Vernon 1996) with Texas Fam.Code Ann. §-107.014(a)(3)(Vernon 1995). However, an attorney ad litem must take great care to ensure that the mandatory provisions of §107.014(b) are carried out or risk a finding against him of negligence per se.

Just as with any other client, an attorney's conduct in representing a child is governed by the Texas Disciplinary Rules of Professional Conduct. TDRP 1.02 (a) (1) provides in relevant part: "... a lawyer shall abide

by a client's decision: 1) concerning the objectives and general methods of representation." This very rule can get an attorney ad litem into a difficult situation with a child whose objectives in the case may differ from what the ad litem believes to be in the child's best interest. In this case, if the ad litem is appointed solely in the role of an attorney ad litem, under the Disciplinary Rules he should be bound by his client's direction. Professor John J. Sampson has urged attorneys in this situation to be governed by the wishes of their clients without regard for what is in the child's best interest. See Sampson, John J., Representing the Child as an Ad Litem, Attorney v. Guardian, 1989 Advanced Family Law Course, Chapter OO. The Texas Disciplinary Rules also require an attorney to keep a client reasonably informed about the status of the case, and to explain matters to a client sufficiently so that a client can make an informed decision regarding representation. TDRP 1.03. Obviously, this may not be possible if the child is of a very young age; however, the comments to TDRP 1.03 suggest that an attorney should try and communicate to the extent possible with the child and allow them input into decisions. Comment 5 to TDRP 1.03 provides:

> "When a lawyer reasonably believes a client suffer a mental disability or is not legally competent, it may not be possible to maintain the usual attorney client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children's opinions regarding their own custody are given some weight."

TDRP 1.02 (g) provides that an attorney should take action to secure a guardian or other protective measures for a client when the attorney believes that the client lacks legal competence and that the action is necessary to protect the client. In situations where an ad litem is functioning in a joint role and there is no conflict between the best interests of the child and the child's wishes, then the separate appointment of a guardian ad litem may not be necessary. See generally, Montgomery, Outline on Role of Ad Litem, (Houston Bar Association Family Law Section 1994 Seminar). When a conflict does arise the best practice is to ask the court to appoint a separate guardian ad litem or withdraw from the case. Id.

V. GETTING PAID

However noble representing a child is, the bottom line is that attorneys still have bills to pay and must meet payroll. Getting paid as an ad litem can often be a daunting task. When an ad litem takes a position adverse to a party, that party will often feel the ad litem is doing nothing to justify his fee or that the ad litem is incompetent and does not deserve to be paid.

A. Payment of Fees for Guardian Ad Litems

Before the Texas Family Code was amended on September 1, 1995, the payment of guardian ad litems was governed by Texas Fam. Code Ann. 11.10(a). This section provided that if a judge or master of the court found that the parties were able to defray the costs of the ad litem's compensation (apparently referring to both guardian ad litem and attorney ad litems) then the court could order the parties to pay into the registry of the court prior to the final hearing funds for the use and benefit of the ad litem. Texas Fam. Code Ann. §11.10(a) (Vernon 1994). This section was recodified into Texas Fam. Code Ann. §107.015(b) (Vernon 1995). While §107.015(b) tracts the language contained in the prior version of the Code it does create some ambiguity as to the courts authority to order the parties to make payment to a guardian ad litem. Section 107.015 appears in the subchapter entitled Attorney Ad Litems. Additionally, §107.015(a) references payments only to an attorney appointed to represent a parent or child. Presumably, the legislature intended §107.015(b) to apply to guardian ad litems as well as attorney ad litems. Without this interpretation there is apparently no statutory authority to pay a guardian ad litem under the Texas Family Code. Texas Rule of Civil Procedure 173 may provide an out. The rule provides in relevant part: "... the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs." Texas R.Civ.P. 173. Under §107.015(b) these fees can be ordered paid as interim fees and paid into the

registry of the court or other account prior to a final hearing, or the fees may be taxed as costs against one or more of the parties.

B. Payment of Fees for Attorney Ad Litems

Section 107.015 of the Texas Family Code also governs payment of attorney ad litem fees. This section allows an attorney appointed to represent a parent or child a reasonable fee to be paid by the parents of the child unless the parents are indigent. Texas Fam.Code Ann. §-107.015(a) (Vernon 1995). If the parents of the child are shown to be indigent, then the attorney ad litem's fees shall be paid by the county in which the suit is pending. Texas Fam.Code Ann. §107.015(c) (Vernon 1995). Case law interpreting the prior codification of §107.015, which was §11.10(e), has held that courts have no discretion and must order the parents to pay for attorney ad litem fees absent a finding of indigency. See In the Interest of A.B.B., 785 S.W.2d 828, (Tex. App. -- Amarillo 1990, no writ) citing Klement v. Munder, 619 S.W.2d 31 (Tex. Civ. App. -- El Paso 1981, no writ). The statute does not address situations for payment of attorney fees in situations where the parents are indigent but termination is not being sought, such as when the Department of Protective and Regulatory Services file seeking managing conservatorship. See In the Interest of A.B.B., 785 S.W.2d at 831, Footnote 3.

C. Enforcing and Proving Up Your Fees

Assuming you have gotten a court to grant an order awarding you attorney fees from the parties, can it be meaningfully enforced? At least one case has said no. In Shirley v. Montgomery, the Houston Court of Appeals set aside an order by the trial court which struck relator's pleading for failure to pay $15,000 into the trust fund of the attorney ad litem. Shirley v. Montgomery, 768 S.W.2d 430 (Tex.App--Houston 14th Dist. 1989, no writ). The case involved a bitter custody dispute over a four year old child, with allegations of kidnaping, physical assault, emotional abuse, and illegal drugs. Shirley, 768 S.W.2d at 431. The relator's parents had supported her during the custody fight, paying well over $100,000 in her legal fees. Id. In December 1988, Judge John Montgomery signed an order requiring relator to pay $15,000 into the attorney ad litem's trust account. Id. The relator subsequently failed to pay the required funds and the attorney ad litem filed a motion for contempt and/or motion for sanctions. At the hearing on the motion, evidence was presented that relator's parents would not continue to fund the litigation and that relator did not have the funds to pay the ad litem. Id. at 433. The trial court entered an order striking the relator's pleadings and preventing her from putting on evidence at the time of trial if the $15,000 was not paid by a date certain. Id. at 432.

Relator made two (2) main arguments to attack the trial court's order. First, that the order was not enforceable by Texas R.Civ.P. 215 sanctions. Second, that even if the order was enforceable by Rule 215 sanctions, the trial court abused its discretion in striking her pleadings, and that striking her pleadings and not allowing her to present evidence would not be in the child's best interest. The Court of Appeals first addressed the applicability of Rule 215 sanctions. Relator had argued that under Baluch v. O'Donnell, 763 S.W.2d 8 (Tex.App.--Dallas 1988, n.w.m.) the use of discovery sanctions to enforce an order for attorney's fees was inappropriate. The Court of Appeals distinguished Baluch from the case before it and stated:

> "While in the present case there has been much said about attorney's fees, the language of the order as well as the testimony at the contempt hearing make it clear that the money in the present case was to be used for discovery costs and expenses, not attorney's fees. We, therefore, hold that Baluch is inapplicable to the present case." Shirley, 768 S.W.2d at 433.

The lesson to be learned from this is to make sure that any motion or order be couched in terms of payment for discovery costs and expenses and not attorney's fees. This will allow the teeth of the Texas Rule of Civil Procedure 215 to be used in enforcing an order for fees.

The Court then addressed the propriety of striking relator's pleadings and concluded that the court had abused its discretion in doing so. This decision was based upon two (2) grounds. The court stated "where the relator has demonstrated that she cannot comply with a discovery order, we hold the trial judge abused his discretion when he ordered relator's pleadings stricken." Id. at 434. The second basis for the court's ruling was that it felt it was not in the child's best interest to prevent the child's mother from putting on her evidence. The Court of Appeals stated "we believe it will be in her

[referring to the child] best interest for her mother to have a forum in which to present her claim of conservatorship in the upcoming trial." Shirley, 768 S.W.2d at 434.

Justice Ellis in his dissent voices his concern that the court's ruling will leave trial courts powerless to enforce orders to pay interim attorney fees to an attorney ad litem. Justice Ellis wrote:

> "Implicit in the grant of this Mandamus is a message to all parents, children, and attorneys embroiled in custody battles in this state that avoidance of interim attorney fee awards to an appointed attorney ad litem is condoned and that refusals to pay court-ordered monies to minors' lawyers may be permitted because there is no remedy to enforce compliance. Such a ruling subtly deprives Texas children from effective representation in litigation which directly impacts their lives." Id.

Justice Ellis feared that by refusing to uphold a trial court order regarding payment of attorney ad litem fees, parents in a custody trial could: "1) undermine the court's appointment of independent counsel; 2) deprive the child of effective representation; and 3) block the discovery of evidence which will serve the best interests of the child." Shirley, 768 S.W.2d at 435.

Four (4) years later the same Court of Appeals was faced with the same question. In Eason v. Eason, 860 S.W.2d 187 (Tex.App.--Houston, [14th Dist.] 1993, no writ), the Court of Appeals upheld a trial court ruling that struck the pleadings of appellant and prevented her from putting on any evidence as a sanction for: failure to pay attorney ad litem fees; and failure to respond to discovery requests. In making its decision the Court of Appeals did not address its prior opinion in Shirley v. Montgomery. What was the distinction when the court examined the issue a second time? The difference appears to be the totality of appellant's egregious conduct in the Eason case. Not only did she fail to pay attorney ad litem fees, she also failed to respond to discovery requests, failed to attend a court ordered social study, and intentionally caused a mistrial in a prior trial. Eason, 860 S.W.2d at 190.

In proving up fees Judge John Montgomery in his outline on the role of ad litems, offered advise for: justifying the fee; preserving the record for appeal; and protecting yourself against a possible claim of malpractice or incompetence. First, prove up your qualifications; i.e. when licensed, experience, board certifications, awards, etc. Second, make a detailed record of what you did in the case; i.e. pleading and correspondence reviewed and drafted, parties, witness, and expert interviews and/or consulted, and a listing of depositions and hearings attended. This advise is even more important in view of the new statutory requirements of Texas Fam.Code Ann. §107.014. Lastly, exercise caution when testifying to the amount of your fees. In Alford v. Whaley, 794 S.W.2d 920 (Tex.App.--Houston [1st Dist] 1990, no writ), a guardian ad litem testified to and received $25,000 in attorney's fees. However, she had also testified that her hourly rate was $150.00 and that she had spent approximately ninety (90) hours working on the case. Alford, 794 S.W.2d at 925. The Court of Appeals reversed her award and changed the judgment to an award of $13,500 which was her hourly rate times the number of hours worked. Id. at 926.

VI. NEW CASE LAW, DELCOURT V. SILVERMAN

A. Synopsis

In Delcourt v. Silverman, No. 14-94-00579-CV, (Tex.App.--Houston [14th Dist.] 1996)(opinion not yet published) the Court of Appeals considered a case of first impression in Texas: whether a psychologist, appointed under Texas Rule of Civil Procedure 167A(d)(1) in a case under the Family Code, and a guardian ad litem, appointed under former Texas Family Code §11.10 (now recodified as §107.001) are entitled to absolute judicial immunity for actions taken in accordance with their appointment by the court? The Court of Appeals held that both the psychologist and the guardian ad litem were entitled to immunity under the Doctrine of Derived Judicial Immunity because they were functioning as an extension of the court.

B. Facts and Background

Karen Ann Delcourt, the appellant in the present case, and her ex-husband, Tony Moreland, have a long and bitter history of

custody litigation. Karen Delcourt and Tony Moreland were divorced on May 17, 1988. Delcourt, unpublished opinion at 1. Mr. Moreland was appointed as sole managing conservator of the couple's daughter, Tiffany, with Ms. Delcourt having visitation. Less than one (1) year after the divorce, on February 17, 1989, Mr. Moreland filed a motion to modify requesting the court to restrict Ms. Delcourt's visitation with Tiffany. Ms. Delcourt subsequently filed her own motion to modify asking to be appointed sole managing conservator. A jury trial was held and Mr. Moreland was replaced as sole managing conservator by Ms. Delcourt. Id. at 2.

In March of the following year, Mr. Moreland again filed a motion to modify custody alleging that the child's "present environment may endanger her physical health or significantly impair her emotional development." Id. at 9. A temporary orders hearing was held, at which Ms. Delcourt did not show up. Id. at 2. The court entered temporary orders removing Ms. Delcourt as sole managing conservator and replacing her with Mr. Moreland, as well as appointing Dr. Edward Silverman, Ph.D., a psychologist, to evaluate the parties and Tiffany. Id. Several days later, the court appointed Norma Levine Trusch as guardian ad litem for the child, although apparently no written order was entered to this effect. Id. at 2, 18. This case was finalized in October 1990, with a jury trial on the issue of custody. Id. at 2. The jury found and the court entered an order removing Ms. Delcourt as sole managing conservator and replacing her with Mr. Moreland. Id.

Some two years later, on October 1, 1992, Ms. Delcourt began the present case by filing suit against both Dr. Silverman and Ms. Trusch. The suit alleged claims for: 1) breach of common law duty; 2) breach of court appointed duty; 3) negligence; 4) fraud; 5) violation of constitutional and parental rights; 6) civil conspiracy; 7) tortious interference with custodial and parental rights; 8) intentional inflictions of severe mental distress; and 9) failure to provide standard of care. Id. at 4. Ms. Trusch and Dr. Silverman subsequently filed a motion for summary judgment claiming that as a matter of law: "1) they owed no duty to Ms. Delcourt; and 2) they were protected by judicial immunity for actions taken within the scope of their appointments. Id. at 2. Some confusion exists as to what Ms. Delcourt's live pleadings were at the time the motion for summary judgment was filed. Id. at 4. The Court of Appeals held this was irrelevant because both of Ms. Delcourt's pleadings essentially raised the same claims: 1) negligence; 2) fraud; 3) civil conspiracy; and 4) intentional infliction of severe mental distress. Id. The trial court granted Dr. Silverman and Ms. Trusch's motion for summary judgment and Ms. Delcourt appealed.

C. The Court's Analysis

In affirming the granting of the motion for summary judgment, the Court of Appeals focused solely on the issue of judicial immunity and did not reach the issue of whether Dr. Silverman and Ms. Trusch owed a duty to Ms. Delcourt. In analyzing whether a court appointed psychologist and guardian ad litem were entitled to absolute immunity the court began by looking at judicial immunity. The court noted that "it is well established that judges are absolutely immune from liability for judicial acts that are not performed in the clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive." Johnson v. Kegans, 870 F.2d 991, 995 (5th Cir.), cert.denied, 492 U.S.921 (1989); Turner v. Pruitt, 342 S.W.2d 422, 423 (1961). The purpose of this grant of immunity is to protect judges and allow them to exercise their judicial functions independently without fear of consequences. Bradley v. Fisher, 80 U.S. 335, 350 (1871).

A prior Texas court had examined the question of absolute immunity for a guardian ad litem appointed under Texas Rule of Civil Procedure 173. In Byrd v. Woodruff, the Dallas Court of Appeals stated "when judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. Officers of the court who are integral parts of the judicial process, such as court clerks, law clerks, bailiffs, and constables issuing writs, and court appointed receivers and trustees are entitled to judicial immunity if they actually function as an arm of the court. Byrd v. Woodruff, 891 S.W.2d 689, 707 (Tex.App.--Dallas 1994, writ denied). Absolute immunity flowing from judicial immunity is referred to as "derived judicial immunity." See Clements v. Barnes, 834 S.W.2d 45, 46 (Tex. 1992)(holding bankruptcy trustees immune from tort liability as "arms of the court".) The Delcourt Court agreed with the policy reasons behind derived judicial immunity. See e.g. Johnson, 870 F.2d at 996-

997 (policy guarantees an independent decision making process as well as preventing intimidation that could result from disgruntled litigants suing the person who presented the decision maker with information adverse to them).

In making a determination of whether a party is entitled to immunity, a functional analysis of their role should be employed. Delcourt at 7. In choosing to follow a functional approach to determine immunity, the Delcourt Court cited a string of federal cases. See e.g. Gardner v. Parson, 874 F.2d 131, 145-46 (3rd Cir. 1989); Hodorowske v. Ray, 844 F.2d 1210, 1213-15 (5th Cir. 1988); Meyers v. Contra Costa County Dep't of Social Serv., 812 F.2d 1154, 1157 (9 Cir.), cert denied, 484 U.S. 829, (1987); Malachowski v. City of Keene, 787 F.2d 704, 712, (1st Cir.) cert.denied, 479 U.S. 828 (1986). "Under the functional approach, courts determine whether the activities of the party seeking immunity are intimately associated with the judicial process." Delcourt at 7, citing Imbler v. Pachtaman, 424 U.S. 409 (1976).

The court then proceeded to apply this functional analysis to the role of the psychologist and the guardian ad litem. A detailed rendition of the court's analysis of the psychologist's role is beyond the scope of this paper, but suffice to say the court ruled that Dr. Silverman was acting as an agent of the court and was entitled to absolute judicial immunity. Delcourt at 9. In large measure the court did so on policy grounds, stating "without the protection of absolute immunity, such professionals would be, at the very least, reluctant to accept these appointments. This would in turn inhibit judges from performing their duties." Id.

In applying the functional analysis to the guardian ad litem, the court had to reconcile itself with the holding in Byrd v. Woodruff. The Byrd case had addressed the question of judicial immunity for a guardian ad litem who had been sued in the context of a minor settlement hearing involving the apportionment of settlement proceeds. See Byrd 891 S.W.2d at 704. The Dallas Court of Appeals analyzed the nature of the relationship between a guardian ad litem, the minor, and the court. Id. This is essentially the same as the functional approach which the Delcourt Court employed. The Byrd Court noted that a guardian ad litem is appointed only when it appears that the next friend has an interest adverse to that of the minor. Id. at 705, citing Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992). Once appointed the guardian ad litem displaces the next friend and becomes the personal representative of the minor. Id.

The Byrd Court held that a guardian ad litem in this capacity was in a fiduciary position with respect to the minor, and was acting as an advocate not as a representative of the court. Id. at 706, 708 (Court noting duties of a guardian ad litem appointed under 173 include investigating and evaluating: 1) The damages suffered by the minor; 2) the adequacy of the settlement; 3) the proposed apportionment of settlement proceeds among the interested parties; 4) the proposed manner of disbursement of the settlement proceeds; and 5) the amount of attorney's fees charged by the minor's attorney. These duties place an ad litem in the capacity of a minor's personal representative.) The Byrd court concluded "the ad litem appointed under Rule 173 is acting as a personal representative and advocate for the interest of the minor; the fact that he or she was appointed by the court is merely procedural. Therefore, this type of ad litem is not and should not be entitled to absolute immunity." Id. at 707.

To distinguish the case from Byrd, the Delcourt Court listed three (3) primary factors that favor granting a guardian ad litem absolute immunity in the context of a child custody case. The court first cited a string of federal cases which held that a guardian ad litem should be granted absolute immunity because they are part of the judicial process and could not function independently if they were subject to later harassment and intimidation from dissatisfied parents. See e.g. Kurzawana v. Mueller, 732 F.2d 1456, (6th Cir. 1984)(Guardian Ad Litem entitled to absolute immunity in suit by parents for unlawfully terminating their parental rights), Cok v. Cosentino, 876 F.2d(1st Cir. 1989)(Guardian Ad Litem entitled to absolute immunity in suit by ex-wife because guardian ad litem involved in adjudicative process), Myers v. Morris, 810 F.2d 1437(8th Cir.), Cert. Denied, 484 U.S. 8282, (1987)(Guardians in sex abuse case held absolutely immune from liability for: testimony; questioning of children; and recommendations to court). The court's second premise for absolute immunity was a policy argument. The pool of qualified attorneys to represent children in the midst of a custody fight could dry up if disgruntled parents could come back and hold them personally liable. Delcourt

at 14, Citing Collins v. Tabet, 806 P.2d 40, 51(N.M. 1991); See also Jim Guiberteau and Linda Motheral, The Changing Role of Guardian and Attorney Ad Litems. 48 Tex.B.J. 955, 957(1995). Lastly, the court concluded that the source of a guardian ad litem's compensation should be considered in determining whether the guardian ad litem is acting as an advocate or as an arm of the court. Delcourt at 14. The court citing Collins v. Tabet, held there was more reason to hold that guardian ad litem was functioning more as advocate when he was compensated from the child's resources rather than from the parents or from public funds. Id. at 14-15. The court noted that under Texas Fam.Code §11.10 the guardian ad litem's fee is paid by the parents unless they are indigent. Id. at 15. The court reached the following holding:

> "Based upon our review of the applicable case law, we hold that guardian ad litem appointed under Article 11.10 of the Texas Family Code is absolutely immune from liability for his or her actions taken pursuant to and within the scope of their appointment, provided that the appointment contemplates the ad litem acting as an extension of the court." Id. at 15.

Based upon this ruling, the court stated that to be entitled to summary judgment in the instant case, Trusch had to show that as a matter of law:

1) The appointment contemplated that she acted as an extension or arm of the court; and
2) She did not depart from the scope of the appointment.

An affidavit was provided to the court by the associate judge who appointed Ms. Trusch. The affidavit stated "it would be within the scope of Ms. Trusch's duties to meet with both of the parties to the custody suit, to gather information from professionals, lay witnesses and police officers regarding Ms. Delcourt's allegations of sexual abuse" and to serve "as an officer of the court to assist me in properly protecting the minor child's interest." Id. Based upon this and an affidavit supplied by Ms. Trusch the court concluded that Ms. Trusch acted as an arm of the court and acted within the scope of her appointment. Id. at 15-16. Therefore, the summary judgment evidence presented was sufficient to establish the affirmative defense of derived judicial immunity.

D. Do ad litems appointed under the Family Code have judicial immunity after the Delcourt v. Silverman decision?

After Delcourt, can you take on an appointment as an ad litem and feel secure that you are protected from future litigation under the Doctrine of Derived Judicial Immunity? The answer would appear to be no if you are appointed as an attorney ad litem; no, if you are appointed as a dual guardian/attorney ad litem; and maybe, if you are appointed as strictly a guardian ad litem. As David Gray said in his comments, "Please Ad Litem don't jump for joy because there's lots of holes in the Court of Appeals' opinion..."

The first thing to note right off the bat is that the holding the court made applied to the old Texas Fam.Code §11.10, now recodified as numerous sections of chapter 107 of the Texas Family Code. In comparing the old §11.10 with the recodified statutes of chapter 107, the major changes are actually new provisions that have been introduced. See e.g., Texas Fam.Code Ann. §107.006 (Vernon 1995) (qualifications of ad litems), Texas Fam.Code Ann. §107.014 (Vernon 1995) (powers and duties of attorney ad litem for child). However, in the recodification of the Texas Fam.Code §107.015 (ad litem fees) guardian ad litems are not specifically mentioned. It is arguable about whether this statute also governs payment to guardian ad litems. See p. 14 infra. The other changes mainly concern the timing and discretion of the court in making appointments. See e.g. Texas Fam. Code Ann. §107.001 (appointment of guardian ad litem); Texas Fam.Code Ann. §107.011 (discretionary appointment of attorney ad litem). Are these changes significant enough to make the holding inapplicable to guardian ad litem appointed under Texas Fam.Code §-107.011 or §107.012? Probably not. These new changes do not alter the function of the guardian ad litem in a custody case. The function and role of the guardian ad litem was the court's primary focus in analyzing derived judicial immunity. Although the court did discuss the issue of who pays the guardian ad litem fees as being a consideration in determining whether a guardian ad litem should receive derived judicial immunity, it is hard to see how the current practice of parents paying the guardian ad litem's fees will be changed, regardless of how Texas Fam.Code §107.015 is construed.

Can the holding in Delcourt v. Silverman be stretched to provide immunity for attorney ad litems or dual attorney/guardian ad litems? Based on how the court analyzed derived judicial immunity, the answer would be no. An attorney ad litem is clearly an advocate for the child, not an information gathering apparatus for the court. An attorney ad litem is expected to make opening and closing statements, call and examine witnesses, and make preemptory strikes. See Texas. Fam.Code Ann. §107.014 (Vernon 1995); Priest v. Priest, 536 S.W.2d, 954, 955 (Tex.Civ.App.--Waco 1976, no writ). These are clearly not functions or duties of the court. Once you have signed your name to a motion or other pleading you have likely signed away any possibility of receiving derived judicial immunity. If Texas Courts continue to follow the Byrd and Delcourt Courts' lead in applying a functional analysis to determine immunity, it is hard to see how attorney ad litems can receive this grant of protection. However, this still leaves the problem that the court noted as a factor in extending judicial immunity to guardian ad litems. The problem is that qualified people will not serve and be independent if they are threatened by a subsequent lawsuit by a spited parent. Doesn't this concern apply to attorney ad litems as well? Because an attorney ad litem plays a more active role in the case, isn't their exposure for a potential suit down the road even greater than that of a guardian ad litem? However, instead of protecting attorney ad litems, the legislature has gone the other way by enacting Texas. Fam.Code §107.014 which simply gives litigants a potential negligence per se claim.

Does your appointment as a guardian ad litem vest you with judicial immunity? Not necessarily. The court's opinion must be closely read. As David Gray notes, "If you focus on the advocating angle of this opinion, an active guardian ad litem fully participating in a contested custody suit, abandons his or her judicial immunity because the trial court does not act as an advocate, thus by advocating the guardian ad litem abandons his or her impartial role as an arm of the court, which cannot act as an advocate." At what point do you stop being an officer of the court looking out for the child's best interests and start becoming an advocate? The Delcourt opinion does not say. What it does say is that to be entitled to derive judicial immunity you must: 1) have been appointed with the idea you would act as an extension of the court; and 2) that you did not depart from the scope of that appointment. The duties of a guardian ad litem are not statutorily listed as they are with attorney ad litems, so getting the court to specifically define the scope of your appointment becomes extremely important if you desire judicial immunity. Therefore, to comply with the court's holding Delcourt and to protect yourself, a potential guardian ad litem should get the court in its order appointing an ad litem to: 1) appoint the ad litem as an officer of the court; 2) state that the appointment contemplates that the ad litem is functioning as an extension or arm of the court; and 3) specifically delineate what the guardian ad litem's duties and responsibilities are, i.e. interview witnesses and the parties, file written report, etc. After the court tells you what the scope of your appointment is, stay within those bounds and try to ensure that you are not overtly acting as an advocate. A real problem arises when you are given the title of guardian ad litem but are expected to function as an attorney ad litem, i.e., an advocate. While the Delcourt v. Silverman opinion does represent a step forward, a guardian ad litem must walk a tightrope to ensure that they receive the protection of this decision.

VII. CONCLUSION

Wading into the middle of a contested custody battle as an ad litem can often be a thankless job, with the only satisfaction being you did what was best for the child--something that is often overlooked by the parties. While many courts have gone to the practice of appointing a single ad litem to fill both roles, important differences exist between the two (2) roles in terms of appointment, duties and responsibilities, getting paid, and whether you can be sued. Your job title becomes even more important after the enactment of Texas Fam.Code §107.014 and the decision in Delcourt v. Silverman. In simple terms of exposure to liability, an attorney ad litem now faces a far greater risk of potential litigation by a disgruntled parent. The Delcourt opinion proves that an attorney appointed as an ad litem in a dual capacity of both guardian and attorney ad litem is potentially facing the worst of both worlds, they must assume the responsibilities of both roles without the potential liability shield. The trend in trial courts to appoint a single person to fill both roles is at odds with clear

legislative and case law distinctions between the two (2) positions. This is a problem that needs to be addressed.