ROLE OF THE AD LITEM

IN PERSONAL INJURY LITIGATION

Presented By

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HOUSTON BAR ASSOCIATION CIVIL COURT AD LITEM SEMINAR
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I. WHAT IS AN AD LITEM?

A. "Ad litem" in Latin means "for the suit." A guardian ad litem serves as the legal guardian of the child or person who is legally incapacitated for purposes of the suit for which the ad litem has been appointed. *Brownsville-Valley Regional Medical Ctr., Inc. v. Gamez*, 894 S.W.2d 753 (Tex. 1995)(citing *Durham v. Barrow*, 600 S.W.2d 756 (Tex. 1980)). This representation is concluded when the conflict which required the ad litem appointment is settled or the suit concludes. *Id.*

B. Role of the Attorney Ad Litem.

1. The duties of an ad litem attorney appointed to represent a party following citation by publication are to locate the party and to give notice of the pending suit, or if unsuccessful in locating party, to zealously defend the party in his absence. *Anderson v. Anderson*, 698 S.W.2d 397, 399 (Tex. App. -- Houston [14th Dist.] 1985, writ dism'd, w.o.j.).

2. When a party answers in an action, the attorney ad litem which has been appointed by the court following citation by publication can no longer act in the party's stead absent the party's permission. *Id.*

3. An attorney ad litem serves to assure that a person who cannot be located is afforded due process of law.

C. Role of the Guardian Ad Litem.

The most basic function of the guardian ad litem is to assist and protect the interests of a minor or incompetent person while making informed and unbiased decisions that are material to the minor's position in the lawsuit.

1. The appointment of a guardian ad litem is presumed necessary to assure an equitable determination of the rights for those who are unable to evaluate the circumstances at hand and prevent any unfair advantage from being taken by those in a dominant position.

2. The guardian ad litem is usually authorized by the court to take whatever steps necessary to protect the best interests of the minor and ensure that the dispute will be resolved fairly and expeditiously. *Friends For All Children, Inc. v. Lockheed Aircraft, Corp.*, 725 F.2d 1392, 1400 (D.C. Cir. 1984).

3. The guardian ad litem must participate in the case to the extent necessary to protect the ward. *Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 647 (Tex. App. - Tyler

1993,). This includes the ability to prosecute an appeal on behalf of a minor, even where there is no appeal as to the parents interests in a case. *Sosa v. Koshy*, 961 S.W.2s 420, 424-25 (Tex. App. -- Houston [1st Dist] 1997).

4. Although seldom used, a guardian ad litem has authority to nonsuit or settle the claim of a child in civil litigation. *Roberts v. Parish*, 567 S.W.2d 581 (Tex. App. -- Waco 1978, no writ). This is not something that should be taken lightly or without the ad litem being certain of that position. A guardian ad litem may also remove, where appropriate, a child's portion of the case to federal court, where that would be the better forum to adjudicate the claim.

5. The guardian ad litem has two essential roles.

   a. He is a data-gatherer whose task it is to use all available sources and find all relevant facts that will enable him to assess all available alternatives.

   b. He acts as an advocate responsible for ensuring that all relevant facts and options regarding the minor's best interests are presented to the court.

6. A guardian ad litem's representation is limited to the matters related to the suit for which he was appointed. *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980).

7. The guardian ad litem serves as a protection for the interest of a minor and prevents the existence of a conflict of interest on claims brought by a parent (or other next friend) claiming damages both individually and on behalf of a minor. *Tex. Employers Ins. Corp. v. Keenom*, 716 S.W.2d 59, 67 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.); TEX. R. CIV. P. 173.

8. The 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 interest. *Dawson v. Garcia*, 666 S.W.2d 254, 265 (Tex. App. -- Dallas 1984, no writ). As a guardian ad litem, not an attorney ad litem, there is no duty to act as the minor's attorney and prosecute the suit. *Miller v. Armogida*, 877 S.W.2d 361, 365 (Tex. App. -- Houston [1st Dist.] 1994).

9. A guardian ad litem who goes beyond his role and assumes the duties of plaintiff's attorney is not entitled to compensation for work done assisting or acting for plaintiff's counsel. However, the guardian ad litem is allowed considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary to protect the ward's interests. *Crisp v. Charles, 2000 Tex. App. LEXIS 3002 (Ct. of App. of Texas, Dallas [5th Dist.] 2000.* *Note *Crisp* is an UNPUBLISHED OPINION. The guardian ad litem is required to participate in the case to the extent necessary to protect the ward. *Id.*

10. The guardian ad litem has the authority to hire an attorney to represent a child in court.

11. The guardian ad litem is the personal representative of an individual subject to a disability, and is appointed to protect the interests of the disabled person in any lawsuit where that individual is a party. *Id*. Further, the Dallas Court of Appeals held that a fiduciary duty is created when a trial court appoints an ad litem for a minor. *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.-Dallas 1994). The ad litem must be loyal to the minor; must use the utmost good faith; and must serve the interest of the minor and place the minor's interest before his or her own. Otherwise, there is a breach of fiduciary duty for which the minor may sue the ad litem after the minor becomes an adult. Note: the ad litem cannot be sued for malpractice because there is no attorney/ client relationship. Since a breach of fiduciary duty claim differs from a malpractice cause of action, the ad litem's malpractice insurance may not cover the breach of fiduciary duty claim. The minor in the Byrd case sued on the basis that the funds put into the court's registry were not put in an interest bearing account as required by the judgment; numerous payments made during her minority were for her parent's benefit rather than hers; and her parents stole and spent trust proceeds.

12. The guardian ad litem should investigate the circumstances and submit a written report. *Holley v. Adams*, 544 S.W.2d 367, 369 (Tex. 1976).

13. The guardian ad litem cannot waive any substantial right of the minor. *Reasoner v. State*, 463 S.W.2d 55 (Tex. Civ. App. -- Houston [14th Dist.] 1971, writ ref'd n.r.e.).

II. WHEN MUST A GUARDIAN AD LITEM BE APPOINTED?

A. Where mandated by TEX. R. CIV. P. 173.

The clear language of this rule mandates appointment of a guardian ad litem under certain circumstances:

> When a minor, lunatic, idiot or non compos mentis may be a defendant to a suit and has no guardian within this state, or where such person is a party to a suit either as a plaintiff, defendant or intervener and is represented by a next friend or guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non compos mentis, the court shall appoint a guardian ad litem for such person...(Emphasis added)

1. No guardian within the state.

When such person may be a defendant to a suit and has no guardian within the State of Texas, appointment is mandatory.

2. "Adverse interest" test.

The proper test for determining whether to appoint a guardian ad litem is the "adverse interest" test. This requires a determination that there is an adverse interest between the minor and next friend or whether an adverse interest is likely to arise. *Tex. Employers Ins. Corp. v. Keenom*, 716 S.W.2d 59, 67 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e.). If the guardian or next friend is representing the minor and appears to the court to have an adverse interest to the minor, the appointment is mandatory. Under this test, a conflict is not required to have manifested itself in order for the court to appoint the guardian ad litem. The mere likelihood that a conflict may arise at some point during the proceedings is all that is necessary. *Id. See Davenport v. Garcia*, 834 S.W.2d 424 (Tex. 1992).

a. Adversity of interest is a preliminary matter to be determined by the court from the record and the evidence before it and its decision will not be disturbed in the absence of a showing of abuse of discretion. *Kennedy v. Mo. Pac. R.R. Co.*, 778 S.W.2d 552, 555 (Tex. App. -- Beaumont 1989, writ denied).

b. Where no conflict of interest between the minor and the parents is shown, the appointment of a guardian ad litem is unnecessary, and only adds to the cost of the suit. *Saad v. Nat'l Child Care Ctr.*, 612 S.W.2d 660, 661 (Tex. App. -- Houston [14th Dist.] 1981, no writ).

c. The appointment of a guardian ad litem when there is no showing of a conflict of interest between the child and the parent may constitute an abuse of discretion by the trial court. *See, Leigh v. Bishop*, 678 S.W.2d 572, 573 (Tex. App. -- Houston [14th Dist.] 1984, no writ).

d. However, the erroneous appointment of a guardian ad litem does not call for a reversal unless it is shown to have prejudiced the jury. *Hall v. Birchfield*, 718 S.W.2d 313, 319 (Tex. App. --Texarkana 1986, rev'd on other grounds).

B. When should a guardian ad litem be appointed?

There are other circumstances when it is appropriate or necessary to appoint a guardian ad litem in order to protect the interests of minors or others even though Rule 173 does not mandate such appointment.

1. Where it can be shown that the interests of the guardian ad litem are adverse to those of the child, it is an abuse of discretion for the trial judge to fail to appoint a different guardian ad litem. *Durham*, 600 S.W.2d at 758.

2. When the attorneys for an insurance carrier wish to protect their client from subsequent claims of unfairness for an inadequately represented minor, it would be wise to request the appointment of a guardian ad litem.

3. A clear conflict of interest in the attorney's representation of both the incompetent party and the next friend would warrant the appointment of an ad litem.

4. It is an abuse of discretion for the trial judge not to appoint a new guardian ad litem if the previously appointed ad litem interests are adverse to those of the child. *Durham*, 600 S.W.2d at 757.

5. The appointment of an attorney ad litem does not take the place of the requisite guardian ad litem for a minor defendant charged with being a delinquent child. *Berkley v. State*, 473 S.W.2d 346 (Tex. Civ. App. -- Fort Worth 1971, no writ).

6. Language in *Arce v. Burrow*, 997 S.W.2d 229 (Tex. 1999) may suggest that it is a breach of fiduciary duty for an attorney representing the Plaintiff to make a demand or accept and offer in a case in which the parents are suing both individually and on behalf of a child without an ad litem having been appointed.

7. The appointment of a guardian ad litem is appropriate at all stages of a case, not just the trial. *McGough v. First Court of Appeals*, 842 S.W.2d 637, 640 (Tex. 1992). (The fact that the appointment occurred post-judgment is unimportant, since a guardian ad litem may have usefulness for all stages of a case).

8. Note: Once a guardian ad litem has been discharged from a case, the trial court may appoint a second guardian ad litem if the need arises. This is not an abuse of discretion. *McGough*, 842 S.W.2d at 637.

C. <u>When should a Guardian ad litem not be appointed</u>?

1. A guardian need not be appointed where there is no possibility of conflict between a parent bringing an action solely as next friend and seeks no individual recovery whatsoever. *Saad v. Nat'l Child Care Ctr., Inc.*, 612 S.W.2d 660 (Tex. App. -- Houston [14th Dist.] 1981, no writ). <u>Note</u>, this is an academic point at best since virtually all cases will involve a parent requesting some money in an individual capacity, either as reimbursement for medical expenses incurred on behalf of the minor or for lost wages, attorney's fees, etc. However, the Corpus Christi Court of Appeals recently held that when a parent or next friend has specifically disclaimed any and all portions of the settlement agreement, but is still seeking attorney's fees, no conflict exists and it is an abuse of discretion to appoint an ad litem. *McAllen Medical Center v. Rivera*, 89 S.W.3d 90, 95-96 (Tex. App. – Corpus Christi 2002,

2. The supporting authority for cases holding it to be an abuse of discretion to appoint a guardian ad litem where there is no possibility of conflict is *Newman v. King*, 433 S.W.2d 420 (Tex. 1968). This was an appeal from a name change order. The Supreme Court held that it was not fundamental error (father failed to object to absence of ad litem at trial level) for an order to be entered which affects a minor without an ad litem.

3. *Newman* has been cited for the proposition that it is an abuse of discretion to appoint an ad litem where there is no direct conflict. *Leigh v. Bishop*, 678 S.W.2d 572 (Tex. App. -- Houston [14th Dist.] 1984, no writ).

4. Where the parents of minors were no longer seeking either individual recovery or expense reimbursement because of a settlement agreement, the removal of guardian ad litem was not an abuse of discretion. No conflict of interest was present between the parents and children. *Davenport v. Garcia*, 834 S.W.2d 4, 24 (Tex. 1992).

5. When the conflict of interest between the minor and the next friend ceases, the trial court should remove the guardian at litem. *Estate of Catlin v. General Motors Corp., 936 S.W.2d 447, 452 (Tex. App. --Houston [14th Dist.] 1996, no writ).*

6. The Corpus Christi Court of Appeals recently ruled that it was not error for a trial judge to appoint numerous ad litems to protect the interests of children whose parents sought no individual recovery. The opinion, regrettably, does not set out these facts as clearly as the briefs filed by the parties do. In any event, the case settled after the Supreme Court granted Writ of Error, so the case may well have limited authority. See *Bleeker v. Villarreal*, 941 S.W.2d 163 (Tex. App. --Corpus Christi 1996; writ granted, order withdrawn; Dism Agr.)

D. <u>What is the effect of the failure to appoint a guardian ad litem</u>?

1. The judgment as it applies to the minor child is voidable, but not void. *Kelly v. Kelly*, 178 S.W. 686 (Tex. App. --Galveston 1915, no writ); *Jaynes v. Lee*, 306 S.W.2d 182, 184 (Tex. App. -- Texarkana 1957, no writ); *Hungate v. Hungate*, 531 S.W.2d 650 (Tex. Civ. App. -- El Paso 1975, no writ); *Cook v. Winters*, 645 F. Supp. 158 (S.D. Tex. 1986).

2. Where a judgment is entered that affects a child, in which a child is either plaintiff or defendant, the child need only file a motion showing that judgment was rendered for or against him without the presence of an ad litem; then the judgment should be set aside. *Brown v. State Farm Mut. Auto Ins.*, 449 S.W.2d 93 (Tex. Civ. App. -- Fort Worth 1969, no writ).

3. Such a judgment is voidable, even where the judgment is otherwise final. *Id.*

4. Defense counsel should note that indemnification agreements, which parents are asked to sign, are only as good as the credit-worthiness of the parents.

5. In life insurance interpleader situations (e.g. mommy kills daddy, arguably in self-defense), minor children must be represented by an ad litem. If an ad litem is not

appointed prior to the time money is interpled into the registry of the court, the life insurance company will not be discharged.

6. If a minor plaintiff is awarded a sum in a judgment not approved by a guardian ad litem, and if the minor later moves to set aside the judgment, the defendant will be given a credit for any monies paid to the minor pursuant to the voided judgment.

E. Federal Court Proceedings

In proceedings in Federal Court, the appointment of a guardian ad litem is mandated by FED. R. CIV. P. 17(c), which states:

> The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

III. WHAT SHOULD A GUARDIAN AD LITEM DO AFTER BEING APPOINTED?

A. This obviously depends upon what stage in the proceedings you have been appointed and what you believe the probable outcome of the case will be.

B. Case evaluation and preparation by the ad litem.

1. The guardian ad litem should evaluate the case from the point of view of the child.

2. In order for the guardian ad litem to determine which course of conduct best serves the interest of their respective clients, they must obtain clear and comprehensive information from all available sources.

   a. This includes meeting with the minor and developing a comfortable rapport with him/her in order to assess the surrounding circumstances and needs of the minor.

   b. The relevant factors which must be considered are: (1) the minor's mental state; (2) seriousness of the injury; (3) parental influence; (4) stability of the home environment; and (5) the likelihood of a favorable outcome.

3. The guardian ad litem should raise issues of concern rather than simply responding to the matters presented to him.

4. A full awareness of the preparation and strategies of the attorneys involved as well as all of the court's scheduling and docket control orders is also necessary.

5. Usually, the appointment of an ad litem precedes either imminent settlement or imminent trial of a case, and time is usually of the essence. If trial is too imminent,

do not hesitate to seek a continuance to give you adequate time to evaluate the case and participate meaningfully (e.g. file a response to a motion for summary judgment).

6. If the nature of a minor's claim for personal injury damages is damages sustained directly by the child, an appropriate point of departure is to obtain as quickly as possible a complete set of medical records in the case.

C. If a settlement has been negotiated prior to your appointment, you should make a full and complete review of the liability facts and the damage facts to ascertain the reasonableness of the settlement.

1. On liability facts, always weigh the inability of a child (particularly a very young child) to articulate what might have happened at the scene of the accident. In the absence of third-party testimony, liability can be very difficult to prove.

2. On damage questions, however, juries will often be very sympathetic to a minor, even when a minor cannot articulate damage facts.

3. If proper, determine the amount of net proceeds the child will receive after payment of bills, attorney’s fees, etc.

4. In general, any claim of the child should be evaluated in light of liability problems and the child's damages, and whether the child's settlement is likely to afford the child as much or more than the child would receive in net proceeds in the event of a trial.

D. Promotion of settlement.

1. Often the avoidance of a courtroom trial through settlement can be in the best interest of the minor.

2. Broadly stated, there are three reasons why a civil lawsuit cannot be resolved prior to trial: (1) one of the attorneys is incorrectly evaluating a case; (2) lawyers have become personally entangled with each other and want a trial to vindicate their side of hard feelings that have built up; (3) a client is incorrectly evaluating the case over the objections and despite the entreaties of an attorney. An ad litem doing his or her job, because of the unique position in the case, can often help with any of these problems.

3. One of the greatest criticisms of the appointment of guardians ad litem in civil cases is that they are often seen as being co-counsel for the plaintiff. The guardian ad litem who enters a case seeing it as their job to be a caddie and spear carrier for the plaintiff's lawyer is asking for a legal malpractice suit, especially if a settlement offer is turned down that is substantially more than any recovery ultimately obtained by a jury verdict.

4. Soon after completing the evaluation of the case, a good guardian ad litem should learn the amount of any pending settlement offer. If a case is not settled because a plaintiff's lawyer is over-evaluating a case, the objective viewpoint of a lawyer new to the case, with knowledge of the facts, may help prevent a trial that cannot reasonably afford the minor a better monetary judgment than the settlement offer.

5. Another common reason for settlement negotiations to break down is that an attorney representing the defendant is underestimating the settlement value of the case. Since the ad litem is perceived by many to be the eyes and ears of the court, a good ad litem will take advantage of that position to settle the case.

6. For smaller cases, a guardian ad litem can use the possibility that the guardian ad litem's fee will be assessed against the defendant as a factor in raising the "cost of defense" argument to raise a defendant's settlement offer.

7. Far too often, a client's expectations of the result of a case have been so overblown that, even in the face their attorney's recommendations, all settlement offers are turned down and a case goes to trial. A professional guardian ad litem will, in these circumstances, use their position in a case to prompt or force settlement.

    a. Occasionally, parents will turn down an otherwise acceptable settlement offer because they want to go to court to prove their case "as a matter of principle." Since the role of the guardian ad litem is to look out for the child's best interest, and the child will probably not acquire as much benefit from "principles" as by money, an ad litem in this situation should request permission to confer with the parents separately from their attorney.

    b. Please remember that the appointment of a guardian ad litem presupposes the existence of a conflict of interest between the parents and their child. If "principles" are preventing settlement of the child's portion of the case, the existence of that conflict is very real. The guardian ad litem's ethical duty in such an event is to diligently represent his or her client even against the client's parent.

8. Far more often than most of us realize or would care to admit, a case does not settle because the attorneys have, in the course of litigation, come to hate each other's guts. The ad litem can serve as a perfect sounding board and intermediary between lawyers whose personal animosities have stopped them from properly and ethically representing their client.

9. One of the most difficult decisions the guardian ad litem will have to make is whether it is in their clients' best interests to accept far less than the insurance policy limits for the settlement of their clients' devastating injuries or risk trial judgment in hopes of a greater award.

10. Frequently, an ad litem will be appointed only after a case is settled and the details of a structured settlement have been determined. While disturbing the settlement is seldom tasteful, an ad litem should not blindly accept a settlement unless certain that the settlement is proper both in its amount (the current cash value of the settlement), and in the details of the structures (e.g., since punitive damages are taxable, the ad litem should nonsuit any claim for punitive damages before settlement).

11. Investment of Minor's Funds.

a. Before the settlement agreement becomes final, the guardian ad litem should assist in determining what should be done to invest the minor's settlement funds. There are only four choices:

(1) The funds can be deposited in the court registry.

(2) A guardianship of the estate of the minor can be created.

(3) A "structured settlement", or annuity, can be purchased.

(4) A "142 Trust under § 142 of the Texas Property Code can be established.

b. It should be noted that each of these options has its own advantages and disadvantages and the choice should be made according to the circumstances of the case with the ad litem's full understanding of the minor's needs (e.g., periodic payments made through an annuity are tax-free).

E. Section 142 of the Texas Property Code

1. Section 142.001(a) permits a trial court to order the investment of funds accruing to a minor or incapacitated person under a judgment only if the following conditions are met:

(1) the minor or incapacitated person is represented by a next friend; (2) the next friend makes an application to the trial court; and (3) the trial court conducts a hearing.

2. Section 142.001(a) does not give the trial court the authority to order an annuity to be purchased from a specific company for a minor represented by an ad litem. *McGough v. First Court of Appeals*, 842 S.W.2d 637 (Tex. 1992).

3. The following mandatory provisions are provided in TEX. PROP. CODE ANN. § 142.005(b) (Vernon 1992):

a. the minor must be the sole beneficiary of the trust. Thus, a separate trust must be created for each settling minor;

b. the trustee may disburse amounts of the trust's principal, income, or both as the trustee in his sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary;

c. any income not disbursed is added to the principal;

d. in the case of a minor, the trust must terminate on the minor's death, a date provided in the trust, or the minor's 25th birthday, whichever occurs first. A trust for an incapacitated person will terminate upon death or the person's regaining capacity;

e. the trustee serves without bond;

f. the trustee receives reasonable compensation paid from the trust.

4. § 142.005(c) states that a trust established under this section may provide that:

a. distributions may be made as the beneficiary attains certain ages at designated percentages of the principal;

b. distributions may be made to legal guardian or directly for the benefit of the beneficiary without intervention from any legal guardian or other legal representative of the beneficiary.

5. <u>Advantages</u>

a. A trust under these provisions provides maximum flexibility for the use and distribution of the settlement funds, both before and after the minor reaches the age of majority. Thus, ensuring that the best interests of the child may be provided for.

b. As the interest rises, the income from the trust also rises, unlike a structured settlement with a locked rate.

c. The funds may be used to provide for certain benefits such as education or health costs which the parents would otherwise not have the financial ability to afford.

d. The court will maintain supervision over the trust until termination.

6. Disadvantages.

a. Appropriate limitations should be provided in the trust to ensure that the trustee's investment authority will not be abused.

b. The high cost of attorney's fees and trust fees will prevent trustees from taking trusts with relatively small trust principals.

c. Unscrupulous parents may obtain finances today, when that money would better serve the minor in the future.

F. Evaluation of "policy limit" cases - what to do when a defendant has offered policy limits.

1. Always investigate the credit-worthiness of the defendant and evaluate his ability to pay a judgment now, and his probable ability to pay a judgment in the future.

2. At the very least, check the deed records for non-exempt real property and ascertain the defendant's occupation. While this is not an absolute determination of the inability of the defendant to satisfy a judgment, it may avoid an allegation of negligence against you.

3. Always get a copy of the insurance policy setting out the policy limits and introduce it into evidence at the minor's settlement hearing.

4. If a minor child is being asked to take less than he would likely recover in the event of a trial due to the defendant's policy limits, all other parties should be expected to take proportionate reductions in their recoveries.

5. Make sure the plaintiffs thoroughly understand the nature of insurance and the concept of exempt property.

G. Apportioning damages between parents and children.

1. Remember this general rule: If the case were to be tried, what would a jury be likely to award the parents as opposed to the children? In a settlement, an award to children should be approximate in proportion to what a jury is likely to award.

2. The collateral source rule does not apply to determining a parent's share of damages against his own child.

a. Where a parent's medical insurance has provided reimbursement to the parent for medical expenses incurred by the child, it is relevant and admissible to determine what amount of money to the parent is actually out of pocket.

b. Always obtain complete bills before allowing a parent to take a proportion of a settlement as reimbursement of medical expenses for a child.

c. If necessary, do not be afraid to subpoena hospital records, billing clerks, health insurance companies' records, etc. to determine what sums of money a parent is actually out of pocket for expenses incurred on behalf of his child.

3. Health insurance premiums paid by a parent on behalf of a child are not reimbursable from the minor's share of settlement proceeds.

H. When you determine that, for whatever reason, a particular proposed settlement is not appropriate, you should file pleadings seeking relief for the child. If appropriate, a *Stowers* letter should be sent to the defendant's attorney.

I. Filing a petition seeking affirmative relief and becoming the representative of the child to the defendant might spare your minor client what befell the minors in *Howell v. Fifth Court of Appeals,* 689 S.W.2d 396 (Tex. 1985). In this case, a guardian ad litem objected to a proposed settlement in a Dallas County action. Shortly thereafter, the plaintiff and defendant filed a friendly suit in neighboring Tarrant County without telling the ad litem. After it was final, the plaintiff filed a nonsuit in the Dallas County action. The Dallas trial judge refused to sign the nonsuit order. The Texas Supreme Court held that since the Tarrant County suit was final and binding, the trial judge had a ministerial duty to sign the nonsuit. (Read the three-judge dissent. With slightly more prompt order signing and with affirmative pleadings, the result might change.)

IV. CONFLICTS BETWEEN CHILDREN AND PARENTS, AND BETWEEN CHILDREN

A. Dividing sums in a personal injury case.

1. The most reasonable rule of thumb in dividing a settlement is to determine total medical bills charged to each plaintiff, make sure they are related to the accident and necessary for injuries, and proportional total net proceeds according to the medical bills.

2. Be sure to factor future probable pain and suffering in order to increase or decrease damages to be paid to a minor.

3. Where medical evidence clearly calls for immediate or short-term medical treatment for the minor, it is appropriate to award the parents additional sums out of a settlement amount for payment of future medical expenses. On the other hand, if the child's injuries will continue to be covered by the parent's medical policy, there is no need to set aside any money for that purpose. It remains the common law and statutory duty of the parents to provide for their child's medical needs.

4. Do not lose sight of the best interest of the child in your attempts to maximize the child's award. If, for example, a child is rendered a paraplegic or will be in a wheelchair for an indefinite period of time, it might be appropriate, and would be in the child's best interest, to allow the parents to purchase from the proceeds of the settlement a van with wheelchair lifts to enable the child to live a more active life.

B. Purely intangible divisions -- death cases.

1. In representing a child's or children's interests in a death case, you have no "hard" damages to help you proportion an award among plaintiffs.

2. Please keep in mind that a surviving parent or grandparent will have the duty to support the child until the child's eighteenth birthday. At the same time, unless a parent's portion of the settlement is structured, there is no assurance that the award will by available more than a few months after the case is settled to help the surviving parent raise the child.

3. The point of departure in any such analysis should be the nature of the surviving parent's relationship with the deceased. if it was a particularly close one, an award of up to 60% of net proceeds is appropriate. Where the surviving spouse was separated, obviously the claim of a surviving spouse for companionship damages should be limited, if not eliminated.

4. Remember the general rule: Approximate how a judge or jury would proportion damages in the event of a trial. Remember also that your appointment as guardian ad litem presupposes the existence of a conflict of interest. Where sums of money are being divided between a parent and a child in the case with few "hard" damages, that conflict is very real.

5. Where grandparents, sisters, brothers, etc. are making claims for loss of a loved one, and those interests are adverse to your client's interest, proportion their loss of companionship, friendship, etc. with the somewhat greater damages suffered by a child over the loss of a parent.

V. PLACING FUNDS INTO THE REGISTRY OF THE COURT

A. Once a simple procedure, the deregulation of banks, savings and loans, the advent of other options, and bank closures, have made placing funds into the registry of the court an increasingly troublesome matter

B. Placing funds into the registry of the court.

1. The Harris County Clerk's Office will not accept minor's funds unless the checks are certified. Note: This applies to insurance company checks as well.

2. The District or County Clerk should not accept funds into the registry until after the final judgment has been signed.

C. Redepositing monies.

1. In most minor settlement cases, a relatively small amount of money is being placed into the registry of the court, there to remain until the child's eighteenth birthday. The child is entitled to receive interest in that amount as long as it remains in the court's registry.

2. Regardless of whether money is redeposited into an interest bearing account, a motion and order will have to be filed after the child's eighteenth birthday, or upon emancipation, for the money to be withdrawn.

2. The Harris County District Clerk's Office will not allow interest to accrue on funds without the social security number of the child being disclosed. (exception: where a child is a foreign national, no social security number is required. However, thirty percent (30%) of all interest earned will be paid by the bank to the IRS until the money is withdrawn.)

3. If the minor is not a citizen of the United States, or for whatever other reason does not have a Social Security Number, money should only be deposited into the registry of the court under unusual circumstances, since the IRS will automatically be sent 30% of the interest. It would be difficult to imagine the argument in which this is in the best interest of the minor.

VI. THE MINOR'S SETTLEMENT HEARING

A. The days when a guardian ad litem could afford to have his first contact with the plaintiff and learn whatever he needed to know about a case the morning of the minor settlement hearing are long since gone (if they were ever here). Any guardian ad litem whose entire involvement in a case involves thirty minutes of meeting the plaintiffs and reviewing the court's file prior to the hearing is asking for a legal malpractice suit.

B. It is important that the next friend be informed of what questions they are likely to be asked at the time of the hearing. Among the questions you should make sure the parents know they will be asked are the following:

1. Do they understand the basic terms of the settlement, including the net amount they will receive and the net amount the minor child will receive?

2. Do they understand that they have a fee contract paying a contingent fee to their attorney?

3. Do they understand if the court accepts the settlement that they and the child will be forever foreclosed from bringing another lawsuit for damages?

4. Do they understand that a jury or judge could award them more money, less money, or no money at all?

5. Where appropriate) Do they understand the significance of policy limits in a case?

6. Do the parents understand they will be responsible, out of their portion of the settlement, for future medical expenses the child may incur as a result of the incident made the subject of the suit?

7. Do you believe settlement of the case is in the best interest of the minor child?

C. What the ad litem should do during a hearing.

1. Always request a record. Please remember that the child has the right to sue you, the ad litem, until his or her 20th birthday.

2. Try to demonstrate some knowledge of liability and damage facts on the record, again to protect yourself from liability.

3. Be prepared to introduce into the record appropriate documents. For example, where a child has been released from future medical treatment by a physician, have a copy of the medical narrative introduced into the record as an ad litem's exhibit.

4. Ask the court reporter to place his notes in the District Clerk's files (which are retained forever) rather than his personal files (which he is free to burn after three years). If a court reporter will not do that, file a motion to perpetuate the record, and ask that the judge of the court order the court reporter to file his notes with the records of the District Clerk.

VII. ANNUITIES AND STRUCTURES

A. Increasing numbers of settlements in recent years have been structured -- that is, plaintiffs received payments over time.

1. The Structured Settlement Act of 1984 encourages this, by making the "increased value" of the money received by a defendant over and above the market value of an annuity at the time of the settlement, tax free for purposes of income.

2. Another advantage of structured settlements is that plaintiffs are protected from their own wasteful tendencies. Monies are paid to the plaintiffs over time in a pre-set schedule.

3. Proper use of structured settlement enables you to allow a minor plaintiff to receive money in the future as you expect he will need it, (e.g. some money for college, some money with which to buy a car, or some money with which to buy a house). Where you anticipate continuing medical treatment for years into the future (e.g. for a paraplegic) or where a child's future earning capacity is expected to be diminished because of an injury, a monthly annuity would be appropriate.

4. When long-term monthly annuities are employed, it is usually better to include a clause calling for increases over time, in order to help the recipient keep up with inflation.

5. When a structured settlement is submitted to you as ad litem at the time of your appointment, always determine either the market value of the annuity in current dollars, or if possible, ascertain the purchase price of the annuity. Evaluate the case not in dollars to be paid in the future, but if the current value of the annuity approximates what the child would receive from a jury.

6. NOTE: the trial court cannot force a guardian ad litem to make application for the purchase of an annuity or order such an investment sua sponte. *McGough v. First Court of Appeals*, 842 S.W.2d 637, 640 (Tex. 1992).

6. In *Woodfin v. Coleman*, 931 S.W.2d 383 (Tex. App. --Austin 1996), a annuity was purchased as a part of a settlement. The terms of the settlement approved by the ad litem and the Plaintiff's attorney stated that the payments terminated on the death of the beneficiary. After the minor died intestate, the child's father, who was not a party to the underlying suit, sued to recover the value of the annuity as a statutory heir of the deceased minor. The court held termination on death provisions valid, and ruled the suit an impermissible collateral attack on a final settlement, since the annuity had been approved by a guardian ad litem.

7. The 2003 session of the Texas Legislature changed the nature of structures in post-verdict structures by adding Section 74.503 to the Civil Practice and Remedies Code. The section requires a court, at the request of a defendant health care provider (or claimant) to require that future damages be paid over time. Significantly, if a beneficiary of future damages over time dies, Section 74.506 requires that all benefits, except loss of future earnings, revert to the Defendant. No case has yet gone to trial (or appeal) in which this statute has been applicable. The details of its operation will be the subject of work for careful ad litems and Plaintiff attorneys.

B. <u>Determination of attorney's fees in structured settlement cases.</u>

1. It is axiomatic (but not apparent to all attorneys) the attorney may not receive in current dollars a contracted contingent percentage of future dollars. In other words,

if the settlement calls for $50,000.00 to be paid at the time of settlement and $10,000 annually for ten years, an attorney receiving one third of the amount of settlement is not entitled to all of the "up front" money, since the current market value of the structured portion of the settlement is substantially below $150,000.00.

2. Unfortunately, an Internal Revenue Service regulation states that if a person is in "constructive receipt" of proceeds of a structured settlement, the increased value of the structure is taxed to him, if the parents know of the purchase price of the annuity. Assuming this interpretation is correct, where the defendant insurance company refused to disclose the purchase price of the annuity, the guardian ad litem should then obtain an actuarial analysis to determine the current market value of the proposed structure.

3. In federal court, more independence has been given trial judges to set attorney's fees in contingent fee cases involving minors. In *Hoffert v. Gen. Motors*, 656 F.2d 161 (5th Cir. 1981), the Fifth Circuit upheld the action of a trial court in reducing a contingent fee from one-third to one-fifth, even where the ad litem made no objection to the proposed one-third fee. The court based its decision on the equitable powers of a court to supervise contingent attorney's fees under the Code of Professional Responsibility, EC 2-20; DR 2-106.

4. The awarding and amount of fees depends on the discretion of the trial judge. *Pharo v. Trice*, 711 S.W.2d 282 (Tex. App.--Dallas 1986, no writ).

5. A trial court's award of fees is reversible is an abuse of discretion is apparent from the record. *Alford v. Whaley*, 794 S.W.2d 800 (Tex. App.--Houston [1st Dist.] 1978, no writ). In this case, a guardian ad litem was granted $25,000 by the trial court. The record showed that the guardian's hourly rate was $150.00. She spent 90 hours working on the case. The Court of Appeals reduced the original award to $13,500 which reflected the true product of (hours worked x hourly rate).

C. Always ascertain and place in the record the Best Rating of the insurance company selected to fund the annuity. The A.M. Best Company rates every insurance company on the basis of quality and strength of reserves. As a general rule, companies of lesser quality will pay a slightly better return (of course, there is no assurance that Mutual of Muskogee will be around in fifteen years to fund your client's annuity). Most language guaranteeing that payment of the settlement amount by the defendant to the annuity company releases the defendant. If the annuity company selected subsequently goes under, the only "deep pocket" left to sue might be the plaintiff attorney and guardian ad litem.

VIII. ADVANTAGES OF STRUCTURED SETTLEMENTS

A. There are practical advantages to structuring settlements.

1. Structured settlements are particularly effective in personal injury lawsuits where the plaintiff may want (or be better off with) monthly payments for life, a medical fund, a college fund, or a custodial fund.

2. A settlement agreement might provide for one lump sum payment to defray current medical expenses and attorneys fees, and then provide for either monthly payments or regular large payments payable every one, two, or three years.

3. One suggestion is to provide for a guaranteed number of payments payable to a beneficiary so that the death of the minor or legally disabled will not result in a lesser total being paid. Any additional guaranteed payments to a beneficiary or heir may be made payable all at once or spread over time.

B. The tax consequences of structured settlements.

1. The total tax burden created by a $100,000.00 payment spread into five equal installments over five years will normally be substantially less than the tax burden on the payment if it is all received and taxable in one year. (The ad litem may wish to ask for some compensation for the time-use of the money.)

2. Arrangements can be made in the settlement of personal injury actions that provide for tax-free periodic payments. IRC § 104(a)(2). Three revenue rulings have confirmed this tax-free treatment of personal injury awards.

   a. In one case, the U.S. government established a trust for the purpose of paying medical bills under a settlement agreement arising out of a personal injury suit against the government. Rev. Rul. 77-230, 1977-2 CB 214.

   b. In another personal injury case, the plaintiff accepted an insurance company's offer of a lump sum of $8,000 and $250 per month for life or twenty years, whichever is longer, with the payments to be made to his estate if he died before the end of twenty years. The defendant insurance company purchased an annuity contract from another insurance company in order to provide the monthly payments. Although the second insurance company was to make the payments directly to the plaintiff, the defendant insurance company maintained all ownership rights in the contract, including the right to change the beneficiary, and the plaintiff was to rely on the defendant insurance company's credit for their collection. Under these circumstances, the IRS ruled that the full amount of the monthly payments the plaintiff receives, not the discounted present value, are excludable from gross income under IRC § 104(a)(2). The IRS also ruled that if the taxpayer died before the end of twenty years, any payments made to his estate would also be excludable. Rev. Rul. 79-220, 1979-2 CB 74.

   c. In a suit where the settlement called for the defendant insurance company to make annual payments to the plaintiff for twenty years, with each payment to be 5% higher than the payment for the preceding year, the IRS deemed these payments to be tax-free. The commissioner reasoned that the payments are received through a settlement in lieu of a prosecution of an action based on tort rights. The IRS pointed out that the plaintiff could not increase, decrease, or accelerate the amount of any payment. In addition, the insurance company was not required to set aside any specific assets to secure any part of its obligation, and the plaintiff's rights against the insurance company were only those of a general creditor. Rev. Rul. 79-313, 1979-2 CB 75.

   d. If the funds involved do not arise from a personal injury case (i.e. probate case), a portion of a monthly annuity payment is excludable from gross income. The excludable portion of each monthly payment is found by

multiplying the amount of monthly payment, not including any cost of living increase, by the monthly annuity exclusion ratio based on the monthly receivable as of the annuity starting date. The exclusion ratio is applicable to monthly payments received before and after a lump sum payment is received. A portion of a lump sum credit is also excludable from gross income under 1.72-11(f) of Federal Income Tax Regulations.

3. Tax advantages provided by the Periodic Payment Settlement Act.

a. The Periodic Payment Settlement Act of 1982, P.L. 97-473: IRC § 104(a)(2), confirmed that an injured plaintiff may, under certain conditions, receive a full settlement in a personal injury suit tax-free. This Act provides for uniform exclusion from gross income of settlement payments for personal injury recoveries, regardless of whether they were received as a lump sum or an installment basis over a period of time. This Act also added § 130 to provide rules governing the practice of assigning the defendant's payment liability to a third party.

b. Under § 130(a) of the Periodic Settlement Act, if a defendant pays an insurance annuity company, or other qualified assignee for assuming its liability to pay an injured plaintiff, the amount received by the assignee is not included as gross income to the extent that it does not exceed the aggregate cost of any "qualified funding asset".

IX. THE ROLE OF THE ATTORNEY AD LITEM

A. An attorney ad litem is usually appointed where a person cannot be served with citation and no other means of service is not likely give the defendant notice. TEX. R. CIV. P. 244.

B. An attorney ad litem can also be appointed to represent the interests of a minor child, such as in the case of juvenile delinquency (This representation is a Constitutional right.), *In Re Gault*, 387 U.S. 1 (1967), or divorce-custody proceedings.

C. An attorney ad litem in such a situation has two duties:

1. To make sure that a good faith effort has been made to attempt to locate the defendant cited by publication; and

2. To ascertain any possible defenses that person would have. *Anderson v. Anderson*, 698 S.W.2d 397 (Tex. App. -- Houston [14th Dist.] 1985, writ dism'd w.o.j.).

3. Pursue the wishes of the child, even though minors lack the experience and knowledge to avoid detrimental choices. It is the role of the judge to decide the what is in the best interest of the minor and ultimately protect their welfare. ROBYN-MARIE LYON, SPEAKING FOR A CHILD: THE ROLE OF INDEPENDENT

COUNSEL FOR MINORS, 75 CALIF. L. REV. 681 (1987). The adversarial process is undermined if a client's attorney too greatly influences the proceedings with personal judgments.

D. An attorney ad litem's point of departure is to ask the plaintiff seeking a judgment against an absent defendant what efforts he has made to locate the defendant and what clues he might have as to the whereabouts of the defendant.

1. Most plaintiff's lawyers will give you run of their file to help you uncover any possible clue as to the whereabouts of the defendant.

2. Where a plaintiff is uncooperative, undertake formal discovery to unearth all efforts made by the plaintiff to attempt to locate the defendant.

E. <u>An attorney ad litem should make an independent effort to attempt to locate the defendant.</u>

1. The extent to which you should try to locate a defendant obviously depends on facts of the case, the likelihood of succeeding, and the last known contact with the defendant.

2. In addition to a thorough examination of the plaintiff's records, checking telephone books, deed records, voter registration lists, and utility records in any county in which the defendant was known to have resided can very often be successful.

3. Where a plaintiff is seeking a judgment against the defendant to foreclose on real property, a visit to the property will often be successful in finding someone who knows the whereabouts of the defendant.

4. It is <u>not</u> the job of the attorney ad litem to play private investigator, but merely to make sure that the defendant cannot easily be found.

F. <u>Raising a defense for the defendant</u>

1. Determine if the plaintiff's cause of action is barred, in whole or in part, by any properly pled affirmative defenses, limitations, etc...

2. Be sure the plaintiff is able to put on a <u>prima facie</u> case. If a <u>prima facie</u> case is not made, be sure you have made a record noting that you did not think one had been made and asking for dismissal.

3. Be sure a statement of facts is presented to the court in conjunction with the judgment. TEX. R. CIV. P. 812.

4. If you subsequently find the defendant, remember the court retains jurisdiction over defendants cited by publication for two years after the date the judgment is signed.

G. Remember, ex parte communication is no different for an ad litem than for any other attorney in any other case. It is inappropriate. Canon 3(A)(5) of the Code of Judicial Conduct, as presently written, prohibits such communications. This applies to both attorneys ad litem and guardians ad litem.

X. DETERMINATION OF AN AD LITEM FEE

A. A guardian ad litem is an officer of the court and cannot be denied a reasonable fee on the outcome of trial. In *Alford v. Whaley* the court explained, "[a] guardian ad litem must be paid a reasonable fee win or lose. *See* Tex.R.Civ.P. 173. A trial judge cannot refuse to award a reasonable fee, based on the result of trial." 794 S.W.2d 920, 925-26 (Tex. App. -- Houston [1st Dist.] 1990, no writ).

B. When determining the reasonableness of the fee, "the court must recognize that the guardian ad litem is required to participate in the case to the extent necessary to adequately protect the ward." *Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 646 (Tex. App. - Tyler 1993).

C. The courts recognize and support the policy that the guardian ad litem should be reasonably sure of receiving a fee for their services. *Dover Elevator Co. v. Servellon*, 876 S.W.2d 166, 171 (Tex. App. -- Dallas 1993) (citing *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992)). A guardian ad litem appointed to protect the interests of a minor is a cost incurred by the party or parties who made the appointment necessary and "no part of the fee should be taxed against other parties to the suit unless facts or circumstances are shown by the record from which it clearly appears that he or they should, in fairness, be required to pay all or part of the fee." *Interest of Cassey D.*, 783 S.W. 2d 592, 597 (Tex. App. -- Houston [1st Dist.] 1990) (citing *Dawson v. Garcia*, 666 S.W.2d at 265).

The general rule requires guardian ad litem fees be assessed against the losing party, however, "[t]he court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." *Dover Elevator Co. v. Servellon*, 812 S.W.2d 366 (Tex. App. -- Dallas 1991) (citing TEX R. CIV. P. 141).

A showing that no one other than the prevailing party is available to pay the attorney ad litem fees is good cause for assessing fees against the successful parties. *Rhodes v. Cahill*, 802 S.W.2d 643 (Tex. 1990). However, good cause is not established when a prior settlement is available for the payment of the guardian ad litem fees. Dover *Elevator Co. v. Servellon*, 876 S.W.2d at 171. The structuring of "a settlement agreement in such a manner hat the funds are placed in an investment allegedly 'unreachable' for the payment of the guardian ad litem fees does not create 'good cause' under [Texas Civil Procedure] Rule 141." *Id.*

D. A trial court's discretion to award an ad litem fee is **not** unbridled. *Simon v. York Crane and Rigging Co.*, 739 S.W.2d 793, 794 (Tex. 1987). The test is whether the trial court's decision was reasonable. *Alfred v. Whaley*, 794 S.W.2d 920 (Tex. App. -- Houston, [1st Dist.] 1990, no writ). Oral testimony as to the reasonableness of a fee is helpful, but

standing alone, "testimony that a certain fee was 'normal and customary' does not necessarily make it 'reasonable.'" *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 15 (Tex. App. --El Paso 1990).

E. Ideally, these should be agreed between the parties. To avoid disputes with the attorney for the party paying your fee, it is a good idea to maintain detailed time and expense records, and be able to offer detailed evidence to substantiate your fees. If you fail to include some of your expenses in the record and order you will not get them. For a sad tale of an ad litem who diligently put in uncompensated time and unreimbursed expenses on behalf of a minor, see *Sever v. Massachusetts Mutual Life Insurance Co.*, 944 S.W.2d 486 (Tex. App. --Amarillo 1997).

F. A trial court may not void or reform a referral fee agreement between lawyers when the court has no jurisdiction over one of the attorneys who is a party to the agreement in the absence of notice to that reduction to the referring lawyer. This is true even where minor plaintiffs are involved. *Vance v. Davidson*, 903 S.W.2d 863 (Tex. App. - Houston[14th Dist.] 1995, orig. proceeding). The question of whether a trial judge may reduce a health care providers recovery from a minor's settlement remains unanswered. In light of language in the *Vance* opinion, if an ad litem is going to ask a court to limit an unconscionable fee from a health care provider, it is probably the better practice to give formal notice of the minor settlement hearing to any such person.

G. Courts have very wide discretion over the amount of the ad litem fee. *Pratt v. Tex. Dept. of Human Resources*, 614 S.W.2d 490, 496 (Tex. App. -- Amarillo 1981, writ ref'd n.r.e.). Appellate courts should not and generally do not disturb the award of an ad litem fee unless it is a clear abuse of discretion. *Cypress Creek Util. Serv. Co. v. Mueller*, 640 S.W.2d 860 (Tex. 1982). "If there is no evidence and insufficient evidence to support the award, there has been an abuse of discretion." *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 16 (Tex. App. --El Paso 1990, no writ). The burden of bringing forth facts is on the party asserting that the fee is unreasonable. *Dover Elevator Co. v. Servellon*, 812 S.W.2d 366 (Tex. App. -- Dallas 1991, no writ).

H. Some appellate courts have become further involved in determining what is a reasonable ad litem fee. For example, a fee of 15-18% of the plaintiff's recovery has been allowed as reasonable. *Valley Coca Cola Bottling Co., v. Molina*, 818 S.W.2d 146, 149 (Tex. App. -- Corpus Christi 1991). The court in *Alford v. Whaley*, 794 S.W.2d 920 (Tex. App. -- Houston [1st Dist.] 1990) stated that in order to be reasonable, the fee should be equivalent to the customary hourly rate for attorneys. That ad litems are to receive roughly 2-3% of the recovery is an inaccurate "rule of thumb", and would actually result in ad litem fees being to small in a majority of cases.

I. In *Simon v. York Crane and Rigging Co., Inc.*, 739 S.W.2d 793, (Tex. 1987), an award of $25,000.00 plus $12,000.00 for appeal, was granted to a guardian ad litem. The court of appeals reversed the award, holding it was based on no evidence. The Texas Supreme Court, however, upheld the award, pointing out that it was the burden of the appellant to show that the award was an abuse of discretion. Since no record was made of the hearing

in which the ad litem fee was awarded, the trial court's discretion was upheld. If no objection to a fee is made, a fee will not even be considered an abuse of discretion. *Cypress Creek Util. Serv. Co. v. Muller*, 624 S.W.2d 824 (Tex. App. -- Houston [14th Dist.] 1981).

J. An ad litem "is not paid a contingent fee but is paid a reasonable fee for the services rendered." *Executors of Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App. -- Houston [14th Dist.] 1975, writ ref'd n.r.e.). A "reasonable fee" for an ad litem is provided in TEX.R.CIV.P. 173.

K. An award of guardian ad litem fees for appeal is proper only if it is conditioned upon whether an appeal is successful. *Sever v. Massachusetts Mutual Life Insurance Co.*, 944 S.W.2d 486 (Tex. App. --Amarillo 1997).

L. When a guardian ad litem is removed prior to the rendering of final judgment, the ad litem must file an intervention in order to have standing on appeal because appellants who are not parties to final judgments may not exercise right of appeal. *Cruz v. Beza*, 2003 WL 22111106 (Tex. App. – Dallas 2003).

M. Factors used in determining an ad litem fee.

1. Generally speaking, the same factors authorized by the cannons of ethics and Texas case law for determining an attorney's fee are the factors used to determine an ad litem fee. *Parkway v. Lee*, 946 S.W.2d 580 (Tex. App. --Houston [14th Dist.] 1997)

   a. the amount of money involved in the case and the amount awarded the minor. *Vaughn v. Gunter*, 458 S.W.2d 523 (Tex. Civ. App. -- Dallas 1970, writ ref'd n.r.e.);

   b. the extent to which the efforts of the ad litem led to the settlement of the case or a result to the benefit of the child; *Phillips Petroleum v. Welch*, 702 S.W.2d 672 (Tex. App. -- Houston [14th Dist.] 1985, no writ). In this case the ad litem fee came to $357.00 per hour where testimony established that the case would not have settled had it not been for the efforts of the ad litem. In another case, the court upheld a large ad litem fee because the ad litem performed extraordinary services which resulted in a larger recovery for the minors. *Valley Coca-Cola Bottling v. Molina*, 818 S.W.2d 146 (Tex. App. -- Corpus Christi 1991, writ denied); *but see, Brownsville-Valley Regional Medical Ctr. v. Gamez*, 894 S.W.2d 753 (Tex. 1995);

   c. the necessity of the number of hours spent in representing the interests of the minor; *Id.* If an ad litem goes beyond his role, that role being protecting the interest of a child or incompetent, and assumes the duties of plaintiff's attorney he is not entitled to compensation for work done assisting or acting as plaintiff's counsel. *Roark v. Mother Frances Hospital*,

862 S.W.2d 643 (Tex. App. -- Tyler 1993). Limiting ad litem fees in this manner will not be an abuse of discretion. *Id.* This appears to be inconsistent with section (b) above, and in fact, the amount of work an ad litem can perform before he goes beyond his role is uncertain.

d. special expertise of the ad litem in a matter relevant to the case, complexity of the issues, the likelihood of future employment, the extent to which the case may have prevented the attorney from handling other matters, and future liability or exposure the case may bring the attorney are all factors the trial court may consider.

e. other factors used to determine ad litem fees can be found in the recent case of *Trimble v. Evans, 1999 Tex. App. LEXIS 9026 (Ct. of App. of Texas, Houston [First Dist.]1999)* included (1) reviewing documents relevant to the case, (2) placing telephone calls relevant to the case, (3) coordinating with the other attorneys working on the case, and (4) appearing in court on behalf of the minors. All of these tasks are duties normally associated with the functions of a guardian ad litem. *Note *Trimble* is an UNPUBLISHED OPINION.

f. To summarize, Courts generally use the same eight factors to determine the reasonableness of attorney's fees and to ascertain the appropriate guardian ad litem fee. *Borden Inc., v. Martinez 19 S.W.3d 469,*

The eight factors are referred to as the *Garcia,* factors, *988 S.W.2d 222*

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
3) the fee customarily charged in the locality for similar legal services;
4) the amount involved and the results obtained;
5) time limitations imposed by the client or by the circumstances;
6) the nature and length of the professional relationship with the client;
7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
8) and whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

2. In federal court, the court may consider these factors and more. Federal courts are given even broader discretion to determine attorney's fees. *Channel 20, Inc. v. World Wide Towers Serv.*, 607 F.Supp. 551 (S.D. Tex. 1985).

N. Time spent on case.

1. To guarantee that you will never be asked to serve as guardian ad litem again, testify to an outrageous number of hours performing your duties as guardian ad litem.

2. On the other hand, no court or defense attorney will object to you visiting a child, reviewing the medical information, reviewing the court's file, and acquiring a working knowledge of the case prior to a settlement hearing. In a more complex case or in a case with substantial damages, it is entirely appropriate to learn more about the future needs of the child, liability facts, etc. In a smaller case, one with little liability damages, it is reasonable that one's responsibilities and future liability is less, and one should adjust time spent on the file accordingly.

3. Where a case involves a field in which you have some special expertise, or where there is substantial future liability for you as ad litem, it is appropriate to raise one's hourly fee to "premium" rates.

4. A trial court may not award ad litem fees for services performed after resolution of the conflict of interest which gave rise to the appointment. *Brownsville-Valley Regional Medical Ctr., Inc. v. Gamez*, 894 S.W.2d 753 (Tex. 1995). If the trial court bases any portion of the fee award on post-litigation services, e.g., those after the trial or resolution of the conflict, it will be an abuse of the trial court's discretion. *Id.*; *Rio Grande Valley Gas Co. v. Lopez*, 907 S.W.2d 622, 625 (Tex. App. - Corpus Christi 1995); *see also Bleeker v. Villarreal*, 941 S.W.2d 163 (Tex. App. --Corpus Christi 1996).

5. In *Borden, 19 S.W.3d 469*, the Court declined to second-guess the trial court's review of the details of the guardian ad litem's billing statement to find an abuse of discretion. *Molina, 818 S.W.2d 148.* At the hearing, the guardian ad litem argued that he took the lead role in arriving at an acceptable settlement formula for all the plaintiffs and he curtailed a substantial amount of legal work to attend to the instant case. The Court noted that an attorney's degree of experience and reputation are significant components in determining the reasonableness of a fee. *Garcia, 988 S.W.2d at 222*.

XI. WHO PAYS THE GUARDIAN AD LITEM FEES?

A. The rule requires that ad litem fees, as a cost of court, be assessed against the non-prevailing party. Usually, in the context of a settlement, the defendant will pay the guardian ad litem fees, but there are times when the fees will by the successful party. Good cause has to be shown and found on the record. Mere participation in the prevailing party's case has been found, by itself, not to be good cause.. *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520 (Tex. App. --Beaumont 1996 writ denied).

Additionally, good cause will not be found on the record if the trial court simply states general notions of fairness as its reason for assessing ad litem fees against the prevailing party. *Roberts v. Williamson*, 111 S.W.3d 113, 124 (2003). Tex. R. Civ. P. 141 requires a trial court to state its reason on the record with specificity. *Id.*

B. Sometimes an attorney may be ordered to pay the guardian ad litem fees out of his or her own fees. If the attorney refuses to pay it can be considered conversion, constructive fraud, or unjust enrichment, and the attorney may be held liable for all resulting damages.. Even though, technically, the attorney is not a party to the suit, the court can constructively make the attorney a party for this purpose. *Newman v. Link*, 866 S.W.2d 721 (Tex. App. --Houston [14th Dist.] 1993. In *Estate of Catlin v. General Motors Corp.*, 936 S.W.2d 447 (Tex. App. --Houston [14th Dist.] 1996), although the plaintiff lost, an award of the guardian ad litem fees against the plaintiff's attorneys was upheld as within the trial court's discretion.

C. The determination of the amount of attorney's fees awarded to an ad litem and the assessment of those fees against a party are matters which must be adjudicated by the trial court before the clerk may tax the fees as court costs. Prior to adjudication, the court clerk has no means to determine the amount of attorney ad litem fees to tax as cost. *Tex. R. Civ. P. 244* itself requires action by the trial court by providing that the court shall allow such attorney a reasonable fee. *Cullen Center Bank & Trust v. Wonzer, 874 S.W.2d 757, 759(Tex. App. --Houston [1st Dist.] 1994, no writ).*

D. An order assessing attorney ad litem fees issued after the expiration of the trial court's plenary jurisdiction is void. A judgment nunc pro tunc cannot be used to correct judicial error. When a party appeals from a void order entered after the trial court's plenary jurisdiction expires, and no appeal is perfected from the final order in the case, the proper procedure is for the appellate court to declare the void order a nullity and dismiss the appeal for lack of jurisdiction. *Hubbard v. Williams, 1999 Tex. App. LEXIS 4391 (Ct. of App. of Texas, Dallas [5th Dist.] 2000).* *Note *Hubbard* is an UNPUBLISHED OPINION.

XII. DUTIES OF AN AD LITEM AFTER COMPLETION OF A CASE.

A. Once money is redeposited, an ad litem has no further legal responsibilities to his client, since he was only appointed for the suit. *Brownsville-Valley*, 894 S.W.2d 753 (Tex. 1995).

B. Many guardians ad litem, however, will be called upon to withdraw funds from the registry of the court for the minor after his eighteenth birthday.

C. Where a savings institution in which money was deposited has been closed, it would be appropriate for an ad litem to arrange to have the minor's funds placed into a more solvent bank or savings and loan association.

D. Should you perform any of these tasks, you should probably do it pro bono, since you cannot obligate a minor to pay you.

E. It is probably equally ethically correct to refer all such matters to the plaintiff's lawyer, who probably had a better relationship with the plaintiff anyway.

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