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OPINION COMMITTEE

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May 11, 2006

FILE # ML-44817-06

I.D. # 44817

Honorable Greg Abbott  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

Via Certified Mail 7160 3901 9848 7864 4683

**RQ-0493-GA**

Re: Interpretation of § 107 of the Texas Family Code and related matters.

Dear General Abbott:

This letter is a request for your opinion concerning the interpretation of §§ 107.011, 107.015, 107.021, and 107.023 of the Texas Family Code and other related matters. Specifically, in light of the above referenced statutes and their precursors, under what circumstances may a County be ordered/required to pay for the employment of an amicus attorney/attorney ad litem/guardian ad litem appointed by a District Court Judge of the State of Texas, upon the determination that it is necessary and in the best interest of the child, in a family law matter in which a governmental entity is *not* a party?

Background

In the hypothetical scenario at hand, non-governmental parties have appeared before a District Court in a family law matter which concerns a suit affecting a parent child relationship, in which a governmental entity does *not* have an interest. A District Court Judge determines that it is necessary to appoint an amicus attorney/attorney ad litem/guardian ad litem to represent the best interests of the child. The matter is subsequently concluded and the Court orders that the fees/costs of the amicus attorney/attorney ad litem/guardian ad litem be paid from the general fund. Typically, (except in extreme circumstances) one or both of the parents are ordered to reimburse the general fund. See representative sample of relevant court orders attached as Exhibit A. The Court, upon the initial appointment determined that the party or parties were indigent and has determined that the appointment of an amicus attorney or an attorney ad litem or a guardian ad litem is in the best interests of the child.

### Discussion of Relevant Statutes

In 1995 the authority of a court to make discretionary appointments of amicus attorneys/attorney ad litem/guardian ad litem in suits where a governmental entity was not a party was provided for under § 107.011 and § 107.015 of the Texas Family Code. Amicus attorneys/attorney ad litem/guardian ad litem who represented parties who were determined to be indigent by a court were to be paid from the general funds of the county as directed by the legislature. Texas Family Code § 107.011(c) (Vernon's 1995).

In 2003, the recodification of § 107.011 to a "new" part of the code that dealt solely with suits in which a governmental unit was not a party resulted in § 107.021 and § 107.023. In those statutes the legislature gave a Court the clear ability to appoint amicus attorneys/attorney ad litem/guardian ad litem but again only appeared to provide for the payment of those services from the parties to the litigation. It was still unclear as to who was responsible for payment of those services ordered by the court but not assessed against a party. While § 107.023 (c) stated that "[a] court may not award costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the state, a state agency, or a political subdivision of the state under this part[.]" the legislature also provided in § 107.021 (b)(3) that a court "may not require a person appointed under this section to serve without reasonable compensation for the services rendered by the person." Furthermore, all references to indigency were removed, however, a court in making the appointment was to take into consideration the "ability of the parties to pay reasonable fees to the appointee" and "balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment". Texas Family Code § 107.021(b) (2003). *See also* Texas Attorney General Opinion GA-0142 regarding the obligation of a state agency to pay for the services of an attorney ad litem appointed for a parent under section 107.013 of the Family Code.

In 2005 the legislature passed revisions to § 107.021 and § 107.023 which appear on their face to conflict with previously passed provisions. Specifically, § 107.023 (d) states that "the court may determine that fees awarded under this subchapter to an amicus attorney, an attorney ad litem for the child, or a guardian ad litem for the child are necessities for the benefit of the child" and § 107.021 (a-1) states "[I]n a suit requesting termination of the parent-child relationship that is not filed by a governmental entity, the court shall, unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests, appoint one of the following...(1) an amicus attorney; or (2) an attorney ad litem."

For example, it would be easy to imagine a circumstance where these new provisions conflict as a court is now put in the impossible situation of being required to

appoint an attorney pursuant to § 107.021 (a-1), while at the same time taking into consideration the parties ability to pay pursuant to § 107.021 (b)(1), and even further still being obligated to not require an attorney appointed under this section to serve without reasonable compensation for the services rendered, all the while still trying to act in the best interest of the child.

### Analysis

#### A. General Appointment Provisions

There is “. . . no general federal or state constitutional right for counsel to be appointed for a civil litigant.” Amegnisso-Tossou v. Westminster Manor, 2002 Tex. App. LEXIS 6362 (Tex. App. Austin, August 30, 2002) and Pourgholam v. Advanced Telemarketing Corp., 2005 U. S. Dist LEXIS 5694 (U. S. Northern Dist., April 6, 2005). However, “[a] district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend the cause.” Tex. Gov’t Code Ann. § 24.016 (Vernon Supp. 2005). “The exercise of that authority is committed to the discretion of the trial court only.” Knie v. Piskun, 23 S.W.3d 455 (Tex. App. – Amarillo 2000, rehearing overruled, review denied). The discretion of a district court judge to make these appointments is necessary for the efficient administration of justice.

#### B. Appointments for Juveniles, etc.

Specifically, Texas has statutorily provided for appointed counsel in juvenile delinquency cases, in parental termination cases, and in cases in which application for court-ordered mental health services has been made. Tex. Fam. Code § 51.10 (Vernon Supp. 2005); Tex. Fam. Code § 107.013 (Vernon Supp. 2005); Tex. Health & Safety Code Ann. § 574.003 (Vernon Supp. 2005); and Gibson v. Tolbert, 102 S.W.3d 710 (Tex. 2003). Furthermore, in default judgment proceedings against a defendant who was served by publication but did not answer or appear, a court must appoint an attorney *ad litem* to represent the defendant. Tex. R. Civ. P. 244 (2005).

Since it is clear that a juvenile in a proceeding is entitled to appointed counsel, one must determine who must pay the fees of appointed counsel. Tex. Fam. Code Ann. §§ 51.10 and 61.053 (Vernon Supp. 2005). If the juvenile court determines that the juvenile’s family is indigent, the appointed attorney is entitled to “a reasonable fee for services to be paid from the general fund of the county according to the schedule for compensation adopted by the county juvenile board.” Tex. Family Code § 51.10 (k) and 61.054 (a) (Vernon Supp. 2005). However, while the court may order the parent or other eligible person for whom it has appointed counsel to reimburse the county, the court may not order payments that exceed the financial ability of the parent or other eligible person. *Id.* at (c) and (l). This, conversely, is in direct opposition to the provision of 107.023 (c) which states that “[A] court may not award costs, fees, or expenses to an amicus attorney, attorney ad litem, or guardian ad litem against the

state, a state agency, or a political subdivision of the state under this part.” Tex. Family Code § 107.023(c) (Vernon Supp. 2005).

### C. Family Law Appointments

A court may appoint an attorney *ad litem* in any case in which the court deems an attorney *ad litem* necessary to protect the interests of a child who is the subject of a suit. Tex. Fam. Code § 107.021 (Vernon Supp. 2005). Additionally, in any suit brought by a governmental entity seeking the termination of the parent-child relationship or where the entity is seeking to be named a conservator of a child, the court must appoint an attorney *ad litem*. Tex. Fam. Code § 107.012 (Vernon Supp. 2005). Next, in a suit seeking termination of the parent-child relationship, an attorney *ad litem* must be appointed to represent the interest of (1) an indigent parent of the child if the parent opposes the termination, (2) a parent served with citation by publication, (3) an alleged father who did not register with the paternity registry, or (4) an alleged father who has registered with the paternity registry but cannot be personally served. Tex. Fam. Code § 107.013 (Vernon Supp. 2005). Lastly, in a suit to determine parentage, an attorney *ad litem* must be appointed to represent a minor child or incapacitated child if the interests of the child are not adequately represented. Tex. Fam. Code § 160.612(b) (Vernon Supp. 2005) and See O'Connor's at 51, *but see* GA-0142 opining that there is no obligation for a state agency to pay for an attorney *ad litem* in regards to service by publication on a unknown father under section 107.013 of the Family Code.

### Conclusion

In light of constitutional considerations and of the above referenced statutes and hypothetical scenario, wherein the government is not a party, but a Court has found it necessary to appoint an amicus attorney/attorney *ad litem*/guardian *ad litem*:

1. When is it permissible for the County to pay for the services of an amicus attorney, attorney *ad litem*, or guardian *ad litem* for cases filed prior to September 1, 2003 and cases filed after September 1, 2003?
2. When is it mandatory for the County to pay for the services of an amicus attorney, attorney *ad litem*, or guardian *ad litem* for cases filed prior to September 1, 2003 and cases filed after September 1, 2003?
3. When is the County prohibited to pay for the services of an amicus attorney, attorney *ad litem*, or guardian *ad litem* for cases filed prior to September 1, 2003 and cases filed after September 1, 2003?

Thank you for your assistance in this matter. I look forward to your prompt response.

Sincerely,

A handwritten signature in black ink that reads "Bruce Isaacks". The signature is written in a cursive style with a large initial "B" and a long horizontal stroke at the end.

Bruce Isaacks