

# Ineffective Assistance of Counsel in DFPS Cases

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## **Biographical Information**

Sherry Van Pelt has been the Associate Judge/Master of 315<sup>th</sup> District Court in Houston for the past 10 years. She has spoken at various CLE programs in regard to Department of Family and Protective Service cases. Judge Van Pelt is a graduate of South Texas School of Law.

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# **ETHICS: INEFFECTIVE ASSISTANCE OF COUNSEL IN D.F.P.S. CASES**

## **I. INTRODUCTION**

Webster's II New Riverside University Dictionary defines ethics as the rules or standards of conduct governing the members of a profession. The Preamble of the Texas Disciplinary Rules of Professional Conduct sets out the minimum standards of conduct for a lawyer (7) and the lawyer's conscience determines where the lawyer's standards are in relation to these rules. (9)

Ineffective assistance of counsel should never be a basis of appeal. The goal of this paper is to outline a few basic steps necessary to aid the attorney ad litem in preventing such an appeal and for the attorney ad litem to effectively represent the client. Attached are American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version), hereinafter referred to as ABA for brevity's sake, and selected statutes of the Texas Family Code. The Texas Disciplinary Rules of Professional Conduct are also being provided.

The following is a brief description of the duties and responsibilities of attorneys who represent children and parents in D.F.P.S. cases and should not take the place of reading the statutes; however, it can be used as an overview.

## **II. AD LITEM FOR THE CHILD**

The child's ad litem has a very large responsibility in D.F.P.S. cases. Not only is the ad litem required to know all that is occurring with the child, the ad litem is also required to know all that is occurring with everyone else participating in the case, including the placement of the child. TFC 107.003, TFC 107.004; ABA sec. C.

Because the Court is required to determine if the current placement of the child is appropriate and if the child is safe, the ad litem should visit each placement of the child and advise the Court as to the safety and appropriateness of that placement. TFC 263.306 (8)(b)(1) The ad litem should not rely upon the D.F.P.S. caseworker. The ad litem should inquire if there are relatives or friends who may be appropriate placements for the child and if there are, the ad litem should see that the information is acted upon immediately. ABA sec. B-1.

If the child is of an age and possess the capacity sufficient to make a decision about placement and the attorney/guardian ad litem does not agree that the child's preference is in the child's best interests, the attorney should petition the court to be removed from the dual role of attorney and guardian ad litem and request that someone else be appointed guardian ad litem. TFC 107.0125 After this has occurred, the attorney ad litem should consult with the new guardian ad litem and then proceed to represent the child's objectives based upon the guardian ad litem's opinion as to the best interests of the child. TFC 107.008(c); ABA sec B-2; TDRPC 1.02(g), TDRPC 103, comments 3 and 5.

If the attorney/guardian ad litem determines that the child cannot make reasonable judgments for the child's own well-being, the ad litem may present to the Court the ad litem's position as to what would serve the best interests of the child TFC 107.009 (b); TDRPC 1.03.

## **III. AD LITEM FOR THE PARENT**

The ad litem for the parent shall follow the client's directions even if the client is incapacitated. If appropriate, the attorney is allowed to seek guardianship proceedings for the client in the proper court. TFC 107.010; TDRPC 103, comments 3 and 5.

The ad litem for the parent should ask the parent for the identity of any relative or friend who can appropriately care for the child and should forward that information to D.F.P.S. and the child's ad litem. TFC 262.201 (c).

The attorney ad litem appointed by publication for a missing parent has a duty to determine if D.F.P.S. used due diligence in searching for the missing parent before D.F.P.S. served the parent by publication. TRCP 109. The ad litem for the missing parent is also required to use due diligence in searching for the parent. If the ad litem locates the parent, the ad litem shall inform the attorney for D.F.P.S. immediately and also inform the client of the pending case. Furthermore, the ad litem shall file with the Court a statement of the evidence. TRCP 244.

#### IV. DUTIES AND RESPONSIBILITIES OF AD LITEMS

"...lawyers shall be competent, prompt and diligent." ABA Preamble 3. The following, in no particular order, are a few observations made over the past ten years that could assist attorneys in avoiding appeals based upon ineffective assistance of counsel and also could help attorneys and their clients:

- a. Prior to appearing before the Court, the ad litem should know the status of the case and of the ad litem's client; TDRPC 1.01 (b)(c)
- b. When first appointed, the ad litem should verify that service on ad litem's client is perfected;
- c. The ad litem should read the pleadings carefully when first appointed;
- d. If necessary services are not being provided for the client by D.F.P.S. and after the ad litem has unsuccessfully tried to acquire the services through the proper channels, the ad litem should not wait for a scheduled Texas Family Code hearing to request those services if that wait is more than two weeks;
- e. The child's ad litem should advise D.F.P.S. attorneys as to whether the pleadings reflect the facts of the case, and if not, make sure the pleadings are amended timely; ABA (c)(3)
- f. Read the final order carefully as to each party, not just yours, and correct any errors; ABA (E)
- g. The ad litem should notify the client of the right to appeal and if the client chooses to appeal, the ad litem should begin the process timely; ABA (F); TDRPC 1.02, comment (6)
- h. Never intentionally mislead the Court, neither by omission nor commission; TDRPC 3.03
- i. At trial, know the facts that are relevant to the client that have to be presented to the Court in order to meet the requirements of the Texas Family Code that is pled. TDRPC 1.01 (b).

#### V. CONCLUSION

The Court makes every effort to be fair, unbiased and to follow the law but can only make decisions based upon the evidence and testimony presented at the hearing and/or trial. If evidence is not presented, it cannot be considered. It is the attorney's responsibility to present the evidence for the client. If the ad litem is thoroughly familiar with the law and the facts of the case and makes a diligent effort to represent the client, ineffective assistance of counsel should be avoided.