

REPRESENTING THE ABSENT OR INDIGENT PARTY IN A TEXAS PARENTAL RIGHTS TERMINATION SUIT

By George Clevenger

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Introduction

The right to appointed counsel for certain parties in a suit for termination of parental rights is based on constitutional due process.¹ The U.S. Supreme Court has held, however, that this right is not absolute, but requires a case-by-case determination of whether “fundamental fairness” merits the appointment.² Texas grants a broader right to parents and alleged parents. In Texas, appointment of an attorney ad litem to represent a parent or alleged parent is *mandatory* in cases brought by a government agency and for respondents who meet statutory criteria.³ The absolute failure to appoint an attorney ad litem to a parent or alleged parent when appointment is warranted constitutes reversible error and will result in a new trial.⁴

Types of Appointed Counsel in a Termination Suit

An *attorney ad litem* provides legal services to a person (either an adult or child who is a party in the suit).⁵ This role differs from that of a *guardian ad litem*, who is appointed to represent the best interests of a child who is a subject of the suit.⁶ An *amicus attorney* does not provide legal services to any party in the suit, but instead assists the court in protecting the child’s best interests.⁷

Attorneys Ad Litem for the Parent or Alleged Parent under Texas Law

The Texas Family Code requires the appointment of an attorney ad litem in a termination suit to represent the legal interests of an indigent parent who opposes the termination, a parent served by publication, an unidentified alleged father who did not register with the paternity registry and cannot be located, and an alleged father who did register but was not successfully

served by the petitioner.⁸ Appointment is also mandatory for an indigent parent in a suit brought by a government agency for temporary managing conservatorship of a child, but alleged parents and parents served by publication are not generally afforded the right to appointed counsel in conservatorship cases.⁹ Whether the mandatory appointment for indigent parents extends to conservatorship suits filed by private individuals remains an issue unresolved by Texas case law.¹⁰ However, the courts may—but are not mandated to—appoint counsel for any party in any case in which such appointment will serve the best interests of a child who is the subject of the suit.¹¹ A parent who has signed a clear and unambiguous relinquishment of parental rights has consequently no right under Texas law to ad litem representation.¹²

The Process and Timing of Attorney Ad Litem Appointment

Statutory law mandates appointed counsel for an indigent parent in a termination proceeding, but only after that party is actually found to be indigent by the trial court. Indigent parents must file affidavits of indigence and alleged parents must request an attorney to prompt the trial court to appoint an ad litem.¹³ Where a parent is served by publication, the trial court will be alerted to the fact that an ad litem should be appointed at the first hearing on the suit when the parent fails to appear.

Statutory law has only specified a definite time for appointment of an attorney ad litem for a *child* in a termination suit, but remains silent about appointment deadlines for appointing counsel to parents or alleged parents.¹⁴ The appellate courts have held that the proper timing of appointment by a trial court may depend on the circumstances of the case and the status of the party who requires appointed counsel.¹⁵ The legislature did not directly address a time requirement, and the timing of the appointment is left to the trial court's discretion; the court meets its duty once the attorney ad litem is appointed.¹⁶

The trial court may not be required to appoint an attorney immediately after the initial hearing, but the appointment should not be “unreasonably delayed.”¹⁷ The length of time between the original filing and the court’s appointment is a less important factor in determining timeliness than the time between the appointment and the date of trial, especially if the representation provided by the attorney ad litem is found to be effective.

No harmful error was found where an ad litem was appointed five months before the full trial, because the attorney was extremely diligent in representing inmate alleged father’s interests within that limited time; counsel filed an original answer, discovery requests, numerous limine motions and continuance, and requested the child’s emergency placement with the defendant’s mother.¹⁸ An appellate court also found no error where the appointment was made two years after the commencement of the suit (but seven months before the final hearing), because the indigent defendant made no objection at the time the appointment was made and he received effective assistance of counsel.¹⁹

Conversely, an appellate court found that delay was excessive where a clearly indigent mother was denied counsel during the eight months before trial, and she decided to voluntarily relinquish her rights shortly before the trial when she still did not have legal representation.²⁰

Duties and Effectiveness of the Attorney Ad Litem

When representing an absent or indigent parent or alleged parent, an attorney ad litem owes to that person the same duties of “undivided loyalty, confidentiality, and competent representation” owed to a client who privately hires an attorney.²¹

The U.S. Supreme Court has specifically addressed a parent’s right to effective assistance of counsel.²² Texas courts have held that the right to counsel in termination proceedings includes the right to effective counsel.²³ A represented party wishing to challenge the

effectiveness of an attorney ad litem has the burden of proving that the counsel's representation was so deficient and flawed that the attorney was not properly functioning as counsel and that this deficiency prejudiced the party's defense.²⁴

Where an inmate parent was appointed counsel only on the day of the full hearing, the parent was not present at the hearing, and the attorney ad litem neither consulted with the parent prior to the hearing nor sought a continuance, the court held that the parent was denied effective assistance of counsel.²⁵

An ad litem representing a mother in a termination suit did not render ineffective assistance and did not fail to conduct proper discovery because the mother was uncooperative, provided no witness information to the ad litem and insisted on preparing for trial with the father of the child and his attorney.²⁶ Additionally, an ad litem in a termination suit will not be deemed ineffective for failing to file a motion for new trial or a notice of appeal where the ad litem, in his reasonable professional opinion, did not believe that the motion and notice were well-founded.²⁷

Generally, attorneys ad litem are afforded protection against liability for professional recommendations and opinions unless that advice is made with "conscious indifference or reckless disregard for the safety of another, is made in bad faith or with malice, or is grossly negligent or willfully wrongful."²⁸

One attorney ad litem may represent both parents in a single termination lawsuit if the representation does not create a conflict of interest, which exists if there is a "substantial risk" that the attorney's obligations to one party would "materially and adversely affect" her obligations to another.²⁹

Representing the Indigent Parent

A “parent” is a mother, a presumed father, a man adjudicated by a court to be the father, a man who has acknowledged paternity, or an adoptive mother or father.³⁰

Before an attorney ad litem will be appointed to an indigent parent, the parent must file an affidavit of indigence, after which the court will conduct a hearing to determine whether an appointment is warranted.³¹ The affidavit must comply with the Rule 145(b) of the Texas Rules of Civil Procedure, which outlines the required contents and process for filing the affidavit.³²

Trial courts may look at several factors to determine indigence: the indigent’s income and source (and whether income includes spousal support), number of dependents, debts, assets, living expenses, and property.³³ Receipt of governmental assistance is prima facie evidence; a mother who provided proof to the court that she received food stamps and TANF was entitled to counsel and the denial of an attorney was harmful error.³⁴ The parent’s statement alone that he is poor will generally be insufficient to prove indigence; a trial court’s denial of appointed counsel was proper where father claimed to have proof of debt, including numerous receipts, bills, and tax liens, but failed to provide that evidence in court.³⁵

Representing the Parent Served by Publication

Notice to any party in a termination suit is required for due process, but actual personal service on the party is not required.³⁶ Any identified person entitled to service of citation in a termination suit but cannot be located may be served by citation of publication, or any other method likely to give the respondent actual notice.³⁷ However, the petitioner may only use citation of publication after using due diligence in attempting to locate the parent’s address or after unsuccessful attempts to personally serve the parent at a known location.³⁸ If a parent served by publication wishes to later contest the service, the trial court must make a

determination of the diligence used by the petitioner.³⁹ One trial court did not abuse its discretion in finding that the mother petitioner used diligence because the petitioner tried to find the father's location in Mexico through his family, but was told that he was dead and was refused any identifying information about the father, including his birth date.⁴⁰

Before serving by publication, a petitioner must file, attached to the original petition so that it will be preserved on the record, evidence of attempted service on each person.⁴¹

Representing the Alleged Father

An alleged father is one whose paternity has not been determined, but who alleges himself to be the biological father of a child, or is alleged to be the father by another party. This type of respondent is not entitled to representation by an attorney ad litem in conservatorship suits, but alleged fathers have generally the same procedural and substantive rights in a termination suit that any established parent would have.⁴²

Some rights, however, are limited: the alleged father only has the right to be notified of a suit for termination if he has registered with the paternity registry before the birth of the child or within the 31st day of the child's birth; if he has an established relationship with the child under another provision of the statutory law; or if he initiates a suit related to the child before any termination proceedings begins.⁴³

However, a petitioner is *not* required to serve citation by publication on an alleged father who has or has not registered and cannot be located; a petitioner who seeks to terminate the parental rights of an alleged father is only required to use due diligence to identify and give personal notice to that person, including searching the registry in the bureau of vital statistics for information about the alleged father's location.⁴⁴ No search of the registry is necessary if the alleged father has relinquished his rights or was already served with citation.⁴⁵ The petitioner

also need not conduct a formal search of the registry if the alleged father has admitted paternity before trial.⁴⁶ If the petitioner is required by statute to conduct a search of the registry, the petitioner must receive and provide to the court a certificate indicating the results of that search.⁴⁷

If an alleged father has not registered with the paternity registry and his location is unknown, a court cannot terminate his parental rights until receiving an affidavit by the petitioner swearing that a diligent attempt has been made to locate and serve the alleged father; the court will review any evidence submitted by the attorney ad litem appointed for the alleged father in order to determine that the petitioner used due diligence.⁴⁸ The role of an attorney ad litem for an alleged father who has or has not registered and cannot be located is partially limited to ensuring that the petitioner used due diligence in attempting to serve the respondent. Once due diligence is found, the court may terminate the rights of even the alleged father who did register with the paternity registry.⁴⁹

If an attorney ad litem appointed to represent the interests of an alleged father is able to locate that person, and the alleged father wishes to contest the termination, any of the following must be filed prior to the final hearing: an admission of paternity, a counterclaim for paternity, or a request for voluntary legitimation.⁵⁰ Any alleged father can waive both the right to notice and the right to have an appointed attorney ad litem by signing an affidavit of waiver of interest in the child, but failure to submit an admission, counterclaim, or other alternative filing by the final hearing date will have the effect of waiving interest in the child.⁵¹ A request for an indigence hearing by an alleged father constitutes an admission of paternity, if the alleged father refers to himself as a “parent” in the filing.⁵²

Representation on Appeal

Though a parent's or alleged parent's right to counsel on appeal is not granted in Texas statutory law, Texas courts have held that any parent who has a right to receive counsel in a termination suit has the same right on appeal.⁵³ However, the same burden is placed on the indigent parent to provide some proof of present indigence to warrant appointment on appeal. The failure of the parent to specifically request an attorney for appellate purposes does not waive that right; the right can only be waived if the parent makes a knowing and intelligent waiver on the record.⁵⁴

¹ *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18 (1981).

² *Id.* at 2162.

³ Tex. Fam. Code Ann. § 107.013 (Vernon 2004).

⁴ *Odoms v. Batts*, 791 S.W.2d 101, 102 (Tex. App.—Waco, 1993, no writ).

⁵ Tex. Fam. Code Ann. § 107.001(2) (Vernon 2004).

⁶ Tex. Fam. Code Ann. § 107.001(5) (Vernon 2004).

⁷ Tex. Fam. Code Ann. § 107.001(1) (Vernon 2004).

⁸ Tex. Fam. Code Ann. § 107.013 (Vernon 2004).

⁹ Tex. Fam. Code Ann. § 107.013(c) (Vernon 2004).

¹⁰ *Baird v. Harris*, 778 S.W.2d 147, 148 (Tex. App.—Dallas, 1989).

¹¹ Tex. Fam. Code Ann. § 107.021(a)(2) (Vernon 2004).

¹² *Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390 (Tex. 1982), rehearing denied.

¹³ Tex. Fam. Code Ann. § 107.013(d) (Vernon 2004).

¹⁴ Tex. Fam. Code Ann. § 107.012 (Vernon 2004).

¹⁵ *Manning v. Tex. Dept. of Family & Protective Servs.*, 2005 WL 1116389 at

¹⁶ *Salinas v. Tex. Dept. of Protective & Regulatory Servs.*, 2004 WL 1896890 at *4.

¹⁷ *In re A.R.*, 2001 WL 1143208 at *3.

¹⁸ *Salinas v. Tex. Dept. of Protective & Regulatory Servs.*, 2004 WL 1896890 at *4-5.

¹⁹ *In re A.R.*, 2001 WL 1143208 at *40.

²⁰ *In re C.D.S.*, 172 S.W.3d 179 (Tex.App.—Fort Worth 2005).

²¹ Tex. Fam. Code Ann. § 107.001 (Vernon 2004).

²² *Strickland v. Washington*, 466 U.S. 668 (1984).

²³ *In re M.S.*, 115 S.W.3d 534, 2003 WL 21512654 (Tex. 2003).

²⁴ *Brice v. Denton*, 135 S.W.3d 139, 141 (Tex. App.—Waco 2004, pet. denied).

²⁵ *Id.* at 142.

²⁶ *In re T.N.F.*, 205 S.W.3d 625 (Tex.App.—Waco 2006).

²⁷ *Duran v. Tex. Dept. of Protective & Regulatory Servs.*, 2005 WL 1047548.

²⁸ Tex. Fam. Code Ann. § 107.009 (Vernon 2004).

²⁹ *In re B.L.D.*, 113 S.W.3d 340, 342-43 (Tex. 2003).

³⁰ Tex. Fam. Code Ann. § 101.024 (Vernon 2004).

³¹ Tex. Fam. Code Ann. § 107.013(d) (Vernon 2004).

³² *Id.*

³³ *In re C.D.S.*, 172 S.W.3d 179 (Tex.App.—Fort Worth 2005).

³⁴ *Id.*

³⁵ *Maddox v. Tex. Dept. of Protective & Regulatory Servs.*, 2003 WL 21716185 at *4.

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- ³⁶ Tex. Fam. Code Ann. § 102.009 (Vernon 2004); Tex. Fam. Code Ann. § 102.010 (Vernon 2004).
- ³⁷ Tex. R. Civ. P. § 109(a).
- ³⁸ Tex. R. Civ. P. § 109.
- ³⁹ *Id.*
- ⁴⁰ In the Interest of K.E.Q., 2007 WL 882493 at *2.
- ⁴¹ Tex. Fam. Code Ann. § 102.010 (d) (Vernon 2004).
- ⁴² Tex. Fam. Code Ann. § 161.002(a) (Vernon 2004).
- ⁴³ Tex. Fam. Code Ann. § 160.402(a) (Vernon 2004).
- ⁴⁴ Tex. Fam. Code Ann. § 161.109(b) (Vernon 2004), Tex. Fam. Code Ann. § 160.422(c) (Vernon 2004).
- ⁴⁵ Tex. Fam. Code Ann. § 160.422(d) (Vernon 2004).
- ⁴⁶ In the Interest of J.P.H., 196 S.W.3d 289 (Tex.App.—Eastland 2006).
- ⁴⁷ Tex. Fam. Code Ann. § 160.421 (Vernon 2004).
- ⁴⁸ Tex. Fam. Code Ann. § 161.002(b)(2) (Vernon 2004).
- ⁴⁹ Tex. Fam. Code Ann. § 161.002(b)(3) (Vernon 2004).
- ⁵⁰ *Estes v. Dallas County Child Welfare Unit of Tex. Dept. of Human Servs.*, 773 S.W.2d 800 (Tex.App.—Dallas 1989, writ denied).
- ⁵¹ Tex. Fam. Code Ann. § 102.009(a) (Vernon 2004).
- ⁵² *Estes v. Dallas County Child Welfare Unit of Tex. Dept. of Human Servs.*, 773 S.W.2d 800, 801 (Tex.App.—Dallas 1989, writ denied).
- ⁵³ In the Interest of T.V., 8 S.W.3d 448 (Tex.App.—Waco, 1999).
- ⁵⁴ *Id.*