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## **Right to Counsel and Guardian Ad Litem**

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Constitutional Requirement: In *Re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967) holding in an appeal from a juvenile commitment, that the Due Process Clause of the Fourteenth Amendment requires the right to counsel in a proceeding which may result in commitment to an institution in which a juvenile's freedom is curtailed. (The right can be waived if specifically and intentionally done).

Family Code Requirement: TFC51.10(b) goes further than the holding in *Re Gault* to require the right to counsel at every stage of proceedings under Title 3. The right to counsel cannot be waived in:

1. Discretionary transfer (Certification) proceedings;
2. Adjudication hearings;
3. Disposition hearings,
4. Motions to Modify Disposition (where TYC is sought); or
5. Chapter 55 hearings (Mental hearings).

Counsel can be waived at detention hearings and MTMD where TYC is **not** a possible outcome. (Under 51.09 the Respondent's Attorney must join in the Waiver).

TFC 51.10 (f)2 requires Court to appoint counsel if it finds the parent financially unable to employ counsel.

TFC 51.10(d) & (e) allows that if the parent is able but doesn't employ counsel, the Court can order parent to retain counsel (enforceable by

contempt) **OR** appoint counsel and hold parent responsible to pay Court or reimburse County (also enforceable by contempt).

TFC 51.10 Fees to be paid out of county funds as set out in CCP Art. 26.05 which allows for Atty. to be reimbursed for reasonably necessary expenses (with prior approval of Court) for:

- a) investigators,
- b) experts, and expert testimony,
- c) Atty. fees based on time in court, reasonable out of court time, appellate work

All fees based on labor required, complexity of case and experience level of Atty., and paid in accordance with the fee schedule adopted by the County and District Court Judges. Each schedule shall have fixed rates, minimum and maximum hourly rates, and daily rates. A form for the reporting of the services being paid for shall be adopted and no payment made without the proper form.

NOTE: The Court is **not** bound to follow any schedule when setting and assessing fees against a parent that can afford an Attorney but the Court found it necessary to appoint one and hold the parent responsible.

Statutes creating a Public Defenders office can meet the need of representation along with (or perhaps in lieu of) Court appointed counsel.

The Court can consider evidence from many sources (formal and not) when considering if the parent(s) are financially unable to retain counsel but it is a decision that must be made by the Judge (or Referee) and be based on the resources of the parents. No specific standards are set by the Family Code.

Under the Code of Criminal Procedure, the defendant's own resources is all that matters, so when a Juvenile is transferred to Criminal Court, under CCP Art. 26.057 (certified) the County is given a cause of action against the parent or anyone responsible for the support of the Juvenile to sue for recovery of the fees paid and costs to sue and recover

the fees. This probably only applies to juveniles certified while less than 18 years old.

#### HEARINGS CONDUCTED WITHOUT COUNSEL:

Hearings can be conducted without counsel if proper waiver under TFC 51.09 is made (and the Code does not expressly prohibit waiver of Counsel)

#### DETENTION HEARINGS:

If an attorney has been appointed at the time of the Detention hearing both attorney and Respondent may waive the necessity of the participation of the attorney at the hearing.

If the attorney is not present and has not been appointed, conducting a detention hearing without counsel is authorized only when necessary due to time requirements (i.e. to not delay a statutorily required Detention Hearing). TFC54.01(n) allows a De Novo Detention Hearing when the first detention hearing was held without counsel and the child was detained. Such a hearing must be requested within ten working days of the Attorney's appointment, must be held within TWO WORKING DAYS of the request for it, and it can be set before the ten-day hearing.

#### NOTICE OF RIGHT TO COUNSEL:

TFC 54.01(b) Requires the Court to notify the Child and Parents (parties) of the right to counsel at the beginning of the Detention hearing.

TFC 54.03(b)(5) Requires the Court to notify the Child and Parents (parties) of the right to counsel at the beginning of the Adjudication Hearing.

#### GUARDIAN AD LITEMS:

GAL not necessary if the parent present (TFC 51.11).

GAL authorized when parent unable or unwilling to act in the child's best interests (TFC 51.11(b)).

GAL cannot be a law enforcement officer, probation officer, or employee of the Court, with the exception of the defense Attorney, who may serve as GAL. (TFC 51.11(c)).

GAL may be a De Facto Guardian of the child or in other words, the presence of a De Facto guardian of the child makes it unnecessary to appoint a GAL by the Court. The person appearing in a proceeding on behalf of the child may not be a guardian by law but fills the same function, therefore it is not necessary to appoint someone else. (see case law on pages 98 and 99 of Texas Juvenile Law, 5<sup>th</sup> Edition for rulings on different De Facto Guardians.)

#### INTERPRETERS:

One is necessary for the respondent if needed to conduct hearings, one is necessary for parents (as parties) only through the admonishments phase. TFC 54.03(b)

The Court, court personnel or the Attorney can do interpretation of proceedings for parent (and presumably the child).