The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation

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THE AMBIGUOUS ROLE AND RESPONSIBILITIES OF A GUARDIAN AD LITEM IN TEXAS IN PERSONAL INJURY LITIGATION

Jennifer L. Anton

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A court appointed guardian ad litem representing a minor plaintiff in personal injury litigation faces the challenge of determining what his responsibilities are to the court, to the minor whose interests he is appointed to represent, and to the other involved participants. The responsibilities of guardians ad litem and the rules governing their relationships with their wards, the court and others are not commonly stated with sufficient specificity in legislation, judicial decisions, or appointment orders. In Texas, judicial decisions provide little guidance to the guardian ad litem in this area. Although the Texas Legislature addressed some important guardianship issues in both the 1993 and the 1995 legislative sessions, many unresolved issues remain.

This Comment focuses on the responsibilities of the guardian ad litem who is appointed to represent a minor in a personal injury lawsuit. The Comment attempts to assist the guardian ad litem in evaluating his responsibilities to the ward and to the court by focusing primarily on Texas judicial decisions and scholarly commentary. It further attempts to examine some of the confusion concerning the role of the guardian ad litem in such cases. However, this Comment does not purport to provide a comprehensive analysis of the role confusion, although it does attempt to define an appropriate role for the guardian ad litem.

II. HISTORY

"Guardianship and the law [pertaining to] it date back at least to the
time of the Roman Empire.”3 Roman law recognized more types of guardianship than American jurisprudence.4 The Roman’s “special cura-
tor” was the type of guardian that most parallels the modern guardian ad litem.5 The special curator was appointed for a certain affair or transaction, as is the guardian ad litem.6 The modern-day guardian ad litem is authorized only to represent the rights and interests of his ward in the proceeding that gave rise to his appointment, and his authority ends when the final judgment or decree resulting from those proceedings is rendered.7

American jurisprudence more closely parallels English common law than Roman law with respect to its protection of infants and incompetents.8 Under English common law, the King was the protector of infants and incompetents.9 When an infant or incompetent needed protection in court, the King issued a letter patent for the appointment of the guardian.10 Eventually, this duty was transferred to the Chancery Courts.11 The early English Chancery Courts gave this protection to infants because infants were considered to lack the discretion to manage their own causes.12

“American courts were quick to adopt a policy of appointing guardians ad litem to protect the interests of [minors in] litigation.”13 The United States’ state courts obligated the states to the philosophy that the King has an inherent obligation to protect persons unable to protect themselves (parens patriae), but this duty was not adopted by the federal judiciary.14 However, statutory provisions extended this duty to the federal level,15 and state legislatures have since codified this duty in their statu-

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3. Ellen K. Solender, The Guardian Ad Litem: A Valuable Representative or an Illu-
4. See Sherman, supra note 3, at 129; Solender, supra note 3, at 619.
5. See Sherman, supra note 3, at 129; Solender, supra note 3, at 619.
6. See Sherman, supra note 3, at 129; Solender, supra note 3, at 619.
7. See Byrd v. Woodruff, 891 S.W.2d 689, 705 (Tex. App.—Dallas 1994, writ denied); Solender, supra note 3, at 619.
9. See id. at 620; see Note, Guardianship in the Planned Estate, 45 IOWA L. REV. 360, 377 (1960).
10. See Solender, supra note 3, at 620; Guardianship in the Planned Estate, supra note 9, at 377.
11. See Solender, supra note 3, at 620; Guardianship in the Planned Estate, supra note 9, at 377.
12. See Guardianship in the Planned Estate, supra note 9, at 377-78.
13. Id.
14. See Solender, supra note 3, at 620; Insurance Co. v. Bangs, 103 U.S. 435, 438 (1880) (“It is the State and not the Federal government . . . which stands, with reference to the persons and property of infants, in the situation of parens patriae.”).
15. See FED. R. CIV. P. 17(c), which provides in part: “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 an infant or incompetent person.”
These provisions [typically] are found in rules of civil procedure, probate codes, mental health codes, and various other codes concerning parent and child. Although most of these statutes provide for discretionary appointment of a guardian ad litem, some provide for mandatory appointment.17

III. WHAT IS A GUARDIAN AD LITEM?

A guardian ad litem is generally defined as a "special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs."18 The term "guardian ad litem" also has been defined as "a person appointed by a court to protect the interests of a minor or an incompetent person in a lawsuit"19 and as "a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise."20 Texas law defines the guardian ad litem as a "personal representative of an individual subject to a disability who is appointed to protect the interests of the disabled person in any lawsuit where that individual is a party."21

In the vast majority of personal injury cases in which a guardian ad litem is appointed to protect the interests of a minor plaintiff, the ad litem's primary responsibility is to review the settlement agreement between the minor and the defendant. The ad litem is required to determine whether the agreed-upon settlement is fair, reasonable and in the best interests of the minor. The guardian ad litem then reports his determination to the court. After evaluating the ad litem's report, the court will either approve or reject the settlement agreement. Without the court's approval, the settlement agreement will not be binding on the parties.22

17. Solender, supra note 3, at 620; see TEX. R. CIV. P. 173, which provides, "[w]here a minor . . . is a party to a suit either as plaintiff, defendant or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor . . . the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs." (emphasis added).
22. See discussion infra Part VIII.A.
IV. WHY SHOULD A GUARDIAN AD LITEM BE APPOINTED IN A CIVIL MATTER?

Most of the authority for the appointment of guardians ad litem is statutory. Rules governing their appointment in civil cases are found in the Texas Rules of Civil Procedure.23 There are few cases that address the role of the guardian ad litem because guardians ad litem are generally appointed to approve settlements.24 Appeals typically occur only in cases where a dispute over the guardian ad litem’s fees has arisen.25

Because a minor does not have the legal capacity to employ an attorney to represent his interests in a lawsuit, Rule 44 of the Texas Rules of Civil Procedure authorizes a next friend to represent the minor’s interests while allowing the minor to remain the real party in interest.26 “Although[ ] the minor is the real plaintiff, the bringing of a suit by [the] next friend does not change the minor’s status. The minor is non sui juris and remains altogether under the court’s protection.”27

When the interests between the next friend and the minor plaintiff conflict, the next friend is no longer competent to represent the minor.28 Because the minor’s legal status remains unchanged, the district court is obligated to appoint another person to represent the minor’s interests.29 Rule 173 of the Texas Rules of Civil Procedure requires a court to appoint a guardian ad litem for any “minor, lunatic, idiot or non-compos mentis” where such person is a plaintiff in a lawsuit and is represented by a next friend or guardian who appears to the court to have an interest adverse to such plaintiff.30 “Rule 173 provides for a contingency not covered by Rule 44: the appearance, after suit is filed, of a probable conflict between the real plaintiff and next friend.”31 The rule authorizes the court to appoint a guardian ad litem when it appears that the next friend has an interest adverse to the minor represented.32 As a preliminary decision, a court will determine whether to appoint a guardian ad litem based on the record and evidence before it.33

“[I]n practice most judges freely appoint guardians [ad litem] upon a

25. See id. at F-6.
26. See TEX. R. CIV. P. 44; Byrd, 891 S.W.2d at 704. A “next friend” is defined as “one acting for benefit of infant, or other person not sui juris (person unable to look after his or her own interests or manage his or her own lawsuit) without being [a] regularly appointed guardian.” BLACK’S LAW DICTIONARY 1043 (6th ed. 1990).
27. Byrd, 891 S.W.2d at 704.
28. See id.
29. See id.
30. TEX. R. CIV. P. 173.
31. Byrd, 891 S.W.2d at 705.
32. See id. at 704; Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992).
simple request by any party.\textsuperscript{34} However, the trial court may appoint a guardian ad litem on its own motion.\textsuperscript{35} Trial courts are required to appoint a guardian ad litem if there is "even a likelihood that an adverse interest may develop in the future."\textsuperscript{36} The trial court's decision to appoint a guardian ad litem will not be reversed on appeal absent a showing of an abuse of discretion.\textsuperscript{37} Regardless of whether an actual conflict of interest arises, the appointment of a guardian ad litem will not be considered an abuse of discretion if upon appeal it can be proven that a conflict of interest could have arisen either during settlement negotiations or during the prosecution of the suit.\textsuperscript{38} Further, the failure of a court to appoint a guardian ad litem to represent the minor's interest in such a situation results in the judgment of the trial court being voidable and subject to direct attack.\textsuperscript{39}

District courts appoint guardians ad litem most often in tort litigation involving minor plaintiffs and defendants.\textsuperscript{40} These types of suits typically involve "a parent [who] sues on her own behalf and also as a representative of a minor child for injuries arising out of the same occurrence . . . ."\textsuperscript{41} In such cases, a conflict of interest between the two parties may arise.\textsuperscript{42}

For example, in a personal injury case, where the question of settlement amount is at issue, often the minor's parent (the child's legal guardian), although concerned about the recoverable amount, may be pressured to settle due to time constraints and mounting bills. As a result, the parent may be willing to settle quickly for herself and may believe a quick settlement is in the best interests of her child. In this instance, a guardian ad litem is appointed to approach the situation from the perspective of the minor and to evaluate the long-term results on the minor of rapid settlement.\textsuperscript{43}

The conflict between parent and minor child may be "aggravated where settlement discussions are underway as each party vies for a fixed

\begin{thebibliography}{9}
\bibitem{Smith} See id.; Smith v. Smith, 720 S.W.2d 586, 591 (Tex. App.—Houston [1st Dist.] 1986, no writ).
\bibitem{Litman} Litman, \textit{supra} note 34, at 2.
\bibitem{Kennedy} See \textit{Kennedy}, 778 S.W.2d at 555.
\bibitem{Clark} See Clark v. McFerrin, 760 S.W.2d 822, 828 (Tex. App.—Corpus Christi 1988, writ denied); Coleman v. Donaho, 559 S.W.2d 860, 864 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); see also Cynthia F. Solls & Garnett E. Hendrix, Jr., \textit{The Guardian Ad Litem's Perspective: The Case as Seen and Heard Through the Eyes and Ears of the Court, in The Role of the Guardian Ad Litem in Personal Injury Litigation} at 2 (Dallas Bar Ass'n Seminar, Dallas, Tex. Dec. 4, 1992).
\bibitem{Solender} See Solender, \textit{supra} note 3, at 627.
\bibitem{Phillips} Phillips Petroleum Co. v Welch, 702 S.W.2d 672, 674 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
\bibitem{Smith} See \textit{id}.
\bibitem{Solender} See Solender, \textit{supra} note 3, at 627-28.
\end{thebibliography}
In other words, when there is a limited fund and the sum must be allocated among parties, the conflict is exacerbated.

A trial court should always appoint a guardian ad litem for a minor when both the minor and the next friend are parties to a suit and both are seeking to recover damages for themselves.

V. DISTINCTION BETWEEN A GUARDIAN AD LITEM AND AN ATTORNEY AD LITEM

The distinction between a guardian ad litem and an attorney ad litem is among the most misunderstood in all of Texas law. The confusion exists because the same titles are used in the Texas Rules of Civil Procedure, the [Texas] Probate Code, the [Texas] Family Code and other statutes, for positions whose duties are substantially different. The roles of a guardian ad litem and an attorney ad litem differ considerably.

As a general rule, in civil cases, a guardian ad litem represents the minor by providing independent advice to the judge, thereby serving as an extension of the court. A guardian ad litem does not participate in the judicial proceeding as counsel to the minor in the litigation. "[The] guardian ad litem need not necessarily be an attorney." In most cases, the guardian ad litem represents the child insofar as he recommends settlements or actions to the court with respect to a child.

An attorney ad litem, in contrast, does represent the minor as counsel of record in the legal proceeding. The attorney ad litem serves no special court function. He performs the same services as any attorney: to diligently and zealously represent his client, with the only distinction being that his client is a minor.

An additional distinction between the guardian ad litem and the attorney ad litem concerns the matter of how the fees of each are paid. Plaintiffs bear the responsibility for compensating an attorney ad litem whereas guardian ad litem fees are taxed as costs and are therefore assessed against the losing party.

Although most courts correctly distinguish the guardian ad litem from the attorney ad litem, the Corpus Christi Court of Appeals has not yet

44. Phillips Petroleum, 702 S.W.2d at 674.
45. See Solls & Hendrix, supra note 38, at 2; Clark, 760 S.W.2d at 828; Coleman, 559 S.W.2d at 864. But cf. Byrd, 891 S.W.2d at 705 n.6 ("Because the guardian ad litem displaces the next friend, the trial court should exercise great caution in appointing an ad litem. The appointment of a guardian ad litem is appropriate only when a conflict of interest exists between the minor and the next friend.") (emphasis added).
46. See Wood, supra note 24, at F-5.
47. Id.
48. See id.
50. Wood, supra note 24, at F-8.
51. See id.
52. See id. at F-5.
53. See duPont, 771 F.2d at 882.
understood or drawn a clear distinction between the two. In *Valley Coca-Cola Bottling Co. v. Molina*, the court described the guardian ad litem as "representing" the minors. The same court, in *Brownsville-Valley Regional Medical Center, Inc. v. Gamez*, referred to the appointed lawyers as attorneys ad litem when they were "obviously serving in the capacity of guardians ad litem."

Because the terms "guardian ad litem" and "attorney ad litem" are not interchangeable, guardians ad litem should insist on correct references in all court documents. However, misdesignating a guardian ad litem as an attorney ad litem is not controlling if the guardian ad litem was clearly appointed under Rule 173.

VI. WHEN DURING THE LITIGATION PROCESS SHOULD THE COURT APPOINT A GUARDIAN AD LITEM?

Once suit is filed involving a minor/incompetent, the court may determine the appropriate time to appoint a guardian ad litem. Guardians have been appointed at various times throughout the legal proceeding and "may be useful in all stages of a case, not just [during] the trial" or during settlement negotiation. For the first and only time to date in Texas, a court addressed the issue of the timing of a guardian ad litem's appointment in the Texarkana Court of Appeals' decision, *Jones v. Martin*. In *Jones*, the trial court appointed a guardian ad litem after opening statements. The court of appeals concluded that appointing the guardian ad litem for the minor at the beginning of trial did not amount to reversible error. However, three important factors weighed heavily in the court's decision: (i) the minor had been represented by competent counsel throughout the legal proceeding; (ii) Rule 173 fails to articulate an appropriate time for the appointment of a guardian ad litem; and (iii) the child's failure to prove "that his rights were in any manner prejudiced by such late appointment or that the trial of the case would have been conducted in any other manner which would have afforded him better protection of his rights . . . ." Perhaps, had either (i) or (iii) not been present, the court would have ruled differently, deciding that an ad litem could not be appointed at such a late date.

55. See Wood, supra note 24, at F-8.
56. 818 S.W.2d 146 (Tex. App.—Corpus Christi 1991, writ denied).
57. See id. at 148.
58. 871 S.W.2d 781, 784 (Tex. App.—Corpus Christi 1994), rev'd on other grounds, 894 S.W.2d 753 (Tex. 1995).
60. See id. at F-9.
64. 481 S.W.2d 467, 471 (Tex. Civ. App.—Texarkana 1972, no writ).
65. See id. at 473.
66. Id.
The Houston Court of Appeals peripherally addressed the issue in *Gibson v. Blanton* when it declared that the court is under a duty to appoint a guardian ad litem "[w]hen it 'appears to the court' that there is a conflict between the interests of the minor and those of his next friend." In the great majority of cases, a guardian ad litem is first appointed only after a settlement has been reached.

**A. Defendant's Perspective**

Typically, the defendant does not desire early appointment of a guardian ad litem. Understandably, the defense wants to avoid paying unnecessary fees and does not want to strengthen the plaintiff's representation by providing an additional diligent and capable attorney to advance the plaintiff's claims and interests. Occasionally, the defense will request appointment of a guardian ad litem during the earlier stages of litigation or settlement negotiation if such appointment might facilitate settlement or assist the defense in persuading the plaintiff's counsel or next friend to lower his settlement demands. Without the approval of a guardian ad litem, the settlement agreement or court award will always remain open to challenge on grounds of unreasonable settlement, unfair trial, or incompetent counsel and representation for the minor.

**B. Plaintiff's Perspective**

Occasionally, plaintiff's counsel will perceive significant conflicts between the minor/incompetent and the next friend and will request early appointment of a guardian ad litem, especially in complex litigation. Due to the complex nature of some litigation, appointment of a guardian ad litem toward the end of the legal proceeding may be ineffective due to the difficulty the ad litem will have in appreciating the intricacies of the case. In complex litigation, the guardian ad litem will be able to perform his duties most effectively if he is able to participate in the development of the case.

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68. Id. (holding that the court is under a duty to appoint a guardian ad litem before it acts on a motion for non-suit filed on behalf of the minor by the next friend).
70. See id. Guardian ad litem fees are taxed as part of the costs of litigation incurred by the party who did not prevail. See *Tex. R. Civ. P.* 131, 173; see also infra discussion Part IX.
71. See id. at 1-2.
73. See Misko, *supra* note 69, at 2.
74. See id.
75. See id.
VII. WHO MAY BE APPOINTED AS A GUARDIAN AD LITEM?

Ordinarily, an attorney who wants to be appointed as a guardian ad litem goes to the particular court and offers his name to the clerk of the court who then places it on the clerk's list of potential appointees. When the need for a guardian ad litem arises in a case, the judge of the court typically selects an attorney from the list.

No special qualifications are required of an attorney for his first appointment. However, if he is late, or if he fails to appear or manages to commit some other obvious breach of his duty to represent the disabled party in the course of his first appointment, he will not be given a second appointment.

Neither case law nor Rule 173 requires that the guardian ad litem be an attorney. However, because the role of the guardian ad litem is to protect the interests of the minor in litigation and to exercise judgment regarding legal considerations affecting the child, appointment of an attorney is preferable.

The court has complete discretion regarding who to appoint as a guardian ad litem. Unfortunately, many guardians tend to have little training in personal injury litigation and often are younger, inexperienced attorneys in need of the fee and the experience. Also, since it is typically the plaintiff's attorney who requests the appointment of a guardian ad litem, some commentators have argued that courts tend to appoint guardians who have close relationships with plaintiff's counsel.

When evaluating attorneys' qualifications for participation as guardians ad litem, courts should seek persons with high moral and ethical standards as well as demonstrated experience in personal injury litigation. To ensure that only capable attorneys are appointed to participate as guardians ad litem, courts would be wise to formulate a list of qualifications that must be met by each prospective appointee. Judge Bill Rhea of the 162nd District Court in Dallas requires prospective ad litem appointees to: (i) testify as to their qualifications, experience, education and other legal training; (ii) submit letters of recommendation from both plaintiff and defense attorneys; (iii) describe the type and size cases for which they believe themselves to be qualified; (iv) describe the time and resources they have available for the duty; and (v) describe any financial or other relationship they have with the judge that could serve as the

76. See Solender, supra note 3, at 626.
77. See id.
78. Id.
79. See Litman, supra note 34, at 4.
80. See id.
81. See Solender, supra note 3, at 628.
82. See Litman, supra note 34, at 4.
83. See id.
basis for a motion to recuse. If more judges chose to adopt criteria similar to those of Judge Rhea, the quality and contribution of the guardians ad litem appointed by the courts would significantly improve.

VIII. THE ROLE AND RESPONSIBILITIES OF A GUARDIAN AD LITEM

The role and responsibilities of a guardian ad litem have not been clearly delineated by statute or case law. Case law does, however offer some general guidelines. It requires that the guardian ad litem participate in the case to the extent necessary to adequately protect the minor’s interests. Where the ad litem is appointed, case law also limits the ad litem’s powers in matters connected with the suit and requires that the ad litem’s powers end when a judgment is entered.

Once appointed, the guardian ad litem displaces the next friend and becomes the personal representative of the minor. To the minor, he owes a fiduciary duty. The guardian ad litem is required to place the interests of the minor before his own and to use the skill and prudence that an ordinary, capable and careful person would use in the conduct of his own affairs. He (i) must use diligence and discretion in representing the minor's interests; and (ii) must be loyal to his fiduciary. The fiduciary must perform is duties with integrity and the utmost good faith.

A guardian ad litem is not an attorney for the minor, nor is he a party to the suit, but rather “is an officer appointed by the court to assist it in properly protecting the infant’s interests.” A “formal relationship of confidence” exists between the minor and the guardian ad litem, and the minor is justified “in trusting that the ad litem will endorse her interests.” The ad litem is appointed by the court to protect the minor’s interests and is granted “considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary to that effort.” However, “[a] guardian ad litem who goes beyond his role and assumes the duties of [the] plaintiff’s attorney is not entitled to compensa-

84. See Letter from Judge Bill Rhea, 162nd Judicial District Court, to all attorneys on ad litem appointment list for the 162nd Judicial District Court (May 27, 1992) (on file with materials from DALLAS BAR ASS'N SEMINAR: THE ROLE OF THE GUARDIAN AD LITEM IN PERSONAL INJURY LITIGATION (Dallas Bar Ass'n Seminar, Dallas, Tex., Dec. 4, 1992)).
85. See Byrd, 891 S.W.2d at 706; Roark v. Mother Frances Hosp., 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied); Phillips Petroleum, 702 S.W.2d at 674; Pleasant Hills, 596 S.W.2d at 951.
86. See Byrd, 891 S.W.2d at 705. Whether or not, in practice, the ad litem's duties end when judgment is entered is discussed infra Part VIII.
87. See id. at 706; Grunewald, 931 S.W.2d at 595.
88. See Byrd, 891 S.W.2d at 706.
89. See id. at 706-07.
90. See id. at 707.
91. Dawson v. Garcia, 666 S.W.2d 254, 265 (Tex. App.—Dallas 1984, no writ); see Byrd, 891 S.W.2d at 704.
92. Byrd, 891 S.W.2d at 706.
93. Roark, 862 S.W.2d at 647; see also Byrd, 891 S.W.2d at 706.
tion for work done assisting or acting [as the] plaintiff’s counsel.”

“The guardian ad litem may not bind the infant by adverse admissions or waive substantial rights[,] nor may the guardian ad litem bind the child to a settlement agreement without judicial approval.” “The guardian ad litem may, however, make ‘such arrangements as will facilitate the determination of the case’” and may, in some jurisdictions, “bind the minor to procedural steps of litigation.” “For example, [the] guardian ad litem may engage counsel, select a forum, choose venue, determine whether to waive a jury trial and admit or stipulate to undisputed facts.”

A. THE ROLE OF THE GUARDIAN AD LITEM REGARDING SETTLEMENT AGREEMENTS

“In most cases, a settlement hearing is not necessary; the agreement of the parties to a suit is a sufficient basis for rendition of judgment.” However, in a suit involving a minor, once the parties have agreed upon a settlement, a judgment ratifying the compromise cannot be rendered without a hearing before the court convincing the judge that the settlement serves the minor’s interests. Arguably, the most important role of the guardian ad litem is to determine that the settlement is fair, reasonable and “in the minor’s best interest—not the parents, and not the plaintiff’s attorney.” After receiving court approval, the settlement agreement becomes forever binding and conclusive on the minor.

Typically, appointment of the guardian ad litem occurs after settlement has been reached rather than during the negotiation process. The most important role of a guardian ad litem arises subsequent to the settlement negotiations and prior to the settlement hearing. “As a personal representative, the ad litem is under a duty to evaluate the circumstances surrounding the suit and make a recommendation to the district court on the minor’s behalf.” After a settlement has been reached, the guardian ad

94. Roark, 862 S.W.2d at 647. The court does not specify details concerning the role of the guardian ad litem but states only that “the guardian ad litem is required to participate in the case to the extent necessary to adequately protect the interest of his ward.” Id. at 647.


96. Hunter & Horowitz, supra note 95, at 77; see also Kingsbury v. Buckner, 134 U.S. 650, 680 (1890).

97. Hunter & Horowitz, supra note 95, at 77; see also Dacanay v. Medoza, 573 F.2d 1075, 1079 n.8 (9th Cir. 1978).


99. Byrd, 891 S.W.2d at 705.

100. See id.; TEX. R. CIV. P. 44.

101. Wood, supra note 24, at F-12.

102. See TEX. R. CIV. P. 44; Byrd, 891 S.W.2d at 705.

103. Byrd, 891 S.W.2d at 706.
litem is required to conduct a thorough investigation into the facts of the case.\textsuperscript{104} He should contact all counsel, preferably in writing, in an effort to obtain basic information concerning the matter.\textsuperscript{105} He should review the agreed upon settlement and the details of its terms.\textsuperscript{106} He should determine the nature of the case, the facts and law pertinent to the case, and the facts and law concerning damages.\textsuperscript{107}

In an effort to gather all necessary information, guardians ad litem may insist that certain steps be taken prior to the settlement approval hearing (i.e., taking of fact depositions, deposing expert witnesses).\textsuperscript{108} The amount of detail with which a guardian ad litem should perform his evaluative duties depends on his experience, the competence and trustworthiness of other counsel involved in the case and the individual facts of the case.\textsuperscript{109} Most cases do not require the guardian ad litem to question the physicians and other fact or expert witnesses.\textsuperscript{110} The guardian ad litem may rely on the work of the plaintiff and defense counsel if he knows them to be reliable.\textsuperscript{111} However, the ad litem should be diligent in ascertaining the relevant facts of the case. After receiving fact information from both counsel, the ad litem should contact the next friend for information.\textsuperscript{112} This may require a "cross examination" of the next friend to ensure that he "understands what is happening, and agrees with it."\textsuperscript{113} "It is not uncommon for the next friend to be pressured into a settlement with which he or she doesn't really agree, because of overzealous plaintiff's counsel or the 'sweep' of events."\textsuperscript{114}

After conducting this preliminary investigation, the guardian ad litem is under a legal duty to evaluate more thoroughly: "(i) the damages suffered by the minor, (ii) the adequacy of the settlement, (iii) the proposed apportionment of settlement proceeds among the interested parties, (iv) the proposed manner of disbursement of the settlement proceeds, and (v) the amount of the attorneys' fees charged by the minor's attorney."\textsuperscript{115} Such steps are taken to enable the guardian ad litem to provide the court with sufficient information and a recommendation regarding the case by which the court can make a reasonable and informed decision as to whether to approve the proposed settlement.\textsuperscript{116}

\textsuperscript{104} See Solls & Hendrix, supra note 38, at 4.
\textsuperscript{105} See Wood, supra note 24, at F-13.
\textsuperscript{106} See id.
\textsuperscript{107} See id. Guardians ad litem should be aware that the "court file is not a good source of information concerning the facts, the status of and responses to discovery, or the status of the settlement." Id. The ad litem must go beyond the court file to make his evaluation of the matter. See id.
\textsuperscript{108} See Solls & Hendrix, supra note 38, at 4.
\textsuperscript{109} See Wood, supra note 24, at F-14.
\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Byrd, 891 S.W.2d at 707.
\textsuperscript{116} See id.
1. Evaluating the Minor’s Damages

When evaluating the minor’s damages, a prudent guardian ad litem should typically contact the minor’s medical providers and establish (i) the extent of the minor’s injury; (ii) the costs of present and future treatment; (iii) the likelihood of future medical complications; and (iv) whether the providers will accept pro-rata reduction in their bill if settlement is low.117

2. Evaluating the Adequacy of the Settlement Amount

Some experts insist that the role of the guardian ad litem is to do everything “necessary to achieve the maximum possible recovery for the [minor] whose interest he represents.”118 Under this theory, the guardian ad litem strives to obtain the highest monetary award for the minor. A fair settlement amount is not the greatest amount a jury is likely to award; rather it is an “amount [that] represents the median [amount] . . . a jury would [award] in a particular case discounted by the percentage likelihood of a finding of no liability.”119 A further discount should be added for the “additional out-of-pocket (and unreimbursable) costs of litigation, the time value of money, and the psychic wear and tear on the individuals involved.”120 A reasonable settlement should not be analyzed in terms of the most the defendant will offer to pay or the least the plaintiff will accept.121 Rather, it should be determined in terms of the probable outcome at trial.122

There are circumstances, however, when a lesser sum will appear attractive to the guardian ad litem, as when such amount will provide some particularly significant and necessary benefit (e.g., medical attention, college education). In such an instance, the guardian ad litem must be a zealous and independent advocate on behalf of the minor and ensure that an appropriate settlement decision is made bearing those factors in mind.123

Judge Mike Wood of the Harris County Probate Court No. 2 cautions guardians ad litem to

[w]atch for situations in which all parties have settled and been paid, except the minor, particularly in policy limits settlements. For example, consider a case in which there are 20/40 policy limits, with three persons injured, two of whom are adults, one of whom receives $20,000, and another [of whom] receives $15,000. You are requested to approve $5,000 for the minor. The prior payments are not binding.

118. Solls & Hendrix, supra note 38, at 3.
119. Misko, supra note 69, at 3.
120. Id.
121. See id.
122. See id.
123. See id.
on [the guardian ad litem] or the court, because until the [ad litem]
and the court have approved the settlement, it isn't binding under
Rules 44 and 173. If it isn't right, don't be "buffaloed" into approv-
ing, just because everyone has jumped the gun and partially
performed.124

Other plaintiffs’ counsel may be reluctant to give the guardian ad litem
settlement information on their plaintiffs in the case.125 Thus, if it be-
comes necessary, the guardian ad litem should set a hearing where the
court will recognize the guardian ad litem’s need to gather information
for settlement approval.126 As dictated by the Code of Professional Re-
sponsibility, the plaintiffs’ counsel must prepare a written explanation of
the gross settlement, listing all deductions for fees and expenses.127 The
guardian ad litem should routinely request such settlement statements
from other plaintiffs’ counsel.128 “The more resistant the other parties’
counsel are to full disclosure of the settlement, the more the guardian ad
litem needs to carefully question all aspects of the settlement.”129

In a policy limits case, the guardian ad litem must evaluate the possibil-
ity of a collectible recovery in excess of policy limits.130 “If the injury is
one that would probably result in a jury award in excess of policy limits,
[he] must determine the collectability of a judgment against the
insured.”131

3. Evaluating the Proposed Apportionment of Settlement Proceeds
   Among the Interested Parties

There is virtually no guidance in the legal literature or case law to assist
the guardian ad litem in determining how to allocate the money among
the next friend and the minor. In light of this fact, the guardian ad litem’s
best strategy is to consider all damage evidence that would have been
introduced at trial and try to determine what a trier of fact would have
done.132 “In most cases, a fair apportionment is based on the proportion
each party’s damages bears to the total damages.”133 If the parents are
requesting reimbursement of medical expenses, travel expenses, lost
wages or other damages relating to their child’s injury, the guardian ad
litem should request to see invoices and inquire as to other insurance
coverage.134 Most trial judges will not permit the parents to receive funds
from the minor’s settlement for medical expenses that are reimbursable

125. See id.
126. See id.
127. See id.
128. See id.
129. Id.
130. See id. at F-14.
131. Id.
132. See Misko, supra note 69, at 4.
133. Wood, supra note 24, at F-14.
134. See id.
through other insurance. The collateral source rule may provide for recovery of these expenses, but judges are reluctant to award them because judges want the child rather than the parents to benefit from the recovery.

In addition, the Texas Family Code and the Texas Probate Code outline parental duties and the use of settlement proceeds, thus prohibiting the guardian ad litem from approving reimbursement or compensation to the parents for routine educational and medical costs, for their time, or for routine expenses in caring for the child, such as parking, travel, or improvement of vehicles or housing arrangements, except in extreme cases.

In those cases where, for example, the decedent left behind a widow and a child (or children), the guardian ad litem must take into consideration the relative “needs” of the parties and consider the damage evidence that might be presented at trial in order to determine how a trier of fact would have allocated the proceeds. If no agreement can be reached between the next friend and the guardian ad litem, the issue of allocation may be presented to the court for determination either with or without a jury.

4. Evaluating the Proposed Manner of Disbursement of the Settlement Proceeds

Another significant involvement of the guardian ad litem in the settlement phase is overseeing the arrangement of finances for the minor. Determining the most appropriate method of investment of the minor’s settlement funds is technically the decision of the next friend, with the advice of his or her counsel. The guardian ad litem approves the decision and recommends it to the court. In practice, however, many plaintiff and defense attorneys are deferring the decision making to the

135. See id.
136. See id. at F-14, F-15.
137. See id. at F-15; TEX. FAM. CODE ANN. § 151.003(3) (West 1996) (“A parent of a child has the following rights and duties: (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education.”). The Texas Probate Code provides that:
   (a) Except as provided by Subsection (b) of this section, a parent who is the guardian of the person of a ward who is 17 years of age or younger may not use the income or the corpus from the ward’s estate for the ward’s support, education, or maintenance.
   (b) A court . . . may authorize the guardian of the person to spend the income or the corpus from the ward’s estate to support, educate, or maintain the ward if the guardian presents clear and convincing evidence to the court that the ward’s parents are unable without unreasonable hardship to pay for all of the expenses related to the ward’s support.
   TEX. PROB. CODE ANN. § 777 (Vernon Supp. 1997)
138. See Misko, supra note 69, at 4.
139. See id.
140. See Solls & Hendrix, supra note 38, at 5.
141. See Wood, supra note 24, at F-15.
142. See id.
guardians ad litem. In the opinion of at least one probate court judge, "[t]his is basically dereliction of duty by the plaintiff's counsel, who is being compensated very well to assist the next friend in making this decision." Thus, the guardian ad litem should encourage the plaintiff's counsel to actively participate in the decision-making process.

In general, the guardian ad litem should base his decision regarding the best possible means for managing the minor's money on the amount of compensation awarded to the minor. It is recommended that the guardian ad litem retain a financial expert to assist him in this decision-making process.

If the method by which the settlement award is to be invested has been determined by counsel without consultation with the guardian ad litem, and the ad litem disagrees with the decision, he should be aggressive in defending his position, for that is precisely what he was appointed to do. It will not be too late for the ad litem to voice his objection because the settlement cannot be binding or final without his approval.

a. Investment of Settlement Proceeds by Clerk of Court

"Smaller settlements are often placed in the registry of the court." Ordinarily, any settlement or judgment proceeds recovered on behalf of the minor may be invested by the clerk of the court or the next friend in a bank or savings account, subject to the continuing jurisdiction of the court. This arrangement allows the clerk to invest the money in a savings and loan or bank certificate of deposit where the money typically remains until the minor achieves majority or has his disabilities removed. This arrangement is appropriate for smaller amounts that are not needed to ensure the well-being of the minor. Here, the money is safe and the rate of return is modest but predictable. Additional advantages include "simplicity and lack of significant ongoing fees." This arrangement may be undesirable with larger awards for the following reasons: (i) the next friend may not withdraw funds from the financial institution without a court order, and (ii) the plaintiff receives the funds

143. See id.
144. Id.
145. See id.
146. See Solls & Hendrix, supra note 38, at 5.
147. See Wood, supra note 24, at F-16.
148. See id. at F-14.
149. Misko, supra note 69, at 5.
151. See Tex. Prop. Code Ann. § 142.004(c) (Vernon 1995); Misko, supra note 69, at 5; Wood, supra note 24, at F-16.
152. See Misko, supra note 69, at 5.
153. See id.
154. Wood, supra note 24, at F-16.
upon reaching majority age, which is a rather tender age at which to receive a large amount of money.

b. Investment of Settlement Proceeds by Next Friend

The court may also “authorize the next friend or another person to take possession of the judgment or settlement proceeds and manage those proceeds for the benefit of the minor.” The disadvantages of this alternative include:

(1) prior to taking possession of the proceeds, the next friend or other person must post a bond in an amount at least equal to the value of the judgment or settlement proceeds, and (2) the next friend or other person is under a fiduciary duty to use the settlement proceeds under the direction of the court for the minor’s benefit.

An amount awarded to a minor plaintiff of less than $10,000 would more wisely be placed in a money market account or an interest-bearing savings account at the highest possible rate of interest.

c. Formal Guardianship

Cases involving substantial settlements are occasionally removed to the probate court. In this situation, “the next friend will take out a guardianship and, indeed, may seek the specific authorization of the probate court to make the compromise settlement involved.” Supervision by the probate court ensures that the money will not be squandered or improvidently invested. Under this arrangement, however, there is extensive court involvement which can be cumbersome and costly. Court approval becomes necessary for many routine matters, including the expenditure of guardianship funds, the sale of guardianship assets, the investment in certain properties, and termination of the guardianship. The costs associated with creating and administering a guardianship can “range from $1,500 on up.” Although this procedure is often considered a “last resort” means of handling the minor’s settlement, it can be useful if the minor needs continuing medical care, the cost of which is outside the parents’ financial capability, due to the parents’ ability to continually access the settlement funds.

Advantages of a guardianship include access to the settlement funds and the opportunity for the parent to be appointed guardian as opposed to

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156. See id. § 142.004(c).
157. See Cresswell, supra note 150, at 12.
158. Id.; see also Tex. PROP. CODE ANN. § 142.002(a) (Vernon 1995).
159. Cresswell, supra note 150, at 12.
160. See Solls & Hendrix, supra note 38, at 5.
161. See Misko, supra note 69, at 5.
162. Id.
163. See id.; Cresswell, supra note 150, at 13.
164. See Cresswell, supra note 150, at 13.
165. Id.
166. Id.
167. See Wood, supra note 24, at F-17.
to a third person. Disadvantages include the “additional costs attendant to continuing probate court jurisdiction, the availability of funds immediately upon the minor’s reaching age eighteen and the inclusion of all interest in the minor’s income.”

d. Commercial Annuity

The purchase of a commercial annuity is another means for managing the minor’s settlement award. “Typically, the defendant purchases a single-premium annuity policy from a life insurance company which then makes periodic payments directly to the plaintiff or his guardian.” The payments may be made periodically: “monthly, annually, [in] a series of lump-sum payments or [in] a combination of these frequencies.” The term “structured settlement” is used where there is “a promise to pay a series of future cash payments rather than a single lump-sum cash payment.” This arrangement can be advantageous even if the settlement amount is less than $10,000, especially if the plaintiff is very young.

The advantages associated with the purchase of a commercial annuity include: (i) a predictable rate of return; (ii) the entire annuity payment including interest being excludable from the plaintiff’s gross income; (iii) eliminating the risk of the plaintiff prematurely dissipating the settlement funds (because payments are made over a lifetime); (iv) no administrative costs, other than a one-time, hidden commission paid upon the purchase of the annuity contract; (v) payments generally do not begin until the minor’s eighteenth birthday, but may extend as long as desired, with larger payments possible after the minor has achieved greater maturity; and (vi) providing the plaintiff with financial peace of mind due to the fact that (a) he does not bear the risk of managing the annuity funds, and (b) he can be certain of a stream of income without worrying about interest rates or inflation.

Some disadvantages under this arrangement do exist. They include: (i) “the amount of each annuity payment is fixed as of the date of purchase of the annuity contract;” (ii) fixed payments may not be helpful to a plaintiff who later experiences unanticipated medical or other expenses; (iii) the fixed payment schedule does not allow for the flexibility needed to accommodate the changing needs of the minor; (iv) if future inflation rates are higher than anticipated at the time of settlement, future annuity payments may be of less value than originally intended; (v) low interest rates; and (vi) the possibility of insurance company insolvency.

168. See id.
169. Id.
171. Id. at 10.
172. Id.
173. See Solls & Hendrix, supra note 38, at 5.
174. See Cresswell, supra note 150, at 10-11; Wood, supra note 24, at F-17 to F-18.
175. Cresswell, supra note 150, at 11; see Misko, supra note 69, at 6; Wood, supra note 24, at F-18.
If the amount of money awarded to the minor is between $10,000 and $100,000, the guardian ad litem should consider using a portion of the money to purchase an annuity and placing the unused portion in an interest-bearing savings account. This is a particularly attractive option if the minor plaintiff will not be using the settlement money before his eighteenth birthday.

e. Section 142 Trusts

Substantial settlements (those typically greater than $150,000) may also be placed into a trust under Section 142 of the Texas Property Code. "The purpose of a Section 142 trust is to provide a management vehicle for proceeds received from judgments or settlements in favor of minors or incapacitated persons." Section 142.005 of the Texas Property Code requires that there be a suit in which the settlement (or judgment) is in favor of an incapacitated person or a minor who has no legal guardian of his estate at the time of creation of the trust. Benefits to establishing a Section 142 trust include: (i) the trust remains in place until minor plaintiff reaches twenty-five years of age (rather than eighteen); (ii) the district court may retain a general oversight function over the trust, but need not be involved in the daily investment or administration of the funds, which saves expenses and avoids potential difficulties; (iii) a trust officer with a fiduciary duty to the minor plaintiff is bound by a continuous duty to ensure the safety of the funds and to increase the growth of the funds; (iv) if necessary, the minor plaintiff's next friend has a trust officer to consult regarding distribution of the minor plaintiff's money before the minor's twenty-fifth birthday, which can be made without an order of the court provided that the trust officer authorizes the distribution; (v) the trust is "not limited to the recovery of lump-sum cash payments" and "may be established to receive judgment or settlement proceeds in... installment or annuity payments as part of a structured settlement;" and (vi) "the proceeds are excludable from the plaintiff's gross income as 'damages received... on account of personal injuries.'"

The guardian ad litem should be alerted to some of the disadvantages associated with setting up a Section 142 trust. These include: (i) high fees charged by the corporate trustee relative to the amount of income generated by the trust; and (ii) "the rate of return on investment of trust assets is less certain than, for example, the guaranteed return available by the purchase of a commercial annuity."

176. See Soils & Hendrix, supra note 38, at 5.
177. See id.
178. See Cresswell, supra note 150, at 1; Misko, supra note 69, at 6; Soils & Hendrix, supra note 38, at 5; Wood, supra note 24, at F-18 to F-19.
179. Cresswell, supra note 150, at 1.
180. See TEX. PROP. CODE ANN. § 142.005 (Vernon 1995); Cresswell, supra note 150, at 2.
181. Cresswell, supra note 150, at 5-6; see Misko, supra note 69, at 6; Soils & Hendrix, supra note 38, at 5.
182. Cresswell, supra note 150, at 6-7.
5. **Evaluating the Amount of the Attorney's Fees Charged by the Minor's Attorney**

An important aspect of the guardian ad litem's role is to evaluate the appropriateness of the legal fees that the minor's attorney proposes to charge for rendition of his services. "The amount of attorney's fees to be borne by the minor's portion of the settlement should be carefully reviewed and specifically explained to the court in the settlement hearing."\(^{183}\) The guardian ad litem's evaluation should be guided by Texas Disciplinary Rule 1.04(b), which addresses the issue of reasonableness of attorney fees as follows:

Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, 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. the 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 legal services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.\(^{184}\)

When determining the reasonableness of the out-of-pocket litigation costs expended, the guardian ad litem can apply the same general principles enumerated for the evaluation of fees.\(^{185}\) This amount should be determined by viewing the amount "prospectively (before the settlement was negotiated) rather than retrospectively, after it has been determined that a settlement will be achieved."\(^{186}\)

Many judges will only approve an attorney's fees if it is less than forty percent of the recovered amount of the minor's damage award, "notwithstanding a standard 40% contract between the next friend and the plaintiff's attorney."\(^{187}\) "In most cases, the court will only authorize a one-third fee with respect to the minor's portion of the settlement."\(^{188}\)

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185. See Misko, *supra* note 69, at 5.
186. *Id.*
188. *Id.*
a guardian ad litem is appointed to oversee a "friendly suit" (suit brought simply to secure approval after a settlement is achieved), he should encourage plaintiff's counsel to accept a fee as low as twenty to twenty-five percent of the gross settlement, taking into consideration the amount of work involved in securing the settlement.\textsuperscript{189}

After taking all necessary steps to enable the guardian ad litem to provide the court with sufficient information and a recommendation regarding the appropriateness of the settlement agreement, the ad litem should attend the hearing to prove up the settlement. Rule 44 of the Texas Rules of Civil Procedure requires court approval of the settlement.\textsuperscript{190} The guardian ad litem's presence at the hearing is necessary to ensure, on the record, that "(i) all aspects of the settlement are explained to the court and (ii) [the ad litem's] involvement [in the suit] is clearly explained."\textsuperscript{191} The guardian ad litem should ensure that the court is familiar with all payments to be made to the next friend, and the extent of the minor's injuries.\textsuperscript{192} Whether the minor should be present at the hearing should be discussed with counsel, court staff and if necessary, the judge.\textsuperscript{193} The guardian ad litem should ensure that four main issues are presented to the court through appropriate testimony: (i) the next friend's knowledge of and familiarity with the concept of settlement—its fairness and finality; (ii) the ad litem's role in the litigation, especially the results of his investigation into the matter; (iii) the ad litem's opinion as to the appropriateness and fairness of the settlement; and (iv) the ad litem's fees.\textsuperscript{194}

Finally, the guardian ad litem should ensure that the final settlement documents are properly prepared and that a judgment in proper form is submitted to the court.\textsuperscript{195} The judgment should include: (i) the disposition of all parties, not just the minor; (ii) the details of the settlement; (iii) the minor's social security number, if funds are to be deposited into the court registry; and (iv) the amount of the guardian ad litem's fee and a provision for its direct payment to the ad litem.\textsuperscript{196}

As a caveat, the guardian ad litem should approve the settlement agreement as to form only and should not sign it on behalf of the minor.\textsuperscript{197} He also should be cautious to avoid making representations and warranties beyond those specifically relating to his conduct (i.e., that he explained a settlement or discussed the investment of settlement proceeds).\textsuperscript{198}

\textsuperscript{189.} See id. But see Malouf v. Mulaula, 802 S.W.2d 268, 270 (Tex. App.—Waco 1990, writ denied) (holding that a district court may approve a 50% contingent fee prior to appointment of the guardian ad litem).
\textsuperscript{190.} See Tex. R. Civ. P. 44; Wood, supra note 24, at F-19.
\textsuperscript{191.} Wood, supra note 24, at F-19.
\textsuperscript{192.} See id.
\textsuperscript{193.} See id.
\textsuperscript{194.} See id.
\textsuperscript{195.} See id.
\textsuperscript{196.} See id.
\textsuperscript{197.} See id. at F-20.
\textsuperscript{198.} See id.
B. The Role of the Guardian Ad Litem After Judgment

Texas courts have held that a guardian ad litem's duties in connection with the suit in which he is appointed conclude when either judgment is entered or when the conflict of interest no longer exists.\textsuperscript{199}

The Texas Supreme Court in \textit{Brownsville-Valley Regional Medical Center, Inc. v. Gamez} ruled that follow-up work, including acting as an advisor to the minor's parents and overseeing the activities of the trustee, may not be compensated.\textsuperscript{200} The court ruled that "[w]hen the conflict of interest no longer exists, the trial court should remove the guardian ad litem."\textsuperscript{201} In other words, when there no longer exists a conflict of interest between the minor and the next friend, a guardian ad litem may not be awarded a fee for work performed for the minor.\textsuperscript{202}

Presumably, the guardian ad litem may legally provide services to the minor after the judgment is rendered. However, the ad litem will have to provide the services without compensation or will have to charge the minor for the services rendered. The ad litem will no longer be considered an officer of the court.

Prior to \textit{Brownsville-Valley}, legal literature tended to hold that, in practice, guardians ad litem would occasionally have to follow up on items regarding such issues as trust fund disbursement, without reimbursement.\textsuperscript{203} In particular, the ad litem might have had to assist the minor in securing the funds from the court registry when the minor became an adult.\textsuperscript{204} However, a guardian ad litem need not have assumed any responsibility for the investment of the funds by the district clerk or the trustee under a trust.\textsuperscript{205}

A prudent ad litem should retain his file in the event that he be exposed later to liability.\textsuperscript{206} He also should provide the minor and the next friend with his address and telephone number so the minor can contact the ad litem should the need arise for funds to be withdrawn before the minor reaches majority.\textsuperscript{207}

\begin{itemize}
\item \textsuperscript{199} See \textit{Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez}, 894 S.W.2d 753, 755 (Tex. 1995) ("When the conflict of interest no longer exists, the trial court should remove the guardian ad litem."); Durham v. Barrow, 600 S.W.2d 756, 761 (Tex. 1980) ("Barrow's appointment as guardian ad litem ended when the judgment in the termination suit became final."); \textit{Byrd}, 891 S.W.2d at 705 ("the ad litem's powers end when the judgment is entered").
\item \textsuperscript{200} See \textit{Brownsville-Valley}, 894 S.W.2d at 757; Solls & Hendrix, \textit{supra} note 38, at 7.
\item \textsuperscript{201} \textit{Brownsville-Valley}, 894 S.W.2d at 755; see \textit{Davenport}, 834 S.W.2d at 24 (dismissing the guardian ad litem because the next friends had settled their claims, thereby eliminating the conflict).
\item \textsuperscript{202} See \textit{Brownsville-Valley}, 894 S.W.2d at 757; Bleecker v. Villareal, 941 S.W.2d 163 (Tex. App.—Corpus Christi 1996, writ granted) ("A trial court abuses its discretion by awarding ad litem fees for services to be performed after the resolution of the conflict of interest that gave rise to the appointment.").
\item \textsuperscript{203} See Solls & Hendrix, \textit{supra} note 38, at 7.
\item \textsuperscript{204} See \textit{Wood}, \textit{supra} note 24, at F-20.
\item \textsuperscript{205} See \textit{id}.
\item \textsuperscript{206} See Solls & Hendrix, \textit{supra} note 38, at 7.
\item \textsuperscript{207} See \textit{id}.
\end{itemize}
The ad litem should inform the minor plaintiff's next friend that the funds in trust may be withdrawn only to pay for the plaintiff's medical needs and that such withdrawals will be paid directly to the health care provider for the rendering of those necessary medical services. 208

C. THE ROLE OF THE GUARDIAN AD LITEM DURING LITIGATION

If there is no settlement at the time of the guardian ad litem's appointment, he should ensure that the minor's interests are protected. 209 He should contact counsel to notify them of his appointment. 210 He should also contact plaintiff's counsel to discuss the ad litem's role in the case. 211 The guardian ad litem should be informed of plaintiff counsel's strategy and preparation and all court scheduling. 212

Generally, it is not necessary for the guardian ad litem to attend pre-trial discovery or hearings unless his presence is requested or unless plaintiff's counsel is doing an inadequate job. 213 If attendance is necessary, the ad litem should discuss his pre-trial involvement with the defense counsel, since the defense will ultimately be paying the ad litem's fees and, without such discussion, may later dispute the necessity of such fees. 214

As a court-appointed personal representative of the minor, a guardian ad litem is neither co-counsel for the plaintiff, nor is he separate counsel. 215 As stated earlier, Texas courts have given guardians ad litem "considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary" to protect the interests of the minor. 216 In practice, guardians ad litem participate in voir dire, opening statements, closing statements, and the examination of witnesses. 217 Although, the ad litem is granted this considerable latitude, he cannot separately designate experts and should not ordinarily participate in depositions without prior approval. 218

If the guardian ad litem determines it is necessary to perform such an increased role in the trial process, he should discuss this with all parties to avoid a future fee dispute. 219 In trial, a guardian ad litem's participation tends to be as extensive as the court will allow. 220 The extent of a guard-

208. See id.
209. See Wood, supra note 24, at F-20.
210. See id.
211. See id.
212. See id.
213. See id.
214. See id.
215. See id.
216. Roark, 862 S.W.2d at 647; see Grunewald, 931 S.W.2d at 595; Byrd, 891 S.W.2d at 706.
217. See Litman, supra note 34, at 6; Misko, supra note 69, at 3; Solls & Hendrix, supra note 38, at 4; Wood, supra note 24, at F-21.
218. See Wood, supra note 24, at F-20.
219. See id. at F-21.
220. See id.
ian ad litem’s participation during trial is a controversial issue.\(^{221}\)

IX. COMPENSATION OF THE GUARDIAN AD LITEM

Rule 173 of the Texas Rules of Civil Procedure provides that the court shall allow a guardian ad litem a “reasonable fee for his services to be taxed as a part of the costs.”\(^{222}\) Determination of the amount of guardian ad litem fees is within the sound discretion of the trial court.\(^{223}\) A reviewing court will not set aside a fee award absent evidence illustrating a clear abuse of discretion.\(^{224}\) A trial court will be considered to have clearly abused its discretion only if the movant has proven that the court acted arbitrarily and unreasonably.\(^{225}\) “The discretion of the trial court in setting an ad litem fee is not unbridled.”\(^{226}\) In general, the factors used to determine the reasonableness of an attorney’s fee may be used to evaluate the reasonableness of the guardian ad litem’s fee.\(^{227}\) Such factors include: (i) the difficulty and complexity of the case; (ii) the amount of time and labor involved; (iii) the extent of the responsibilities assumed by the attorney; (iv) whether other employment is lost by the attorney because of the undertaking; (v) the benefit resulting to the client, (vi) the amount of money or the value of the property or interest involved; (vii) the contingency or certainty of compensation; (viii) the skill and experience reasonably needed to perform the service; and (ix) whether the employment is casual or for an established client.\(^{228}\) “A guardian ad litem must be paid a reasonable fee, win or lose.”\(^{229}\) A trial judge cannot refuse to award a reasonable fee based on the result of the trial.\(^{230}\)

Guardian ad litem fees are taxed as part of the costs of litigation incurred by the party who did not prevail.\(^{231}\) Rule 131 of the Texas Rules of Civil Procedure pertains to the assessment of costs and provides that “[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided.”\(^{232}\) No part of the fee may be taxed against the prevailing party unless there is good cause requiring that the prevailing party do so.\(^{233}\) The court may assess costs on

\(^{221}\) See infra discussion Part XII.

\(^{222}\) See Brownsville-Valley, 894 S.W.2d at 756; Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987).

\(^{223}\) See Brownsville-Valley, 894 S.W.2d at 756.

\(^{224}\) See Simon, 739 S.W.2d at 794.

\(^{225}\) Id.

\(^{226}\) See id.; Alford v. Whaley, 794 S.W.2d 920, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ).

\(^{227}\) See id.; Alford v. Whaley, 794 S.W.2d 920, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ).

\(^{228}\) See Simon, 739 S.W.2d at 794; Alford, 794 S.W.2d at 925; Smith v. Smith, 720 S.W.2d 586, 591 (Tex. App.—Houston [1st Dist.] 1986, no writ).

\(^{229}\) Tex. R. Civ. P. 173; see Alford, 794 S.W.2d at 925.

\(^{230}\) See Alford, 794 S.W.2d at 925.


\(^{232}\) See Rogers, 686 S.W.2d at 601.

\(^{233}\) See Tex. R. Civ. P. 141; Rogers, 686 S.W.2d at 601; Newman v. Link, 866 S.W.2d 721, 724-25 (Tex. App.—Houston [14th Dist.] 1993, writ denied).
the prevailing party for good cause as shown on the face of the record.\textsuperscript{234} Good cause may include the consideration of whether the losing party has the ability to pay the guardian ad litem's fee and whether the guardian ad litem performed the duties of plaintiff's counsel in prosecuting the case.\textsuperscript{235} In Rule 141 cases, "an appellate court should scrutinize the record to determine whether it supports the trial [court's] decision to tax the prevailing party with part, or all, of the costs."\textsuperscript{236}

The rationale for assessing guardian ad litem fees on the prevailing party is twofold. First, the guardian ad litem should be reasonably sure of receiving a fee for his services. Second, the minor is not the sole recipient of the ad litem's services; defendants desire the certainty that a judgment adverse to a minor will not be overturned for lack of a guardian ad litem's having been appointed.\textsuperscript{237}

\section*{X. LIABILITY OF THE GUARDIAN AD LITEM}

Judges are absolutely immune from tort liability resulting from acts performed or not performed "in the course of a judicial proceeding in which [they have] jurisdiction."\textsuperscript{238} "Absolute immunity refers to the right to be free, not only from the consequences of the litigation's results, but from the burden of defending oneself altogether . . . ."\textsuperscript{239} When judges delegate their authority or appoint persons to perform services for the court, those persons may also be afforded such immunity, known as

\begin{quotation}
\textsuperscript{234} See Rogers, 686 S.W.2d at 601.
\textsuperscript{235} See Davis v. Henley, 471 S.W.2d 883, 885 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); Newman, 866 S.W.2d at 723.
\textsuperscript{236} Rogers, 686 S.W.2d at 601. In a recent and unusual opinion, Catlin v. General Motors Corp., the Houston Court of Appeals approved an assessment of guardian ad litem fees against the plaintiffs' attorneys under Rules 141. See Catlin v. General Motors Corp., 936 S.W.2d 447 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.). Throughout the opinion, the court used the terms "guardian ad litem" and "attorney ad litem" interchangeably, although the ad litem fees at issue were paid to a guardian ad litem appointed under Rule 173. The court concluded that Rule 141 allows ad litem fees to be "assessed against an attorney to be paid out of the funds recovered in a personal injury action." \textit{Id.} at 452. The court reasoned that because, in personal injury cases, attorneys are compensated on a contingency basis by the funds recovered by the plaintiff, such assessment was reasonable. See \textit{id.} The court held:

[T]he attorney has an interest in the outcome of the litigation and will be treated as a party . . . . [T]he ad litem [in this case] was essentially aligned with the [plaintiffs'] attorneys in their representation of all the plaintiffs and . . . . the ad litem's fees were incurred in conjunction with the plaintiffs' case . . . . [The trial court] believe[d] it . . . appropriate, because what [the ad litem] was doing was assisting Plaintiff's [sic] counsel, that it be paid by Plaintiff's [sic] counsel out of their fees.

\textit{Id.} at 452-53.
\end{quotation}

Not only is this case illustrative of the confusion surrounding payment of guardian ad litem fees, it clearly illustrates the confusion courts have in distinguishing between guardians ad litem and attorneys ad litem and the confusion guardians ad litem have in defining their role as arms of the court versus advocates for the plaintiff.

\textsuperscript{237} See Davis, 471 S.W.2d at 885.
\textsuperscript{238} Turner v. Pruitt, 342 S.W.2d 422, 423 (Tex. 1961).
quasi-judicial immunity.240

In Texas, only one court of appeals has addressed the issue of providing judicial immunity for guardians ad litem. The court in Byrd stated, "[t]he guardian ad litem is not an agent of the court and has no delegated authority to act in the name of the court."241 He acts independently of the court, which has no authority to control the ad litem's actions.242 Therefore, the guardian ad litem should be provided no judicial immunity.243 Although the court recognized that this decision could discourage potential ad litems from participating in the guardian ad litem program, it reasoned that this concern was outweighed by a minor's right to sue for inadequate representation of her interests.244

Other states have addressed the issue of affording judicial immunity to the guardian ad litem and although the results have been inconsistent, they have been insightful. Some have afforded the guardian ad litem, in connection with court approval of a settlement involving a minor, absolute immunity.245 These decisions are typically based on the theory that the court appointed guardian ad litem is an integral part of the judicial proceedings, serves as an adjunct of the court, and is entitled to be free from harassment from disgruntled parents who object to the ad litems' impartial decisions.246

The New Mexico Supreme Court in its 1991 decision, Collins v. Tabet,247 adopted a functional analysis approach. Under this theory, "a guardian ad litem, appointed in connection with court approval of a settlement involving a minor, is absolutely immune from liability ... provided that the appointment contemplates investigation ... into ... the reasonableness of the settlement in its effects on the minor."248 However, "if the guardian's appointment does not contemplate actions on behalf of the court but instead representation of the minor as an advocate ... then the guardian is not immune and may be held liable under ordinary principles of malpractice."249 The ad litem who works to determine the reasonableness of settlement is considered a "friend of the court" and is entitled to immunity, whereas the ad litem who "is acting as an advocate for his client's position—representing the pecuniary interests of the child instead of looking into the fairness of the settlement ... on behalf of the court," is afforded no quasi-judicial immunity.250 A finder of fact is

240. See Byrd, 891 S.W.2d at 707.
241. Id. at 708.
242. See id.
243. See id.
244. See id.
246. See Short, 730 F. Supp. at 1039; Tindell, 428 N.W.2d at 387; Thomas, supra note 239, § 3.
248. Id. at 44.
249. Id.
250. Id. at 48.
required to determine which role the ad litem assumed.  

The federal district court of Colorado, applying Colorado law, found that a guardian ad litem should be afforded absolute immunity because he is an integral part of the judicial proceedings and serves as an adjunct of the court. The court used a functional analysis and determined that under state law, the court may appoint a guardian ad litem whose function is to represent the interests of the child and to “determine and recommend those available alternatives which are in the best interests of the child.” Therefore the guardian ad litem acts as an “agent of the court.” The court stated that “[w]hen a guardian ad litem investigates, makes recommendations to a court, or enters reports, he or she, like the court, must hold paramount the child’s best interests” and, thus, serves as an adjunct of the court. “[T]he guardian’s judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents” which can “warp judgment that is crucial to vigilant loyalty” toward the child. The court articulated several additional rationales for allowing the guardian ad litem immunity from liability:

First, the immunity attaches only to conduct within the scope of a guardian ad litem’s duties. Second, the appointing court oversees the guardian ad litem’s discharge of those duties, with the power of removal. Third, parents can move the court for termination of the guardian. Fourth, the court is not bound by and need not accept the recommendations of the guardian. The court can modify or reject the recommendations as it deems appropriate. . . . Finally, determinations adopted by an appointing court are subject to judicial review.

The Minnesota Supreme Court has also ruled that a guardian ad litem should be afforded judicial immunity to enable him to freely “engage in a vigorous and autonomous representation of the child” without harassment from parents who may object to the guardian’s actions. Courts have also ruled that a guardian ad litem cannot be held liable to the parents of the infant for negligence, because no legal duty exists between the ad litem and the parents. As of date, no Texas court has addressed this issue.

A guardian ad litem in Texas should limit his conduct to analysis and reporting to the court. Independent activity as an advocate for the minor can expose an ad litem to liability for malpractice.

251. See Thomas, supra note 239, § 3.
252. See Short, 730 F. Supp. at 1037; Thomas, supra note 239, § 3.
254. Id.
255. Id.
256. Id. at 1039.
257. Id.
258. Tindell, 428 N.W.2d at 387.
XI. CONFUSION REGARDING ROLE DEFINITION

Since a guardian ad litem appointed to represent a minor is regarded as an officer of the court whose duty is to protect the interests of the minor and to submit his recommendations to the court for approval, considerable role confusion may result regarding the appropriate duties owed to the court and to the ward. Role definition issues experienced by guardians ad litem include uncertainty and inconsistency about their general responsibilities and about the specific tasks they are expected to perform.\(^\text{261}\)

The universally acknowledged responsibility of guardians ad litem is “to represent the best interests” of children who are involved in litigation. Beyond this general charge, the responsibilities of guardians ad litem and the rules governing their relationships with their wards are not commonly stated with sufficient specificity in legislation or appointment orders . . . . [C]ourts and legislatures are inconsistent in defining society’s expectations of guardians ad litem for children. Guardians ad litem are frequently assigned conflicting responsibilities, for example, to determine and pursue the best interests of children, to be advocates for children, and to serve as investigators for courts.\(^\text{262}\)

No decision could lead to more confusion for a guardian trying to determine his role identity than the Fifth Circuit’s description of the role of the guardian ad litem in *duPont v. Southern National Bank of Houston*. In this case, the court stated that the guardian ad litem “plays a hybrid role, advising one or more parties as well as the court.”\(^\text{263}\) A guardian ad litem is appointed merely to aid and to enable the court to perform its duty of protection.\(^\text{264}\) The ad litem may be seen as equally responsible to the minor and to the court.\(^\text{265}\) With this lack of guidance, how is an ad litem to determine what duties to perform?

Courts and legislatures tend to assign two categories of responsibilities onto guardians ad litem: 1) to serve as advocates for the best interest of children, and 2) to serve as fact finders for courts.”\(^\text{266}\) Texas courts have been inconsistent in defining the precise role of the guardian ad litem. Whereas the guardian ad litem has been categorized as an “officer of the court,”\(^\text{267}\) he has also been assigned the responsibility of “properly protecting the infant’s interests.”\(^\text{268}\) The guardian ad litem appears to function as an “arm of the court” when he is assigned such duties as making evaluations and recommendations to the court regarding: (i) the damages suffered by the minor, (ii) the adequacy of the settlement, (iii) the

\(^\text{261}\) See Stuckey, *supra* note 1, at 1786.
\(^\text{262}\) Id.
\(^\text{263}\) *DuPont*, 771 F.2d at 882 (quoting Schneider v. Lockheed Aircraft Corp., 65 F.2d 835, 854 (D.C. Cir. 1981)).
\(^\text{264}\) See id.
\(^\text{265}\) See Misko, *supra* at 69, at 7.
\(^\text{266}\) Stuckey, *supra* note 1, at 1787.
\(^\text{267}\) See *Dawson*, 666 S.W.2d at 265; *Byrd*, 891 S.W.2d at 704.
\(^\text{268}\) *Dawson*, 666 S.W.2d at 265; *Byrd*, 891 S.W.2d at 705-06.
proposed apportionment of settlement proceeds among the interested parties, (iv) the proposed manner of disbursement of the settlement proceeds, and (v) the amount of the attorneys' fees charged by the minor's attorney."^269

However, the court of appeals' decision in Byrd explicitly held that "[the] guardian ad litem is not an agent of the court and has no delegated authority to act in the name of the court."^270 Additionally, Byrd allows a guardian ad litem to be held liable for negligently representing the interests of the ward,^271 which is consistent with the philosophy that a guardian ad litem acts as a representative of the minor, rather than as an "arm of the court." Furthermore, the fact that Texas courts consider the guardian to have "displaced" the next friend and stepped into the shoes of the guardian^272 is further proof that the guardian is to act solely as an advocate. Lastly, the recognition of a fiduciary duty between guardian ad litem and minor plaintiff^273 promotes the theory that an ad litem acts as an advocate rather than as a court appointed officer. When articulating the duties of the guardian ad litem, Texas courts have refused to encourage the ad litem to evaluate the "reasonableness" of the settlement, attorney's fees, etc. The fact that courts fail to use the term "reasonable" when articulating how the ad litem is to evaluate the plaintiff's interests, further indicates that the ad litem's role is that of child advocate who, rather than seeking appropriateness and fairness, is to represent the pecuniary interests of the child and do all things necessary to achieve the maximum possible recovery for the minor whose interests he represents.

Although neither the Texas Legislature nor the Texas judiciary has specifically articulated the exact roles and responsibilities of the guardian ad litem in personal injury litigation, the trend appears to lean toward requiring the guardian ad litem to act as a zealous advocate for the minor plaintiff.

This is not an appropriate role for the guardian ad litem. It is the role of the minor's attorney ad litem. The guardian ad litem should serve only as an officer of the court to ensure that the minor is represented fairly and responsibly.

Consider the following example:

During settlement negotiations between the minor and the defendant, the defendant makes a settlement offer that the minor and his attorney accept. As the guardian ad litem appointed to the case, you believe the offer to be fair and reasonable. However, you also believe that the minor could squeeze some more money out of the defendant. Is it your duty to interject in the settlement process and persuade the defendant to offer a larger settlement? Is it your duty

^269. Byrd, 891 S.W.2d at 707.
^270. Id.
^271. See id. at 708.
^272. See Grunewald, 931 S.W.2d at 595; Gibson, 483 S.W.2d at 373.
^273. See Byrd, 891 S.W.2d at 706.
to report to the court that the settlement offer is not in the best interests of the minor?

I argue that the guardian ad litem is required only to ensure that the litigation process and settlement agreement are fair and reasonable to the minor. The role as advocate is reserved for the attorney ad litem. This is precisely the intended distinction between guardian ad litem and attorney ad litem. Furthermore, having the guardian ad litem act as an arm of the court better serves the interests of society. Because society wants to protect the minor, the guardian ad litem is appointed by the court. He is a part of the proceeding solely because the plaintiff is a minor. Thus, he should act as an independent agent for the court when determining whether the settlement serves the interests of the minor.

Because the guardian ad litem plays such an integral role in assisting a minor litigant in litigation, many states have adopted mission statements and guidelines to assist guardians ad litem in performing their duties. Perhaps the Texas Bar Association or other capable organization would be wise to consider adoption of such guidelines to ensure that appointed guardians ad litem perform their duties with consistency and competency in the courts.

XII. CONCLUSION

A court appointed guardian ad litem representing a minor plaintiff in personal injury litigation is confronted with a tremendous responsibility to the ward. He further faces the challenge of determining what his responsibilities are to the court, to the minor whose interests he is appointed to represent, and to the other involved participants. The responsibilities of guardians ad litem and the rules governing their relationships with their wards, the court, and others are not commonly articulated in legislation or judicial decisions. However, guidelines designed to assist the ad litem in fulfilling his duties need not necessarily take the form of legislative rulemaking or judicial decision making. District court judges, bar organizations and child advocacy groups can assist appointed guardians ad litem by drafting guidelines and presenting them to the guardians upon notification of their appointment.

XIII. APPENDIX—GUARDIAN AD LITEM CHECKLIST

Most items included in the following checklist were originally included in the checklist written by Cynthia F. Solls and Garnett E. Hendrix, Jr., which was presented at the December 4, 1992, Dallas Bar Association Seminar entitled *The Guardian Ad Litem's Perspective: The Case as Seen and Heard Through the Eyes and Ears of the Court.*

1. Request plaintiff’s original petition;
2. Request defendant’s original answer;
3. Request copies of all medical records and all medical bills;
4. Request evidence and amounts of any third party health insurance carriers’ subrogated liens and/or hospital liens and/or letters of protection to medical providers;
5. Request final settlement negotiation figures;
6. Request copies of plaintiff’s attorney’s contract and percentage of plaintiff’s attorney’s fees;
7. Request an itemized copy of any costs (not taxable court costs) requested to be reimbursed by plaintiff’s attorney from minor’s settlement;
8. If the parents are requesting reimbursement of medical expenses, travel expenses, lost wages or other damages relating to their child’s injury, request to see invoices and inquire as to other insurance coverage;
9. Request the amounts of any outstanding medical payments to health care providers;
10. Request any evidence of out-of-pocket costs and expenses for medical bills and lost wages that will be requested as reimbursement for the next friend (parent);
11. Request next friend’s address, home phone and work phone numbers;
12. Request date of birth and social security number of minor;
13. Request if any personal injury protection funds were available and utilized if an automobile accident was involved;
14. Request the existence of any under-insured policy coverage of the next friend if the settlement amounts of the adverse carrier were for policy limits;
15. Request copy of homeowner’s policy and homeowner’s policy limits if the injury occurred on the homeowner’s property;
16. Contact the next friend and discuss the entire settlement in detail (be firm in informing the next friend that the minor’s recovery will be placed into some type of savings institution until minor reaches age of majority);
17. Meet with the minor child before the setting of the hearing of the minor prove-up to investigate the injury and limitations personally;
18. Be assured that the minor child is performing the same activities as before the accident or that the treating physician has stated that the minor has recovered as much as he/she will recover;
19. If applicable, contact the treating physician and discuss the minor's physical condition;

20. If physical disfigurement is a result of the accident, obtain an estimate of cost of future medical treatment and cost of plastic surgical revision by a competent plastic surgeon along with hospital expenses;

21. Maintain extremely accurate written time records of every conversation and prepare an oral report for the judge at the time of the prove-up hearing (prepare a written report if the incident/injury is of serious nature);

22. In most cases, a "general denial" should be filed by the guardian ad litem on behalf of the minor/incompetent;

23. Ensure that all court documents refer to you as a guardian ad litem and not as an attorney ad litem;

24. Ensure that the final settlement documents are properly prepared and that a judgment in proper form is submitted to the court;

25. Retain your file in the event that you are exposed later to liability;

26. Provide the minor and the next friend with your address and telephone number so the minor can contact you should the need arise for funds to be withdrawn before the minor reaches majority.275

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275. See Solls & Hendrix, supra note 38 at 7, 10-11; Wood, supra note 24, at F-9, F-13, F-14, F-19.