PROCEDURAL ISSUES IN CPS SUITS INVOLVING PARTY INCAPACITY

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PROCEDURAL ISSUES IN CPS SUITS INVOLVING PARTY INCAPACITY

Abstract: This paper discusses some procedural issues in CPS cases when a party lacks capacity.

INTRODUCTION

A party's capacity refers to a party's legal authority to act in litigation.[1] A minor child[2] or adult incapacitated person[3] is under a legal disability that affects that person's capacity to act in litigation.[4] Because of incapacity such persons need to rely on special processes to participate in suit.[5] The purpose of this paper is to discuss some of the procedural issues related to party incapacity when a child protection suit is filed by the Department of Family & Protective Services.

I. PROCEDURAL ISSUES RELATED TO INCAPACITY OF SUBJECT CHILD

In this State, when a minor child is in a dangerous home situation that cannot be prevented or eliminated with reasonable efforts, the Department has standing and authority to file suit for protection of that child.[6] While the suit seeks relief that is for the child, the child does not direct the suit nor is the child named as a petitioner. Instead, the Department files the suit as petitioner to advocate the State's interest in protecting the child.[7] While the Department does not directly represent the child, procedures are statutorily required to protect the child's interests in light of the child's incapacity.

A. Subject child's suit representatives.

Among the first actions a court must take immediately to ensure the child's interests are represented after the Department files suit is to appoint a guardian ad litem and attorney ad litem.[8] The term "ad litem" means "for the suit."[9]

The guardian ad litem is recognized as an officer of the court with certain statutory powers and duties limited to the suit from which the appointment derives.[10] The statute authorizing the appointment specifies this representative "is not a party to the suit."[11] Moreover, none of the powers granted the guardian ad litem allow the representative to make legal decisions for the child.[12] The role is defined as someone who represents "the best interest of a child."[13]

The specific powers and duties of the guardian ad litem are specified in Section 107.002 of the Family Code.[14] Subpart (a) begins by specifying such

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[1] *Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001).

[2] Any reference to "child" in this article concerns a child as defined by the Family Code: a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes. Tex. Fam. Code Ann. §101.003 (West 2014).

[3] The term "incapacitated" person is not defined in the Family Code. The Estate Code has a definition. Tex. Est. Code Ann. §22.016 & §1002.017. The Civil Practice & Remedies Code refers to such persons as of "unsound" mind. Tex. Civ. Prac. & Rem. Code §16.001.

[4] *See Sax v. Votteler,* 648 S.W.2d 661, 666 (Tex. 1983) ("A child has no right to bring a cause of action on his own unless disability has been removed"); Austin *Nursing Cte., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) ("Minors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities"); Tex. Civ. Prac. & Rem. Code §16.001 (person under 18 years old or of unsound mind is under a legal disability for purposes of limitations periods).

[5] 171 S.W.3d at p. 848.

[6] Tex. Fam. Code Ann. §102.003(a)(6) (West 2014) (Department has standing); Tex. Fam. Code Ann. §262.001(a) and §262.113 (West 2014) (may file suit affecting parent-child relationship or take possession consistent with standards in chapter 262 of Family Code); Tex. Fam. Code Ann. §153.001(a)(2) (state's policy is to provide safe, stable and nonviolent environment for children); Tex. Hum Re. Code Ann. §40.002(b) (West 2014) (Department's to provide protective services for children).

[7] Tex. Fam. Code Ann. §262.001 (directs government entity with interest in child legal authority to request order for child as provided in chapter 262).

[8] Tex. Fam. Code Ann. §107.011-012 (West 2014). Note: a guardian ad litem is an officer of the court appointed to assist in properly protecting an interest. *Jocson v. Crabb,* 133 S.W.3d 268, 271 (Tex. 2004). Consequently, the representation of an "ad litem" is traditionally limited to matters related to the suit of the appointment. *Id.*

[9] *Brownsville-Valley Reg'l Med. Ctr., Inc v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995); BLACK'S LAW DICTIONARY 43 (6th ed. 1990).

[10] *See Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980) (holding guardian ad litem lacked standing to bring bill of review to attack adoption, because his authority was limited to the suit for termination underlying his appointment); *Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida*, 596 S.W.2d 947 (Tex. App. --- Fort Worth 1980, no writ) (acknowledging a guardian ad litem appointed under former-Section 11.10(a) of the Family Code is only given powers in matters connected to the suit in which he or he is appointed); *See also Jocson v. Crabb,* 133 S.W.3d 268, 271 (Tex. 2004) (noting generally a guardian ad litem is an officer of the court whose powers is limited to the case).

[11] Tex. Fam. Code Ann. §107.002 (West 2014).

[12] *Id.;* Tex. Fam. Code Ann. §107.011 (West 2014).

[13] Tex. Fam. Code Ann. §107.001(5) (West 2014).

[14] Tex. Fam. Code Ann. §107.002 (West 2014).

official's authority to investigate and obtain relevant medical, psychological and school records as provided in Section 107.006 of the Family Code.[15] Subpart (b) then states duties the official "shall" 'perform.[16] Those duties include interviewing the child and persons with significant knowledge, and learning the child's expressed objectives.[17]

The guardian ad litem is then to be involved in the litigation by participating in any staffing, hearing or trial, and is entitled to give input on placement decisions, appropriateness of child welfare service providers, evaluate educational needs and goals and provide recommendations on what is in the best interest of the child.[18] The guardian ad litem is also entitled to receipt of notices in the case and papers filed, but will not call witnesses or otherwise provide legal services unless also a licensed attorney acting in a dual role as the child's attorney ad litem.[19]

The other representative that must be appointed for the child is the Attorney ad Litem.[20] The specific duties and powers of the Attorney ad Litem for the Child are set forth in Sections 107.003 and 107.004 of the Family Code.[21] However, the source provision that mandates this appointment indicates the legislature's overall intent for this appointee is "to ensure adequate representation of the child."[22] In that connection, the definition of "Attorney Ad Litem," clarifies this officer provides legal services that include the duties of undivided loyalty, confidentiality and competent representation.[23]

To ensure that the representation is adequate, however, this scheme takes into account the child's natural incapacity as a minor and the need for special evaluation. Namely, the scheme gives the attorney ad litem authority to make certain determinations about the child's competency to participate in the attorney-client relationship. If the attorney ad litem determines the child is competent to understand the nature of the attorney-client relationship and can form that type relationship, the attorney ad litem will represent and follow the child's expressed objectives of representation.[24]

However, if the child appears to lack ability, Section 107.008 may permit an alternative method for representation. Namely, it specifies a standard the attorney ad litem must apply in evaluating the child's ability to meaningfully formulate his or her objectives.[25] If under that standard the attorney determines the child is unable to meaningfully formulate his or her objectives of representation, the attorney ad litem may present the court with a position that the official determines will serve the best interest of the child.[26] However, in doing that, the attorney ad litem is also required to consult with the guardian ad litem, and, though not bound by the position of the guardian ad litem, is to ensure any recommendation of the guardian ad litem regarding the child's best interest, and its basis is presented to the court.[27]

B. Department's Authority for Child

The attorney ad litem and guardian ad litem clearly have representative authority for a child in a suit filed by the Department. Nevertheless, their roles are limited as each is an "ad litem" for the specific suit and only perform the statutory duties on the authority granted in Chapter 107 of the Family Code. That authority does not include the right to assume control and care of the child.

Also, in a child protection suit, the Department is typically appointed as temporary nonparent sole managing conservator for the child during the suit.[28] Unless limited by court order, that means the Department assumes not only the power to care for the child but also the right to represent the subject child in legal actions and make other decisions of legal significance.[29] Consequently, while the attorney ad litem has the specific right to represent the child in the subject suit, the Department's appointment gives it the broader general authority to assert legal action and other important legal decisions on behalf of the child.

C. Subject child's ability to file suit

Considering the child's lack of capacity, an important procedural question that may need to be addressed is whether any representative could file suit *by the child*. To bring a lawsuit, a party must have both standing and capacity.[30] Standing focuses on the party's relationship with the lawsuit so as to have a "justiciable interest" in its outcome whereas capacity deals with the personal qualifications of the party to litigate.[31]

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[15] *Id.* §107.002(a).
[16] *Id.* §107.002(b).
[17] *Id.*
[18] *Id.*
[19] *Id.* §107.002(c)(4).
[20] Tex. Fam. Code Ann. §107.012 (West 2014).
[21] Tex. Fam. Code Ann. §§107.003-004 (West 2014).
[22] Tex. Fam. Code Ann. §107.012 (West 2014).
[23] Tex. Fam. Code Ann. §107.001(2) & §107.003(a) (West 2014).
[24] Tex. Fam. Code Ann. §107.004(2) (West 2014).
[25] Tex. Fam. Code Ann. §107.008 (West 2014).
[26] *Id.*
[27] *Id.*
[28] Tex. Fam. Code Ann. §105.001(a)(1), §262.106, & 262.201 (West 2014);
[29] Tex. Fam. Code Ann. §153.371 (West 2014).
[30] *Austin Nursing Center, Inc. v. Lavato*, 171 S.W.3d 845, 848 (Tex. 2005).
[31] *Id.* at 848.

An important distinction between the concepts of standing and capacity is the extent these principles are subject to protection. Namely, standing is a legal requirement of such importance that a suit can be challenged for lack of standing at any time, while challenges to capacity must be raised in a verified pleading and can be waived.[32] In this connection, the Supreme Court has stated even "a minor's lack of capacity … may be waived."[33]

With respect to capacity, the subject child obviously lacks capacity to personally bring suit on his or her own unless the legal disability of minority is removed.[34] The only rule of procedure that specifically addresses a minor's ability to sue is Rule 44.[35] That rule permits a suit to be filed on behalf of a minor child through a next friend when a child does not have a legal guardian. In a suit by a "next friend," the real party plaintiff is the child and not the next friend.[36]

Rule 44 does not state much direction on the procedural operation of this rule. In that connection, since it does not specify, next friends generally just act on behalf of the minor without formal appointment.[37] This suggests a next friend could easily file suit for a child even if someone else has authority over the child.

In *In re Bridgestone Americas Tire Operations, L.L.C.*,[38] that seemed to be the case when an uncle who lived in Texas filed a wrongful death suit for one of his deceased sibling's children even though the children's grandparents were the children's guardians under Mexican law and Mexico was where the children lived. The defendants filed a motion to dismiss the uncle's suit as next friend of the children on the basis of forum non-conveniens, in part, because the uncle lacked authority under Rule 44 to sue as the children's next friend since he was not guardian.

The Supreme Court agreed that in order for Rule 44 to make sense it should only be construed to allow minors to prosecute their claims through a next friend "when they otherwise could not through a legal guardian."[39] The Texas Supreme Court then commented in a footnote that a child usually has a recognized legal guardian qualified to sue for the child when the child has a parent with the right to represent the child in legal proceedings.[40]

In the case before it, however, the Supreme Court acknowledged the children's parents died and the grandparents became their guardians under Mexico law. Nonetheless, the court did not find the title of guardian gave the grandparents the right to act under Rule 44 for the children, because their appointment in Mexico was not recognized as legal authority to act for the children in Texas. The court then held because the children did not have a recognized legal guardian in Texas, Rule 44 permitted the uncle to sue as next friend for the children[41]

Importantly, the Supreme Court's analysis makes clear a child does not have a "guardian" for purposes of Rule 44 just because a child has a representative with the name "guardian." The key is whether that representative has legal authority like a parent to act for the child in a suit under Texas law.[42]

In a child protection suit, the subject child's "*guardian* ad litem" has a title that includes the word "guardian." However, under *Bridgestone*, that word is not what controls for application of Rule 44. The key is whether that official is a person with authority to act for the party.[43]

In a child protection suit, nothing in the statutory authority of the guardian ad litem gives that official appointed for the child authority to make legal decisions for the child. Moreover, a child's guardian ad litem will not be representing the child in the suit unless acting in the dual role as an attorney ad litem.[44]

As far as the child's parents, the general authority of the parents to represent the subject child is removed when the court orders the Department to assume authority over the child as a non-parent temporary sole managing conservatorship. With that appointment, the Department receives the right,

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[32] *Id.* at 849.
[33] *In re Bridgestone Americans Tire Operations, LLC*, 459 S.W.3d 565, 573 (Tex. 2015); *See also Safeway Stores of Texas v. Rutherford*, 130 Tex. 465, 111 S.W.2d 688, 469 (Tex. 1938) (commenting: "we think it is the settled law that a judgment in favor of a minor plaintiff is not void, even in a case where such minor sues alone and not by next friend."); .*See e.g. Kelly v. Kelly*, 178 S.W.686 (Tex. App. – Glveston 1915, no pet.) (fact defendant in a suit was minor waived because the age of the child did not appear on face of record).
[34] *Sax v. Votteler,* 648 S.W.2d 661, 666 (Tex. 1983); *But See* Tex. Fam. Code Ann. §31.001 (West 2014) (minor may petition to have disabilities of minority removed for limited or general purposes in certain circumstances).
[35] Note related rule: Tex. R. Civ. P. 173 provides procedure for appointment of a guardian ad litem for a party represented by a next friend or guardian if the next friend or guardian appears to have an interest adverse to the party or if the parties agree.
[36] *Gracia v. RC Cola-7-Up Bottling Co*., 667 S.W.2d 517, 519 (Tex. 1984).
[37] *Id.* p. 577, n. 11.
[38] 459 S.W.3d 565 (Tex. 2015).
[39] *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d at p. 570.
[40] *Id* at p. 577, n. 9.
[41] *Id.*
[42] *Id.* .
[43] *See eg.* Tex. Est. Code §1151.101(a) (guardian of estate may sue or defend for ward).
[44] See Tex. Fam. Code Ann. §107.002 and §107.0125 (West 2014).

formerly belonging to the parent, to make legal decisions for the child and represent the child.[45] That gives the Department the "standing" of the child because it gives the Department the right to assume the child's relationship with the suit and justiciable interests as the child's conservator in its outcome.[46] Consequently, the Department appears to be in the guardian position for purposes of Rule 44 when acting as managing conservator of the child.[47]

That being said, though given that authority, the Department has limits in fully exercising that authority by virtue of its own capacity. Actions taken on behalf of any government entity can only be taken within the scope of statutory powers and authority given under the constitution or statute.[48] When it comes to governmental action to sue for child protection, the statutory grant at Section 262.001 of the Family Code indicates the governmental entity (i.e. the Department) files suit – not the child.[49] When the law grants a power and the method for which it is to be prescribed, that method excludes all others and must be followed.[50]Consequently, it could be argued that the Department can only file suit as a governmental entity when acting under Chapter 262 of the Family Code for a child because that is the mechanism prescribed.

In addition, though the Department may be the child's legal guardian for purposes of Rule 44, the attorney ad litem for the child is also statutorily given a share of that authority to the extent the child requires representation in the child protection suit. In particular, Section 107.003 of the Family Code is the provision that gives the attorney ad litem authority to "represent a child" when appointed for the child.[51] Nothing in that section specifically provides that this power includes the power to affirmatively file pleadings or suit by the child. However, filing pleadings is clearly a part of what a lawyer does in representing a party.

Case law provides numerous examples of the variety of pleading requests an attorney ad litem for a child files for a child: i.e. an answer,[52] a request to strike an intervention,[53] a request for specific drug type testing by a parent,[54] a request to stop visits,[55] motion for placement with relative,[56] motion to strike request for jury trial,[57] motion to confer with child,[58] motion for new trial,[59] motion for sanctions against attorney[60] and mandamus proceeding seeking to vacate order setting case for jury trial.[61]

Moreover, Section 107.004(a)(3) of the Family Code requires an attorney ad litem to become familiar with the American Bar Association's standards of practice for attorneys who represent children in abuse or neglect, and those standards specifically provide a child's attorney "should file petitions" for relief that may include claims for relief independent of that sought by the Department, such as a claim for "termination of the parent-child relationship."[62] A comment to those standard appears to acknowledge some state jurisdictions might not authorize a child's attorney ad litem to file pleadings; however, that is not

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[45] Tex. Fam. Code Ann. §153.371 (West 2014).
[46] *See Austin Nursing Cener, Inc.*, 171 S.W.3d at p. 848.
[47] *See In re Bridgestone Americas Tire Operations, LLC,* 459 S.W.3d at p 577 n. 9 (disagreed a parent is not a legal guardian since the parent has the power to represent his child in legal proceedings)
[48] *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948).*See* Tex. Atty' Gen. Op. No. JC-0132 (1999) (state officer could not enter binding contract for state unless authorized to do so by the constitution or statute); *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941).
[49] Tex. Fam. Code Ann. §262.001
[50] *See Canales v.* Laughlin, 247 Tex. 169, 180, 214 S.W.2d 451, 457 (Tex. 2948).
[51] Tex. Fam. Code Ann. §107.003 (West 2014).

[52] *In re Villanueva*, 292 S.W.3d 236, 238 (Tex. App. – Texarkana 2009, no pet.).
[53] *In re L.M.,* 572 S.W.3d 823, 831 (Tex. App. – Houston [14th Dist.] 2019, no pet.) (trial court granted motion to strike intervention of child's attorney ad litem); *In re A.M.*, 312 S.W.3d 76, 79 (Tex. App. – San Antonio 2010, pet. denied) (children's attorney ad litem filed motion to strike grandparent's petition for lack of standing); *Oehlerich v. Dept of Fam. & Prot. Servs*, No. 03-99-00559-CV, 2000 WL 1508424 (Tex. App. Austin 2000, no pet.) (mem. op.) (appellate court affirmed the order granting the joint motion to dismiss intervention filed by the Department and attorney ad litem for the child).
[54] *See In re K.B.*, 2017 WL 4081815 *1 (Tex. App. – Dallas 2017, no pet.) (child's attorney ad litem filed a motion requesting the father to submit to a nail bed drug test).
[55] *In re G.H.*, No. 02-17-00193-CV, 2017 WL 4683925 (Tex. App. – Fort Worth 2017, no pet.).
[56] *In re R.S.*, No. 02-18-00127-CV, 2018 WL 4183117 *8 (Tex. App. – Fort Worth 2018, no pet.).
[57] *In re K.H.*, No. 02-17-00192-CV, 2017 WL 4413356 (Tex. App. Fort Worth 2017, pet. filed) (mem. op.).
[58] *In re Z.W.M.*, No. 07-15-00316-CV, 2016 WL 638092 *1 (Tex. App – Amarillo 2016, no pet.) (mem. op.).
[59] *K.G. v. Tex. Dept..of Fam. & Prot. Servs.*, No. 03-15-00296-CV, 2015 WL 7165841 (Tex. App. – Austin 2015, pet. denied) (mem. op.) (joint motion with Department).
[60] *Ketterman v. Tex. Dept of Fam. & Prot. Servs.*, No. 01-12-00883-CV, 2014 WL 7473881 *3 (Tex. App. – Houston [1st Dist.] 2014, no pet.) (mem. op.).
[61] *In re L.R.*, 324 S.W.3d 885 (Tex. App. – Austin 2010, original proceeding).
[62] American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (Approved by the America Bar Association House of Delegates, February 5, 1996) at C-3; available at: http://www.mncourts.gov/mncourtsgov/media/scao_library/CJI/ABA_Standards_for_Child_Representation.pdf

specifically precluded in the procedures for a child's attorney ad litem in a Texas child protection matter.

In fact, looking at the duty imposed on an attorney ad litem for a child at Section 107.004(d-3) of the Family Code, it could be argued that this section imposes a duty on an attorney ad litem for a child to file suit for the child if required by this section. Namely, that section requires an attorney ad litem for a child in a suit filed by the Department to periodically review the child's safety and well-being, including effects of trauma, and take appropriate action.[63] Conceivably, a situation could arise when the facts indicate the appropriate action an attorney must take to address the effects of trauma or other issues that involves the child's safety and well-being requires affirmative pleadings for specified relief for the child.

As far as a child's standing, Section 102.003(a)(2) of the Family Code expressly gives general standing to "the child" to file suit "through a representative authorized by the court."[64] It is acknowledged that there is no case specifically holding an attorney ad litem for the child is a representative authorized by the court under this section for purposes of standing. Nonetheless, there are examples in courts of appeals' opinions when an attorney ad litem for a child brought suit for the child in a child protection suit.[65]

For example, in *In re R.L.A.,*[66] the Department filed a suit for parental termination involving two children after one of the children made an outcry of sexual abuse by her stepfather. During the suit, the foster parents filed an intervention for parental termination when they realized the Department was changing its position.[67] Two days later, the attorney ad litem for one of the children also filed a suit for parental termination on the same grounds as the foster parents.[68] The Mother filed a motion to strike the foster parents' intervention and the Department then formally dropped its request for parental termination from its pleadings.[69]

The trial court denied the motion to strike the intervention and after a trial to the jury, the court granted parental termination. On appeal, the Mother complained, in part, that the trial court erred in denying her motion to strike the foster parents' intervention, because the Department had already effectively abandoned parental termination when they filed and the foster parents' intervention unnecessarily multiplied the issues by adding termination.

The court of appeals rejected this argument, noting the attorney ad litem for one of the children also filed a suit seeking parental termination that placed the issue of parental termination before the court and no challenge was made to that suit. The appellate opinion included no language suggesting the attorney ad litem lacked authority to bring that suit. In fact, the appellate court's reasoning indicated it considered it to have full effect to put the issue of parental termination before the court.

D. Subject Child's Ability to Request De Novo Hearing

It is not uncommon for the trial of a child protection cases to be conducted by an Associate Judge appointed under Chapter 201 of the Family Code.[70] An associate judge appointed under Subchapter A of Chapter 201 of the Family Code can render and sign a final order if the parties waive the right to a *de novo* hearing under the procedures provided.[71] The right to request a *de novo* hearing essentially gives the party who properly requests it the right to have the referring court hold a new hearing on issues already considered by the associate judge who presided over trial of the case.[72] In the new *de novo* hearing, the parties can present witnesses on the issues specified in the request for hearing, and the referring court can consider the record from the associate judge's hearing.[73]

This process for *de novo* hearing has a time specific requirement that is triggered on the proper request of a "party."[74] One question that may be raised is whether an attorney ad litem for a child is authorized to request this hearing as a "party" even though no pleadings are filed on behalf of the child as a party.

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[63] Tex. Fam. Code Ann. 107.004(d-3) (West 2014).
[64] Tex. Fam. Code Ann. §102.003(a)(2) (West 2014).
[65] *See In re R.L.A.*, No. 02-08-153-CV, 2009 WL 885881 (Tex. App – Fort Worth 2009, no pet.) (suit for child brought by attorney ad litem recognized in child protection proceeding); *In re A.R.*, No. 04-98-00340-CV, 1999 W 734806 (Tex. App. – San Antonio 1999, no pet.) (mem. op.) (attorney ad litem for children filed cross-petition to terminate parental rights and parent claimed on appeal that such attorney was not actually properly advocating the position of the children; however, the parent's claim on appeal was considered waived because the parent failed to raise it at trial); *See also In re N.L.V.*,No. 04-09-00640-CV, 2011 WL 1734228 (Tex. App. – San Antonio 2011, no pet.) (cross-petition by children's attorney for modification of conservatorship in private suit);
[66] No. 02-08-153-CV, 2009 WL 885881 (Tex. App. – Fort Worth 2009, no pet.).
[67] *Id.* at **3.*
[68] *Id.* at *1.
[69] *Id.*
[70] *See e.g.* Tex. Fam. Code Ann. §§201.001, 201.005, & 201.201, (West 2014).
[71] Tex. Fam. Code Ann. §201.007 and 201.202 (West 2014).
[72] Tex. Fam. Code Ann. §201.015(f) (West 2014).
[73] *Id.* at §201.015(c).
[74] Tex. Fam. Code Ann. §107.015 (West 2014).

There are two sections among the duties of an attorney for a child that indicate the attorney for the child can request this hearing as a party even without pleadings as a party. First, Section 107.003(a)(3)(B) of the Family Code specifically states the attorney ad litem for the child is entitled to "request a hearing or trial on the merits."[75] That section does not premise that right on whether pleadings have been filed on behalf of the child as a party. Therefore, it indicates the attorney ad litem for the child has authority to request the *de novo* hearing for the child even if the child has no pleadings as a party.

Second, Section 107.003(a)(1)(F) states the attorney ad litem for the child shall "participate in the conduct of the litigation to the same extent as an attorney for a party."[76] This language evidences the legislature's intent that legal representation activities of the attorney ad litem be treated as activities by a party. Since filings in the case would be an essential part of what an attorney does in representing a party, such language indicates the filings of the attorney ad litem for the child are treated as filings by a party to the same extent as other parties.

Notably, there is no case law that directly holds that these sections give the subject child the right to request de novo hearing as a party. However, there is at least one example of a case in which the appellate court reviewed a challenge based on the action of an attorney ad litem for the children who brought a *de novo* notice from a jury trial that resulted in denying parental termination.[77]

In that case, the attorney ad litem for the children filed a notice contending the evidence before the jury established by clear and convincing evidence that the parent's rights should be terminated contrary to the jury's finding and was against the great weight of the evidence.[78] As permitted for de novo hearings, the trial judge of the referring court heard testimony in addition to the evidence from the jury trial on the termination claim, and rendered a new judgment that terminated parental rights.[79]

On appeal, the parents argued the trial court erred in having a full blown new hearing based on the notice filed by the attorney ad litem for the children. The parents did not challenge the authority of the attorney ad litem for the children to ask for the de novo hearing. Instead, the parents claimed the children's attorney ad litem notice was insufficient, because it did not challenge the associate judge's ruling on the jury's finding correctly to give the trial judge authority to undo the trial on termination.[80] The appellate court disagreed and held the challenge in the notice was sufficient. Namely, because the notice claimed the evidence established clear and convincing evidence that termination should be granted and that the jury verdict was against the great weight, the court found that was sufficient to permit *de novo* review of the termination.[81]

E. Subject Child's Representation on Appeal

An attorney ad litem for a child could determine that appeal from a judgment is needed to protect the child's interests. The section in the Family Code for the appointment of an attorney ad litem for the subject child in the Department's suit, however, does not specifically state such attorney may appeal for the child or that the attorney's appointment extends through the appeal.[82]

Section 107.016 of the Family Code, entitled "Continued Representation; Duration of Appointment" looks like it should address that issue based on its title. Moreover, it specifically addresses the duration of the appointment of the attorney ad litem for the parent or alleged father with language that clarifies the appointments of those attorneys could extend through appeal.[83] However, nothing in that section expressly addresses the attorney ad litem for the child with respect to appeals.

Instead, it provides:

> An order appointing the Department … as the child's managing conservator may provide for the continuation of the appointment of the attorney ad litem for the child as long as the child remains in the conservatorship of the department;[84]

This language indicates the attorney ad litem for the child may be ordered to continue to represent the child in the final judgment that appoints the Department as the child's managing conservator for as long as the child remains in the conservatorship of the Department. This could permit the appointment to continue even past the timeframe for appeal when the Department is named permanent managing conservatorship in a final order. Consequently, this provision does not really specify when the appointment of an attorney ad litem for a child ends. It merely gives the court authority to extend the appointment after the finality of the case if the

[75] Tex. Fam. Code Ann. §107.003(a)(3)(B) (West 2014).
[76] Tex. Fam. Code Ann. §107.0003(a)(1)(F) (West 2014).
[77] *In re D.N.*, 172 S.W.3d 303, 305 (Tex. App. – Amarillo 2005, no pet.).
[78] *Id.*
[79] *Id.*
[80] *Id.* at 308.
[81] *Id.*
[82] Tex. Fam. Code Ann. §107.012 (West 2014).
[83] Tex. Fam. Code Ann. §107.016 (West 2018).
[84] *Id.* §107.016(2).

Department is named the child's managing conservator.

No other section expressly addresses the length of the appointment of the attorney ad litem for the child with respect to the appeal. Consequently, it appears this must be construed from examination of the statutory provision authorizing the appointment at Section 107.012 of the Family Code. In interpreting a statute, the fundamental objective is to determine and give effect to the Legislature's intent.[85] The plain language of the statute is typically the surest guide to determine intent.[86]

Nonetheless, the legislature's intent as to the length of the appointment based on this section is not obvious since it only specifically addresses the appointment's beginning date. That is, it requires the appointment of an attorney ad litem to represent the child immediately after the filing of the suit by a governmental entity requesting termination of the parent child relationship or to be named conservator of the child.[87] It does not specify when that appointment ends.

Notwithstanding, this statute specifies the purpose of this appointment is to "ensure adequate representation of the child."[88] Such language evidences an intent that this mandatory appointment of an attorney ad litem for a child should be provided for the length of time needed to ensure adequate representation of the child's interests. Since a child's interests in a child protection suit could be the subject of an appeal, this indicates the legislature's intent would be for such appointment to extend to appeal, if necessary, to ensure adequate representation of the child.

That interpretation is consistent with how courts have viewed similar schemes. For example, Texas Rule of Civil Procedure 244 requires the appointment of an attorney ad litem to "defend the suit" on behalf of a defendant served by publication and, like section 107.012, does not explicitly state when that appointment ends or if it could continue through appeal. Nonetheless, the Supreme Court in *Cahill v. Lyda*[89] held: "The attorney ad litem must exhaust all remedies available to his client and, if necessary, represent his client's interests on appeal."[90] Consequently, the Supreme Court indicated this general appointment necessarily includes representation on appeal, when necessary.

The San Antonio Court of Appeals in *In re Guardianship of Hahn* held similarly in its construction of a statute in the Probate Code that mandated the appointment of an attorney to represent the interests of an individual subject to a guardianship proceeding.[91] The court noted the statutory authority provided in the Probate Code did not specifically provide a statutory right to appointed counsel on appeal. However, relying on *Cahill*, the court held it could extend to appeal.

Applying the holdings of this case and the Supreme Court's reasoning in *Cahill* supports the view that appointment of the attorney ad litem for the child will extend through appeal as necessary. That being said, it is acknowledged case law provides few examples when an attorney ad litem for a child actually took action on appeal.[92]

The author of this paper found only one example when an appellate court acknowledged a notice of appeal filed by an attorney ad litem of children who contested a termination judgment in a CPS case.[93] However, in that appeal, the parents also filed a notice of appeal challenging the judgment, and the appellate opinion only addressed the points raised in the parents' brief and reversed on a point the parents brought. The opinion made no mention of a brief filed by the attorney ad litem for the children.[94] Therefore, this opinion gives little insight on how an appellate courts treats appellate complaints brought by an attorney ad litem for a child.

In *In re K.C.M.*,[95] the attorney ad litem for the child filed a brief challenging the sufficiency of the evidence to terminate a mother's parental rights. Nevertheless, the attorney in that case did not file a separate notice of appeal for the child. In that circumstance, without a separate notice of appeal, the

[85] *In re Lee,* 411 S.W.3d 445, 451 (Tex. 2013).
[86] *Id.*
[87] Tex. Fam. Code Ann. 107.012 (West 2014).
[88] *Id.*
[89] *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992).
[90] *Id.*

[91] *In re Guardianship of Hahn*, 276 S.W.3d 515, 518 (Tex. App. – San Antonio 2008, no pet.).
[92] In *In re D.W.*, No. 10-13-00359-CV, 2014 WL 813834 (Tex. App. – Waco 2014- no pet.) (mem. op.), the appellate court granted a joint motion of the Department, appellant and the attorney ad litem for the child for remand of the case to the trial court for entry of an agreed order terminating the parent's rights based on a recent relinquishment affidavit. In *Wilson v. Tex. Dept. of Prot. & Reg. Servs.*, No. 03-02-00801-CV, 2003 WL 737026 (Tex. App. – Austin 2003, no pet.) the appellate court granted the motion filed by the attorney ad litem for the children to dismiss a parent's appeal for want of prosecution.
[93] *In re C.D.K.*, 64 S.W.3d 679, 680 (Tex. App. – Amarillo 2002, no pet.).
[94] The electronic docket sheet for the Seventh Court of Appeals under the cause number for this case at 07-00-00239-CV *accessed at the Texas Courts website http://www.txcourts.gov/) reflects a couple briefs were filed but does not identify the parties or post the briefs.
[95] 4 S.W.3d 392, 399 n.1 (Tex. App – Houston [1st Dist.] 1999, pet. denied),

appellate court treated the brief as an amicus brief under Tex. R App. P. 11.

II. PROCEDURAL ISSUES RELATED TO INCAPACITATED PERSON NAMED AS RESPONDENT

Section 102.009 of the Family Code provides the list of parties entitled to service of citation when a suit affecting the parent-child relationship is filed.[96] Such list includes persons who have rights to access, possession or support of the child, conservators, parents and any alleged father.[97]The chances that one of those persons entitled to service is a minor-parent or incapacitated person is a very real possibility. Therefore, the procedural issues that relate to the incapacity of such persons needs to be considered.

A. Suits against Minors Generally

Since this State's earliest legislation in 1846, this State made provision for suit against minors by a providing a procedure to sue a child who does not have a guardian in the State to defend the child's interests.[98] That process placed an affirmative duty on the court to appoint a guardian (later called "guardian ad litem') for the minor to defend the suit if the minor was sued without a guardian in the State.[99] Such process indicated a child could be sued through a legal guardian, but if no legal guardian was in the State, this process would be used. This remained the law for many years.[100]

In 1881, the Supreme Court first had opportunity to review that process in a situation in which the minors "waived" service of process prior and the court appointed a guardian ad litem for the minors.[101] On appeal from an adverse decision, the court was asked to decide whether the process was effective against the minors when the guardian ad litem was appointed without personal service of process being first perfected on the minors.[102] The court concluded it was not.

In its discussion, the opinion commented that it believed the process would be subject to much less abuse if a defendant without a guardian was personally served with process first before the court appoints a guardian ad litem to represent him.[103] It noted that had been the usual practice in England chancery in which courts would not appoint a guardian ad litem until the infant was physically brought into the presence of the court to ascertain the child's age and whom he desired to act for him.[104] Accordingly, it concluded the case required reversal in the absence of proof that the child had been personally served.[105]

That being said, the court acknowledged since a minor lacks legal capacity, the minor's acceptance of service is not really a legally valid and binding act for purposes of service.[106] That being the case, the court acknowledged it was aware there likely was no injustice in the case before it by failing to serve the minor personally, but did not feel it would be good precedent to create an exception for that case and therefore reversed the case. By ruling in this manner, it indicated personal service on a minor is required even if the minor is represented in the suit.

In 1939, the legislature repealed this law when it gave the Supreme Court authority to create court rules, but the Supreme Court effectively readopted this process with then-Rule 173.[107] Thereafter, however, in 2005, the Supreme Court eliminated this particular process when it substantially amended Rule 173. The new process under rule 173 only allows a court to appoint a guardian ad litem when the next friend or guardian appear to have an interest adverse to the party they represent or the parties agree.[108] The

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[96] Tex. Fam. Code Ann. §102.009 (West 2014).

[97] *Id.*

[98] Act approved May 13, 1846, 1st Leg., R.S., 1846 Tex. Gen. Laws 363, 374; *reprinted in 6 H.P.N. Gammel,* he Laws of Texas 1822-1897 (Austiin Gammel Book Co. 1846) ("In all cases where minors may be defendant to a suit, and it shall be shown to the court, that such minors have no guardians, within the State, it shall be the duty of the court to appoint a guardian to such minors, for purpose of defending such suit.)..

[99] *Id.*

[100] Act of April 19, 1895, 24th Leg., R.S., 1895 Tex. Gen. Laws p. 80 ("In all cases when a minor .. may be a defendant to a suit, and it shall be shown to the court that such minor … has no guardian within the State, it shall be the duty of the court to appoint a ***guardian ad litem*** …. For the purposes of defending the suit, and to allow him a reasonable compensation for his services, to be taxed as part of the costs of suit.") (emphasis added); *See Wright v.* Jones, 52 S.W.2d 247 (Tex. Comm'n App. 1932

[101] Wheeler *v Ahrenbeak*, 54 Tex. 535, 536, 1881 WL 9719 *1 (1881).

[102]Id.

[103] *Id.*

[104] *Id.*

[105] *Id. See also Sprague v. Haines,* 68 Tex. 215, 4 S.W.371 (1887) ("The service of process upon the minors is essential in order to confer jurisdiction upon the court, and to authorize the appointment of a guardian ad litem.").

[106] *Id.*

[107] Act of May 12, 1939, 46 Leg., R.S. ch.25 §1, 1939 Tex. Gen. Laws 201, 201; Order of September 16, 1940 "Order of the Supreme Court of Texas Adopting Rules of Practice and Procedure Governing Civil Actions in the Various Courts of this State" (Tex. Bar. Journal, Vol. III (December 1940) at p. p. 522).

[108] Order of October 7, 2004, Court Rules Texas Supreme Court Amendments to the Texas Rules of Judicial Administration, (republished in 151 S.W.3d xxx and xxxii (Tex. R. Civ. P. 173.2).

Supreme Court did not adopt any other rule to permit courts to appoint a guardian ad litem. Therefore, Rule 173 remains the exclusive authority for courts to appoint a guardian ad litem unless a statute provides otherwise.[109]

You may still find a treatise that states courts can appoint a guardian ad litem for a defendant minor whenever without a guardian.[110] However, since the Supreme Court eliminated that process from Rule 173 in 2005, such authority does not appear available unless specifically provided by law.

Consequently, in general civil practice, unless provided by specific statute, there currently is not a procedure that authorizes the court to appoint a guardian ad litem solely because a child is sued without a guardian.[111] Instead, when a child is without a guardian, it appears you have to look to Rule 44. That rule provides a minor who has no legal guardian "may sue *and be represented* by a "next friend."[112] This suggests in a general civil suit against a minor, if the child has no guardian, the plaintiff may name and serve a next friend of the child to pursue suit against the child.

However, Rule 44 does not give much direction, and, in particular, does not provide a process or requirement for appointment of a next friend. Moreover, Rule 44 does not require the next friend to have a familial or other relationship with the person they seek to represent and indicates any competent adult acting in good faith could appear as next friend.[113] Therefore, it does not appear to have court involvement to safeguard the child's interest under the former system that allowed the court to appoint a guardian ad litem for the child.

That being said, it has long been held when children are sued as individuals every precaution should be exercised by the court on their behalf.[114] In addition, the Supreme Court held long ago that factual assessment of a person's consent to a next friend's representation requires affirmative involvement and inquiry by a trier of fact, because the personal liberties involved necessitate that.[115] On that basis, the Austin Court of Appeals commented that safeguards through the court's inquiry process should be exercised that parallel the process for appointment of guardians.[116]

Rule 173 seems to acknowledge the need for a trial court to affirmatively act because it grants a court authority "on its own motion" to appoint a guardian ad litem if the next friend appears to have an interest adverse to that party.[117] No other specific authority for appointments is given to a court to affirmatively safeguard the process; however, the Supreme Court has indicated courts have equitable power to act for a child in a context of custody matters that arguably permits a court to take action that is necessary to protect the process needed for a minor child.[118]

B. Minor-Parent in Child Protection Suit

It is not necessarily clear if the evaluation for process in a regular civil case to confer a court with personal jurisdiction over a minor is the same in a child protection case. There is at least one appellate court, *In re M.M.S.*, that held a court's personal jurisdiction over a minor-parent as a defendant requires service on a "parent, guardian, or next friend," consistent with what appear to be the current practice in general civil suits against minors.[119] Nevertheless, the Texas Supreme Court declined to review that case, and it appears to be the only case to date to directly hold personal jurisdiction over a minor

[109] *See eg. Simpson v. Canales*, 806 S.w.2d 802, 810 (Tex. 1991) (Supreme Court described Rule 171 as the exclusive method for appointment of masters in state courts and, concluded every referral to a master, unless authorized by statute or consented by the parties must comply with such rule.).

[110] *See* TEX. JUR Family Law §837 (citing *Gulf, C. & S. F. Ry. Co. v. Conder*, 23 Tex.Civ. App. 488, 58 S.W.58 (1900), writ refused; *Long v. Behan*, 19 Tex. Civ. App. 325, 48 S.W.555 (1898), writ refused.).2222

[111] *See e.g. In re Collins*, 242 S.W.3d 837, 346 (Tex. App. – Houston [14th Dist] 2007, no pet.) (rejects grandparents' claim that court was authorized by statute, necessity or inherent power to appoint an amicus attorney to act as a compensated "next friend.")

[112] Tex. R. Civ. P. 44 (emphasis added); *See e.g. Am Gen Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 492 (Tex. 1995) (refers to action in which mother defended declaratory judgment action on behalf of her child as a "next friend.").

[113] *Abbott v. G.G.E.*, 463 S.W.3d 633 (Tex. App. – Austin, 2015, pet. denied).

[114] *Willliams v. Patternson*, 288 S.W.132 (Tex. Com. App. 1926, holding approved)

[115] *Lindly v. Lindly,* 102 Tex. 135, 113 S.W. 750 (1908).

[116] *Abbott*, 463 S.W.3d at p. 644.

[117] Tex. R. Civ. P. 173.2.

[118] *Leithold v. Plass,* 413 S.W.2d 698, 701 (Tex. 1967) ("Technical rule of practice and pleadings are of little importance in determining issues concerning the custody of children …once the child is brought under its jurisdiction .. it becomes the duty of the court in the exercise of its equitable powers to make proper disposition of all matters comprehended thereby in a manner supported by the evidence.").

[119] *In re M.M.S.*, No. 14-16-00349-CV, 2016 WL 6134456 *5 (Tex. App. – Houston [14th Dist.] 2016, pet. denied) ("We conclude that because Mother was a minor at the time the Department sought to effect service on her, and because Mother's ***parent, guardian, or next friend*** was not duly served with citation under the law, the trial court did not acquire personal jurisdiction over Mother, and the trial court's judgment is void.").

requires service on a parent, guardian or next friend. As such, it provides a good starting place to evaluate the state of the law pertinent to process against a minor-parent defendant in a child protection case.

In *In re M.M.S.,* the Department filed suit against a minor-parent who was almost 18 years of age. As stated in the opinion, the minor-parent was "served with citation approximately three weeks before her eighteenth birthday." [120] The record did not show that citation was perfected upon a parent, guardian or next friend of the mother at the time the minor-mother was served.[121] Moreover, the mother was not served again after she turned 18 during the pendency of the suit.[122]

While no representative was served, the minor-mother responded by filing an affidavit of inability to pay costs in the court after she was served, and the court ordered the appointment of an attorney ad litem to represent her.[123] After the mother turned 18 years of age, the mother's appointed attorney filed an answer with a general denial and appeared at an adversary hearing with a mediated settlement agreement that mother signed agreeing to a specified placement.[124] The mother's attorney then later appeared at trial after the Department filed an amended petition that indicated it was served on that attorney as the mother's representative.[125] At the conclusion of trial, the court ordered termination of the mother's parental rights.[126]

On appeal, the mother challenged the judgment, because the court did not appoint her a guardian ad litem.[127] The appellate court did not address that claim. Instead, the opinion discussed whether personal jurisdiction over the mother was reflected in the record based on the process used.[128]

In discussing personal jurisdiction, the court first noted the Supreme Court held in *In re P.R.J.E.* that personal jurisdiction over a parent through proper service of citation was necessary in order to enter a binding judgment against a parent in a child protection suit.[129] The court further indicated it reviewed that issue with higher scrutiny, because termination of parental rights involves fundamental constitutional rights.[130] The opinion noted the Family Code required service of citation on each parent named in a suit affecting the parent-child relationship unless waived and, acknowledged the rules applicable to civil cases applied to such service.[131]

To address service against the minor-parent in the case before it, the opinion began by commenting that historical law required personal service on a minor prior to appointment of a guardian ad litem. In particular, it quoted the 1881 decision *Ahrenbeak* that reversed a case when the minor was not personally served even though it noted there likely was no injustice in that case since the court appointed a guardian ad litem who represented the minor. The opinion also cited the *Wright* decision from 1932 that held a minor lacks capacity to appear and confer jurisdiction because of the child's status as non sui juris.[132]

The court then considered that the Supreme Court's opinion in *W.L.S.*, 562 S.W.2d 454, 455 (Tex. 1978) that held a juvenile lacks legal capacity to waive or accept service of process in a juvenile law case.[133] The opinion acknowledged a child protection case is not a juvenile law case. It also acknowledged the Amarillo Court of Appeals held *W.L.C.* had no application to a child protection case in which a minor-parent waived service through a voluntary relinquishment of parental rights that was authorized by specific statute.[134] However, the opinion commented the case before it did not involve relinquishment and while *W.L.S.* was a case involving a juvenile law matter, it considered the common law rule that was not limited to juvenile matters.[135]

The opinion acknowledged the mother's attorney ad litem made appearances for the mother after she turned 18 and considered the Department's claim that she waived service through her attorney's appearances on her behalf. However, the opinion stated: "The rule is well established that a minor, even in a civil proceeding lacks the capacity to accept or waive service …. Therefore, at the time Mother was served with citation, she was a minor and incapable of accepting service without being represented by a parent, next friend, or guardian."[136] The opinion stated her later appearance after turning 18 could not cure that.[137] Therefore, the opinion concluded failure to serve the mother's parent, guardian or next friend at the beginning of the suit prevented the court from exercising jurisdiction over the minor-mother.[138]

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[120] 2016 WL 6134456 *3.
[121] *Id.* at *2.
[122] *Id.* at *3.*
[123] *Id.* at *1.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at *2.
[128] *Id.* at *3
[129] *Id.* at *2 (citing *P.R.J.E.*, 499 S.W.3d 571 (Tex. 2016).
[130] *Id.* at *3.

[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* (citing *S.A.S. v. Catholic Family Services,* 613 S.W.2d 540, 543 (Tex. App. – Amarillow 1981, no writ).
[135] *Id.*
[136] *Id.*at *4.*
[137] *Id.*
[138] *Id.*

Notably, the court in *In re M.M.S.* did not provide much analysis about the capacity of a minor-parent in the context of a suit affecting that minor-parent's parental rights. Instead, the opinion relied on general law that assumes a minor parent is *non sui juris* with respect to capacity. Nonetheless, there are some Family Law provisions and concepts in the context of a child protection case that probably should have been considered.

First, the definition in the Family Code defines a minor child as any person under 18 who is not and has not been married or who has not had the disabilities of minority removed for general purposes.[139] That definition does not exclude a person from being considered a minor child just because the person is a parent and the disability of minority is not subject to removal just because a child is a parent.[140]

Nevertheless, there are a number of specific legal authorities granted a minor-parent that indicate a minor-parent has legal capacity, at least with respect to decisions in her capacity as a parent. The following are a few examples:

1. A minor-parent has statutory authority to maintain a proceeding on behalf of her own child under Chapter 159 of the Family Code for child support. Tex. Fam. Code Ann. §159.302 (West 2014).
2. A minor-parent can sign an affidavit of voluntary relinquishment of the parent-child relationship that includes a provision for waiver of service of process. Tex. Fam. Code Ann. §161.103 (West 2014).
3. An unmarried minor-parent of a child who has custody of his/her child and consents to medical, dental, psychological or surgical treatment for that child can also consent to the minor-parent's own treatment by a physician or dentist. Tex. Fam. Code Ann. §32.003(6) (West 2014).
4. Section 151.001 of the Family Code lists the numerous rights and duties of a parent and does not state that such rights or duties are restricted as the result of the parent's age. Tex. Fam. Code Ann. §151.001 (West 2014).

As indicated, these authorities indicate a minor parent is given specific statutory authority to make legal decisions for her child and, capacity to bring suit for her child. She also can make legal decisions with respect to medical treatment for her and her child. She can also decide to terminate her parental relationship. Such authorities together indicate a minor-parent statutorily has some unique capacity abilities in the parent child relationship. Such abilities indicates the typical presumption of the lack of capacity is not warranted when a child is a parent.

Moreover, in this same connection, there are some obvious implications in the context of a child protection situation. Namely, because the minor-parent is the party with legal responsibility to his or her child, he or she will be the person who is the subject of that investigation for determining the safety of the subject child. Also, that minor-parent will necessarily be the one who must agree to alternative placement arrangements or family based services. In addition, if suit is filed and a court orders the child under the care of the Department, the Department will be required to work with the minor-parent in coming up with a service plan for reunification which the court will likely order as a condition for reunification.[141]

In this connection, at least one appellate court held a trial court is not precluded from ordering a parent under age 18 from completing a service plan, and minority will not excuse that minor parent from failing to comply with it.[142] On the basis of that decision, it could be argued that a minor-parent sued in a child protection suit must be treated to have personal capacity to act in the legal proceeding. Otherwise, the parent could not be held personally accountable to comply with court action to reunify with his or her child.

Based on such assessment, it could be argued that the proper process for personal jurisdiction over a minor-parent must consider the capacity necessarily implied in the minor-parent's responsibility to personally act in the legal processes related to her or her parent-child relationship. A prudent litigant may interpret that to mean the minor should be treated as a party with capacity entitled to personal service of citation per Section 102.009 of the Family Code.

In that connection, another Family Law provision that should be considered is Section 107.010 of the Family Code that applies to incapacitated parties who are entitled to service of citation. That section provides as follows:

> The court may appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney ad litem shall follow the person's expressed objectives of representation, and,

[139] Tex. Fam. Code Ann. §101.003 (West 20140); *See also* Tex. Est. Code Ann. §1002.019 (similar definition).
[140] Tex. Fam. Code Ann. §31.001 (West 2014).
[141] *See* Tex. Fam. Code Ann. §263.103, *et seq.* (West 2014).
[142] *See In re L.A.M.*, 545 S.W.3d 579, 584 (Tex. App. – El Paso, 2016, no pet.)

> if appropriate, refer the proceeding to the proper court for guardianship proceedings.

Tex. Fam. Code Ann. §107.010 (West 2014). As indicated, this provision allows a court to appoint an attorney ad litem for an "incapacitated" person. [143]

The term "incapacitated is not defined in the Family Code, but since this section refers to the possibility of guardianship proceedings, it appears appropriate to consider the definition applicable to guardianships in the Texas Estates Code. In that Code, a person is "incapacitated" if the person:

> (1) is a minor;
>
> (2) is an adult who, because of a physical or mental condition is substantially unable to:
>
> (A) provide food, clothing or shelter for himself or herself; or
>
> (B) care for the person's own physical health; or
>
> (C) manage the person's own financial affairs; or
>
> (3) must have a guardian appointed for the person to receive funds due the person from a government source.[144]

With this definition considered, Section 107.010 appears to authorize a court to appoint an attorney ad litem for a minor in a child protection suit, because such person meets the definition of an incapacitated person. Once appointed, Section 107.010 requires the appointed attorney take one or two specific actions for the child:

> follow the person's expressed objectives of representation,
>
> and, if appropriate,
>
> refer the proceeding to the proper court for guardianship proceedings[145]

As indicated, the appointed attorney must follow the objectives of representation of the incapacitated client. In many ways, if this attorney ad litem is appointed after the minor-parent is personally served, it mimics the early system in our State (discussed above) that permitted a court to appoint a minor a guardian ad litem when the minor was without a guardian after the minor was personally served with process.

With Section 107.010 applicable, a minor parent would have someone to follow that minor's expressed objectives of representation in the suit, but it also indicates "if appropriate" the attorney ad litem may need to refer the matter for guardianship proceedings. Guardianship proceedings is not defined in Section 107.010 but it is apparent it is referring to the process to obtain a representative to make legal decisions for the incapacitated person.

Arguably, the time that would be appropriate for an appointed attorney ad litem to seek a guardianship type proceeding for a minor-parent likely would be when the attorney ad litem determines the minor-parent lacks ability to meaningfully formulate the objectives of representation related to the parent-child issues involved. As already discussed, Section 107.008 of the Family indicates there could be a situation when a minor is unable to meaningfully participate in an attorney client relationship because of lack of maturity that requires a process to ensure the minor's interests are protected.

Notably, in this regard, the procedure under Section 107.008 of the Family Code does not appear applicable for an incapacitated minor-parent respondent, because it only involves a process for "the child" in the suit and can require involvement of a guardian ad litem.[146] Section 107.010 of the Family Code does not authorize or require the appointment of a guardian ad litem, and the minor-parent would not normally be referred to as "the child" in the suit.

Also, Section 107.011 of the Family Code requires the mandatory appointment of a guardian ad litem in a child protection suit, but that again is only for "the child" in the suit, and is not specifically authorized for a party "entitled to citation" as referenced in Section 107.011.[147] Moreover, the primary duty of a guardian ad litem in Section 107.002 of the Family Code is to determine the best interest of "the child." The duty needed by a representative in protecting the interests of a minor parent named as a "respondent" would be protection

[143] Note, there is another provision that if applicable, requires the court to appoint an attorney ad litem for the parent. *See* Tex. Fam. Code Ann. §107.013 (West 2014). That section could be applicable to a minor-parent if the court finds the minor indigent and in opposition to the suit, a parent served by publication or an allege father in certain situations. It does not involve consideration of incapacity.

[144] Tex. Est. Code Ann. §22.016 (West Supp. 2015); *Id.* §1002.017; *But see* Tex. Prop. Code Ann. §14.007 ("For the purpose of this chapter, "incapacitated person" means a person who is impaired because of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxicate, or any other cause *except status as a minor to the extent that the person lacks sufficient understanding of capacity to make or communicate responsible decisions concerning his person*.").

[145] Tex. Fam. Code Ann. §107.010 (West 2014).

[146] Tex. Fam. Code Ann. §107.008 (West 2014).

[147] Tex. Fam. Code Ann. §107.011 (West 2014).

of that party's ability to receive proper representation.[148]

That being said, it should be noted that at least one appellate court in *In re G.A.C.* suggested appointment of a guardian ad litem and attorney ad litem for a minor-parent respondent is appropriate to meet the legal process for a minor-parent.[149] In that case, the respondent minor-parent argued that due process under the Fourteenth Amendment required that the court toll the suit for protection of the subject child until the minor-parent was no longer a minor. The Court disagreed finding because the record showed the minor-parent was appointed a guardian ad litem eleven days after the Department initiated suit as well as a court appointed attorney, she was provided due process.[150]

Notably, the issue raised in *In re G.A.C.* did not revolve around interpretation of the sections concerning the appointment of a guardian ad litem. In addition, it did not expressly state that the appointment of a guardian ad litem is authorized when a minor-parent is named as a respondent. Therefore, it probably is not a good case to rely upon to argue a guardian ad litem should be appointed for a minor-parent named as a respondent.

C. Parent with mental issue in child protection suit

As recognized in the Health Code, a person is presumed to be mentally competent unless there is a judicial finding to the contrary made under the Estates Code.[151] Also, even if suffering from mental illness, a person has the right to sue or be sued.[152]

Nonetheless, while it may be presumed mental issues do not preclude a party from acting with capacity in a suit, it can still be a difficult for an attorney appointed to represent a person with mental illness in a child protection case. In this connection, lawyers are not medical doctors, but it does not take a medical degree to know when a client demonstrates very bad communication skills, or has a difficult personality disorder that make representation very difficult.[153]

In that connection, a lawyer representing a parent may have an ethical duty to take appropriate action on the attorney's assessment. Namely, Texas Disciplinary Rule 1.02(g) states:

> A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

The Texas Supreme Court recently addressed that assessment in *In re Thetford.*[154] It acknowledged that at least one court held a lawyer has a duty to file an application for guardianship when the attorney reasonably believes his client is incompetent.[155] However, the Supreme Court held Rule 1.02's requirement that an attorney take "reasonable action" to protect a client expressly *allows*, but does not *require,* the attorney to institute a guardianship proceeding.[156]

Section 107.010 of the Family Code appears to provide a mechanism to address that situation. Namely, Section 107.010 of the Family Code permits the court in which the child protection suit is filed to find the parent incapacitated without a formal declaration of incapacity in a guardianship proceeding.[157] The only legal effect of a finding of incapacity under Section 107.010 is to permit the appointment of an attorney ad litem who can represent the expressed objectives of such parent and "if appropriate" refer the proceeding to the proper court for guardianship proceedings.[158]

The Family Code does not provide the specified mental competency standard a parent must meet to participate in a child protection suit as a party.[159] Section 107.010 indicates there is an appropriate situation when the attorney ad litem appointed under that section must refer the matter for guardianship proceedings, but does not explain what makes it appropriate. Arguably, since this same section requires the appointed attorney to follow the

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[148] *See e.g.* Tex. Fam. Code Ann. §107.002 (West 2014) (guardian ad litem under Section 107.002 given authority to "evaluate whether the child welfare service providers are protecting the child's best interests regarding appropriate care … and all other foster children's rights" which is clearly only involved in representing the interests of the subject child).
[149] *In re G.A.C.*, 499 S.W.3d 138 (Tex. App. – Amarilllo 2016, pet. denied).
[150] *Id.* at 141.
[151] Tex. Health & Safety Code Ann. 576.002(b)
[152] See Tex. Health & Safety Code Ann. §576.001(b).
[153] *See* Hon. Roy Moore, Kelly Ausley-Flore and Kathryn Flowers Samler, "Navigating Your Family Law Matter when Someone with a Personality Disorder is Involved," 44th Annual Advanced Family Law Court (August 2018), ch. 9.
[154] *In re Thetford*, 547 S.W.2d 362, 372 (Tex. 2019).
[155] *Id. (citing Frank v.* Roades, 310 S.W.3d 615, 627 (Tex. App. – Corpus Christi 2010, no pet.).
[156] *Id.*
[157] Tex. Fam. Code Ann. §107.010 (West 2014).
[158] *Id.*
[159] *In re E.L.T.,* 93 S.W.3d 372, 375 (Tex. App – Houston [14th Dist.] 2002. no pet.)

expressed objectives of the party, the situation that would be appropriate is when the incapacity makes it impossible for the attorney ad litem to follow the party's expressed objectives of representation.[160] Short of that, it looks like the attorney ad litem would have authority to represent the party without a guardianship proceeding.

Considering this procedure, one might argue that allowing a representative for someone who a court finds mentally incapacitated under Section 107.010 without a formal guardianship proceeding should be considered invalid. Nevertheless, there is case law authority in the context of next friend appointments that indicates otherwise. Namely, cases law indicate a person does not need to be formally found incapacitated to have a next friend represent him or her.[161] There merely needs to be enough reason to show there is some type infirmity to indicate that person is incapable of properly caring for his or her interests in the litigation so as to need that representative. So similarly, a system that permits an attorney ad litem representative to assist the court as a representative for someone the court finds incapacitated without a formal guardianship proceeding seems consistent with that.

CONCLUSION

As indicated, there are many procedural issues related to a party's incapacity in a child protection case. A minor who is the subject of a child protection suit has specific statutory rights to appointment of representatives with different responsibility to address that child's interests in light of the child's incapacity. The attorney ad litem appointed for the child, in particular, would appear to have the most direct authority to represent the child in the particular suit, including to possibly file suit or appeal for the child as a distinct party.

The mechanism for suing a minor-parent does not seem as clear. There are only a couple of cases to address civil process for minor-parent defendants in a child protection case. One case indicated the process is the same as in general civil cases, the other indicated a minor-parent's interest can be protected through appointment of a guardian ad litem and attorney ad litem.

In the context of suits against adults who appear incapacitated, Section 107.010 of the Family Code appears to provide a mechanism for a court to safeguard the process against that individual with an attorney ad litem. Nevertheless, key terms in that section are not defined to make application completely clear. It is acknowledged this paper does not address every procedural issue related to incapacity pertinent to a child protection suit. Nevertheless, it is hoped that this paper starts the conversation and assists in that evaluation.

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[160] *Id.*

[161] *Kennedy v. Missouri Pacific R.R. Co*. 778 S.W.2d 552, 555 (Tex. App. Beaumont 1989, writ denied) (citing *Kaplan v. Kaplan*, 373 S.W.2d 271 (Tex. Civ. App. – Houston 1963, no writ)); Also see *Smith v. Thornhill*, 12 S.W.2d 625 (Tex. Civ. App. 1928) aff'd, 25 S.W.2d 597 (Tex. Comm'n App. 130, judge set side on reh'g 34 S.W.3d 803 (Tex. Comm'n App 1931) and rev'd on other grounds 34 S.W.2d 803 (Tex. Comm' App. 1931).