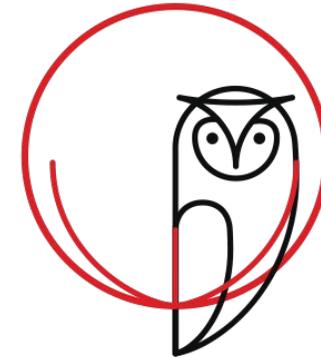

HANDLING THE EXTRAS IN THE CUSTODY STORY



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The Wise Choice

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TYPES OF EXTRAS

- Child Custody Evaluator
 - Amicus Attorney
 - Attorney Ad Litem (AAL)
 - Guardian Ad Litem (GAL)
 - Volunteer Advocate (CASA)
 - Parenting Coordinator (PC)
 - Parenting Facilitator (PF)
-

In re Gopalan, 2021 Tex. App. 2021 WL 2964263 (Tex. App.-Austin, July 15, 2021, orig. proceeding)

- **Facts:** During a divorce proceeding the court appointed a child custody evaluator, Dr. X, who prepared an original custody evaluation report and an updated report. Father designated Dr. Y in his discovery as someone who would review and analyze Dr. X's reports. Dr. Y eventually prepared rebuttal reports. Mother filed a motion to exclude Dr. Y from testifying claiming Dr. Y had not been appointed pursuant to TFC chapter 107 and had not performed a completed custody evaluation. The trial court granted the motion to exclude, and Father sought mandamus relief.
- **Holding:** Petition for Writ of Mandamus Denied
- **Opinion:** TFC § 104.008(a) specifically provides that no person may offer an expert opinion or recommendation relating to conservatorship or access unless they have conducted a child custody evaluation under chapter 107. While the parties do not disagree that Dr. Y did not conduct any such evaluation, Father argues that he was not planning to offer an opinion or commendation per § 104.008, but instead he was simply critiquing the methodologies employed by Dr. X. Mother argues that Dr. Y's testimony still "relates" to conservatorship and possession and was properly excluded.

The exclusionary effects of TFC § 104.008 include all person who have not performed a statutory custody evaluation. Dr. Y's report does in fact criticize some aspects of Dr. X's approach but is also actually recommends that the trial court consider a more equal possession schedule as different from Dr. X's recommendation. Dr. Y's report was properly excluded because it "related to" conservatorship and possession, and Dr. Y had not done a statutory evaluation as TFC § 104.008(a) requires.

CHILD CUSTODY EVALUATION - § 107.101

- Conducted in high conflict cases.
 - An evaluative process ordered by a court through which information, opinions, recommendations, and answers to specific questions asked by the court may be made regarding:
 - Conservatorship; possession of or access to a child; or any other issue affecting the best interest of a child.
 - Must be conducted by a qualified child custody evaluator.
-

CHILD CUSTODY EVALUATOR V. AMICUS ATTORNEY

CHILD CUSTODY EVALUATOR - § 107.104

AMICUS ATTORNEY - § 107.003

- Master's degree from accredited college or university in a human services field of study;
- Be licensed to practice in this state as a social worker, professional counselor, marriage and family therapist, or be a board certified psychiatrist; and
 - have 2 years full-time experience or equivalent part-time experience under professional supervision during which the individual performed functions involving the evaluation of physical, intellectual, social, and psychological functioning and needs and developed an understanding of the social and physical environment, both present and prospective, to meet those needs; and
 - have performed at least 10 court-ordered child custody evaluations under the supervision of an individual qualified under this section.

- Be trained in child advocacy or have experience, as determined by the court to be equivalent to that training.

CHILD CUSTODY EVALUATOR V. AMICUS ATTORNEY (cont'd)

CHILD CUSTODY EVALUATOR - § 107.104

AMICUS ATTORNEY - § 107.003

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- If haven't performed 10 court-ordered child custody evaluations, be practicing under the direct supervision of an individual qualified under this section in order to complete at least 10 court-ordered child custody evaluations under supervision; or
 - Be employed by or under contract with a domestic relations office, provided that the individual conducts child custody evaluations relating only to families ordered by a court to participate in child custody evaluations by a domestic relations office.
 - If have a doctoral degree and hold a license in a human services field of study, is qualified to conduct a child custody evaluation if completed a number of hours of professional development coursework and practice experience directly related to the performance of child custody evaluations.
 - Completed 8 hours of family violence dynamics training
- Be trained in child advocacy or have experience, as determined by the court to be equivalent to that training.

CHILD CUSTODY EVALUATOR V. AMICUS ATTORNEY (cont'd)

CHILD CUSTODY EVALUATOR - § 107.104

AMICUS ATTORNEY - § 107.003

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|--|---|
| <ul style="list-style-type: none">• May be called as an expert witness to testify.• Required to submit a report to the parties, the parties' attorneys, the court, and any other person appointed in the suit at least 30 days before trial.• Ordered to give opinions, recommendations, and answer specific questions about conservatorship, possession of or access to a child, or any other issue affecting the best interest of a child. | <ul style="list-style-type: none">• Prohibited from testifying.• May not submit a report.
• Prohibited from giving opinions or recommendations about conservatorship or possession of or access to a child. |
|--|---|

In re C.F.M., No. 05-16-00285-CV, 2018 WL 1704202 (Tex. App.-
Dallas, 2018, no. pet. h.)

- **Facts**: Father filed for divorce. Court appointed an amicus attorney. A jury trial was conducted on the issue joint managing conservatorship. The amicus participated in closing arguments and discussed the evidence concerning three of the factors the jury was instructed to consider in determining whether the parents should be joint managing conservators. The amicus stated: “. . . I think there is only one name that the evidence and the law and the instructions that have been given to you that you write in this, and that’s [mother’s] name. That’s what my argument to you is and that the evidence has shown.” Father appealed arguing that the amicus attorney testified, which is prohibited.
 - **Holding**: Affirmed
 - **Opinion**: The amicus attorney’s arguments were not testimony. The statements were not the amicus attorney’s bare opinions but were a summary of the evidence and reasonable inferences and deductions from the evidence, which were proper form of jury argument.
-

In re Ortegon, 616 S.W.3d 48 (Tex. App.-San Antonio, 2020, orig. proceeding)

- **Facts**: Mother filed a modification suit, seeking to lift the geographic restriction imposed on child's primary residence. During the suit, the trial court appointed a guardian ad litem ("GAL"). The GAL later filed his report in which he concluded that it was not in the child's best interest for the geographic restriction to be lifted. Mother filed a motion to remove the GAL, alleging that he had not followed the protocol for a child-custody evaluator pursuant to TFC chapter 107. After a hearing, the trial court excluded the GAL's report for all purposes and prevented the GAL from testifying as to anything other than what he observed as a fact witness. Father filed a petition for writ of mandamus.
 - **Holding**: Petition for Writ of Mandamus Granted
 - **Opinion**: Father argues that the GAL was not required to follow the protocol for child-custody evaluators in TFC chapter 107 in order to testify about the child's best interest. The portions of TFC chapter 107 authorizes GALs to conduct an investigation "to determine the best interests of the child" and requires a trial court to "ensure . . . that a [GAL] has an opportunity to testify regarding, and is permitted to submit a report regarding, the [GAL]'s recommendations relating to . . . the best interests of the child."
 - While TFC § 104.008 specifically states that nobody may offer an expert opinion or recommendation relating to conservatorship, possession, or access unless the person has conducted a child-custody evaluation pursuant to TFC chapter 107, until the Legislature clearly removes a GAL's ability to testify about the best interest of a child and vests that power exclusively in a child-custody evaluator, the courts may not engage in judicial activism and remove that ability from a GAL.
-

ORDER FOR CHILD CUSTODY EVALUATION- § 107.103(e) – (g)

NEW!!!

- (e) In appointing a child custody evaluator in a suit in which a party subject to the child custody evaluation does not speak English as a primary language, the court shall ensure that the child custody evaluator:
 - (1) Is able to effectively communicate in the primary language of the party; or
 - (2) Will be assisted by a licensed or certified interpreter.
 - (f) A licensed or certified interpreter assisting a child custody evaluator under Subsection (e)(2) may accompany the evaluator in person or assist through use of audio or video conferencing technology.
 - (g) The court may require the parties to pay any costs associated with obtaining assistance for a child custody evaluator from a licensed or certified interpreter.
-

AAL & AMICUS ATTORNEY – § 107.003(a)

- Interview the child if 4 years or older;
 - Interview each person who has a significant knowledge of the child's history and conditions, including any foster parent of the child and the parties to the suit.
 - Seek to elicit the child's expressed objectives of representation;
 - Investigate the facts of the case to the extent the attorney considers appropriate;
 - Obtain and review copies of relevant records relating to the child as provided by Section 107.006;
 - Participate in the conduct of the litigation to the same extent as an attorney for a party;
 - Take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings;
 - Encourage settlement through ADR;
 - Review and sign or decline to sign a proposed or agreed order affecting the child;
 - Request clarification from the court if the role of the attorney is ambiguous;
 - Request a hearing or trial on the merits;
 - Consent or refuse to consent to an interview of the child by another attorney;
 - Receive a copy of each pleading or other paper filed with the court;
 - Receive notice of each hearing in the suit;
 - Participate in any case staffing concerning the child conducted by DFPS;
 - Attend all legal proceedings in the suit.
-

ATTORNEY AD LITEM V. AMICUS ATTORNEY

ATTORNEY AD LITEM - § 107.004 & § 107.008

AMICUS ATTORNEY - § 107.005

- Provide legal services to a person (parent/child);
- Owes duties of undivided loyalty, confidentiality, and competent representation.
- Represent the child's expressed objectives.
- An AAL or an attorney in a dual role as AAL/GAL may determine that the child cannot meaningfully formulate child's objectives of representation and may present to the court a position that the AAL determines will serve the best interests of the child.
- May only be appointed in dual role as AAL/GAL in suit filed by governmental entity requesting termination of parent or appointment of entity as conservator of child.

- Provide legal services to assist the court in protecting child's best interests.
- Advocate the best interests of the child after reviewing the facts and circumstances of the case.
- Not bound by the child's express objectives of representation but ensures that the child's expressed objectives are made known to the court (with consent of the child).
- May not disclose confidential communications between the amicus attorney and the child unless disclosure is necessary to assist court regarding child's best interests.
- Cannot be appointed in suit by governmental entity.

AAL ADDITIONAL DUTIES § 107.004(b-1) – (b-3)

NEW!!!

- (b-1) An attorney on a list maintained by the court as being qualified for appointment as an AAL in a child protection case must:
 - Complete at least three hours of CLE relating to the representation of a child in proceeding under Subtitle E each year before the anniversary date of the attorney's listing; and
 - Provide proof that the attorney has completed a training program regarding trauma-informed care and the effect of trauma on children in the conservatorship of DFPS.
 - (b-2) The training described by (b-1)(2) may satisfy the training requirement under (b-1)(1) in a year in which an attorney completes the training.
 - (b-3) An attorney described in (b-1) shall complete the training required by (b-1)(2) as soon as practicable after the attorney is placed on the list.
-

AAL ADDITIONAL DUTIES § 107.004(b-4) **NEW!!!**

- (b-4) The training required by (b-1)(2) must be designed to educate an attorney regarding the attorney's duty under (d-3) and include:
 - Symptoms of trauma and the impact that trauma has on a child;
 - Attachment and how a lack of attachment may affect a child;
 - The role that trauma-informed care and services can have in a child's ability to build connections, feel safe, and regulate the child's emotions to help the child build resiliency and overcome the effects of trauma and adverse childhood experiences;
 - The importance of screening children for trauma and the risk of mislabeling and inappropriate treatment of children without proper screening, including the risks and benefits associated with the use of psychotropic medication;
 - The potential for re-traumatization of children in the conservatorship of DFPS; and
 - The availability of:
 - Research-supported, trauma-informed, non-pharmacological interventions; and
 - Trauma-informed advocacy to increase a child's access, while the child is in the conservatorship of DFPS, to trauma-informed care; and trauma-informed mental and behavioral health services.
-

GUARDIAN AD LITEM V. AMICUS ATTORNEY

GUARDIAN AD LITEM - § 107.002

AMICUS ATTORNEY - § 107.005

- Appointed to look out for the best interests of the child.
- Seek to elicit and consider the child's expressed objectives and is not bound by those objectives.
- Do not take a participatory role in litigation (unless dual role as AAL/GAL in a suit by DFPS).
 - Cannot be appointed in dual role of AAL/GAL in a private suit.
- May testify at trial and submit a report regarding recommendations to the best interest of the child if serving only as GAL and not dual role.
- Mandatory appointment in suit filed by DFPS seeking either termination of a parent or managing conservatorship of a child.

- Provide legal services to assist the court in protecting child's best interests.
- Not bound by the child's express objectives of representation but ensures that the child's expressed objectives are made known to the court (with consent of the child).
- Cannot testify at trial or submit a report.
- Cannot be appointed in suit by DFPS.

GUARDIAN AD LITEM V. VOLUNTEER ADVOCATES

GUARDIAN AD LITEM - § 107.002

- Appointed to look out for the best interests of the child.
- Seek to elicit and consider the child's expressed objectives and is not bound by those objectives.
- Do not take a participatory role in litigation (unless dual role as AAL/GAL in a suit by DFPS).
 - Cannot be appointed in dual role of AAL/GAL in a private suit.
- May testify at trial and submit a report regarding recommendations to the best interest of the child if serving only as GAL and not dual role.
- Mandatory appointment in suit filed by DFPS seeking either termination of a parent or managing conservatorship of a child.

VOLUNTEER ADVOCATE - § 107.031

- May be appointed in a suit filed by DFPS for termination or conservatorship of the child if:
 - A volunteer with a charitable organization (i.e., CASA) whose charter mandates the provision of services to allegedly abused and neglected children; or
 - An individual who has been certified by the court to appear at court hearings as a GAL for the child or as a volunteer advocate for the child.
- Cannot be appointed in a private suit as a GAL unless the training of the volunteer advocate is designed for participation in suits other than by DFPS.
- May be assigned to act as a surrogate parent for the child if the child is in the conservatorship of DFPS.

DISCRETIONARY APPOINTMENTS - § 107.021

- To ensure determination of child's best interests
 - **Private case - court may appoint**
 - Amicus attorney;
 - Attorney ad litem; or
 - Guardian ad litem
 - **Private termination case – court shall appoint**
 - Amicus attorney; or
 - Attorney ad litem; UNLESS
 - Court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict the child's interests
-

ATTORNEY WORK PRODUCT AND TESTIMONY

§ 107.007

- (a) An attorney ad litem, an attorney serving in the dual role, or an amicus attorney may not:
 - be compelled to produce attorney work product developed during the appointment as an attorney;
 - be required to disclose the sources of any information;
 - submit a report into evidence; or
 - testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional conduct.
 - (b) Subsection (a) does not apply to the duty of an attorney to report child abuse or neglect under Section 261.101.
-

In re Burwitz, No. 04-20-00576-CV 2020 WL 7264558 (Tex. App.- San Antonio, 2020, orig. proceeding)

- **Facts**: In a suit affecting the parent-child relationship, the trial court appointed an amicus attorney. After a hearing, the trial court discharged the court-appointed amicus attorney and ordered her to prepare a written report to be admissible at final trial that summarized her work, impressions, observations, and recommendations. Father filed a petition for writ of mandamus.
- **Holding**: Petition for Writ of Mandamus Granted in Part; Denied in Part
- **Opinion**: Father first argues that the trial court erred in discharging the amicus attorney. However, the trial court is permitted to discharge an amicus attorney pursuant to TFC chapter 107.

Father next argues that the trial court's order that the amicus attorney circulate a written report that summarizes her work, impressions, observations and recommendations violates the statutory attorney work-product privilege in TFC § 107.007(a). This order does violate the statutory attorney work-product privilege and there is no adequate remedy by appeal for the compelled disclosure of the amicus attorney's work produced.

FEES IN SUITS § 107.023

- Entitled to reasonable fees and expenses in private cases:
 - Amicus attorney;
 - Attorney ad litem for the child; and
 - A professional who holds a relevant professional license and who is appointed as guardian ad litem for the child, other than a volunteer advocate.
 - Ordered in addition to attorney's fees that may be awarded under Chapter 106.
 - The Court shall:
 - Determine the fees and expenses by reference to the reasonable and customary fees for similar services in the county of jurisdiction;
 - Order a reasonable cost deposit to be made at the time the court makes the appointment; and
 - Order an additional amount to be paid before final hearing
 - Cannot award costs, fees, or expenses against the state.
 - Fees awarded under this subchapter are necessities for the benefit of the child
-

In re M.B.D., No. 09-18-00278-CV, 2020 WL 1879474 (Tex. App.-
Beaumont, 2020, no pet. h.)

- **Facts**: In a modification suit brought by Mother, the trial court appointed an Amicus Attorney. During the suit, the Amicus Attorney filed a motion requesting the parties to pay reasonable attorney's fees to the Amicus Attorney for the time he spent working on the case. Thereafter, Mother requested and the trial court granted a nonsuit of Mother's petition to modify. The trial court subsequently signed an order granting the Amicus Attorney's request for attorney's fees. Mother appealed.
 - **Holding**: Affirmed
 - **Opinion**: Mother asserts that, because she was the only party with affirmative relief on file, the nonsuit of her petition to modify constituted a final order in the case. As such, Mother asserts that the trial court lacked jurisdiction when it subsequently granted the Amicus Attorney's request for attorney's fees. However, the Amicus Attorney filed his request for attorney's fees prior to the nonsuit and his request for attorney's fees constitutes a request for affirmative relief by itself. When the trial court nonsuited Mother's petition to modify, this had no effect on the Amicus Attorney's request for attorney's fees. Thus, the trial court still had jurisdiction to grant the Amicus Attorney's request for attorney's fees.
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In re A.V.T.R., No. 14-19-00986-CV, 2021 WL 924372 (Tex. App.-Houston [14th Dist.], 2021 no pet. h.)

- **Facts**: Under a prior order, Mother was appointed SMC, and Father was appointed PC of Child. Father subsequently filed a modification suit, seeking appointment as SMC. At trial, the amicus attorney filed a motion to compel attorney's fees. The amicus asserted that the total amount of fees owed to her by the parties was \$22K, of which Father had already paid \$9K and Mother had paid \$800, leaving a remaining total of \$12K. Father objected to the amicus's fees, asserting that he had already paid the vast majority of them. Nonetheless, the trial court assessed the remaining amicus fees to Father. Father testified that he had paid the amicus attorney approximately \$14.5K in fees. After the trial court denied Father's motion for new trial, Father appealed.
 - **Holding**: Affirmed
 - **Opinion**: Father argues that the trial court abused its discretion in assessing the amicus attorney's fees against him, because it did not consider amounts already paid by the parties to the amicus attorney. In her motion to compel attorney's fees, the amicus attorney stated that there was \$12K outstanding to her and that Father had previously paid \$9K to her. However, at the hearing on his motion for new trial, Father testified that he had paid the amicus attorney approximately \$14.5K. The evidence is therefore conflicting as to how much Father paid the amicus attorney before the trial court rendered judgment. However, it is also plausible that Father paid some of the amicus fees between the date of judgment and the hearing on his motion for new trial. Viewing this conflicting evidence in the light most favorable to the trial court's ruling, Father has not shown that the trial court abused its discretion in its allocation of amicus attorney's fees to him.
-

Coordinator V. Facilitator – § 153.601 – § 153.6081

Coordinator

- CONFIDENTIAL
- Duties: Identify disputed issues; clarify parents' priorities; implement parenting plans; reduce misunderstandings; settle disputes.
- May not be appointed unless:
 - High-conflict case or good cause shown; and
 - Best interest of child
- SHALL submit a written report to the court and to the parties as often as ordered by court
 - Limited to whether parenting coordination should continue

Facilitator

- NOT CONFIDENTIAL
- Duties: Same as PC except also monitor compliance with court orders.
- May not be appointed unless:
 - High-conflict case or good cause shown; and
 - Best interest of child
- SHALL submit a written report to the court and the parties as ordered by court.
 - Recommendations to implement or clarify provisions of existing court order;
 - May not recommend issues of conservatorship of or possession/access of child.

Coordinator V. Facilitator – § 153.610 – § 153.6101

Coordinator

- Bachelor's degree in counseling, education, family studies, psychology, or social work; or
- Graduate degree in a mental health profession with emphasis in family and children's issues; or
- Licensed attorney in good standing in this state.
- Must complete
 - 8 hours of family violence dynamics training provided by a family violence service provider;
 - 40 classroom hours of training in dispute resolution;
 - 24 classroom hours in the field of family dynamics, child development, and family law;

Facilitator

- Licensed as social worker; LPC; LMFT; psychologist; or attorney
- Must complete
 - 8 hours of family violence dynamics training provided by a family violence service provider;
 - 40 classroom hours of training in dispute resolution;
 - 24 classroom hours in the field of family dynamics, child development, and family law;
 - 16 hours of training in laws governing parenting coordination and parenting facilitation and the multiple styles and procedures used in different models of service.

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