

## MEMORANDUM

TO: Robert E. Meadows  
FROM: Christie Cardon  
DATE: February 23, 2004

**PRIVILEGED AND  
CONFIDENTIAL: SUBJECT TO  
ATTORNEY-CLIENT  
PRIVILEGE AND ATTORNEY  
WORK PRODUCT DOCTRINE**

RE: Immunity considerations with respect to guardian ad litem appointments under TRCP 173

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Texas Rule of Civil Procedure 173 authorizes a court to appoint a guardian ad litem to protect the interests of a minor or other legally incapacitated person who (1) is a defendant to a suit and has no guardian within Texas, or (2) is a party in a suit and is represented by a next friend or guardian whose interest appears to the court to be adverse to that of the minor or other incapacitated party. With respect to the latter, the guardian ad litem displaces the guardian or next friend whose interests are to some degree adverse to those of the incapacitated party.<sup>1</sup>

A guardian ad litem is an officer of the court<sup>2</sup> who functions as the personal representative—not the attorney—of the minor or other incapacitated party, and participates in the suit only to the extent necessary to protect that party's interests.<sup>3</sup> A guardian ad litem appointed under Rule 173 is to be distinguished from the appointment of a guardian ad litem under the Texas Probate<sup>4</sup> and Family Codes.<sup>5</sup>

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<sup>1</sup> *Davenport v. Garcia*, 834 S.W.2d 4, 24 (Tex. 1992) (observing that Rule 173 contemplates a conflict-of-interest standard); *Kennedy v. Missouri Pac. R.R.*, 778 S.W.2d 552, 555 (Tex. App.—Beaumont 1989, writ denied) (“Displacement of the next friend with a guardian ad litem is authorized only when it appears to the court that the next friend has an interest adverse to the person represented.”).

<sup>2</sup> *Dawson v. Garcia*, 666 S.W.2d 254, 265 (Tex. App.—Dallas 1984, no writ).

<sup>3</sup> *See, e.g., Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied).

<sup>4</sup> *See* TEX. PROB. CODE ANN. § 645(a) (appointment of guardian ad litem to represent best interest of incapacitated person in guardianship proceedings); TEX. PROB. CODE ANN. § 53(b) (appointment of guardian ad litem to represent interests in heirship proceedings of known heirs whose whereabouts or names are unknown).

<sup>5</sup> *See* TEX. FAM. CODE ANN. § 2.103(e) (mandatory appointment of guardian ad litem for minor seeking order granting permission to marry); TEX. FAM. CODE ANN. § 31.004 (mandatory appointment of guardian ad litem for minor in suit seeking order removing disability of minority); TEX. FAM. CODE ANN. § 33.003(e) (mandatory appointment of guardian ad litem for minor in suit seeking authorization for abortion absent parental notification); TEX. FAM. CODE ANN. § 107.001 (mandatory appointment of guardian ad litem for minor in suit seeking termination of the parent-child relationship).

In 1994, the Dallas Court of Appeals held in *Byrd v. Woodruff* that a guardian ad litem appointed under Rule 173 operates as a fiduciary of the minor or other incapacitated party whose interests she is representing.<sup>6</sup> According to the *Byrd* court, “a formal relationship of confidence [exists] between the minor and the guardian ad litem.”<sup>7</sup> Thus, under the auspices of Rule 173, the guardian ad litem is entrusted by the court “to evaluate the circumstances surrounding the suit and make a recommendation” in accordance with the minor’s interests, and the minor is in turn “justified in believing that a special confidence exists . . . [and] that the ad litem will endorse her interests.”<sup>8</sup> Because any settlement reached in a friendly suit operates as a binding and conclusive adjudication of the minor’s rights, the *Byrd* court reasoned that a guardian ad litem appointed under Rule 173 is legally obligated to exercise care and diligence in making recommendations to the court on behalf of the minor.<sup>9</sup> Any judgment in a friendly suit involving an appointment pursuant to Rule 173 will be “a final resolution of the minor’s interests—as represented by a guardian ad litem.”<sup>10</sup>

The duties of a guardian ad litem appointed under Rule 173 include that of employing the skill and judgment that an ordinary, capable, and careful person would apply to her affairs, as well as the diligence and the discretion necessary to represent the minor’s or the incapacitated party’s interests.<sup>11</sup> More generally, “[a]s a fiduciary, the guardian ad litem’s duty . . . is one of integrity, loyalty, and the utmost good faith.”<sup>12</sup>

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<sup>6</sup> 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ diss’d by agr.).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 706-07 (noting that in the absence of a friendly suit, a minor represented by a next friend can sue to have set aside a judgment entered in her favor on grounds of inadequate representation of her interests, and citing TEX. R. CIV. P. 44).

<sup>10</sup> *Id.* at 706 (emphasis in original).

<sup>11</sup> *Id.* at 706-07.

<sup>12</sup> *Id.*; *Grunewald v. Technibilt Corp.*, 931 S.W.2d 593, 597 (Tex. App.—Dallas 1996, writ denied).

Byrd brought suit against her guardian ad litem and others for negligence in the negotiation of settlement and trust agreements and the administration of settlement proceeds arising out of products liabilities actions in which she sought recovery for injuries she had sustained in an accident. The *Byrd* guardian ad litem raised the doctrine of derived judicial immunity as a basis for summary judgment below.<sup>13</sup> The court acknowledged that Texas courts had extended judicial immunity for acts performed or not performed during judicial proceedings to “officers of the court who are integral parts of the judicial process.”<sup>14</sup> The Texas Supreme Court has noted in this regard that “[t]he policy reasons for judicial immunity are also implicated when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court.”<sup>15</sup>

The *Byrd* court determined that derived judicial immunity was inappropriate because rather than exercising delegated authority as an agent of the court, the guardian ad litem appointed under Rule 173 “conducts an independent investigation, evaluates the benefits of settling, and determines the best interests of the minor to communicate, *as the minor’s personal representative*, his recommendations to the court.”<sup>16</sup> Unlike court clerks or court-appointed receivers and trustees, for example, a guardian ad litem representing the interest of a minor or other incapacitated party in a civil proceeding pursuant to appointment under Rule 173 is not accountable to the court, short of removal for cause.<sup>17</sup> A Rule 173 guardian ad litem functions

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<sup>13</sup> The trial court granted summary judgment for the guardian ad litem without specifying which among several grounds formed the basis of its ruling. *Byrd*, 891 S.W.2d at 695.

<sup>14</sup> *Id.* at 707 (noting that prosecutors performing typical prosecutorial functions, court clerks, law clerks, bailiffs, constables, and court-appointed receivers and trustees had previously received absolute judicial immunity for actions undertaken in the performance of their duties); *see also Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002) (observing that absolute judicial immunity “serves to protect the public ‘whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences’”).

<sup>15</sup> *Halsey*, 87 S.W.3d at 554.

<sup>16</sup> *Byrd*, 891 S.W.2d at 708 (noting also that the “court appoints a personal representative for the minor precisely because the court cannot represent the minor’s interests”).

<sup>17</sup> *Id.*

independently—consistent with her role as a fiduciary with respect to the party whose interests she has been appointed to represent, and for that reason, the *Byrd* court found lacking the policy justifications for immunizing these court officers from civil liability.

According to the *Byrd* court, certain policy reasons dictate that a guardian ad litem appointed under Rule 173 within the context of a friendly suit be liable for civil damages for injuries caused to the minor or other incapacitated party whose interests are at stake. Rule 173 preserves the incapacitated party’s right to sue and obtain a final judgment, while at the same time protecting the party from the conflicting interests of a next friend or a guardian. The *Byrd* court reasoned that the “utility of the friendly suit” outweighed the acknowledged possibility that potential ad litem would be discouraged from assuming fiduciary duties, the breach of which could expose them to civil liability.<sup>18</sup> As a fiduciary, the guardian ad litem “is empowered to make decision for, and act on behalf of, the minor.”<sup>19</sup> To abrogate civil liability of a guardian ad litem appointed under Rule 173 “would deny the minor any protection against acts of incompetence or bad faith committed by her guardian ad litem.”<sup>20</sup> The *Byrd* court thus found compelling the incapacitated party’s right to hold an ad litem responsible for deficient representation, and was persuaded that the significance of that right outweighed the risk that qualified persons will be dissuaded from taking ad litem appointments that entail fiduciary obligations.<sup>21</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The *Byrd* guardian ad litem additionally argued that he could not be held liable for attorney malpractice because no attorney-client relationship was formed between him and the minor whose interests he was appointed to represent. The *Byrd* court reiterated that Rule 173 contemplates that the guardian ad litem act as the incapacitated party’s personal, not legal, representative. *Id.* at 710. The decision notes that in the absence of a contractual relationship obligating the ad litem to render legal services on the incapacitated party’s behalf, no attorney-client relationship arises, such as could give rise to a malpractice cause of action. *Id.* The *Byrd* court therefore rejected attorney malpractice as a viable cause of action against a guardian ad litem appointed under Rule 173 in the context of a friendly suit.

More recently, in *Dallas County v. Halsey*, the Texas Supreme Court declined to extend judicial immunity to a court reporter sued for fraud, breach of contract, and violations of the Texas Deceptive Trade Practices Act in connection with errors in an official transcript. Like the guardian ad litem in *Byrd*, the court reporter in *Halsey*, though her work was indispensable to the operations of the court, was not engaged in a discretionary function with respect to the performance of her duties.<sup>22</sup> In explaining that Texas courts had adopted a functional approach for purposes of extending absolute judicial immunity to certain officers of the court, the Supreme Court contrasted the decision in *Byrd* with a subsequent decision by the Fourteenth Court of Appeals in *Delcourt v. Silverman*.<sup>23</sup>

In *Delcourt*, the court granted derived judicial immunity to a guardian ad litem appointed under the Texas Family Code to represent the best interests of a minor in a custody proceeding.<sup>24</sup> The *Delcourt* court determined that absolute judicial immunity should be afforded the guardian ad litem in this setting because she functioned as an adjunct of the court. The ad litem was in this capacity obligated to report impartial recommendations that would then be used to assist in resolving particular issues that had been identified by the court.<sup>25</sup> The decision noted in this regard that “[c]onsiderations favoring immunity have generally been found in the context of disputes involving child custody or allegations of neglect or abuse of a child.”<sup>26</sup> Such recognized considerations include those of preserving the confidence of the court and interested parties in the impartiality of the recommendations they receive from the guardian ad litem, in situations where the ad litem might otherwise be compromised by, for example, “fear of liability to one of

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<sup>22</sup> *Halsey*, 87 S.W.3d at 553.

<sup>23</sup> 919 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

<sup>24</sup> *Id.* at 786. (examining former article 11.10 of the Texas Family Code).

<sup>25</sup> *Id.* at 786.

<sup>26</sup> *Id.* (citing *Cok v. Cosentino*, 876 F.2d 1 (1st Cir. 1989) and *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984)).

the parents,” or “appeasement of antagonistic parents.”<sup>27</sup> Moreover, the *Delcourt* court commented that such fear of litigation could otherwise generally deter qualified ad litem from accepting court appointments.<sup>28</sup>

In *Halsey*, the Supreme Court noted approvingly that the lower courts in Texas had granted derived judicial immunity to court officers based not on their identities—a guardian ad litem appointed under Rule 173 functions differently from one appointed under the Texas Family Code—but on whether their conduct, in the course of their appointments, closely approximated that of the appointing judge.<sup>29</sup> The Supreme Court credited the courts of appeals in *Byrd* and *Delcourt* with relying on a functional approach to derived judicial immunity similar to that used by the United States Supreme Court in *Antoine v. Byers & Anderson, Inc.*<sup>30</sup> In *Antoine*, the Court declined to grant the protections of judicial immunity to court reporters, and in doing so, cited the lack of subjective discretion exercised by court reporters in the performance of their duties.<sup>31</sup> Judicial immunity, wrote the Court, was appropriate only as to court officers whose “judgments are ‘functionally comparable’ to those of the judge.”<sup>32</sup>

A clear dichotomy in extending immunity to guardians ad litem has developed in Texas; an appointment under Rule 173 has received qualitatively different treatment from an appointment under the Family or Probate Codes. Provisions of the Texas Family and Probate

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<sup>27</sup> *Id.* (quoting *Short v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990)).

<sup>28</sup> *Id.* (citing *Collins v. Tabet*, 806 P.2d 40, 51 (N.M. 1991)).

<sup>29</sup> *Halsey*, 87 S.W.3d at 555-56 (finding also that the same functional approach had been applied by the United States Supreme Court to deny absolute judicial immunity to a court reporter who did not exercise discretion in compiling the record of a judicial proceeding or otherwise engage in the judicial decisionmaking process). In *Halsey*, the court also cited *City of Houston v. West Capital Financial Services*, 961 S.W.2d 687 (Tex. App.—Houston [1st Dist.] 1998, pet. dismissed w.o.j.), as another case in which the functional approach was used to determine the propriety of extending judicial immunity to court officers. *Halsey*, 87 S.W.2d at 554. In *West Capital Financial*, the court denied judicial immunity to the chief clerk of a municipal court in connection with his administration of contracts with the City of Houston because this function was not under the direction or supervision of the delegating judge. *Id.* at 690. The court examined the *particular* function of the court officer, rather than relying on the manner in which he functioned in the aggregate.

<sup>30</sup> 508 U.S. 429 (1993).

<sup>31</sup> *Id.* at 436-37.

Codes now shield guardians ad litem from liability for civil damages in connection with recommendations made and opinions rendered in connection with certain appointments.<sup>33</sup>

Whereas an appointment under Rule 173 has been construed as giving rise to a fiduciary relationship with the incapacitated party, the statutory appointments involve an ad litem's performance of a service at the court's discretion. Enactment of statutory immunity followed Texas courts' extension of derived judicial immunity in those settings.

Notably, the Texas Supreme Court in *Halsey* did not review the policy reasons articulated by the Dallas Court of Appeals in support of its decision not to extend derived judicial immunity to a Rule 173 appointee in *Byrd*.

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<sup>32</sup> *Id.* at 436.

<sup>33</sup> *See, e.g.*, TEX. FAM. CODE. ANN. § 107.009 (extending immunity to a guardian ad litem appointed to represent a minor in a suit affecting the parent-child relationship); TEX. FAM. CODE. ANN. § 33.006 (extending immunity to a guardian ad litem appointed to represent a minor in a suit to authorize an abortion absent parental notification); TEX. PROB. CODE. ANN. § 645A (extending immunity to a guardian ad litem appointed to represent the interest of an incapacitated person in a guardianship proceeding). The *Delcourt* decision apparently preceded legislative action in regard to extension of immunity to guardians ad litem appointed to represent the interests of minors in suits affecting the parent-child relationship.