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## APPENDIX 1



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V.T.C.A., Government Code § 74.092

Vernon's Texas Statutes and Codes Annotated [Currentness](#)

Government Code [\(Refs & Annos\)](#)

Title 2. Judicial Branch [\(Refs & Annos\)](#)

Subtitle F. Court Administration

▣ [Chapter 74.](#) Court Administration Act [\(Refs & Annos\)](#)

▣ [Subchapter D.](#) Administration by County

➔ **§ 74.092. Duties of Local Administrative Judge**

- (a) A local administrative judge, for the courts for which the judge serves as local administrative judge, shall:
- (1) implement and execute the local rules of administration, including the assignment, docketing, transfer, and hearing of cases;
  - (2) appoint any special or standing committees necessary or desirable for court management and administration;
  - (3) promulgate local rules of administration if the other judges do not act by a majority vote;
  - (4) recommend to the regional presiding judge any needs for assignment from outside the county to dispose of court caseloads;
  - (5) supervise the expeditious movement of court caseloads, subject to local, regional, and state rules of administration;
  - (6) provide the supreme court and the office of court administration requested statistical and management information;
  - (7) set the hours and places for holding court in the county;
  - (8) supervise the employment and performance of nonjudicial personnel;
  - (9) supervise the budget and fiscal matters of the local courts, subject to local rules of administration;
  - (10) coordinate and cooperate with any other local administrative judge in the district in the assignment of cases in the courts' concurrent jurisdiction for the efficient operation of the court system and the effective administration of justice;

(11) establish and maintain a list of all attorneys qualified to serve as an attorney ad litem; and

(12) perform other duties as may be directed by the chief justice or a regional presiding judge.

(b) A list of attorneys ad litem maintained under Subsection (a)(11) must contain the names of all attorneys who:

(1) meet any statutory or other requirements to serve as an attorney ad litem; and

(2) have registered to serve as attorney ad litem with a court for which the judge maintaining the list serves as local administrative judge.

#### CREDIT(S)

Added by [Acts 1987, 70th Leg., ch. 148, § 2.93\(a\), eff. Sept. 1, 1987](#). Amended by [Acts 1989, 71st Leg., ch. 646, § 14, eff. Aug. 28, 1989](#); [Acts 1991, 72nd Leg., ch. 746, § 68, eff. Oct. 1, 1991](#); [Acts 2009, 81st Leg., ch. 1224, § 1, eff. Sept. 1, 2009](#).

#### HISTORICAL AND STATUTORY NOTES

##### 2005 Main Volume

Acts 1989, 71st Leg., ch. 646, in the introductory paragraph, inserted "for the courts for which the judge serves as local administrative judge".

Acts 1991, 72nd Leg., ch. 746 inserted subsec. (10); and renumbered former subsec. (10) as (11).

##### 2009 Electronic Pocket Part Update

##### 2009 Legislation

Acts 2009, 81st Leg., ch. 1224 designated the introductory paragraph as subsec. (a); designated the text of subsec. (a)(11) as (a)(12), in subsec. (a)(11) inserted "establish and maintain a list of all attorneys qualified to serve as an attorney ad litem; and"; inserted subsec. (b) and made nonsubstantive changes.

Section 9 of Acts 2009, 81st Leg., ch. 1224 provides:

"The change in law made by this Act applies only to the appointment of an attorney ad litem on or after December 1, 2009."

##### 2005 Main Volume

## APPENDIX 2

## Michael C. Engelhart

1300 McGowen Street, Houston, Texas 77004 (713) 333-3200; mengelhart@midtownlegal.com

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### PROFESSIONAL EXPERIENCE

**ENGELHART & GREENWOOD, L.L.P.**

Houston, Texas

*Partner*, 1997-present

Handled over 500 cases involving commercial, personal injury, consumer & civil rights litigation

18 jury trials; 6 bench trials

Represented clients in multiple arbitration and appellate proceedings

Participated in over 150 mediations of matters in litigation

Representative published opinions -

1. *Hooper v. Chittaluru*, 222 S.W.3d 103 (Tex.App.-Houston [14 Dist.], *pet. denied*) (*reversed trial court's exclusion of expert witness testimony*)

2. *Madern v. City of Pasadena*, Not Reported in S.W.3d, 2006 WL 560183, Tex.App.-Hous. (1 Dist.), March 09, 2006 (No. 01-05-00337-CV.) (*reversed and remanded dismissal of declaratory judgment action regarding constitutionality of tort claims act provision*)

3. *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725 (Tex.App.-Houston [14 Dist.]) (*challenged procedure for first-party insurance claim examination under oath*)

4. *Frazer v. Texas Farm Bureau Mut. Ins. Co.*, 4 S.W.3d 819 (Tex.App.-Houston [1<sup>st</sup> Dist.] 1999) (*summary judgment reversed*)

5. *Ortmann v. Ortmann*, 999 S.W.2d 85 (Tex.App.-Houston [14 Dist.] 1999, *pet. denied*) (*catalogued bill of review elements*)

6. *Pifer v. Muse*, 984 S.W.2d 739 (Tex.App.-Texarkana 1998, *no pet.*) (*created good Samaritan class of entrants onto land*)

7. *Goad v. Lanier*, Slip Copy, 2006 WL 1698014, S.D. Tex., June 16, 2006 (No. Civ. A. H-06-0718.) (*denied defendant's motion to dismiss*)

8. *Williams v. National R.R. Passenger Corp.*, 392 F. Supp.2d 790, E.D. Tex., August 18, 2005 (No. 1:04 CV 711.) (*challenged preemption in Amtrak personal injury case*)

9. *Forrester v. Ginn*, 2008 WL 96051, January 10, 2008 (Tex. App.-Houston [14<sup>th</sup> Dist.], *no pet. hist.*) (*reversed dismissal of case for lack of notice to Plaintiff*)

- Representative trials and settlements:
- Cause No. 830,807; In County Civil Court at Law No. 1; Hadley Medical Clinic v. Allstate et al. Represented medical clinics in claims against third-party insurers in claims for breach of third-party beneficiary contracts. Medical clinics had notified insurers of their written assignments from injured accident victims. Insurer settled with injured victims and created release and settlement agreements stating that releasing parties included “assigns”. \$38,000 + judgment for clinics on breach of third-party beneficiary contracts because insurers failed to pay assignee clinics directly pursuant to release agreements;
- Wrongful death; Individual murdered outside apartment in parking lot of complex by unknown criminal; confidential settlement;
- Wrongful death; Individual murdered by assailant who was known to be dangerous by apartment management, but which failed to keep her off of premises; confidential settlement;
- Fen-Phen; Represented dozens of individuals injured by Fen-Phen combination; worked jointly with large law firms on multiple cases to successfully settle all cases;
- Enron litigation; Undertook representation of over 250 individual shareholders in litigation against Enron principals, lenders and auditors; pending;
- Wrongful death; Worked as originating attorney and co-counsel on largest single settlement of multi-vehicle accident resulting in rollover and death against manufacturer of this vehicle;
- DTPA; Currently oversee an active docket of consumer lawsuits arising out of defective new cars; successfully negotiated manufacturer buyback of dozens of new vehicles for myriad electrical, motor or safety design issues;
- Prisoner litigation; Currently litigating civil rights and tort-claims act lawsuit on behalf of 136 inmates of Darrington Unit of TDCJ over mass food poisoning incident;
- Medical malpractice; Obtained confidential settlement in litigation against physician who performed contra-indicated adenoidectomy in girl with submucous cleft palate, resulting in complete loss of voice;
- Wrongful death; Obtained confidential settlement in wrongful death case against family that allowed their son, a non-custodial father with psychological issues and an angry divorce, to have his daughter sleep over at their house; father then murdered daughter (subsequently convicted) to collect life insurance proceeds;
- Med mal; Currently litigating unnecessary and contra-indicated surgery case involving missed diagnosis of interstitial cystitis in which surgeon performed total abdominal hysterectomy as well as extensive pelvic floor surgery for which patient was asymptomatic;
- Wrongful death; Currently litigating wrongful death claim against oil platform owner and maintenance companies, as well as against manufacturers of drilling turbine over explosion due to leaking fuel gas that killed platform worker.



**JOHN M. O'QUINN, P.C.**

Houston, Texas

*Associate*, 1995-1996

*Law Clerk*, 1994-1995

- Handled pre-trial matters in commercial litigation, intellectual property matters, and personal injury litigation.
- Researched and briefed various complex legal issues, drafted variety of pleadings and papers, and undertook extensive, document intensive discovery and depositions

Representative matters handled:

- Dispute over ownership of medical technology between large state university system and inventor.
- Airplane crash products liability litigation
- Premises liability matter involving sexual assault of employee by criminal third party

**PROFESSIONAL AFFILIATIONS & ACCOMPLISHMENTS**

Member, State Bar of Texas

Member, Consumer Law Section, State Bar of Texas

Member, Appellate Section, State Bar of Texas

Trial Lawyers College, Member (2004-Present)

Special Commission Member, County Civil Court at Law No. 1 (2002)

Guardian Ad Litem and Attorney ad Litem Appointments CCCL 1, 2 & 4, & 11<sup>th</sup> District Court (1998 to present)

Board of Directors Anti-Defamation League (2003-2005)

Board of Directors, Barbara Ann Radnofsky for US Senate, Inc.

Member, San Antonio Trial Lawyers Association

Member, Houston Trial Lawyers Association

Member, Brith Shalom Synagogue

Sustaining Member, Harris County Democratic Party

Member, Bellaire Democrats

Member HGLBTPC

Member Houston Bar Association (Litigation & Appellate Sections)

**Bar Admissions**

Texas, 1995

U.S. District Court Southern District of Texas

U.S. District Court Western District of Texas

U.S. District Court Northern District of Texas

U.S. District Court Eastern District of Texas

U.S. Court of Appeals 5th Circuit

Education:

J.D., University of Houston Law Center, Houston, Texas, 1995  
Honors: Lillian Kaiser Lewis Scholarship  
Houston Law Review, Associate Editor

B.A., University of Michigan, Ann Arbor, Michigan, 1992  
Major: Political Science; Additional Concentration in Spanish

Languages:

Fluent in English and Spanish

Fraternities/Sororities:

Tau Kappa Epsilon

Presentations:

*Recent Texas Case Law Affecting the Recovery of Attorney's Fees and Judgment Interest and Strategies for Litigators.* Presented to Association of Women Attorneys monthly meeting, June 27, 2007.

# Attorney Ad Litem Investigation Resources



## Search Engines

google.com  
yahoo.com  
lycos.com

hotbot.com  
altavista.com  
search.aol.com

excite.com  
go.com  
bing.com

## Combination Search Engines\*

metacrawler.com  
clusty.com

vivisimo.com

dogpile.com  
ask.com

\*these sites search the search engines

## Genealogy Websites

familysearch.org\*  
txgenweb.org\*  
legacy.com/NS (obituaries)\*  
onegreatfamily.com

ancestry.com  
ssdi.rootsweb.ancestry.com\*  
usgenweb.org\*  
rootsweb.com\*

myheritage.com/research\*  
archives.gov/genealogy  
kindredtrails.com/TX\_Harris.html  
genealogy.com

\*free online searches available

## People Tracking Firms

globaltracing.com  
landexresearch.com  
omnitrace.com

missingheir.com  
arb.com

heirsearch.com  
blakeandblake.com  
locatorfirm.com

## Harris County Resources

Harris County Appraisal  
District  
www.hcad.org

Harris County  
Voter Registration Database  
www.tax.co.harris.tx.us/voter/voter.aspx

Harris County  
Clerk's Office Databases  
www.cclerk.hctx.net

Justice Information Management Services (JIMS)—<http://home.jims.hctx.net>. JIMS requires a subscription and can be used to search for criminal and civil cases that have been filed in Harris County. To obtain records at no charge, visit the District Clerk's Public Service Section during business hours at the addresses below. Public records are also available online at [www.hcdistrictclerk.com](http://www.hcdistrictclerk.com) (click on the "Search Records and Documents" link). In addition, service is available over the phone (713.755.7300) for a fee.

### Criminal Public Service

Criminal Justice Center  
1201 Franklin, 3<sup>rd</sup> Floor  
Houston, TX 77002

### Civil Public Service

Harris County Civil Courthouse  
201 Caroline, 2<sup>nd</sup> Floor RM 210  
Houston, TX 77002



## Other Helpful Resources

accurint.com\*  
intelius.com  
yellowpages.com  
zabasearch.com  
people.yahoo.com  
tracersinfo.com\*

publicdata.com\*  
myspace.com  
switchboard.com  
facebook.com  
merlindata.com\*

whitepages.com  
googleguide.com  
lexisnexis.com\*  
usa-people-search.com\*  
pipl.com  
irbsearch.com\*

\*subscription required

## Family History Center Libraries

Family History Center Libraries are maintained by The Church of Jesus Christ of Latter-day Saints (Mormons) and are branch facilities of the Family History Library in Salt Lake City, the world's largest genealogical library. Centers provide access to most of the microfilms and microfiche in the Family History Library. The general public is welcome to use Family History Center resources. Call ahead for hours of operation or to make an appointment.

Baytown Texas  
1010 Birdsong Dr.  
Baytown, TX 77521  
281-428-5141

Clear Lake Texas  
1802 Gunwale Rd.  
Houston, TX 77062  
281-488-4406

Klein Texas  
16535 Kleinwood Dr.  
Spring, TX 77379  
281-251-5931

Houston Texas  
1101 Bering Dr.  
Houston, TX 77057  
713-785-2105

Houston Texas East  
4202 Yellowstone Dr.  
Pasadena, TX 77504  
281-991-8479

Houston Texas North  
16331 Hafer Road  
Houston, TX 77090  
281-893-5381

Katy Texas  
1603 Norwalk  
Katy, TX 77413  
281-578-8338

Kingwood Texas  
4021 Deerbrook  
Kingwood, Texas 77339  
281-360-1352

Magnolia Texas  
31706 Michael Rd.  
Magnolia, TX 77355  
281-259-7233

Old Katy Texas  
1928 Drexel  
Katy, TX 77493  
281-391-7689

Pine Trails Texas  
14404 Kemrock Dr.  
Houston, TX 77049  
281-458-1526

Shadowdale Texas  
4703 Shadowdale Dr.  
Houston, TX 77041  
713-466-7706

## Other Genealogy Libraries

Clayton Library Center for Genealogical Research  
Houston Public Library  
5300 Caroline  
Houston, Texas 77004  
832-393-2600

Texas State Library & Archives Commission  
1201 Brazos Drive/P.O. Box 12927  
Austin, TX 78711  
512-463-7102

## General Tips

When searching, also run queries using only the last name so you can contact possible relatives of the target. If there is a house on the property, leave a card. If the mortgage company is involved, request a copy of the mortgage application to obtain personal information and references or next of kin. Send letters to all potential persons and heirs. If you find through the district clerk's office that the target has been involved in other civil or criminal cases, use addresses, other parties and the listed lawyers to locate the target.

# **Attorney Ad Litem Investigation Resources**



**Prepared by: Judge Mike Engelhart  
151<sup>st</sup> Civil District Court**

## APPENDIX 3



## **About Judge Dan Hinde**

Dan Hinde was appointed Judge of the 269<sup>th</sup> District Court of Harris County, Texas in November 2008. Judge Hinde grew up in Houston, having moved with his family from Illinois to Harris County when he was eight years old. He graduated *summa cum laude* from Klein Forest High School, where he was a National Merit Scholar, Drum Major of the marching band, and a member of the swim team. After high school, Judge Hinde studied music education for one year before transferring to Texas A&M University, where he earned his Bachelor of Science in Electrical Engineering. He received the Buck Weirus Spirit Award for student leadership his senior year at Texas A&M and graduated *magna cum laude*.

After college, Judge Hinde attended the University of Texas School of Law. He served as an Articles Editor for the *Texas Law Review* and received his Doctor of Jurisprudence with Honors in 1997. He then clerked for U.S. District Judge Sim Lake for two years before joining Vinson & Elkins, LLP. More recently, Judge Hinde was Senior Counsel at the trial boutique firm of Steele Sturm, PLLC.

As a lawyer, Judge Hinde represented both plaintiffs and defendants and handled a wide variety of cases, including commercial, construction, corporate-governance, employment, energy, maritime, mass-tort, personal-injury, products-liability, securities-fraud, and technology litigation. Judge Hinde also prosecuted criminal cases and represented indigent defendants challenging their sentences. He tried sixteen cases as first or second chair, including twelve jury trials and argued before the United States Court of Appeals for the Fifth Circuit. Judge Hinde is a member of the Bar of the Supreme Court of the United States and has been a member of the College of the State Bar of Texas and the Pro Bono College.

In addition to trying cases, Judge Hinde involved himself in a number of bar and community activities. For several years, he has served on the HBA's Judicial Polls Committee. Before taking the bench, Judge Hinde represented pro bono the Houston Chapter of the American Red Cross and the Houston Society of the Archaeological Institute of America.

His service to the bar and community continues. Currently, he is the Chair of the Federal Practice Section of the Houston Bar Association, and he also serves as a member of the Court Rules Committee of the State Bar of Texas.

Judge Hinde met his wife, Rosanna, at First Presbyterian Church, which he has attended since returning to Houston from law school. At church, the Hinds are members of the Trinity Sunday School Class, which Judge Hinde teaches from time to time. Rosanna and Judge Hinde are the proud parents of David and Anne.

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CAUSE NO. 2007-44883

HARRIS COUNTY et al.,

*Plaintiffs,*

vs.

TOM W. GUY,  
and ROSA LEE GUY,

*Defendants.*

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

11TH JUDICIAL DISTRICT

FILED  
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DISTRICT CLERK  
HARRIS COUNTY, TEXAS

2008 JUL 31 PM 2:41

BY \_\_\_\_\_ DEPUTY

**DEFENDANTS' SPECIAL EXCEPTIONS, ORIGINAL ANSWER,  
REQUEST FOR DISCLOSURES, AND REQUEST FOR PRODUCTION**

TO THE HONORABLE DISTRICT COURT JUDGE:

Defendants Tom W. Guy and Rosa Lee Guy, whose locations are unknown, and such persons' unknown heirs, successors and assigns, whose identities and locations are unknown, unknown owners, such unknown owners' heirs, successors and assigns, and any and all other persons, including adverse claimants, owning or having any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this suit ("Defendants") file their Special Exceptions, Original Answer to Plaintiffs' Original Petition for Taxes and Claim for City of Houston Special Assessments, as supplemented, Requests for Disclosure and Request for Production, and in support would respectfully show the Court as follows:

**I.  
DEFENDANTS' SPECIAL EXCEPTIONS TO  
PLAINTIFFS' ORIGINAL PETITION FOR TAXES  
AND CLAIM FOR CITY OF HOUSTON SPECIAL ASSESSMENTS**

Defendants specially except to the Plaintiffs' Original Petition for Taxes and Claim for City of Houston Special Assessments and request that the Court order Plaintiffs to replead and cure their pleading defects.



**A. Special Exceptions**

1. Defendants specially except to Paragraphs III, IV, and V of Plaintiffs' Original Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for taxes. While Plaintiffs allege that tax is owed on the property, their pleading does not cite the Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose the alleged tax or setting the tax rate that each taxing authority imposed. Defendants are left to guess where to look to confirm whether each Plaintiff had the authority to impose a tax and at what rate such authority was authorized to set the tax.

2. Moreover, Defendants specially except to Paragraphs III, IV, and V of Plaintiffs' Original Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for penalties imposed on taxes allegedly owed. While Plaintiffs allege that penalties are owed on the allegedly unpaid property taxes, their pleading does not cite the Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose the alleged penalties for unpaid taxes or setting the penalty rate that each taxing authority may impose on allegedly unpaid taxes. Again, Defendants are left to guess where to look to confirm whether each Plaintiff had the authority to impose a penalty on allegedly unpaid taxes and at what rate such authority was authorized to charge a penalty.

3. Furthermore, Defendants specially except to Paragraphs III, IV, and V of Plaintiffs' Original Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for interest accrued on taxes allegedly owed. While Plaintiffs allege that interest is owed on the allegedly unpaid property taxes, their pleading does not cite the Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose interest on unpaid taxes or setting the interest rate that each taxing authority may impose on allegedly unpaid taxes. Again, Defendants are left to guess where to look to confirm whether each

Plaintiff had the authority to recover interest on allegedly unpaid taxes and at what rate such interest accrues.

4. Additionally, Defendants specially except to Paragraph VIII of Plaintiffs' Original Petition because Plaintiffs' pleading does not give fair notice of Plaintiff City of Houston's claim for recovery of certain special assessments. The City of Houston alleges "one or more of the following provisions" permit it to recover the special assessments it claims in the Petition. But rather than identify the specific state statutes that that authorize it to seek recovery of the claimed special assessments, the City of Houston instead refers generally to at least five different chapters spread across three different codes: TEX. HEALTH & SAFETY CODE ch. 342, TEX. LOCAL GOV'T CODE ch. 214, and TEX. TRANSP. CODE chs. 311-313. Defendants are left to guess which sections in those five chapters the Plaintiffs rely on as the authority to recover the alleged special assessments.

5. Similarly, Defendants specially except to Paragraph VIII of Plaintiffs' Original Petition because Plaintiffs' pleading does not give fair notice of Plaintiff City of Houston's claim for interest on the allegedly unpaid special assessments it claims. Again, rather than identify the specific state statutes that authorize it to recover interest on the allegedly unpaid special assessments, the City of Houston instead refers generally to five different chapters spread across three different codes: TEX. HEALTH & SAFETY CODE ch. 342, TEX. LOCAL GOV'T CODE ch. 214, and TEX. TRANSP. CODE chs. 311-313. More problematic, the City alleges that it is entitled to recover interest at a rate of 10% per annum under TEX. HEALTH & SAFETY CODE ch. 342 and TEX. LOCAL GOV'T CODE ch. 214 or 8% or more per annum under TEX. TRANSP. CODE chs. 311-313. Yet the City fails to identify which rate it claims on each special assessment claimed by the City of Houston. Defendants are left to guess which sections in those five chapters the City of

Houston relies on as the authority to recover interest on the alleged special assessments and more importantly, what interest rate the City of Houston claims applies to the various special assessments it claims on the property.

6. Finally, Defendants specially except to Paragraph VI because Plaintiffs' Original Petition requests attorneys' fees in a general allegation but does not specify which statute makes them available in this type of suit.

**B. Prayer**

THEREFORE, Defendants ask the Court to (1) set their Special Exceptions for hearing, (2) sustain their Special Exceptions, (3) order Plaintiffs to replead and cure their pleading defects, and (4) if Plaintiffs do not cure their defects, strike Plaintiffs' Petition.

**II.**  
**SUBJECT TO THEIR SPECIAL EXCEPTIONS,**  
**DEFENDANTS' ORIGINAL ANSWER**

**A. General Denial**

7. Subject to their Special Appearance and without waiving same, Defendants deny generally each and every, all and singular, the allegations contained in Plaintiffs' Original Petition for Taxes and Claim for City of Houston Special Assessments, and demand strict proof thereof.

**B. Affirmative Defenses**

8. Plaintiffs have failed to properly serve one or more of the Defendants.

9. The Court lacks jurisdiction *in personam* over one or more of the Defendants.

10. Granting the relief requested by the Plaintiffs would constitute an uncompensated taking of Defendants' property interest without just compensation, in violation of the Texas and United States Constitutions.

11. Granting the relief requested by the Plaintiffs would deprive Defendants of property without due process of law, in violation of the Texas and United States Constitutions.

12. Defendant reserves the right to amend its pleadings herein to further allege any additional defensive pleadings after full and complete discovery in this case has been completed.

**C. Attorney Ad Litem Fees and Costs**

13. The undersigned counsel for Defendants has been appointed by the Court as Attorney Ad Litem for the Defendants and has incurred costs and expense in carrying out his duties. The Defendants and the Attorney Ad Litem therefore request that the Court award reasonable attorneys' fees and costs against Defendants. TEX. R. CIV. P. 244.

**D. Prayer**

THEREFORE, subject to their Special Exceptions, Defendants pray that judgment be entered that Plaintiffs take nothing, that the levy of tax on Defendants' property be declared illegal and void, that the Plaintiffs be restrained from taking any steps to enforce the illegal levy, that the Court award Attorney Ad Litem fees and costs against Plaintiffs, and that Defendants have such other and further relief to which they may be justly entitled.

**III.**

**DEFENDANTS' REQUESTS FOR DISCLOSURE TO PLAINTIFFS**

Defendants request that Plaintiffs disclose within thirty (30) days of this request the information or material described in TEXAS RULE OF CIVIL PROCEDURE 194.2(a)-(i), (l).

IV.  
**DEFENDANTS' REQUEST FOR PRODUCTION TO PLAINTIFFS**

In accordance with Rule 196 of the Texas Rules of Civil Procedure, Defendants direct the following Requests for Production to Plaintiffs (attached as Exhibit 1). In accordance with Rule 196.2, Plaintiffs must respond within 30 days after service of these Requests.

Respectfully submitted,

STEELE STURM PLLC

By: 


Daniel E. Hinde  
State Bar No. 24002289  
Wells Fargo Plaza  
1000 Louisiana, Suite 3780  
Houston, Texas 77002  
Telephone: (713) 659-2600  
Facsimile: (713) 659-2601

**ATTORNEY FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I certify that on this 31st day of ~~June~~ <sup>July</sup>, 2008, a copy of this document was served on all counsel by facsimile, hand delivery, or placing a copy in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Angelica M. Hernandez  
Linebarger Googan Blair & Sampson, LLP  
1301 Travis, Suite 300  
Houston, Texas 77002

  
Daniel E. Hinde

## EXHIBIT 1

### DEFENDANTS' REQUESTS FOR PRODUCTION

**REQUEST NO. 1:** Please produce a certified copy of all entries in each Plaintiff's tax roll showing the Property and the amount of tax, interest, or penalty allegedly owed.

**REQUEST NO. 2:** Please produce a certified copy of all entries in each Plaintiff's delinquent tax roll showing the Property and the amount of tax, interest, or penalty allegedly owed.

CAUSE NO. 2006-27981

HARRIS COUNTY et al.,

*Plaintiffs,*

vs.

JOHN DAVID THOMAS

*Defendants.*

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

11TH JUDICIAL DISTRICT


**DEFENDANT'S REQUEST FOR PRODUCTION**

TO: Plaintiffs Harris County; Harris County Department of Education; Port of Houston Authority of Harris County; Harris County Flood Control District; Harris County Hospital District; City of Houston; Houston Independent School District; Houston Community College System, by and through their attorneys of record, Angelica M. Hernandez, Linebarger Goggan Blair & Sampson, LLP, 1301 Travis Street, Suite 300, Houston, Texas 77002.

In accordance with Rule 196 of the Texas Rules of Civil Procedure, Defendant John David Thomas whose location is unknown, and such person's unknown heirs, successors and assigns, whose identities and locations are unknown, unknown owners, such unknown owner's heirs, successors, and assigns, and any and all other persons, including adverse claimants, owning or having any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this suit ("Defendant") direct the following Requests for Production to Plaintiffs Harris County; Harris County Department of Education; Port of Houston Authority of Harris County; Harris County Flood Control District; Harris County Hospital District; City of Houston; Houston Independent School District; Houston Community College System ("Plaintiffs"). In accordance with Rule 196.2, Plaintiffs must respond within 30 days after service of these Requests.

Respectfully submitted,

STEELE STURM PLLC

By: 

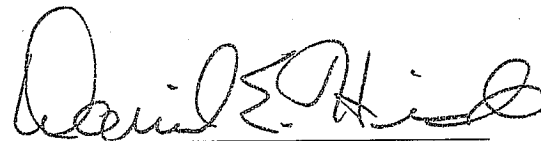
Daniel E. Hinde  
State Bar No. 24002289  
Wells Fargo Plaza  
1000 Louisiana, Suite 3780  
Houston, Texas 77002  
Telephone: (713) 659-2600  
Facsimile: (713) 659-2601

**ATTORNEY AD LITEM FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I certify that on this 31st day of July, 2008, a copy of this document was served on all counsel by facsimile, hand delivery, or placing a copy in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Angelica M. Hernandez  
Linebarger Googan Blair & Sampson, LLP  
1301 Travis, Suite 300  
Houston, Texas 77002



Daniel E. Hinde



## I. INSTRUCTIONS

1. Pursuant to TEX. R. CIV. P. 193.5, this discovery is continuing in nature, thereby requiring supplementation of Defendant's Responses from time to time.
2. The answers to this discovery shall be in writing and shall include such knowledge and documents as are within Plaintiffs' custody, possession, or control, or are within the custody, possession, or control of Plaintiffs' consultants, accountants, attorneys, or other agents, or which are otherwise available to Plaintiffs.
3. The terms used in these Requests are to be given their most expansive meaning unless specifically limited.
4. Please produce all responsive documents in the same file or organizational environment in which they are maintained. For example, please produce a document that is part of a file or other grouping together with all other documents from the file or other grouping responsive to the request, in the same order or manner of arrangement as the original.
5. If any material or information is withheld because you claim it is privileged, constitutes attorney work product, or is otherwise not subject to disclosure, please provide the information about such material or information required by TEX. R. CIV. P. 193.3.

## II. DEFINITIONS

1. "Action" shall refer to Cause No. 2006-27981; *Harris County et al. v. John David Thomas*; In the 11<sup>th</sup> Judicial District Court of Harris County, Texas.
2. "Defendant" shall refer to Defendant John David Thomas, whose location is unknown, and such person's unknown heirs, successors and assigns, whose identities and locations are unknown, unknown owners, such unknown owner's heirs, successors, and assigns, and any and all other persons, including adverse claimants, owning or having any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this Action.
3. "Documents" shall refer to papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations, whether in electronic, magnetic, optical, or hardcopy form, that constitute or contain matters relevant to the subject matter of this Action.
4. "Mr. Thomas" shall refer to Defendant John David Thomas.
5. "Plaintiffs" shall refer to Plaintiffs Harris County; Harris County Department of Education; Port of Houston Authority of Harris County; Harris County Flood Control District; Harris County Hospital District; City of Houston; Houston Independent School District; Houston Community College System as well as their respective parent organizations, subsidiaries, employees, officers, directors, partners, agents, or assigns.

6. "Property" shall refer to Lot 7 in Block M of Bayou Estates, a subdivision in Harris County, Texas according to the map or plat thereof recorded in Volume 36, Page 47 of the Map Records of Harris County, Texas; Account No. 0772470130007.

### III. REQUESTS FOR PRODUCTION

**REQUEST NO. 1:** Please produce a certified copy of all entries in each Plaintiff's tax roll showing the Property and the amount of tax, interest, or penalty allegedly owed.

**REQUEST NO. 2:** Please produce a certified copy of all entries in each Plaintiff's delinquent tax roll showing the Property and the amount of tax, interest, or penalty allegedly owed.

CAUSE NO. 2006-27981

05

HARRIS COUNTY et al.,

*Plaintiffs,*

vs.

JOHN DAVID THOMAS,

*Defendant.*

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§

IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
11TH JUDICIAL DISTRICT

FILED  
THERESA CHANG  
DISTRICT CLERK  
HARRIS COUNTY, TEXAS

08 JUN 27 PM 3:57

BY 0.27.08 DEPUTY

**DEFENDANT'S SPECIAL EXCEPTIONS, ORIGINAL ANSWER,  
AND REQUEST FOR DISCLOSURES**

TO THE HONORABLE DISTRICT COURT JUDGE:

Defendant John David Thomas, whose location is unknown, and such person's unknown heirs, successors and assigns, whose identities and locations are unknown, unknown owners, such unknown owner's heirs, successors and assigns, and any and all other persons, including adverse claimants, owning or having any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this suit ("Defendant") files his Special Exceptions, Original Answer to Plaintiffs' Second Amended Petition, as supplemented, and Requests for Disclosure and in support would respectfully show the Court as follows:

**I.  
DEFENDANT'S SPECIAL EXCEPTIONS TO  
PLAINTIFFS' SECOND AMENDED PETITION**

Defendant specially excepts to Plaintiffs' Second Amended Petition for Taxes and Claim for City of Houston Special Assessments and request that the Court order Plaintiffs to replead and cure their pleading defects.

**A. Special Exceptions**

1. Defendant specially excepts to Paragraphs III, IV, and V of Plaintiffs' Second Amended Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for taxes. While Plaintiffs allege that tax is owed on the property, their pleading does not cite the

Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose the alleged tax or setting the tax rate that each taxing authority imposed. Defendant is left to guess where to look to confirm whether each Plaintiff had the authority to impose a tax and at what rate such authority was authorized to set the tax.

2. Moreover, Defendant specially excepts to Paragraphs III, IV, and V of Plaintiffs' Second Amended Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for penalties imposed on taxes allegedly owed. While Plaintiffs allege that penalties are owed on the allegedly unpaid property taxes, their pleading does not cite the Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose the alleged penalties for unpaid taxes or setting the penalty rate that each taxing authority may impose on allegedly unpaid taxes. Again, Defendant is left to guess where to look to confirm whether each Plaintiff had the authority to impose a penalty on allegedly unpaid taxes and at what rate such authority was authorized to charge a penalty.

3. Furthermore, Defendant specially excepts to Paragraphs III, IV, and V of Plaintiffs' Second Amended Petition because Plaintiffs' pleading does not give fair notice of Plaintiffs' claims for interest accrued on taxes allegedly owed. While Plaintiffs allege that interest is owed on the allegedly unpaid property taxes, their pleading does not cite the Constitutional provisions, statutes, ordinances, or other sources of law authorizing each of the Plaintiffs to impose interest on unpaid taxes or setting the interest rate that each taxing authority may impose on allegedly unpaid taxes. Again, Defendant is left to guess where to look to confirm whether each Plaintiff had the authority to recover interest on allegedly unpaid taxes and at what rate such interest accrues.

4. Finally, Defendant specially excepts to Paragraph VI because Plaintiffs' Second Amended Petition requests attorneys' fees in a general allegation but does not specify which statute makes them available in this type of suit.

**B. Prayer**

THEREFORE, Defendant asks the Court to (1) set his Special Exceptions for hearing, (2) sustain his Special Exceptions, (3) order Plaintiffs to replead and cure their pleading defects, and (4) if Plaintiffs do not cure their defects, strike Plaintiffs' Petition.

**II.**  
**SUBJECT TO HIS SPECIAL EXCEPTIONS,**  
**DEFENDANT'S ORIGINAL ANSWER**

**A. General Denial**

5. Subject to his Special Appearance and without waiving same, Defendant denies generally each and every, all and singular, the allegations contained in Plaintiffs' Second Amended Petition and demands strict proof thereof.

**B. Affirmative Defenses**

6. Plaintiffs have failed to properly serve the Defendant.

7. The Court lacks jurisdiction *in personam* over Defendant.

8. Plaintiffs' suit is barred in whole or in part by the statute of limitations in TEXAS TAX CODE § 33.05.

9. Granting the relief requested by the Plaintiffs would constitute an uncompensated taking of Defendant's property interest without just compensation, in violation of the Texas and United States Constitutions.

10. Granting the relief requested by the Plaintiffs would deprive Defendant of property without due process of law, in violation of the Texas and United States Constitutions.

11. Defendant reserves the right to amend his pleadings herein to further allege any additional defensive pleadings after full and complete discovery in this case has been completed.

**C. Attorney Ad Litem Fees and Costs**

12. The undersigned counsel for Defendant has been appointed by the Court as Attorney Ad Litem for the Defendant and has incurred costs and expense in carrying out his duties. The Defendant and the Attorney Ad Litem therefore request that the Court award reasonable attorneys' fees and costs. TEX. R. CIV. P. 244.

**D. Prayer**

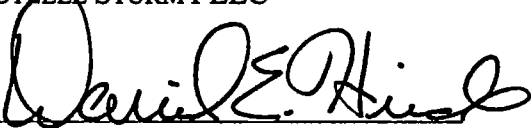
THEREFORE, subject to his Special Exceptions, Defendant prays that judgment be entered that Plaintiffs take nothing, that the levy of tax on Defendant's property be declared illegal and void, that the Plaintiffs be restrained from taking any steps to enforce the illegal levy, that the Court award Attorney Ad Litem fees and costs against Plaintiffs, and that Defendant has such other and further relief to which he may be justly entitled.

**III.  
DEFENDANT'S REQUESTS FOR DISCLOSURE TO PLAINTIFFS**

Defendant requests that Plaintiffs disclose within thirty (30) days of this request the information or material described in TEXAS RULE OF CIVIL PROCEDURE 194.2(a)-(i), (l).

Respectfully submitted,

STEELE STURM PLLC

By: 

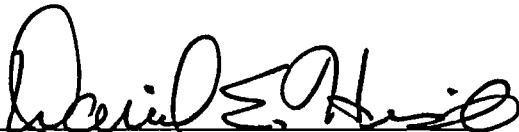
Daniel E. Hinde  
State Bar No. 24002289  
Wells Fargo Plaza  
1000 Louisiana, Suite 3780  
Houston, Texas 77002  
Telephone: (713) 659-2600  
Facsimile: (713) 659-2601

**ATTORNEY AD LITEM FOR  
DEFENDANT**

**CERTIFICATE OF SERVICE**

I certify that on this 27<sup>th</sup> day of June, 2008, a copy of this document was served on all counsel by facsimile, hand delivery, or placing a copy in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Angelica M. Hernandez  
Linebarger Googan Blair & Sampson, LLP  
1301 Travis, Suite 300  
Houston, Texas 77002

  
Daniel E. Hinde

## APPENDIX 4



## About Judge Al Bennett

### Education

University of Texas School of Law, Austin, Texas; J.D. May 1991

University of Houston, Houston, Texas

B.S. Political Science, May 1988

A.A. White Dispute Resolution Center, University of Houston, Houston, Texas

40 Hour Basic Mediation Training, August 2007

### Legal Experience

Law Offices of Alfred H. Bennett, Houston, Texas

Solo Practitioner, March 1998 – December 2008

Thurgood Marshall School of Law – Texas Southern University

Adjunct Professor of Law - Trial Advocacy, Spring 2003 – present

Solar & Fernandes, L.L.P., Houston, Texas

Associate, October 1994 – February 1998

Fulbright & Jaworski L.L.P., Houston, Texas

Associate, September 1991 – September 1994

### Bar Admissions

State Bar of Texas, 1991

United States District Court, Southern, Eastern & Northern Districts of Texas

### Bar Associations

National Bar Association

Constitution & Bylaws Committee, Member, July 2000 – 2004

Gertrude E. Rush Mid-Year Planning Committee, Vice-Chair, 1997

Member, 1988 - present

State Bar of Texas

Committee on Lawyer Referral & Information Services, Chair, July 2004 - July 2006

Vice-Chair, May 2002 – July 2004

Member, July 1998 – July 2006

Grievance Committee, District 4A (Houston), Member, June 2002—June 2004

Texas Minority Conference Program Houston Host Committee, Member, Fall 1999 & Fall 2003

President-Elect's Advisory Committee on Strategic Planning, Member, 1995 – 1996

Texas Young Lawyers' Association

Dropout Prevention & Literacy Committee, Past Member

Voters Rights & Registration Committee, Past Member

Houston Lawyers Association

Immediate Past President, 1998 – 1999

President, 1997 – 1998

Chair, Board of Directors, 1997 – 1998

President-Elect, 1996 – 1997

Nominations Committee, Member 2000 – 2001, Chair 2001 – 2002

HLA Annual Scholarship Golf Classic Committee, Vice-Chair 1999 – 2000

Member, 1992 – present

Houston Bar Association, Member, 1991 – present

Volunteer, Lawyers in Public Schools, H.I.S.D., Fall 1999

Volunteer, LegalLines

Houston Young Lawyers Association, Member, 1991 – 2001

W. J. Durham Legal Society, Past Member

# Discharging the Duties of an Attorney Ad Litem\*

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## I. General Rule

It is the attorney ad litem's duty to defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *In re Estate of Stanton*, 202 S.W.3d 205,208 (Tex.App.-Tyler 2005, pet. denied)

## II. Attorney Ad Litem appointed to Represent a Child

### A. Duty to Interview

- Within a reasonable time, an attorney ad litem appointed to represent a child shall interview:
  1. the child in a developmentally appropriate manner, if the child is four years of age or older; Fam. Code § 107.003(1)(A)(i)
  2. each person who has significant knowledge of the child's history and condition, including any foster parent; § 107.003(1)(A)(ii)
  3. the parties to the suit. § 107.003(1)(A)(iii)
- Two months can be a reasonable time to interview a parent in a child custody proceeding. *In re John K. Chu* 134 S.W.3d 439, 465 (Tex.App.-Waco 2004, orig. proceeding).

### B. Duties in Representation

- An attorney ad litem appointed to represent a child shall:
  - Seek to elicit the child's expressed objectives of representation, and represent those objectives if the attorney determines that the child is competent to understand the nature of an attorney-client relationship and has formed that relationship with the attorney ad litem; §§ 107.003(1)(B), 107.004(a)(2)
  - Consider the impact on the child in formulating the attorney's presentation of the child's expressed objectives of representation to the court; § 107.003(1)(C)
  - Investigate the facts of the case to the extent the attorney considers appropriate; § 107.003(1)(D)
  - Obtain and review copies of relevant records relating to the child; § 107.003(1)(E)
  - Participate in the conduct of the litigation to the same extent as an attorney for a party; § 107.003(1)(F)
  - Take any action consistent with the child's interests that the attorney considers necessary to expedite the proceedings; § 107.003(1)(G)
  - Encourage settlement and the use of alternative forms of dispute resolution; § 107.003(1)(H)
  - Review and sign, or decline to sign, a proposed or agreed order affecting the child; § 107.003(1)(I) and

- Advise the child in a developmentally appropriate manner, structuring all communications to account for the individual child’s age, level of education, cultural context, and degree of language acquisition. § 107.004(a)(1); ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, Part I, A-3.
- An attorney ad litem appointed to represent a child is entitled to:
  - Request clarification from the court if the role of the attorney is ambiguous; § 107.003(3)(A)
  - Request a hearing or trial on the merits; § 107.003(3)(B)
  - Consent or refuse to consent to an interview of the child by another attorney; § 107.003(3)(C)
  - Receive a copy of each pleading or other paper filed with the court; § 107.003(3)(D)
  - Receive notice of each hearing in the suit; § 107.003(3)(E)
  - Participate in any case staffing concerning the child conducted by an authorized agency; § 107.003(3)(F) and
  - Attend all legal proceedings in the suit. § 107.003(3)(G)

### **C. Duty to Meet with the Child**

- Unless good cause is shown that compliance is not feasible or in the child’s best interest, an attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 shall meet before each court hearing with the child or with the individual with whom the child ordinarily resides if the child is younger than four years of age. § 107.004(d)-(e)
- Irrespective of the child’s age, the child’s attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting the child. Opinion of the Texas Attorney General, 2006 WL 4999547, 3 (2006), quoting the American Bar Association’s standards of practice for attorneys who represent children in abuse and neglect cases.
- Ordinarily, a telephone interview will not satisfy the duty to meet with the child. *Id.*

### **D. Duty to be Informed and Trained or Experienced**

- An attorney ad litem appointed for a child shall become familiar with the American Bar Association’s standards of practice for attorney who represent children in abuse and neglect cases. § 107.004(a)(3)
- An attorney ad litem appointed to represent a child must be trained in child advocacy or have experience determined by the court to be equivalent to that training. § 107.003(2)
- An attorney ad litem appointed for a child in a proceeding under Chapter 2262 [Procedures in a suit by governmental entity to protect the health and safety of a child] or 263 [Review of placement of children under care of Department of Protective and Regulatory Services] shall complete at least three hours of

continuing legal education relating to child advocacy as soon as practicable after the attorney ad litem's appointment. § 107.004(b)

### **III. Attorney Ad Litem Appointed to Represent an Unknown Heir or an Unknown Property Owner**

- An attorney ad litem appointed to represent unknown property owners and unknown heirs have the duty to defend the rights of his client as he would a client who employed him. *Stanton*, 202 S.W.3d at 208.
- The attorney ad litem must exhaust all remedies available to his client and, if necessary, represent his client's interest on appeal. *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992); *Executors of the Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).
- The attorney ad litem for an unknown heir owes the same duty to his client as the attorneys representing the executors owe to their clients. *Tartt*, 531 S.W.2d at 698.
- An attorney ad litem appointed to represent unknown heirs has no duty to represent an heir known at the time of appointment. *Gilbert v. HISD*, 2009 Tex. App. LEXIS 7496, 8 (Tex. Civ. App.—Houston [1st Dist.] 2009).
- The attorney ad litem for unknown heirs may take all actions for the unknown clients as the attorney ad litem could take for actual known clients. *Wills and Trusts*, 60 SMU L. Rev. 1363, 1364 (2007).

### **IV. Attorney Ad Litem Appointed to Represent a Proposed Ward, an Incapacitated Person or an Unborn Person**

- An attorney ad litem appointed in a guardianship proceeding has a duty to represent and advocate on the behalf of a proposed ward, an incapacitated person or an unborn person. Tex. Prob. Code § 601
- An attorney ad litem appointed to represent a proposed ward shall, within a reasonable time before the hearing, interview the proposed ward. Tex. Prob. Code § 647(a)
- An attorney ad litem representing a proposed ward shall discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding disposition of the case, and the grounds on which guardianship is sought. Tex. Prob. Code § 647(a)
- An attorney ad litem representing a proposed ward shall review the application for guardianship, certificates of current physical, medical and intellectual examinations, and all of the proposed ward's relevant medical, psychological and intellectual testing records. Tex. Prob. Code § 647(b)

## APPENDIX 5

MICHAEL L. LANDRUM

450 Gears Rd., Suite 800

Houston, Texas 77067

MICHAEL\_LANDRUM@JUSTEX.NET

O'DONNELL, FEREBEE, MEDLEY & KEISER, attorney of counsel

**EDUCATION:**

University of Texas School of Law, Doctor of Jurisprudence, 1976

University of St. Thomas, Bachelor of Arts, 1973

**PROFESSIONAL LICENSES:**

Supreme Court of Texas, 1976

U.S. District Court, Southern District of Texas, 1977

United States Fifth Circuit, 1978

Board Certified Specialist - Civil Trial Law, Texas Board of Legal Specialization, 1989

Board Certified Specialist - Civil Appellate Law, 1995

**PROFESSIONAL ASSOCIATIONS:**

State Bar of Texas

Houston Bar Association

American Arbitration Association

Member: Commercial Arbitration Panel of Neutrals

Construction Industry Arbitration Panel of Neutrals

FINRA Dispute Resolution (NASD), Panel of Neutrals

**EXPERIENCE:**

General civil practice, with emphasis in business and corporation related disputes, construction and design disputes, real property transactions and title related matters, and financial transactions and disputes. Appeals related to areas of practice.

Tax Master, Harris County, February 1996 to present.

## PROTOCOL FOR TRIAL OF TAX CASES

2-7-07

This protocol will be tested as a pilot project from May 15, 2005 through December 31, 2005 only in those cases in which an attorney ad litem is appointed by the Court. The protocol will apply to all such cases filed on or after 5-15-05, and all pending cases on that date.

For cases pending on 5-15-05 the parties must comply with the protocol only for work done after 5-15-05. The parties do not need to re-do any work already completed that does not comply with the protocol requirements in order to comply with the protocol. However, all work done in a case pending on 5-15-05 must comply with the protocol requirements for work done in the case after 5-15-05 to the greatest extent possible without there being any delay in the case resulting from a party having to do or re-do any work to "catch up" with the protocol requirements.

For example, in those cases pending on 5-15-05 in which a motion to appoint an AAL has been filed prior to 5-15-05, the parties do not need to do any additional work to comply with the protocol prior to the date the motion was filed. However, the work in such a case after 5-15-05 must comply with the protocol.

### Purpose and Summary of Protocol Plan:

1. Due process: The Protocol is expected to bring greater certainty and efficiency to the minimum due process requirements and trial procedures in tax cases.
2. Procedural matters: The Protocol identifies what is generally expected of the tax unit plaintiffs, intervenors and court appointed AALs in connection with the pre-trial procedures and the presentation of the case at trial in contested and uncontested cases involving the following matters:
  - a. Time guidelines for case progress.
  - b. Production of trial evidence.
  - c. Tax authorities due diligence and compliance with TRCP 117a.3. ("Service by Publication") prior to Court appointment of an AAL.
  - d. Appointment and work of an AAL.
  - e. Notice of trial.
  - f. Determination of AAL fees.
  - g. Entry of judgment.
3. AAL work and fees: The Protocol establishes standards for AAL work and fee guidelines for such work.
4. Case progress time guidelines: It is anticipated that the progress of most cases should take place within the following time guidelines. In most cases the time



from filing of suit to judgment should be not more than 170 days for a case in which an AAL is not necessary, and 270 days in a case in which an AAL is necessary. All parties are to attempt to comply with these guidelines, however, during the time this protocol is being tested these guidelines will be aspirational (with the exception that the dates and deadlines found in Sections I through IV of this protocol are mandatory) and used to evaluate the administration and progress of tax court cases. In the event of a delay the attorneys involved should report the nature and cause of the delay to the Court in the due diligence affidavit filed with the Court as provided in this protocol below and in any other manner required by the Court. The time guidelines are as follows:

- a. Issuance of citation on all known defendants: The tax authority will request and diligently pursue issuance of citation to all known defendants at the time the petition is filed.
- b. 90 days: Service of citation on known defendants: Within 90 days after the tax suit is filed the tax authority should have served all known defendants in the case and filed all original citations and returns with the Court, subject to additional time for service by publication under TRCP 117a and appointment of an AAL if necessary, as provided below.
- c. 15 days: Notice of trial when no AAL is necessary. Within 15 days after the citation answer date for all known defendants, the tax authority will serve on all parties the notice of trial provided in the protocol. The trial date shall not be any earlier than 45 days after the notice of trial is served.
- d. 20 days: Production of documents when no AAL is necessary and in which no answer has been filed. Not later than 20 days prior to the trial date the tax authority will serve on all parties the documents and forms provided in the protocol.
- e. 60/45 days: Trial date when no AAL is necessary and in which no answer has been filed. 60 days after the tax authority serves on all parties the documents, forms and notice of the first trial setting provided in the protocol, the case will be called to trial. 45 days after the tax authority serves on all parties the documents, forms and notice of any trial setting other than the first trial setting provided in the protocol, the case will be called to trial.
- f. 90 days: Service by Publication (TRCP 117a). Within 90 days after the suit is filed the tax authority should know what defendants are nonresidents, absentees from the state, transients, unknown persons by name or residence and others it is permitted to serve by publication under TRCP 117a. Within such 90 day period the tax authority should file the affidavit required by TRCP 117a, a due diligence affidavit, and serve the defendant by publication.
- g. 60 days: Return of citation by publication (TRCP117a.3.). Defendants must answer the citation by publication by 10:00am on the Monday that is 42 days after the issuance of the citation by the clerk. The return of the citation may take up to 60 days following its issuance to be filed with the Court.

- h. 10 days: Motion to appoint AAL and hearing on the motion. Within 10 days after the return of citation by publication is filed with the Court, the tax authority will file a motion to appoint AAL and give notice of the hearing on the motion which should be set for a date that is not more than 15 days after the date the motion to appoint is filed.
- i. 15 days: Hearing on motion to appoint AAL. The hearing on the motion to appoint the AAL should take place within 15 days after the date the motion is filed.
- j. 15 days: Production of documents to AAL by tax authority. Within 15 days after the date of the appointment of the AAL by the Court the tax authority will:
  - i. produce to the AAL copies of the documents required by the protocol.
  - ii. send notice of the trial date and time, which will be 75 days after the tax authority produces to the AAL copies of the documents required by the protocol.
- k. 60 days: AAL due diligence affidavit and fee report. Within 60 days after the tax authority produces to the AAL copies of the documents required by the protocol the AAL will complete the AAL's work and file a due diligence affidavit and fee report.
- l. 75 days: Trial date when AAL is appointed. 75 days after the tax authority produces to the AAL copies of the documents required by the protocol the case will be called to trial.
- m. 10 days or promptly: Judgment after trial. 10 days after trial in the tax court, or as promptly thereafter as is reasonable under the circumstances, the tax master will forward to the District Judge a recommended form of judgment.

I. Pre-trial procedure and presentation of the case:

1. At least 45 days prior to the first trial date in a case where no AAL is necessary and no answer has been filed, and at least 60 days prior to the first trial date in a case where an AAL is necessary or an answer has been filed, and **at least 45 14 days** prior to any subsequent trial dates in all other cases **circumstances**, the lead tax claimant (the "LTC") must send notice of the trial date and time by regular mail to all intervenors, any AAL appointed by the Court, and all parties served with citation, whether or not ay such party has filed an answer.

[Note: The LTC may change as tax units dismiss their claims. The LTC is the tax unit requesting the hearing. In the event the hearing is set by the Court or a party who is not a tax unit, the LTC is determined by the priority in which the tax units appear in the case beginning with the tax unit first named in the petition followed by other tax units named as plaintiffs in the order they are named in the petition, followed by intervenors in the order they file their interventions.]

2. At least 20 days prior to the first trial date in a case where no AAL is necessary, and at least 60 days prior to the first trial date in a case where an AAL is

necessary, and **at least 14 days** prior to any subsequent trial dates in a case where an AAL is necessary, the LTC must send a notice by regular mail containing the following matters to all intervenors, any AAL appointed by the Court, and all parties served with citation, whether or not an answer has been filed:

- a. Certify that case is ready for trial and that all pre-trial procedural prerequisites have been satisfied. This case ready certificate is to be in the form of a sworn affidavit and is a representation by the affiant that the affiant has reviewed the Court's file to confirm the following:
  - i. All citations and returns are in the Court's file.
  - ii. The citations and returns are complete, accurate and comply with the applicable laws.
  - iii. The documents required by this Protocol for Trial of Tax Cases to be filed with the Court are in the Court's file and are complete and accurate.
- b. Copy of evidence to be submitted at trial. The evidence is to include the evidence of all tax units (plaintiffs and intervenors), which must be certified as correct and complete by the responsible tax unit. In the event that there is a change in the claim for taxes due in the case between the time the notice under this paragraph is mailed and the date of trial, the responsible tax unit must certify the change in the taxes as correct and complete and the LTC must send a copy of the evidence supporting the change in the taxes claimed at the time the circumstances giving rise to the change in taxes occurs. If within 10 days prior to the trial date circumstances occur which give rise to a change in taxes to be claimed by the plaintiff or intervenor which are different than those specified in and supported by the copies of the evidence mailed under this paragraph, the responsible tax unit must certify the change in the taxes as correct and complete, and the tax master may consider the change in taxes claimed at the time of trial and make a determination as to whether the change is material (more than a nominal affect on the rights or liabilities of any party who was given notice of the trial or has appeared in the case). All plaintiffs and intervenors shall provide to the LTC copies of their pleadings, evidence and certification of taxes to be included in the evidence package sent by the LTC, and shall cooperate with the LTC in preparing the form of judgment to be sent by LTC as provided below. If any plaintiff or intervenor is unable to agree with the LTC or any other plaintiff or intervenor as to the form of judgment, all plaintiffs and intervenors who disagree with the form must file an objection, and appear at trial. The LTC may obtain a written waiver from other plaintiffs and intervenors of the requirement to send to the plaintiffs and intervenors the copy of the evidence package. Any waiver must be filed with the Court not later than the time of trial.
- c. The Form of judgment with signature pages for the plaintiffs, intervenors, and any AAL.
- d. The form of judgment is to be in the form approved by the Court with the

necessary tax information provided by the plaintiffs and intervenors.

- e. If there is an AAL appointed in the case, a form of Statement of the Evidence with signature lines for the tax master and the District Court Judge to sign, and with signature pages for plaintiffs' counsel, intervenors' counsel, and the AAL to sign.
- g. Notice:
  - i. Stating the name, address, fax number, email address and all telephone numbers (if known) of each party and each attorney (naming who each attorney represents) to whom a copy of the notice of trial was sent.
  - ii. That the evidence, judgment and order approving the AAL's fees will be presented to the Court on the trial date and time indicated.
  - iii. That an affidavit from the AAL concerning a report of the AAL's work and fees will be sent at a later date to the persons receiving this notice from the LTC.
  - iv. That if they oppose the evidence, the form of judgment, or the AAL's fees, they must at least 10 days prior to the trial date, file with the Court and serve on all parties to whom a copy of the notice of trial is sent, a written objection, and appear at the trial to contest the pleadings, evidence, AAL's fees, or the form of judgment. That if the addressee does not file a written objection and appear at the trial to contest the pleadings, evidence, AAL's fees, or the form of judgment, the Court may sign the form of judgment and approve the AAL's fees.
  - v. That if they know of any person or entity that may have an interest in the property or taxes in issue in the case, they should immediately provide to such person(s) a copy of the notice of trial, pleadings, evidence, judgment and other documents they received, and call the attorney for the LTC to provide such attorney with information about such person(s) or entities.
  - vi. Any person having an interest in the case should obtain the advice of counsel about their rights and liabilities.

3. Certificate of service: File with the Court a Certificate of Service supporting service by the LTC of the pre-trial documents and the notice to be sent by the LTC as stated above. The Certificate must state the full name, address, fax number, email address and all telephone numbers (if known) of each person to whom the documents and notice were sent.

## II. Trial: Trial by uncontested submission and trial by contested evidentiary hearing:

1. Case called: On the date and time for the trial stated in the notice sent by the LTC pursuant to paragraph I. above, and subject to the following, the tax master will call the case to trial in open court.

2. No contested appearances or objections: If there are no contested appearances or objections to the pleadings, evidence, the AAL's fees, or form of judgment, the tax master will review the file, and recommend that the court sign the judgment and approve the AAL's fees based upon the pleadings, the evidence submitted, any affidavits on file, and the form of judgment provided by LTC, or make other recommendations or additional requirements. Any additional requirements made by the tax master that are material (more than a nominal affect on the rights or liabilities of any party who was given notice of the trial or has appeared in the case) with respect to the pleadings, evidence, the fees, or the form of the judgment will require a new trial date and a repeat by the LTC of the notice process in paragraph I. above. The notice to be given of the additional requirements must include a statement by the LTC of each requirement.
3. Appearances at trial: The attorneys for the tax authorities seeking relief (plaintiffs and intervenors) must appear at all trial settings. There is no need for the AAL appointed in the case to appear in person at the initial trial setting, unless the AAL opposes the pleadings, evidence or the form of judgment, and has filed and served such objection as provided above, or has received a written objection to the AAL's pleadings or fees. However, the AAL may in his or her discretion appear at trial if he or she feels it is necessary to represent the persons he or she was appointed to represent.
4. Contested appearances at trial: If a defendant or other person who claims to have an interest in the case appears at the trial to contest the pleadings, evidence, the AAL's fees, or the form of judgment (even though no objection was filed):
  - a. The tax master will obtain the name, address, fax number, email address and all telephone numbers of all such persons.
  - b. The tax master will obtain the identity of the nature of such persons' claims in the case.
  - c. The tax master will confirm that such persons have received the identity and contact information of all parties and the attorney's for all parties in the case.
  - d. The tax master will confirm that such persons have a copy of the pleadings, the evidence, pleadings, form of judgment and all other documents sent by the LTC with the notice of the trial.
  - e. The tax master will have the LTC provide a copy of the pleadings, the evidence, pleadings, form of judgment, AAL due diligence affidavit and fee report, and all other documents sent by the LTC with the notice of the trial to any such person who does not have a copy of those documents.
  - f. The tax master will obtain from such persons, orally on the record or in writing (filed with the Court), their reason for appearing at the trial.
  - g. The tax master will determine whether or not there is a contested issue regarding the pleadings, evidence, the form of judgment, or the AAL's fees.

- h. If the tax master determines that there is no contested issue at the trial, the tax master will review the file and recommend that the court sign the judgment based upon the pleadings, the evidence submitted, any affidavits on file, and the form of judgment provided by the LTC, or make additional requirements. Any additional requirements made by the tax master that the tax master finds are material (more than a nominal affect on the rights or liabilities of any party who was given notice of the trial or has appeared in the case) with respect to the pleadings, evidence or the form of the judgment will require a new trial date and a repeat by the LTC of the notice process in paragraph I. above. The notice to be given of the additional requirements must include a statement by the LTC of such requirements.
- i. If the tax master determines that there is a contested issue, the parties will be given an opportunity at the time of the initial trial setting to confer and reach an agreement. The AAL may be included in this conference by telephone. If an agreement is reached, the agreement will be recorded at the time of the trial, either orally on the record, or in writing and filed with the Court. If the agreement makes any changes to the pleadings, evidence, the AAL's fees, or form of judgment sent by the LTC prior to the trial, and the tax master finds that such changes are material (more than a nominal affect on the rights or liabilities of any party who was given notice of the trial or has appeared in the case), the tax master will set a new date and time for trial and the LTC will repeat the notice process in paragraph I. above. The notice to be given of the new trial setting must include a copy of the statement of the agreement and the changes to the pleadings, evidence, fees or form of judgment.
- j. In the event of a new trial date, the tax master will notify orally and in writing at the time of the first trial, the LTC and all persons and parties appearing at the trial of any new date and time at which the case is set for trial.
- k. For each trial setting, the tax master will at the time of the trial setting make a written report of the identity of each person appearing at the trial, the nature of their claims, and findings as to whether the claims result in a contested issue.
- l. In the event of a new trial date, the tax master will notify the LTC that the LTC is to give written notice of the new trial setting to all plaintiffs, intervenors, AALs, and all parties who been served with citation, filed an answer, filed an objection, or appeared at the first trial setting. The LTC must also send with the notice of the new trial setting; a copy of the tax master's report of appearances and findings; a copy of any changes or additions to the pleadings, evidence, AAL's fees, or the form of the judgment; any agreements reached by the parties appearing at the first trial setting; that at the new trial setting the case will be called to trial at which time the parties having an interest in the matter must appear and present evidence, or any objection they have to the pleadings, evidence, AAL's fees, agreements, or form of the judgment will be waived; and the other

matters the LTC is required to send as described in paragraph I. above. The LTC must file a Certificate of Service with the Court in connection with the notice and documents sent.

- m. At any new trial setting, the case will be called to trial at which time those persons who were served with notice of the new trial date and time (including any AAL) must appear and be prepared to present evidence, cross examine witnesses and make arguments to the tax master. If such persons do not appear, they will be deemed to have waived all objections to the matters sent to them with the notice of the trial setting.
  - n. Following the trial the LTC will prepare and file a statement of the evidence presented at trial. This statement of evidence is the statement required by TRCP 244. The statement shall be reviewed and signed by the attorney's for the tax authorities, any AAL and the tax master.
5. Judgment: Following a trial, either contested or uncontested, the tax master will recommend a disposition to the Court. If the tax master recommends that the Court sign a judgment and approve the AAL's fees, the tax master will confirm that the file contains the following pre-trial and trial documents to be forwarded to the District Judge with the file and the Court's docket sheet:
- a. The tax master's report to the Court.
  - b. The form of judgment recommended by the tax master.
  - c. The evidence supporting the judgment.
  - d. A statement of the evidence signed by the attorney's for the tax authorities, any AAL and the tax master.
  - e. If the AAL fees are not agreed to by the parties, or the tax master will not recommend the fees, the tax master will determine, in the manner provided below, and recommend approval of an amount fees to be paid to the AAL. The fees recommended by the tax master will be included in the form of proposed judgment submitted to the Court with the tax master's recommendations, and in the Supreme Court of Texas Appointments and Fees Report signed by the attorneys for the parties and the AAL stating that they agree or disagree to the fees claimed by the AAL or recommended by the tax master.
  - f. The AAL's due diligence affidavit and fee report.
  - h. All certificates of service required by this protocol for the trial of tax cases.
6. Determination of AAL fees: The tax master will determine the amount of the AAL's fees at the time of trial. The tax master will review the due diligence affidavit and fee report of the AAL to confirm that the Base Fee complies with the provisions of paragraph III. below, and that any additional fees are reasonable under the circumstances. If there is no objection to the fees, the fees are agreed to by the parties, and the Supreme Court of Texas Appointments and Fees Report form is complete, the tax master will review the same and make a recommendation to the District Judge. If there is an objection to the fees by a

party or the tax master, the tax master will take evidence in relating to objection at the time of the trial setting.

### III. Appointment and work of an AAL: TRCP 244 & 117a:

1. AAL's appointment: In an appropriate case the LTC must within 10 days after the return of citation by publication is filed with the Court file a motion to appoint an AAL and give notice of the hearing on the motion, which should be set for a date that is not more than 15 days after the date the motion to appoint is filed. Any other party who becomes aware that the appointment of an AAL is necessary or appropriate shall immediately notify the LTC of the fact and all relevant information. The AAL will be appointed to represent the following, which must be named as defendants in the case (see TRCP 117a):

“(Name), whose location is unknown, and such person's unknown heirs, successors and assigns, whose identity and location are unknown, unknown owners, such unknown owners' heirs, successors and assigns, and any and all other persons, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this case.”

2. Tax authority's due diligence affidavit: With the motion to appoint the AAL the tax authority will file a due diligence affidavit in the form approved by the Court. The affidavit must include statements that the affiant accomplished the following activities, and the results or findings of the activities. The tax authority must maintain records to support the progress and results of each of the activities represented in the affidavit. The affidavit must contain at least the following (minimum requirements):
  - a. A brief statement of the history of the title to the property, and the sources of the information supporting the history. Among other things, the history must include the identities of all persons who appear to hold legal title to the property based on the real property records and all other sources available to the affiant.
  - b. A statement of the name of persons (persons includes people and entities) who are known but cannot be located, the nature of the interest of each such person in the property, such person's address and phone numbers (if any) and a statement of what is known about such person(s).
  - c. A statement of all information known about the identity of unknown parties, including last known addresses and telephone numbers.
  - d. Report of attempts at telephone contact with known and unknown persons who cannot be located, and the results of such attempts.
  - e. Report of correspondence and attempts to correspond with known and unknown persons who cannot be located at all available addresses, and the results of such correspondence and attempts.



- f. Report of correspondence and attempts to correspond with current owners and occupants of the property, and the results of such correspondence and attempts.
- g. Report of the searches of specific named Web sites and government records reasonably appropriate for the facts and circumstances in the case or as required by the Court, and the results of such searches.
- h. Report of visit to the property address, with photos of the property and the neighborhood, and the results of such visit. This visit requires the affiant to make all reasonable inquiry at the time of the visit about the identity and location of the defendants. The affiant is not required to enter property, knock on a door or approach a person under circumstances that would violate the law or lead the affiant to reasonably believe that the affiant's safety is in danger.
- i. Report of attempts to locate and interviews with residents, owners, occupants and neighbors, and the results of such attempts to locate and interviews.
- j. A statement that, if reasonable to do so, a notice was posted at the Property. The notice must state the nature of the case and how to contact the attorney for the tax authority. The notice must also contain substantially the same information found in the citation to be published in the case, and state where on the property it was posted, the date it was posted, and any responses to the posting. The notice must be posted securely in an open and obvious location on the property, that is, the notice must be posted on the front door of what appears to be the main building or residence on the property, on a gate in the front of the property if the property is fenced and access to the main building or residence on the property is not reasonably accessible, or on a tree, stake or fence at the front of the property if the property is vacant. The notice must be in at least 12-point bold type writing, on at least 8&1/2 inch X 11 inch paper, and protected from the weather in a transparent plastic cover.
- k. A statement of who cannot be identified or located, their relationship to the taxes and property in issue in the case, and the reason such persons cannot be identified or located.
- l. State that the work of the affiant is complete and accurate and citation by posting is necessary.

3. AAL's initial work: Upon appointment the AAL must diligently:

- a. Review the Court's file.
- b. Obtain and review a copy of the tax authorities due diligence affidavit and the documents supporting the matters stated in the affidavit. At the time the AAL is appointed, the tax unit, at its cost, must provide to the AAL by mail, email, or on a website, copies of the motion to appoint the AAL, the Court's order appointing the AAL, the due diligence affidavit with supporting documents, and all other pleadings in the case of which the tax unit is aware.

- c. File an answer stating whom the AAL represents. Such statement must be consistent with the defendants named in the posting of the citation and the order appointing the AAL.
  - d. Attempt telephone contact with known and unknown persons represented by the AAL in an attempt to locate known and unknown persons represented by the AAL (based on information provided by the tax authorities and any information obtained by the AAL based upon reasonable additional work under the circumstances).
  - e. Send letters by regular mail to known and unknown persons represented by the AAL in an attempt to locate known and unknown persons represented by the AAL (based on information provided by the tax authorities and any information obtained by the AAL based upon reasonable additional work under the circumstances as provided below).
  - f. Send letters by regular mail to the owners and occupiers of the property in an attempt to locate known and unknown persons represented by the AAL (based on information provided by the tax authorities and any information obtained by the AAL based upon reasonable additional work under the circumstances as provided below).
  - g. **Site visit: Visit the property address and interview residents and neighbors. Take photos of the property and the neighborhood if the property and neighborhood are substantially different than that represented by the photos provided to the AAL by the tax authorities. This visit requires the AAL to knock on the door of any building on the property and make relevant inquiry about the identity and location of the defendants. However, the AAL is not required to enter the property, knock on a door or approach a person under circumstances that would violate the law or lead the affiant AAL to reasonably believe that the affiant's AAL's safety is in danger.**
  - h. File the due diligence and fee report described below.
4. AAL's additional work: The work stated above as the "AAL's initial work" will be considered sufficient unless from a review of the Court's file, the tax authority's due diligence affidavit and the materials supporting the due diligence work of the tax authority, the AAL believes that the circumstances in a particular case require in his or her professional judgment that additional work that is reasonably appropriate under the circumstances in a particular case for the AAL to effectively represent the defendants, in which event the AAL may engage in such work and may receive a fee in addition to the fee for the initial work subject to tax master recommendation and Court approval after trial in the tax court. The additional work may include, but is not limited to the following:
- a. Duplicating, supplementing or completing the tax authority's work.
  - c. Post Notice: Post a notice at the property stating the nature of the case and how to contact the AAL. The notice must contain substantially the same information found in the citation published in the case. The notice must be posted securely in an open and obvious location on the property, that is,

the notice must be posted on the front door of what appears to be the main building or residence on the property, on a gate in the front of the property if the property is fenced and access to the main building or residence on the property is not reasonably accessible, or on a tree, stake or fence at the front of the property if the property is vacant. The notice must be in at least 12 point bold type writing, on at least 8&1/2 inch X 11 inch paper, and protected from the weather in a transparent plastic cover.

5. AAL's due diligence affidavit and fee report: Within 60 days after the LTC produces to the AAL copies of the documents as provided in paragraph I. above the AAL will file a due diligence affidavit and fee report in the form approved by the Court. The AAL must maintain records to support the progress and results of each of the activities represented in the affidavit. The affidavit and fee report must include a statement that the AAL accomplished the following activities, and state the results or findings from the activities and fees claimed (minimum requirements):
  - a. Reviewed the Court's file.
  - b. Obtained a copy and reviewed the tax authorities due diligence affidavit and the documents supporting the matters stated in the affidavit.
  - c. Filed an answer.
  - d. That additional work either was or was not reasonable under the circumstances, and describe the additional work and the reason it was reasonable under the circumstances, and itemize the AAL's charges and expenses, if any, for such work consistent with the AAL fee guidelines provided in this protocol.
  - e. Attempted telephone contact with known and unknown persons represented by the AAL.
  - f. Sent letters to known and unknown persons represented by the AAL.
  - g. Sent letters to the owners and occupiers of the property.
  - i. If reasonable under the circumstances, visited the property address, interviewed neighbors, and took photos of the property and neighborhood if it is substantially different than that represented by the photos in the tax authorities file.
  - j. If reasonable under the circumstances, posted a notice at the property stating the nature of the case and how to contact the AAL (see paragraph III. above).
  - j. State that the persons cannot be located or, if the AAL does locate a person the AAL was appointed to represent, that the AAL has disclosed to the plaintiff, intervenors and all parties who have answered in the case, and all information the AAL has discovered concerning the identity and location of such persons.
  - k. State that the work of the AAL is complete and accurate.
  - l. State a claim for the Base Fee described in the AAL fee guidelines below, or state a claim for the Base Fee and additional fees for reasonable work under the circumstances. A claim for additional fees over the Base Fee

must be supported by an itemized statement of the work done, the expenses incurred, and the time assigned to such work in increments of one quarter of an hour and rounded to the nearest one quarter of an hour. All documents relevant to such additional fees and any expenses must be filed with the affidavit and fee report.

6. Pre-trial procedure in the event the tax authority or the AAL identifies a person who the AAL is appointed to represent as an unknown person, or locates a person who the AAL is appointed to represent as a person who is known but whose location is unknown:
  - a. In the event any tax authority with a claim in the case identifies or locates such a person, it shall immediately file with the Court and send by regular mail to the AAL and all other tax units who are parties in the case, a written notice (with a certificate of service of such notice) identifying such person or location. The LTC shall immediately join such person as a party in the case. The AAL will be deemed to have withdrawn as the AAL for such person at such time as the person is served with citation, without the need for the AAL to file a motion to withdraw.
  - b. In the event the AAL identifies or locates such a person, the AAL shall immediately file with the Court and send by regular mail to the plaintiffs and intervening tax units, a written notice (with a certificate of service of such notice) identifying such person or location. The LTC shall immediately join such person as a party in the case. The AAL will be deemed to have withdrawn as the AAL for such person at such time as the person is served with citation, without the need for the AAL to file a motion to withdraw.
  
7. AAL fee guidelines: The AAL will be paid fees in accordance with the following schedule:
  - a. "Base Fee" for initial work: The AAL will be paid \$800. **\$1,000**. as a Base Fee (plus reasonable and necessary expenses of the AAL's work) for the limited work described in paragraph III.3. above for the AAL's initial work. The AAL will submit an agreed order for such fees and expenses on the form approved by the Court. This form is the form used in compliance with the Supreme Court reporting requirement.
  - b. Fee for additional work: The AAL will be paid the Base Fee plus an additional \$150. per hour for each hour of AAL work that is reasonable under the circumstances in the particular case and in excess of the initial work for which the Base Fee is paid in a particular case. Such additional work may include but is not limited to: site visits; posting notice at the property; AAL work in objecting to or contesting the pleadings, the trial evidence, or the form of Judgment of the taxing authority; and appearance at trial. Any fee over the Base Fee must be reasonable under the circumstances in the particular case, and approved by the Court. If the

AAL incurs fees over the Base Fee, the AAL will include in the due diligence affidavit a detailed summary of the work, time, expenses, and results of the work over the Base Fee work. The approval of the AAL's fees is determined in accordance with the procedure described in paragraph III. above herein.

- c. Fee for work that is less than the initial work: In the event that the AAL completes his or her work and such work is less than the initial work for which the Base Fee is paid, the AAL will be paid fees and expenses for work actually completed at the rate of \$150. per hour for each hour of AAL work that is reasonable under the circumstances in the particular case plus reasonable and necessary expenses associated with such work.
- d. Withdrawal: In the event the AAL withdraws from the appointment as a result of identifying or locating a person the AAL was appointed to represent, or in the event a tax unit identifies or locates such a person, the AAL's fees will be assessed and paid in accordance with the Tax Code and the procedures in paragraph III subparts a., b. and c. above.

#### IV. Other provisions:

1. Service of notices: Any notice, other than citation, may be served by email if the serving party obtains the written consent of the addressee to accept notice by email. The written consent must contain the name of the addressee, the addressee's address, telephone number, email address to which notice may be sent and the signature of the addressee. The written consent must also contain a statement as to what notices may be sent to the email address.
2. The AALs and tax authorities that are plaintiffs or intervenors in cases to which this protocol apply shall maintain the originals and copies of all records described in this protocol for at least five years after the date the records are created, the date the records are obtained, or the date a judgment is signed by the Court in the case, whichever occurs later.

Houston Bar Association's

## Ad Litem Seminar

October 29, 2009

### **REPRESENTING THE UNFINDABLE CLIENT**

#### **I.**

#### **What Is An Attorney Ad Litem?**

When the identity or location of a defendant is unknown, the only method of notice available is through citation by publication or posting. In such cases, an attorney ad litem must be appointed to represent the interests of the unknown or missing person. TEXAS RULES OF CIVIL PROCEDURE, Rules 109 through 117a concern the procedures used in accomplishing citation by publication and posting.

There are two basic types of ad litem: an attorney ad litem and a guardian ad litem. These are not the same thing. An attorney ad litem is appointed under Tex.R.Civ.P. 244 or 759 and a guardian ad litem is appointed under Tex.R.Civ.P. 173. An attorney ad litem acts like any other attorney representing a client and "...must exhaust all remedies available to his client...", *Cahill v. Lyda*, 826 S.W.2d 932,933 (Tex. 1992). Under Tex. R. Civ. P. 244 when service is by publication and no appearance has been filed by the defendant, the court shall

appoint an attorney “...to defend the suit in behalf of the defendant...”. The attorney ad litem has the same fiduciary duties any lawyer owes a client.

The duties of an attorney ad litem under rule 244 are to locate the party and give notice of the pending suit, or if unsuccessful in locating the party to zealously defend the party in his absence. *Anderson v. Anderson*, 698 S.W.2d 397,399 (Tex.App.- Houston [14<sup>th</sup> Dist.] 1985, writ dismissed, w.o.j.). If the party answers in the action the attorney ad litem can no longer act in the party's stead absent the party's permission. *Id.*

## II

### Finding Missing Defendants

1. FILE AN ANSWER: The first thing to do upon appointment is to file an answer on behalf of the parties you represent. As in all cases, you should plead any affirmative defenses available in the circumstances – limitations, for example.

2. SEND A LETTER: The second thing to do upon appointment is to send a letter to the defendant's last known address by regular mail advising the defendant of your appointment. The notice should also advise the recipient of the nature of the suit and request that he or she contact the ad litem attorney immediately.

3. LOOK IN THE TELEPHONE BOOK: Believe it or not this works from time to time.

4. REVIEW THE PLAINTIFF'S FILE: Request the plaintiff's attorney to furnish information about their title and person search efforts. Often the plaintiff's file will contain a checklist of the steps already taken. While this is an important first step, you rely upon the accuracy of the plaintiff's work at your own peril. The reason that you were appointed is to make sure that your “client” is truly unfindable, and that the plaintiff's representation to the court that his location is unknown is accurate.

It is also a good idea, at this time, to review the Court's file for several things:

- a. Per TRCP Rule 109, the application for citation by publication must contain a statement under oath from the plaintiff's attorney stating the facts supporting the need for citation by publication or posting.
- b. If you have not received a copy of it from the plaintiff's attorney, review the order that appoints you, to make sure of the identity of the party for whom you have been appointed. Obviously, it is important that your answer name all persons for whom you have been appointed.
- c. Review the officer's return to be certain that citation was properly published or posted and that the return of citation has been executed and filed.
- d. Ascertain whether any other defendants have been named in the suit, whether citation has been served upon them, and whether any of them have filed answers.

5. VISIT THE PROPERTY: The next thing to do is to visit the defendant's last known address to interview the current resident (if any) and neighbors. If the real property that is the subject of the suit is a different address than the last known address of your client, you should visit both locations. This is particularly true where the litigation involves tax or title to real property that the defendant once owned. The current owner, occupant and the neighbors almost always have information regarding the defendant's circumstances, relatives or whereabouts. **Get their telephone numbers** if they will give them to you because if your efforts are not productive at first you will surely be calling them back to follow up with questions that arise from your subsequent efforts.

Take careful note if there is any use made of the property, even though it may be unoccupied at the time of your visit. At least in tax court cases, the appointment of the ad litem includes an omnibus appointment for all persons claiming or who may claim an adverse interest in the property. Therefore, if it appears that the property is being occupied for any purpose that is "open, notorious and adverse", you may have a client that was not explicitly named in the order appointing you. Adverse possession includes obvious uses of the property for purposes in addition to habitation: cultivation, pasturing animals, or other similar uses. Fencing of a tract contiguous with another is usually an indication of adverse possession. Very often, a next-door



neighbor will have begun mowing the lot next door for health and safety purposes; nevertheless, the ad litem should interview that person to make certain that this is all that is going on, and that the person does not intend to establish title by limitations.

6. OTHER SEARCHES: If a visit to the property address does not result in locating the defendant then a variety of other simple but effective avenues should be exhausted:

1. Review the citations for all other defendants in the Court's file. Constables routinely make notes on a citation's return of information they have gathered in the field regarding the whereabouts of the various defendants. Sometimes the defendant is dead. Sometimes the constable visited with the defendant's neighbor or family member whose name and address might be listed. Sometimes a business address will be crossed out and another written in. Information like this can lead to a new address, siblings, children, landlords, business partners or others who can help you track down your missing party.
2. Review the plaintiff's file for title search efforts. The plaintiff's attorney usually obtains an adequate legal description of the property and has established a chain of title through a title search. With this information you can discover the real property filing numbers and any relevant title documents. From these you can attempt to interview prior title holders. Perhaps the prior title holder is a person who sold the property to your client. She may not know your client's location but she likely knows something about him or his family.
3. Obtain the addresses and descriptions and ownership data for adjacent properties contiguous with your defendant's property, as well as addresses for current adjacent landowner or residents. Adjacent property owners and prior nearby property owners are good sources of information on the defendant's history and whereabouts.
4. Visit the Harris County Clerk's office to examine the various databases

available that might help you in your search. The straightforward databases available include the following:

- (a) Assumed Name Records ; used primarily for businesses, this database can help you locate prior addresses, business partners, attorneys or other people and locations that may assist in locating the defendant;
- (b) Real Property Records : these records may help you locate people who have purchased property from or sold property to the defendant as well as attorneys and other individuals who might help in you search. You may also learn that your defendant owns other real property;
- (c) Army Discharge Records
- (d) Marriage License Records : prior spousal information and where applicable, maiden names can help locate individuals that may know the defendant and his or her whereabouts;
- (e) Informal/Miscellaneous Licenses;
- (f) UCC Index; oftentimes debtor/creditor information on the defendant can help produce a creditor or a creditor's attorney who may have also engaged in efforts to locate or deal with the defendant;
- (g) Voter Registration Records;
- (h) Vehicle Registration Records;
- (i) Tax Records (first floor); with property descriptions or addresses you can find out who has paid the taxes for any given period of time on a particular piece of property.

Many of these indices may also be searched online at: [www.cclerk.hctx.net](http://www.cclerk.hctx.net). The records of the Harris County Appraisal District can be accessed at [www.hcad.org](http://www.hcad.org). Information concerning public records from across the nation can be accessed through <http://publicrecords.netronline.com>.

7. INTERVIEW OTHER DEFENDANTS. If service of citation has been issued on any other defendants, communicate with them to ascertain whether they have additional information concerning the persons for whom you have been appointed, or the property involved in the case. Very often, the plaintiff may have located an heir to your client, and that person can relate family history or other information to guide you.

8. INTERNET DATABASES. There are a great many Internet databases that can provide a wealth of information to assist you in attempting to locate the missing client. Some can be accessed for free, but the more comprehensive ones charge fairly reasonable subscription fees, and can yield an amazing amount of detailed information. Some of the more useful appear to be the following:

- (j) Accurint.com
- (k) PublicData.com
- (l) The social security death index can be accessed via a number of search sites, such as rootsweb.com
- (m) Chron.com – the website for the Houston Chronicle can be accessed to search local obituaries
- (n) Ancestry.com; rootsweb, and other ancestry search sites.

Frequently, an extensive search will locate more than one person with the same name or a name similar to that of the person you are seeking. This is particularly troublesome when it has been ascertained that the actual party is deceased, and the ad litem is seeking that person's heirs. In such cases, the ad litem should make reasonable efforts to contact potentially interested people via telephone, mail or in person to determine whether each individual is, in fact, related to the case. Sometimes, certain people can be eliminated from consideration simply upon their "vital statistics". For example, a person with a name similar to a suspected heir may be "disqualified" if he was born after the date of the death of the potential ancestor.

A person whom you have identified as a potential interested party may deny any relationship to the case or the property in issue. In such cases, best practice would be to obtain a written statement to this effect; however, very often people are reluctant to be so helpful; in these cases, detailed notes should be made and translated into an affidavit for filing with the court.

If missing defendants are located, the information should be immediately transmitted to the plaintiff's attorneys, with a request that personal citation be issued for the party at the address which you have located. Once a party cited by publication has been located, it is not proper to proceed until citation has been personally served, as due process requires. See *Quarles v. Champion Int'l. Corp.*, 760 S.W.2d 792 (Tex. App. – Beaumont 1988, writ den.)

As you find your missing parties you should send them a written notice of the proceedings with copies of pleadings and trial settings. Answer their questions and help them find lawyers of their choosing. Then as their counsel appear, you withdraw from representation. Your claim for a fee remains even after a person is located and served.

### III.

#### **Representing Missing Defendants**

Sometimes however, it is not so easy. Sometimes you represent multiple defendants and you can only find some, or none, or the ones you find refuse to participate. As mentioned above, if you have determined that an individual is, in fact, an interested party, you should require that citation be issued to and served upon that individual. Following that, you are relieved of further obligation concerning that person, and a conventional default judgment may later be taken against him or her. At that point you may want to set a hearing and seek the Court's guidance, or at least an award of your fee, which is taxed as a court cost.

If your search is exhausted and you still represent one or more defendants who are missing your job is to defend them through the matter's resolution or until you are discharged. You should take the following steps:

1. Send another letter with the following information:
  - (a) A judgment against them is likely if they do not participate.
  - (b) You are their court appointed attorney of record.
  - (c) The court will most likely award you an attorney fee for representing

them and it will be awarded against them and/or their property.

- (d) Do they have any defenses that they are aware of?
- (e) Include all trial or other hearing settings.

2. Read the applicable law. Applicable tax code provisions are chapters 31-43 of the Texas Tax Code and to a lesser extent, chapters 21-26. When appointed in a probate proceeding you should review the relevant portions of the Probate Code. Both the tax court and the probate court have a high number of proceedings which are small and relatively routine, with appearances by pro-se, lay defendants. This means that both tax court and probate court have masters, staff attorneys and other staff that are accustomed to helping ad litem evaluate their case. If you need help go see the master or staff attorney.

3. Amend your answer to interpose any applicable defenses, including affirmative defenses. Be sure and send a copy of the answer to the client or the client's last known address and to all other parties.

4. Familiarize yourself with the causes of action and evidence.

5. Attend trial and defend the case. If it is a tax case, just before trial review the court's file for the following procedural requirements. This checklist of requirements applies to all judgments including default, default at trial and judgment after trial on the merits.

a.) Have all defendants been personally served? For a corporation this means that the registered agent was served, not some other person. For certified mail, this means that the named defendant signed the green card, not some other person.

b.) Does the citation list all interveners?

c.) Is there anything in the file that constitutes any kind of pro se answer or any attempt at all on the part of any defendant or lienholder to communicate with the court or plaintiff's counsel? For a corporation, this includes a letter from a non-attorney. For individuals, this includes a letter from a non-party.

d.) Does the certificate of last known address correctly name the defendant and address? Do they match the citations?

- e.) Are all judgment defendants included in the certificate of last known address?
  - f.) Do the judgment figures match the evidence presented at the trial or hearing?
  - g.) Does the judgment dispose of all parties? This includes all plaintiffs, interveners; defendants; and lienholders.
  - h.) Are all tax statements and any affidavits signed, certified, and notarized?
  - i.) Are all motions and judgments file marked?
  - j.) Is a notice of hearing in the file?
  - k.) Does the judgment dispose of all parties who appeared or filed an answer?
  - l.) Are the certificate of last address and military affidavit attached to the judgment?
  - m.) A "Statement of Evidence" must be filed with the papers of the case and signed by the judge. TRCP, Rule 244.
  - n.) A fee report should be included in the papers presented to the Judge.
7. Contest the case on the merits, if warranted. If the plaintiff seeks judgment for damages, attorney fees or other expenses, be sure that the relief is authorized under law and that proof on each element has been presented.
8. New protocol procedures: effective June, 2005 the Tax Court has instituted a new protocol for certain ad litem cases. Under this protocol ad litem are no longer required to attend trial but may testify to their efforts by affidavit. There are also other requirements for the ad litem under this new protocol. A copy of the protocol and a sample attorney ad litem affidavit are attached as Appendix VI.

#### **IV**

#### **Fees**

Ad litem fees are considered a cost of court and are awarded in the discretion of the court. There is no reason to believe that the criteria set forth in *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) do not apply to your application for a fee award. Be prepared to present testimony, either orally or in writing, to support your fee claim.

In cases that do not involve ad valorem taxes, the plaintiff is often ordered to pay such costs, particularly when no living defendant can be located. In these cases, it is prudent to seek an agreement on the amount of the ad litem fee in advance of any hearing. If, at any time following your appointment, you have reason to believe that the plaintiff may not be able or willing to later pay your fees, you may ask the court to require the plaintiff to give security for costs before proceeding, pursuant to Tex. R. Civ. Proc., Rule 143.

Unfortunately, a taxing unit is not liable for costs and may not be required to post security for costs. Tex. Tax Code §33.49. In such cases, the ad litem fee is collected from the proceeds of a public tax sale. The good news is that court costs are afforded priority in the distribution of tax sale proceeds; the bad news is that it may be many months, or even years following the entry of judgment before a property is sold.

## V.

### **A Lawyer's Image**

Once they are located parties frequently resent being involved in the proceeding. They feel like they are being "dragged into the courtroom". As often as not a missing party is "missing" on purpose. Moreover, as you search for missing defendants you necessarily talk to neighbors and relatives. Any attorney contact with the community should be performed as honorably and ethically as possible. Always remember the impression you make. Attached as Appendix VI is a short paper with ideas for promoting integrity and excellence in the practice of law.

## PROTOCOL FOR TRIAL OF DELINQUENT TAX CASES

### FREQUENTLY ASKED QUESTIONS

Q: HOW DO I GET APPOINTED AS AN AD LITEM ATTORNEY IN TAX CASES?

A: Appointments are made on a rotating basis from a list maintained by the Administrative Judge. Requirements for inclusion on the list have been established by the District Courts, and are available [online at \_\_\_\_]

Be sure to keep the clerk informed of any changes in your contact information.

Q: HOW WILL I KNOW WHEN I HAVE BEEN APPOINTED?

A: The clerk of the court should send you the usual postcard notice of the entry of the order appointing you. However, in most cases, the attorney for the plaintiff taxing jurisdiction will likely contact you first. Plaintiff's counsel should provide you with a copy of the order appointing you, so that you will know the names of the parties for whom you have been appointed.

Q: WHO WILL I BE APPOINTED TO REPRESENT?

A: Ad litem attorneys are appointed to represent parties who appear in the real property records as owning or claiming an interest in real property against which delinquent taxes are owed. This can include people appearing in the chain of title as fee title owners or lien holders. If the plaintiff's attorney has identified someone as being a legal successor to a person named in the chain of title, the ad litem may also be appointed to represent this person, if he or she cannot be located.

An ad litem who is appointed to represent a person appearing in the chain of title is simultaneously appointed to represent the unknown heirs or successors of the named person, and any and all persons



who are or appear to be adverse claimants to any interest in the property. The order appointing the ad litem will describe the persons for whom the appointment is made in language similar to that quoted below.

Q: WILL THE PLAINTIFF'S ATTORNEY PROVIDE ANYTHING TO ME?

Plaintiff's counsel is required to furnish you their title search and person search information. They should also furnish you copies of all pleadings. Review these papers. You may spot something useful that the plaintiff did not. You may also be spared re-tracing their steps. But, do not rely solely on the plaintiff's work. You will be disappointed if you decide that your job is only to review the papers given to you – the ad litem is an adversary like any other party in a suit. You may also request other documents from Plaintiff's counsel if you believe they may be useful in your search – formal discovery is usually not required.

Q: WHAT PLEADINGS DO I NEED TO FILE?

**A: File your answer immediately upon learning of your appointment.**

**An answer must be filed in a form similar to that used in all other civil cases. Your answer must describe your “client” in the same detail that the order of appointment does:**

“(Name), whose location is unknown, and such person's unknown heirs, successors and assigns, whose identity and location are unknown, unknown owners, such unknown owners' heirs, successors and assigns, and any and all other persons, including adverse claimants, owning or

having or claiming any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this case.”

As in all cases, a copy of the answer must be sent to all other known parties. Tex. R. Civ. P. 21a.

The ad litem should be alert to changing circumstances that might indicate that an amended answer is needed as the case progresses. For example, you may learn something about your client that may suggest an affirmative defense.

You should consider including in the body of your answer a request for an award of costs to you, as the ad litem fee is a cost.

You should also plead affirmative defenses if you believe it is appropriate to do so. Affirmative defenses are limited in delinquent tax cases. Limitations in a case to collect taxes on real property is 20 years; however, it is not unheard of for a suit to be brought for taxes that are barred, and you can have those amounts stricken if you raise the defense.

Q: WHAT DO I DO AFTER I HAVE APPEARED FOR MY “CLIENT”?

A: Begin your search.

The protocol outlines the minimum steps you should take to make sure you have “touched all of the bases”. The ad litem must use reasonable diligence in determining the specifics of the search to be made in each case. If there is any doubt concerning whether additional effort may locate a missing person or an heir, then the additional work should be done. It is not enough to simply review the files of the plaintiff’s attorney. Your research can use the materials gathered by the plaintiff’s attorney as a starting point, but an independent effort must be made. It is not unusual for an appointed attorney ad litem to succeed in locating someone that the plaintiff’s attorney did not find.

The resources available are many and varied. They include a variety of public databases and internet search sites, some of which are free.

Q: WHAT DO I DO WHEN I THINK I HAVE LOCATED A MISSING PERSON?

A: If you locate a person for whom you were appointed (that includes successors to a named person) notify the court and plaintiff's counsel immediately in writing. Do not merely report this in your diligence affidavit at the time of the final hearing. Be sure to include in your notice all of the relevant information you have about the found person: name, address, telephone number, etc. Plaintiff's counsel should then amend the petition to name the known party, and seek issuance and service of citation.

If you can influence the person you have found to retain counsel or to file a pro se answer, do so. Also encourage any such person to call the Plaintiff's counsel and/or appear in court.

You should file a motion to be removed as counsel for the person located only. If you have found all of the individuals named in your appointment, then you should withdraw entirely, but move for an award of costs for your efforts.

Q: HOW FAR DOWN THE "FAMILY TREE" SHOULD I GO WHEN I HAVE FOUND THE DECEDENT'S HEIRS, BUT THOSE HEIRS HAVE THEMSELVES DIED AND LEFT A NUMBER OF POTENTIAL HEIRS, NONE OF WHOM WANT TO BE INVOLVED IN THE SUIT? DO ALL OF THE UNWILLING GREAT GRANDCHILDREN HAVE TO BE JOINED IN THE SUIT IF THEY HAVE A POTENTIAL CLAIM?

A: You must use your best good faith effort to locate and join all people who have a legal interest. If they can be identified, they must be joined. That is the best way for an ad litem to be safe from a negligence claim. If there is concern for the found person's personal liability, then the judgment could be "in rem only" as to the found person, which is preferable to leaving someone out and having them come in later claiming they'd been deprived of property without due process.

Q: WHAT IF I IDENTIFY A SUCCESSOR TO A DECEASED PERSON BUT I CANNOT LOCATE THEM?

A: If you ascertain the identity for someone who is an heir or successor to your named “client”, then notify Plaintiff’s counsel immediately. It will be necessary to have this person served by publication or posting. You will be re-appointed to represent the interests of this known person who cannot be located, as well as his or her potential heirs. You will then need to file an amended answer naming any newly served person you have been appointed to represent.

Q: WHAT IF THE PERSON I LOCATE SAYS HE/SHE DOESN’T CLAIM ANY INTEREST IN THE PROPERTY?

A: If you are satisfied that he/she has a colorable right in the property, that person must be joined in the suit. If a located person states simply that they do not care to make a claim for an interest in the property, they still must be joined as a party. If the person will voluntarily file an answer and a disclaimer, that will eliminate the need for personal service, and the plaintiff will more than likely agree to name the person as “In Rem Only” in the judgment.

If you speak to a person whom you believe to be an interested party and who refuses to give you any contact information, then you have not located them sufficiently to allow service of citation and you still represent them. You should detail your contact with such a person in your diligence affidavit, and describe your efforts to ascertain an address for the person.

## **Q: WHAT IF THERE ARE OTHER DEFENDANTS NAMED IN THE SUIT?**

A: Often, your client is not the only defendant named in the suit. You should make an effort to communicate with all persons who have been served in the case (whether they have answered or not) to determine if they can give you useful information. Do not wait until the matter is set for hearing – do it early.

Sometimes, the ad litem is appointed for a lien holder, and the title owner is served. Trouble arises when the ad litem neglects to contact the title owner, who winds up paying the taxes, leaving the ad litem fee as the only contested issue. In these instances, the owner is rightly upset that he has to pay a fee to an ad litem whose services could have been spared.

## **Q: DO I HAVE TO GO AND VISIT THE PROPERTY?**

A: YES, a visit to the property is required in all cases, unless there is reason to believe that a visit would present a danger to the safety of the ad litem attorney. The Protocol provides:

Site visit: Visit the property address and interview residents and neighbors. Take photos of the property and the neighborhood if the property and neighborhood are substantially different than that represented by the photos provided to the AAL by the tax authorities. This visit requires the AAL to knock on the door of any building on the property and make relevant inquiry about the identity and location of the defendants. However, the AAL is not required to enter the property, knock on a door or approach a person under circumstances that would violate the law or lead the AAL to reasonably believe that the AAL's safety is in danger.

If you learn of a reason why a site visit would place you in jeopardy, state that reason in your diligence affidavit. Give as much detail as you can.

If you do manage to speak with an occupier of a neighboring property, report the result of your visit. For example: "I visited with Mr. Smith, who lives next door to the subject property, and he told me that the property has been vacant for more than 2 years. He does not know the whereabouts of anyone associated with the property."

## **Q: WHAT ABOUT "ADVERSE CLAIMANTS"?**

A: Ad Litem attorneys are appointed to represent unknown persons who may appear to claim rights by adverse possession. This is one reason why a site visit is important. If you observe any condition on the property – a garden, a fence, livestock, parked car, etc. – that indicates that someone may be presently using the property or making an “open, notorious and adverse” claim, you need to take reasonable steps to ascertain the identity of the person using the property. Even if you are unable to learn the identity of a possible occupant/user, tell the Plaintiff’s counsel what you have seen, so they can investigate further. If you identify an adverse claimant, furnish Plaintiff’s counsel with detailed information so citation can be issued.

Sometimes, a neighbor will mow a vacant lot for aesthetic or safety reasons. You must determine whether the activities in a given case amount to adverse possession. If you do so determine, the person must be joined as a party. In any case, detail your conclusions in your diligence affidavit.

Q: WHAT IS THE “DILIGENCE AFFIDAVIT”, AND WHAT INFORMATION SHOULD I PUT IN MINE?

A: The diligence affidavit is your testimony, and it should be as detailed as you can make it. At some time in the future you could be called upon to defend your work, and the record containing a thorough exposition of your efforts and findings will be helpful in defending against any future allegation of negligence.

A rough guide to assist in the preparation of a diligence affidavit is provided with these materials. Caveat: each case is different, and a set form affidavit used in every case will not be sufficient. It is also not sufficient to simply state what steps were taken to attempt to locate the parties; the affidavit must also detail the results of each of your searches. For example, you should not only describe by name the Internet sites you have searched, but whether any of those searches revealed a lead. If so, then you should describe what you did to follow up on that lead.

It is critical that the details of your site visit be described in your affidavit. It is not enough to say that “I visited the property”. You should describe what you found when you went to the property; even better, attach a photograph.

The Protocol also requires that, when you go to the property, an attempt should be made to contact adjoining property occupants to ascertain whether any of them may have information concerning the

status or whereabouts of the prior occupants of your property. The diligence affidavit should describe the results of these visits.

Some people will refuse to talk to someone they think is a collector; however, it is important that all contacts and attempts be followed up to their reasonable conclusion. If this is done, it may be possible to identify fraud in the post judgment phase. If someone tells you “I am not an heir of John Doe”, report that in your affidavit and give all address or other identifying information you have to plaintiff’s attorney.

**Q: IS MY REPRESENTATION LIMITED TO SEARCHING FOR MISSING PERSONS?**

**A:** No, the ad litem appointment is not limited to merely looking for missing parties. You should behave as an advocate for your clients. You should make sure the taxing jurisdictions can support their claims, including those for their fees and expenses. If you feel a claim is excessive, you may contest it as you would for any client.

The judgment in a delinquent tax case must state the market value of the property on the date of the judgment. This sets the minimum bid amount which will be acceptable at a public sale. If you feel the property is over valued by the plaintiff, you may put on evidence to reduce the “adjudged value”, thus possibly enhancing the possibility of a sale.

## **Q: HOW LONG DOES IT TAKE TO CONCLUDE A CASE?**

**A:** The Protocol is designed to facilitate the disposition of tax court cases. The aim is to have all ad litem cases completed within 270 days after filing. There are many reasons why an individual case may linger on the court’s docket. Unfortunately, failure of ad litem attorneys to promptly complete their work is often one of those reasons. In contrast, an acceptable reason why a case may take longer to resolve is when an ad litem attorney locates one or more heirs, and additional time is needed to serve citation on those people.

Do not wait to receive a setting notice to begin your work. This is the best way to assure that you will receive no more appointments.

Q: HOW IS A CASE RESOLVED?

A: After the ad litem reports that the search is complete, written notice of a hearing will be prepared by the plaintiff's attorney and sent to all parties, including the ad litem. It is advisable to file the diligence affidavit before the notice is sent, and certainly before the hearing date. The "hearing" will be by submission, unless a defendant contests entry of judgment, and demands a hearing. In that case, plaintiff's attorney should notify the ad litem to appear for hearing before the tax court.

The ad litem may request an in-person hearing to make a record, if desired. Simply coordinate a date and time with Plaintiff's counsel and the clerk of the court.

Q: WHAT ABOUT THE AD LITEM FEE?

A: The Protocol provides that the typical fee awarded an ad litem attorney is \$1000.00 in each case. This presumes that a reasonable, average amount of effort is required. In the event a given case should require an extraordinary amount of time and effort, an additional award may be made. The diligence affidavit should state whether extraordinary effort was required of the ad litem, and describe in some detail the amount of additional time or expense, and the reason why additional effort was needed.

By the same token, if a case is resolved without much effort, such as when a party comes forth to pay off the taxes owed, the ad litem should agree to accept a fee lower than the "base fee".

The ad litem fee is taxed as a cost. Since the Tax Code expressly prevents taxing of costs against taxing units, the ad litem fee is usually paid from the proceeds of a public tax sale, which may be months or even years following the date of judgment.



SAMPLE TEMPLATE

Cause No. \_\_\_\_\_

[Plaintiff]	§	IN THE DISTRICT COURT
	§	
v.	§	OF HARRIS COUNTY, TEXAS
	§	
[Defendant]	§	125 <sup>TH</sup> JUDICIAL DISTRICT

**Affidavit of Attorney Ad Litem**

**For Defendant [name]**

BEFORE ME, the undersigned notary public, on this day appeared [attorney], who stated upon oath the following:

My name is [attorney]. I am over the age of 18 years and I am not disqualified from making this sworn statement. The statements herein are made on my personal knowledge and they are true.

I am a licensed attorney, in good standing. I was appointed by the above referenced court to represent the interests of [defendants], who was/were cited by posting or publication in the above captioned matter. I have exercised reasonable diligence in attempting to locate the parties for whom I was appointed to serve as attorney ad litem and my search has been unsuccessful, except as stated below. My search efforts were undertaken for the purpose of attempting to locate the named Defendants or, if they are no longer living, their lawful heirs and/ or successors, and any person asserting an adverse claim to the real property that is the subject of the above captioned matter. My efforts included the following:

- 1) I have reviewed the title, person search and other file materials compiled by the attorneys for the Plaintiff taxing jurisdiction, and I have satisfied myself that the information contained therein did not reveal the whereabouts of the Defendants, or any successors in interest to them.
- 2) It appears that the deed by which the defendants took title was dated [date], and that no taxes levied against the property have been paid in at least X years.
- 3) I have searched the on-line records of the Harris County Appraisal District, and I have determined the following:
  - a) The Defendants are not listed as the owners of any other property on the tax rolls of Harris County, Texas; and
  - b) I have obtained the names and addresses of the owners of property adjacent to that which is the subject of this suit.
- 4) I have searched the public record indices of the Harris County Clerk's office and determined that:
  - a) Defendants are not shown as the owners of other property in Harris County;
  - b) Defendants are not shown as parties to other civil actions in Harris County; and
  - c) There is no record of any probate filings in the names of the Defendants in Harris County.
- 5) I have found no listing for the Defendants on the social security death index. [or, It appears from my search of the social security death index that (name) died on or about (date) in (city).]
- 6) I have visited the real property that is the subject of the pending suit, which is located at [address], and the property is [vacant / occupied by John Q. Public, who reported that he is paying rent/etc.]
- 7) I have attempted to speak to the occupants of adjacent properties, and I have [been unsuccessful/learned that no one knows defendants or their whereabouts/etc]
- 8) I have conducted searches of the following internet based directories and data bases, and found information relating to X persons who may have a relationship to Defendants or who may have a possible interest in the property. [list search sites]
- 9) I have sent letters by regular first class mail to each individual who I believe may be related to the Defendants or who may have an interest in the property, based on my investigation. The result of my mailings was: mail was returned unclaimed from y addressees; no response was received from z addressees, even though it appears that my letters were delivered; and # people responded to my letters and advised me that [they are no relation to defendants, etc]
- 10) My internet search located telephone numbers for X persons who may be related to Defendants or who may have an interest in the subject property. My attempts to reach people at those numbers resulted in conversations with y people claiming no knowledge of the Defendants, and z no answers after repeated attempts.

11) [if applicable] In the course of my investigation, I located [name], whom I believe to be an heir to Defendant [name]. This person, whose address is [address] has been furnished to the Plaintiff's attorney and an attempt to serve said person with citation in this matter has been made, and has failed to appear.

12) [if applicable] I have personally spoken to a person who is named ---, and who I believed to be a possible heir of the named Defendant(s). This person informed me that he/she is not related to the named Defendants, and has no knowledge of the identity or whereabouts of any relations of the said named Defendants.

I believe, based on my search, that additional effort to locate the named Defendants and/or any living heirs or successors will not be successful. Based on the above, I am satisfied that the Defendants, and any living successors to the defendants, cannot be located [except as stated above].

In the course of fulfilling my duties as attorney ad litem, I have devoted X hours of my time, and associate attorneys in my firm have devoted Y hours of time, all of which hours were necessarily expended. My fee for legal services in matters such as this is \$X, which is a reasonable hourly fee for attorneys of the qualification and experience who provided the services. A reasonable fee for the attorney ad litem services rendered in this matter is \$Y, taking into account the factors referenced by the Texas Supreme Court in *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997). In addition, I have incurred out of pocket expenses in the total amount of \$X, which were reasonably incurred in the course of my investigation.

Further affiant sayeth naught.

[signature, jurat]

## TAX COURT BASICS

Michael Landrum

Tax Master

MICHAEL\_LANDRUM@JUSTEX.NET

### I.

#### Introduction

The District Judges of Harris County have established our tax court per Texas Tax Code §33.71, appointing two individuals to serve as masters in chancery to hear delinquent ad valorem tax disputes. The tax court's purview is limited to delinquent tax cases; it does not extend to a review of valuation issues, title disputes or other potentially related matters.

During the first 8 months of 2009 there were 25,737 total civil cases (not including family cases) filed in Harris County. 8,310 of those cases were delinquent tax cases. For the same period, our courts disposed of 8,406 tax cases.

Tax Court is located on the eighth floor of the Civil Courthouse. The main telephone number for the Tax Court is (713) 368-6510.

### II.

#### Proceedings in Tax Court

The tax master is permitted to examine witnesses, and to conduct pre-trial matters. The master reports his recommendation regarding final action to be taken to the District Court. Tax Code §33.71. The tax master's recommendation is accompanied by a proposed order. The District Judge signs any order or judgment deemed appropriate.

The tax master does not conduct jury trials; if a jury fee is paid, the case is referred to the District Court for trial. Tax Code § 33.76. A record is made of hearings held in tax court.

Any party may appeal the recommendation of the tax master to the referring district court by giving notice of appeal within ten (10) days following the date of the recommendation. Tax Code §33.72. The notice of appeal must be in writing and it must specify which of the tax master's findings or conclusions are the subject of the appeal. The appeal is heard *de novo* in the district court. Tax Code § 33.74. There is no fee or bond requirement. Notice of the right to appeal may be given by the tax master in open court or in writing.

Failure to appeal the tax master's recommendation does not preclude an appeal of a final judgment to the Court of Appeals. Tax Code §33.74 (i).

### III.

#### Delinquent Tax Suits

A tax suit is brought to collect delinquent taxes, and to foreclose the tax lien. An ad valorem tax becomes delinquent on February first in the year following the year for which a tax is levied. The tax lien attaches automatically, and no recordation is required. Tax Code §32.01(a) and (d).

Defendants. The title owner of the subject property on January 1 of the tax year in issue is personally liable for the payment of the tax. Personal liability for payment of a tax does not transfer with title - conveyance of the property does not absolve the owner as of January 1<sup>st</sup> of personal liability. Tax Code §32.07(a). Other taxing units may intervene in the suit "without the necessity of further citation or notice to any parties to such suit." TRCP, Rule 117a(4).

While a holder of a lien against property is not personally liable for payment of delinquent taxes, he has a constitutional right to notice of the suit which can extinguish his lien. *Murphee Property Holdings, Ltd. v. Sunbelt Savings Assn. of Texas*, 817 S.W.2d 850 (Tex. App. – Houston [1<sup>st</sup> Dist.], 1991, no writ). Lien

holders are not liable *in personam*, but judgment against their interest in the property, *in rem*, is usually entered. In most cases, the petition and/or citation will note that a lien holder is joined as “in rem only” to designate that personal liability is not asserted as to that party.

Other Taxing Entities. A plaintiff filing a delinquent tax suit “shall join other taxing units that have claims for delinquent taxes against all or part of the same property.” Tax Code §33.44(a). To be entitled to judgment for their delinquent tax claims, these other entities must intervene in the tax suit; failure to do so before final judgment extinguishes the lien of that entity. Tax Code §33.44(c).

Amounts. Penalties and interest on unpaid taxes are set by statute. Tax Code §33.01. Attorney fees are also recoverable, either as costs (Tax Code §33.07), or as “expenses” (Tax Code §33.48). Also recoverable are various other costs and expenses incurred in connection with the suit, including title search costs. Tax Code §33.48.

Non-Tax Claims. Claims for amounts other than taxes can be included in a tax suit. These are commonly known as “special assessments”. Special assessments relate to the real property that is the subject of the tax suit and they are imposed under one or more of the following:

- a. paving liens – Transportation Code §311.092
- b. demolition of dangerous structures – Local Government Code Ch. 214
- c. weed cutting – Health & Safety Code Ch. 342
- d. sewer improvements – Local Government Code Ch. 402
- e. water district standby fees – Water Code §49.231

Special assessment claims do not enjoy the same preferred treatment given to ad valorem tax claims. For example, a certified document “proving” a special assessment claim will not automatically be regarded as prima facie proof. There is no statutory provision that mandates the award of attorney fees in any specific amount. Except for the Water Code, the above statutes do not specify a limitation period, and therefore no limitation exists. See Tex. Civ. Pract. & Rem. Code §16.061.

IV.

Citation

Citation in a delinquent tax suit is different than citation issued in other civil cases. Special provisions relating only to citations in tax suits are found in T.R.C.P. Rule 117a. It is not required that a copy of a petition be served with a citation in a tax suit.

The Citation must contain:

- A brief description of the property against which the tax is allegedly owed;
- The amount of taxes alleged to be owed to the plaintiff taxing unit, exclusive of penalties, interest and costs;
- A statement that the plaintiff seeks collection of the delinquent taxes and all penalties, interest and costs accrued until the date of final judgment; and
- Identification of all other taxing units that may be entitled to bring a claim for delinquent taxes levied against the property.

The citation will also warn that the suit is brought for any additional taxes that may become delinquent after the suit is filed and before the entry of final judgment.

Non-resident individual defendants may be served through the Office of the Secretary of State. T.C.P.C. § 17.091.

V.

Trial

Evidence. Certified tax statements are admissible without further predicate and are *prima facie* evidence of the tax due. The certified tax statements admitted into evidence also stand as proof that the taxing units “complied with all requirements of law” pertaining to the levy of the taxes and the prerequisites established by law for the collection of penalties and interest provided for by statute. Tax Code §33.47. The presumption is rebuttable, and the defendant assumes the burden of proving payment, or another defense. *National Medical Financial Services, Inc. v. Irving Indep. School Dist.*, 150 S.W.3d 901 (Tex. App. – Dallas, 2004).

Defenses. Defenses are very limited in a tax suit:

1. Non-ownership of real property on January 1 of the appropriate year. Tax Code §42.09(b). However, a buyer of taxable business personal property is personally liable for taxes due prior to the purchase, up to the amount of the purchase price. Tax Code §31.081
2. The property is/was not situated within the taxing jurisdiction claiming the taxes. Tax Code §42.09(b).
3. Payment of the taxes and any lawful penalties, interest and costs.
4. Limitations. Tax Code §33.05
  - a. For taxes levied against real property, the limitation period is 20 years.
  - b. For personal property taxes the period is 4 years.
  - c. Limitations begin running on the date taxes become delinquent.

Defense based on lack of notice. Tax Code §33.04 requires certain notices of delinquency to be mailed to property owners. In certain cases, failure to send these notices can result in the postponement of the delinquency date. Justice Duggan has written a fairly comprehensive study of the topic in his opinion in *Aldine Independent School District v. Ogg*, 122 S.W.3d 257 (Tex. App. – Houston [1<sup>st</sup> Dist.], 2003, no pet.). Tax Code §33.011 also allows a waiver of penalties and interest in very limited circumstances.

Over valuation. The only means by which the value of taxable property can be disputed is through timely appeal of the Appraisal District's valuation. Unless such an appeal is timely perfected, the District Court is without jurisdiction to consider over valuation as a defense to a delinquent tax claim. Tax Code §42.09.

## VI.

### Judgment

The judgment will be entered in favor of all taxing jurisdictions that are named in the case as plaintiffs and intervenors. All owners of an interest in the taxable property, including lien holders and persons appearing in the chain of title should be named as defendants – those holding lien interests are shown



as “in rem only”, indicating that the defendant so designated will not be liable for any deficiency following a tax sale.

The judgment must set forth the “adjudged value” of the property. Tax Code §33.50. This is the market value of the property on the date of the judgment.

The judgment will also order the foreclosure of the tax lien. A tax sale is a public sale held in the same manner as other foreclosures [Tax Code §34.01], under an order of sale issued by the District Clerk. Tax Code §33.53. A sheriff’s deed will be issued, and a writ of possession will issue to the successful purchaser. Tax Code §33.51.

## VII

### Post-Judgment

A tax judgment may be vacated on the motion of a taxing jurisdiction, even after it becomes final under the Texas Rules of Civil Procedure, if it is defective or deficient in any one of several particulars. See Tax Code §33.56.

Excess proceeds. If a tax sale yields funds in excess of the amount of the judgment, plus collection costs, then the excess sale proceeds are placed in the registry of the court. Tax Code §33.02. Distribution of excess proceeds is not automatic, but is subject to claims filed pursuant to Tax Code §34.04. Claims for excess proceeds are heard in tax court. The statute provides a priority ranking for the distribution of the excess proceeds. *Id.*

Taxes accruing after the date of judgment and before the sale may be awarded to the taxing jurisdictions from the excess proceeds. Tax Code §34.04(c)(2).

A petition claiming the excess proceeds must be filed within 2 years following the date of the sale of the property. The statute specifies the matters that must be asserted in the petition and the parties who are entitled to notice. Tax Code §34.04. Funds unclaimed after the expiration of two years escheat to the taxing authorities. Tax Code §34.03(b).

Tax Code §34.03(a) requires the Clerk to notify the former owner of the property that funds are deposited in the Registry. The notice must be sent by certified mail, return receipt requested, it shall state the amount of the excess proceeds held, and advise the former owner of its right to claim the excess proceeds. The statute does not say what happens if the notice is not sent; however, it has been local practice to require proof that such notice was sent before the funds will be distributed to the taxing authorities upon the expiration of two years after the funds are deposited.

## VIII

### Local Practice

Our District Courts have adopted policies that are followed in tax court.

Default. The majority of judgments issued in delinquent tax cases are default judgments. Our tax courts require not only that citation must be properly issued, served and returned as in all civil cases, but also that notice of a default judgment hearing must be sent by mail to the defendant(s) before the tax master will recommend entry of default judgment. The default hearing notice must be mailed to the address where service was accomplished, except in cases where service is known to have been at a location other than the defendant's residence or place of employment – such as when a citation was picked up at a constable's office.

A substantial number of defendants appear in person in tax court in response to the default hearing notices. In many cases, this results in a settlement agreement.

Answers. The tax masters view just about all responses as answers, because the majority of defendants who respond are not represented by counsel. An effort is made to be sure to record all personal appearances in the case docket sheet, and all persons who appear are encouraged to fill out and file an answer form. Correspondence received is also counted as a formal answer, which negates the entry of a default judgment.

Ad Litem Attorneys. Attorneys ad litem are appointed to represent defendants who are served with citation by posting or publication. In many cases, the record title owners are deceased, so most ad

litem are appointed also for the unknown heirs of a named defendant, and for any other unknown persons who may have an interest in the subject property. Ad litem attorneys are also charged with representing the interests of unknown adverse possessors.

Ad litem are appointed on a rotating basis from a list maintained by the Administrative Judge, beginning December 1, 2009. Inclusion on the list from which appointments are made is governed by standards adopted by the District Courts.

The duties of tax court ad litem are described in some detail in the "Protocol for Trial of Tax Cases" originally adopted by the District Courts in 2005. In summary, ad litem are expected to independently research the history and whereabouts of their "clients", ascertain the heirs of deceased individuals, attempt to contact anyone who appears to be an interested person, and to visit the property to ascertain its occupancy status. Under the "Protocol", ad litem report their findings in an affidavit. If an ad litem finds a defendant or an heir, information about the identified person is furnished to Plaintiff's counsel, who is then required to issue citation to the person located by the ad litem.

The standard ad litem fee adopted by the District Courts is \$1,000.00 per case. A larger or smaller fee may be recommended, depending upon the circumstances particular to a given case. The fee is taxed as a cost, and is paid either by the taxpayer when the taxes are collected or from the proceeds from the tax sale. In some cases, an ad litem may wait years to be paid on a case; however, on average the fee is paid within 18 to 24 months following entry of judgment.

## APPENDIX 6



**Jason Bailey**

*Houston*

Prior to joining Perdue Brandon Fielder Collins & Mott LLP in 1996, Jason spent 16 years with Roseman & Wiseman and Oshman's Sporting Goods. He has focused solely on ad valorem taxation during his legal career.

### **Bar Admissions**

Texas, 1994

### **Education**

University of Houston Law Center, J.D.

Southwest Texas State University, San Marcos, B.A.

### **Professional Affiliations**

Member, TAAO

Member, TSAA

Anthony W. Nims, a partner in Linebarger Goggan Blair & Sampson, LLP, practices in the Houston office, where he manages the collections, litigation and post judgment departments. He received his Doctor of Jurisprudence Degree with Honors in 1977 from the University of Texas School of Law. Prior to joining the firm, he served as in-house counsel for major corporations such as Gulf Oil Corporation, The Western Company of North America and a national title insurance underwriter. In private practice with several law firms, Mr. Nims had an active trial and appellate practice. He is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit, the United States District Court for the Southern District of Texas, and all courts of the State of Texas.

Mr. Nims is married with three children. He is actively involved in numerous professional and civic organizations.

## APPENDIX 7

The Hon. Sylvia Matthews, Judge of the 281st District Court

Judge Matthews has served as judge of the 281st district court since December 2008. When she was appointed to the court, Judge Matthews had more than 20 years of trial experience and was a partner in the litigation section of the Houston office of Andrews Kurth. In her practice, she litigated a diverse docket of cases including complex business litigation involving various industries as well as claims involving personal injury.

Judge Matthews earned a B.S., *cum laude* in Mathematics, from The College of Charleston in Charleston, SC. She is a 1986 graduate from the University of South Carolina School of Law where she was a member of the Law Review, Order of the Wig and Robe, Moot Court Bar, and the National Moot Court Team.



## APPENDIX 8

Sharon McCally:

Currently Judge of the 334th Civil District Court of Harris County, Texas; elected 2005

Graduated Southern Methodist University, BA

Graduated South Texas College of Law, JD

Following law school, served as law clerk to United States District Judge David Hittner

Practiced with Fisher, Gallagher, Perrin & Lewis; then Gallagher & Lewis 1992 - 98; litigation

Practiced as a principal in Storey, Moore & McCally, 1998 - 2004; litigation and appeals

## Why would I want to be an Attorney *Ad Litem*?

### *For the good of the system?*

Absolutely. Texas Rule of Civil Procedure 244 provides your duty as an attorney *ad litem* is . . . “to defend the suit in behalf of the defendant . . .” A Court’s failure to appoint an attorney *ad litem* to represent a non-appearing defendant is reversible error on the face of the record. *See Isaac v. Westheimer Colony Association, Inc.*, 933 S.W.3d 588, 591 (Tex.App.—Houston [1<sup>st</sup> Dist.], writ denied) (“holding that the purpose of TEX.R.CIV.P. 244 is to “provide a non-appearing defendant effective representation”). So, absent your willingness to serve, non-appearing defendants cannot obtain the process due to them prior to judgment.

### *For the money?*

Maybe. A court must provide a reasonable fee and source of payment for the necessary efforts of an attorney *ad litem*. *Rhodes v. Cahill*, 802 S.W.2d 643, 647 (Tex. 1990). Attorney *ad litem* fees are recovered as costs and expenses to the suit. *See* TEX. TAX CODE ANN. § 33.48(a)(6). But, in tax cases, the Plaintiff taxing authority cannot be taxed for costs. *See* TEX. TAX CODE ANN. § 33.49(a). *City of Wichita Falls v ITT Commercial Fin. Corp.*, 835 S.W.2d 65, 66 (Tex. 1992). So, the better you are at providing effective representation and defending the suit, the less likely you are to get paid. Thus, you have an unadulterated conflict of interest: your interest in getting paid is completely defeated by your client’s interest in your successful defense of the suit.

And, even if you lose the case and are awarded fees, you may experience a delay or reduction in your fee. Section 34.02 provides that the proceeds from the sale of the property foreclosed is applied first to fully pay the costs of advertising the tax sale and second to fully pay attorney *ad litem* fees ordered in the judgment. TEX. TAX CODE ANN. § 34.02. Finally, TEX.R.CIV.P. 149 provides that costs of court may not be collected by execution until the trial court has rendered judgment. *See* TEX.R.CIV.P. 149. And, attorney *ad litem* compensation is not payable until sale of the land by the taxing unit purchasing the same. Op.Atty.Gen. 1940, No. 0-2986.

However, in non-tax cases, it is clear that once you are appointed, the party taxed with your fee as costs cannot effect a nonsuit or agreed judgment to avoid your fee. *See Terry v. Howard*, 546 S.W.2d 66, 69 (Tex.App.—Dallas 1976, no writ) (holding that plaintiff’s nonsuit of claims against the non-appearing Defendant that occurs after the appointment of the attorney *ad litem* does not avoid the attorneys’ fees of the appearing attorney *ad litem*).

Cases governed by the tax protocol suggest that, over the past few years, \$800 - \$1,000 is an appropriate base fee for basic services as an attorney *ad litem* in cases governed by the tax protocol. Thereafter, for additional work as is necessary, \$150 is an appropriate hourly charge.

The fee awarded by the Court is the most that an attorney *ad litem* will be awarded, but frequently does not represent the actual amount paid because (a) the property must worth enough to support the award of fees and (b) the property must actually be sold. These factors, along with the delay in receiving the compensation actually paid, must be a part of the economic analysis.

Before this change in law, the prevailing view in appointing attorneys *ad litem* was that multiple, simultaneous appointments allowed the attorney to reach an appropriate balance: (a) the economic benefit of approximately five fee awards against (b) the time commitment consolidated over five files; the expense of maintaining the search devices; the risk of nonpayment or delay in payment. Now, however, the district courts are without the discretion to bundle appointments. It may no longer be worth it, financially, to handle attorney *ad litem* appointments.

*For the limited liability?*

Legally – no; practically – perhaps.

You should not count on qualified judicial immunity as an attorney *ad litem*. Until the 2005 revision of Tex.R.Civ.P. 173, attorneys appointed as **guardian *ad litem*** did not have qualified judicial immunity. *See Delcourt v. Silverman*, 919 S.W.2d 777, 784 (Tex.App.—Houston[14<sup>th</sup>] 1996, writ denied) (holding that, based upon the “functional approach” analysis, a TRCP 173 guardian *ad litem* is an advocate for the minor and the appointment by the Court is merely procedural). Now the revised rule provides that such attorneys “should have qualified judicial immunity.” There is no such language in TEX.R.CIV.P. 244, the attorney *ad litem* rule. The “functional approach” analysis, when applied to attorneys *ad litem*, should be on a parallel track outlined in *Delcourt* – that is, an attorney *ad litem* is purely an advocate for the non-appearing defendant. Thus, it is unlikely that a TEX.R.CIV.P. 244 attorney *ad litem* would enjoy qualified judicial immunity.

Practically speaking, however, it is unlikely that you will be sued for failing to exercise ordinary care in the defense of the suit. There is not a single reported case of an award of attorney *ad litem* malpractice damages. There is not a single reported case of fee forfeiture for breach of duty. On the other hand, the lack of “client” cooperation offers little refuge for the lazy attorney *ad litem*. In non-tax cases, holding the plaintiff to its burden of proof is often the key to victory.

Similarly, in delinquent tax cases, the face of the record frequently provides adequate defense or limitation of liability to *in rem*. Moreover in tax suits, knowledge of the tax code will provide an attorney *ad litem* the tools to limit the monetary recovery against the non-appearing defendant. For example, the tax code provides that once a penalty has been assessed, a taxing unit may not recover attorney’s fees. *Spring Branch Independent School District v. Siebert*, 100 S.W.3d 520 (Tex.App.—Houston [1<sup>st</sup>] 2003, no pet.). The attorney *ad litem* should review the

proposed judgment carefully to ensure the Plaintiff taxing authority has not overreached its evidence and the tax code. It is easy to prove when the attorney *ad litem* has failed to do so.

*For the gratitude and respect of the Court?*

As a diligent attorney *ad litem*, you are guaranteed the gratitude and respect of the Court whose appointment you receive. However, poor handling of an appointment will provide you a lasting reputation throughout the Courts. While a judge may not know the particulars of a corner you have cut, your lack of familiarity with a file or your lack of diligence will be apparent by comparison to other attorneys *ad litem* who have devoted sufficient energy to the work. If you choose to apply to be on the list, you assume the risk that you will be *ad litem pro bono*.

ADMINISTRATIVE ORDER

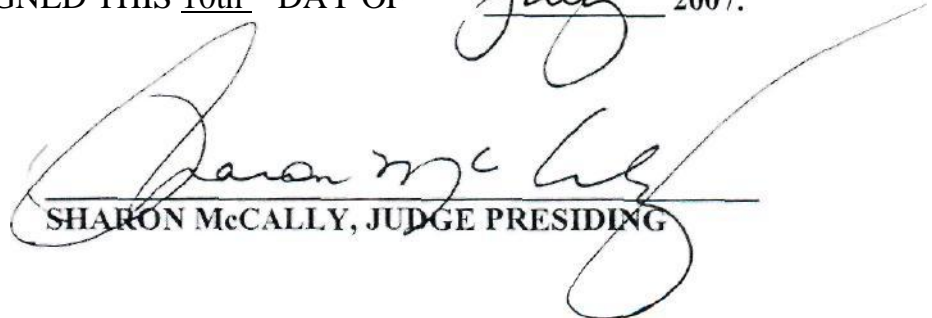
IN RE:  
VS  
DELINQUENT TAX SUITS

IN THE DISTRICT COURT OF  
HARRIS COUNTY , T E X A S  
334TH JUDICIAL DISTRICT

This Court previously entered an Order of Reference of all delinquent tax suits filed in the 334th Civil District Court to Tax Master. Such Order is hereby VACATED and all delinquent tax suits filed or to be filed in the 334th Civil District Court are returned to this Court. All settings in those causes, whether for trial or oral hearing, are also VACATED. Please consult the website or contact the clerk of the 334th District Court for further information about such settings.

Delinquent tax suits will be considered on a case by case basis for reference to the Tax Master for good cause.

SIGNED THIS 10th DAY OF July 2007.

  
SHARON McCALLY, JUDGE PRESIDING

CAUSE NO. 2008-05312

HARRIS COUNTY, *et al.*                    § IN THE DISTRICT COURT OF  
   §  
v.     § HARRIS COUNTY, TEXAS  
JOHNNY COLLINS, *et al.*                    § 334<sup>TH</sup> JUDICIAL DISTRICT

**ORDER**

Pending before the Court is the motion of Plaintiffs to appoint attorney *ad litem* for defendants who have been cited by posting but have not filed an answer. Having considered the motion, the Court determines the motion should be GRANTED. The following attorney is appointed as attorney *ad litem* for the Defendant JOHNNY COLLINS, WHOSE LOCATION IS UNKNOWN, and SUCH PERSON'S UNKNOWN HEIRS, SUCCESSORS and ASSIGNS, WHOSE IDENTITY AND LOCATION ARE UNKNOWN, UNKNOWN OWNERS, SUCH UNKNOWN OWNERS' HEIRS, SUCCESSORS AND ASSIGNS, AND ANY AND ALL OTHER PERSONS, INCLUDING ADVERSE CLAIMANTS, OWNING OR HAVING ANY LEGAL OR EQUITABLE INTEREST IN OR LIEN UPON THE PROPERTY WHICH IS THE SUBJECT OF THE DELINQUENT TAX CLAIM IN THIS SUIT:

**Michael D. West, Texas Bar No. 00785220, 713/222-9378.**

The parties are reminded that this Court's delinquent tax files are not referred to master, and therefore, the Tax Protocol does not apply to this case.

It is further ORDERED that the attorney *ad litem* provide a brief status report (a) upon **prior determination**, if any, that the fees incurred in performing duties in this cause will likely exceed

\$1,000 (for which the attorney *ad litem* will need leave of court to proceed); and/or (b) upon determination, if any, that the work necessary in this cause will require more than 120 days.

SIGNED this 9th day of June, 2009.

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JUDGE PRESIDING



PL

No. 2006-08830

HARRIS COUNTY, ET AL

§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

vs.

HARRIS COUNTY, TEXAS

LAMAR BROWN, ET AL

334<sup>th</sup> JUDICIAL DISTRICT

**Attorney Ad Litem's 1<sup>st</sup> Amended Due Diligence Affidavit and Fee Report**

BEFORE ME, the undersigned notary public, on this day appeared the undersigned Attorney Ad Litem (AAL), who stated upon oath the following:

2009 OCT 12 PM 2:52  
6-08-01  
BY MAIL

My name is Jeffrey Jay Klemm. I am over the age of 18 years and I am not disqualified from making this sworn statement. The statements herein are made on my personal knowledge and they are true.

I am a licensed attorney, in good standing. I was appointed by the above referenced court to represent the interests of the Defendants in this case who were cited by publication in the above captioned matter; LAMAR BROWN, MATTIE PEARL BROWN AND IVA CRYSTAL SMITH (of whom appointment of AAL is pending), whose location is unknown, and such person's unknown heirs, successors and assigns, whose identity and location are unknown, unknown owners, such unknown owners' heirs, successors and assigns, and any and all other persons, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this case. I have exercised reasonable diligence in attempting to locate the parties for whom I was appointed to serve as attorney ad litem and my search has been unsuccessful, except as stated below. My search efforts were undertaken for the purpose of attempting to locate the Defendants I have been appointed to represent. Although this Court is not a Protocol Court, pursuant to the Protocol for Trial of Tax Cases, I have accomplished the following activities specified and required by the Protocol and have obtained the following results or findings from the activities and claim the following fees:

- a. Reviewed the Court's file.
- b. Obtained a tax authorities due diligence affidavit and reviewed the documents received from the tax authority.
- c. Filed an answer.
- d. Determined that additional work was reasonable under the circumstances, consisting of verifying, supplementing and completing the tax authority's work. Such additional work was reasonable in order



RECORDER'S MEMORANDUM  
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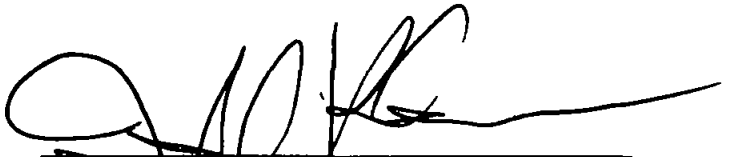
CONFIRMED FILE DATE: 10/12/2009

to provide proper due diligence in attempting to locate Defendants, such efforts not accomplished or shown by the tax authority. Such additional work and request for additional fees is detailed below and in the attached statement, consistent with the AAL fee guidelines provided in the protocol. Some such additional work includes: identifying each of the ten children and the nine heirs of Lamar Brown and Mattie Pearl Brown; dozens of telephone calls with the heirs of Lamar Brown and Mattie Pearl Brown and plaintiff's counsel; locating defendants who moved often; numerous discussions with defendants who were considering paying the taxes; locating defendants in prison and then released; multiple appearances in Court; providing each defendant with the opportunity to answer the suit.

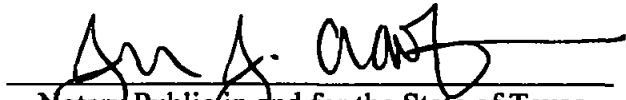
- e. Attempted telephone contact with known and unknown persons represented by the AAL, locating and speaking with Jan Brown, defendant; Gertha Mershon, defendant; Sharron Becker, defendant; Kevin Brown, Jr., defendant; Mary Brown, defendant; Bernadette Brown, spouse of defendant; prison authorities; Emily Dunn, daughter of defendant Iva Crystal Smith; Bruce Brown, defendant; Mary Brown's apartment complex; Walter Bucko, court coordinator of the 334<sup>th</sup> District Court; Plaintiff's attorneys office; Plaintiff's attorneys' paralegals and staff.
- f. Sent over forty letters and faxes to known and unknown persons represented by the AAL, individuals whom it was believed may be related to or have knowledge of the Defendants, and plaintiff's attorney resulting in the above recounted conversations.
- g. Sent letters to the owners and occupiers of the property.
- h. Visited the property address, interviewed any resident and available neighbors, and took photos of the property.
- i. AAL has identified each of the person(s) the AAL was appointed to represent. AAL has located each of the heirs to the property except for Iva Crystal Smith. AAL has disclosed to the plaintiff, intervenors and all parties who have answered in the case, information the AAL has discovered concerning the identity and location of such persons. Defendant Mattie Pearl Brown died September 29, 2000. Defendant Lamar Brown died November 26, 1995. Defendants Jan Agnes Brown, Gertha Raye Mershon, Warren Keith Brown, and Kevin Earl Brown, Jr. filed pro se answers conditional on an *in rem* judgment. Mary Lynn Brown, Sharron Lamar Becker, Byron Lamar Brown and Bruce Alan Brown have been served by citation. Iva Crystal Smith was added, removed and re-added to the suit by the Plaintiff. AAL has sent letters to the address of a relative where Iva Crystal Smith is most likely to live, but has heard nothing back. AAL was unable to locate Iva Crystal Smith, therefore AAL will be appointed for her and will answer for her.

- j. The work of the AAL is complete and accurate.
- k. While AAL recognizes this Court is not a Protocol Court, he requests the \$1,000 base fee and a claim for additional fees as contemplated in the Protocol fee guidelines of \$1,750 for a total of \$2,750 for reasonable work under the circumstances. Such claim for fees which is reduced from the time actually worked, is at AAL's reduced rate of \$150.00/hr., and is supported by the attached itemized detailed statement of the work done, the expenses incurred, and the time assigned to such work. As requested by the Court, AAL previously filed a Notice of Extra Fees. AAL felt it particularly important to locate the heirs to the property because of the value of the property; because the home is being used as a residence; and because different defendants at different times expressed interest in paying the taxes, obtaining other parties interests and keeping the property for their use.

Further affiant sayeth not.

  
\_\_\_\_\_  
JEFFREY J. KLEMM

SWORN TO and SUBSCRIBED before me on this 8<sup>th</sup> day of October, 2009

  
\_\_\_\_\_  
Notary Public in and for the State of Texas



# Jeffrey J. Klemm

## Attorney at Law

3100 Wesleyan, Suite 250  
Houston, Texas 77027  
Tel: (713) 621-9944  
Fax: (713) 621-4441

### STATEMENT FOR LEGAL SERVICES RENDERED

Harris County  
vs. Lamar Brown

Date	Service Rendered	10/19/09 Hours
11/28/06	Receive and review notice of appointment from the Court	N/C
12/19/06	Draft letter to Plaintiff's attorney requesting information and documents	0.25
1/17/07	Receive and review correspondence, pleadings and title work from Plaintiff's attorney	1.00
1/18/07	Draft letter to Jan Brown; calls to Jan Brown and relatives; Telephone Conversation with Blanca Garcia at Plaintiff's office regarding appointment; review e-Docs regarding appointment	0.50
1/29/07	T.C. with Jan Brown	0.25
5/03/07	Receive and review notice of trial and proposed judgment; T.C. with Jan Brown; draft letter to Plaintiff's attorney; search for addresses of the siblings; draft letters to the siblings	1.00
5/15/07	T.C. with Gertha Mershon	0.25
5/22/07	T.C. with Sharon Baker	0.25
6/15/07	Travel to court house to review Court's file	0.50
6/17/07	Travel to subject property, take pictures	0.75
6/26/07	Visit with Jan Brown and Plaintiff's attorney at Court regarding defendants and taxes; search for Kevin Brown; T.C. with Jan Brown; update addresses; send letters to Kevin Brown, Bruce Brown, and Byron Brown; draft letter to Gertha Mershon; draft pro se answer	1.75
6/27/07	Draft letter to Plaintiff's attorney	0.25
6/29/07	T.C. with Jan Brown; fax papers to Jan Brown; T.C. with Kevin Brown, Jr.; draft letter to Kevin Brown, Jr.; update addresses; search for Iva Smith and Emily Dunn; draft letter to Warren Brown	1.50
7/02/07	Telephone messages to the siblings who have not communicated; T.C. with Emily Dunn, daughter of Iva Crystal Smith; draft letter and answer to Iva Smith; T.C. with Jan Brown	0.75
7/13/07	Receive and review pro se answer from Kevin Brown, Jr.; T.C. with Bernadette Brown, Bruce Brown's spouse; draft letter to Bruce Brown; draft letter to Plaintiff's attorney; file Kevin Brown, Jr.'s pro se answer	0.75
7/18/07	T.C. with Bruce Brown	0.25
7/24/07	Receive and review answers; draft correspondence to Court and file same; T.C. with Gertha Mershon; draft letter and pro se answer to Byron Brown; draft letter to Plaintiff; call to Sharon, not in service; left message for Mary Brown; left message for Iva Smith	0.50
12/12/07	T.C. with Jan Brown; message to Emily Dunn; attempts to reach Bruce Brown's wife	0.25

12/20/07	Receive and review letter from Bruce Brown; draft letter to Bruce Brown; attempts to reach Emily Dunn	0.25
2/23/08	Draft letter to Plaintiff's attorney	0.25
4/30/08	Receive and review Plaintiff's 1 <sup>st</sup> amended petition	0.25
5/02/08	T.C.s with Jan Brown; draft e-mail, answer and letter and forward to Mary Brown; message to Bruce Brown	0.50
5/05/08	Message to Bruce Brown; T.C. with Gertha Mershon regarding correct phone numbers for Bruce; letter to Gertha regarding answer for Byron Brown; T.C. with Bruce Brown; draft letter to Plaintiff's office	0.75
7/16/08	Review online Court file for returns; message to Plaintiff's attorneys office; search Emily Dunn and Iva C. Smith for phone number, reverse phone number, death records, people search; calls to Iva Smith (not in service or not her); message to Mary Brown and Jan Brown; T.C. with Bruce Brown; T.C. with Jackie Villarreal at the Plaintiff's office; T.C. with Gertha Mershon; draft letter to Iva Smith; send fax to Jackie Villarreal; T.C. with Kevin Franks from the plaintiff's office; T.C. with Jan Brown; draft letter to Plaintiff	1.75
7/17/08	Draft letters to defendants; correct addresses on pro se answer	0.25
7/21/08	T.C. with Walter Bucko, court coordinator for the 334 <sup>th</sup> District Court, regarding trial setting	0.25
7/24/08	Travel to Court regarding Plaintiff's request for reset of trial	N/C
7/31/08	Receive and review notice trial; attempt calls to Mary Brown and Iva (not in service); draft fax to Plaintiff's attorney	0.25
8/21/08	Reverse phone number search, license plate search, address search	0.25
8/29/08	Call to Mary Brown; calls to other number	N/C
9/25/08	T.C. with Kevin Franks; T.C.s with Jan Brown; search address for Mary Brown; reverse Mary Brown's phone number; search for drivers license; telephone messages to Mary Brown; T.C. with Mary Brown's apartment complex; search for Iva Smith and Emily Dunn in drivers license records, voter registration records, phone records; search e-Docs for service and locate relatives' addresses; attempt to call possible phone number; draft letter to Kelli Hamilton	1.25
10/14/08	Review Court filings	0.25
11/18/08	Draft fax to Kelli Hamilton	0.25
12/02/08	T.C. with Walter Bucko	N/C
12/03/08	T.C. with Kelli Hamilton	0.25
1/15/09	Check on service on Mary Brown; check on status of posting on Iva Smith; locate possible phone number for Iva or her relative and left message	0.50
1/26/09	Leave telephone message to possible telephone number of relative of Iva Crystal Smith	N/C
2/20/09	Draft notice to the Court regarding Attorney Ad Litem Fees; check e-Docs for status of case; draft fax to the Plaintiff's attorney	0.50
3/04/09	Telephone message to Kevin Franks regarding posting and appointment on Iva Smith	N/C
3/12/09	Receive and review notice of trial; check e-Docs for status of appointment for Iva Smith	0.25
5/12/09	Check e-Docs regarding status of appointment and service; message to Kevin Franks regarding same	0.25
5/28/09	T.C. with Kevin Franks regarding service and appointment on Iva Smith; draft answer and AAL affidavit and fee report	0.75

6/01/09	Receive and review 2 <sup>nd</sup> amended petition; Telephone message to Damon Edwards	0.25
6/02/09	Conference with Damon Edwards regarding Iva Crystal Smith	N/C
6/03/09	Research; T.C. with Damon Edwards regarding Iva Crystal Smith appointment	0.25
6/16/09	T.C. with Jan Brown regarding trial and any intentions with subject property; prepare for trial	0.50
6/17/09	Receive and review Plaintiff's proposed judgment; travel to Court to participate in trial	3.00
9/09/09	Draft 1 <sup>st</sup> amended answer, amended AAL affidavit and fee report	0.25
	Receive and review proposed judgment	0.25
10/19/09	Travel to Courthouse; attend and participate in trial	0.50

Total Hours: 24.75

24.75 Hours @ \$150.00/hr.: \$3,712.50

Expenses: N/C

Less reduction: -962.50

Fees Requested: \$2,750.00

THANK YOU!

ORIGINAL 4

CAUSE NO. 2007-44957

Harris County, et al.,	§	In the District Court of
	§	
vs.	§	Harris County, Texas
	§	
Matlen Phillips	§	
AKA Mattlen Phillips, et al.	§	334 <sup>th</sup> Judicial District

Attorney Ad Litem's Due Diligence Affidavit and Fee Report

**FILED**  
Loren Jackson  
District Clerk

JAN 16 2009

County of Harris §  
 State of Texas §

Time: \_\_\_\_\_  
 By \_\_\_\_\_  
 Harris County, Texas  
 Deputy

Before me on January 15, 2009 appeared Donald H. Cahilly, a person known to me, who after being duly sworn testified to the following:

1. My name is Donald H. Cahilly. I am over the age of 18 and in all ways competent to make this affidavit. I am an attorney in good standing with the State Bar of Texas. All of the facts stated herein are true and correct and within my personal knowledge.

2. I was appointed by the Court to serve as attorney ad litem on August 20, 2008 to represent **Matlen Enard Phillips also known as Mattlen Phillips, Millnee Mills aka Mellanee Mills aka Mellanie Johnson, Albert Mills, Azlee Mills aka Azlee Mills Calvert, and Olly Dee mills aka Ollie Dee Mills Enard**, whose locations are unknown, and such persons' unknown heirs, successors and assigns, whose identity and location are unknown, unknown owners, such unknown owners' heirs, successors and assigns, and any other person, including adverse claimants, owning or having or claiming any legal or equitable interest in or lien upon the property which is the subject of the delinquent tax claim in this case.

3. I filed an Answer and Amended Answer for my clients. The Amended Answer was filed because relatives informed me that the correct spelling of Defendant Matlen Phillips name was "Mattlen Phillips." The property has an address of 5557 Wheatley, Houston, Texas, 77091. I filed a status report with the Court. At the time of filing this Affidavit I have not received the Plaintiff's investigative work and cannot testify as to the thoroughness of that work. I expect to file an Amended Affidavit after I receive those materials.

4. Upon appointment I first reviewed on Harris County E-Docs the materials in the Court's file. I obtained addresses for Annette Mills, Dorothy Smith and Mattlen Phillips and mailed letters to each of those people. Using Publicdata.com I searched for

BY \_\_\_\_\_  
DEPUTY T

information for each of my clients using all of the variations of their names and following is what I found on that web site for each:

Mattlen Phillips: I found no listing for her under the Social Security Death Index and no other information except she was identified as the owner of the property that is the subject of this tax suit.

Millnee Mills (Johnson): The Social Security Death Index indicated she died January 30, 2000. On PublicData I learned that she lives at 8014 Beckley Street in Houston. I mailed a letter to the current owner of that property, Samuel Ford, but did not receive a telephone call back.

Albert Mills: The name is too common to obtain any information on PublicData.com as that name leads to hundreds of listings in the Social Security Death Index.

Azlee Mills: The Social Security Death Index indicated she died October 24, 2003. I found no other information for her.

Olly Dee Mills: The Social Security Death Index indicated she died in January 1993. I found no other information for her.

5. I received a telephone call from a female named Linda on December 4, 2008 who claimed to be a friend of a family member who had received one of my letters. She said she would call me the next day but never called again.

6. On December 7, 2008 I received a telephone call from Defendant Annette Mills in reply to my letter. Annette stated that Albert Mills was her father and was deceased. Annette told me that Mattlen Phillips, Olly Mills Enard, Mellanie Mills, and Azlee Mills are all deceased. Annette Mills told me that Defendant Dorothy Smith was the daughter of Azlee Mills and was her cousin by adoption.

7. I obtained a telephone number for Defendant Dorothy Smith and called her. Dorothy told me that Mattlen Phillips was her great aunt and that Azlee Mills was her mother. Dorothy Smith told me that a house was on the property and that one of Mattlen Phillips daughters was living in the house. She said that the name of the daughter was Cheryl Phillips. I wrote a letter to Cheryl Phillips at 5557 Wheatley and to Resident at 5557 Wheatley. I received no response to these two letters or to the initial letter I had mailed to Mattlen Phillips at that address.

8. Figuring that the day after Christmas would be a good day to catch people at home, I drove to the property at 5557 Wheatley and spoke with Sherryll Phillips. Sherryll told me that Mattlen Phillips was her mother and is deceased. Sherryll told me that she did not have a clear title to the property and that other relatives might have an interest but she could not tell me who those might be. Sherryll told me she has a sister named "Dell" but I could not get her to give me Dell's full name, telephone number or



address. Sherryll told me that Melanie Mills, Albert Mills, Azlee Mills and Ollie Enard were all deceased. I told Sherryll that I would send her title documents once I received them from the Plaintiff. I provided the name and address of this heir of Mattlen Phillips to Harris County's attorneys.

9. The Mills family appears to have drifted apart and I have not been able to determine the name or location of any heirs of Melanie Mills or Ollie Enard. An heir of Mattlen Phillips is Sherryll Phillips; an heir of Albert Mills is Defendant Annette Mills, and an heir of Azlee Mills is Defendant Dorothy Smith.

10. I researched Harris County Clerk's property records to determine the identity of any liens or other claims against the property. I found no liens against the property apart from claims that are part of this lawsuit.

11. The results of my work are that I found one heir and her name is Sherryll Phillips. I visited the property and found no signs of adverse possession. It is possible that additional work will be necessary once I receive Plaintiff's investigative file and I will file an amended affidavit if necessary.

12. My work is complete. I devoted seven hours of time on this case all of which was necessary. A reasonable fee for the attorney ad litem services rendered in this matter is \$1,000.00, taking into account the factors set forth by the Texas Supreme Court in *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997). I am making a claim for payment of the base fee of \$1,000.00 under the attorney ad litem fee guidelines.

Respectfully submitted,



Donald H. Cahilly

Attorney at Law

SBN: 00787181

4220 S. Kirkwood, Ste. B

Houston, Texas 77072

Telephone: 281-495-1230

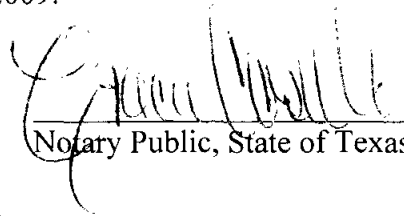
Facsimile: 281-495-1254

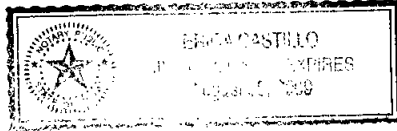
**ATTORNEY *Ad Litem* FOR DEFENDANTS**

**AFFIDAVIT**

Before me, a notary public for the State of Texas, on this day personally appeared Donald Cahilly, a person known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.


Given under my hand and seal on January 15, 2009.

  
\_\_\_\_\_  
Notary Public, State of Texas



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served upon all parties on January 15, 2009.

  
\_\_\_\_\_  
Donald H. Cahilly

Kelli Hamilton  
Linebarger Goggan Blair & Sampson, LLP  
Via Facsimile: 713-844-3502

## APPENDIX 9

## Judge Brent Gamble

270<sup>th</sup> District Court  
Harris County, Texas

Experience	1983 – 1989 Texas	Andrew G. Shebay, III, P.C.	Houston,
		General Civil Litigation.	
	1989 – 1998 Texas	Gamble & Cannata, P.C.	Houston,
		Managing Shareholder	
		Commercial Litigation.	
	1999 -	Judge, 270 <sup>th</sup> District Court, Harris County, Texas.	
Education	<ul style="list-style-type: none"><li>▪ B.S., University of Houston, 1980.</li><li>▪ J.D., South Texas College of Law, 1983.</li></ul> Board Certified, Civil Trial Law, Texas Board of Legal Specialization		
Memberships	State Bar of Texas, Houston Bar Association, Texas Association of Civil Trial and Appellate Specialists. Life Member, Houston Livestock Show and Rodeo Association		
	Admitted to practice before the U.S. District Court for the Southern District of Texas, United States Court of Appeals for the 5 <sup>th</sup> Circuit, and the U.S. Supreme Court.		
Honors	Selected 2000 “Judge of the Year” by P.O.L.I.C.E., Inc. (Peace Officers Looking Into Courthouse Excellence).		
	Director, Texas Assoc. of Civil Trial & Appellate Specialists		