

## **REPRESENTING CHILDREN IN LEGAL PROCEEDINGS INVOLVING ALLEGATIONS OF PARENTAL UNFITNESS**

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Representing children in court proceedings involving allegations of parental unfitness arises in proceedings other than custody disputes between competing parents. The focus of this paper will be on those proceedings where the allegation of unfitness rises to the level that custodial placement with a non-parent, either on a temporary or permanent basis, is the proposed outcome. The two legal proceedings in which this representation would arise are (1) guardianships and (2) termination of parental rights (TPR). A guardianship proceeding is typically instigated in the probate court of the state. A termination of parental rights proceeding is typically litigated in the family court or juvenile court of the state.

In both legal proceedings, the child is before the court due to allegations of endangerment to the child's current and future welfare. As such, the child is deemed a "ward of the court" as to the issues raised in that case.

Of the two proceedings, TPR carries the more severe consequences by virtue of the complete severance of the legal and familial relationship between the parent and child. Often, the legal proceeding is initiated by a governmental agency, as a consequence of child abandonment, extreme abuse and neglect, or parental conviction of certain crimes. The guardianship proceeding, on the other hand, is generally initiated by a third party individual seeking guardianship of a child because both parents are unavailable, unfit, or unwilling to function as the legal and physical custodian of the child. These proceedings are distinct from a family court modification, paternity, or divorce proceeding, where the court is considering placement with a third party, as an alternative to the parent. Guardianship proceedings, although not permanent in nature, have a greater permanency typically than the custodial placement in a paternity, divorce,

or custody modification proceeding. The guardianship proceeding often arises where one parent is deceased, the surviving parent, through disability or other cause, is unable to provide the necessary care and custody of the minor child.

Typically, representation of the child in a proceeding involving allegations of unfitness are by court appointment. In many jurisdictions, the court appoints an attorney as *guardian ad litem* (GAL) with a dual function to act as the attorney advocate for the child's interests, as well as an investigative fact finder. In jurisdictions where the attorney functions as both the attorney and *guardian ad litem*, the dual role and responsibility can be challenging and murky. This form of representation is described as the attorney-GAL hybrid.

The attorney-GAL is best described as an advocate-directed representation. Approximately 60% of US jurisdictions follow this model. The attorney-GAL represents the child's "best interests" and advocates for a result which the attorney believes is in the child's best interests.<sup>1</sup> This representation, while client-centered, is not necessarily client-directed. Although the wishes of the child client must be recognized, unless otherwise specified by law, those wishes may not necessarily control the position advocated by the attorney. The age, maturity, and emotional development of the child client must be weighed by the attorney in advocating the child's wishes. It may be appropriate (and some states require) that the attorney disclose that the child's wishes are at odds with the position advocated by the child's attorney.

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<sup>1</sup> The advocate directed representation of the child is contrary to the American Academy of Matrimonial Lawyers Standards Relating to the Appointment of Counsel for Children in Custody or Visitation Proceedings, which states:

"Unless controlling law expressly provides otherwise, counsel's role in representing a child client is the same as when representing an adult child. Clients who have sufficient capacity, regardless of age, have the right to establish the goals of representation and counsel is obliged to seek to attain those goals. In no case shall counsel for the child advocate for any objectives other than those established by the client." §2.2, Revised Standards for Attorneys for Children in Custody of Visitation Proceedings 2009.

In some states, the GAL makes a report, and other states authorize the GAL to make a recommendation. At least one state, Florida, holds that the GAL's duties and responsibilities are not coextensive with those of an attorney and explicitly define the GAL's responsibility as next friend, evaluator, or investigator, not attorney.

There are representations where the attorney is strictly an attorney for the child and a separate *guardian ad litem*, who may or may not be an attorney, is appointed for the child. In this capacity, the attorney operates as a traditional attorney by filing motions, seeking injunctive relief, subpoenaing witnesses, and functioning as the legal advocate for the child or, in the instances where a separate GAL has been appointed, for the child's representative. This representation is client-directed representation, rather than advocate-directed representation.

The attorney, whether functioning as attorney only or attorney-GAL hybrid, remains bound by the same rules of professional conduct and ethics as are imposed upon the attorneys for the parties. Those professional responsibilities and ethical duties include competence, zealous advocacy, protection of attorney-client confidential communication, and the like.

Most state statutes governing guardianship proceedings direct that the preferences of the child over a certain age be given consideration in the appointment of a guardian. This circumstance illustrates the greatest distinction between an attorney advocate for an adult who has retained private counsel and the attorney-GAL appointed to represent a child in a guardianship proceeding. In advocate directed representation, the attorney should through direct and cross-examination expose the unsuitability of the child's proposed guardian, where the child's preferred guardian would be inappropriate for the child's welfare.

Sometimes, guardianship proceedings are driven by generational struggles between the child's parents and grandparents. The most difficult of these representations are situations where the child was left with the grandparent for the first few years of life, while the parent pursued

other interests. The parent may return to claim the child, and the legal battle for guardianship ensues. At the time the parent seeks to reclaim the child, the parent may then be “not unfit,” but the attachment of the child may make the transfer an unfavorable outcome from the child’s perspective. There are many variations on this guardianship battle between family members and the alleged unfit parent. The controlling statutes often a high threshold to prove parental unfitness, making the representation of the child in these proceedings particularly challenging.

Representation of a child in a TPR matter is fraught with pitfalls from the child’s perspective. This author has observed matters referred to TPR because a governmental agency believes the child is better in an adoptive placement. However, the child, while awaiting adoptive placement, may be circulated through a variety of foster home placements that can be extremely detrimental to the child’s sense of security and emotional development. In these matters, the attorney may need to act as advocate for services for the child in addition to acting as legal representation in the litigation.

Representation of a child in proceedings involving allegations of unfitness may require the attorney to pursue motions for restraining order prohibiting or limiting contact between the parent and child. Similarly, the attorney must protect the child’s rights to exclude or protect private or privileged documents from disclosure in any court proceedings. The adult litigants, even if one is a parent, do not have the unfettered right to use the child’s medical records or other privileged communication records in the court proceeding. Where appropriate, the attorney must file a motion for protective order or motion to quash a subpoena for the child’s privileged communications.

The age, maturity, and emotional development of the child, who is subject of the guardianship or TPR proceeding, often necessitate that the attorney secure the services of other professionals to assist in evaluating the needs of the child. In circumstances where the

jurisdiction does not appoint a GAL for the child, the attorney often must conduct hands-on investigations of the home situation of the competing adult litigants. Keeping in mind that fact that the attorney's role is that of legal advocate, facts not otherwise discoverable can, nevertheless, be disclosed in such visits. During one such home visit, this author found that the guardian being advocated by child protective services was allowing her brother, a convicted child molester, to stay in the home and babysit on occasion.

Representing a child in any legal proceeding imposes great responsibility upon and challenges to the attorney. The consequences to the child, due to the outcome of the legal proceeding, requires vigilant and ardent advocacy on behalf of the child.