Legal, Ethical and Professional Concerns When Representing Children in Abuse Cases in Juvenile Court

By Judge Robert V. Rodatus

> *But in every case, regardless of the parties, the welfare of the child is the controlling and important fact. This is not intended to nullify the laws of nature; for in most instances it will be found that the legal right of the parent and the interest of the child are the same. But if through misconduct or other circumstances it appears that the case is exceptional, and that the welfare of the child requires that it should be separated from its parent, the* parens patriae *must protect the helpless and the innocent. They are the wards of the court, the hope of the state, and the seed corn of the future.* Williams v. Crosby, *118 Ga. 296 (1903).*

Two years ago a position of staff guardian ad litem was created in the Gwinnett Juvenile Court. Since then an organizational philosophy and framework has evolved concerning the appointment, role and duties of the guardian ad litem in neglect and abuse cases. Although grounded in Georgia statutory and case law, this philosophy was also formed after reviewing the law of other states and certain Federal mandates, and is in most cases consistent with the majority views on this subject.[1]

The philosophy expressed in the *Williams* case has remained the guiding principle in determining the role of the courts in Georgia, especially the juvenile court, in protecting the interests of children in this state.[2] In order for the court to effectively meet its obligation it is in some types of cases required and in others necessary that a guardian ad litem be appointed. Although this paper will focus on the representation of children by a guardian ad litem in abuse cases in juvenile court, reference to other types of cases will be made, particularly custody determinations in a traditional domestic relations setting, to fully explore the role of the guardian ad litem.

Appointment and Standing

Certain types of proceedings in the juvenile court require the appointment of a guardian ad litem.[3] These include termination of parental rights[4] and abortion notification bypass procedures.[5] This may be done upon application of a party or by the court on its own motion for children who are parties to the proceeding if they have no parent, guardian or custodian appearing on their behalf or if their interests conflict with the child's or in any other case in which the interests of the child require a guardian.[6] Under the general guardian ad litem provision of the Juvenile Code, O.C.G.A. §15-11-55, a guardian ad litem must be appointed for the child in deprivation actions.[7] The only other types of cases in which a guardian ad litem might be appointed in the juvenile court would be delinquency and unruly cases where the interests of the child and the interests of the parent conflict,[8] and in cases transferred to the juvenile court by the Superior Court for determination of custody, visitation and support.[9] In the latter type of case the appointment of a guardian ad litem is discretionary. The stan-

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dards under which such a determination would be made will be discussed below. Some states require the appointment of a guardian ad litem in all custody proceedings.[10] In any case in which the juvenile court decides to appoint a guardian ad litem compensation will be from the County but the court may order the parents or other persons legally obligated to care for the child to pay this expense or to reimburse the county.[11]

Additionally, Georgia does receive funds under the Adoption Assistance and Child Welfare Act and Child Abuse Prevention and Treatment Act which require that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem shall be appointed to represent the child.[12]

Our sister state of Florida has both mandated appointment of a guardian ad litem in abuse and neglect cases[13] and discretionary appointment in domestic relations actions involving custody or visitation.[14] However, if such a domestic relation action involves verified allegations of abuse or neglect, a guardian ad litem shall be appointed. Florida also has a court created guardian ad litem program. This has led to a series of interesting decisions involving compensation for attorneys appointed who were not a part of this program.[15]

The circumstances under which a court in Georgia might appoint a guardian ad litem in a custody dispute would most likely be those that involve factual matters similar to a termination or deprivation case. These would be cases involving allegations of physical or sexual abuse or other conduct by the parents toward the child that would lead to termination or extreme restriction on the rights of one or even both parents. *M.M. v. R.R.M.*,[16] a Minnesota case, contains an excellent discussion of the circumstances under which a court should be required to appoint a guardian ad litem in a custody dispute. The case specifically discusses the need for an independent guardian ad litem, independent of either of the parents interests, so that a recommendation for placement, including the possibility of foster care, could be presented to the court.

In termination cases, which are often the end result of a deprivation case where reunification efforts have failed, the role of the court appointed guardian ad litem is to make an appropriate recommendation to the court.[17] The duties of the guardian ad litem leading up to the preparation of such a recommendation will be discussed further below.

Two particular issues that should be recognized in discussing the types of cases where a guardian ad litem might be involved are the ability of the guardian to file an independent action and the ability to appeal a decision. Most jurisdictions allow a guardian ad litem appointed for the children to file affirmative pleadings necessary to protect the ward's interest.[18] This includes the standing to file a termination petition to sever the parents rights.[19] Foster parents do not have this right.[20] A public guardian ad litem may not have standing to intervene in the settlement of a class action between a Department of Family and Children Services and a class composed of children who have been in the custody of that department. Although the intervention was denied specifically on the grounds of timeliness, the court went on to find that the merits of the intervention would have supported a finding that it would have been disruptive to the litigation.[21] The Georgia courts reached a unique conclusion in regard to this issue in the case of *In re J.S.C.*.[22] In that case a court-appointed guardian ad litem from a prior deprivation action filed a termination petition. The court found that the guardian ad litem's filing a petition for termination made him a party to the action and therefore he could not be a guardian ad litem under O.C.G.A. §15-11-55 since the court must appoint as a guardian ad litem someone who is not a party to the proceeding. The court noted the function of the guardian ad litem to protect the interest of the child in all matters relating to a litigation. The court found that the best interest of the child may or may not have been served by terminating the father's rights. By initiating the termination proceedings the guardian ad litem had taken the position of advocate for ending those parental rights.

> If the advocate for termination is permitted to be the advocate for the child there is nothing for the court to decide, insofar as the third-party child is con-

> cerned, for the former has already decided that the best interest of the child will be served by termination. Between the two antagonistic parties is the child, who as we have read O.C.G.A. §15-11-55 must have a separate representative. *In re J.S.C.,* 182 Ga. App. 721 at 723.

The conclusion is that guardians ad litem may file termination petitions in the state of Georgia, but by doing so remove themselves from participation in that action as the child's statutorily required guardian ad litem.

However, Georgia is clearly in line with the decisions of other states that allow the statutory guardian ad litem to appeal a decision in a termination case. *In re G.K.J.,*[23] was a termination action brought by the child's mother against the father. The court found clear and convincing evidence to order the termination of parental rights. An appeal was filed by the attorney and guardian ad litem who had been appointed to represent the child under the provisions of O.C.G.A. § 15-11-85(a). The court found that the child is in effect made a party to the action under the code and therefore has standing, through his duly appointed attorney and guardian ad litem, to bring the appeal. Similar decisions have been reached in other jurisdictions concerning termination actions,[24] deprivations actions,[25] custody determinations[26] and adoption cases.[27]

In looking at the extent of the guardian ad litem's authority to act, it sometimes becomes necessary to determine when the appointment ends. In an adoption case it was determined that the representation continued until an appropriate placement was made or until the court's jurisdiction was terminated.[28] Along these lines, it has been determined that the appointment continues until the guardian ad litem is released from further duties by the court.[29] Other courts have found the guardian ad litem's authority to act was ended by a dismissal of the deprivation action.[30] It has also been determined that incarcerated juveniles do not have a right to affirmative legal assistance on treatment and education issues once they have been placed, although they do have a right to counsel for an appeal of their adjudication of delinquency.[31]

Role

Of greater and more practical concern is the role of the guardian ad litem during the pendency of litigation. It is far too simplistic to state that the guardian ad litem has the duty to look out for the best interest of the child. This fails to recognize the inherent tension in deprivation cases between the duty of the court to protect children[32] and the mandate to facilitate reunification of the family if possible.[33] Additionally, the guardians ad litem must recognize they are fulfilling the unique dual role of being an advocate for the child's best interest and being an arm of the court and assisting it in fulfilling its duty to decide in the child's best interest.[34] In regard to the first issue, suffice it to say the guardian ad litem cannot come into the case with a preconceived agenda either for removal or for reunification.[35] It is a misunderstanding of the "dual role" that a guardian ad litem plays in these cases that seems to cause the most confusion and ethical concern on the part of attorneys. The beginning point for any discussion of this issue is a recognition of the court's role under the doctrine of *parens patriae.*[36]

The dual role of the guardian encompasses both serving as an advocate for the child and an investigator for the court.[37] This issue is discussed in detail and against the background of case law on a national scale in *Veazey v. Veazey.*[38] This Alaska case was a custody dispute between parents. The Alaska Court recognized the right of the guardian ad litem for the child to file independent procedural motions on the same basis as a party to the action. One of the parents urged that the role of the guardian ad litem was like that of any other attorney, a zealous advocate for the position of the client, in this case for the child's expressed interest as to which parent was the preferred placement. The other parent argued that the guardian ad litem is more in the nature of an independent expert investigator and advisor to the court. Under this scenario the guardian ad litem should make a recommendation to the court based on the guardian ad litem's view of the best interest of the child taking into account as part of that equation the child's preference.

The court concluded that the guardian ad

litem is in every sense the child's attorney with not only the power but the responsibility to represent the client zealously and to the best of the attorney's ability. This carries with it certain duties including to visit with the child and have a private interview. There would also be a duty when necessary to consult with nonlegal experts such as psychologists, social workers, physicians and school officials. There would be a responsibility to conduct discovery, subpoena witnesses and cross-examine witnesses called by other parties and ultimately to argue the position of the guardian ad litem to the court.

It was argued in *Veazey* that these roles were best left to the advocates for the competing parties. Applying the code of professionally responsibility under EC 5-1 the Alaska Court concluded that the guardian ad litem has a professional duty to exercise judgment solely on behalf of the client and free of influences by and loyalties to the parents. The court points out that the guardian does not need to decide between either of the parent's position as to the ultimate resolution of the case and instead could come up with an independent solution to the custody dilemma.

Finally, the court discusses the responsibilities of an attorney representing one who is not *sui juris*. While the guardian ad litem must consider the child's preference regarding placement, it alone cannot control the guardian's position as to where the child's best interest may lie. This is because the guardian ad litem must take into account all factors in reaching a decision regardless of what the child may or may not believe the guardian "ought" to say.

The critical nature of this independent decision making process is pointed out in the case of *M.M. v. R.R.M.*,[39] where the two teenage children sought to return to the home where they had been sexually abused by a man who might likely abuse them in the future. In this case, the court found that although the appointment of a guardian ad litem in a custody matter was discretionary it was an abuse of discretion not to appoint one.

The need for the investigative role of a guardian ad litem in such cases is pointed out in the Wisconsin decision *Mawhinney v. Mawhinney*,[40] and the Washington case of *Stell v. Stell*,[41] both of which were third party custody actions. However, it should be kept in mind that in the custody arena the appointment of a guardian ad litem is generally considered discretionary and when the court's independent investigative powers do not require assistance there is no abuse of that discretion to fail to appoint a guardian ad litem.[42]

Stated another way, it is the duty of the guardian ad litem to stand in the shoes of the child and to weigh the factors as the child would weigh them if the child's judgment were mature and the child was not of tender years.[43] Some of the most forthright discussion of this "dual role" of the guardian is found in those cases where the issue of immunity from suit is the focus of the decision. guardians ad litem serving in deprivation and custody disputes have been consistently found to be immune from civil liability. This is based upon the theory that they operate as an "arm of the court" and serve a judicial function.[44] The philosophy that is mentioned time and again is that the guardian must be free, in furtherance of the goal of representing the best interest of the child, to engage in a vigorous and autonomous representation of the child. Immunity is necessary to avoid harassment from disgruntled parents who might take issue with any or all of the guardian's actions.[45]

A thorough exposition of this line of cases is found in the Missouri case *Bird v. Weinstock*.[46] The guardian ad litem in that case was serving in a custody proceeding involving allegations of sexual abuse. A lawsuit was brought by the father alleging legal malpractice in the representation of the children in the custody suit. The court began its analysis by noting that the action makes the child a ward of the court and that the appointment of a guardian ad litem to further the court's protection supersedes the parents natural guardianship. The court found that the guardian ad litem had absolute immunity based on the status of a quasi-judicial officer serving as an arm of the court in the custody matter. The court found that to hold otherwise would undermine the independence of guardians ad litem and deter qualified persons from accepting these appoint-

ments. The court emphasizes that the independence of the guardian ad litem is independence from the two parents. The findings of quasi-judicial autonomy is based on a functional inquiry as set out by the United States Supreme Court in *Westfall v. Erwin*.[47]

The court noted the immunity for guardians ad litem has been extended in proceedings to terminate parental rights, custody disputes and in the investigation of child sexual abuse cases. Of particular note is the case of *Collins v. Tabet*,[48] a New Mexico decision where the grant of immunity was predicated upon the guardian ad litem carrying out responsibilities defined by the court as an "arm of the court." That court noted that the guardian going outside the bounds of the appointment, which contemplated an investigation on behalf of the court as to fairness and reasonableness of a proposed settlement, and assuming the role of a private advocate for the child's position could defeat that immunity. In this regard see the Georgia case of *Speck v. Speck*.[49] Again the New Mexico Court notes the dual role of the guardian of assisting the court in carrying out the court's duty of protecting the interest of the child while representing the best interest of the ward as attorney.

Duties

In fulfilling this dual role the guardian must perform certain functions in preparation for a hearing, at the hearing and post hearing. Some statutes specifically require the guardian to prepare a written report.[50] More commonly, the guardian ad litem should appear at the court proceeding and represent the child. Included within this would be the right to call witnesses, expert and otherwise, to file discovery and seek mental and physical examinations of the parties and the child by appropriate experts. Some of these activities would also be included under the investigation of the case. These activities should all lead toward a recommendation for a dispositional plan that is in the child's best interest[51] and include the ability to monitor and if necessary seek modifications of this dispositional plan.[52]

Perhaps the most effective way to communicate to the guardian ad litem the duties that are inherent in such a role is by a specific order of appointment such as used in Wisconsin. This guideline of a guardian ad litem's duties is cited with approval in *Veazey v. Veazey*.[53] A proposed order along these lines is attached as Appendix I to this paper. One of the matters such an order should take into account is the standard the guardian ad litem should utilize in making a recommendation as to custody or placement. A similar checklist is mandated in the state of Texas in ascertaining the best interest of children,[54] and failure of the guardian ad litem to investigate these factors is grounds for reversal.[55] Guidance as to the duties of the guardian ad litem in an abuse case can also be found in cases involving other issues such as sterilization of incompetents.[56] These duties include meeting with the ward, presenting proof, cross examining witnesses, and presenting reasonable arguments in favor of the client's interest.

One of the most important duties in representing a child as guardian ad litem is effective preparation for the proceeding. Part of this involves exercising the right of access to all reports the court may rely upon.[57] Keep in mind that this includes the parent's right to review any report that might be prepared by the guardian ad litem.[58] An interesting case involving this point is the New Hampshire decision of *Ross v. Gadwah*.[59] New Hampshire requires the appointment of a guardian ad litem in custody cases as well as deprivation and termination cases. In this case the guardian ad litem raised two questions: 1) whether it was necessary to produce for inspection notes relevant to the dispute obtained during conversations with persons other than the minor child; and 2) whether a parent's right of due process required access to and the opportunity to challenge any information forming the basis of the guardian's recommendation, even if such information was obtained from the minor child. The Supreme Court of New Hampshire answered both questions in the affirmative. The court began its analysis by noting the dual role of the guardian ad litem as advocate for child and as an impartial court official. In representing the ward the court noted that they "assist the court and the parties in reaching a prompt

and fair determination, while minimizing the acrimony during the process."[60] The guardian in New Hampshire is required to prepare a written report for the court. Since the court concludes that the parents must have the opportunity to challenge evidence utilized by the guardian ad litem, communications between the guardian ad litem and the minor child are not privileged. Based on Georgia case law discussed below it is unlikely that a similar decision would be reached concerning communication between the child and the attorney/guardian ad litem. However, Georgia case law does indicate that reports relied upon by the court are going to be accessible to all parties.

Protection of the Child Witness

In preparation for court the guardian ad litem should keep in mind that one of the duties is to act as "an agent of the court through whom it acts to protect the interest of the minor."[61] In this light, Georgia law gives the court considerable latitude in protecting the child from intrusive examinations and while testifying. The guardian ad litem of a child can refuse to allow the child to be interviewed or to be required to undergo an independent examination.[62]

Certainly by this point all guardians ad litem know that they should familiarize the child with the courtroom if it is determined that child is going to testify. In this light, it should be kept in mind that the child hearsay statute, that permits hearsay descriptions of sexual contact or physical abuse, requires that the child be "available" to testify in the proceedings.[63] Georgia Courts have been quite liberal in regard to provisions being made to lessen the child's tension when appearing in court. It is not error to allow a child to testify with her back to the defendant in a molestation trial.[64] However, an elaborate and child sensitive procedure utilized in a termination proceeding involving the child being in another room and questions radioed to the guardian ad litem being repeated to the child was held to be improper.[65]

It also is important that the guardian ad litem keep in mind that although an assistant to the court in gathering information, such information should only be presented in the context of a report or recommendation available to all of the parties. Any *ex parte* communication with the court, even if cumulative, can result in a proceeding being reversed.[66]

Another area in which a guardian ad litem can protect the interest of the child is in seeing that any examinations performed are done by qualified and objective personnel and under such procedures that there will be no necessity for additional intrusive examinations upon the child. This is particularly important in the area of sexual abuse where repeated examinations only contribute to the trauma to the child. Attached as Appendix II to this paper is a proposed order for a physical examination of a child that seeks to accomplish these goals. In the Gwinnett Superior Court the staff guardians ad litem that are appointed in deprivation proceedings involving sexual or physical abuse are routinely appointed to act on behalf of the child/witness in criminal proceedings in the Superior Court and have been allowed to intervene for the purpose of objecting to such examinations.

Ethical Considerations

As previously stated, the guardian ad litem in an abuse or neglect case stands in the dual role as an advocate for the child's best interest and as an officer of the court assisting the court in fulfilling its duty to care for its ward. Are there ethical considerations an attorney must consider in fulfilling these dual rules? *Veazey v. Veazey*[67] talks about the duties and obligations of the guardian ad litem against the backdrop of various ethical considerations and reaches the conclusion that there is no conflict.

Although not in the context of an analysis of the code of professional responsibility, the Georgia decision in this area is just as clear. *Dawley v. Butts Co. Dept. of Family and Children Services*[68] address this very issue. The court had appointed an attorney as guardian ad litem to the minor children in this deprivation action. It was contended that these duties raised a conflict of interest. This was based on a reading of O.C.G.A. §15-11-55 that prohibits

the guardian ad litem from being a party to the proceeding or his employee or representative. The court found that this was not relevant as the fact that the appointee was an attorney for the child did not cast the attorney in a representative capacity so as disqualify him from also serving as guardian ad litem.[69]

> "The fiduciary relationship to the children is the same in both instances." *Dawley v. Butts Co. DFCS*, 148 Ga. App. 815 at 816.

The situation where the stated wishes of the child differ from the guardian ad litem's position as to the best interest of the child has also been addressed in numerous decisions. One of the most thorough discussions is contained in *Bird v. Weinstock,*[70] where it was noted that the guardian ad litem is not bound by the wishes of the child if the guardian ad litem concludes the desires are not in its best interest. Further, the court is not bound by the opinion or recommendations of the guardian ad litem. The court concluded that the traditional view is that the guardian ad litem's principle allegiance is to the court and although the best interests of the child are always paramount, the guardian's relationship to the child is not strictly that of attorney and client. There is an obligation on the trial judge to monitor the guardian ad litem's performance and discharge the guardian ad litem if there is a failure to perform the duties diligently. This is unlike the typical situation where it is the client, not the court, that determines whether the performance is satisfactory.

> "In essence, the guardian ad litem role fills a void inherent in the procedures required for the adjudication of custody disputes. Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the "best interest of the child," has no practical or effective means to assure itself that all the requisite information bearing on the question will be brought before it untainted by the parochial interest of the parents. Unhampered by the *ex parte* and other restrictions that prevent the court from conducting its own investigation of the facts, the guardian ad litem essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision i.e., the "best interest of the child." Although the child's preference may, and often should be considered by the guardian ad litem in performing this traditional role, such preferences are but one fact to be investigated and are not considered binding on the guardian. Thus, the obligations of the guardian ad litem necessarily impose a higher degree of objectivity on a guardian ad litem than is imposed on an attorney for an adult." *Bird v. Weinstock*, 864 S.W.2d 376 at 384.

In construing the standards regarding Maryland attorneys it was determined that the child's attorney must inform the court of the child's wishes, but is also required to present the court with an independent analysis of what is in the child's best interest. The child's views are to be considered but are not controlling.[71] There is a minority opinion that when the attorney deems it important to have both view points before the court, they might petition the court to appoint a separate guardian ad litem for the child.[72]

Georgia seems to follow the more enlightened and less mechanistic view that EC 7-12 and 7-17 of the Code of Professional Responsibility do not bind an attorney/guardian to the ward's choice insofar as the recommendation to the court is concerned. However, it is recommended that the guardian attempt to explain the reason that the child's request will be not be advanced in a separate conference with the child prior to the court proceeding.[73]

Another pitfall that must be avoided is dual representation. During the course of a proceeding it is not at all unlikely that the objective, well prepared guardian ad litem may become allied with one party or another in a deprivation, termination or custody dispute. However, counsel must guard against letting this alliance become advocacy for and representation of another party. EC 5-14 through 17 discuss this issue. A typical example of how this might come to pass would be representation of the children as guardian ad litem in the juvenile court and then taking on representation of one of the parents in a related criminal

or domestic matter in another court.[74] Another possible way this might arise would be representation of the children as guardian ad litem and subsequently representing a state entity in a related matter such as the collection of child support.[75] Under the "substantial relationship test" an attorney cannot represent a party in a matter in which the adverse party is that attorney's former client and the attorney will be disqualified if the subject matter of the two representations are "substantially related."[76]

It is for these reasons that it would be improper to serve as a guardian ad litem in a case if one was selected by or retained by one of the other parties, be it one of the parents, the Department of Family and Children Services or a third party that might have an interest in the ultimate disposition of the case, such as a relative of the child. For a frank discussion of the need for independence of the guardian ad litem from either of the parents see *M.M. v. R.R.M.*[77] Likewise, the guardian ad litem should not let financial considerations create even the appearance of partiality. Although the court can order the parents to be responsible for the guardian ad litem's compensation,[78] the better practice would be to have the guardian ad litem paid from county funds and allow the court to order reimbursement to the county if appropriate.[79]

One final decision that might play into the guardian ad litem's ability to be an independent advocate for the child is *State v. Demers.*[80] In that case the guardian ad litem, as well as other court officials, had been continually harassed by one of the parents and members of his church. This resulted in his conviction of the offense of the obstruction of the judicial system. Such a prosecution might be appropriate in Georgia under similar circumstances.[81]

Conclusion

There is a statutorily recognized requirement that a guardian ad litem be appointed to represent a child in abuse cases in the juvenile court. These cases may take the form of deprivation actions or ultimately actions to terminate the rights of parents. The guardian ad litem may be an attorney. There is no conflict under Georgia law for an attorney to serve in both of these roles. Further, the role of a guardian ad litem in juvenile court is in itself a "dual role." The attorney serves both as an advocate for the best interest of the child and as an arm of the court to aid it in investigating what is in the best interest of the child. Although the wishes of the child in regard to placement are to be given weight by the guardian ad litem and the court, and the guardian ad litem should make the court aware of the child's wishes, the guardian ad litem is not required to recommend to the court that the child's wishes be followed if they are not in the child's best interest. In representing the child's best interest the guardian ad litem has a multitude of duties both in preparation for any hearings, participation in the hearings and in monitoring the ultimate disposition. In performing these various tasks the guardian ad litem of a child in a deprivation case in juvenile court performs one of the most unique and valuable services to the court and to a client that our system of representation allows.

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Notes

[1]The one glaring dissimilarity is in regard to the guardians role in filing a separate termination of parental rights action.

[2]*Harper v. Ballensinger,* 226 Ga. 828 (1970); *In re J.C.,* 242 Ga. 737 (1978).

[3]A guardian ad litem may also be required in certain cases in other courts such as paternity actions, name changes and settlement of claims. Cases involving these issues are relied upon herein since the basic jurisprudential underpinnings are the same.

[4]In a proceeding for terminating parental rights, the court shall appoint an attorney to represent the child as his counsel and may appoint a separate guardian ad litem or a guardian ad litem who may be the same person as his counsel. O.C.G.A. §15-11-85(a).

[5]O.C.G.A. §15-11-114 and Uniform Juvenile Court Rule 23.2.

[6]O.C.G.A. §15-11-55.

[7]*McBurrough v. DHR,* 150 Ga. App. 130 (1979). 1976 Op. Attorney General No. 76-131.

[8]*K.E.S. v. State,* 134 Ga. App. 843 (1975); *In re W.N.F.,* 180 Ga. App. 397 (1986).

[9]O.C.G.A. §15-11-6.

[10]New Hampshire revised statutes annotated §458:17-a; Wisconsin statues annotated §767.045.

[11]O.C.G.A. §15-11-56.

[12]42 U.S.C.A. § 5106a(b)(6).

[13]§415.508 Florida Statutes.

[14]§61.401 Florida Statutes.

[15]*DHR v. Coskey,* 599 So.2d 153 (Fla. App. 1992); *Brevard County v. DHR,* 589 So.2d 398 (Fla. App. 1991); and *Brevard County v. Lanford,* 588 So.2d 669 (Fla. App. 1991).

[16]358 N.W.2d 86 (Minn. App. 1984).

[17]*In re A.N.S.,* 208 Ga. App. 328 (1993); *In re M.L.G.,* 170 Ga. App. 642 (1984).

[18]*Stanley v. Fairfax County DSS,* 405 S.E.2d 621 (Va. 1991).

[19]*Norris v. Spencer,* 568 So.2d 1316 (Fla. App. 1990); *Stanley v. Fairfax County DSS,* cited *supra.*

[20]*In the Interest of V.F.,* 490 N.W.2d 87 (Iowa App. 1992).

[21]*B.H. v. Murphy,* 984 F.2d 196 (7th Circ. 1993).

[22]182 Ga. App. 721 (1987).

[23]187 Ga. App. 443 (1988).

[24]*In re A.L.,* 492 N.W.2d 198 (Iowa App. 1992).

[25]*In re A.H.,* 689 S.W.2d 771 (Mo. App. 1985).

[26]*Shienvold v. Habie,* 622 So.2d 538 (Fla. App. 1993).

[27]*In the Matter of D.A.L.,* 1991 Minn. App. LEXIS 879.

[28]*In re M.C.P.,* 768 P.2d 1253 (Colo. App. 1988).

[29]*In re J.W.F. v. Schoolcraft,* 763 P.2d 1217 (Utah App. 1988).

[30]*In re Kersey,* 1991 Ohio App. LEXIS 1776.

[31]*John L. v. Adams,* 969 F.2d 228 (Tenn. 1992).

[32]O.C.G.A. §15-11-1.

[33]O.C.G.A. §15-11-41.

[34]It has been held that a CASA (Court Appointed Special Advocate) does not represent the child, even vicariously, and is strictly an aid to the court. *In re D.D.P.,* 819 P.2d 1212 (Kan. 1991).

[35]*Handling Child Custody, Adoption and Protection Cases,* by Ann M. Haralambie (ABA 1987) §13.26.

[36]*Vermilyea v. DHR,* 155 Ga. App. 746 (1980); *In re J.C.,* 242 Ga. 737 (1978).

[37]*Crosby v. Crosby,* _____ N.E.2d _____ (Ohio App. 1993).

[38]560 P.2d 382 (Alaska 1977).

[39]*Supra,* n. 16.

[40]225 N.W.2d 501 (Wisc. 1975).

[41]783 P.2d 615 (Wash. App. 1989).

[42]*Chalupa v. Chalupa,* 371 N.W.2d 706 (Neb. 1985); *Korten v. Haller* unpublished opinion (Neb. App. 1992).

[43]*In re D.B.,* 587 A.2d 966 (Vt. 1991); *J.W.F. v. Schoolcraft* cited *supra.*

[44]*Tindell v. Rogosheske,* 428 N.W.2d 387 (Minn. 1988).

[45]*Kurzawa v. Mueller,* 732 F.2d 1456 (6th Circ. 1984).

[46]864 S.W.2d 376 (Mo. App. E.D. 1993).

[47]484 U.S. 292 (1988).

[48]806 P.2d 40 (N.M. 1991).

[49]42 Ga. App. 517 (1931).

[50]Ohio R.C., 2151.414.

[51]*In re D.A.H.,* 822 P.2d 640 (Kan. App. 1991).

[52]O.C.G.A. §15-11-41 provides that the citizens review panel in considering there unification plan can make a recommendation to the guardian ad litem of the child that a termination action be filed. The dispositional orders in deprived cases in the Gwinnett Juvenile Court specifically require the guardian ad litem to be notified of the terms of the case plan. They have the ability to seek modifications of the plan, including orders for re-transfer of custody under O.C.G.A. §15-11-34. They also have the discretion to participate in the formulation of an appropriate case plan.

[53]*Supra,* n. 38.

[54]*Holley v. Adams,* 544 S.W.2d 367 (Texas 1976).

[55]*Turner v. Lutz,* 685 S.W.2d 356 (Texas App. 3 Dist. 1984).

[56]*In the Matter of K.M.,* 816 P.2d 71 (Wash. App. 1991).

[57]*In re J.C.,* 242 Ga. 737 (1978).

[58]*In re J.C.,* cited *supra; Westmoreland v. Westmoreland,* 241 Ga. 552 (1978); *McNabb v. Carver,* 240 Ga. 526 (1978); *Anderson v. Anderson,* 238 Ga. 631 (1977).

[59]554 A.2d 1284 (N.H. 1988).

[60]*Provencal v. Provencal,* 451 A.2d 374 (N.H. 1982).

[61]*Miller v. Clark,* 356 P.2d 965 (Colo. 1960).

[62]*Collar v. State,* 206 Ga. App. 448 (1992); *Dover v. State,* 250 Ga. 209 (1982); *Sosebee v. State,* 190 Ga. App. 746 (1989). The converse of this rule is that the guardian ad litem must seek the permission of counsel for other parties, such as the parents, before contacting them or interviewing them.

[63]O.C.G.A. § 24-3-16.

[64]*Atwell v. State,* 204 Ga. App. 187 (1992), *Ortiz v. State,* 188 Ga. App. 532 (1988).

[65]*In re M.S.,* 178 Ga. App. 380 (1986).

[66]*Amau v. Amau,* 207 Ga. App. 696 (1993); *Eason v. State,* 260 Ga. App. 445 (1990); *Osgood v. Dent,* 160 Ga. App. 406 (1983).

[67]*Supra,* n. 38.

[68]148 Ga. App. 815 (1979).

[69]Cf. to *In re J.S.C.,* cited *supra.*

[70]*Supra,* n. 46

[71]*John O. v. Jane O.,* 601 A.2d 149 (Md. App. 1992).

[72]Hawaii Child Protective Act, 1983 Hawaii session laws 587; Arizona State Bar Committee on Rules and Professional Conduct, opinion No. 86-13.

[73]Jeffries McGough's Georgia Juvenile Practice and Procedure, §4-14.

[74]*Boyle's case,* 611 A.2d 618 (N.H. 1992).

[75]*State v. R.L.P.,* 772 P.2d 1054 (Wyo. 1989).

[76]*In the Matter of the Guardianship of Tamara L.P.,* 503 N.W.2d 333 (Wisc. App. 1993).

[77]*Supra,* n. 16.

[78]O.C.G.A. §15-11-56(b).

[79]O.C.G.A. §15-11-56(a).

[80]576 A.2d 1221 (R.I. 1990).

[81]O.C.G.A. §16-10-97; and see *Moon v. State,* 199 Ga. App. 94 (1991).

References

Haralambie, A., *Handling Child Custody, Abuse and Adoption Cases,* (ABA Family Law Series 1987).

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Appendix I

In the Juvenile Court of Gwinnett County
State of Georgia

In Re: _____ JUVENILE COURT DOCKET NO. _____

ORDER

By agreeing to serve as guardian ad litem in the above styled case, the court is demonstrating a trust in your ability to work steadfastly and impartially toward determining the best interest of the child or children involved. Everyone concerned in the case should be motivated toward resolving this issue with the minimum of disruption and trauma to the child.

The role of the guardian ad litem is to arrive at an independent determination of what is best for the child. In arriving at this determination, the guardian ad litem should utilize all the resources provided by the court but also avail themselves of personal and separate resources. The final recommendation should be based upon observation combined with input from other sources. The trust accorded to you includes confidence in your ability to properly perform your function without unduly straining the economic resources available for your reimbursement.

The following constitute guidelines for properly performing your duties as a guardian ad litem:

Read the court file and sign the order accepting the appointment as guardian ad litem.

Personally interview the children, the parents (after receiving permission from their attorney, if any) and the custodian of the child.

Interview each child privately.

Include at least one home visit with advance notice to each home being considered.

Interview other people having contact with or knowledge of the child such as school personnel, counselors and juvenile court personnel.

Contact any references used by the parents.

Exchange information with other professionals involved in the case such as psychologists and social workers.

Prepare a report for submission to the court and all interested parties.

Attend the hearing and make use of your powers to cross-examine witnesses, subpoena witnesses and offer testimony.

Be prepared to offer to the court a recommendation on the advisability of the child testifying or conferring with the court in chambers.

Be prepared to offer an oral recommendation to the court at the close of proceedings in the form of an argument to which counsel for other parties might respond.

Should the outcome be adverse to what you believe is in the best interest of the child, determine whether you as the guardian ad Litem should appeal the decision.

In making a determination in a custody case the following factors should be taken into account:

The love, affection and other emotional ties existing between the proposed custodians and the child.

Assessment of the physical and mental health of the child and of the proposed custodians.

The amount of time the proposed custodians will have available to devote to the child and their quality of their interaction with the child.

The background of the proposed custodians.

Home situations that would be created for the child by each proposed custodian.

Proposed plans of the custodian for the care, supervision and education of the child.

Basic motivation for each party desiring custody.

The child's wishes taking into account the child's age, emotional maturity and understanding of the proceedings.

The history or prior relationships of the proposed custodians with the child.

An attitude toward visitation by the non-custodial parents created by the proposed custodial parent.

The recommendations of social workers, counselors, psychiatrists or other professionals.

The existing statutory and case law as applied to the specific facts in your case.

In deprivation and termination cases many of the above factors would be taken into account. However, of more immediate concern should be the following:

Expert evidence regarding the alleged neglect or abuse.

Protecting the child from multiple intrusive physical, psychological or legal examinations.

Proposed steps toward reunification suggested by the parents or DFCS including the existence of adequate supervision and safety plans.

Conferring with the District Attorney's Office regarding any potential or actual criminal prosecution in the case.

Making an adequate review and an appropriate recommendation to the court as to the placement of the child either with the parents, relatives, or with institutional resources available to DFCS.

If your recommendation does involve removal from the home, recommendations for those factors that should be included in the order governing any retransfer of custody to the parents including any restrictions on visitation.

Recommendations concerning appropriate child support.

SO ORDERED this ____ day of _____, 199___.

_____

Robert V. Rodatus, Presiding Judge
Juvenile Court of Gwinnett County

I hereby accept the appointment as guardian ad litem in the above styled action.

_____

Guardian ad Litem/Attorney

Appendix II

In the Juvenile Court of Gwinnett County
State of Georgia

In Re:_____ JUVENILE COURT DOCKET NO.

_____

ORDER

The court hereby grants the request for an examination of the child in regard to allegations of physical and/or sexual abuse. The purpose of this order is to provide for one thorough examination by an independent source and to prevent subsequent multiple examinations of the child.

The parties are expressly prohibited from subjecting the child to any other physical or psychological examinations without the express permission of the court after notification to the other party and the guardian ad litem.

The minor child shall be taken to the Scottish Rite Child Advocacy Center at Scottish Rite Medical Center for examination and evaluation. The child will be taken there by _____.

Said testing and evaluation will be completed as expeditiously as possible. The interview with the child shall be recorded on video tape. Copies of any written reports and video tapes prepared in connection with this examination shall be supplied to counsel for each party and the court appointed guardian ad litem.

The person directed to transport the child to this examination shall be responsible for contacting the advocacy center and arranging for the examination. No other party shall directly or indirectly contact the advocacy center or participate in the examination in any way. The parents in the case, other than a parent who was directed to transport the child to the examination, are expressly prohibited from appearing at the advocacy center at the time of the examination or any other time.

Failure to abide by the terms of this order may result in a finding of contempt and the imposition of fines and/or incarceration for a period of up to twenty (20) days.

SO ORDERED this ___ day of _____, 199___.

_____

Robert V. Rodatus, Presiding Judge
Juvenile Court of Gwinnett County