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Legal title makes a difference when representing children

Even the most seasoned practitioners need an occasional refresher on the subtle differences between commonly used appointments in family law. In Illinois, a child's interests may be represented in court through one of three professionals: a guardian ad litem, attorney for the child or a child's representative.

A guardian ad litem, attorney for the child and a child's representative play very different roles in the divorce process. All roles are important, and one may be more appropriate than others depending on that family's situation.

On its own motion, motion of a party or by agreement, the court may appoint a guardian ad litem, attorney for the child or child's representative to represent the children in a domestic relations matter.

To qualify for any of these roles in Illinois, one must be a licensed attorney and have completed training in various issues involved in family law matters. The training will often provide the attorney with additional guidance in the areas of substance abuse and child development as well as various forms of alternative dispute resolution.

Section 506 of the Illinois Marriage and Dissolution of Marriage Act defines and controls the parameters of all three appointments.

In 2004, the Illinois Supreme Court declared certain aspects of Section 506 unconstitutional, as applied. *In re Marriage of De Bates*, 212 Ill.2d 489 (2004). Thereafter, the statute was substantially rewritten and now clearly defines each appointment.

Guardian ad litem

A GAL is utilized by the court to investigate the family. He or she may interview different family members and ascertain the truth of what is really taking place within the family dynamic.

The GAL will submit a report recommending an outcome that he or she believes to be in the best interests of the children. The report may recommend that the court implement a certain parenting schedule or determine who should make parenting decisions.

The GAL may be called as a witness and cross-examined by the attorneys. Nothing the GAL learns or discusses with the parties can be claimed as privileged. Sometimes the court may direct the GAL to file pleadings when necessary.

The GAL also may be given subpoena power to investigate certain issues. The GAL is not an advocate for either party and is solely looking out for the best interests of the children. The GAL is often called the eyes and ears of the court.

Attorney for the child

In contrast to the GAL, an attorney for the child directly represents the children and provides them independent legal counsel. The AFC owes the child the same duties of loyalty, confidentiality and competency as required in any attorney-client relationship.

The AFC may file pleadings on the child's behalf. Generally, an AFC is appointed in cases where the children are older and can clearly understand and communicate what is going on within the family.

In Illinois, a child's interests may be represented in court through one of three professionals: a guardian ad litem, attorney for the child or a child's representative.

It is important for the child to be able to clearly articulate a preference as to his or her living situation, and other matters, for the attorney to have clear direction in which he or she can advocate.

Like within any attorney client relationship, the attorney must



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weigh the child's age, level of maturity and intelligence when discerning the amount of guidance and direction the attorney will take from the child.

Child's representative

A child's representative may form his or her own opinion about what is in the best interests of the child. The CR may only offer evidence-based legal arguments and thus may not make opinions or recommendations to the court.

A CR can investigate the facts as pleaded by the parties; however, the child's representative cannot be called to testify. A CR has the investigation powers of the GAL and some of the confidentiality available to the attorney for the child.

The biggest distinction is the child's representative will advo-

cate his or her position as to which side he or she intends to advocate for in a pretrial memorandum, which will be given to all attorneys of record.

The position circulated in the memorandum will be considered evidence before the court despite the fact that the CR may not be cross-examined as to that position or the basis for it. Similarly, the child's representative's entire work product is privileged.

Under the statute, the CR is charged with the duty to encourage the use of alternative dispute resolution. The child's representative should be actively pursuing ways to bring the parties to a settlement agreement.

The court may consider the child's representative's position during settlement conferences but may not otherwise receive the pretrial memorandum that was sent to the attorneys.

Under Section 506, all three appointments must file detailed invoices with the court every 90 days. The courts will then review and approve the bills. The court may order that the fees of the guardian ad litem, attorney for the child or child's representative be split between the parties or paid out of the marital estate. If the parties cannot afford to pay these fees, then the court may appoint someone pro bono.

Any practitioner involved in a domestic relations matter must carefully consider each of these roles prior to obtaining such an appointment. Like any matter, nothing is clear cut, and there are numerous instances when children may have an AFC and a GAL.

When thinking things through, we all know situations where children can clearly articulate their requests for their future, yet it is not clear to the court whether the child's request is in his or her best interests. In such a circumstance, the child may have to have both an AFC and a GAL.