

GAL TRAINING FALL 2021
ETHICAL CONSIDERATIONS FOR THE ATTORNEY APPOINTED PER RULE 900

DISCUSSION POINTS

I. THE STATUTE

The Illinois Marriage and Dissolution of Marriage Act provides for representation of a child in 750 ILCS 5/506 (a). There are three potential appointments by the Act; however, this seminar focuses upon 506(a)(2) – Guardian Ad Litem (GAL).

The statute requires the GAL to

- **Testify or submit a written report** to the court regarding his or her recommendations in accordance with the best interest of the child;
- The report shall be made available to all parties.
- The GAL may be called as a **witness** for purposes of cross-examination regarding the report or recommendations.
- The GAL shall investigate the facts of the case and interview the child and the parties

II. SUPREME COURT RULES

Supreme Court Rule 900 applies to IMDMA, UCCJEA, Juvenile Court Act (abuse and neglect), Parentage Act, Domestic Violence Act, 112A of the Code of Criminal Procedure, and guardianship matters involving minors under Article XI of the Probate Act.

Supreme Court Rule 907 (a) requires every child representative, attorney for the child and guardian ad litem **shall adhere to all ethical rules governing attorneys in professional practice**, be mindful of any conflicts in the representation of children and take appropriate action to address such conflicts.

Note, what Rule 907 requires of **all three appointments**:

- right to interview without limitation or impediment
- upon appointment the court **shall** enter an order to allow access to the child and relevant documents
- take whatever reasonable steps are necessary to obtain all information pertaining to issues affecting the child including interviewing family members and others possessing special knowledge of the child's circumstances
- take whatever steps are necessary to determine what services the family needs to address custody or allocation of parental responsibilities dispute, make appropriate recommendations to the parties, and **seek appropriate relief in court, if required, in order to serve the best interest of the child.***
- Shall determine whether a settlement of the dispute can be achieved by agreement, and to the extent feasible attempt to resolve such dispute by agreement that serves the best interest of the child.

*Note, the committee comments to paragraph (d) addressed advocacy.

III. NICHOLS V FAHRENKAMP, 2019 IL 123990

In 2004 Nichols at age 11 received \$600,000 settlement for auto accident injuries she received. The court appointed her mother as her guardian to administer her estate. The Court also in an order "... hereby appoint David Fahrenkamp as guardian ad Litem for the minor".

In 2012 Nichols sued her mother claiming that she used sums of the settlement for her own benefit. She prevailed on some of the claims. Nichols then sued Fahrenkamp for malpractice because he approved the expenditures that were not in her best interest.

The Supreme Court reviewed the history of the role of a Guardian Ad Litem ultimately finding under the functional test and cases in the twenty-first century treat the duties of the GAL as a reporter or a witness and not as an advocate. **Consequently, guardian *ad litem* who submit recommendations to the court on a child's best interest are protected by quasi-judicial immunity.**

IV. WHAT ARE ETHICAL REQUIREMENTS AND PITFALLS TO AVOID

1. YOU ARE STILL AN ATTORNEY AND BOUND BY THE SUPREME COURT OF ILLINOIS RULES OF PROFESSIONAL CONDUCT

Indeed the preamble is not directive but instructive, it is wise to re-read from the perspective that you are an attorney for the best interest of the child.

2. Clearly you report to the court and testify including conversations with the minor. You do not have a client in the traditional sense for all the Rules of Professional Conduct. Consequently, many rules concerning confidentiality and abiding by client's lawful direction do not apply. You must be aware of conflicts of interest.

3. However, Rules I respectfully submit you should not lose sight of even in your role as GAL. Although some of these rules are not "on point" it may be helpful for you in guiding your actions.

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.5 Fees in terms of reasonableness
- Rule 1.16 in terms of declining the appointment
- Rule 3.3 Candor toward the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel

4. You are the "eyes and ears of the court" make sure you know what that means. One of the major problems for Fahrenkamp was that the appointment was general. Do not

hesitate to request not only a specific order from the Court upon appointment but also request upon closure of the case that you are released from your duties. Although you have no powers once the case is disposed of you do not want to be put in the position of a “rouge” GAL.