

REPRESENTING CHILDREN IN CUSTODY CASES

(Best Interests Attorney vs Advocate Attorney)

By: Keith N. Schiszik

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Five year old Chad needs: (1) parents who put his needs ahead of their own. He also needs: (2) a lawyer. He has none of these. We are not able to provide him with the first, but we will furnish him with the second.

Judge Roslyn Bell in Levitt y Levitt, 556 A2d 1162 (1989).

BUT

A poor or inappropriate guardian ad litem can turn a relatively simple case into a disaster. Likewise, a good guardian ad litem can turn a potential nightmare into an amicable situation with positive ramifications reaching way beyond the courtroom.

Judge Daniel R. Moeser
Circuit Court for Dane County, WI ¹

Reasons for Appointment of Attorney for Child

- Limited purpose of waiving or asserting psychologist/patient privilege. (See Nagle y Hooks, 460 A2d 49, (1983)).
- Neither parent seems to be fit and/or a third party is seeking custody.
- Parties are unable to focus on the best interests of their child.

¹Moeser, 'The Role of the Guardian Ad Litem As Viewed by the Judiciary', Advocacy for Children 7 (State Bar of Wisconsin, ATS-CLE-Division, 1984).

Various Roles of the Attorney

The attorney for the child can play one of three roles on behalf of the child. It is therefore very important to determine from the Judge or Master who made the appointment which role they envisioned at the time of the appointment. Also ensure that the Court requires each party to make a reasonable payment into each attorney's trust account to partially cover your initial fee. (See suggested Orders, attached). Also, do not hesitate to keep a close eye on your bill during litigation and seek periodic distributions and/or additional payments into trust. This is fair to you and to the parents, rather than submit a large bill at the end of the case.

1. *Nagle v Hooks* role. (Generally a sub-part of either BIA or Advocate role)

- Attorney decides whether or not to waive psychologist/patient privilege.
- Waiver of privilege may interfere with on-going therapy. Continued therapy may outweigh the potential benefit of the professional's opinion at trial, requiring asserting the privilege, rather than its waiver.
- Waiving privilege may also make the mental health testimony public record which could come back years later to haunt the child as an adult.
- You should interview the child and the mental health provider, make up your mind, and file your waiver or notify opposing parties and the Court that you will not waive. Then submit your fee petition (2 hours, maximum, I would think).

2. **Best Interests**

Attorney or

3. **Child Advocate**
Attorney

At first blush, these roles seem very similar. On close analysis however, they are very, very different and a misunderstanding can result in serious ethical problems relating to "zealous representation of your client".

- As *Best Interests Attorney*, you serve as the child's "guardian" and you should therefore present your own point of view to the Court, indicating that it is the position which you are taking on behalf of your client. You should also inform the Court of your client's position, if they have one. YOUR JOB IS TO ASK THE COURT TO DO WHAT YOU THINK IS BEST FOR YOUR CLIENT, EVEN IF OUR CLIENT DISAGREES WITH YOUR POSITION.

- There is no attorney/client privilege in this role.

-WHEREAS,

- As *Child Advocate Attorney*, it is your job to present your client's position to the Court as their "zealous advocate", regardless of your personal position. Generally, the older the client, the more heavily the Court may lean toward appointing an Advocate rather than a Best Interests Attorney. This is why you must make it clear that your role must be clearly set forth in the Order of appointment.

In every case,

- You (for once in your professional life), truly represent the only innocent party in a case. Your involvement therefore makes you a very important person, to whom the litigants, Counsel, and the Court will turn for an unbiased position. You can and should try to exercise your power over the parties by attempting to bring about a reasonable settlement without trial, if possible.

MEDIATE ALL PRELIMINARY MATTERS, IF POSSIBLE (Visitation, support)

- Push Assignment Office and parties for a "Speedy Trial" for your kid.... Very Important! Bifurcate other issues to ensure speedy trial.

- Actively participate in all phases of the custody portion of the litigation, including

- Depositions and other discovery
- Settlement negotiations
- Witness identification and interviews

- Retaining mental health input if necessary
- Fully participating at trial

- ***DO NOT PREPARE A REPORT OF ANY TYPE!*** (You might then be called as a witness to testify concerning your "recommendations", findings", investigative techniques, etc. This would be awkward, in light of the fact that you are supposed to be serving as an *attorney*.....

- You are an attorney representing a child. Therefore, you may not speak to the parents without their attorneys' permission, and the other attorneys may not speak to your client without your permission. **LET EVERYONE KNOW THIS RIGHT AWAY.**

HOW TO DO IT:

**Initial Investigation By Best Interest Attorney
or Child Advocate Attorney**

- Review Court file
- Get copies of relevant correspondence, informal discovery, positions of parties, etc., from the other attorneys.
- Try to get waivers from parents (after approval by their attorneys) regarding mental health involvement, etc.
- Get permission from attorneys to talk to their clients.
- Inform attorney that they do not have permission to talk to your client because of the harm they could do to the child. (Problems if a party is Pro Se - no suggestions on that one....)
- Review all other available investigative materials
 - DSS reports
 - Court mental hygiene evaluations
 - Therapy records of parents and child
- Meet with both parents
 - Joint meeting first (personal style); then individual meetings.
 - Advise them that privilege DOES NOT APPLY to your discussions with them
 - Get list of potential witnesses from parents
- Contact potential witnesses from lists, plus others who may be able to provide additional information.
- If there is mental health involvement, contact the provider and explain your role, etc.

- Meet with your client
 - If there is more than one child, start the interview with them together. Explain who you are, why you are involved. Explain whether or not privilege will apply and explain in age-appropriate terms what that means. Also explain that what they want, and even what you ask the Court to do, is not necessarily what the Judge may decide. However, it is important that the Judge know as much about the child as possible, so that the Judge can help in the best possible way, etc.

A good example of a sensitive way to approach children at the initial interview is found in Modern Child Custody Practice, Jeff Atkinson, Kluwer Law Book Publishers, Inc., (1986) at page 711.

"Some children whose parents are getting divorced want to talk about who they want to live with, and other children don't want to talk about it. Either way is ok. Children who don't want to talk about it usually have good reasons - like that they love both of their parents; they could be ok with either parent; and they don't want to hurt anyone's feelings. My job is to try to help you. If I can help you by talking about your feelings, I want to help you that way. If I can help you by not asking you very many questions, and trying to keep you out of this as much as possible, I'll try to help you that way."

- Keep the interview low-key, friendly, personal
- Explain how your role relates to disclosing child's preference, if any.
- Generally, do not ask "who do you want to live with?" because that is too much responsibility for a younger child and too much power for an older one (unless you are appointed as advocate, in which case you will probably have to report your client's position to the Court).
- Ask the child at the end of the interview if there is anything they want to ask or tell you. If they want to voice a preference or a concern, it will generally come out at this time.

- Always give the child your card and encourage them to call you any time they would like to talk.
- Keep the child informed of up-coming Court actions, so that they know what is or is not expected of them
- You may want to contact the child's teacher or Guidance Counselor, to let them know of your involvement in the child's life and that you will TRY to keep them out of Court and in the classroom. (they REALLY hate being in court).
- If the child would benefit from Counseling, strongly recommend it to the parents' attorneys.
- Ensure that the parents have completed the "Parenting classes" offered through the Circuit Courts.
- If either side requests a mental health evaluation, see if you can get them to agree on one evaluation, rather than subjecting the child to numerous testing/ evaluating sessions.

ALWAYS EXPLORE POSSIBILITIES OF SETTLING THE CASE.

ALWAYS include in Orders the requirement that they mediate future disputes.

ALWAYS give consideration to using a Parent Coordinator to mediate from a mental health standpoint, now and especially in the future.

PARTICIPATION AT TRIAL

- Try to get the Court to do the custody, visitation, support part of the trial first, so you can leave and save everyone money. You do not need to be there when they fight over property.

- Fully participate in all phases of the trial relating to custody, visitation and support (not property, etc).

"Nominal representation that fails to ensure the child is a party at trial is insufficient and constitutes a breach of your professional duty"

Wisconsin Supreme Court - citation omitted.

- Make sure the Assignment Office has you listed as attorney for the child, so that you get all Court notices, etc.

- Participate at trial to bring out all pertinent facts on cross examination.

- Call witnesses of your own to present a complete picture to the Court. You can call people whom the parents may hesitate to call because of "bad" things they might say about each parent. (Or because of incompetent, uncaring parentallawyers)

- **KEEP IN MIND THAT YOUR PARTICIPATION WILL HAVE AN IMPACT WELL BEYOND THE TRIAL.** There is generally no benefit to an aggressive cross-examination (except for the personal fun of it) on relatively small points. However, it could very well do permanent harm to a parent's relationship to the child.....Keep it as low-key and factual as possible; try to keep it from becoming a personal attack.

- Try to keep the child off the stand and keep the parents and attorneys out of Chambers during the interview with the child.

- Suggest areas of questions for the Judge to put to the child in Chambers and help the Judge in his/her approach to the child.

- Write to or meet with the child at the end of the case to "close the case"- courteous, and makes a lasting impression on the child that you cared.....

Helpful materials:

The Child's Attorney, Ann M. Haralambie, Esq., American Bar Association, 2003.

Representing the Child Client, Soder, et.al., Matthew Bender and Company, New York.

Child Custody Law and Practice, McCahey, et.al, Matthew Bender and Company, New York.

Psychological Experts in Divorce, Personal Injury, and Other Civil Actions, 5th ed., Ackerman and Kane, Aspen Law Publishers, Inc., Frederick, MD 2011.

Attorneys Representing Children, The Children of Separation and Divorce Center, Columbia, MD (Now known as National Family Resiliency Center)

Maryland Bar Journal, "Children and the Law", Vol XLV Number 1, Spring, 2012