

Q & A*

[Sample legal questions received in the state office and advice given by Guardian ad Litem Legal Staff. Legal minds can differ so if you have a question, comment, or disagree with anything here, we'd like to hear from you! And remember, a slight change in the facts can yield a major change in the advice.]

Question 1: What, if anything, can be done to become involved in an appeal when we (GAL) were not initially involved in the appeal?

Advice: It depends upon the stage of the appeal and the reason we were not involved. Under the statutes, we (the GAL—as representative of the child) are as much a party to the appeal as DSS and the parent(s). It is ESSENTIAL that the GAL be involved in the appeal in some capacity, otherwise we lose the ability to take part in oral arguments and appeal unfavorable decisions, some of which may have far-reaching effects on cases statewide, not to mention our ability to zealously represent the best interests of the child. There is nothing worse than seeing an abuse, neglect, dependency, or termination of parental rights case go up on appeal and result in a decision which states, after the caption, the names of the parties' representatives without any mention of a guardian ad litem or guardian ad litem attorney. Unfortunately, this happens frequently.

Until the expiration of the date for filing a brief or filing a motion to get an extension of time on filing a brief, the GAL attorney has the option of either signing on

to the DSS brief or doing a separate brief. If time for filing the brief or filing a motion for an extension of time has passed, we will not be able to be involved in the appeal unless we were not involved because we had no knowledge of the appeal due to improper service of notice. If we were not properly served, we can attempt to rectify this by filing a motion requesting time to file a brief or to sign on to the DSS brief citing the lack of notice as reason to allow the motion.

Signing on to the DSS brief is only appropriate if we agree 100% with the DSS position. If we agree in part but have additional or different arguments to support our position, we can state this in a separate brief, setting out our additional arguments without repeating the DSS arguments we agree with. When our position is essentially the same as DSS, another option is for the DSS attorney and the GAL attorney to join in one brief but divide the work. However, separate briefs provide the advantage of having 35 extra pages to argue the same or a similar position.

Settling the record on appeal is an extremely important stage of the appeal for the GAL attorney to be involved in, because appeals can be won or lost based on what is contained in the record. The GAL, as the representative of a party, can file objections

* By Kella Hatcher, GAL Associate Counsel. This column used to appear in the GAL Court Report Newsletter and will now be electronically distributed separately from that newsletter. Legal questions received in the state office which do not have a wide application or which have been addressed in previous newsletters are not addressed in this column. The questions addressed in this newsletter represent a mere fraction of those received.

to the proposed record on appeal and should participate in any conferences to settle the record on appeal.

The bottom line is, the GAL must participate in the appeal one way or another.

Question 2: How long do we have to retain documents from an appeal?

Advice: The record on appeal and any briefs or other motions submitted to the appellate court is public record and is kept at the Court of Appeals in any event. Once the appeal is over and all deadlines have expired for further appellate action in the matter, such documents should only be kept if they will be useful beyond the appeal itself. Any papers that can be characterized as information obtained or created by the volunteer should be kept in that child’s case file in the GAL office until the child has reached age 21. Any papers that can be characterized as attorney work product (research, notes, etc. . .) belongs to the attorney and the attorney may determine what to do with such papers.

Question 3: When a child is placed in DSS custody as a result of a dispositional alternative in a delinquency proceeding, may the judge appoint a GAL?

Advice: There is nothing in the statutes providing authority for a GAL to be appointed in such circumstances. If the child truly needs a GAL, it is often a situation where an abuse, neglect, or dependency petition is warranted. If so, DSS should file such a petition at which point it would be appropriate for a program GAL to be appointed.

The judge may, on his or her own authority, appoint a GAL knowing there is

no statutory provision expressly providing the authority for such appointment but it should not be a program GAL. The phrase “program GAL” is used intentionally here because an argument can be made that the GAL who is appointed without a petition for abuse, neglect or dependency cannot be a “program GAL” – one who works with and for the GAL program – even though one may not be able to argue with the judge’s authority to appoint a non-program GAL.

Support for this argument can be found in 7B-1200 which expressly states that the program is to provide services to “abused, neglected, or dependent juveniles,” as well as 7B-601 which talks about GAL program representation only in the context of “abused, neglected, and dependent” juveniles. It can be argued that unless and until a petition for abuse, neglect, or dependency is filed, GALs from the Guardian ad Litem Program cannot be appointed, as they have no authority and no training to act in other cases.

It is also important to note that an order of custody to DSS that arises in criminal juvenile court without a petition for abuse, neglect, or dependency will only be in effect as long as the court has jurisdiction over the criminal case. For example, if a child is on probation, the probationary period ends, and the case is over, the order giving DSS custody will no longer be effective at the close of the case.

This issue brings to light a gap in our juvenile system and in the Juvenile Code – the failure to address the overlap between civil juvenile cases and criminal juvenile cases. This issue is being discussed and may well see legislative reform in the near future.

Question 4: What can be done about the fact that an order was never reduced to

writing and signed prior to the judge who rendered the order leaving the bench?

Advice: Rule 63 of the Rules of Civil Procedure allows another judge to act for a judge who has left the bench. This rule can be used in order to get another judge to sign an order and the specific language of the rule should be followed to the letter. In addition, there is a new appellate case, *In re Pittman*, COA01-991, filed June 18 2002, which dealt with a similar issue and may provide some support for finalizing the order neglected by the departing judge.

Question 5: Can the GAL program pay or help to pay the travel expenses or other expenses associated with getting an essential witness to testify at a hearing?

Advice: Usually. The attorney advocate should draft an order for the juvenile court judge to sign to authorize the AOC to pay the fees or expenses for the witness. If the witness will be called by DSS, it may be appropriate for the order to specify that DSS will pay half of the expenses and the AOC will pay the other half. When the judge signs this order, the clerk of court will pay the fee and submit the fee receipt with the court order for reimbursement to the AOC (currently, Shirley Halpin's office). The money used by the AOC to pay these fees should not come out of the GAL budget but will most likely be paid from the AOC witness program.

Question 6: If a parent signs a relinquishment of parental rights, then revokes the relinquishment within the permissible 7 day period, then subsequent to that signs a second relinquishment, does the

parent again have 7 days within which to revoke the relinquishment?

Advice: No. If the second relinquishment is a mirror image of the first (no terms have changed), then the parent does not have the ability to revoke the second relinquishment. This is stated specifically in G.S. 48-3-706(d): "A second relinquishment for placement with the same adoptive parent selected by the agency and agreed upon by the person executing the relinquishment, or a second general relinquishment for placement by the agency with any adoptive parent selected by the agency, is irrevocable."

Question 7: What is the status of the law in North Carolina regarding the duty of members of the Clergy to report child abuse?

Advice: The duty to report suspected child abuse is broadly placed upon every person and institution as articulated in N.C.G.S. § 7B-301. However, members of the clergy often have prohibitions against releasing information revealed to them in confidence. The only statutorily proscribed guidelines for clergy's inability to release confidential information pertains to the competency of clergy to testify at trial. N.C.G.S. § 8-53.2. (Reprinted below). Basically, a member of the clergy is unable to testify about information he obtained while talking with someone who was seeking the clergy member's spiritual counsel.

This provision is not sufficient to release members of the clergy from their obligation to report child abuse. However, they would be unable to testify in court about what information they had obtained. Another problem with getting members of the clergy to report suspected abuse might

be their internal, institutional prohibitions against revealing any confidences. The law is structured appropriately to address this issue, but ensuring that folks are complying might require more education and public awareness.

§ 8-53.2. Communications between clergymen and communicants

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

Question 8: If a parent who does not have custody of a child gets/wins a substantial amount of money, does the child who is in DSS custody have any claims to the money? The parent is in arrears for child support.

Advice: At the very least, some of the money can pay for child support arrears. In addition, it may be possible to collect child support retroactively for times when the parent was either earning too little to be obligated to pay support or when the parent's support obligation was suspended for some reason. Also, it is possible to ask the court to order the parent to make a lump sum payment or monthly payments to cover anticipated future child support obligations if return of the child to the parent is not

anticipated in the near future. All of this is somewhat "outside the box" for those who handle child support, but it can be done. Other than child support obligations, we are not aware of any other claims that the child would have to the parent's windfall.

Question 9: Does DSS have the authority to allow children to visit with family members in another county without conducting a home study first? This is the situation: Child is removed from his home in County A. DSS in County A allows visitation with a family member in County B without conducting or requesting County B to conduct a study or review on the household in County B where the child will be during the visit. The Guardian ad Litem is concerned about the child's safety and well-being during the visits to the family member in County B.

Advice: Assuming that DSS has court-ordered custody of the child, "the court may order DSS to arrange, facilitate, and supervise a visitation plan *expressly approved by the court.*" G.S. 7B-905(c). Since the court is to *approve* a visitation plan, you may advocate in court that DSS be required to conduct a home study or make some other particular investigation of the relatives' home before the court approves visitation with the relatives. In addition, you may ask the court to order that the GAL be fully informed of any changes in visitation, although such changes should be coming through the court for approval in any event. If court approved visitation is not a reality in your district, your GAL attorney advocate can make it a reality by bringing this issue to the attention of the court, and asking the court to inform DSS that visitation must be approved according to statute.

If the visitation is for the purposes of testing out a placement option or transitioning into a placement situation, it is of paramount importance that the DSS in the

county where the relative lives be notified for several reasons. First, a home study must be completed before the relatives' home could be considered for placement. This will ensure the child is being transitioned to a safe home. Second, if the relative placement becomes a preadoptive home or the relative might wish to become the guardian of the child, the knowledge of County B as to the home situation is even more important. In either of these two scenarios, County B could be called upon to monitor the case for County A.

One of the dangers in placing a child in a relative placement is the child's access to seeing their parent while at the relative placement. This same danger may be present during visits. The pertinent statute is G.S. 7B-903 which details the dispositional alternatives for a court after a finding of abuse, neglect, or dependency has been made. In 7B-903(2)(c), the statute clearly prohibits DSS from providing "unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home." Therefore, if the relative home where the visitation is occurring is a place where the child may come in contact with his parent, DSS may not allow that visitation to be unsupervised. Certainly, then, DSS must investigate that home in some fashion to ensure that the child is protected from unsupervised visitation with his parent.

Question 10: Now that we are seeing a number of guardianship or custody situations disrupt after the GAL appointment has been terminated, how can the GAL get back into the case?

Advice: First, it is important to note that even if the court ceases reviewing hearings

in such cases, the court should never terminate jurisdiction. DSS should be motioning such cases back into court for review and if they don't, the GAL can ask to be reappointed and motion the case back in. Section 7B-601 makes it clear that even if a GAL appointment is terminated, any party, as well as the GAL (who by this time is no longer representing a party), may ask that the GAL be reappointed upon a showing of good cause. Thus, your attorney can make a motion asking to be reappointed and once reappointed, the atty will have standing to make any other motions. G.S. 7B-906(b) states that the court cannot refuse to conduct a review hearing if a party requests it. If the motion for review has not yet been made, the atty should make that motion and at the review hearing should ask that the court order DSS back into the case and resume regular review hearings if this has not already been ordered. The tricky part is that the GAL will not want to be in the case unless DSS is in the case so the GAL will have to be zealous about getting the court to order DSS back into the case.

Whenever a judge orders review hearings to cease, the GAL can request that the order also state that if the child's placement disrupts, DSS be required to bring the case back in for review on the next available court date. This would help insure that the court and the GAL resume involvement in the case as early as possible.