

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



PURSUING JUSTICE
IN THE 21ST CENTURY

ETHICAL STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING GUARDIANS AND CHILDREN IN KENTUCKY

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Lexington, Kentucky



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Kentucky Bar Association

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I. INTRODUCTION

Most attorneys in Kentucky are familiar with the representation of an adult client; however, many attorneys are oftentimes in unfamiliar territory when they are appointed as a Guardian ad Litem (GAL) for a minor child. Kentucky attorneys find themselves unsure of the standards they are to follow and what role they are to play. Attorneys also struggle with what defines the attorney-client privilege when the client is a minor child. Is everything confidential? What information can be shared? In October 1999, the Commission on Guardians ad Litem developed a list of GAL responsibilities. This list and the Best Practice Methods, which was developed by the Community Action Workgroup, the Kentucky Court Improvement Project, and the Administrative Office of the Courts (AOC), are currently used in the training offered through the AOC and the Cabinet for Health and Family Services. Even though those mechanisms are currently in place, too few attorneys acting as GALs attend the proper training and learn the responsibilities of being a GAL. This set of proposed standards is meant to be a useful resource to assist in a dialogue between members of the judiciary and the bar concerning standards for Kentucky GALs. It is the Children's Law Center's belief that the adoption of standards will elevate the practice of law on behalf of children and create continuity across the state, allowing judges and lawyers to understand what is expected from the GALs.

A. Definitions (Words to Know)

1. **Child's Attorney:** The attorney represents a child and owes him or her the same duties the attorney would owe an adult. Examples are the duty of loyalty, confidentiality, and competent representation.¹
2. **Best Interests Attorney:** In some states, it is an attorney appointed as a Guardian ad Litem who has a duty to only represent the best interests of the child, regardless of the child's wishes.

¹ American Bar Association, American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, at 1 (1996) available at http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.aucthcheckdam.pdf (last visited Mar. 6, 2011).

3. **Court Appointed Special Advocate (CASA):** A trained non-lawyer volunteer who is appointed by the court to independently investigate dependency, neglect, and abuse cases.² The CASA is to report on his or her recommendations to the Court as to the best interests of the child.³ CASAs can be appointed alongside a GAL, especially when there is a conflict between the child's wishes and what the GAL perceives to be the child's best interests.
4. **Dependent child:** A minor child who is subject to the jurisdiction of the court because he or she was neglected or abused.⁴
5. **Neglected child:** A minor child whose life or health has been found to have been endangered by their parent(s) or person(s) exercising custodial control over the child, or whose parent or person exercising custodial control has not taken the appropriate steps in raising the child. Examples of neglect by a parent or a person exercising custodial control include failing to provide adequate food or education, "placing the child in dangerous or harmful circumstances", or "exposing the child to a...sexually predatory person."⁵
6. **Abused child:** A child who has been found to have been physically, sexually, or emotionally maltreated.⁶
7. **Domestic Violence:** The occurrence of physical or sexual injury by assault or the infliction of fear of such assault between family members or unmarried couples within the same household.⁷

² See generally Court Appointed Special Advocates for Children, *About Us*, (2011) available at http://www.casaforchildren.org/site/c.mtJSJ7MPISe/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm (last visited Mar. 6, 2011).

³ Publication Development Committee Victims of Child Abuse Project, National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases, at 121 (1995), available at <http://www.ncjrs.gov/pdffiles/resguid.pdf> (last visited Mar. 6, 2011).

⁴ *Id.*

⁵ See KRS §600.020(1)(a)-(i). See also Law.com, Parental Neglect, (2011) available at <http://dictionary.law.com/Default.aspx?selected=1446> (last visited Mar. 6, 2011).

⁶ See KRS §600.020(1)(a)-(i).

⁷ KRS §403.720(1).

B. Kentucky's Current Method of Appointment

In Kentucky, the court must appoint an attorney for a child in a mental health proceeding.⁸ In delinquency, dependency, neglect or abuse allegations, a child must be provided counsel.⁹ The courts must also appoint a GAL in termination of parental rights proceedings,¹⁰ adoption proceedings,¹¹ and when a child must defend an action in a civil case.¹² When the child is the victim, a trained GAL or special advocate, if available, shall be appointed by the court.¹³ This latter appointment is not absolutely mandatory, as the statute imposes the requirement only if the representation is "available," thus leaving room for determination by the court. Further, the court has discretion to appoint a "special advocate" in a child victim case, but the statute provides no definition as to who would qualify as a special advocate in these cases.

To be appointed as a GAL in Kentucky, you must first be an attorney.¹⁴ Appointment of a GAL can be done directly by the court or through the motion made by the plaintiff or a friend of the defendant.¹⁵ Under KRS §387.305, the attorney is required to prepare for the case and has the ability to call witnesses and take depositions.¹⁶ Most importantly, the statute clearly states that the attorney representing the child must advocate for the child's best interests.¹⁷

Currently, Kentucky statutes define the type of representation to be given to a child in specific cases. While not every type of case is given a clear definition, some are defined more thoroughly. Below

⁸ See KRS §645.030(2).

⁹ See KRS §610.060(1) and KRS §620.100(1)(a).

¹⁰ KRS §620.100(1)(a).

¹¹ KRS §199.480.

¹² Ky. R.Civ. P. 17.03(2).

¹³ KRS §26A.140.

¹⁴ KRS §387.305(2).

¹⁵ *Id.*

¹⁶ KRS §387.305(3).

¹⁷ KRS §387.305(5).

are descriptions of different cases that require representation to be provided for a child.

C. Termination of Parental Rights

During a voluntary termination of parental rights proceeding, an attorney is appointed for indigent parents who are found to meet the requirements under KRS Chapter 31.¹⁸ In this situation, the attorney is not considered a GAL and the attorney's fee will be paid through the Finance and Administration Cabinet regardless of whether custody is granted to the Cabinet.¹⁹ During these proceedings, the child will be appointed a GAL to represent the child's best interests.²⁰ Under this statute, the GAL is to be paid by the petitioner unless the Cabinet of Health and Family Services is granted custody. Then, the GAL fee will be paid through the Finance and Administration Cabinet.²¹

For involuntary termination of parental rights proceedings, once again parents determined to be indigent can be appointed counsel pursuant to KRS Chapter 31.²² The attorney will be paid for by the Finance and Administration Cabinet.²³ For the child in an involuntary termination of parental rights proceeding, the court will appoint a GAL to represent the child's best interests, whose fee will be paid by the Finance and Administration Cabinet.²⁴

D. Mental Health

For those children undergoing mental health proceedings, counsel will be provided through the Department of Public Advocacy.²⁵

¹⁸ KRS §625.0405(1).

¹⁹ *Id.*

²⁰ KRS §625.041(1).

²¹ *Id.* at (2).

²² KRS §625.080(3).

²³ *Id.*

²⁴ KRS §625.080(2).

²⁵ KRS §645.060(1).

E. Dependency, Neglect, and Abuse

Separate Counsel is appointed for each child involved in a dependency, neglect, or abuse proceeding.²⁶ The separate counsel can also be appointed for the parents of the child who are considered indigent pursuant to KRS Chapter 31.²⁷ Along with separate counsel, a CASA volunteer can be appointed to represent the child's best interests.²⁸ The parents' and child(ren)'s counsel should be paid through the Cabinet of Health and Family Services.²⁹

F. Domestic Violence

Under KRS 126A.140, a court that determines a child may be a victim of domestic violence may appoint the child a GAL or special advocate if available.³⁰ The statute does not provide a mechanism for payment of the GAL or special advocate.

G. Adoption

Under KRS §199.480, a GAL only needs to be appointed if the biological parents of the minor child are not defendants to the case.³¹ Therefore, only children whose parents are not a party need a GAL. Under this statute, nothing is written referring to the payment of a GAL who is involved in a case.

H. KRS 26A.140

Currently under KRS 26A.140, GALs are required to represent the child's interest.³² As stated above, the GALs and special advocates are only to be appointed when they are available, which offers courts some discretion in what cases warrant a GAL.³³ However,

²⁶ KRS §620.100(1).

²⁷ *Id.*

²⁸ KRS §620.100(1)(d).

²⁹ KRS §620.100(1)(a)-(b).

³⁰ KRS §126A.140 (1)(a)

³¹ KRS §199.480(3).

³² KRS §26A.140(1)(a).

³³ *Id.*

when determining how a GAL appointed under this statute will be paid, the statute does not clearly define payment and there appears to be little consistency within various courts throughout Kentucky.

I. Appointments in Kentucky and the Country

The American Bar Association (ABA) has determined that in most situations GALs should perform the duties of representation as a “child’s attorney.”³⁴ It believes that a GAL is something completely separate from a child’s attorney, rather than viewing a child’s attorney as merely one of the roles a GAL may choose to take on.³⁵ Though this is the standard set by the ABA, it is not the method that all states and provinces in the United States have chosen to follow. In 2006, Jean Koh Peters conducted a study and created a spreadsheet which defines and describes the GAL practices in each state and the standards that have been set accordingly.³⁶ Though it is only a basic overview, it represents a wealth of knowledge in the area of GAL studies.

In reviewing Jean Koh Peters’ study and Kentucky law, it appears that Kentucky requires its GALs to represent the best interests of the child.³⁷ However, if the best interests are in conflict with the child’s wishes, then the attorney must inform the court and allow the court to make the ultimate decision on representation. If the court decides, a CASA volunteer may be appointed to represent the child’s wishes.³⁸ Jean Koh Peters’ study describes six basic categories of GAL representation. They range from requiring only a child’s wishes attorney to the requirement that only a best interests attorney is necessary and all else is optional.³⁹ As stated above, Kentucky is defined as a state that requires the attorney to be the best interest attorney, who must also express the wishes of the child where it conflicts with the child’s best interests. Other states in this category include: Delaware, Kansas, Maine, Michigan, and

³⁴ See generally American Bar Association *supra*.

³⁵ *Id.* at 3.

³⁶ See Peters, Jean Koh, U.S. State by State Chart, Representing Children Worldwide: How Children’s Voice Are Heard in Child Protective Proceedings, available at <http://www.law.yale.edu/rcw/rcw/summary.htm> (last visited Mar. 8, 2011). See also Peters, Jean Koh,

³⁷ Peters, Jean Koh, U.S. State by State Chart *supra*.

³⁸ Peters, How Children are Heard in Child Protective Proceedings, *supra* at 1074.

³⁹ Peters, Jean Koh, U.S. State by State Chart *supra*.

Virginia.⁴⁰ Some states use the same system, but they shift the attorney GAL's dual role to purely a child's attorney at a defined age. An example is New Mexico, where the attorney is a best interests attorney until the child reaches 14, thereafter the attorney becomes a child's attorney instead.⁴¹ This format allows a more clearly defined role for the GAL, simply by shifting the attorney's duties based upon the age of the child.

Kentucky GALs can have a difficult time determining whether they are a best interests attorney or a child's attorney. It is an eternal conflict for them and one that more defined standards could help to resolve. It can be a difficult position for an attorney who is to represent the child's best interests, only to find that the child's wishes are in complete conflict with their best interests. One way to address the conflict that arises is to inform the court of both sides. The court then may decide to appoint a separate advocate for the child's wishes and keep the attorney for the best interests, or vice versa. This will help to lessen the struggle the attorney faces and allow them to only advocate for one side.

When appointed as a Guardian ad Litem, there are many types of cases in which an attorney may participate, and it is important to take those various types into consideration when appointed as a GAL. For all GAL representations, there should be a set of proposed standards. However, different standards may need to be applied in different and specific cases. For example, the Kentucky statutes and courts address a custody case in a different way than they would address a Dependency, Neglect, or Abuse case. Therefore, it is important to understand what additional steps should be taken in order to meet the standards for GAL representation. The suggested Standards below provide both general standards applicable to all GALs and also specific standards applicable for different types of cases.

II. PROPOSED STANDARDS FOR GUARDIANS AD LITEM (GALS)

A. Standards of Practice

1. It is the duty of the GAL to zealously advocate for the child they are appointed to represent and to protect the child's rights and interests.

⁴⁰ Peters, How Children are Heard in Child Protective Proceedings, *supra* at 1074.

⁴¹ *Id.*

2. According to the Kentucky Rules of Professional Conduct, an attorney's duties of confidentiality of information to a child client would be similar to those an attorney owes an adult client.⁴²

Comment

In an attorney-client relationship involving an adult client, attorneys may only disclose information they believe necessary in order to prevent death or "substantial bodily harm", to get legal advice on how to comply with the Kentucky Rules of Professional Conduct, to establish a defense when there is a conflict between the lawyer and the client, and when the attorney is complying with another law or a court order.⁴³ Therefore, as much as possible, attorneys representing a minor child should make every attempt to disclose only the same limited type of information they would when representing an adult client.

3. At the end of the GAL's investigation, the GAL submits a report for the court with a list of recommendations concerning the best interests or wishes of the child being represented.
4. Until the child reaches an age of fourteen, the GAL should represent the child's best interests. At the age of fourteen or older, the GAL should begin acting as a child's attorney and represent the child's wishes.
 - a. Below the age of fourteen, if there is a conflict between what the GAL perceives to be the child's best interests and the child's wishes, the GAL shall report the inconsistencies to the Court. It is possible that they will need to request that the Court appoint another GAL or CASA volunteer to represent the child's wishes.
 - b. At the age of fourteen and above, the GAL represents only the child's wishes, unless the wishes directly conflict with the GAL's advice. At that point, the GAL should report the child's wishes and their own advice.

⁴² See generally SCR 3.130(1.6).

⁴³ SCR 1.6(b).

Comment

(1) During the stage of Early Adolescence, twelve to fourteen year olds are becoming more aware of the difference between right and wrong.⁴⁴ It is within this stage that minors learn to better express their feelings verbally and they develop a stronger ability for complex thought.⁴⁵

(2) During the Middle Adolescence state, beginning at the age of fourteen, teenagers take a greater interest in moral reasoning and they learn to understand what is right.⁴⁶

(3) Before the age of fourteen, most teenagers still perceive right and wrong only in terms of black and white.⁴⁷ At or after the age of fourteen, the teenager's view will begin to shift and they will develop an understanding that there are shades of gray.

(4) At or after fourteen, teenagers develop the understanding of the connection which exists between today and tomorrow.⁴⁸ This understanding allows teenagers to link their present actions with future consequences. This understanding also allows them to grasp temporal differences (e.g., sequence of events) and be better equipped to testify on such matters.

(5) As a child gets older, their brains go through periods of growth and gradual loss of gray matter. The thinning of gray matter near puberty tends to correspond to increases in a teenager's cognitive abilities.⁴⁹ These increased abilities

⁴⁴ Center for Disease Control and Prevention, "Child Development: Early Adolescence," 1 (2005) available at <http://www.cdc.gov/ncbddd/child/earlyadolescence.htm> (last visited Mar. 6, 2011).

⁴⁵ *Id.*

⁴⁶ South Carolina Department of Mental Health, Get the Facts on Mental Illness: Adolescent Development, available at http://www.state.sc.us/dmh/adolescent_facts.htm (last visited Mar. 6, 2011).

⁴⁷ Pawlowski, Wayne & Hamilton, Gayle, Stages of Adolescent Development, 2, available at <http://www.proyectoideas.jsi.com/Docs/OCC%20Call%20-%20Stages%20of%20Adolescent%20Development.pdf> (last visited Mar. 6, 2011).

⁴⁸ *Id.* at 1.

⁴⁹ Ruder, Debora Bradley, Harvard Magazine, "The Teen Brain", <http://harvardmagazine.com/2008/09/the-teen-brain.html>.

allow a teenager to understand the definition of what is right and what is wrong, and allows them to comprehend the existence of gray areas in morality. These abilities and developments of the mind allow children to better understand the decisions they will be making for themselves and the consequences those decisions will have in the future.

B. Standards of Communication and Contact

1. The GAL should meet with the child to gain a better understanding of what it will require to represent that child and what the child will specifically need. This includes, but is not limited to:
 - a. Observing the child to determine the level of maturity and stage of development.
 - b. Learning the child's wishes regarding the proceedings.
 - c. Determining any special needs the child may possess.

Comment

(1) Special needs do not always mean needs regarding special education in schools; a special need could be anything that makes the experience less like representing an adult.

(2) Special needs may include meeting somewhere other than the attorney's office, communicating with the child through email rather than by telephone, meeting with the child at irregular times due to scheduling conflicts or school, etc.

- d. Determining the cultural needs of the child.

Determining whether an interpreter will be necessary for communication or testimony.

2. When meeting with the child, the GAL should make it clear that the child's role in the case is not the only thing the judge is using to make a decision.

Comment

(1) The child plays an important role in any case, but regardless of the type of proceeding or action, the child should not feel like they are the determining factor.

(2) If the child feels as though the case hinges on them, they may feel guilty or bad if the case does not turn out the way they expected. They may feel as though they did something wrong, even though there were many other factors being considered by the judge.

3. The GAL should make an honest attempt to meet with the child at each of their placements.

Comment

(1) When a child is in foster care, there is no guarantee that the child will only be placed in one home during the time period. It is an expectation that the GAL make it a priority to meet with the child when the child is moved into a new house and family.

(2) Attempting to meet with a child each time the child's foster home changes provides consistency for the child, allowing him or her to see a familiar face and allowing the GAL to be aware of the child's needs and feelings during that time. This can be a significant benefit to the GAL in the representation of the child.

4. During the different phases of the proceedings, the GAL should counsel the child based on the GAL's observations of the child's maturity and developmental stage. This can include explaining the court system as a whole or the roles of the different courtroom participants.

Comment

(1) Each proceeding can be something new for a child. Depending on the situation, the child could be completely unaware of how the law works, especially how it works relating to him or her. Therefore it is necessary to explain the type of proceeding to the child, and if the hearing or action is for a specific purpose, the GAL should explain the purpose to the child, so the child can grasp why he or she is there.

(2) These explanations depend largely on the maturity of the child and how much he or she can understand. The GAL should be aware of what information the child will understand, based on the GAL's observations and interactions with the child. Ultimately, it is the GAL's responsibility to explain the situation to the child in a way that the child will comprehend.

(3) When speaking to a child, a GAL should not speak down to the child using child-like phrases and comments. If the child does not understand, the GAL should use simpler language that will provide the necessary information at the child's level. Speak to the child as you would an adult, merely adjusting the complexity of the vocabulary and language to compensate for the child's age and maturity.

5. The GAL explains all court orders and decisions to the child, as well as the consequences resulting from those orders.

Comment

(1) Court decisions can impact a child, and the effects and consequences of the court's determinations can be confusing for the child. The GAL should attempt to thoroughly explain the court's decision and subsequent orders so that the child is prepared for what is to come.

6. The GAL contacts the child regarding any emergency or event that will impact the child.

Comment

(1) Cases and proceedings to which the child is not directly involved can still impact the child. Therefore, it is the duty of the GAL, as the child's legal representative, to make sure all information is shared with the child⁵⁰ in order to ensure the child will not be surprised by any possible changes.

7. The GAL needs to be accessible to the child during the attorney's office hours through various mediums, such as telephone, fax, email, or in person.

⁵⁰ See SCR 3.130(1.4).

Comment

(1) The method of communication is at the discretion of the attorney.

(2) Outside of office hours, it is not necessary that the child be able to contact the GAL, unless it is an emergency. However, in those situations, it is likely that the GAL will be contacted by someone involved. Therefore, it is not necessary for the child to have the personal cell phone or home phone number of the GAL.

8. The GAL should pursue all issues that arise on behalf of the child. Issues can include educational concerns, mental health proceedings, abuse issues, etc.

Comment

(1) GALs are appointed for a multitude of reasons. However, if an issue arises that is not the reason for the GAL's appointment, it is the duty of the GAL to pursue the additional concerns to determine if further investigation or action is needed. If the issue is not one the GAL is able to perform in his regular duties, the GAL may need to recommend the appointment of another attorney to deal with that issue.

9. If there is a change of venue, the GAL who was first appointed should remain with the child's case until a new GAL can be appointed. In order to effectuate a smooth transition of the case, the first GAL should review the case with the new GAL.

The GAL should discuss the change in venue with the child, making it clear that the GAL is not abandoning the child, but that it was the court rules they were required to follow.

Comment

(1) Children can be vulnerable and confused when a person in their life abruptly leaves, therefore it is important for the GAL to reassure the child that he or she is leaving not because he or she wants to, but because of the court's ruling. Also the GAL should try to ensure the child does not think the GAL is leaving because he or she dislikes the child. The GAL should try to ensure the child does not feel

responsible for change, taking as much of the burden off the child as possible.

10. Unless determined that other representation will be arranged, the GAL will continue to represent the child in appellate proceedings.
 - a. The decision to appeal the court's decision can be made by a child who is age fourteen or older, while it will be the GAL's decision for a child thirteen years or younger.
 - b. The GAL needs to file an entry of appearance for the appeal and take all steps necessary to represent the child fully in that proceeding.
11. When the case reaches its end, the GAL discusses the new nature of his or her relationship with the child in a way the child will understand according to the child's level of maturity and development.

Comment

(1) Termination of a relationship, especially one which has become important to the child, can be a difficult transition. The GAL should do what is necessary to make it clear that the reason for the GAL's appointment is at an end and that their relationship is now changing. It should be clear to the child that the GAL will no longer be available to the child.

C. Standards for Investigation and Case Review

1. The GAL should interview the following parties as they pertain to the child:
 - a. Cabinet for Health and Family Services worker(s).
 - b. Parents.
 - c. Foster parents or other guardian.
 - d. Family members.
 - e. Therapist.
 - f. Physician(s).

- g. Teachers/school faculty.
 - h. Law enforcement officers.
 - i. Neighbors.
 - j. Clergy.
 - k. Any other third party who may play a role in the hearings, judicial reviews, and other court proceedings involving the child.
2. The GAL should gather and review the following:
 - a. Records relating to social services, psychiatric care, psychological care, drug and alcohol, medical, law enforcement, school, and other records of relevance.
 - b. Court files and documents related to the case and child.
 3. The GAL should contact lawyers for both parties and the CASA (if one has been appointed) for further information regarding the case.
 4. The GAL should make requests for production if necessary.
 5. The GAL should file all necessary papers and pleadings on time.

Comment

(1) The GAL still has the same responsibilities of an attorney to their client and must make sure that the job is done correctly and punctually.

D. Case Planning Standards

1. The GAL needs to create a full and comprehensive service plan that seeks out and requests services to meet the child's needs and protect the child's interests. The following are just some of the services that may be sought:
 - a. Screening and diagnostic services.

- b. Family preservation or reunification services.
- c. Home-based services.
- d. Sibling and family visitation.
- e. Child support.
- f. Domestic Violence prevention, intervention, or support.
- g. Medical and mental health care.
- h. Drug and alcohol treatment.
- i. Parenting education.
- j. Independent living services.
- k. Foster care -- short or long term.
- l. Termination of parental rights action.
- m. Services related to adoption.
- n. Educational services.

The GAL should determine if special education services will be necessary and proceed as the attorney would with a special education action or refer the child or the child's family to a special education attorney.

- o. Recreational or social services.
 - p. Housing.
 - q. Seeking any funding that is necessary.
2. The GAL should maintain his or her own case file with pertinent notes and information, and not rely on the court's file.
 3. If the Court appoints a CASA worker, the GAL should communicate with the CASA on the relevant issues in the case.
 4. The GAL should appear at all hearings concerning the child.

Comment

(1) A GAL should go to all hearings that relate to the child, even if the child is not the main purpose of the hearing. This could include divorce hearings, child support proceedings, as well as domestic violence hearings. These all can have an impact on the child, even if the child is not directly included.

5. When applicable, the GAL should motion for a speedy trial.⁵¹

Comment

(1) The concept of how long the trial will take is not apparent to the child. The longer the trial takes, the more stress it places on the child. This makes it important to keep the trial and proceedings from being prolonged longer than necessary.

6. The GAL monitors the implementation of the case plan and orders delivered by the court.

Comment

(1) When the court orders something to be done, the GAL should determine whether it is being implemented and whether the implementation is sufficient. If it is not being done or is insufficient, the GAL should bring notice to the court to have the issue addressed.

7. The GAL's representation continues as long as the appointing authority has jurisdiction.

E. Standards for DNA Cases

1. In sexual abuse cases, the child may be too shy or afraid to testify. The GAL should think about considering whether a medical professional or counselor may be considered the child's "treating physician" and would be able to testify as to what the child said.⁵²

⁵¹ See KRS §421.510.

⁵² See Edwards v. Commonwealth, 833 S.W. 2d 842, 845 (Ky. 1992).

2. In a sexual abuse case, if the child is unable to testify in front of the alleged perpetrator, the GAL should consider filing a motion to have the child testify in another room and have the testimony shown over closed circuit TV or through video tape.⁵³

F. Custody

1. The GAL should make every attempt to visit the homes of the two parents and determine if they are fit for the child during a custody dispute.
2. If unable, due to hostility from the parties, the GAL should document the reason for the inability to conduct a home visit.

G. Standards for Domestic Violence Cases Introduction

In accordance with the Child Abuse Prevention and Treatment Act (CAPTA), GALs or CASA advocates should be appointed to represent children in dependency cases involving domestic violence.⁵⁴

The National Council of Juvenile and Family Court Judges (the "Council") recognized the need to integrate efforts of domestic violence agencies, child protection agencies, juvenile courts, and community-based agencies to achieve better outcomes in cases involving family violence. The Council identified three common goals: "Create safety, enhance well-being, and provide stability for children and families."⁵⁵ The principles and recommendations of the Council are the basis of the following Standards for GAL and CASA appointees in cases involving family violence.

Standards:

1. A GAL should seek special training to achieve competency in the area of domestic violence.

⁵³ See KRS §421.350.

⁵⁴ See 42 U.S.C. 5106a (2011).

⁵⁵ The Greenbook Initiative, National Council of Juvenile and Family Court Judges, Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice, at 2 (2007) available at http://www.thegreenbook.info/documents/ei_dv_summ.pdf (last visited Mar. 6, 2011).

Comment

(1)The Council’s recommendation is that in setting the standards for competent and well-trained attorneys, Judges should incorporate a requirement that appointed counsel be specially trained and competent in the area of domestic violence.⁵⁶

2. A GAL appointed to a case involving domestic violence should screen the home for domestic violence, regardless of whether the couple has separated and no official charges or allegations have been made.

In addition to the guiding principles and best practices of GAL Investigation and Case Review, the GAL should take the following recommended measures to screen for domestic violence:

- a. Review any police reports, Family Court reports, or any other agency reports for incidents or indicators of DV.
- b. Interview the parties separately. Ensure that the interview takes place in a safe and private environment before you ask any questions about the abuse.
- c. Treat all parties involved with respect and dignity. If a party discloses to you act(s) of domestic violence committed against him/her, take into account that it is very hard for victims to speak about the abuse and respond with a supportive statement such as “I am so sorry this happened to you. It should not have.” Also, the GAL should reassure the suspected victim that only information obtained through case review and other sources will be shared with the offending partner.
- d. Ask the party whether the offending partner harmed or threatened to harm the children.

⁵⁶ The Greenbook Initiative, National Council of Juvenile and Family Court Judges, Effective Intervention in Domestic Violence and Child Maltreatment Cases: A Summary of Recommendations for Judges, at 3 (2007) available at http://www.thegreenbook.info/documents/ei_judges.pdf (last visited Mar. 6, 2011).

- e. Ask the party if there is anything they should be aware of in relation to the victim's or the children's personal safety.
- f. Interview the children individually taking into consideration possible safety concerns in relation to both the children and the non-offending parent.
- g. Interview the suspected batterer and make sure that the safety of the children and non-offending parent will not be compromised as a result. Do not confront the offending partner about specific incidents of DV or information provided by the victim(s). If the offending partner denies the violence, do not force a disclosure. Confirmation of DV may be derived from victim statements and other police or agency reports.

Comment

(1) Domestic violence is a pattern of assaultive and/or coercive behaviors – physical and/or psychological abuse -- that a person uses against his or her former or current intimate partner primarily for the purpose of gaining control over the partner.⁵⁷

(2) The U.S. Department of Justice recognizes the following forms of intimate partner abuse:⁵⁸

- i. Physical abuse: Hitting, slapping, shoving, grabbing, pinching, biting, hair-pulling, etc. Physical abuse also includes denying a partner medical care or forcing alcohol and/or drug use.
- ii. Sexual abuse: Coercing or attempting to coerce any sexual contact or behavior without consent. Sexual abuse includes, but is certainly not limited to, marital rape, attacks on sexual parts of the body, forcing sex after physical violence has occurred, or treating one in a sexually demeaning manner.

⁵⁷ U.S. Department of Justice, Office on Violence against Women, About Domestic Violence, available at <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Mar. 6, 2011).

⁵⁸ *Id.*

- iii. Emotional abuse: Undermining an individual's sense of self-worth and/or self-esteem. This may include, but is not limited to constant criticism, diminishing one's abilities, name-calling, or damaging one's relationship with his or her children.
- iv. Economic abuse: Making or attempting to make an individual financially dependent by maintaining total control over financial resources, withholding one's access to money, or forbidding one's attendance at school or employment.
- v. Psychological abuse: Causing fear by intimidation; threatening physical harm to self, partner, children, or partner's family or friends; destruction of pets and property; and forcing isolation from family, friends, or school and/or work.

(3) Statistically, it is projected that one-third of women in Kentucky will experience domestic violence.⁵⁹ Also, data shows that batterers are primarily male and victims are primarily female; however, records show approximately 5 percent of all domestic violence cases involve men as victims. Domestic violence also occurs between same-sex partners.⁶⁰

(4) Studies show that contrary to popular belief, 25-50 percent of disputed custody cases involve domestic violence.⁶¹ Also, the American Bar Association states that the co-occurrence of child abuse and domestic violence is present in 30-60 percent of violent homes.⁶²

⁵⁹ Cullison, Richard A., "How Kentucky's Civil Legal Aid Programs Assist Victims of Domestic Violence: One Program's Perspective," 74 Bench and Bar 1, at 6 (January 2010).

⁶⁰ *Supra* note 4.

⁶¹ American Bar Association Commission on Domestic Violence, 10 Myths about Custody and Domestic Violence and How to Counter Them, (Jul. 2006) *available at* http://www.americanbar.org/content/dam/aba/migrated/domviol/custody_myths.authcheckdam.pdf (last visited Mar. 6, 2011) (The article discredits the common assumption that domestic violence is rare in custody cases).

⁶² *Id.* (The article discredits the myth that Domestic Violence is unrelated to child abuse.)

(5) “Approximately 50 percent of men who frequently assaulted their partners indicated they also abused their children; domestic violence may be the single major precursor to child abuse and neglect fatalities in this country; and studies indicate that 80 to 90 percent of children living in homes with domestic violence are aware of the violence.”⁶³

(7) For screening purposes, below is a list of some common indicators present in victims of domestic violence:

- i. The person apologizes for his/her partner’s behavior and makes excuses for him/her.
- ii. The person often has unexplained injuries.
- iii. The person seems isolated from his/her family and/or friends.
- iv. The person often looks at his/her partner before she answers any questions.
- v. The person is quiet, withdrawn, and/or has poor eye contact when his/her partner is present.

(8) Older children are likely to minimize incidents of fighting between parents while younger children may be less guarded with their reports.⁶⁴

3. The GAL should identify and document what triggered identification of domestic violence (DV).
 - a. Police reports.
 - b. Other investigation.
4. The GAL should document confirmed domestic violence incidents and the identity of the perpetrator or offending parent.

⁶³ Family Violence Prevention Fund, The Facts on Children and Domestic Violence, available at http://www.endabuse.org/userfiles/file/Children_and_Families/Children.pdf (last visited Mar. 6, 2011).

⁶⁴ *Supra* note lxiv.

5. The GAL should identify specific behaviors the domestic violence perpetrator has engaged in to harm the children.
6. The GAL should identify any adverse impact to a child that resulted from the domestic violence perpetrator's behavior.

Comment

(1) Children may be impacted by the batterer's violence either through direct physical maltreatment by the batterer, through exposure to the violence against another parent, by using the children to coerce or manipulate the other parent, and by undermining the other partner's parenting or simply by being a neglectful parent.

(2) Studies have found that in addition to the safety risks, children exposed to domestic violence display internal and external symptoms such as anxiety, aggression, depression, trauma (Post-Traumatic Stress Disorder), cognitive and social issues, and long-term adjustment problems.⁶⁵

(3) Children respond differently to domestic violence and the effects of the children's exposure depend on a number of factors. This includes, but it is not limited to:

- i. Frequency, severity, chronicity, and proximity to the violence. Children exposed to severe or frequent incidents of violence are more likely to be harmed, physically and psychologically, than children who are exposed to lesser forms of violence (pushing and shoving) less frequently.
- ii. The age of the child and the corresponding developmental stage at which exposure begins. If a child's exposure to DV begins at a young age when they are developing basic functioning skills they are more likely to be negatively impacted. They might not have an opportunity to master even basic motor skills or language as a result of the violence, which can have long-term consequences.

⁶⁵ Summers, Alicia, et al., Children's exposure to domestic violence: A guide to research and resources, 14-45 (2006) available at <http://www.safestartcenter.org/pdf/childrensexpostoviolence.pdf> (last visited Mar. 6, 2011).

(4) As a survival technique, a child can experience “traumatic bonding” with the offending parent that results in strong but unhealthy ties to the batterer.⁶⁶

(5) David Mandel argues that those working with children in DV cases should assess the child’s problems (*i.e.* poor academic performance; social and/or behavioral problems) from a perspective that acknowledges the impact of the offending parent’s behavior and *specifically identifies* the offending parent’s behavior as the cause for the disruption in the home.⁶⁷

7. The GAL should circumvent strategies that blame the non-offending parent for the violence committed by others.

Comment

(1) “Mothers who are victims of DV are often depressed and suffering from post-traumatic stress disorder, and as a result, can present poorly in court to best interest attorneys and/or custody evaluators.”⁶⁸

8. The GAL should investigate and identify the pattern of coercive behavior of the offending parent against the non-offending parent to anticipate any safety risks to the child.

Comment

(1) “Domestic violence perpetrators’ patterns of coercive control are frequently present in cases that end in a critical incident or child fatality.”⁶⁹

⁶⁶ American Bar Association Commission on Domestic Violence, *supra* at 2 (*citing* to Bancroft, Lundy & Silverman, Jay, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics, 39-40 (2002). The Article counters the myth that “If a child demonstrates no fear or aversion to a parent, then there is no reason to award unsupervised contact or custody.”

⁶⁷ Mendel, David, Best Practices To Protect Children from Maltreatment in Situations Involving Dometic Violence, Seminar, Kentucky Bar Association Convention, Lexington Convention Center, Lexington, Kentucky, (June 17, 2010), Kentucky Bar Association Convention: The Building Blocks of Democracy, The Latest Thinking on How Best to Address Child Maltreatment in Cases Involving Domestic Violence, http://www.kybar.org/documents/cle/ac_material/ac2010_29.pdf, 1, 3-6. For more information regarding David Mandel and his work in Domestic Violence and its effects on the family and children please visit www.endingviolence.com.

⁶⁸ American Bar Association Commission on Domestic Violence, *supra* at 2.

⁶⁹ Edelson , J. & Schechter, S., In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies, (2010), *available at*

(2) “Batterers are often clever, charming, and manipulative, and they may rationalize their behavior to themselves and others... [they] are not out of control. Instead they are exerting the control that is rightfully theirs.”⁷⁰

(3) The focus of a child protection intervention should be to establish and maintain safety for the non-offending parent and child together by holding the perpetrator of violence accountable for his behavior and engaging him to change that behavior through batterer intervention or some other help.

(4) “Abusive parents are more likely to seek sole custody than nonviolent ones and are successful 70 percent of the time.”⁷¹

(5) “Allegations of domestic violence have no demonstrated effect on the rate at which fathers are awarded custody of their children, nor so such allegations affect the rate at which fathers are ordered into supervised visitation.”⁷²

9. The GAL should not assume that the domestic violence has ended because the couple has separated or divorced.

Comment

(1) There is evidence that violence is likely to continue post-separation and that the risk of harm against the child is higher after divorce or separation.⁷³ The American Bar Association recognized that: “Many batterers’ motivation to intimidate and control their victims through the children

<http://www.mincava.umn.edu/documents/wingsp/wingsp.html#id262897> (last visited Mar. 6, 2011).

⁷⁰ Domestic Abuse Intervention Project, The Co-Occurrence of Child Maltreatment and Domestic Violence Guidelines for Case Management in Child Welfare, at 10 (2010) available at http://www.thegreenbook.info/documents/STL_casemgmt.pdf (last visited Mar. 6, 2011).

⁷¹ American Bar Association Commission on Domestic Violence, *supra* at 1.

⁷² *Id.*

⁷³ Mills, Linda G. & Levin, Amy, “Fighting for Child Custody When Domestic Violence is at Issue: Survey of State Laws,” 48 Social Work 4, 463, 464 (Sept 2003) available at <http://www.cpr-mn.org/Documents/Fighting%20for%20Child%20Custody.pdf> (last visited Mar. 6, 2011).

increases after separation, due to the loss of other methods of exercising control.”⁷⁴

10. A GAL appointed to a child protection case should disclose to the court domestic violence that has caused harm to a child.

Comment

(1) The Council recommends that a petitioner in child protection proceedings should allege in petitions or pleadings any domestic violence that has caused harm to a child.

11. The GAL should make its recommendations in conformity with any restraining orders, other written or verbal court orders, or any condition of probation or parole prohibiting or limiting contact between parties.
12. The GAL should consider the safety risks for non-offending parents when making recommendations regarding visitation arrangements.
13. The GAL should take precautions when reporting information so as not to jeopardize the safety of the children and the non-offending parent.
14. The GAL should recommend that the non-offending parent develop a safety plan, if one is not already in place, and refer them to a domestic violence crisis center. Helping the non-offending parent access safety can also decrease the risk of violence against the children.
15. The GAL should become aware of the safety plan and provide input to the extent that it applies directly or indirectly to the children.

H. Standards for a Child Witness

1. The GAL should attempt to take the child to visit the courtroom before the hearing or trial date.

⁷⁴ American Bar Association Commission on Domestic Violence, *supra* at 2.

Comment

- (1) Courtrooms can be very intimidating to the child, and it is important to ensure the child is as prepared as possible for the trial. Taking the child to the courtroom will allow the child to see it when it is empty and will take away some of the fear of the unknown.
2. The GAL should fully prepare the child to testify in the courtroom.
 - Practice questioning the child.
3. The GAL should determine if KRS §26A.140 will apply.

Comment

- (1) KRS §26A.140 is dedicated to accommodating the special needs of children in courts.
- (2) The statute allows the environment of the courtroom to be modified. This includes the use of smaller chairs and even frequent breaks.⁷⁵
- (3) The courts can use KRS §26A.140 to keep the child from having visual contact with the alleged perpetrator of the crime against them or one which they witnessed.⁷⁶
- (4) Not all courts are as willing to make specific accommodations because the needs of the child must be balanced with the rights of the defendant. The court will not allow accommodations which are unduly burdensome of the defendant, regardless of how uncomfortable something may make the child.⁷⁷
4. The GAL should take steps to protect the child witness from being treated unfairly on the stand.

⁷⁵ See KRS §26A.140(1)(b).

⁷⁶ KRS §26A.140(1)(d).

⁷⁷ KRS §26A.140(1).

- Make sure to object when age appropriate language is not being used or when the child is being confused by the questions presented.
5. The GAL should request breaks in testimony if the questioning is going to be too prolonged.
 6. The GAL should inform the child victim that they are permitted a “victim advocate” in the court proceedings.⁷⁸

Comment

(1) A victim advocate is allowed to go with the child victim in order to lend moral and emotional support.⁷⁹

(2) A victim advocate can converse with the child victim reasonably either orally or in writing.⁸⁰

(3) A victim advocate should not be used to give legal advice to the child victim.⁸¹

(4) A victim advocate should be used to help the child victim testify with more confidence and less fear.

I. Training Standards and Content

1. Attorneys participating as Guardians ad Litem need to attend training that covers the following areas:
 - a. Methods on how to minimize the stress being placed on the represented child and family.
 - b. The social, emotional, physical, developmental, educational, vocational, and psychological stages and needs of children.
 - c. Skills on how to interview and counsel a child.

⁷⁸ See KRS §421.575.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

- i. It is especially important that the first interview not revolve around only the reason of the appointment. The GAL should discuss topics that will help relax the child and create a rapport with the child before addressing the difficult topics.
 - ii. For younger children, the GAL should provide a tangible object for the child to hold while talking with them, such as a toy for a young child. This can make the meeting less daunting for the child and can give him or her an outlet during the conversation.
 - d. Avenues of communication with children representing different ages or levels of maturity and development.
 - Age appropriate language
 - e. Relevant statutes pertaining to GALs and child representation.
 - f. The role of specific agencies within the context of a child.
 - g. Applicable standards for representation.
 - h. Family dynamics and dysfunction, including substance abuse and the use of kinship care.
 - i. How to access services such as medical, educational and health resources for child clients and their families.
 - j. Conflicts that arise for GALs and how to handle them.
2. GALs should attend courses to update their practice in child advocacy every two years.

**KENTUCKY STANDARDS OF PRACTICE
GUIDELINES FOR REPRESENTING PARENTS IN TERMINATION OF
PARENTAL RIGHTS ACTIONS:
A DRAFT FOR DISCUSSION***
Children's Law Center, Inc.

Spring 2011

I. INTRODUCTION

The right of parents to raise their children and bring them up as they see fit has been a long existent fundamental right protected under the Due Process Clause of the United States Constitution.¹ This incorporates the rights of parents to educate their children with values they find appropriate, and to decide for themselves questions of the child(ren)'s growth, development, and upbringing.² Due to the status of these fundamental rights, the state can only interfere when a compelling justification exists.³ Parental rights involving their children are so important to the government and society that specific steps must be taken before there can be an involuntary termination of parental rights. One such step and safeguard for parents is that both parents are entitled to a hearing regarding their parental fitness before the state may take the child from them.⁴ Congress has also done its part to ensure that families are made a priority throughout the country. Within the Adoption Assistance and Child Welfare Act of 1980, Congress required that a state must make reasonable efforts to preserve and reunify families in order to receive funding given under the Act.⁵ The efforts made by the United States Supreme Court and Congress to protect the family unit demonstrate its importance and explain why terminating parental rights is such a difficult and complicated process.

* Representing parents in any situation can be both difficult and confusing. It can be even more of a struggle when representing a parent who is voluntarily or involuntarily facing the possibility of losing or giving up their parental rights over their children. This manual is designed to encourage discussion of the ethical standards impacting legal representation in these difficult cases.

¹ See generally Meyer v. Nebraska, 262 U.S. 390 (1923).

² See Arnold v. Board of Education of Escambia Co., Ala., 880 F.2d 305, 312-314 (11th Cir. 1989).

³ *Id.* at 313.

⁴ Stanley v. Illinois, 405 U.S. 645, 658 (1972).

⁵ 42 U.S.C. §671(a)(15) (2011).

Termination of parental rights actions can be lengthy, complex, and detail-oriented. Representing a parent in an action is something general practitioners may not be prepared for due to the uniqueness of the suit. There are typically multiple key actors in a voluntary or involuntary termination of parental rights case. There is the parent or parents of the child, the parent(s)'s attorney(s), the child(ren), the child(ren)'s attorney, acting in Kentucky as a Guardian ad Litem, potential adoptive parents, the adoptive parents' attorney, a county attorney representing the state's *parens patriae* interest, a representative from the Cabinet for Health and Family Services, and possibly counsel for the Cabinet and a Court Appointed Special Advocate (CASA) for the child(ren).⁶ Identifying who is represented by counsel and must be spoken to only through said counsel, and who is unrepresented but must be interviewed in order for the attorney for the parent to provide competent representation can be complicated to sort out. No matter how many or how few representatives, clients, relatives or other people with pertinent information are involved, communication with each is vital to adequately representing parents in a legal matter involving the potential termination of their parental rights. Communication with your own client is especially important. It is not enough to just represent your client; as his or her attorney you are expected to explain his or her rights, the steps in the process, and to answer any questions he or she may have throughout the case.

II. STATUTES

In Kentucky, there are a few key statutes that impact how parental rights are terminated, what standards or elements must be satisfied, and when a parent may have counsel appointed for them. Though there are only a few such statutes, they are regularly used and referred to in potential termination of parental rights actions.

A. KRS §600.020

This statute provides the definitions necessary to read and understand the meaning of the corresponding statutes addressing termination of parental rights. The following are the pertinent definitions that are used throughout this manual and that a parent's attorney will be expected to have in his or her vocabulary.

⁶ Courts can and do appoint CASA workers to assist in investigating issues regarding the children. CASAs also have the ability to provide an independent determination as to the child's best interest. They are not constrained by either a GAL's legal duty to represent the child(ren)'s wishes, nor are they required to be focused on reunification of the family. They can truly represent a child's best interests and can also assist the court in making decisions by providing an independent and fact-based assessment.

Abused or neglected child -- A child whose parent, guardian, or person exercising custodial control of the child has been deemed to do one or more of the following:

1. Allows or inflicts physical or emotional injury on the child.
2. Allows or creates a risk of physical or emotional injury on the child.
3. Exhibits a pattern of conduct that keeps him or her from being capable to care for the child's immediate or ongoing needs.
4. Constantly fails or refuses to give the needed parental care and protection to the child.
5. Allows or commits acts of sexual abuse, exploitation or prostitution on the child.
6. Allows or creates the risk that the child will be sexually abused, exploited, or prostituted.
7. Simply abandons or exploits the child.
8. Fails to provide the child with necessary care, supervision, food, clothing, shelter, education, or medical care that is needed for the child's well-being.
9. Has not made sufficient progress toward the court-identified goals in the case plan that has caused the child to remain in the foster care system for fifteen out of the previous twenty-two months.⁷

B. KRS §625.090

This statute defines on what grounds a court may involuntarily terminate all parental rights and delineates that all pleadings and evidence must meet the clear and convincing standard.⁸ In order to involuntarily terminate all parental rights, the Court must find termination to be in the child's best interest.⁹ There must also be

⁷ See KRS §600.020(1)(a)-(i).

⁸ See KRS §625.090(1).

⁹ See KRS §625.090(1)(a)(3).

evidence that either the child was neglected or abused by the parent or that the parent was previously convicted of abusing or neglecting any child and that it is likely to occur to the named child if parental rights are not terminated.¹⁰ In addition, the Court must find the existence of one or more of the ten things listed:

1. The parent has abandoned the child for not less than ninety days.
2. The parent inflicted or allowed serious physical injury to befall the child.
3. The parent inflicted or allowed physical injury or emotional harm to be inflicted on the child repeatedly.
4. Parent was convicted of a felony involving the serious physical injury to any child.
5. The parent is or has been incapable for at least six months to provide the parental care and protection needed for the child and there is no expectation that it will be improved.
6. The parent has caused or allowed the child to be sexually abused or exploited.
7. Parent has been incapable, for reasons other than poverty, to provide needed food, clothing, shelter, medical care, and education and it is not expected to be improved.
8. The parent has had his or her rights to another child involuntarily terminated, that the named child was born subsequent to or during the previous termination, and that the factors for termination have not been corrected.
9. The parent was convicted of a crime that contributed to or caused the death of another child due to physical or sexual abuse or neglect.
10. The child has been under the care of the Cabinet for fifteen of the most recent twenty-two months preceding the filing for termination.¹¹

¹⁰ See KRS §625.090(1)(a)(1)-(3).

¹¹ KRS §625.090(2)(a)-(j).

Generally, Courts today must find, by clear and convincing evidence, the following three factors in order to involuntarily terminate parental rights: (1) the child must be found to have been abused or neglected by clear and convincing evidence; (2) it must be found that it would be in the child's best interest that the rights be terminated; and (3) one of the ten factors from above must be found to exist.¹²

Under the statute, the parent also has the opportunity to present evidence to refute the notion that his or her parental rights be terminated. In particular the parent may provide testimony regarding reunification services that have been offered by the Cabinet and whether additional services may help establish a long-term change that would allow the child(ren) to return to the parent permanently.¹³ If the parent can show by a preponderance of the evidence that the child will not return to abuse or neglect if the child is returned to the parent, the Court has discretion to not terminate the rights of the parent.¹⁴ Ultimately, it is the Court's decision, based on the testimony and evidence presented, whether to terminate an individual's parental rights or to dismiss the action and either keep the child in the state's custody or return the child to the parent(s).¹⁵

C. KRS §625.0405

This statute provides for indigent parents involved in voluntary termination of parental rights cases the right to appointed counsel.¹⁶ In order to be appointed counsel, the Court must determine the parent is indigent pursuant to KRS Chapter 31.¹⁷ If the parent is indigent, the Court must appoint counsel for the parent within forty-eight hours of the request.¹⁸

¹² See R.C.R. v. Commonwealth of Ky., Cabinet for Human Resources, 988 S.W.2d 36, 38-40 (Ky. App. 1998).

¹³ See KRS §625.090(4).

¹⁴ See KRS §625.090(5).

¹⁵ See KRS §625.090(6).

¹⁶ See KRS §625.0405(1).

¹⁷ *Id.*

¹⁸ *Id.*

D. KRS §625.040

This statute outlines specific information required when filing petitions for the *voluntary* termination of parental rights.¹⁹ The statute makes it very clear that such petitions may only be filed by the parent, counsel for the parent, or by a Cabinet representative, and cannot be done until three days after the birth of the child.²⁰

III. REASONS FOR TERMINATION

Based upon Kentucky's statutes relating to the termination of parental rights, it is evident that there are numerous potential reasons for the voluntary and involuntary termination of parental rights. Some of the possible reasons may include, but are limited to:

- A. Dependency
- B. Neglect
- C. Abuse
- D. Adoption
- E. Mental illness of the parent
- F. Felony or crime by parent, guardian or person exercising custodial control against another child

IV. PROPOSED STANDARDS FOR COUNSEL REPRESENTING PARENTS IN TERMINATION OF PARENTAL RIGHTS ACTIONS

Standards of Practice

Representing parents in these difficult actions may lead to a lot of uncertainty, especially for attorneys who have not previously had the opportunity to be involved with such a case. Some states throughout the country have already created standards and guidelines to be followed by attorneys representing parents in termination of parental rights actions, evidencing the importance for Kentucky to do so as well. In the creation of this manual, standards from Maine and Washington have been used as a reference to create the standards and key points below. These standards

¹⁹ KRS §625.040(2).

²⁰ See KRS §625.040(1) and (3).

will help guide attorneys through proceedings in Kentucky courts involving the potential termination of parental rights. Also, below are specific proposed standards to assist in more unique cases, ones that require more specific knowledge and information.

A. General Standard for Termination of Parental Rights.

1. Counsel for a parent in termination of parental rights actions should be sure to follow all Rules of Professional Conduct given by the Supreme Court of Kentucky under SCR §3.130.

Comment

(1) This standard should be followed in all representations taken on by counsel, regardless of the type of action. It is particularly important for counsel representing parents in potential termination of parental rights actions to pay attention to the rules governing an attorney's competence,²¹ possible conflicts of interest,²² and the acceptance of court appointments in these actions.²³

Following the Rules of Professional Conduct will enable the attorney to do the best job he or she can in representing a parent who is suffering through a difficult and confusing process.

2. Counsel for the parent should know the reason the action has been brought, so he or she can better gauge the steps that will need to be taken in the case.

Comment

(1) Without taking the time to understand why the client is involved in a termination action, counsel may not bring the proper materials, seek the correct discovery options, or make the most appropriate legal arguments to best represent their client.

(2) If the state is intervening in the family, it will be necessary for an attorney to understand the reason for the state's

²¹ SCR §3.130(1.1).

²² SCR §3.130(1.7 and 1.8).

²³ SCR §3.130(6.2).

involvement, as well as what the state hopes to accomplish.²⁴ This will allow an attorney to better know how to prepare and combat accusations.

3. Counsel for a parent involved in a termination of parental rights case should be familiar with the national and state legislation on dependency, neglect and abuse (DNA), foster care, termination of parental rights, and adoption.²⁵

Comment

(1) Knowing the law is the first step to knowing how to address the case. If an attorney is unfamiliar with the statutes and case law addressing parental rights, he or she will be unable to properly defend the client's rights.

4. Counsel for the parent must be familiar with the Family Court Rules of Procedure and Practice that went into effect the 1st of January, 2011.²⁶

Comment

(1) For termination of parental rights cases and those involving DNA issues, the attorney should be generally familiar with Kentucky's Family Court Rules of Procedure and Practice (FCRPP), and specifically Rules 16-36.²⁷

(2) The full FCRPP Rules can be found in the Appendix.

5. Parental counsel needs to be timely in their court filing and proceedings.

²⁴ Publication Development Committee Victims of Child Abuse Project, National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases, at 23 (1995), available at <http://www.ncjrs.gov/pdffiles/resguid.pdf> (last visited Mar. 6, 2011).

²⁵ *Id.*

²⁶ Supreme Court of Kentucky, In re: Order Amending Rules of Criminal Procedure (RCr), Rules of Civil Procedure (CR), Family Court Rules of Procedure and Practice, (2010), available at <http://courts.ky.gov/NR/rdonlyres/21BD9C18-94C1-4650-9A8F-9F816BDBBE25/0/201009.pdf> (last visited Mar. 6, 2011).

²⁷ See *id.* at 30-36.

Comment

(1) Prolonging cases through frivolous motions or untimely filing is harmful to the parent-client, as well as to the child involved in the action. Being untimely can also frustrate a judge and cause the case to start off poorly. Therefore, it is better to be on time in order to benefit all parties involved.

6. Counsel for the parent should know the client's past court actions and criminal background in order to make sure the client's background does not allow for the termination of parental rights under KRS §625.090.

Comment

(1) As seen above, a parent's rights may be terminated if he or she has been convicted of a felony or crime relating to the injury, sexual abuse, or death of a child.²⁸ For counsel, information about those types of crimes is paramount to the case and foreseeing the possible outcomes and issues that may arise.

7. Counsel for the parent should not only know how to interview and handle adult clients, but should also be trained in talking with and interviewing children.

Comment

(1) Children are always involved in termination of parental rights cases, because otherwise there would be no parent for the case. Therefore, in order to get a full understanding of the case, the parent(s)'s counsel will need to interview the child subject to the action and understand the child's role in the case.

(2) Not all children with knowledge important to the case will be directly involved in the termination action. For example, the parent's paramour may have children who lived with your client and/or witnessed your client's interactions with the child(ren) who may be subject to that present action.

²⁸ See KRS §625.090(1)(a)3 and (2)(i).

8. Counsel for the parent(s) should make sure to be aware of the parent's rights to view court records and documents related to the DNA accusations.²⁹

Comment

(1) Under Kentucky Revised Statutes, there is a short list of those who can view the report made by the Cabinet regarding alleged or suspected child abuse, neglect, or dependency. That list includes custodial parents, the guardian of the child(ren), the noncustodial parent once the DNA has been substantiated, and those suspected of the child abuse, neglect, or dependency.³⁰ Therefore, even if the parent is the one accused or suspected of the child abuse, they are able to access the documents and reports.

9. The parent's counsel should be communicating with the other attorneys, the Guardian ad Litem, and other representatives working within the case and making every effort to cooperate with them to maintain a professional working relationship throughout the case.

Comment

(1) Parents should also be taking steps and making it a priority to speak with the Cabinet for Health and Family Services if the child has been placed in the Cabinet's custody. Good communication could help the reunification process go more smoothly and quickly. Therefore, the parent's counsel should not hinder that communication.³¹

(2) In addition, parent's counsel should make it a priority to be familiar with family preservation services and programs in the community that will help resolve the client's specific areas of struggle.³² By knowing this information, an attorney will be better equipped to help the client reach reunification with the child(ren).

²⁹ See generally KRS §620.050.

³⁰ KRS §620.050(5)(a)-(b) and (e).

³¹ State of Maine, Representing Parents in Child Protection Cases: A Basic Handbook for Lawyers, (1999), available at http://www.courts.state.me.us/maine_courts/specialized/family/handbook_lawyers.html (last visited Mar. 6, 2011).

³² Publication Development Committee Victims of Child Abuse Project, *supra* note 24, at 23.

10. Counsel for a parent must be prepared to handle emotional situations impacting the client.

Comment

(1) Termination of parental rights severs the legal relationship between a child and the parent.³³ Parents who do not wish to destroy that relationship may become distraught, angry, or simply depressed. Their counsel needs to be ready to handle such outpourings of emotion.

11. Counsel for a parent must advise a parent of their right to appeal and ensure the perfection of the appeal for the client. Counsel should either represent the parent throughout the appellate process or file a motion to withdraw with the trial court after filing the notice of appeal and designation of record so that the trial court can ensure that either counsel is appointed for the appellate process or the parent can be informed of the right to seek appointment of counsel on appeal from the appellate court.

Comment

Counsel has a duty to inform a client of every step in the process of representation and to protect the interests of the client. When a client opposes the decision of the trial court, then counsel has a duty to ensure that the client's right to challenge that action in a higher forum has been fully preserved. This obligation arises from the requirement that counsel provide competent representation.³⁴ The duty of loyalty to the client, the duty to be thorough in one's representation and the duty to avoid any conflict of interest mandate that the attorney act at the direction of the client after fully explaining the appellate process and any potential consequences.³⁵ The lawyer may believe fulfillment of these duties will impact her relationship with the trial court but such

³³ See Commonwealth of Ky., Cabinet for Health and Family Services v. L.J.P., 316 S.W.3d 871, 873 (Ky. 2010) (*citing to Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). See also generally Kentucky Cabinet for Health and Family Services, Termination of Parental Rights, https://apps.chfs.ky.gov/pandp_process/termination_of_parental_rights.htm#TPR (last visited Mar. 6, 2011).

³⁴ SCR §3.130(1.1).

³⁵ SCR §3.130 (1.2, 1.7, and 1.8).

anticipated pressure or possible future disfavor cannot have an impact on the action of the attorney for the parent.

B. Voluntary Termination of Parental Rights

1. Counsel representing a parent in a voluntary termination of parental rights petition should ensure the papers for voluntary termination are not filed until three days after the child's birth³⁶ and those papers contain the necessary information required under KRS §625.040(2).

Comment

(1) Pursuant to KRS §625.040, information an attorney will want to gather from his or her client includes the residence of the petitioners and their relation to the child, the residence of the child, along with their name, sex, and date of birth, a factual basis for the termination of parental rights, the name and address of those individuals the rights are to be transferred, and a statement from those individuals willing to take the parental duties of the child(ren).³⁷

2. When counsel is representing a parent in a voluntary termination of parental rights case, the parent does not have to be present, if they choose, at the hearing.³⁸

Comment

(1) To avoid presence at the proceedings, a parent must file an appearance-waiver and a consent-to-adopt form with the court.³⁹

(2) The appearance-waiver and consent-to-adopt form include a statement of acknowledgement and agreement to be signed by the parent(s), counsel for the parent, and the Cabinet. It should also include a notarized signature of the parent(s) and the address at which the parent(s) would like the final judgment sent.⁴⁰

³⁶ KRS §625.040(3).

³⁷ KRS §625.040(2).

³⁸ See generally KRS §625.041.

³⁹ KRS §625.041(1).

⁴⁰ KRS §625.041(3).

3. A minor parent(s) does have the ability to voluntarily terminate his or her parental rights and consent to the adoption of their child.⁴¹

Comment

(1) In such a situation, the Court is required to appoint a Guardian ad Litem to represent each minor parent.⁴²

C. Involuntary Termination of Parental Rights

1. Counsel for the parent should seek information relating to the reunification requirements provided by the Cabinet and consider other services that might enable the client to develop the parenting skills necessary to keep their parental rights.

Comment

(1) Reunification can be a lengthy process that requires multiple steps and effort on the part of the parent(s). Counsel for the parent(s) should be communicating with the Cabinet to make sure their client is in compliance and doing what is required to enable reunification with the child(ren).⁴³

2. Counsel for the parent should request, collect and review discovery in order to assist in presenting evidence to the Court that will show the child would be is safe from any abuse and neglect upon return to the parent.⁴⁴

Comment

(1) The Cabinet and the Court are looking to protect the child(ren) from further abuse, neglect, or dependency. It is imperative that counsel for the parent provide evidence that will reassure the Cabinet and the Court that the child is safe.

⁴¹ KRS §199.500(2).

⁴² *Id.*

⁴³ State of Maine, *supra* note 31.

⁴⁴ See KRS §625.090(5).

- (2) Evidence may include documents showing that parents have been taking the necessary steps to reunify with the child(ren), testimony by experts or involved Cabinet investigators or workers, and testimony from the parent(s) stating what steps they have taken to remove the threat that once existed.⁴⁵
3. The petition for involuntary termination may not be filed until five days after the child's birth.⁴⁶ Counsel should take note of the dates on the petition and make sure procedures are being followed.

Comment

- (1) If the petition is filed any earlier than five days after the child's birth, it could be viewed as infringing upon the parent(s)' rights. Five days is already a short period of time, and there is no need to shorten it further.
4. Counsel should make the parent aware of his or her rights to information and decision-making while the child is under the care of the Cabinet for Health and Family Services.⁴⁷

Comment

- (1) It is important to advocate for the parents and make sure that they still get a chance to play a role in their child's life. Encouraging them to use their rights through decision-making is just one part of being the supportive advocate.
- 1.
- D. Standards for Incarcerated Parents and Unwed Fathers

Not every parent that an attorney is appointed to represent will be one that is available and easily found. In some situations, a parent may be in prison or for statutory purposes is considered an unwed father. Stereotypically, these clients are thought to always be men. However, that may not always be the case as there are women who can be in prison during the pendency of a termination of parental rights action.

⁴⁵ *Id.*

⁴⁶ See KRS §625.050(5).

⁴⁷ Publication Development Committee Victims of Child Abuse Project, *supra* note 24, at 25.

When appointed to represent an incarcerated parent or an unwed father, counsel must take some additional steps that would not otherwise be necessary. These are unique cases and will require a different type of involvement from the attorney. Listed below are a number of things an attorney should do and consider when representing an incarcerated parent or unwed father. There are also additional key statutes listed that will assist that parent's attorney in navigating the system.

1. The first thing the attorney should do is locate the incarcerated parent or unwed father.

Comment

(1) If the parent is in prison when the attorney is appointed, locating the correct prison or jail may be a more difficult task than finding a parent who lives in the child's neighborhood.⁴⁸ One place to start is to conduct a search through the Kentucky Offender Online Lookup System, located at <http://www.corrections.ky.gov/kool.htm>.⁴⁹

(2) Under Kentucky statutes, an unwed father is called a putative father.⁵⁰ A putative father is a little easier to locate because he is a father who has been voluntarily identified by the mother, has been acknowledged through a paternity test to be the father, has his name on the child's birth certificate, has financially supported the child, or he has taken additional steps to identify himself as the father.⁵¹

2. Next, the parent's attorney should take the appropriate steps to meet with the parent and discuss the case. At this time, it is necessary to explain procedures and give the parent enough information that will help him or her decide what to do next.

⁴⁸ Kathleen Creamer, "Representing Incarcerated Nonresident Fathers in Child Welfare Cases," in *Advocating for Nonresident Fathers in Child Welfare Court Cases*, 135, 139 (ed. Claire S. Chiamulera 2009) available at <http://www.fatherhoodqic.org/chapter8.pdf> (lasted visited Mar. 6, 2011).

⁴⁹ Kentucky Offender Online Lookup System, Ky. Department of Corrections, available at <http://apps.corrections.ky.gov/KOOL/ioffsrch.asp> (last visited Mar. 6, 2011).

⁵⁰ See generally KRS §625.065.

⁵¹ KRS §625.065(1)(a)-(f).

Comment

(1) Meeting with an incarcerated parent may be done in-person at the prison, (if they are permitted visitors), otherwise, contact should occur through telephone or written communication.⁵²

(2) Meeting with an unwed father may prove less difficult. Once he is located, the challenges for the attorney will be similar to those faced with any other parent with which the attorney would meet.

3. Both incarcerated parents and unwed fathers will need to decide what type of case plan they would like to pursue. For some it will be difficult to reach a point of reunification, if possible at all. Some will want reunification and may be able to reach that point. Some parents may not want reunification and would prefer to voluntarily terminate their parental rights. The only way to learn this information is through communication with the parent and explanation of the laws and procedures the case involves.

Comment

(1) If reunification is not possible due to time constraints or the type of crime committed, or it is not the wishes of the parent, then the attorney should discuss other options with the parent for the child.⁵³

4. If reunification is the goal, then the first step will be getting the incarcerated parent or unwed father in touch with the involved Cabinet office and possibly the social worker assigned to the child's case in order to get the parent involved in creating an appropriate case plan and involved in decision making regarding the child.⁵⁴

Comment

(1) Creating a case plan is a vital step to reunification. The case plan will determine what the parent needs to do in

⁵² Creamer, *supra* note 48, at 140.

⁵³ *Id.* at 137.

⁵⁴ *Id.* at 141.

order to accomplish reunification. Examples include going through a rehabilitation program, seeing a counselor, taking parenting classes, having contact with the child, etc.

5. Parental counsel for an incarcerated parent should be familiar with the prison facility at which the parent is located. It is important that counsel be aware of the programming available to the parent to help him or her reach the goals set by the Cabinet that will allow them to reunify with their child(ren).⁵⁵

Comment

(1) Some prison facilities will have programming that will help the parent reach his or her reunification goals. It is important for the attorney to be aware of which programs are offered and how to get the parent into the programs and classes.⁵⁶

6. A concern with incarcerated parents is when the parent has a sentencing time longer than fifteen months, which in turn leads to the child being in foster care for fifteen of the preceding twenty-two months. In those situations, under the Adoption and Safe Families Act (ASFA), courts may be required to initiate a termination of parental rights case.⁵⁷ Therefore, it is the job of the attorney to know the exceptions to the Act.

Comment

(1) Under the ASFA, even if the parent's incarceration is less than fifteen months, if the incarcerated parent's sentencing time leads to the net effect of the child being in foster care for greater than fifteen out of the past twenty-two months (child placed into foster care prior to parent's incarceration), this could trigger the requirement for proceedings to terminate that parent's right.⁵⁸

⁵⁵ *Id.* at 140.

⁵⁶ *Id.*

⁵⁷ 42 U.S.C. §675(5)(E) (2011).

⁵⁸ *Id.*

- (2) The exceptions to termination of parental rights when a child has been in foster care for fifteen out of the past twenty-two months include:
- a. When the child is being cared for by a relative at the choice of the State;
 - b. The State agency has documented a compelling reason in a case plan that is available for court review, as to why termination is not in the best interest of the child; and
 - c. When the State has not provided the services necessary for reunification under the case plan.⁵⁹
7. The counsel for the incarcerated parent or the unwed father should make sure to include the parent in hearings and decisions regarding his or her case.

Comment

(1) Even though an incarcerated parent is currently in a prison facility, it is important to meet with the parent regularly, (in person, via telephone, or through written communication), and make sure he or she is included in every step of their case.

(2) The attorney should look into state and local rules regarding the ability of the incarcerated parent to attend the hearings or whether video or voice conferencing is acceptable.⁶⁰

(3) For the unwed father, including him in every step of the case is vital in the attorney's representation. The attorney should not make any assumption as to what decisions the unwed father would make; instead, the attorney should meet with him to determine their desires.⁶¹

⁵⁹ *Id.* at §675(5)(E)(i)-(iii).

⁶⁰ Creamer, *supra* note 48, at 139.

⁶¹ See SCR §3.130(1.2) (*defining* the allocation of authority between attorney and client).

8. Counsel for the incarcerated parent or unwed father should make sure the parent understands the importance of being a part of the child(ren)'s life during the pendency of the case.

Comment

(1) Unwed fathers may or may not have been a part of the child's life before this time.⁶² Regardless of whether the unwed father has been a part of the child(ren)'s life before now, if he has chosen a goal of reunification, it is important for him to become a part of the child(ren)'s life now.

(2) The attorney for the unwed father should contact the Cabinet and social worker assigned to the case and, if possible, arrange for times that the father may spend with the children.

(3) The attorney for an incarcerated parent should become familiar with the visitation policies of the prison facility and should determine whether visitation by the child(ren) is allowed. Things the attorney may want to know are whether the visitation is through a window, if there is a special room for children, if touching is allowed, who may supervise the visit, and whether there is a requirement for the parent to be shackled.⁶³ Knowing this information may be crucial in determining if the visitation will be possible or even in the child's best interest.

9. An attorney for an unwed father should be aware of the case law relating to the client's status. Counsel should make it clear to the parent that he has a right to a fitness hearing before the court prior to the children can be taken from him.⁶⁴

Comment

(1) In many cases, an unwed father is someone who is in the child(ren)'s life and may even live with the mother. However, oftentimes problems arise because the father is not married to the child(ren)'s mother. When problems related

⁶² KRS §625.065.

⁶³ Creamer, *supra* note 48, at 142.

⁶⁴ Stanley v. Illinois, 405 U.S. 645, 649 (1972).

to the parent's unmarried status arise, the holdings in Stanley v. Illinois can be used to show that a father cannot have his children taken away under the presumption that he will be unfit (due to marital or other status) without holding a proper fitness hearing.⁶⁵

E. Adoption

1. When representing a parent in a termination of parental rights case involving adoption, the attorney is not to represent both the biological parent(s) and the prospective adoptive parent(s) in the same case.⁶⁶

Comment

(1) An attorney who attempts to represent both the biological and adoptive parents in the same case can be charged with a misdemeanor.⁶⁷ That type of punishment demonstrates how seriously the courts will take dual representation in adoption proceedings.

(2) An attorney should not only be deterred by the misdemeanor punishment, but also by the conflict of interest that could exist by representing both sides, which could materially limit the lawyer's responsibilities to the other client.⁶⁸

2. If the proceedings to terminate the parental rights of the biological parents have already concluded, then the biological parents being represented by counsel will not be made a party to the adoption proceeding.⁶⁹

Comment

(1) If the parents' rights have already been terminated, they are legally no longer a part of the child's life and have given up (or lost) all claims to the child, making it unnecessary for those parents to participate in an adoption proceeding.

⁶⁵ *Id.*

⁶⁶ KRS §625.0407(1) and KRS §199.492(1).

⁶⁷ KRS §625.0407(2) and KRS §199.492(2).

⁶⁸ SCR 3.130(1.7(a)).

⁶⁹ KRS §199.480(1)(b).

3. In order for a child to be adopted, voluntary and informed consent must be given by the biological parents of the child.⁷⁰

Comment

(1) Voluntary and informed consent is not required if the parent(s)' rights have already be terminated in an earlier proceeding.⁷¹

(2) Voluntary and informed consent is also not required from the biological parent(s) if it has already been pleaded and proved that any of the provisions under KRS §625.090 exist.⁷²

- The provisions of KRS §625.090 are laid out in the statutes above and include abuse, neglect, abandonment, and serious injury inflicted by the parent on the child or was allowed to be inflicted under the supervision of the parent.⁷³

(3) Voluntary and informed consent is defined under KRS §199.011(14). The definition makes it clear that voluntary and informed consent requires that the parent(s) was fully informed of the legal effect of the proceedings, that he or she did not give consent under coercion or the promise of anything of value other than what is accepted under KRS §199.590(6), and that that the consent is in writing and sworn.⁷⁴

⁷⁰ KRS §199.500(1).

⁷¹ KRS §199.500(1)(b).

⁷² KRS §199.500(4).

⁷³ See generally KRS §625.090.

⁷⁴ KRS §199.011(14).

GUARDIAN AD LITEM REPORT

This form should be completed before the Disposition; and should be updated before each review; it is suggested that any updates be designated with bold type or italicized.

_____ Have reviewed GAL standards and best practices Guidelines developed by the American Bar Association, the NCJFCJ Resource Guidelines, and the Kentucky Best Practice Model for DNA Cases.

_____ Appointment Dated _____

_____ Appointment Received (date: _____)

_____ DNA-10 received

_____ DCBS face sheet received

_____ Family Team Meeting (date: _____)

_____ Attended Family Team Meeting (within 5 days of removal if child is in Cabinet custody; within 10 days of removal if child is in relative custody:

GAL comments from Family Team Meeting:

_____ Interviewed child (or saw child at home)

GAL comments from interview or observation of child; this should include:

I. DETAILS FROM HOME VISIT

- A. Are there any language barriers? Are there any concerns about immigration status? How are these being addressed?
- B. How many people live in the home?
- C. Siblings? Ages?
- D. What are the sleeping arrangements?

- E. Is there adequate food in the home?
- F. Does the child have adequate clothing?
- G. Are there any environmental concerns?
- H. Are there any safety concerns?
- I. Are there any other concerns about the home?
- J. Conversations with caretakers
- K. How does the child get to school?

II. DETAILS ON CONVERSATIONS WITH THE CHILD

- A. From home visit prior to disposition
- B. From in-person or telephone visit before each review

III. INVESTIGATION OF THE CHILD'S MEDICAL AND THERAPY RECORDS

IV. REPORT ON VISITATION WITH THE PARENTS, INCLUDING:

- A. Parents' report and concerns, if any
- B. Caretaker's report and concerns, if any
- C. Cabinet report and concerns, if any

V. DETAILS FROM A SCHOOL VISIT, INCLUDING:

- A. Report card, attendance records, counseling records
- B. Conversations with teachers, counselors regarding child's behavior
- C. Any truancy issues?
- D. Disability, special needs
 - 1. Has the child been tested for disability, educational needs?
 - 2. Does the child have a disability that adversely impacts her/his education?

3. Does the child receive special education and related services?
 4. If so, does the child have a current IEP (individualized education plan)?
 5. Does the child have a Behavior Intervention Plan?
 6. Does the child have a 504 plan?
- E. Since these kids get moved around, it is important that any educational plan follows them. (Educational Passport is supposed to travel with the kid.)
- F. Should the Children's Law Center or Legal Services be appointed to advocate for the child's educational needs?

VI. MEDICAL ISSUES

Do you believe that this child would benefit from medical, dental, vision, or mental health care?

If so, please detail:

VII. OVERALL RECOMMENDATIONS

PARENT'S ATTORNEY REPORT

This form should be completed throughout the representation as each stage is completed and should be updated before each review; it is suggested that any updates be designated with **bold** type or *italicized*.

DEPENDENCY, NEGLECT, AND ABUSE

- Appointment Dated _____/_____/_____
- Appointment Received _____/_____/_____
- Have reviewed, where pertinent, KRS §600.020 (relevant definitions), KRS Chapter 620, and any other relevant statutes. Pay attention to burdens and evidence rules at each stage of the process.
- Have reviewed the Rules of Professional Conduct (SCR §3.130), the Family Court Rules of Procedure and Practice (FCRPP), the NCJFCJ Resource Guidelines, and the Kentucky Best Practice Model for DNA Cases.
- Obtained and reviewed initial petition and any other documents in the court file.
- Emergency Custody Order (if applicable) _____/_____/_____
 - Outcome and comments:
- Temporary Removal Hearing _____/_____/_____
 - Outcome and comments:
- Initial Parent Interview _____/_____/_____
 - o Attorney comments from interview; this should include:
 - A statement indicating that the client was informed about the duty of confidentiality and the attorney-client privilege.

- A statement indicating that the client was informed about the scope of the representation.
- A statement indicating that the client was informed about the nature of the allegations and the proceedings.
- Basic Information About the Client
 - Name:
 - Sex:
 - Date of Birth:
 - Phone:
 - Address of Residence:
 - Relation to Child:

 - Employment History

 - Immigration Status

 - Primary language and Ability to Speak English
- The reason why the action is being brought
 - Why is the client involved?

 - If there is state intervention, the reason for the state's involvement.

 - What is the client's version of the story? Does the client have any defense suggestions?

 - Are there any companion criminal charges?

- Are there any other custodians, or potential custodians, of the child? What are the client's opinions concerning the fitness of the current or potential custodians to act in such a capacity?
- The names, ages, and reason for involvement of any other relatives or individuals that may be involved in the case.

- The client's past court actions and criminal background
 - Previous family involvement with the courts.

 - Whether the family currently receives services.

 - If the child is not in the home, what is the current visitation schedule? What are the client's desires regarding visitation?

 - Has the client been convicted of a felony or crime relating to the injury, sexual abuse, or death of a child?

 - Has the client ever been convicted of any other crime that resulted in the death or permanent or physical or mental disability of a member of the client's family or household?

- Has the client ever been diagnosed with any serious physical illness or disease?

- Has the client ever been diagnosed with any serious mental illness or disability?

- Does the client use, or has the client ever used, alcohol or drugs?
 - If so, how often?
 - Has the client ever been treated for drug or alcohol abuse?

- Does the client use, or has the client ever used, tobacco?
 - If so, how often?

- Information about client's conduct
 - Has the client ever hurt the child physically or emotionally?
 - Has the client ever sexually abused the child?

- Information about home environment
 - How many people live in the home, and who are they?
 - Does the child have any siblings?
 - What are the sleeping arrangements?
 - Who supervises the child?
 - Is there adequate food in the home?

- Does the child have adequate clothing?
 - Are there any environmental concerns?
 - Are there any safety concerns?
 - Are there any other concerns about the home?
 - How does the child get to school?
 - Does the child receive medical, dental, and other care?
- Information about the child
- School performance and involvement.
 - Extracurricular activities.
 - General emotional and physical wellbeing.
 - Does the child have special needs?
 - Language barriers, if relevant.

- Immigration status, if relevant.
- Is there any evidence that should be preserved? Photographs that should be obtained or taken?
 - A statement indicating that the client was given information concerning how to reach counsel.
 - A statement indicating that the client was informed about the importance of appearing, when requested, at any point in the proceedings.
- If appropriate and practicable, follow up with the parent in writing and communicate with all other parties about counsel's position on communicating with the client.
 - Post-Initial Client Interview Investigation
 - Communicated with other attorneys, the guardian ad litem, and other representatives, including, but not limited to, Cabinet for Health and Family Services and Court Appointed Special Advocates.
 - When possible, review all relevant court files.
 - Make all reasonable efforts to obtain relevant information from third parties.
 - Identify all potential witnesses and prioritize interviews. Potential witnesses may include, but are not limited to, mental health workers that have worked with the parent or child, school personnel, law enforcement, physicians, relatives, neighbors and landlords, employers, caseworkers, foster parents and other caretakers, alcohol and drug counselors, ministers, clergy, other faith leaders, and parenting instructors.
 - Interview potential witnesses.
 - If needed, interview the child after obtaining permission of the guardian ad litem.
 - If needed, interview the client again.

□ Evaluation of Pleadings or Written Answers

- Review the petition, summons, and return of service and, unless there are sound tactical reasons for not doing so, move to dismiss the pleadings if there are defects, such as:
 - The petition does not contain the name, date of birth, and address of the juvenile, and the name and last known address of the parent, guardian, or custodian;
 - The petition was not properly verified by the DSS Director or his or her designee;
 - The petition does not contain sufficient factual allegations to convey subject matter jurisdiction and personal jurisdiction over the parent; or
 - The petition and summons were not properly and timely served on the parent client.
- After reasonable inquiry, counsel should consider filing a timely written answer to the petition and raising any applicable affirmative defenses.

□ Pre-Adjudication Motions

- Motions to be made may include, but are not limited to, discovery motions, motions for an in camera inspection, motions to dismiss the petition or other motions related to the insufficiency of the pleadings, motions to divulge the identity and contact information for witnesses and others, motions for medical, psychological, or psychiatric evaluations, evidentiary motions and motions in *limine*, and, if appropriate, motions for appointment of a guardian ad litem for the respondent parent.

□ Pre-Adjudication Conferences

- Counsel should be aware that, by local rule, some judicial districts conduct a pre-adjudication conference to clarify all issues for trial. Counsel should be familiar with all applicable local rules and should know what issues must be raised at a pre-adjudication conference to be preserved for the adjudicatory hearing. In districts that do not require a pre-adjudication conference by local rule, counsel should consider requesting a conference.
- Counsel should also be aware of any local rules requiring the parties to exchange at the pre-adjudication conference witness lists and documents they intend to introduce at the adjudicatory hearing, and should comply with those local rules.

□ Discovery

- Counsel should consider utilizing all available informal and formal discovery methods, including informal written requests, depositions, interrogatories, requests for admissions, subpoenas for persons, subpoenas *duces tecum* for the production of documents, and other methods.
- Unless there are sound tactical reasons for not requesting discovery, counsel should seek discovery of relevant information to the broadest extent permitted under state and federal law.

□ Experts and Support Services

- Throughout case review and investigation, and in preparation for each hearing in an abuse, neglect, dependency, or termination of parental rights case, the parent attorney should consider whether the assistance of an investigator, licensed clinical social worker, family preservation specialist, mental health expert, or other expert is necessary and appropriate. If necessary and appropriate, counsel should file a motion with the court setting forth a particularized showing of necessity and requesting funds to secure the assistance of an expert whose evaluation, consultation, or testimony may assist the client at each phase of the proceedings.
- If counsel believes an expert evaluation of the child is necessary and appropriate, counsel should serve any motion for expert funding on the legal custodian of the child and the GAL attorney advocate.
- If appropriate, counsel should obtain reports from experts and prepare them to testify. Counsel should also prepare the respondent parent for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.
- If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court.
- If, at any hearing in an abuse, neglect, dependency, or termination of parental rights case, the parent attorney learns that another party intends to call an expert witness to testify, counsel should take steps to determine whether the witness is qualified as an expert in the relevant field.

□ Negotiating

- After appropriate investigation and case review, counsel should explore with the client and adverse parties the possibility and desirability of reaching a negotiated consent judgment, and should be aware that an adverse party will often dismiss one of the grounds alleged in the petition in exchange for a stipulation to another ground.
- Counsel should explain to the client all possible consequences of stipulating to one or more facts or circumstances or entering into a consent judgment, including the possible waiver of appellate rights.

□ Adjudication

- Throughout preparation and the adjudicatory hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.
- Counsel should be familiar with the Kentucky Rules of Evidence and the law relating to all stages of the adjudicatory process, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the adjudicatory hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections.
- In advance of the adjudicatory hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research.
- Where appropriate, counsel should have the following information and materials available at the time of the adjudicatory hearing:
 - Copies of all relevant documents filed in the case, including the petition;
 - A copy of critical statutes and cases related to anticipated issues;
 - The cabinet and GAL reports and attachments, if available;
 - Any expert reports;
 - Copies of subpoenas;
 - A list of all exhibits to be offered and the witnesses through whom they will be introduced;
 - Any reports from assessments or counseling that the client has completed;
 - Documentation concerning the client's employment and housing status;

- Documentation regarding any special achievements of the child while in the custody of the parent;
 - Negative drug screen results, if any;
 - A plan, outline, or draft of opening statement;
 - Cross-examination plans for all possible adverse witnesses;
 - Direct-examination plans for all prospective defense witnesses;
 - A plan, outline, or draft of closing arguments;
 - Proposed amendments to the petition, if applicable; and
 - Proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.
- Counsel should consider whether there are tactical reasons to stipulate to damaging facts that are readily provable and uncontroverted, such as the possibility that the facts will have less impact on the court if they are summarized rather than the subject of lengthy testimony, and the possibility that the court will view the client as accepting responsibility for the stipulated facts or circumstances.
 - Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting evidence on behalf of the parent, and instead relying on the evidence and inferences, or lack thereof, from the adversary's case.

Disposition

- Counsel should note that when the court is petitioned to remove or continue the removal of the child from the custody of a parent, the court shall first consider whether the child may be protected against the alleged dependency, neglect, or abuse, by alternatives less strict than removal.
- Counsel should be prepared to present all mitigating and favorable information regarding the parent client to the court at the dispositional hearing -- including evidence of the parent's achievements and progress after the filing of the petition -- through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information.

- If appropriate, counsel should present to the court an alternative dispositional plan or report on behalf of the parent client, including placement of the child in the parental home or viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan or report.
- Counsel should be aware of the dispositional alternatives set forth in KRS §620.140, and should advocate for those that are consistent with the client’s wishes and well grounded in fact and law.

Post-Disposition

- Counsel should discuss with the parent client the result of the dispositional hearing, all responsibilities of the parent pursuant to the court’s ruling, any available post-disposition motions to set aside an adverse decision, and the parent’s right to appeal.
- If necessary and appropriate, counsel should file any applicable motions for rehearing, for an amended order, or for relief from the order in accordance with the Rules of Civil Procedure, as well as any notices of appeal in compliance with the Rules of Appellate Procedure.

TERMINATION OF PARENTAL RIGHTS

Initial Planning

- Counsel should develop, in consultation with the client, an overall theory of the case. Throughout preparation and the termination hearing, counsel should consider the theory of the case and ensure that counsel’s decisions and actions are consistent with that theory.
- If the petition or motion to terminate is not timely filed, and the court has not entered an order finding good cause for the late filing, counsel should move to dismiss the petition or motion, unless there are sound tactical reasons for not doing so.
- Counsel should confer with the client as soon as possible after a petition or motion to terminate is filed about all issues related to the defense of the petition or motion, including but not limited to:
 - Witnesses that should be interviewed and possibly subpoenaed;
 - Documentary and photographic evidence that should be gathered and/or subpoenaed;

- Any prior court files, both for the subject juvenile and any other child of the parent client, which may be relied upon or introduced into evidence by the petitioner or the GAL.
- If appropriate, counsel should also discuss with the client whether there are tactical reasons to stipulate to any allegations in the petition or motion, other than ultimate facts that could themselves constitute a ground for termination, such as facts that are uncontroverted and/or readily capable of determination or proof.
- The decision to file pre-trial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Pre-trial motions that counsel should consider filing include, but are not limited to:
 - Discovery motions;
 - Motions for an in camera inspection;
 - Motions to dismiss the petition or motion on the grounds of insufficiency of the pleadings;
 - Motions to divulge the identity and contact information for witnesses and others;
 - Motions for medical, psychological, or psychiatric evaluations;
 - Evidentiary motions and motions in *limine*; and
 - Motions for appointment of a GAL for the respondent parent, if appropriate.
- Unless there are sound tactical reasons for not doing so, counsel should consider utilizing all available informal and formal discovery methods and should seek discovery to the broadest extent permitted by law, including but not limited to:
 - The identity of all lay witnesses who will be called to testify at the termination hearing and a summary of the testimony to be elicited;
 - The identity of all expert witnesses who will be called to testify at the termination hearing and copies of the witnesses' curriculum vitae and any reports prepared by the witnesses; and
 - A list of all reunification services that were provided to the parent prior to the filing of the petition or motion to terminate.
- If discovery is not timely provided to counsel, the parent attorney should consider filing a motion to compel production and/or seeking a continuance of the termination hearing.

- After an answer or response is filed, counsel should take any necessary steps to enforce the parent’s right to a special hearing. At the special hearing, counsel should raise any pre-trial motions that may require an evidentiary hearing prior to the adjudication of the termination petition or motion, such as discovery motions or motions in *limine*.
- In advance of the termination hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research, including but not limited to:
 - Interviewing and subpoenaing all potentially helpful defense witnesses that have been identified by the client and by counsel’s review of the pleadings and evidence, including medical personnel or other professionals that are referenced in the files;
 - Interviewing and subpoenaing any needed adverse witnesses, including the child if necessary and appropriate;
 - Examining and subpoenaing all potentially helpful physical or documentary evidence;
 - Obtaining copies of all reports and attachments so that counsel can be prepared with rebuttal witnesses and evidence;
 - Making a timely motion in advance of the hearing for funds for investigators or other experts if warranted, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;
 - Obtaining and reading transcripts of any prior proceedings in the case or related cases, if applicable;
 - Obtaining any photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may help the judge better understand the case; and
 - Meeting with the client to review the reports and attachments, discuss the defense, and prepare the client’s testimony.
- Counsel should be familiar with the Rules of Evidence and the statutory and case law relating to all stages of a termination proceeding, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the termination hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections. If, at the termination hearing, the petitioner makes material allegations about facts or circumstances that are not contained in the petition or motion, counsel should consider seeking a continuance or objecting to preserve the issue for appellate review.

- Where appropriate, counsel should have the following information and materials available at the time of the termination hearing;
 - Copies of all relevant documents filed in the case, including the petition or motion issues;
 - A copy of the Juvenile Code and other critical statutes and cases related to anticipated;
 - All reports and attachments;
 - Any expert reports;
 - Copies of subpoenas;
 - A list of all exhibits to be offered and the witnesses through whom they will be introduced;
 - Any reports from assessments or counseling that the client has completed;
 - Documentation concerning the client’s employment and housing status;
 - Documentation regarding any special achievements of the child while in the custody of the parent;
 - Negative drug screen results, if any;
 - A plan, outline, or draft of opening statement;
 - Cross-examination plans for all possible adverse witnesses;
 - Direct-examination plans for all prospective defense witnesses;
 - A plan, outline, or draft of closing argument; and
 - Proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.

- If the adjudicatory and dispositional phases of the termination proceedings are not concluded within the time periods mandated by statute, counsel should move to dismiss the petition or motion, unless there are sound tactical reasons for not doing so.

Adjudication

- Counsel should anticipate the petitioner’s theory of the case, all evidence the petitioner can reasonably be expected to introduce during the adjudication phase of the termination hearing, and any weaknesses in that evidence. Counsel should research and prepare to argue corresponding motions, including motions to dismiss.

- Unless sound tactical reasons exist for not doing so, counsel should make timely and appropriate objections and motions to strike improper evidence offered by the petitioner or GAL, and should assert all possible grounds for exclusion of the evidence.

- In preparing for cross-examination, counsel should:
 - Consider the need to integrate cross-examination, the theory of the case, and closing argument;
 - Be thoroughly familiar with petitioner’s file, as well as the previously submitted reports and attachments;
 - Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the parent’s case;
 - Anticipate the adverse witnesses that might be called, including the parent client, and consider a cross-examination plan for each anticipated witness;
 - Be alert to inconsistencies, variations, and contradictions within each witness’s testimony;
 - Be alert to inconsistencies, variations, and contradictions between different witnesses’ testimony; and
 - Be alert to issues relating to bias and credibility of witnesses.
- If petitioner or the GAL attempts to present dispositional evidence or a dispositional report to the court prior to the conclusion of the adjudication phase, counsel should make appropriate objections.
- At the close of the petitioner’s case, counsel should move to dismiss the petition or motion for insufficient evidence. Where appropriate, counsel should be prepared to present argument in support of the motion, including supporting case law.

□ Disposition

- If the court determines that grounds to terminate parental rights exist and the case enters the dispositional phase, counsel should be prepared to present to the court at the dispositional hearing all mitigating and favorable information on behalf of the parent client – including evidence of the parent’s achievements and progress after the filing of the petition and evidence of the child’s expressed interests regarding adoption -- through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information. During the dispositional phase, counsel’s goal is to demonstrate that, while grounds to terminate may exist, termination would not be in the best interest of the juvenile.
- If appropriate, counsel should present to the court an alternative dispositional plan to termination and adoption, including viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan.

SCENARIO #1

You have been appointed to represent Alice in an involuntary termination of parental rights proceeding in a Kentucky court. Alice is the single mother of Chandler, a seven-year-old boy. In an interview, you learn from Alice that she desires to retain all parental rights in relation to Chandler. Alice stated, "I may not have been the best parent in the past. I know that. But, I am wholly committed to becoming a better parent in the future. You cannot let them take Chandler away! That is all I want!" There is no indication that Alice will back down from her stance. In a later interview with Chandler you learn his side of the story. Chandler stated, "I love my Mommy, but sometimes I am very scared of her. She uses very mean and ugly words all the time. The other day I forgot to pick up my toys. She yelled at me, grabbed my arm, and pulled me up real fast. It hurt! Mommy didn't let me have lunch or dinner either. I was real hungry when I went to sleep on the floor. I'm so happy that I have a nice teacher who gave me money to buy a snack because my Mommy was gone to work when I got on the bus and forgot to give me any." As Chandler went on you learned that Chandler goes to bed hungry almost every night. It seems that the only food he receives is from school. Furthermore, Chandler tells you that his "head hurts" from the cigarette smoke that constantly fills the small rundown apartment in which he and his mother live. Chandler stated, "The other night Mommy was drinking that stuff that makes her act crazy. She fell asleep with one of those smoky things in her hand! I had to shake her real hard to wake her up!" The boy appeared sickly and weak, and his clothes were ratty and tattered. You feel that allowing Alice to retain all parental rights is not in Chandler's best interest. How do you proceed? What ethical duties do you have to your client, Alice? To Chandler?

Comments:

This factual scenario illustrates the problems that can arise when the ethical representation of a parent may not be in the best interests of the child. Here, it is clear that the lawyer feels that allowing the mother to retain parental rights is not in the best interests of the child. Nevertheless, Kentucky SCR 3.130(1.2)(a) states, "A lawyer shall abide by a client's decisions concerning the objectives of the representation." This is a classic ethical conundrum facing attorneys who represent parents in dependency, neglect, and abuse cases. Ethically the answer is to advocate for the parent's objectives. It must be remembered that the guardian *ad litem* is the attorney representative that is to advocate the "best interest" of the child. Furthermore, Kentucky SCR 3.130(1.2)(b) notes, "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or *moral* views or activities." (*emphasis added*)

SCENARIO #2

You have been appointed to represent Bobby (12), Darcy (14), and Lucy (17) as guardian *ad litem* in a dependency, neglect, and abuse case. The children live with their mother, Amber. It appears that Amber suffers from severe delusions. She believes that Bobby's inner thigh is infested with flesh-eating bacteria; that he was treated for his condition at UK hospital while she was out of town; and that she murdered the surgeon after she found her son in a horrible post-surgery condition. All of those beliefs are false. Darcy told authorities that Amber pulled down Bobby's pants after a doctor's visit in order to look at his inner thigh and genital region to disaffirm the doctor's negative diagnosis. Furthermore, it seems that she once "massaged" Lucy's breast. The children's father is out of the country and pays child support very sporadically. The petition filed by the cabinet alleges that there is a substantial risk of serious physical harm as a result of Amber's inability to provide for them; that Bobby is at a substantial risk of suffering serious emotional damage as the result of being included in discussions about his genital area; and that Bobby is at substantial risk of sexual abuse. Amber realizes that other people perceive her as delusional but will not admit that her beliefs are actually delusions. A psychological report submitted to the court stated that there is a possibility that Amber's mental illness could lead to future neglect or physical abuse. However, the report also stated that the condition can possibly be treated with medication, and Amber has begun such treatment. Her treating physician seems optimistic. It doesn't appear that there are any other potential custodians for the children, and your experiences as a lawyer in the area have made you very discontented with the foster care system. You realize that often times the foster parents can be worse than the custodians from which the children are taken. The children express a strong desire to remain with their mother and are strongly opposed to any interference with the relationship they have with her. Do you advocate for what the children want or for the best interests of the children? What are the children's best interests? Is it different for each child? If so, how do you approach such a situation? Do you ask the court to appoint separate counsel? If they do, can you ethically continue to represent a single child?

Comments:

This factual scenario illustrates the problems that can arise when a lawyer represents a child as a GAL and the child's best interest may be in conflict with what the child desires. The children in this hypothetical situation are twelve (12) to seventeen (17) years old and are able to clearly articulate what they want, and what they want is to live with their mother. However, that may not be in the child's best interest. It appears that Kentucky requires its GALs to represent the best interests of the children. See [Best Practice Methods and Essential Elements for the Child's Guardian Ad Litem](http://courts.ky.gov/NR/ronlyres/7993FD71-7F14-4877-A9EB-166368E2C08B/), Community Action Workshop Kentucky Court Improvement Project Administrative Office of the Courts, <http://courts.ky.gov/NR/ronlyres/7993FD71-7F14-4877-A9EB-166368E2C08B/>

[0/GALBestPracticesModel.pdf](#). However, if the best interests are in conflict with the child's wishes, then the attorney must inform the court and allow the court to make the ultimate decision on representation. In some situations, the court may appoint a CASA volunteer to represent the child's best interest. This problem also illustrates the problems that can arise when a GAL is appointed to represent multiple children. The best interests of each individual child may vary. Kentucky SCR 3.130(1.7) states, "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client" and "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client." Sometimes, a lawyer may ethically be required to ask the court to appoint a separate representative for each child. If a court accepts such a request it may be ethically impossible to represent a single child due to conflicting interests and the duty of confidentiality. See Kentucky. SCR 3.130(1.6) Comments [1-4 & 6-8]. Finally, the representation of minors often involves questions of client disability. Kentucky SCR 3.130(1.14) states that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" in such a situation. The next scenario examines such a situation in more detail.

SCENARIO #3

You represent Frank in an involuntary termination of parental rights case in a Kentucky court. After the initial interview and review of court documents, you realize that the case against Frank is extremely strong. It seems that to discipline his children he would often lock them in the barn behind his house. He did this numerous times throughout the winter and some of the occurrences lasted for multiple days. Furthermore, medical reports indicate that the children are malnourished, and the children have often shown up at school with bruises on their arms and legs. Frank has been diagnosed with a severe mental illness that has made working with him extremely difficult. He exhibits delusional behavior and confused thinking. When asked about his desired outcome, Frank said, "I want the kids. I'm not going to bend on this one mister. I ain't going to let those fascist suits take them away." Several days later you again inquired as to his desires. He stated, "They are all that protect me from them. You can't take my children." When you inquired as to whom he was referring to as "them" he acted as if he had no idea what you were talking about and started mumbling under his breath. Though he occasionally has episodes, most of the time Frank seems to clearly articulate what he wants. He will not accept losing his children. As Frank's attorney, what duty do you have concerning the client? How should you proceed with his case? Should you investigate his claims? The cause of his illness?

Comments:

This hypothetical illustrates the problems that can arise when a lawyer represents a parent that holds onto a hope that is, in your opinion, futile. It further illustrates the problems that can arise when your client has a disability that makes abiding by ethical rules more difficult. Kentucky SCR 3.130(1.3) states, "A lawyer shall act with reasonable diligence ... in representing a client." Kentucky SCR 3.130(1.3) Comment [1] states, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." As already discussed, Kentucky SCR 3.130(1.2) requires that the lawyer abide by the client's wishes concerning the "objectives" of the representation. Furthermore, Kentucky SCR 3.130(1.14)(a) states, "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of [minority] age, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client." This indicates that the lawyer in this hypothetical should zealously advocate for the client and attempt to abide by his wishes as far as reasonably possible. This includes investigating and presenting the case to the best of the lawyer's ability. The lawyer should probably investigate as to the cause of the mental illness and seek to delay the proceedings until such cause is determined. For example, the illness may stem from an underlying physical illness that could be eliminated by medication.

SCENARIO #4

You represent Mary, the thirty-six-year-old mother of Bronson. Mary's mother reported a number of possibly abusive incidents to the cabinet. After investigating the matter, the proper authorities filed a dependency, neglect, and abuse petition with the court. After short proceedings it was clear that Mary had engaged in various abusive and neglectful actions. Among other things, Mary often hit the child with a belt, left him locked in his room for hours, and failed to provide the child with proper food and bedding. Following a finding that the child had been neglected and abused, the judge recommended mediation for the next phase of the case. All parties agreed. You have recommended to Mary a number of solutions that you feel would be in her best interest. Nevertheless, she takes a stance that you feel may serve Mary's most immediate desires, mainly frequent visitation with the child, but will fail to serve Mary's long-term wishes; in particular, you realize that advocating for Mary's solution will cut off her ability to have any kind of control over the child's life. Mary suffers from a number of mental illnesses and has a difficult time grasping the future import of the possible solutions. During the last couple of meetings between you and Mary, you noticed that Mary seemed very distrustful of you and your motives. Though you have tried to console her discomfort by stating that her interest is your first priority in all matters, you overheard her say to her sister, "That damn lawyer don't care about us." In the initial mediation sessions Mary's actions and verbal tone indicated her distrust concerning the representation. Now, it seems that all parties in the room

have picked up on the frayed relationship. How do you proceed? How can you ensure that the outcome of the mediation reflects Mary's wishes as well as what, in your view, best serves her interests? What kind of ethical dilemmas exist?

Comments:

Mediation is cooperative rather than adverse. Uncooperative clients can often make the lawyer's job in such a setting difficult. There are numerous things that must be kept in mind when operating in such a setting. Though the client's views concerning the outcome of the matter are paramount, sometimes clients have difficulty grasping the important aspects of solutions. See Kentucky SCR 3.130(1.2 & 1.3). A lawyer may feel a need to push certain solutions on a client so that they can obtain outcomes that are beneficial to the client in the overall scheme of things. Kentucky SCR 3.130(2.1) states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." However, zealously advocating for a solution that the client is not wholly comfortable with can lead to distrust between the lawyer and the client. This can lead to a breakdown in the negotiating process, especially when other parties realize that such a strained relationship exists. When acting in such a scenario, the lawyer should keep all of these aspects in mind and balance the representation in conformance with the cooperative nature of the proceedings.

