Dissolution of Marriage in Guardian ad Litem Practice[1]

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The courts view dissolution as a dispute between two parents. The child is not a party, but the court determines the child's best interests in making custody decisions. IC 31-17-2-8. The factors the court shall consider are: the age and sex of the child; the wishes of the child's parent or parents; the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen years of age; the interaction and interrelationship of the child with the child's parent or parents, the child's sibling, and any other person who may significantly affect the child's best interests; the child's adjustment to the child's home, school, and community; the mental and physical health of all individuals involved; evidence of a pattern of domestic or family violence by either parent; and evidence that the child has been cared for by a de facto custodian. The court may interview the child in chambers to ascertain the child's wishes concerning custody. IC 31-17-2-9. The court may seek the advice of professional personnel even if the professional is not employed by the court; the advice shall be given in writing and made available by the court to counsel upon request. IC 31-17-2-10.

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The court may award sole custody of the child, which allows the sole custodian to determine the child's upbringing, including the child's education, health care, and religious training. IC 31-17-2-17. The court may specifically limit the custodian's authority if it finds, after motion by the non-custodial parent, that, in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or emotional development would be significantly impaired. IC 31-17-2-17. The court may also award joint legal custody if it would be in the child's best interests. IC 31-17-2-13. In awarding joint legal custody the court shall consider: (1) as a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to joint legal custody; (2) the fitness and suitability of the persons; (3) whether the persons are willing and able to communicate and cooperate in advancing the child's welfare; (4) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen years of age; (5) whether the child has a close and beneficial relationship with both persons; (6) whether the persons live in close proximity to each other and plan to continue to do so; and (7) the nature of the physical and emotional environment in the home of each of the persons. IC 31-17-2-15.

An award of joint legal custody does not require an equal division of physical custody of the child. IC 31-17-2-14. Often parties will agree, or the court will order joint legal custody with one parent designated as primary physical custodian. This means that the primary physical custodian must consult with the other legal custodian so that both custodians can agree on issues concerning the child's education, health care, and religious training.

The court may also award custody to a de facto custodian or a third party custodian. A de facto custodian is defined at IC 31-9-35.5 as a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least six (6) months if the child is less than three years of age; or one (1) year if the child is at least three years of age. IC 31-17-2-8.5 provides that if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian, the de facto custodian shall be made a party to the dissolution proceeding. If the court finds that the child has been cared for by a de facto custodian, the court shall consider the following factors in addition to the factors listed at IC 31-17-2-8 in determining custody: (1) The

wishes of the de facto custodian; (2) the extent to which the child has been cared for, supported and nurtured by the de facto custodian; (3) the intent of the parent in placing the child with the de facto custodian; (4) the circumstances under which the child was allowed to remain with the de facto custodian. The court shall award custody to the de facto custodian if the court determines that it is in the best interests of the child. A non-parent third party may be awarded custody even if the third party is not a de facto custodian if the criteria established by Indiana case law for guardianships and third party custodianships to which parents have not consented are met. There is a rebuttable presumption in favor of a child being placed in the custody of a parent. To rebut the presumption, the court must find by clear and convincing evidence at least one of the following: (1) parental unfitness; (2) parental acquiescence in the child remaining with the third party; (3) parental voluntary relinquishment of custody to the child to the third party for such a long period that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. See Hendrickson v. Binkley, 316 N.E. 2d 376, 393-394 (Ind. Ct. App. 1947). The court must also find the child's best interests are substantially and significantly served by placement with the third party. See In Re Guardianship of B.H., 770 N.E. 2d 283, 287 (Ind. 2002).

The court may not modify a child custody order unless the modification is in the best interests of the child and there is a substantial change in one or more of the statutory custody factors the court may consider. The court shall not hear evidence on a matter occurring before the last custody proceeding unless the matter relates to a change in the factors relating to the child's best interests. IC 31-17-2-21. In Joe v. Lebow, 670 N.E. 2d 9, 19 (Ind. Ct. App. 1996), the Court of Appeals of Indiana explained that the requirements of finding a substantial change and the best interest of the child demonstrates that "the policy of stability continues to guide the trial courts when considering modification petitions."

IC 31-17-4-1, IC 31-17-4-2 and IC 31-17-2-8.3 set forth the standards for parenting time by the noncustodial parent. The former term for parenting time was visitation. The noncustodial parent is entitled to "reasonable parenting time rights" unless the court finds, after a hearing, that the parent "might endanger the child's physical

health or significantly impair the child's emotional development." IC 31-17-4-1. The court may modify an order granting or denying parenting time rights "whenever modification would serve the best interests of the child" unless such parenting time "might endanger the child's physical health or significantly impair the child's emotional development." IC 31-17-4-2. IC 31-17-2-8.3 provides that there is a rebuttable presumption that the court shall order supervised parenting time if a noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child. The presumption states that visitation shall be supervised for at least one year and not more than two years immediately following the crime or until the child becomes emancipated, whichever occurs first. The crimes involving domestic or family violence are listed at IC 31-9-2-29.5. The crimes include homicide offenses, battery, kidnapping, criminal confinement, rape, child molesting, sexual misconduct with a minor and other sex crimes, robbery, arson, burglary, trespass, disorderly conduct, intimidation or harassment, voyeurism, stalking, human and sexual trafficking, and animal cruelty. If the court requires supervision during the noncustodial parent's parenting time or suspends the noncustodial parent's parenting time, the court shall enter a conditional order naming a temporary custodian who shall receive temporary custody of the child upon the death of the custodial parent. IC 31-17-2-11.

The Indiana Supreme Court adopted the Indiana Parenting Time Guidelines on March 31, 2001. The Guidelines are presumptive and any deviation from the Guidelines must be accompanied by a written explanation by the court indicating why the deviation is necessary or appropriate. The Guidelines are "not applicable to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development." See Haley v. Haley, 771 N.E. 2d 743, 751 (Ind. Ct. App. 2002), in which the Court held that the Guidelines are applicable in a custody modification, even if the original custody determination was made before the Guidelines went into effect. Cases in which parenting time was ordered by courts before the effective date of the Indiana Parenting Time Guidelines do not "automatically" change to the Guidelines unless the parties agree or there is a hearing for the court to consider whether the Guidelines should be ordered.

IC 31-17-6-1 through 9 delineate the roles and duties for Guardians ad Litem in dissolution proceedings. The definition of a guardian ad litem in the dissolution code reads as follows: "an attorney, a volunteer, or an employee of a county program designated under IC 33-24-6-4, who is appointed by a court to represent and protect the best interests of a child; and provide the child with services requested by the court, including: researching; examining; advocating; facilitating; and monitoring the child's situation." IC 31-9-2-50. The court may not appoint a party, the party's employee, or the party's representative as the GAL. IC 31-17-6-2. Except for gross misconduct, a GAL is immune from any civil liability that occurs as a result of the GAL's performance so long as the GAL acts in good faith. IC 31-17-6-8. The GAL is considered an officer of the court in representing the child's best interests. IC 31-17-6-5. The GAL does not represent the child's wishes on the dissolution proceeding, but instead represents and protects the child's best interests. The GAL does provide a voice for the child's desires and concerns. See Matter of D.V.H., 604 N.E. 2d 634, 638-39 (Ind. Ct. App. 1992), in which the court noted that the GAL should "refrain from repeating verbatim statements" made by the child, but noted that the legislative creation of the guardian ad litem appointment "contemplates some summarization of the child's desires and state of mind." Id. at 639. The GAL serves until the court enters an order for removal. IC 31-17-6-3.

The GAL does not have party status in a dissolution case by statute, but the GAL is characterized as a party in Deasy-Leas v. Leas, 693 N.E. 2d 90, 97 (Ind. Ct. App. 1998), which states that a "guardian ad litem is a party to the proceedings and is subject to examination and cross-examination." See also Carrasco v. Grubb, 824 N.E. 2d 705, 710-711 (Ind. Ct. App. 2005), a custody modification case in which the Court opined that the GAL was required to serve until excused by the trial court and the GAL had the authority to file a motion for hearing which resulted in custody modification due to the GAL's duty to supervise the child's situation. In J.M. v. N.M., 844 N.E. 2d 590, 601 (Ind. Ct. App. 2006), the Court opined that the GAL's participation in the dissolution arbitration hearing, including the examination and cross-examination of witnesses, was within statutory authority and did not constitute an abuse of discretion. The Court also found no merit to the father's contention that the GAL's presence during the arbitration hearing was barred by the separation of witnesses order. Id.

The GAL has the following five specific roles by statute in dissolution:

1. To conduct an investigation and prepare a report for the court which may be received in evidence if statutory procedures are followed (IC 31-17-2-12);
2. To exercise continuing supervision over the child to assure that the custodial or visitation terms of the court order are carried out (IC 31-17-6-7);
3. To subpoena witnesses and present evidence regarding the supervision or any investigation and report required by the court (IC 31-17-6-6);
4. To refer the child to professional personnel for diagnosis upon order of the court (IC 31-17-2-12(b));
5. To request court ordered counseling for the child (IC 31-15-4-9).

Courts have routinely allowed attorney guardians ad litem to do the following:

1. Attend all hearings and pre-trial conferences to provide input to the child's best interests;
2. Approve and sign all agreements regarding custody/visitation issues or provide alternate recommendations if agreement cannot be reached;
3. Cross-examine witnesses at hearings to bring out pertinent information regarding the child's best interests or needs;
4. File motions requesting in camera interviews for the child, supervised visitation, and evaluation or treatment for the child and family;
5. File and present legal memoranda and give an oral argument;
6. File other motions, including requests for production of documents and motions for fees, continuances, and removal when the case is resolved.

An attorney guardian ad litem personally conducts a complete investigation, visits the child's home and interviews the child, parents, and those who have important roles in the child's life such as teachers and counselors, prepares a report for the court, and advocates for the child's best interests while at hearings and through documents.

IC 31-17-2-12 provides that while preparing the report for the court, the GAL may consult any person who may have information about the child and his potential custodial arrangements. The GAL should obtain the names and addresses of all persons consulted and retain this information along with any notes, reports, or other data in the GAL's file. Retaining this information in the GAL's file is essential so the report may be

admitted into evidence. Bringing the complete GAL file to court will also facilitate the GAL's testimony. The GAL shall make the file of underlying data and reports available to counsel and to any party not represented by counsel.

The GAL report may be received in evidence at the hearing and will not be excluded on the grounds that it is hearsay or otherwise incompetent if it is mailed to the parties ten days prior to the hearing and other statutory requirements are fulfilled. IC 31-17-2-12. A GAL is not a custody evaluator and does not comply with the American Psychological Association's rules for custody evaluators.

A GAL does not have a statutory privilege with the child for whom the GAL is appointed. Id. at 94. But see Deasy-Leas v. Leas, 693 N.E. 2d 90, 99 (Ind. Ct. App. 1998), which states that a GAL can request that certain documents and communications be protected by Ind. Trial Rule 26 (C).

The second role for attorneys in GAL practice involves representing and giving legal advice to the CASA (court appointed special advocate) volunteer, including appearing in court with the volunteer to advocate for the child's best interests. Either role may involve a significant amount of work over a long period of time, depending on the complexity of the problems and the parties' refusal or inability to reach an agreement. On any particular case, it is important at the time of your GAL appointment to delineate your role to the court and the parties.

Indiana case law and statutes provide for court-ordered GAL fees to be paid by the parents. Sometimes the court divides the fee evenly between the parents. The court may also divide the fee based on the parents' proportionate income as shown in the financial declaration, or order the parent who requested the GAL services to pay the entire fee. If the court has not ordered the GAL fee at the time of appointment, it is best to file a motion for the fee as soon as possible. There is no statutory limit on the fees. Indiana case law in support of the GAL fee in dissolution includes Danner v. Danner, 573 N.E. 2d 934, 938 (Ind. Ct. App. 1991), where the Court found that a prior statute, IC 31-1-11.5-21(h), contemplated the appointment of a guardian ad litem and the resultant court-ordered payment of the guardian ad litem fee.

The GAL should deal professionally and courteously with the parties and their attorneys while maintaining independence. The goal of fostering agreement and helping

the parents improve their attitudes and situations should always be uppermost. The child in a dissolution case will most probably benefit from an ongoing relationship with each parent, so it is important to encourage parent-child contact and interaction whenever possible. A custody or parenting time order which has been tailored to meet the family's individual needs has the best chance of succeeding. A good resolution to dissolution issues can also help prevent abuse, neglect, and delinquency.

The GAL attorney in dissolution cases needs to use skills in investigation of records (accessing court, police, county Department of Child Services, medical, school and counseling records); interviewing children and adults; observing interactions between children and others; seeking out needed community social services agencies; facilitation; and advocacy. The GAL role is excellent training for new members of the bar. GAL work can also be rewarding pro bono work for experienced attorneys and for those whose practice does not usually include parent-child issues. Perseverance in monitoring the child's situation and trying new approaches to resolve old conflicts is also required for the GAL role. Courts depend on the GAL to help bring to light relevant child-focused information and suggested solutions so that better, more long-lasting custody and visitation decisions can be made to the child's benefit.