

FORMAL OPINION NO 2005-159

Competence and Diligence:

Requesting a Guardian Ad Litem in a Juvenile Dependency Case

Facts:

The Juvenile Court appoints guardians ad litem (GALs), who are often lawyers, for mentally ill parents in some dependency cases and termination-of-parental-rights cases.

Questions:

1. May a lawyer for a parent ethically request a GAL for the client?
2. When a lawyer acts as a GAL, does the lawyer have the same ethical duties, obligations, and powers as in a regular lawyer-client relationship?
3. After the appointment of the GAL for the mentally ill parent, is the lawyer obligated to take direction from the GAL?

Conclusions:

1. No, qualified.
2. No, qualified.
3. Yes, qualified.

Discussion:

It is generally accepted that it is error for a court to proceed without appointment of a GAL for a party when facts strongly suggest a lack of mental competency. *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat Cnty., State of Wash.*, 795 F2d 796, 806 (9th Cir 1986). Similarly, it is a violation of due process to fail to appoint a GAL for a mentally incompetent parent in a termination-of parental-rights proceeding. *State ex rel. Juvenile Dep't of Multnomah Cnty. v. Evjen*, 107 Or App 659, 813 P2d 1092, *rev den*, 312 Or 526 (1991).

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1. Seeking Appointment of a GAL.

Although a marginally competent client can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a client's limited capacity before resorting to a request for a GAL. This is reflected, *inter alia*, in Oregon RPC 1.14, which provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Consequently, and as a general proposition, lawyers for parents should not invade a typical client's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their clients only when a client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.¹

¹ It has been suggested that the parent's lawyer should seek a GAL only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R.

Although often referred to as determinations of the client's ability to aid and assist in their case, requests for GALs for parents in dependency proceedings are not governed by ORS 161.360, which governs the determination of whether a defendant in a criminal proceeding is unfit to proceed to trial due to his or her mental illness. In a criminal proceeding, due process prohibits a mentally incompetent defendant, who is unable to aid and assist in the defense, from being tried until the defendant becomes competent.² Thus, while the aid-and-assist motion may have other undesirable effects for the mentally ill criminal client, it does not permanently deprive the client of his or her right to a trial or representation by counsel. In contrast, in a juvenile dependency case or termination-of-parental-rights case, when a GAL is appointed for a parent the case proceeds to trial. Not only is the parent effectively deprived of counsel and the authority to make case decisions, but also the finding by the court that a GAL is required arguably establishes a parent's unfitness.

Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L Rev 515, 566–67.

Counsel for other parties to the proceeding, however, may be obligated to advise the court of the parent's incompetence. In *30.64 Acres of Land, More or Less, Situated in Klickitat Cnty., State of Wash.*, 795 F2d at 805, the court stated:

Rather, if it should appear during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if *pro se*), to consult with his lawyer with a reasonable degree of rational understanding, *Dusky v. United States*, 362 US 402, 402, 80 S Ct 788, 4 L Ed 2d 824 (1960) (standard for competency to stand trial in criminal case); *Thomas v. Cunningham*, 313 F2d 934, 938 (4th Cir 1963), or otherwise to understand the nature of the proceedings, *cf. Dusky*, 362 US at 402 . . . ; *Thomas*, 313 F2d at 938, that information should be brought to the attention of the court promptly.

² In a juvenile dependency proceeding, a lesser degree of due process applies because the rights of the parent must be balanced against the best interests of the child. Thus, in a dependency proceeding, the required fundamental fairness is met by providing a GAL for the parent and proceeding with the case so that the child does not languish in foster care.

In determining whether the client can adequately act in his or her own interests, the lawyer needs to examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client. Short of a client's being totally noncommunicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation. Standards for representation in juvenile dependency cases and termination-of-parental-rights cases recognize that the lawyer should always seek the lawful objectives of the client and should not substitute the lawyer's judgment for the client's in decisions that are the responsibility of the client.³ However, the lawyer may make other necessary decisions consistent with the client's direction on these essential issues.

2. *Distinguishing the Role of GAL and Lawyer.*

There is no requirement that a GAL be a lawyer, and nonlawyers frequently serve as GALS. Thus, when a lawyer acts as a GAL, the lawyer is performing a nonlawyer function and does not have the same ethical duties, obligations, and powers in the guardian-ward relationship as in a lawyer-client relationship, although both a lawyer and a GAL have a fiduciary relationship with the client or ward.

Oregon courts have indicated that a GAL has authority to settle claims on behalf of an incapacitated person and, with prior court approval, a GAL may confess judgment on behalf of the incapacitated person. *Alvarez v. Salvation Army*, 89 Or App 63, 66, 747 P2d 379 (1987), *rev den*, 305 Or 594 (1988); *see Guardianships, Conservatorships, and Transfers to Minors* § 3.14 (OSB Legal Pubs 2009). The GAL's authority essentially substitutes for the incapacitated person's

³ Indigent Defense Task Force Report, *Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases* (OSB Sept 25, 1996) (available at <www.osbar.org/surveys_research/idtf/index.html>). Standard 3.3 specifies the decisions that are the client's to make and includes whether to admit the allegations of the petition; whether to agree to jurisdiction, wardship, and temporary commitment to the State Offices for Services to Children and Families; whether to accept a conditional postponement; or whether to agree to specific services or placements.

authority to make these decisions in the proceeding. “In the law of adult incompetents, the role of the GAL has sometimes been held to incorporate the concept of substituted judgment, whereby the GAL attempts to make decisions for the ward based on what the GAL thinks the particular ward would have wanted had the ward not been incompetent.” Ann M. Haralambie, *The Child’s Lawyer: A Guide to Representing Children in Custody, Adoption and Protection Cases* (ABA 1993).

3. *Taking Direction from Client’s GAL.*

Because the rationale for the appointment of a GAL is to have someone who can make decisions for the incompetent client, after the appointment of the GAL the lawyer for the parent generally must take direction from the GAL and can make stipulations and agreements and do other acts at the GAL’s direction that the parent could do if the parent were competent. It is improper for the parent’s lawyer to act contrary to the direction of a GAL who is adequately asserting the client’s interests. *See, e.g., Brode v. Brode*, 278 SC 457, 298 SE2d 443 (1982) (improper and beyond scope of lawyer’s authority for lawyer to appeal from decision authorizing sterilization of profoundly retarded handicapped minor, when GAL did not choose to appeal); *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 521 F Supp 365 (DNH 1981), vacated and remanded on other grounds, 689 F2d 281 (1st Cir 1982) (lawyers in agency established by statute to advocate for rights of disabled persons may not act independently of incompetent client’s GAL).

When a GAL is appointed for an incompetent client, “appointment of a parent or other adult does not absolve the lawyer of the duty to make an independent determination of the client’s interests.” Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children’s Class-Action Cases*, 64 Fordham L Rev 1435, 1446 (1996). Parents’ lawyers should serve as a monitor to assure that the GAL adequately asserts the incapacitated client’s interests. Furthermore, the lawyer has a responsibility to inquire periodically whether the client’s

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competence has changed and, if appropriate, request removal of the GAL. Such inquiries should occur at every critical stage in the proceeding.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 18.3 to § 18.3-9 (ethical duties of representation of clients with diminished capacity) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 20, 24 (2000) (supplemented periodically); and ABA Model RPC 1.14.