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A/N/D and TPR Cases: The Role of the Child's Guardian ad Litem

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In abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) proceedings, the child who is the subject of the action is a party. G.S. 7B-401.1(f); -601; -1104. In most actions, the child is represented by a guardian ad litem (GAL). See G.S. 7B-601; -1108(b)-(c). This post provides an overview of the rights and duties of the child's GAL, which are addressed in statute and case law.

The Child as a Party and Their Rights

The child, regardless of their age, is a party to both A/N/D and TPR proceedings. G.S. 7B-401.1(f); -1104; see G.S. 7B-601(a) ("the juvenile is a party in all actions under this Subchapter"). As a party, the child has due process rights to notice of and participation in the proceedings – proceedings that impact their lives related to their care, custody, control, and relationship with their parents. In some cases, like a nonverbal infant, direct participation by the child is impossible. Sometimes, the child's direct participation is possible but does not occur. In other cases, the child's direct participation is desired or necessary. For example, the child may be the only witness to the alleged abuse, neglect, or dependency and must testify to the factual allegations in the petition. For juveniles who are 16 or 17 years old, the court must question the teen before ordering a primary permanent plan of Another Planned Permanent Living Arrangement (APPLA). G.S. 7B-912(d).

In addition to due process protections, the Juvenile Code explicitly allows the juvenile (not just their GAL) to present evidence and to have the court consider information the juvenile provides. G.S. 7B-901(a); -906.1(c); -908(a),(b)(1). For children who are 12 and older, they must receive notice of review, permanency planning, and post-TPR placement review hearings, and in TPR actions, they must be served with a copy of the TPR order. G.S. 7B-906.1(b); -908(b)(1); -1110(d). The child has the right to appeal. G.S. 7B-1002(1)-(2).

The Juvenile Code does, however, exclude the juvenile from being served with the summons and petition in A/N/D and TPR actions even though the juvenile is a party. Instead, those pleadings are provided to the GAL. See G.S. 7B-402(c); -406(a), -408, -1106(a),(a1), -1106.1(a)(5).

The Appointment of a GAL

The court appoints a GAL to represent the child's best interests and to protect the child's legal rights. See G.S. 7B-601(a). Whether a GAL must be appointed depends upon the pleadings in an A/N/D and TPR case.

Required

A GAL must be appointed to represent the child in each of the following instances:

- in all A/N/D cases where the petition alleges abuse or neglect (G.S. 7B-601(a));
- in all TPR cases where the respondent files an answer or response that denies material allegations in the TPR petition or motion (G.S. 7B-1108(b));
- in all TPR cases where the child is represented by a GAL in an A/N/D case and an answer or response is filed in the TPR that denies a material allegation in the petition or motion; the GAL in the A/N/D case represents that child in the TPR action unless the court determines the child's best interests requires otherwise (G.S. 7B-1108(d)).

The failure to appoint a GAL when one is required "creates a presumption of prejudice requiring reversal." *In re M.G.B.*, 293 N.C. App. 568, 591 (2024).

Discretionary

There are three situations where the court has the discretion to appoint a GAL to represent the child:

- when only dependency (and not abuse or neglect) is alleged in an A/N/D case (G.S. 7B-601(a));
- in any TPR action where an answer or response denying a material allegation in the petition or motion has not been filed; the discretionary appointment may occur before or after adjudication (G.S. 7B-1108(c));
- for post-TPR placement review hearings if a GAL was not already appointed in the TPR (G.S. 7B-908(b)(2)).

In deciding whether to appoint a GAL, the court should consider that a child is a party with certain statutory and constitutional rights. A stated purpose of the Juvenile Code is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles...." G.S. 7B-100(1). The court may want to consider whether and how the purpose of the Juvenile Code will be satisfied if a GAL is not appointed to the child.

Reappointment

In an A/N/D case, the appointment of a GAL terminates when a permanent plan for the child has been achieved and approved by the court. G.S. 7B-601(a); *In re R.A.H.*, 171 N.C. App. 427 (2005). The court may reappoint the GAL upon a showing of good cause. G.S. 7B-601(a). The court may also reappoint a GAL when (i) a motion for a permanency planning hearing is filed after guardianship has been ordered (G.S. 7B-906.1(b1)(3)) or (ii) permanency planning hearings have been waived and a motion to review visitation has been filed (G.S. 7B-905.1). If a motion to modify an A/N/D order is made under G.S. 7B-1000, the court must reappoint a previously released GAL. The modification hearing cannot be held until the GAL and attorney advocate are appointed. G.S. 7B-1000(c).

GAL Representation

The GAL's representation serves two primary purposes: (i) advocating for the child's best interests and (ii) protecting the child's legal rights. As a result, the GAL representation must include an attorney. See G.S. 7B-601(a); -1108(b). For A/N/D cases, the GAL typically consists of a team of individuals: a staff member at the local GAL office, a GAL volunteer, and an attorney advocate. See G.S. 7B-601(a); -1200; *In re J.H.K.*, 365 N.C. 171 (2011) (recognizing team representation). In some cases, there may be a conflict of interest with the GAL program such that an attorney is appointed to serve in the dual role of the GAL volunteer and attorney advocate. See G.S. 7B-1202. In other cases, there may be a lack of volunteers, which limits the ability for team representation. In TPR actions where there is not an underlying A/N/D case, the GAL program cannot be appointed unless the GAL program consents. G.S. 7B-1108(b). When the GAL program is not appointed, an attorney is appointed to perform both roles of the GAL – volunteer and attorney advocate. (For a discussion about an attorney appointed to dual roles and the ethics involved, see my colleague's, Timothy Heinle's, blog post [here](#).)

The Duties of the GAL

The GAL "stands in the place of the minor who is not *sui juris*," meaning of age. *In re J.H.K.*, 365 N.C. at 175, quoted in *In re M.G.B.*, 293 N.C. App. at 591. The GAL must fulfill the duties specified in G.S. 7B-601. *In re M.G.B.*

The specific statutory duties of the child's GAL include

- making an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs;
- facilitating, when appropriate, the settlement of disputed issues;
- offering evidence and examining witnesses at adjudication;
- exploring options with the court at the dispositional hearing;

- conducting follow-up investigations to ensure that the orders of the court are being properly executed;
- reporting to the court when the needs of the juvenile are not being met; and
- protecting and promoting the best interests of the juvenile until formally relieved of the responsibility by the court.

G.S. 7B-601(a); see G.S. 7B-1108.

North Carolina's appellate courts have repeatedly stated that protecting the best interests of the child is the GAL's "polar star." *In re J.H.K.*, 365 N.C. at 176. The courts have also discussed the specific duties of the GAL.

1. *Child's express wishes*

The GAL's representation centers around the child's best interests and not the child's express preference. See G.S. 7B-601(a). Still, "[o]ne of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court." *In re J.C.-B.*, 276 N.C. App. 180, 192 (2021). Those express wishes are not binding on the court as the court determines what is in the child's best interests. *In re M.G.B.*, 293 N.C. App. 568; *In re A.J.T.*, 374 N.C. 504 (2020). When considering how much weight to give a child's preference, the court may consider the age of the child. *In re A.K.O.*, 375 N.C. 698 (2020) (distinguishing between preference of 17-year-old and 9-year-old siblings).

2. *The GAL Investigation*

"[W]e have little guidance as to what constitutes sufficient investigation" by a GAL. *In re M.G.B.*, 293 N.C. App. at 592. Appellate opinions discuss the need for the GAL to interview the child, parents, family members, and other persons who are involved in the proceeding. See, e.g., *In re M.G.B.*; *In re R.A.H.*, 171 N.C. App. 427.

In one case, the supreme court held the GAL's investigation was sufficient when the GAL "regularly filed reports describing the children's needs; the nature and availability of educational, supervisory, health care and other resources, and other important matters, such as the respondent father's incarceration...[and] the GAL volunteer's assessment of the parents' compliance with court orders and her recommendation concerning the best interests of the children..." *In re J.H.K.*, 365 N.C. at 177. In another case, the court of appeals held the investigation was sufficient when the GAL had consistent contact with the children and visited with them monthly at their foster home; had monthly phone calls with the foster parents; spoke with the custodian more than once until the children were removed from her care; had access to DSS reports that included notes about the custodian's positive visitation with the children; and

filed written reports with the court that addressed the children's health, well-being, education, relationship with their foster parents and each other; and the children's wishes about remaining in their foster home. *In re M.G.B.*

Issues involving the sufficiency of the GAL's investigation must be raised at the trial court and are not automatically preserved for appeal. *In re M.G.B.* (statutory directive is to the GAL and not a mandate to the trial court to take a special act or direct a courtroom proceeding).

3. Legal Duties of the Attorney

The legal duties of facilitating a settlement when appropriate, offering evidence, examining witnesses, and exploring options with the court at the dispositional hearing are completed by the attorney advocate. *In re J.H.K.*, 365 N.C. 171. The attorney advocate appears at the hearings and introduces the GAL's report or testimony. *Id.* The attorney advocate also gives legal advice and assistance to the GAL volunteer for the child. *In re S.D.H.*, ___ N.C. App. ___ (Nov. 5, 2024).

4. Hearings

At dispositional hearings, the GAL must offer evidence to the court, either through testimony, a written report, or both, as to their recommendations of what is in the child's best interests. *In re L.L.*, 386 N.C. 706 (2024). The court may not proceed with a dispositional hearing without receiving evidence from the GAL when one has been appointed. *In re S.D.H.*, ___ N.C. App. ___ (vacating TPR and remanding for new dispositional hearing). Failure by a trial court to take evidence from the GAL at a dispositional hearing so that it can make an informed decision about the child's best interests is an abuse of discretion. *Id.* Conducting the dispositional hearing without any evidence from the GAL is an issue that is automatically preserved for appeal because of the trial court's implicit duty to ensure the GAL's statutory roles of providing information to the court are performed. *Id.* If necessary to give the GAL sufficient time to complete their investigation and make best interests recommendations, the trial court should continue the dispositional hearing. *Id.*

Although evidence from the GAL must be admitted at the hearing, the only member of the GAL team required to be present is the attorney advocate, absent a subpoena or court order requiring otherwise. *In re J.H.K.*, 365 N.C. 171. A dispositional hearing is not adversarial and allows for the admission of evidence that is relevant, reliable, and necessary, including hearsay evidence. *In re R.D.*, 376 N.C. 244 (2020); see G.S. 7B-1110(a). As a result, there is no absolute right to cross-examine the GAL at a dispositional hearing. *Id.* There is also no requirement that the court make an express finding that the GAL report is relevant, reliable, and necessary evidence in order to admit it. *Id.*

Access to and Disclosure of Information

To complete its duties, the GAL “has the authority to obtain any information or reports, whether or not confidential, that may in the guardian ad litem’s opinion be relevant to the case.” G.S. 7B-601(c). This includes access to information maintained by the department of social services. See G.S. 7B-302(a1)(2); -524(d)(2). The GAL does not have access to information that is protected by attorney-client privilege. G.S. 7B-302(a1)(2). Additionally, certain federal laws may require a specific court order for information, e.g., substance use information. See Chapter 14 of the A/N/D TPR Manual (discussing access to information under G.S. Chapter 7B, HIPAA, G.S. Chapter 122C, 42 C.F.R. Part 2, and FERPA).

The information or reports that a GAL receives are not subject to discovery, unless local rules in a judicial district provide otherwise. G.S. 7B-700(f); see G.S. 7B-700(b) (authorizing local rules). The GAL must not disclose information they receive unless there is a court order for the disclosure or the disclosure is required by law. G.S. 7B-601(c). The GAL is required to share with all the parties any report or records the GAL files with the court before such filing. G.S. 7B-700(f). The GAL may share information it determines is in the child’s best interests at safe babies court meetings. G.S. 7B-536(e).

This entry was tagged with the following terms: abuse neglect and dependency, department of social services, guardian ad litem.

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