

GAL, LGAL OR CHILD ADVOCATE ATTORNEY: DO YOU KNOW THE DIFFERENCE?

By:

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As attorneys, we often find ourselves in discussions with other attorneys, judges, and referees regarding the appointment of a GAL, LGAL or Child Advocate Attorney. During our discussion, someone will usually ask the basic question, “what is the difference between a GAL, LGAL and Child Advocate Attorney?” Because of the frequency of this question, this article will attempt to provide a basic summary of the differences between the GAL, the LGAL and the Child Advocate Attorney. This article will specifically explore the authority for each, the duties, the client, the report/file, presentment at trial, immunity/liability, and the appointment order.

Authority

The GAL is defined in MCR 722.22(f) as follows:

“[A]n individual whom the court appoints to assist the court in determining the child’s best interests. A guardian ad litem does not need to be an attorney.”

The authority for the appointment of a GAL in divorce matters is found in the Michigan Statutes and Court Rules. Specifically, MCL 722.27, Section 7. (1) provides as follows:

“If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child, the court may do 1 or more of the following...”

Section (d) provides as follows:

“Utilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes.”

The Court Rule for the appointment of a GAL in divorce matters is found in MCR 3.204(E) which provides as follows:

“In a case involving a dispute regarding the custody of a minor child, the court may, on motion of a party or on its own initiative, for good cause shown, appoint a guardian ad litem to represent the child and assess the costs and reasonable fees against the parties involved in full or in part.”

LGAL

The LGAL is defined in MCL 722.22(g), which provides as follows:

“[A]n attorney appointed under section 4. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in section 4.¹”

The authority for the appointment of an LGAL is found in MCL 722.24, (2) – (4). The specific appointment authority is found in Section 2, which provides as follows:

“If, at any time in the proceeding, the court determines that the child’s best interests are inadequately represented, the court may appoint a lawyer-guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in section 17d of chapter XIA of 1939 PA 288, MCL 712A.17d. All provisions of section 17d of chapter XIA of 1939 PA 288, MCL 712A.17d, apply to a lawyer-guardian ad litem appointed under this act.”

Because section 2 references and incorporates MCL 712A.17d, all of the provisions set forth in MCL 712A.17d are also applicable to an LGAL in divorce cases. MCL 712A.17d provides as follows:

“(1) A lawyer-guardian ad litem’s duty is to the child, and not the court. The lawyer-guardian ad litem’s powers and duties include at least all of the following:

- (a) The obligations of the attorney-client privilege.**
- (b) To serve as the independent representative for the child’s best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.**
- (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation**

¹ MCLA 722.24.

of progress relating to all aspects of the last court-ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

- (d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:
 - (i) Before the pretrial hearing.
 - (ii) Before the initial disposition, if held more than 91 days after the petition has been authorized.
 - (iii) Before a dispositional review hearing.
 - (iv) Before a permanency planning hearing.
 - (v) Before a post-termination review hearing.
 - (vi) At least once during the pendency of a supplemental petition.
 - (vii) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.
- (e) The court may allow alternative means of contact with the child if good cause is shown on the record.
- (f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.
- (g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
- (h) To attend all hearings and substitute representation for the child only with court approval.
- (i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.
- (j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing

their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

(l) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable."

Child Advocate Attorney

A Child Advocate Attorney is defined in MCL 722.22(c), which provides as follows:

"...[A]n attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subsection owes the same duty of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client".

MCL 712A.17d(2) also allows for the appointment of a Child Advocate Attorney, which provides as follows:

"...If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem."

Duty/Client

The GAL does not have to be an attorney. The duty of the GAL is to assist the Court to determine the best interest of the child; the duty of the GAL is to the Court. The appointment of a GAL does not create an attorney-client privilege. See MCR 5.121(E).

The LGAL must be an attorney. The LGAL represents the child and has a duty to the child, not to the Court. The LGAL has an attorney-client privilege with the child/client. The LGAL is to make a determination of the child's best interest.

The Child Advocate Attorney has the child for the client and owes its duty to the child. The child advocate has a traditional attorney-client relationship with the child governed by MRPC. The appointment of a Child Advocate Attorney creates an attorney-client privilege.

Report and File

The report of the GAL may be considered by the Court pursuant to MCL 722.27(d), which provides that the Court can consider the recommendations of the GAL for the resolutions of the dispute. Further, the report may be considered pursuant to MCR 5.121(C), which provides as follows:

“Before the date set for hearing, the guardian ad litem or visitor shall conduct an investigation and shall make a report in open court or file a written report of the investigation and recommendations. The guardian ad litem or visitor need not appear personally at the hearing unless required by law or directed by the court. Any written report must be filed with the court at least 24 hours before the hearing or such other time specified by the court.”

(D) Evidence.

(1) *Reports, Admission Into Evidence.* Oral and written reports of a guardian ad litem or visitor may be received by the court and may be relied on to the extent of their probative value, even though such evidence may not be admissible under the Michigan Rules of Evidence.

(2) *Reports, Review and Cross-Examination.*

- a. Any interested person shall be afforded an opportunity to examine and controvert reports received into evidence.**
- b. The person who is the subject of a report received under subrule (D)(1) shall be permitted to cross-examine the individual making the report if the person requests such an opportunity.**

- c. **Other interested persons may cross-examine the individual making a report on the contents of the report, if the individual is reasonably available. The court may limit cross-examination for good cause...**

MCR 3.219 also allows for the production of the GAL report to the Court and it provides as follows:

“If there is a dispute involving custody, visitation, or change of domicile, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the friend of the court and to the attorneys of record for the parties, or the parties if they are not represented by counsel. The attorneys for the parties, or the parties if they are not represented by counsel, may file objections to the report before a decision is made.”

The file of the GAL is discoverable unless the appointment order provides otherwise.

The report and recommendations of the LGAL are governed by MCL 722.24(3), which provides as follows:

“In a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation. The court shall not, however, admit the report and recommendation in to evidence unless all parties stipulate the admission. The parties may make use of the report and recommendation for purposes of a settlement conference.”

The Court may also consider the report pursuant to MCR 3.219, provided above.

The file of the LGAL is not discoverable pursuant to MCR 712A.17d (3), which provides as follows:

“...[T]he lawyer-guardian ad litem’s file of the case is not discoverable.”

Because the Child Advocate Attorney is not a GAL or LGAL, the advocate does not provide a written report to the Court. The file of the Child Advocate Attorney is governed by the attorney-client privilege and is therefore, not discoverable.

Trial

The GAL is subject to cross-examination and may be called to a trial or hearing as a witness. See MCL 5.121. The LGAL is not subject to cross-examination and shall not be called as a witness in a case pursuant to MCL 712.17(d)(3). (See statute language above). The Child Advocate Attorney is an advocate for the child and cannot be called as a witness or subject to cross-examination in the pending case. The LGAL and the attorney advocate present a case at

trial. See MCL 712A.17d(g), which provides in part that the LGAL independently calls witnesses on behalf of the child.

Immunity/Liability/Fees

Pursuant to MCL 619.1407, a GAL has immunity from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as GAL. The LGAL and the Attorney Child Advocate have standard attorney liability to the child. The GAL has limited immunity. Generally, GAL fees and Child Advocate fees for the child are non-dischargeable in bankruptcy as they are regarded as “support.” (See bankruptcy abuse prevention and consumer protection act).

Order

Often, subsequent to an appointment of the GAL or an LGAL, the Court or the parties will issue or sign an order which sets forth many of the duties of the GAL or LGAL. We often see “kitchen sink” orders which may include the following provisions:

- Scope of the investigation
- Testing requirements
- Release of information requirements
- Access to records
- Discoverability of the file
- Privilege
- Ability to file pleadings

Because the appointment of a GAL, LGAL, or Child Advocate Attorney is very important in a divorce proceeding, it is very important that attorneys and the Court understand the difference between the three. Hopefully, this article has provided a better understanding of the basic differences between the three tools which the Court and/or the parties can rely upon in high conflict divorce cases involving custody and/or parenting time issues.

For a more thorough discussion regarding the issues related to the GAL, see the GAL Handbook for Divorce Practice available through the State Bar Family Law Section at a cost of \$89.50. The Handbook may be obtained through Connie R. Thacker at Rhoades McKee.

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