

GUARDIANS AD LITEM IN CONTESTED TPR CASES

State Public Defender Private Bar Specialty Certification Training
Termination of Parental Rights
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ROLE & RESPONSIBILITIES OF THE GUARDIAN AD LITEM:

Wis. Stat. §48.235(3)(a) Guardian ad litem; Duties and Responsibilities

“The guardian ad litem shall be an advocate for the best interests of the person or unborn child for whom the appointment is made”

Functions independently

Acts “in the same manner as an attorney as a party to the action.”

Shall consider, but is not bound by, “wishes of that person or the positions of others as to the best interest of that person or unborn child”

Not a “general Guardian”

Wis. Stat. §48.235(3)(b) Guardian ad litem; Duties and Responsibilities

Unless granted leave by the court not do so, GAL shall personally or through a trained designee, meet with the child or expectant mother, to assess the appropriateness and safety of the child’s/unborn child’s environment, and if child is old enough to communicate, interview the child and determine the child’s goals and concerns regarding his or her placement

Make clear and specific recommendations to the court concerning the best interest of the child or unborn child at every stage of the proceeding

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INVOLUNTARY TPR TRIAL PRACTICE IN ROCK COUNTY FOR GUARDIANS AD LITEM FOR CHILDREN

General procedural practice in Rock County although there might be minor modifications depending upon the judge assigned to the case

Mirrors the general procedure for Custody/Placement cases

Appointment

Appointed at the time TPR Petition is filed

Usually receive Petition along with Appointment

Initial Plea Hearing

May defer entering plea until after conducting pre-trial investigation

In many CHIPS based TPRs, GAL was GAL in CHIPS case and may enter plea at initial hearing or shortly thereafter

Discovery/Pre-Trial Motions

Write letter to counsel/unrepresented party inviting parent(s) to meet with me before fact-finding hearing

Contact –

Parents

Parents' counsel

Other possible witnesses/sources of information:

Social Workers

Therapists/Mental Health Professionals for child

Therapists/Mental Health Professionals for parent(s)

Medical providers for child and/or parent

Review Social Service Records

Review Mental Health/Treatment/Medical Records

Teachers

CASA workers

Law enforcement

Foster parents

Family/Friends of Family

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Meet with child, if appropriate

Talk with whom the child is living with prior to conference

Try to determine what the child knows/what is child's perception of what is happening before meeting with child

Meet with child and person they are living with

If child is comfortable with GAL, meet with child alone

Try to ask general non-leading questions such as

Ask child to describe current situation

How do they feel about what's going on

What, if anything, would they change

Participate in Discovery

If Petitioner/Respondent schedules deposition – please notify GAL

Parents' counsel should avoid speaking with the child

Cf., In re the Matter of the Disciplinary Proceedings Against Kinast, 192 Wis.2d 36, 38, 530 N.W.2d 387, 388 (1995)(footnote omitted).

“We determine, contrary to the referee's conclusion, that Attorney Kinast's interview with the children without the knowledge and consent of their guardian ad litem violated the rule, SCR 20:4.2, prohibiting a lawyer from communicating with a party the lawyer knows to be represented by counsel concerning the matter for which the lawyer was retained unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” (divorce case)

Participate in Motions for Summary Judgment

If a formal plea was not entered early in case or at any subsequent Status Conferences, let parties know position as soon as possible

Start coordinating trial presentation with party GAL is aligned with

Fact Finding Hearing/Jury Trial

Formally enter a plea if not done so already

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GAL usually has his/her own table at trial

Wis. Stat. §48.235 Communication to a Jury

“In jury trials under this chapter, the guardian ad litem or the court may tell the jury that the guardian ad litem represents the interest of the person or unborn child for whom the guardian ad litem was appointed.”

VOIR DIRE

Court

Petitioner

Respondent

Guardian ad Litem

JURY STRIKES

Guardian ad Litem shares with party they are aligned with

In re the Interest of C.E.W., 124 Wis. 2d 47, 66-67, 368 N.W.2d 47, 57 (1985)

OPENING INSTRUCTIONS

Wisconsin Jury Instruction – Children

No. 300 – Involuntary Termination of Parental Rights:

Preliminary Instruction (General) (partial)

“The interests of (child) will be represented by Attorney _____, who is the child’s guardian ad litem. [(Child) is not in the courtroom because the laws governing this proceeding do not require that (he)(she) attend.]”

But see, In Interest of J.A.B., 153 Wis. 2d 761, 769-70, 451 N.W.2d 799, 802 (Ct. App. 1989)(Not error for court to tell jury GAL represents the child’s best interest).

OPENING STATEMENTS

Petitioner

Respondent

Guardian ad Litem

“The guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury.”

C.E.W., 124 Wis. 2d at 66-67, 368 N.W.2d at 57.

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PETITIONER'S CASE/WITNESSES

Petitioner
Respondent
Guardian ad Litem
Petitioner
Respondent
Petitioner

RESPONDENT'S CASE/WITNESSES

Respondent
Petitioner
Guardian ad Litem
Respondent
Petitioner
Respondent

GUARDIAN AD LITEM'S CASE/WITNESSES

Guardian ad Litem
Petitioner
Respondent
Guardian ad Litem

PETITIONER'S REBUTTAL/WITNESSES

Petitioner
Respondent
Guardian ad Litem
Petitioner
Respondent
Petitioner

CLOSE

Guardian ad Litem
“The guardian ad litem cannot, of course, invoke the best interests of the child in statements to the jury.”
C.E.W., 124 Wis. 2d at 70, 368 N.W.2d at 58.
Petitioner
Respondent
Petitioner

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Post-Trial Investigation

Review Report filed pursuant to Wis. Stat. §48.425 if one is submitted

Follow up investigation if necessary

Contact/Re-contact potential witnesses for Dispositional Hearing

Similar as list above

Meet with child, if appropriate

Similar to what is described above

I don't ask children whether they want their parent's parental rights terminated

Try to determine what they want to happen, if anything at all

Notify Parents' counsel of position as soon as it is known

Dispositional Hearing

Evidentiary Portion of Hearing:

Petitioner

Respondent

Guardian ad Litem

Petitioner

GAL shares child's wishes, if any

Argument:

GAL gives recommendation

Based upon evidence offered in court & "best interests of the child" including factors in Wis. Stat. §48.426(3):

Likelihood of adoption

Age & health of child at time of disposition and time of removal from the home, if applicable

Whether child has substantial relationships with parent(s) or other family members, and whether it would be harmful to the child to sever these relationships

Wishes of child

Duration of separation of the parent(s) from child

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Whether child will enter into a more stable and permanent family relationship as a result of the termination taking into account conditions of current placement, likelihood of future placements, and results of prior placements

List is not exclusive

GAL is not bound by child’s wishes (Wis. Stat. §48.235(3)(a))

Petitioner
Respondent
Petitioner

Court is not required to follow GAL’s recommendation

Appeal

Appointment continues

Can file separate brief or joint brief with Petitioner/Respondent

GUARDIAN AD LITEMS FOR INCOMPETENT PARENTS IN TPR CASES

Wis. Stat. §48.235(1)(g)

Appointment

GAL can be appointed for parent who is subject to a TPR proceeding if the parent is not competent to participate in the proceeding or to assist his or her counsel or the court in protecting the parent’s rights in the proceeding

Wis. Stat. §48.235(5m)

Matters Involving Contested Termination of Parental Rights Proceedings

If child found to be in need of protection and services and GAL appointed pursuant to Wis. Stat. §48.235(1)(g), GAL shall provide information to the court regarding the parent’s competency to participate in the proceeding and assist parent’s adversary counsel

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But, GAL may not participate in the proceeding as a party

May not call witnesses

May not make an opening statement or a closing argument

May not participate “in any activity at trial that is required to be performed by the parent’s adversary counsel.”

RESOURCES

Joan N. Alshuler, et al., *The Guardian ad Litem Handbook* (3d ed. 2008)
(State Bar of Wisconsin CLE Book)

Gina M. Pruski, et al., *Wisconsin Juvenile Law Handbook* (2d ed. 2008)
(State Bar of Wisconsin CLE Book)

Wisconsin Juvenile Jury Instructions Committee, *Wisconsin Jury
Instructions – Children – 2009 Edition*