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When it comes to children, distinction in attorney roles is key

In last month's edition of Collaborative Concepts, the subtle, yet important, differences among the various appointments made to represent a child's best interest in a domestic relations proceeding were discussed.

In Illinois, those appointments include guardian ad litem (GAL), attorney for the child (AFC) and child's representative (CR). The procedure for appointment varies, as a GAL, AFC or CR may be appointed and chosen directly by the court, the attorney representing either adult party may move for such an appointment or the parties may reach an agreement requesting appointment of any of the three.

Once one understands the differences between the roles played by GALs, AFCs and CRs, the essential question becomes which appointment, and in what scenario, is most appropriate for an attorney to seek the services of a GAL, AFC or CR?

Guardian ad litem

It has long been said that a GAL serves as the eyes and ears of the court when it comes to child-related disputes in domestic relations matters. Specifically, a GAL is charged with a combination of roles in that a GAL is both the court's expert witness and possesses powers similar to those held by the parties to the litigation.

As an expert, a GAL is not an advocate for either party and compiles information from an investigation of the family. The GAL's investigation serves as the basis for the GAL's report, which all GALs are required to submit to the court containing his or her recommendation.

The GAL recommendation is based solely from the perspective of the best interest of the child. As a quasi-party, the court also permits GALs to file necessary pleadings, issue subpoenas, call witnesses and file post-decree motions to further the child's best interest.

Gloria Block, founding partner of the law firm Hoffenberg & Block LLC, has many years of

experience advocating for children in domestic relations proceedings and explained that "the focus point for making the appropriate appointment should be the age of the child or children the court seeks to appoint representation for."

Block opined that "no two children of the same chronological age are exactly alike, thus no hard-and-fast cutoff for appointing a guardian ad litem exists, but the younger the child the more appropriate a GAL appointment is likely to be."

Typically, courts prefer GALs where the child is very young or if there is suspected abuse and/or dishonesty on the part of one or both parents. A GAL, as the eyes and ears of the court, is, therefore, useful in searching for the facts, given that he or she can investigate all parties freely and is subject to cross-examination.

Practitioners should also note that the appointment of a guardian ad litem is left to the court's discretion. So long as the trial court takes into account the best interests of the child, they will likely be found to not have abused its discretion. *In re Marriage of Doty*, 255 Ill. App. 3d 1087 (1994)

Attorney for the child

In contrast to the role of a GAL, an AFC is an attorney who directly represents the child. An AFC provides independent legal

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counsel for the child and owes the same duties of loyalty, confidentiality and competent representation as are due an adult client. The appropriateness of appointing an attorney for the child, likewise, focuses on the age of the child but covers the other end of the age spectrum in comparison to a GAL. Given that an AFC is

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the advocate for the child's overall position in the litigation, AFCs are only appropriate for older and more mature children.

In appointing an AFC, it is essential that the child represented is old enough to understand the matters attendant in the case and has the capacity to appropriately communicate with his or her AFC and the court. If a child is too young or unable to reasonably articulate his or her position, the attorney for the child will be without the ability to appropriately and diligently represent his or her client.

Child's representative

A child's representative is an attorney for the child that advocates what the CR finds to be in the best interests of the child after reviewing the facts and circumstances of the case. A CR's

facts and circumstances of the case to formulate his or her position; however, unlike a GAL, the CR cannot be called as a witness to testify.

Block, in discussing the role of CRs, emphasized the importance of the child interviews, stating, "The appointment of a child's representative is likely to be effective only if the child or children can be successfully interviewed, thus, if the child is too young, seeking the appointment of a child's representative is simply inappropriate."

The concern courts have in appointing CRs is that they lack the ability to be cross-examined and, therefore, are subject to human error. *In Re Marriage of Norma Perez de Bates*, 212 Ill. 2d 489 (2004). However, a CR is beneficial when the child seemingly has an agenda or has been influenced by one parent or the other as to try and influence the appointed representative.

Block emphasized that great caution must be used when dealing with a child who is attempting to influence the litigation, stating, "It is very important for a child's representative to identify a child with an agenda and explain to that child that his or her opinion only serves as one of a myriad of factors comprising the ultimate outcome of the litigation."

In appropriately addressing these issues from the start, a child's representative can best manage the child's expectations and obtain accurate information through the crucial child interviews.

Overall, practitioners need be thoughtful when making a decision about which appointment they seek.

There are even situations in which two appointments in a single case may be appropriate. Though there are similarities across all three appointments, the success of any appointment is driven by the particular circumstances of each case with the key factor across all cases is the age and maturity of the children who will be represented.