

REPRESENTING JUVENILES ABUSE/NEGLECT VS.

There are many different areas in which a lawyer can represent a child: abuse/neglect proceedings, juvenile justice cases, guardianship cases, probate cases, civil litigation case, and parental custody cases. This article will focus on the similarities and differences between representing a child in abuse/neglect cases and parental custody cases. This article is written based on my experiences as an attorney for children in New Mexico governed by New Mexico law.

ABUSE/NEGLECT CASES

Abuse/neglect cases involve representing children who have been taken into custody by the state and are in foster care, relative placement care, or another type of out-of-home placement. In these cases, the state is the legal custodian of the child and is responsible for making all decisions for the child, including, but not limited to, the child's placement; education; scheduling and ensuring the child receives medical, dental, and counseling services; and visitation with parents or other family members.

When a child is under 14 years old, the child is appointed a guardian ad litem (GAL), an attorney who is tasked with advocating for the child's best interests. The GAL is also responsible for being a check and balance on the other players in the case—making sure the state is providing services the child needs, the placement is appropriate and safe for the child, the child is spending time with appropriate family members such as grandparents or siblings, and the social workers and other agents of the state are following stated policies and laws. While a child's wishes are important and are to be taken into consideration, a GAL is responsible for making recommendations regarding the best interests of a child, regardless of the child's wishes. The GAL is required to report the child's wishes at every proceeding, but the GAL's recommendations or report to the court are not bound by the child's wishes.

By Kathryn E. Terry



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PARENTAL CUSTODY



In some states, such as New Mexico, when a child turns 14, the child no longer has a GAL but instead is represented by a youth attorney. In this role, the attorney is appointed not as a best-interest attorney but as an attorney who specifically advocates for the child's wishes, just as an attorney representing an adult. This can be a difficult role when a child wants something that is contrary to his or her best interests. In these situations, the attorney usually uses the phrase "my client has stated . . ." or "my client wants . . ." to indicate that a child wants something that is contrary to his or her best interests.

child's counselor that the child should not attend a hearing, a child is in school, or it would be traumatic for a child to be in the courtroom. When a child is 14 or older, the child can choose whether or not to attend hearings.

Custody. In New Mexico almost all cases begin with a plan of reunifying the family and sending the child home to the parents. When a child is alleged to have been abused or neglected, the state files a petition and an affidavit outlining the details of the abuse or neglect. If the petition is granted, an ex-parte custody order is entered allowing the state to

an abuse/neglect case, including children, have a statutory right to counsel under the Children's Code. At the time of the custody hearing, the GAL or youth attorney is new to the case, as are the attorneys for the parents, and may or may not have met the child. The appointment of the child's attorney occurs at the time the custody hearing is scheduled, therefore the GAL or youth attorney generally has only a few days to gather initial information and get a sense of the general facts of the case. The attorney for the child will make a report to the court regarding how the child is doing and the child's wishes if the child is 14 or older and if the attorney has had an opportunity to meet with the child prior to the hearing.

Adjudication hearing. Sixty days after the custody hearing is held, the court is required to hold an adjudication hearing, which is a trial to determine if the parents abused or neglected their children. Often the parents take a plea to avoid a trial. Regardless of whether there is a finding of abuse and/or neglect or if a parent enters a plea deal, the court orders a treatment plan with specific services for the child and the parents. It is important to note that these proceedings are civil, not criminal, therefore the plea agreement can only be used in further abuse/neglect proceedings and cannot be used in any criminal case. If a criminal case is pending, a parent will generally receive use immunity so nothing in the abuse/neglect case can be used in the criminal proceeding.

By this point in the case, the GAL or youth attorney has had time to meet with the child and interview foster parents, teachers, and other people close to the child. The attorney may also have observed a supervised visit between the child and the parents. The adjudication hearing pertains only to events that occurred from the time the state was contacted regarding potential abuse or neglect until the time of the custody hearing. The GAL or youth attorney can question and call witnesses at the adjudication hearing, but this is not required. The attorney for the child will again give a report to the court regarding how the child is doing and will let the court and the state know if there are

The phases of abuse/neglect cases are dictated by federal timelines, based on the needs of the child.



The most typical example of this is a child who wishes to return home to an abusive parent or a parent who is not engaging in services to change the situation that led to the child entering state custody. If a child is under 14 at the time a case starts but turns 14 prior to the case ending, the GAL can become the child's youth attorney, unless the child requests a different attorney, the GAL requests to withdraw, or the court determines that appointing a different attorney would be appropriate.

Abuse/neglect cases tend to follow specific phases: custody, adjudication, judicial review, permanency, termination of parental rights, and dismissal. Each phase is dictated by federal timelines based largely on the needs and timeline of the child. Additionally, in New Mexico, starting in 2016, children are required to attend all hearings, unless there is good reason for the child not to attend. Good reason can include a therapeutic recommendation from the

have temporary legal custody and place the child in an out-of-home placement. The first hearing that occurs is a custody hearing, which is a probable-cause hearing with expanded rules of evidence to determine whether there is probable cause to keep the child in state custody. At the time of the custody hearing, the hearing officer or judge does not make a formal determination regarding the parents' actions but rather makes a determination regarding whether the child should remain in state custody until further proceedings can be held. This hearing is required to be held ten days after the ex-parte custody order is signed.

As part of the order from the custody hearing, a general assessment plan is developed in which the parents and the child are ordered to attend assessments and follow recommendations regarding the need for certain services. At the time an ex-parte custody order is entered, the parents and the child are assigned attorneys because all parties to

any other services the child needs. The child's attorney will often take a position regarding the state's case against a parent, but the burden of proof is on the state, not on the child.

Judicial review. Ninety days after the adjudication is completed, the court holds an initial judicial review. This is an opportunity for the court to obtain information on whether the parents are working through their treatment plans, how the child is doing in the out-of-home placement, whether the child has moved, and whether any changes need to be made to placement, visitation, or treatment plans. The state must demonstrate that it is making reasonable efforts to reunify the child and the parents.

Permanency hearing. Six months after the initial judicial review, the court holds a permanency hearing. Generally, the child will have been in custody for close to a year by the time the permanency hearing is held. At this hearing, the state is responsible for recommending either that the plan should remain reunification if the parents are working their treatment plans and making progress, or that the plan should be changed to guardianship, adoption, or a planned permanent living arrangement (independent living), depending on the age of the child and the circumstances involved. If a child is with family members who are partly working their plans, but need more time, guardianship might be an appropriate option. If the parents are not working their plan and not making any progress in eliminating the causes and conditions that brought the child into custody and the child is under 17 years old, the plan is likely to be changed to adoption. Once the plan is changed, it can be changed back to reunification if a parent begins making progress. Subsequent permanency hearings are held every six months until the child is returned home, adopted, or the case is otherwise dismissed.

Termination of parental rights. If a parent continues to fail to make progress with his or her treatment plan, the state can file a motion for termination of parental rights. The state has the burden of proving that it made reasonable efforts to help the parents work their treatment

plan and that the parents failed to make sufficient progress or change the concerns that led to the state taking custody of the child. In New Mexico, if the state does not file the motion for termination of parental rights and the child is over 14, the child has a right to file the motion and request attorney fees be paid by the state. At each proceeding, the GAL or youth attorney makes a report to the court on the ongoing progress of the child, voices the concerns of the GAL or youth attorney, and states the child's wishes. The attorney also has a right in any proceeding to challenge the evidence provided by the state or the parents. If a parent does not wish to go through a trial on the motion for termination of parental rights, a parent can voluntarily relinquish his or her rights to the child.

Once termination or relinquishment has occurred, a child is considered available for adoption. At this point, if the child is in a foster home or with a family

tuition for college or trade school in New Mexico, and additional supports for finding a job or enrolling in school. Under certain circumstances, some of these benefits are available to the child until he or she turns 26. The youth attorney for the child is responsible for advocating for the child's wishes, including assisting the child with the applications, making sure the appropriate appointments and assessments are done, and advising the child on the child's rights and responsibilities throughout the process.

Dismissal. Once the adoption, guardianship, or transition to independent living is complete, the case is dismissed. A case is also generally dismissed when a child turns 18, by which point one of the above events is likely to have occurred. The case is now closed, and the attorney no longer has any additional duties to the child. Throughout all proceedings in an abuse/neglect case, the attorney has a right to challenge the evidence provided by the



In abuse/neglect cases, the attorney has a right to challenge the evidence provided by the state or the parents.

that wishes to adopt the child, the process can move relatively quickly. If that is not the case and the child needs an adoptive home, or if a child is nearing the age of 18, the process can move much more slowly. If a child is 16 or older and the child does not want to be adopted, the state can create an independent living plan for the child. This involves an assessment of the child's skills and needs, along with an application for the child and the social worker to complete. In New Mexico, a child who does not want to be adopted but instead would like to live on his or her own can receive benefits such as Medicaid, a housing stipend,

state or the parents and provide witnesses and evidence that support the child's wishes or the child's position. Additional responsibilities for the attorney representing a child include attending treatment team meetings if the child is in treatment foster care, attending Individualized Education Program (IEP) meetings if the child is in special education, communicating with mental health professionals treating the child (with the child's consent if the child is over 14), meeting with the child prior to any proceeding, reviewing medical or mental health reports for the child (with the child's consent if the child is over 14), representing and protecting the

child's cultural needs, and advocating for a child's right under federal laws such as the Americans with Disabilities Act and Individuals with Disabilities Education Act.

when a child is 14 or older and the court is considering a change in custody, the court is required to consider the child's wishes. In many cases, parents believe that children get to choose or make their

child still requires a GAL after the expiration date set out in the order, either parent or the GAL can request that the appointment be extended. Similarly, if there is no expiration date, either parent or the GAL can request termination of the GAL's appointment.

A GAL in a parental custody case often has wide discretion and, upon the agreement of the parties, can be given arbitration authority to make certain decisions in a case. While advocating for the child and reporting the child's wishes are similar in abuse/neglect and parental custody cases, a GAL in custody cases often has greater authority. Additionally, once recommendations are made, if a parent objects to the recommendation, the GAL gives an oral report regarding the investigation and the recommendations and can be questioned by the parents or the parents' attorneys. GALs can also call witnesses and cross-examine any witnesses who are called by the parents.

In both systems, the child's attorney can file motions and request relief from the court; in custody cases, however, the judge has broader discretion and authority. For example, in abuse/neglect cases, the state has authority over the placement of the child. This decision can only be overturned by a showing of abuse of discretion. Therefore, even if a child, a child's attorney, or the judge disagrees with the placement, if it cannot be proven that the state abused its discretion in making the placement decision, the decision will stand. In custody cases the judge has complete discretion over the time-sharing schedule and physical custody of a child. Additionally, in custody cases the parents' rights are still intact and parents simply disagree regarding the child's best interests. In abuse/neglect cases, there is only one entity making decisions for the child.

Owing to the nature of custody cases, a GAL also has the role of being a referee between the parents. GALs are usually appointed in high-conflict custody cases, when the parents cannot agree on certain decisions that need to be made for their child. Often the parents have been through multiple professionals, including a parent coordinator, a custody evaluation, or additional mental health assessments prior to

In parental custody cases, the GAL makes formal recommendations to the court regarding what is in the best interests of the child.



PARENTAL CUSTODY CASES

In contrast to an abuse/neglect case, in a parental custody case a child does not have any statutory or rule-based right to an attorney. In parental custody cases, the appointment of an attorney for a child is within the court's discretion, based on the facts, circumstances, and needs of the child. In New Mexico, unlike abuse/neglect cases, a child can be appointed a GAL in a parental custody case regardless of the child's age. The GAL is required to investigate by interviewing all parents or parties involved in the case, interviewing the child, interviewing mental health professionals and any other professionals the GAL deems necessary, and reviewing any documentation the GAL deems necessary. Unlike a GAL in an abuse/neglect case, in parental custody cases the GAL makes formal recommendations to the court regarding what is in the best interests of the child. This can include legal or physical custody, time sharing, choice of school, choice of religion, extracurricular activities, or any other issue that is disputed between the parents. The GAL can be appointed for a limited purpose (determining what school the child should attend) or for a more general purpose (determining legal and/or physical custody of the child).

Pursuant to New Mexico statutes,

own decisions when they are 14, but this is a false belief. The court is still required to act in the child's best interests, regardless of what the child actually wants. In practical terms, children who are 17 and whose parents are in a high-conflict custody case are likely going to have more say in where they spend their time. Teenagers often "vote with their feet" as they get closer to turning 18. An attorney representing an older teenager can help that child voice concerns and can help the child and parents better communicate so they can improve their relationship and decrease conflict.

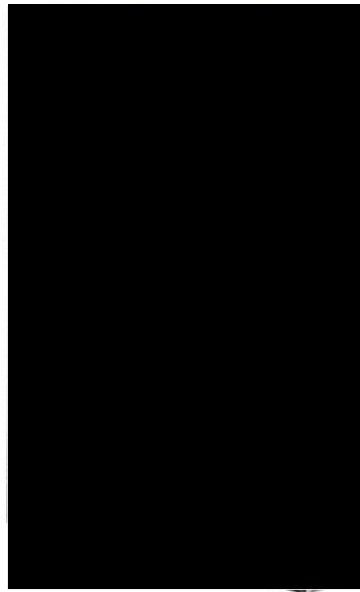
Additionally, the appointment of a GAL can occur at the beginning of a case, for example in a particularly contentious divorce proceeding, or after years of litigation. The GAL, as an advocate for the child, often provides suggestions and guidelines for the parents on issues such as communication. The appointment of a GAL is rule-based in New Mexico, not statutory-based. There are no set phases or timelines for ongoing parental custody cases, and appointments can have a specific time frame (e.g., one year) or can be indeterminate. If no expiration date is included in the order appointing a GAL, the only event that would automatically trigger the end of the GAL's appointment is a child turning 18. If the

the appointment of the GAL. Sometimes the case has been pending for a long time as the judge has attempted to work out the disputes between the parties. Often, the appointment of a GAL is a last-resort option. The role in these cases is not one of oversight or a check-and-balance system, but instead is one of investigation. In custody cases the GAL is an arm of the court that serves as the court's eyes and ears in helping the court determine what decisions are in the child's best interests.

CONCLUSION

In both systems, an attorney who is appointed to represent a child has the duty to fiercely defend and protect the rights of that child. In each system, the attorney gives the child a voice by consistently reporting to the parties and to the court what the child wants and how things look from the child's point of view. An attorney appointed in a parental custody case may have more authority to make recommendations to the court about specific issues, whereas an attorney appointed in an abuse/neglect proceeding is more of a check and balance; nevertheless, both attorneys have an opportunity to change the outcome for a child. In one system, that change might be decreasing the conflict between two parents when the child is in the middle of that conflict. Or it might be creating a time-sharing plan that is less disruptive for a child, thereby giving the child some peace and stability. In the other system, the change might be providing a better home and a more stable foundation for a child, whether this results from parents making progress on a treatment plan or from adoption or guardianship. These changes can fundamentally affect how a child develops, what opportunities the child might have in the future, and how a child deals with a mental health issue that might otherwise go undiagnosed. Being an attorney for a child, regardless of the system, is a powerful role that comes with specific duties and significant responsibilities. ■

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