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LAWYER APPOINTED AS GUARDIAN-AD-LITEM

Adopted: January 21, 2005

Opinion explores the role of a lawyer who is appointed guardian-ad-litem for respondent parent with diminished capacity.

Inquiry #1:

Attorney A is appointed guardian-ad-litem (GAL) for a respondent parent with diminished capacity in a Termination of Parental Rights (TPR) action. The parent is indigent and, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), has also been appointed legal counsel, Attorney B. In *In re Shepard*, 03-212 (N.C. App. filed January 20, 2004), the court of appeals held that, in a TPR action based upon parental "incapability," a parent's GAL, who is a lawyer but is not providing legal representation to the parent, "may testify as to the ward's parental capability, and ultimately against the interest of their ward as to the termination hearing."

The basis for the court's decision stems from the observation that the North Carolina State Bar's Rules of Professional Conduct do not appear to govern the conduct of a GAL who acts "purely as a guardian and not an attorney." at 8. The court also suggested that the role of the GAL is to ensure that the parent receives procedural due process by helping to explain and execute his or her rights.

Is a lawyer, appointed solely as GAL for the parent, governed by the Rules of Professional Conduct?

Opinion #1:

The court in *Shepard* recognized that some of the Rules of Professional Conduct create duties that are owed only in the professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Scope, cmt. [4]. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Preamble, cmt. [3].

The GAL does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients. See RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer.

Inquiry #2:

If the court appointed a lawyer to serve both as lawyer for the parent and as the parent's GAL, do the Rules of Professional Conduct require that the lawyer keep all communications confidential?

Opinion #2:

Yes. A lawyer serving as both lawyer and GAL for a parent in a TPR action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.

Inquiry #3:

If the court appoints the same lawyer as counsel for the parent and as the parent's GAL, does the lawyer have a conflict of interest?

Opinion #3:

The *Shepard* court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. *Shepard*, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

Inquiry #4:

Assume the parent has separate appointed counsel. Under Shepard, how can the parent's GAL perform his duties with competence if the parent has been advised by her lawyer that she should not share confidential information with the GAL?

Opinion #4:

The performance of the GAL's duties, as distinct from a lawyer's duties to a client, is not a matter upon which the Ethics Committee can opine.

Inquiry #5:

Assume the facts in Inquiry #4. Can the parent's lawyer ever advise the client to confer candidly with the GAL under the Rules of Professional Conduct?

Opinion #5:

Yes. In light of the Shepard decision, a lawyer should inform the parent, to the extent possible, that the GAL does not owe the parent a duty of confidentiality and that the GAL could be called upon to testify as to parental capability. Then, the lawyer must analyze each case and determine whether the parent's full disclosure to the GAL will accomplish the goals of the representation. If the lawyer believes full disclosure is appropriate under the circumstances, he or she may advise the client that he may be candid with the GAL. Likewise, a lawyer may reasonably conclude that full disclosure would not be in the parent's interests and may advise the client against it.