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ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's column

By Pamela J. Kuzniar

My creative juices are being stifled by my need to report to you regarding HB 1452. HB 1452 (the complete rewrite of the Illinois Marriage and Dissolution of Marriage Act (" IMDMA") was filed on February 6, 2013, referred to the Rules Committee on February 12, 2013, assigned to Judiciary on February 19, 2013, and referred back to the Rules Committee on March 22, 2013. Representatives Kelly Burke (D-36th District) and Ann Wilson (D-11th District) hope to advance the bill during the fall veto session which starts on October 22, 2013. In my last column I noted that our section council did not approve the original bill as written. The bill has undergone a major rewrite. Our assigned members Rory Weiler of St. Charles, William Scott of Lisle and Morris Lane Harvey of Mt. Vernon assisted Jim Covington, the Director of the ISBA Legislative Affairs as needed to work with the individuals participating in the rewrite of HB 1452. The Legislative Reference Bureau ("LRB") published the revisions of HB 1452 on October 7, 2013. Our section council is reviewing the rewrite published October 7, 2013. Our next meeting is October 12, 2013; our members will analyze the re-draft version of HB 1452. This is a massive undertaking for our section council as the bill is 192 pages. Quite frankly, I do not

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Guardian Ad Litem or Child Representative? Why lawyers and judges need to be more deliberate about designating role of attorneys representing children

By Matthew A. Kirsh

If you practice family law in Cook County, you know that when a child needs representation in a case, the court will almost, without fail, appoint a child representative and not a guardian ad litem or an attorney for the minor child. If you practice family law in DuPage County you know that when a child needs representation in a case, the court will almost, without fail, appoint a guardian ad litem and not a child representative or an attorney for the minor child.* I am sure that the judges in both counties have their reasons for their respective practices, but lawyers are not privy to their intra-judicial thought processes. As a practitioner, I do know that the seemingly automatic appointment of attorneys as child representatives or guardians ad litem does not always serve the interests of the children or parents involved in the cases. Each case should be considered individually and lawyers and judges should carefully consider which role will best serve the interests of the minor child for whom representa-

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Chair's column

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understand the urgency. My personal review of the bill causes me to conclude that this is a solution looking for a problem, so I do not understand the need to move this in the veto session. I would prefer more time so that our members have time to thoughtfully comment on the current version. However, I am keeping an open mind and I will report on our progress to the Board of Governors in October. Once again, I encourage you to review the bill and form your own opinion. HB 1452 in its revised form is available for your review on the Illinois General Assembly Web site. At this time, your only place to voice your individual opinion would be through your legislative representative.

Our custody trial play will be presented in Galena, Illinois on the 10th and 11th of October. If you are not able to attend look for it on the ISBA's Web site as an electronic CLE offering. As I write this column the CLE has not taken place. I look forward to reporting on it in my next column.

Keep an eye out for our "Settle-it" CLE to be presented in Chicago on November 14, 2013. The presenters are teams of valuation experts and attorneys who will use valuation reports during the seminar to discuss the appropriate value of the case for settlement purposes regarding asset division and maintenance when a) the business is a small corporation, law firm, real estate developer, and medical practices of varying size and b) when the main asset is the executive's ability to earn income along with perquisites of employment. Members of the Alternative Dispute Resolution Committee will present settlement options and discuss appropriate settlement language given the circumstances. Members of the judiciary will disseminate the information necessary to conduct a meaningful pretrial that will result in settlement. IF you have not dealt with a business valuation this is a must attend seminar, as you will have the opportunity to review (and keep) multiple valuations of a variety of entities and address both value and appropriate maintenance due to the true economic income revealed during the valuation. ■

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Guardian Ad Litem or Child Representative? Why lawyers and judges need to be more deliberate about designating role of attorneys representing children

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tion is being appointed.

When appointing a legal representative for a minor child, 750 ILCS 5/506 allows the court to designate that the attorney fulfill one of three roles: guardian ad litem, child representative or attorney for the minor child. The differences in the roles are clearly spelled out in Section 506. Courts rarely appoint an attorney for the minor children, presumably because the attorney in such a role has no "best interests" obligation; an attorney for minor child is ethically bound to advocate for the wishes of the child, no matter how those wishes correspond to the child's best interests. A guardian ad litem is the "eyes and ears of the court" and "shall testify or submit a written report to the court regarding recommendations in accordance with the best interests of the child." A guardian ad litem has no confidentiality with the child and may be cross examined after rendering a best interests opinion. A child representative is often described as a hybrid between attorney for the minor child and guardian ad litem. A child representative has a confidential relationship with the minor child and cannot be called as a witness, but also has the duty to advocate for what he finds to be in the child's best interests. Pursuant to the letter of Section 506, a child representative may only express his position in a pretrial memorandum.

With the foregoing as a backdrop, courts should carefully consider which role will best serve the interests of a child when appointing a legal representative for that child.

A child representative is more appropriate when the children involved in the case are older and the idea of confidentiality is important to make it easier for the child to disclose personal information that the child may not want his parents or other relatives to know. If it appears that a case is going to go to trial and/or the court has appointed its own expert witness pursuant to 750 ILCS 5/604(b), a child representative may be more appropriate. In such cases, a best interests advocate is essential (if, for example, the child representative disagrees with the expert) and the court will have the benefit of the expert's opinion which lessens the importance of an opinion from a guardian ad litem. By insulating the child's statements from disclosure with attorney-client privilege, the appointment of a child representative can prevent a child from the anger or disappointment expressed by parents who both believe they should have custody.

There are cases when the appointment of a guardian ad litem will better serve the interests of a child than would the appointment of a child representative. If a child is non-verbal or too young to understand the concept of confidentiality, a guardian ad litem will be a more effective best interests attorney. Most cases do not go to trial and most families cannot afford drawn out custody litigation involving two attorneys for the parents, a child's attorney and an expert witness. Often deadlocked parents need a neutral, third-party opinion to get them off of their entrenched positions. In this situation, a recommendation from a guardian ad litem may be just what the parents need to break the deadlock. Also, a guardian ad litem's recommendation early in the case is a useful tool for the parents' attorneys who are probably trying to extol the virtues of settlement. Many cases need an opinion or recommendation on temporary issues such as a parenting schedule while the case is pending. In such a situation the court is going to most likely look to the child's legal representative for guidance. In my opinion, a court is on more solid ground when entering a temporary order upon the recommendation of the guardian ad litem who can be cross examined by the parents' attorneys. In this way, the temporary order is based on evidence, as opposed to merely the argument of attorneys.

If a case is going to trial and a 604(b) expert is financially unrealistic, a guardian ad litem can provide opinion testimony from a professional whom the court trusted enough to appoint in the first place. In my opinion, under *Wilson v. Clark* a guardian ad litem can testify to matters that would otherwise be considered hearsay as long as the information is the kind of information customarily relied upon by guardians in the performance of their duties. While an attorney serving as a GAL does not have the extensive educational and training background of a mental health professional, most GALs, through both education and experience, are capable of making a well-reasoned best interests recommendation.

Many lawyers fear that acting as a GAL will subject them to civil liability and that the liability will not be covered by their malpractice insurance. This simply is not the case. GALs and child representatives have absolute immunity from civil liability. *Vlastelica v. Brend*, 954 N.E.2d 874 (1st Dist. 2011). My ISBA Mutual professional liability policy defines "Professional Services" which are covered by the policy as services including "as an administrator, arbitrator, conservator, executor, guardian, mediator, notary public, personal representative, real estate title insurance agent, receiver, trustee or in any other similar fiduciary activity." To me that says, "no matter what your role, you are covered."

In conclusion, when appointing legal representation for a child, lawyers for the parents and judges should carefully consider which role will best serve the child's interests in that particular case. If the attorney who is appointed feels that he or she could better serve the child's best interests in a different role, the attorney should ask to have their role changed. However, such a request must be made before meeting with the children. Attention to the designation of child representative or guardian ad litem can make a big difference in the quality of representation you are able to provide in a case. ■

My practice is limited to Cook and DuPage and I freely admit that everything in this article is based upon my experiences in these two northern Illinois counties.

Conscious divorce: The conscious lawyers and collaborative practice

By Sandra Crawford

It would appear the clients who experience a "good divorce" and are most successful are those who are: (1) actively willing to work consciously to understand why the separation is happening, (2) know what their part in the process of separation has been and is now, and, (3) know what lessons their separation is showing up to teach them at this stage in their life's journey. If we apply those same parameters to the role of the legal professionals assisting clients to "birth their life transition" it might look something like this.

A. Willingness as a divorce professional to work with a client to understand why divorce is happening

In the traditional legal model of divorce representation the focus is typically not on "why" but on "how" to get the process done as quickly and cheaply as possible. However, when in the midst of, what has been described as one of life's most emotionally devastating events, lots of clients cannot work effectively on the "how" with their chosen legal provider until they have fully processed the "why is this happening to me" part of their story. In the initial intake stage of a case an attorney might ask questions to get a glimpse of the "why" but typically after the first couple of sessions with a client that legal professionals quickly move to focusing only on the "how to complete the divorce" and spare little or no time for the unraveling of the story about why the individual has arrived at this juncture in their life and relationship or why she now finds herself in a family lawyer's office. Not working with clients to understand the "why" or being unwilling to be open to working in some concerted way with that material can often lead to greater difficulties when helping clients through the process. Those difficulties frequently show up in clients in the forms of procrastination, delay, bargaining for unreasonable outcomes, and in the extreme, as hostility toward the legal system or the other attorney or the judge. Enter the interdisciplinary Collaborative process and non-legal collateral professionals - the mental health professionals (MHPs). These are practitioners specifically educated in working with the trauma associated with the disintegration of core relationships. In the interdisciplinary Collaborative Practice model of divorce and separation the MHP, known also as the "Divorce Coach," works to understand and explain what is motivating an individual and how that motivation can be used to fuel positive progression. Coaches, through their training and experience, know how to work with the client's "why is this happening" story most effectively and can help digest that story for the legal professionals and provide the professionals and the clients with strategies and tools for working effectively with the "why" to build better coping strategies and positive future outcomes. Although attorneys might see the value in having clients work in that way, as a profession we might not be fully equipped by training or professional experience to help clients appropriately process the "why" of their story. Accordingly, it is critical that lawyers become conscious of the client's need to tell his or her story. It is also essential that lawyers be open to actively working with the client and her Coach to help unravel the story of how he or she got to this place in life and what beneficial lessons there may be which can then be used to an advantage in moving the divorce process forward and helping the client envision a healthier, happier future.

B. What is the lawyers' part in the client's process of transition

When Collaborative Law professional present basic Collaborative Law Skills Training to lawyers they often challenge participants to exam their own place within the conflict resolution spectrum. The trainers ask questions about practice philosophy and practice wisdom of the lawyers and challenge them to verbalize where they see themselves in relationship to the client i.e. in a paternalistic role, telling the client what to do, or in a guidance role, helping the client understand the process and settlement options, so she can make the most informed decisions and create a sustainable future. Understanding of ones' own personal biases and preconceived notions of what "should be" is critical to authentic discussions with clients about the possible range of outcomes for their process. If a lawyer is genuinely interested to leave clients better then where he found them, that is a very different role then just getting the client a divorce judgment. In the author's mind the latter role is merely a mechanical one which some day could be replaced by a clever software program. Whereas the former role, serving as the steward of leaving clients in positions at least no worse then when they came for help, is the highest calling of professionals who desire the title of "counselors at law." Cross-training with professional like financial professional, specifically educated in divorce math, known as Certified Divorce Financial Analysts (CDFA), can be of value and help orientate lawyers. It can help lawyers place themselves psychologically within the greater context of the entire process the client is experiencing, which necessarily involves changes in his financial, emotional and legal status.

C. What life lesson is any one client showing up to teach the legal practitioner

As the saying goes: "There are no accidents. We have who we have in our lives to teach us a needed lesson". As legal practitioners we attract clients with all types of different challenges. The general practice wisdom tells lawyers that, understanding the emotional and financial profile of the particular clients we work best with is a recipe for a rewarding, peaceful and joyous practice. So a conscious lawyer must consult and trust his deep knowing and instincts in taking on clients in the first instance. Pre-screening questionnaires completed by clients before the first intake interview with the lawyer can be extremely useful tools to helping lawyers assess if they are ready for the challenge and the life lessons which any one potential client is about to teach. A good example of such a screening tool can be found in the work of Minnesota lawyers, Stu Webb and Ron Ousky on Collaborative Divorce. Also, dedicating some time at the end of each of case to say "thanks for the lesson" can help further understanding into "which is the best type of client for me." This time is known as a "case completion debrief" and provides another road to building a rewarding legal practice. In the Collaborative model this "thanks for the lesson" work takes the form of a team meeting where each of the professionals, JD, MHP and CDFA, take turns talking about what worked and didn't work in the particu-

lar case and what practice wisdom might be gained and built on for the next Collaborative case. In a non-Collaborative case, a type of debrief can take the form of an informal lunch meeting with your former opposing counsel when all matters are concluded to talk about process (not of course about the particular clients).

It often goes without saying that family lawyers deal with significant trauma and distress on a daily basis. Becoming and remaining conscious of the impact of the stress on one's own life is critical and being available as problem solvers and peace builders. Taking time to assess and understand: (1) one's own story, (2) what impact a particular case is having on one personally, and, (3) what lesson this client or case has shown up to teach can be valuable to maintaining a meaningful and rewarding practice of family law. ■

Sandra is a solo practitioner and mediator in Chicago and is a principal in Trainers for the Advancement of Collaborative Practice, Inc., a training company offering Basic Collaborative Law Skills Training. The next Basic Skill session will be taking place Springfield, Illinois on November 8 and 9, 2013. For more information go to: http://collablawil.org/clii-announces-its-2-day-basic-training/

Where have all the grandmas gone? Standing of grandparents seeking custody under the IMDMA

By Marilyn Longwell & Aurelija Juska

In the past, extended families lived together or in close proximity, with various family members participating in the raising of children. As we have become more mobile and our birthrate lower, the extended family living together has become more rare. Longer lifespans and better healthcare have also encouraged older Americans to be more active and less tied to their homes and grandchildren. The nuclear family and the single parent family has become more the rule. Nevertheless, grandparents have continued to maintain a stake in their grandchildren's lives and have sometimes used the courts to obtain visitation and even custody of those grandchildren.

In 2000, the U.S. Supreme Court decided *Troxel v. Granville*, 530 U.S. 57 (2000), finding that, as applied, the Washington statute giving third parties the right to seek court ordered visitation despite opposition from a fit parent violated substantive due process by allowing governmental interference with a parent's constitutional right to raise her children as she saw fit. As applied to the facts of that case, the state statute did not pass the strict scrutiny test.

The same year, the Illinois Supreme Court rendered a similar ruling in *Lulay v. Lulay*, 193 Ill.2d 455 (2000). In *Lulay* the parents were divorced, but both opposed visitation by the paternal grandmother. The Illinois statute was determined, as applied to the facts of that case, to create an unconstitutional infringement on the parents' right to control the upbringing of their children.

Then, in 2002, the Illinois Supreme Court, in *Wickham v. Byrne*, 199 Ill.2d 309 (2002), went beyond *Lulay* and found the sections authorizing grandparent petitions for visitation and custody to be facially unconstitutional because of their failure to defer to the decision-making of "fit" parents.

Following *Wickham*, the legislature amended the statutes to qualify the right of grandparents, or other persons, to pursue a petition for visitation or custody, by building in a presumption of fitness of a parent to deny visitation. It also added a requirement for certain petitioners that the child not be in the custody of a parent when a custody petition was filed. P.A. 93-1026 (2004).

The challenge, therefore, in representing grandparents is to establish standing, under the current statute without running afoul of the constitutional standards. Typically, since *Troxel* and *Wickham*, grandparent custody cases arise either when one of the child's biological parents is deceased, or when a grandparent who was already caring for the child on a full-time, though informal, basis seeks to establish legal rights over the child.

Because of parents' superior rights over the custody and control of their children, grandparents and other third parties seeking custody of a child must first demonstrate that they have standing to bring an action. Two provisions of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) may apply: Section 601(b)(2) allows a person other than a parent to seek custody of a child only if the child "is not in the physical custody of one of his parents;" Section 601(b)(4) allows a grandparent to file a petition for custody if their child or step-child is the deceased parent of the child in question and one or more of the following facts existed at the time of the parent's death: A. The surviving parent had been absent from the home for more than a month with whereabouts unknown; B. The surviving parent was in State or Federal custody; C. The surviving parent had been convicted of or received supervision for certain criminal acts toward the deceased parent or child or violated on Order of Protection for the deceased parent or child.

Determining standing under sub-section (4) is fairly straightforward and the conditions listed serve as an inference that the surviving parent is not fit to control the upbringing of his/her children. Such an inference is sufficient to get past the presumption of fitness and thus pass the strict scrutiny test for constitutionality. Such an inference does not occur under subsection (2). Any petition filed under Subsection (2), must allege facts which create an inference that the parent or parents who are respondents are not fit to control the upbringing of their children, thus triggering the state interest and passing the strict scrutiny test.

As set forth in the statute, when grandparents or other third parties seek custody under subsection (2), the children must not be in the physical custody of a parent. That determination is based on a three-pronged "voluntarily relinquishment" test, that requires the court to consider: (1) who cared for the child before the custody petition was filed, (2) how the nonparent gained physical possession, and (3) the nature and duration of the possession. (MCC.) This analysis is highly fact-dependent.

Courts are clear that physical custody is

not determined by who has physical possession of the child at the moment the petition is filed. This is to avoid a "race to the courthouse" or abduction situation, and to ensure that the grandparent did not obtain possession based on "happenstance." The parents or surviving parent must have relinquished physical custody for an indefinite period, not merely temporarily, to satisfy the statutory requirement.

In the event a custodial parent lives with their parent (the grandparent), and then passes away, courts have held this living situation is insufficient to establish standing for grandparent custody. Thus, in the case of *In re: Custody of Peterson*, 112 Ill.2d 48 (1986) the court held that upon the death of the custodial parent who was being cared for, along with her child, by her parents, the minor child "must be considered to have been in the physical custody of her father."

Contrast that scenario with one in which both parents, unmarried, decide that they are unable to properly care for the child, so they place the child with the mother's mother. Several years later, they decide they are "ready," but the grandparent does not wish to give up her *de facto* custody. In this scenario, the grandparent is in a much different legal position, because both parents voluntarily placed the child with her.

Other factors to be considered in establishing a grandparent's standing are whether the now-objecting parent previously acquiesced to the grandparent's care for the child and the level of involvement of the parent in the child's life. Biological parents need not relinquish legal custody in order for a grandparent to have standing, as the analysis hinges on physical custody. *In re A.W.J.,* 316 Ill.App.3d 91 (2000) A parent who is incarcerated is incapable of exercising custody of the child and therefore the child is not in his/her custody. However, a short-term incarceration may be insufficient as the parent is entitled to make short-term care arrangements for the children. See In re: *A.W.J.*, Id. and cases cited therein.

In establishing standing under the IMDMA, both statutory provisions and constitutional requirements must be met. Under House Bill 1452, however—currently under consideration in the state legislature—the entirety of Section 601 is repealed and the sections replacing it appear to make no provision whatever under which grandparents can seek custody of their grandchildren under the IMDMA.

The advisability of such a policy is up to the legislature, but many grandparents will lose an avenue to help their grandchildren despite the loss or unavailability of one or both parents. ■

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