RIGHTS, ROLES AND RESPONSIBILITIES OF CHILD ADVOCATES
Attorney for Child, Guardian *ad Litem*, and Child's Representative

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I. Historical Background

Before the enactment of the IMDMA, 750 ILCS 5/101, *et seq*., in 1977, there was no statutory authority providing for legal representation of a child in dissolution of marriage or post-judgment proceedings. However, there was authority for the appointment of a GAL to promote the best interest of the child in domestic relations proceedings.

Statutory change occurred when courts began to recognize that parents are under no legal obligation to act as advocates for their children in domestic relations proceedings. The United States Supreme Court recognized the competing interests between parent and child in custody disputes, finding that decisions vital to a child's well-being frequently cannot be left to the discretion of the parents because the estrangement of husband and wife often clouds parental judgment with emotional prejudice. *See Ford v. Ford*, 371 U.S. 187, 9 L.Ed.2d 240, 83 S.Ct. 273 (1962).

Prior to the January 1, 2000, revision, IMDMA §506 granted Illinois courts the power to appoint an AFC and/or a GAL to represent the interest of the child:

> The court may appoint an attorney to represent the interest of a minor or dependent child with respect to his support, custody, visitation, and property. The court may also appoint an attorney as the guardian-ad-litem for the child. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney and guardian-ad-litem, as the case may be. The order shall be made against either or both parents or any adult party, or against the child's separate estate.

The revision of IMDMA §506, effective January 1, 2000, expanded the court's power by providing for the appointment of a children's representative ("CR").

(a) Duties. In any proceedings involving the support, custody, visitation, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, and subject to the terms or specifications the court determines, appoint an attorney to service in one of the following capacities:

(1) As an attorney to represent the child;

(2) As a guardian ad litem to address issues the court delineates;

(3) As a child's representative whose duty shall be to advocate what the representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child's representative shall have the same power and authority to take part in the conduct of the litigation as does an attorney for a party and shall possess all the powers of investigation and recommendation as does a guardian ad litem. The child's representative shall consider, but not be bound by, the expressed wishes of the child. A child's representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child's representative has been appointed. The child's representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. The child's representative shall not be called as a witness regarding the issues set forth in this subsection.

During the proceedings the court may appoint an additional attorney to serve in another of the capacities described in subdivisions (a)(1), (a)(2), or (a)(3) on its own motion or that of a party only for good cause shown and when the reasons for the additional appointment are set forth in specific findings.

(b) Fees and costs. The court shall enter an order as appropriate for costs, fees, and disbursements, including a retainer, when the attorney, guardian ad litem, or child's representative is appointed, and thereafter as

necessary. Such orders shall require payment by either or both parents, by any other party or source, or from the marital estate or the child's separate estate. The court may not order payment by the Illinois Department of Public Aid in cases in which the Department is providing child and spouse support services under Article X of the Illinois Public Aid Code. Unless otherwise ordered by the court at the time fees and costs are approved, all fees and costs payable to an attorney, guardian ad litem, or child's representative under this Section are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523. The provisions of Sections 501 and 508 of this Act shall apply to fees and costs for attorneys appointed under this Section.

II. Attorney for the Child - AFC

The AFC is an advocate for the child's interest. The AFC functions throughout the proceeding as an attorney exercising professional judgment and is bound by the rules of civil procedure, advocacy, and the code of professional responsibility. The role of the AFC in custody, support, and visitation disputes is to interview the child and parents, prepare and file pleadings, subpoena witnesses and documents, present and examine witnesses, encourage settlement of disputes, focus proceedings on the child's best interest, seek to reduce hostilities, protect the child from unnecessary trauma, and generally advocated the child's position.

III. Guardian *ad Litem* - GAL

The GAL has traditionally acted as the "eyes and ears" of the court. It is proper for the GAL to make the child's preference known to the court, and the court should give some weight to the GAL's recommendation. *See In re Marriage of Wycoff*, 266 Ill.App.3d 408, 639 N.E.2d 897, 203 Ill. Dec. 338 (4th Dist. 1994). The GAL does not act as an independent advocate but acts under the control and direction of the court. *See Roth*

v. Roth, 52 Ill.App.3d 220, 367 N.E.2d 442, 10 Ill.Dec.54 (1st Dist. 1977) and *Ott v. Little Company of Mary Hospital*, 273 Ill.App.3d 563, 652 N.E.2d 1051, 210 Ill. Dec. 75 (1st Dist. 1995). Once appointed, the GAL is charged with defending the interest of the minor. *See Ott v. Little Company of Mary Hospital*, 273 Ill.App.3d 563, 652 N.E.2d 1051, 210 Ill. Dec. 75 (1st Dist. 1995) and *Wreglesworth v. Arctco, Inc.,* 316 Ill. App. 3d 1023; 738 N.E.2d 964; 2000 Ill. App. LEXIS 788; 250 Ill. Dec. 495 (1st Dist 2000)

The IMDMA §506 provides that the GAL must be an attorney. However, the roles and requirements of a GAL are not set forth in the statute and therefore, must be inferred from case law. The roles and requirements of a GAL are best described as both a ***pro se* party and an independent expert witness**.

The GAL acts as a party to the litigation on the child's behalf. *In re the Marriage of Apperson,* 215 Ill. App. 3d 378, 385, 574 N.E. 2d 1257, 1261 (4th Dist. 1991) Stated another way, while the child does not actually become a party, the child in fact enjoys party status because the child can fully participate in the custody aspects of litigation through a GAL. *See In re Marriage of Tzoumas*, 187 Ill.App.3d 723, 543 N.E.2d 1093, 135 Ill. Dec.525 (2nd Dist. 1989).

The GAL possesses all the powers of a *pro se* party in all stages of the litigation (depending on when the GAL is appointed), including pre-trial proceedings, trial, and post-decree proceedings. The GAL possesses the power to file an appearance, file pleadings, conduct depositions, testify, call witnesses, present a closing argument, and file post-decree motions, if necessary. However, keep in mind, that as a GAL, acting as a *pro se* party, the GAL'S closing argument is limited to the evidence presented.

This is where the GAL'S second role comes into play, as an independent expert witness making a recommendation to the court. Supreme Court Rule 213 (f) (2) defines an independent expert witness as follows and Supreme Court Rule 213(g) sets guidelines for the expert as follows:

> (2) *Independent Expert Witnesses.* An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert

witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(g) *Limitation on Testimony and Freedom to Cross-Examine.* The information disclosed in answer to a Rule 213(f) interrogatory, or at deposition, limits the testimony that can be given by a witness on direct examination. Information expressed in a deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the deposition.

Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

The GAL is an expert since by statute, they are required to be an attorney and the GAL must obtain certification and/or training in the respective circuit and county in which the GAL practices. The GAL has broad powers of investigation and is frequently asked to make recommendations to the trial court on specific issues, as is stated in §506. In performing its investigation, the GAL may consider evidence otherwise inadmissible at trial. *See In re the Marriage of Karonis,* 296 Ill. App. 3d 86, 91, 693 N.E. 2d 1282, 1286 (2nd Dist. 1998) Be aware though, that this recommendation, whether in the form of a written report or testimony during trial, should be in compliance with Supreme Court Rule 213 (f) and (g).

As a witness, the GAL may testify to the GAL'S personal observations, and offer an in-court personal expert opinion concerning what is in the best interest of the child, not based solely on the evidence, but also based on the GAL'S investigation. The GAL's opinion is limited to the GAL's investigations and level of expertise. For example, a GAL cannot make an opinion regarding someone's psychological state of mind, and opine as to whether someone has a diagnosable psychological disorder. This is outside the scope and expertise of the GAL'S expert qualifications. The Court should weigh the GAL's opinion accordingly.

Additionally, some case law specifically references that a GAL can testify as to hearsay when it is in the best interests of the minor child. *See In re Marriage of Wycoff*, 266 Ill.App.3d 408, 639 N.E.2d 897, 203 Ill. Dec. 338 (4th Dist. 1994). *In re Marriage of Stuckert* (1985), 138 Ill. App. 3d 788, 791, 486 N.E.2d 395, 396-97, 93 Ill. Dec. 294 (1st Dist. 1985). *In re Marriage of Smith*, 114 Ill. App. 3d 47, 49-50, 448 N.E.2d 545, 547 (2nd Dist. 1983). As an expert witness, the GAL can rely on hearsay evidence to advance the GAL's opinion. *See Wilson v. Clark,* 84 Ill. 2d 186, 417 N. E. 2d 1322 (1981). Again, the Court must be cognizant of the hearsay nature of this evidence when weighing it in the Court's decision.

If the GAL does not testify, or present a written report, and if the GAL makes a closing argument at trial, the closing argument would be limited solely to the evidence presented at trial. However, should the GAL testify at trial as to his investigations and the resulting recommendations, and such is admitted into evidence, the GAL, in the role of the *pro se* party, would be able to argue the evidence during his closing argument.

With this dual power of being able to act as a *pro se* party and an expert witness, the GAL has very broad powers, with two major exceptions. The GAL functions under the supervision of the court, and therefore must protect the best interest of the minor child, and the GAL has no attorney-client privilege with the minor child.

When it is clear that the parents are looking after only their own interests and the interests of the child may be seriously neglected, it is recommended to the trial court that an AFC or a GAL be appointed in any further proceedings on remand. *Hartman v.*

Hartman, 89 Ill.App.3d 969, 412 N.E.2d 711, 45 Ill. Dec. 360 (4th Dist. 1980). The appointment of an attorney to represent a child pursuant to §506 of the IMDMA is a matter left to the sound discretion of the trial court. *In re Marriage of Ricketts*, 329 Ill. App.3d 173, 768 N.E.2d 834, 263 Ill. Dec. 753 (5th Dist. 2002). For example, in *In re the Marriage of L.R.,* the circuit court was directed to appoint a GAL, who was also an attorney, on remand when the "parties seem[ed] to have lost sight of [the daughter's best interest], as evidenced by the fact that they refer[red] to all family members by their full names in court documents, which are a matter of public record." *In re marriage of L.R.*, 202 Ill.App.3d 69, 559 N.E.2d 779, 789, 147 Ill. Dec. 439 (1st Dist. 1990). However, the court's refusal to appoint an AFC was not error because the evidence of the children's best interest was presented by psychologists and therapists, baby-sitters, family, friends, and neighbors although there were accusations of child sexual abuse, adultery, phone-tapping, and physical violence. See *In re Marriage of Doty*, 255 Ill.App.3d 1087, 629 N.E.2d 679, 196 Ill. Dec. 134 (5th Dist. 1994) and *In re Marriage of Ricketts*, 329 Ill. App.3d 173, 768 N.E.2d 834, 263 Ill. Dec. 753 (5th Dist. 2002). Conversely, it has been held to be an abuse of the trial court's discretion to appoint a guardian ad litem to represent a child when there is no evidence before the court to indicate that the best interests of the child were in any way jeopardized.

IV. Child's Representative: (The *Bates* Case)

The cases demonstrate that the divorce court must decide what it wants for the child. While an attorney must advocate a client's interests, a GAL must advocate the *best interests* of the client. Theoretically, the child representative statute is supposed to be the best of both worlds for the child, as the **CR could be characterized as a "best interests attorney."**

In a case of first impression, *In Re Marriage of Norma Perez de Bates, n/k/a Norma I. Perez, v. R. Edward Bates*, Supreme Court of Illinois, 212 Ill. 2d 489; 819 N.E.2d 714 (2004) the Court upheld the constitutionality of section 506(a)(3) on its face, but found it was unconstitutional as applied to the particular facts of *Bates*.

Synopsis of Facts: Both parties filed post-decree motions, including a Motion to Modify Custody and Motion to Modify Visitation. The trial court appointed a child's representative, who prior to trial presented a recommendation in the form of a written report to the court. At trial on the issue of custody, the wife motioned the court to order the child's representative to testify, or in the alternative to strike his written recommendations. The Court redacted the child's representative's report, but then ultimately considered the report in making its final decision to modify custody.

The Supreme Court performed a two-part analysis of the constitutionality of §506 (a)(3) of the IMDMA. The first part of the analysis was whether the language of §506 (a)(3) is clear and unambiguous, and therefore should be strictly construed, which would result in the prohibition of the CR from testifying on the "issues set forth" in the trial. The second part of the analysis focused on due process, specifically the right to cross examine the CR, and whether any such denial was harmless error.

Clear and Unambiguous Language. Section 506 provides that the child representative's duty shall be "to advocate what the representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case," and further provides that the representative "shall possess all the powers of investigation and recommendation as does a guardian ad litem." 750 ILCS 5/506(a)(3) *Bates* at 511. The Court then stated that the statutory language is clear and unambiguous and the "issues set forth" in section 506(a)(3) clearly include the duty to advocate what the representative finds to be in the child's best interests and the power to investigate and recommend in the manner of a guardian *ad litem*. Where the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 255, 807 N.E.2d 439, 282 Ill. Dec. 815 (2004). The court found the CR's observations and conversations with the parties, witnesses, and the minor child were clearly within the statutory ambit barring him as a witness. Id at 512. The Supreme Court then had to decide whether this bar violated the parties' due process right.

Due Process Rights. The Illinois Supreme Court followed the dictates of *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), where the Supreme Court held that "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335, 47 L. Ed. 2d at 33, 96 S. Ct. at 903. The Court in *Bates* found that the wife's fundamental liberty interest to the companionship, care, custody and management of her child was implicated by the statutory prohibition against calling child's representatives as witness. Id at 512.

The Court noted it had recently held that one of the fundamental rights protected under the fourteenth amendment is the right of parents to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion. See *Wickham v. Byrne*, 199 Ill. 2d 309, 316, 769 N.E.2d 1, 263 Ill. Dec. 799 (2002). Id at 512, 513.

Finally, the court found the inability to cross-examine the CR's findings, conclusions, and recommendations created a serious risk of erroneous deprivation of the wife's custodial rights. The court further went on to say that calling the child's representative as a witness would not impose any fiscal or administrative burdens. However, in spite of the unconstitutional denial of due process, the court found that the child's representative's report was essentially cumulative of other evidence; and therefore the denial of due process, by not allowing the wife to call the child's representative as a witness, was constitutional harmless error as applied specifically to the case of *Bates*.

Based on the Court's ruling in *Bates*, the interpretation of the role and characterization of the CR is simple, the CR is an attorney in all aspects, required to follow the rules of procedure, advocacy, as well as the Code of Professional

Responsibility, but with the one exception: THE CR DOES NOT HAVE TO LISTEN TO HIS CLIENT. To state another way, the CR is a best interests attorney, who advocates not necessarily for what the client wants, but advocates for what is in the best interest of his client.

With respect to the issue of giving a recommendation the court, a CR must tread carefully as there are two separate issues, pre-trial recommendations and trial recommendations. Throughout the pre-trial proceedings, a child's representative has the right, as an advocate to be active in pre-trial conferences, status dates and so forth to update and inform the Court and the attorneys of what the CR believes is in the best interests of the child. One of the concerns of the Supreme Court in *Bates,* was that a CR who makes observations, recommendations and conclusions outside the ambit of trial, is subject to the human error, and if not cross-examined on such, could violate a party's due process rights.

As set forth above, during trial, the CR again has the same abilities to advocate as any other attorney, such as giving an opening statement, presenting evidence, calling witnesses, cross-examining witnesses, and presenting a closing argument. Based on *Bates,* to avoid any violation of due process rights, the safest course of action for the CR is to wait until all of the evidence is presented at trial, then the CR should make his recommendation to the Court as to what he believes to be in the best interest of the minor child(ren) in the form of a closing argument, based on **only** the evidence presented at trial.

There is no requirement that there be a hearing on the appointment, and any objection not made in a timely manner is waived. The procedure for appointment is either for the court to choose the person to act as AFC, GAL, or CR, or for the attorneys or the parties to agree to the selection. The individual appointed must be on the approved list of qualified attorneys as set forth by the presiding judge of the circuit court or must possess such experience as determined to be equivalent to such training by the chief judge of the circuit court. Attorneys who want to be placed on this list should apply to the presiding judge, who selects attorneys on the basis of experience in the field of family

law, educational background, experience or training in related fields, and experience as a trial attorney. Attorneys on the Cook County list must attend training sessions designed to prepare them to deal effectively with issues confronting AFC, GAL, and CR.

Under the previous statute, one person was often appointed in the dual capacity of AFC and GAL. The language of the present statute removes the problems inherent to such dual representation (i.e. client communications privileged with AFC; not privileged with GAL) by directing the court to appoint an attorney to serve in only one of the roles, as AFC, GAL, or CR. The statute grants the court the power to appoint an additional attorney to serve in another capacity for good cause shown.

In re D. B., a Minor, 246 Ill.App.3d 484, 615 N.E.2d 1336, 186 Ill. Dec. 279 (4th Dist. 1993), dealt with the issue of a conflict of interest arising from representation. The court found that an attorney's representation of the mother after the attorney had represented the child in question as a GAL in a neglect proceeding was not a "*per se* conflict of interest." *Id*. at 1342. This case should be reviewed when the issue of a conflict of interest arises in the AFC and GAL setting.

In split custody and removal cases, the attorneys as well as the court should be aware of the possible need for multiple appointments of AFC, GAL, and CR. Separate representation of each child may be necessary when the children have different positions as to custody and residential arrangements.

Like the §506 appointment itself, the decision of how the parties will share the burden of the costs, fees, and disbursements incurred as a result of the appointment is a matter left to the trial court's discretion. §506(b) of the IMDMA gives the trial court the specific authority to order that fees be paid for the AFC, GAL and/or CR as follows:

> (b) Fees and costs. The court shall enter an order as appropriate for costs, fees, and disbursements, including a retainer, when the attorney, guardian ad litem, or child's representative is appointed, and thereafter as necessary. Such orders shall require payment by either or both parents, by any other party or source, or from the marital estate or the child's separate estate. The court may not order payment by the Illinois Department of Public Aid

> in cases in which the Department is providing child support enforcement services under Article X of the Illinois Public Aid Code [305 ILCS 5/10-1 et seq.]. Unless otherwise ordered by the court at the time fees and costs are approved, all fees and costs payable to an attorney, guardian ad litem, or child's representative under this Section are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523. The provisions of Sections 501 and 508 of this Act [750 ILCS 5/501 and 750 ILCS 5/508] shall apply to fees and costs for attorneys appointed under this Section.

Moreover, when the §506 appointment is necessitated by one party's actions, it is appropriate for that party to share more of the fee burden. *See Gibson v. Barton*, 118 Ill.App.3d 576, 455 N.E.2d 282, 286-287, 74 Ill. Dec. 252 (4th Dist. 1983) (appropriate for respondent to pay 80 percent of fees when filing of respondents' counter petition for change in custody necessitated appointment of guardian ad litem). However, §506 does not authorize an award of attorneys' fees when a child reaches adulthood and then retains an attorney to initiate suit against the parents. *Garrison v. Garrison*, 99 Ill.App.3d 717, 425 N.E.2d 518, 522, 54 Ill. Dec. 653 (2nd Dist. 1981).

The amount of fee awarded pursuant to §506 depends on the facts and circumstance of each case, including…

> the circumstances of the mother and father; the importance, novelty, and difficulty of the questions raised, especially from a family law standpoint; the degree of responsibility involved from a management perspective; the time and labor required; the usual and customary charge in the community; and the benefits to the client. *McClelland v. McClelland*, 231 Ill. App.3d 214, 595 N.E.2d 1131, 172 Ill. Dec. 461 (1st Dist. 1992).

The granting of a fee award is improper when there is no evidence presented on the services performed, the basis of the award, or the reasonableness of the fees. *In Re Marriage of Soraparu*, 147 Ill. App.3d 857, 498 N.E.2d 565, 101 Ill. Dec. 241 (1st Dist

1986), see also *McClelland v. McClelland*, 231 Ill. App.3d 214, 595 N.E.2d 1131, 172 Ill. Dec. 461 (1st Dist. 1992). In *Soraparu*, the award of fees to the guardian ad litem was held improper because:

a. no showing was made concerning the services performed during the "25 hours or more" of service claimed.

b. no showing of necessity for any service was made; and

c. contrary to the court's order, the guardian ad litem failed to file a written report regarding custody of the minor child. *Id.*

The trial court has broad discretion in determining the reasonableness of a guardian ad litem's petition for attorney fees, and its decision will not be disturbed on appeal absent a clear abuse of this discretion. *In re the Marriage of Petersen*, 319 Ill. App. 3d 325, 744 N.E.2d 877, 253 Ill. Dec. 144 (1st Dist. 2001) . It has also been held that separate hourly rates should be paid for court time and non-court time on the assumption that the former requires a higher degree of competency. *Gibson v. Barton, supra.* However, there is no rule requiring this fee differential. *Id.*

Finally, §506 is applicable not only in actions brought under the IMDMA but also in any action under any statute coming within the scope of the court's jurisdiction under §601 of the IMDMA. Thus, IMDMA §506 applies in child custody proceedings initiated under the Probate Act of 1975 (755 ILCS 5/1-1, *et seq.*), under habeas corpus provisions of the Code of Civil Procedure (735 ILCS 5/10-10, *et seq.*), and under the Juvenile Court Act of 1987 (705 ILCS 405/1-1, *et seq.*). *In re Estate of Azevedo*, 115 Ill.App.3d 260, 450 N.E.2d 423, 426, 70 Ill. Dec. 950 (5th Dist. 1983).

V. Comparing Attorney For Children, Guardian Ad Litem, and Children's Representative

The following chart compares the roles and responsibilities of the AFC, GAL, and CR:

Function	AFC	GAL	CR
Power to have privileged and confidential conversations with child	Yes	No	Yes
Power to bind child to settlement provisions without first seeking court approval	Yes	No	Yes
Power to protect child's best interest without decision being subject to supervision of court	Yes	No	Yes
Power to testify in court proceeding on child-related issues	No	Yes	No
Power to submit report to court concerning recommendation	No	Yes	Yes
Power to file appearance	Yes	Yes	Yes
Power to file petitions	Yes	Yes	Yes
Power to interview child	Yes	Yes	Yes
Power to interview parent (with permission of counsel, who may be present)	Yes	Yes	Yes
Optional power to interview others	Yes	Yes	Yes
Optional power to investigate home situation (not necessarily home visit)	Yes	Yes	Yes
Power to advise court	Yes	Yes	Yes
Power to argue child advocate's belief of child's best interest	No	Yes	Yes
Power to make closing arguments limited to facts admitted into evidence	Yes	Yes	Yes