

MARYLAND GUIDELINES FOR PRACTICE FOR COURT-APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS

INTRODUCTION AND SCOPE

These Guidelines are intended to promote good practice and consistency in the appointment and performance of lawyers for children in cases involving child custody and child access decisions. However, the failure to follow a Guideline does not itself give rise to a cause of action against a lawyer nor does it create any presumption that a legal duty has been breached. These Guidelines apply to divorce, custody, visitation, domestic violence, and other civil cases where the court may be called upon to decide issues relating to child custody or access. Nothing contained in the Guidelines is intended to modify, amend, or alter the fiduciary duty that an attorney owes to a client pursuant to the Maryland Lawyers' Rules of Professional Conduct.

These Guidelines do not apply to Child In Need of Assistance (“CINA”), Termination of Parental Rights (“TPR”), or adoption cases. The appointment and performance of attorneys appointed to represent children in those cases is addressed by the *Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings*.

1. DEFINITIONS

A court that appoints counsel for a minor child in a case involving child custody or child access issues should clearly indicate in the appointment order, and in all communications with the attorney, the parties, and other counsel, the role expected of child's counsel. The terminology and roles used should be in accordance with the definitions in Guidelines 1.1--1.3.

1.1. CHILD'S BEST INTEREST ATTORNEY

“Child's Best Interest Attorney” means a lawyer appointed by a court for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. This term replaces the term “*guardian ad litem*.” The Child's Best Interest Attorney makes an independent assessment of what is in the child's best interest and advocates for that before the court, even if it requires the disclosure of confidential information. The best interest attorney should ensure that the child's position is made a part of the record whether or not different from the position that the attorney advocates.

1.2. CHILD'S ADVOCATE ATTORNEY

“Child's Advocate Attorney” means a lawyer appointed by a court to provide independent legal counsel for a child. This term replaces the less specific phrase, “child's attorney.” A Child's Advocate Attorney owes the child the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. A Child's Advocate Attorney should be appointed when the child is in need of a voice in court, such as in relocation cases, when there are allegations of child abuse, or where the child is sufficiently mature and sees his or her interests as distinct from the interests of the child's parents.

1.3. CHILD'S PRIVILEGE ATTORNEY

“Child's Privilege Attorney” means a lawyer appointed by a court in a case involving child custody or child access to decide whether to assert or waive, on behalf of a minor child, any privilege that the child if an adult would be entitled to assert or waive. This term replaces the term “*Nagle v. Hooks* Attorney.” ([Nagle v. Hooks, 296 Md. 123 \(1983\)](#)). The court may combine the roles of Child's Privilege Attorney with either of the other two roles.

2. RESPONSIBILITIES

2.1. DETERMINING CONSIDERED JUDGMENT

The attorney should determine whether the child has considered judgment. To determine whether the child has considered judgment, the attorney should focus on the child's decision-making process, rather than the child's decision. The attorney should determine whether the child can understand the risks and benefits of the child's legal position and whether the child can reasonably communicate the child's wishes. The attorney should consider the following factors when determining whether the child has considered judgment:

- (1) the child's developmental stage:
 - (a) cognitive ability,
 - (b) socialization, and
 - (c) emotional and mental development;
- (2) the child's expression of a relevant position:
 - (a) ability to communicate with the attorney, and
 - (b) ability to articulate reasons for the legal position; and
- (3) relevant and available reports, such as reports from social workers, psychiatrists, psychologists, and schools.

A child may be capable of considered judgment even though the child has a significant cognitive or emotional disability.

In determining considered judgment, the attorney may seek guidance from professionals, family members, school officials, and other concerned persons. The attorney also should determine whether any evaluations are needed and request them when appropriate.

An attorney should be sensitive to cultural, racial, ethnic, or economic differences between the attorney and the child.

2.2. CHILD'S BEST INTEREST ATTORNEY

A Child's Best Interest Attorney advances a position that the attorney believes is in the child's best interest. Even if the attorney advocates a position different from the child's wishes, the attorney should ensure that the child's position is made a part of the record. A Child's Best Interest Attorney may perform the following duties in exercising the attorney's obligation to the client and the court, as appropriate:

- (a) Meet with and interview the child, and advise the child of the scope of the representation.
- (b) Investigate the relative abilities of the parties in their roles as parents or custodians.
- (c) Visit the child in each home.
- (d) Conduct individual interviews with parents, other parties, and collateral witnesses.
- (e) Observe the child's interactions with each parent and each other party, individually.
- (f) Review educational, medical, dental, psychiatric, psychological, or other records.
- (g) Interview school personnel, childcare providers, healthcare providers, and mental health professionals involved with the child or family.
- (h) File and respond to pleadings and motions.
- (i) Participate in discovery.
- (j) Participate in settlement negotiations.
- (k) Participate in the trial, including calling witnesses and presenting evidence and argument, as appropriate.
- (l) If the child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to, and seek to minimize any harm to the child from the process.
- (m) Inform the child in a developmentally appropriate manner when the representation is ending.

A Child's Best Interest Attorney shall not testify at trial or file a report with the court.

2.3. CHILD'S ADVOCATE ATTORNEY

If a Child's Advocate Attorney determines that the child has considered judgment, the attorney advances the child's wishes and desires in the pending matter. If a Child's Advocate Attorney determines that the child does not have considered judgment, the Child's Advocate Attorney should petition the court to (1) alter the attorney's role to permit the attorney to serve as a Child's Best Interest Attorney or (2) appoint a separate Child's Best Interest Attorney. A Child's Advocate Attorney may perform the following duties in exercising the attorney's obligation to the child and the court, as appropriate:

- (a) Meet with and interview the child, and advise the child of the scope of the representation.
- (b) Investigate the relative abilities of the parties in their role as parents or custodians.
- (c) Visit the child in each home.
- (d) Conduct individual interviews with parents, other parties, and collateral witnesses.
- (e) Observe the child's interactions with each parent and each other party, individually.
- (f) Review educational, medical, dental, psychiatric, psychological, or other records.
- (g) Interview school personnel, childcare providers, healthcare providers, and mental health professionals involved with the child or family.
- (h) File and respond to pleadings and motions.
- (i) Participate in discovery.
- (j) Participate in settlement negotiations.
- (k) Participate in the trial, including calling witnesses and presenting evidence and argument, as appropriate.
- (l) If the child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to, and seek to minimize any harm to the child from the process.
- (m) Inform the child in a developmentally appropriate manner when the representation ends.

A Child's Advocate Attorney shall not testify at trial or file a report with the court.

2.4. CHILD'S PRIVILEGE ATTORNEY

A Child's Privilege Attorney notifies the court and the parties of the attorney's decision to waive or assert the child's privilege by (1) filing a document with the court prior to the hearing or trial at which the privilege is to be asserted or waived or (2) placing the waiver or assertion of privilege on the record at a pretrial proceeding or the trial.

A Child's Privilege Attorney may perform the following duties in exercising the attorney's obligation to the child and the court, as appropriate:

- (a) Meet with and interview the child, and advise the child of the scope of the representation.
- (b) Interview any witnesses necessary to assist the attorney in determining whether to assert or waive the privilege.
- (c) Review educational, medical, dental, psychiatric, psychological, or other records.

3. CONFLICTS OF INTEREST

An attorney who has been appointed to represent two or more children should remain alert to the possibility of a conflict that could require the attorney to decline representation or withdraw from representing all of the children.

If a conflict of interest develops, the attorney should bring the conflict to the attention of the court as soon as possible, in a manner that does not compromise either client's interests.

4. TRAINING AND CONTINUING EDUCATION

Unless waived by the court, an attorney appointed as a Child's Best Interest Attorney, Child's Advocate Attorney, or Child's Privilege Attorney should have completed at least six hours of training that includes the following topics:

- (a) applicable representation guidelines and standards;
- (b) children's development, needs, and abilities at different stages;
- (c) effectively communicating with children;
- (d) preparing and presenting a child's viewpoint, including child testimony and alternatives to direct testimony;
- (e) recognizing, evaluating, and understanding evidence of child abuse and neglect;
- (f) family dynamics and dysfunction, domestic violence, and substance abuse;
- (g) recognizing the limitations of attorney expertise and the need for other professional expertise, which may include professionals who can provide information on evaluation, consultation, and testimony on mental health, substance abuse, education, special needs, or other issues; and
- (h) available resources for children and families in child custody and child access disputes.

Each court should require attorneys seeking appointments as child counsel to maintain their knowledge of current law and complete a specific amount of additional training over a defined interval.

5. QUALIFICATIONS

An attorney appointed to serve as a Child's Best Interest Attorney, Child's Advocate Attorney, or Child's Privilege Attorney should, as a minimum:

- (a) be a member of the Maryland Bar in good standing, with experience in family law, or have been approved to represent children through a *pro bono* program approved by the bench; and
- (b) unless waived by the court, have successfully completed the six hours of training specified in Guideline 4.

In addition, courts should seek to appoint attorneys who:

- (a) are willing to take at least one *pro bono* appointment as child counsel per year, and
- (b) have at least three years of family law experience or other relevant experience. In evaluating relevant experience, the court may consider the attorney's experience in social work, education, child development, mental health, healthcare, or other related fields.

6. COMPENSATION

6.1. COMPENSATION STRUCTURE

Each court should develop a compensation structure for the three roles of child counsel: Child's Best Interest Attorneys, Child's Advocate Attorneys, and Child's Privilege Attorneys.

6.2. COMPENSATION MECHANISM

Each court should take steps to ensure that child counsel are compensated adequately and in a timely fashion, unless the attorney has been asked to serve *pro bono publico*. Courts may use the following mechanisms to ensure attorney compensation:

- (a) Require one or more of the parties to deposit a significant retainer amount or a fixed fee determined by the court into an attorney escrow account or the court's registry.
- (b) If a party qualifies for a fee waiver, compensate child counsel out of available funds. See Guideline 6.3.
- (c) Enter a judgment for any unpaid fees.

6.3. FEE WAIVERS

Each court should prepare its budget to ensure that it has sufficient funds to cover the expense of counsel fees for children when the parties are not able to pay the full fees, or the court should develop a *pro bono publico* component to its program to provide counsel for children.

Each court should apply the same fee waiver procedure, forms, and standard for the appointment of child counsel that are set forth in the *Guidelines for Grant Recipients* for all family services funded by the Family Division/Family Services Program Grants. If a fee waiver is granted, the court should apply a cap on compensation that is appropriate to the role for which child counsel is appointed.

CREDIT(S)

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