GUARDIANS AD LITEM FOR PARENTS IN DEPENDENCY AND TPR CASES

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Trying a dependency or termination of parental rights case against a parent who is incompetent to direct and assist his or her attorney violates due process, just as trying an incompetent criminal defendant does. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659 (1991); *Dusky v. United States* 362 US 402 (1960). However, the consequences of finding that a parent is incompetent are quite different from those of finding that a criminal defendant is incompetent. In a criminal proceeding, if the defendant is found incompetent to stand trial, the proceedings are stopped, and the defendant is committed to the state mental hospital until he or she regains competence. ORS 161.370(2).[1] In contrast, in a dependency or termination proceeding, a guardian ad litem is appointed to make decisions for the parent, and the case proceeds. ORS 419B.231. *See also State ex rel. Juv. Dept. v. Cooper*, 188 Or App 588 (2003); *State ex rel. Juv. Dept. v. Sumpter*, 201 Or App 79 (2005).

A guardian ad litem cannot be appointed for a parent unless a judge finds, following a hearing, that "(a) Due to the parent's mental or physical disability or impairment, the parent lacks substantial capacity either to understand the nature and consequences of the proceeding or to give direction and assistance to the parent's attorney on decisions the parent must make in the proceeding; and (b) The appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment." ORS 419B.231(4).[2] The court may hold the hearing on the written or oral motion of a party or based on the judge's own reasonable belief that grounds for appointing a guardian exist. ORS 419B.231(1), (2).

Criminal defense attorneys routinely raise questions to the court about their clients' competence to aid and assist in their own defense, since to do so is consistent with protecting the client's right to due process and since a finding of incompetence cannot result in the client being convicted of a crime.[3] Because an incompetent parent with a guardian ad litem may become subject to the juvenile court's dependency jurisdiction or even have his or her parental rights terminated, the parent's attorney who doubts the parent's competence is in a far different position than the criminal defense attorney. Most

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[1] If the defendant does not regain competence within three years or the length of the maximum sentence authorized for the offense with which he or she is charged, whichever is shorter, he or she must be released from the mental health facility. ORS 161.370(6). Oregon has not enacted a statute governing competence to stand trial issues in juvenile delinquency proceedings, but the issue can be raised in them. Oregon State Bar Continuing Legal Education, Juvenile Law §§ 26.11 –26.13 (2007 rev.).

[2] The GAL must be "a licensed mental health professional or attorney, … be familiar with legal standards relating to competence, … have skills and experience in representing persons with mental and physical disabilities or impairments; and may not be a member of the parent's family." ORS 419B.234(1).

[3] The difficult question of the attorney's ethical duty when he or she thinks that the criminal defendant client is incompetent but the client opposes raising the issue to the court is beyond the scope of this memo. For a discussion of this issue in the context of a juvenile delinquency proceeding, *see* David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. Cal. Interdis. L. J. 293 (2007).

obviously, simply raising the question of the parent's competence to direct his or her attorney is likely, as a practical matter, to cast grave doubt on his or her ability to parent a child, even though ORS 419B.231(5) provides, "The fact that a guardian ad litem has been appointed under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, any civil commitment proceeding or any other civil proceeding." Given this reality, the parent's attorney who doubts the capacity of the parent to direct the case or whose client's capacity is challenged by another is in a difficult ethical position. The first part of this memo discusses this problem. The second part addresses the relationship between the parent's attorney and the guardian ad litem.

A. The ethical duties of a parent's attorney when the parent's competence to direct the case is questionable or challenged

The Oregon State Bar Ethics Committee issued a formal opinion regarding the obligations of an attorney for a parent whose competence is in question five years before the legislature enacted ORS 419B.231, which creates a process for appointing a guardian ad litem for such a parent. *Zealous Representation: Requesting a Guardian ad Litem in a Juvenile Dependency Case*, OSB Formal Op. No. 2000-159 (2000). The legislation is not inconsistent with the ethics opinion, which, therefore, remains valid. The principal question that the opinion addresses is whether a lawyer for a parent may request that a GAL be appointed. Applying general ethical principles that govern attorneys' relationships with clients of diminished capacity, the opinion provides in relevant part:

> Although a marginally competent client can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a client's limited capacity before resorting to a request for a GAL (citing Oregon Rule of Professional Conduct 1.14). . . [L]awyers should request GALs for their clients only when a client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

OSB Formal Op. No. 2000-159 at 435-36.[4] The normal attorney-client relationship includes the lawyer's duties of diligence, competence, and loyalty to the client; the attorney must protect the client's confidences and avoid conflicts of interest. The duty of loyalty requires the lawyer to allow the client to determine the objectives of the representation and to seek to achieve them. It is, therefore, central to the attorney's duty to maintain as normal a relationship as possible with the client with diminished capacity. The commentary to ABA's Model Rule of Professional Conduct 1.14, which is identical to Oregon's Rule 1.14,

[4] In the same vein, American Bar Association Formal Opinion 404 (1996) provides:

> A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of his client, including petitioning for the appointment of a guardian. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian…"

recommends that the attorney think of the client's mental competency as being on a continuum, which allows an attorney to analyze which decisions can be left up to the client and which may require additional external input. The Oregon ethics opinion emphasizes that a lawyer "can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation." OSB Formal Op. No. 2000-159 at 437.

Oregon Rule of Professional Conduct 1.14, like the Model Rule, contemplates that the lawyer will make special efforts to avoid having a GAL appointed for the client. The commentary to the Model Rule gives several examples of measures that an attorney might take to avoid having a GAL appointed for a client. Among those that are applicable when the attorney represents a parent in a child protective proceeding are "(1) consulting with family members, (2) using a reconsideration period to permit clarification or improvement of circumstances, … (4) consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."

The Oregon and Model Rules provide that the attorney's usual obligation to maintain a client's confidentiality is modified when the client has diminished capacity: "When taking protective action pursuant to Rule 1.14(b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." RPC 1.14(c). The commentary to ABA Model Rule 1.14(b) gives an example of how the obligation to maintain confidentiality might be modified:

> The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under Rule 1.14(b), must to look to the client, and not family members, to make decisions on the client's behalf.

Appointment of a guardian ad litem should be the last resort when a parent facing a dependency or termination of parental rights proceeding is marginally competent. The parent's lawyer must evaluate the circumstances carefully and advocate the least restrictive action on behalf of the client.

B. The role and obligation of the parent's guardian ad litem

The statutes concerning appointment of GALs for parents in child welfare proceedings and the 2000 State Bar ethics opinion both make clear that after a GAL is appointed, the GAL "control[s] the litigation and provide[s] direction to the parent's attorney on the decisions that would ordinarily be made by the parent in the proceeding." ORS 418B.234(3)(d); OSB Formal Op. No. 2000-159 at 438. *See also State ex rel. Juv. Dept. v. Sumpter*, 201 Or App 79 (2005) (When parent has a GAL, the GAL alone is able to make a valid waiver of the parent's right to a trial on the merits, and that waiver must be knowing and intelligent. That the guardian was present and did not object does not show

such a waiver. The court must ascertain on the record that the guardian understand what rights are being given up for the waiver to be valid.).

The Oregon statute gives the GAL authority to make all decisions that the parent could normally make, including deciding not to contest a case. ORS 419B.234(3)(b) explicitly allows the GAL to "admit or deny the allegations of any petition; agree to or contest jurisdiction, wardship, temporary commitment, guardianship or permanent commitment; accept or decline a conditional postponement; or agree to or contest specific services or placement." Subsection (3)(c) allows the GAL to "make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270 and agreements under ORS 109.305."

In exercising this decisionmaking authority, the GAL must "make the decisions consistent with what the guardian ad litem believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceeding or give direction or assistance to the parent's attorney on decisions the parent must make in the proceeding." ORS 419B.234(4). In other words, the GAL does not act on his or her own assessment of the client's best interests, but rather on the basis of what the GAL believes the parent would do. The GAL is required to "consult with the parent, if the parent is able, and with the parent's attorney and make any other inquiries as are appropriate to assist the guardian ad litem in making decisions in the juvenile court proceeding." ORS 419B.234(3)(a). Courts in some other states have held that because the central function of a GAL is to protect a parent's fundamental legal rights, a GAL may waive a parent's legal rights only in return for a legal benefit. E.g., . *In re Christina B*., 19 Cal. App. 4th 1441 (1993).

The parent's attorney must follow the instructions of the guardian ad litem regarding decisions that are ordinarily made by the parent in the proceeding. ORS 419B.234(5). However, the attorney also continues to have an obligation to protect the parent's interest in making decisions if he or she is competent. The statute requires the parent's attorney to "inquire at every critical stage in the proceeding as to whether the parent's competence has changed and, if appropriate, [to] request removal of the guardian ad litem." *Id.*[5]

[5] The GAL also has an obligation to inform the court if the parent no longer needs a GAL. ORS 419B.234(3)(e).