

ETHICS , BEST PRACTICES OR BOTH?

ETHICAL DILEMMAS IN CHILD WELFARE CASES FOR NEBRASKA GALS



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ETHICS AND BEST PRACTICES FOR GALS

- What is the difference between what is ethical and what might be more accurately described as “best practices” when representing a child in a child welfare case?
- How does the uniqueness of representing both the best interests and the desires of the child pose particular ethical challenges?
- When is it ethical and/or good practice to ask the court to appoint an attorney for the child?

DEVELOPING YOUR PHILOSOPHY OF PRACTICE

- The privilege of representing children
- The challenge of a unique type of client and practice

OR – What did you go to law school for?

HERE’S MINE -

“ A person’s a person, no matter how small”
(By Horton in *Horton Hears a Who* by T. Suess Geisel)

“ I know, up on top you are seeing great sights, but down here at the bottom we, too should have rights” (By Mack in *Yertel the Turtle* by T. Suess Geisel)

WHAT ARE THE ETHICAL RULES AND WHAT IS GOOD PRACTICE?

Nebraska Supreme Court Rules of Professional Conduct

Guidelines for GALS in Juveniles in Juvenile Court Proceedings –

THE GAL ROLE IN NEBRASKA

- Guidelines and Neb. Rev. Stat. § 43-272(3) – the “dual role” as both – an **advocate** who investigates and makes independent determinations and recommends what is in child’s best interests and protects best interests and **legal counsel** who acts as any lawyer for any party would

GAL ROLE IN NEBRASKA

- Under what circumstances does the GAL ask the court to appoint separate legal counsel? When have you asked and when have you not asked?
- Guidelines III C 4
- “expresses a preference which is inconsistent”
- “assess” the “need” – age, capacity, maturity, nature of inconsistency re significance in bounds of law and reality
- advise court of conflict, ask for ruling
- You stay as best interests advocate, new counsel is legal – III C 7

BASICS

- § 3-501.1 Competence – A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, preparation and judgment reasonable necessary for the representation.
- § 3-501.3 Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client.

WHAT ARE THE AREAS OF KNOWLEDGE ?

- The law, obviously – keeping up, federal as well
- Child development
- Family dynamics, particularly where there is maltreatment
- Substance abuse
- Mental health issues, trauma, testing and treatment
- Community services
- Placement options

- Guidelines speak to obtaining information and making reasonable efforts to obtaining pleadings, copies of all case plans and reports, obtaining information from all professionals and service providers as well as making visits to child where child is residing.
- Guidelines speak to consulting with the child at specific times and stress meeting in person, making inquiry with those involved, making a report and recommendations to the court, attending court and participating in court proceeding with “quality representation and advocacy”

RECOMENDATIONS AND REPORTS

- Must you do a written report?
- What is envisioned? How long and what is it to cover?
- Do you have to review something more than the agency records?

SO WHAT DOES QUALITY AND ETHICAL GAL WORK LOOK LIKE?

- Meeting client and establishing relationship
- Helping client understand your role – how do you explain “confidentiality” ?
- Helping client understand your duality and how to discuss if separate legal counsel is needed
- Issues to work with –
 - placements
 - relative options
 - visitation
 - service needs

MEETINGS

- o How often do you meet with client?
- o Should it be alone?
- o Do you have to go to their home?
- o What events trigger a meeting?
What if the child is not nearby? What if the child is in a congregate care placement?
- o What if the child is actually out of state?
- o Can you have someone else, like a paralegal, do the visit?

- o Guidelines –V A

ETHICAL AND QUALITY REPRESENTATION

- o Helping the client understand what is happening
- o Helping the client formulate a position – options, possibilities and probabilities
- o Reviewing and explaining significant paperwork – like the case plan
- o Helping the child prep and have an effective appearance in court
- o Assisting the placed child with placement issues including permanency options
- o Helping all children with issues with significant others – like caseworker, counselor, school
- o Making legal choices, like appeals

WHAT ELSE?

- o What else do you see as your role?

- Providing a way to contact you and what to contact you about
- Talking to the child about life plans and significant decisions
- Encouragement and support
- Role model, mentor

AND WHEN HAVE YOU GONE TOO FAR?

- o When have you gone too far or crossed the line?

- Buying gifts for the child
- Bringing child to your home
- Introducing child to your family or friends
- Continuing a relationship after the case is over

- What is the limit to your caseload?

OTHER RELEVANT SECTIONS

- o §3-501.6 Confidentiality
- o §3-501.14 Client with diminished capacity
- o §3-503.3 Candor toward the tribunal
- o §3-503.4 Fairness to opposing party and counsel
- o §3-540.1 Truthfulness in statements to others
- o §3-504-2 Communication with person represented by counsel
- o §3-504-3 Dealing with unrepresented person
- o §3-508.3 Reporting Professional Misconduct

GUIDELINES

- o III C 6 – conflicts between clients – advocacy of the legal and best interest of one are adverse to or conflict with the legal and best interests of another
- o V B – inquiry and consultation with others
- o V C – report and recommendations to the court contents, provide to the client?
- o V D – participation in court proceedings
- o VE - caseloads

- Your client is a child in foster care and tells you that she is seeing her father when she visits her mother and she wants to see him and there are no problems or worries but court order is that there should no contact at all. Child says to you – “don’t tell , nothing bad is happening on the visits and aren’t you are supposed to keep my secrets”
- Does it matter how old the child is?
- Does it matter if the child is doing this but mother does not know?
- Does it matter “why” the Judge issued the order?

- A relative has no lawyer but comes forward saying she can take the children temporarily. She does not ask about foster care subsidies. Is there an obligation for you to tell her that she could get more money/services to care for the children if she was able to obtain a foster care subsidy? Should you tell someone else to tell her?
- What if she is told about foster care subsidies but the relative says she does not need the money as she is sure the placement will be a short one. Is there an obligation to explain ramifications of that choice?

- While handling a contested hearing, GAL Sue Jones realizes her opponent has been drinking and appears somewhat impaired but it does not seem like anyone else notices. What should she do?
- What if it is the Judge that GAL Sue Jones suspects has been drinking?
- Will it make any difference that the impairment means GAL Sue Jones’ client seems to be getting a better deal?
- What if GAL Sue Jones realizes that the opposing lawyer has misquoted the law in a way that helps Sue’s case?

- The child tells you “ I do not want to be sent to live with my grandmother, she lives on that Indian reservation” You do not think placement with the grandmother is a good idea either as she lives too far away for reunification efforts to be effective.
- The Judge asks the whole courtroom in a general way: “Is there any reason to think this is an ICWA case?” No one says anything – should you keep your info confidential? Can you still advocate for what you want if you tell?

- Fifteen year old client tells GAL that mother was “smoking weed” on last unsupervised home visit but does not want GAL to tell court as child wants to go home soon. GAL was hoping child could go home soon as well and GAL wonders if mother using a little marijuana is really much of a safety risk for client. What should GAL do?
- Does the age of the child make a difference in the answer?
- What if the prosecutor says to the Judge – “Mother is no longer using drugs and child can go home.”
- Should a parent be denied visits if there is dirty UA?

- The GAL tells the Judge that the child Marcel “does not want to go home” but the caseworker whispers to the GAL that this is not Marcel’s position. What should the GAL do?
- What if the GAL has not seen Marcel since the last hearing? What if not in several weeks?
- What if Marcel told the GAL that when he had talked to the caseworker, he did say that he wanted to go home but Marcel told the GAL “don’t tell the caseworker that I really do not want to go home” ?
- What if Marcel tells the GAL that he does not want anyone but the Judge to hear his position?

- The police call a GAL and say they would like to talk to a foster child client, who is in placement due to parental neglect, about some neighborhood burglaries – can/should the GAL assist to bring the foster child to the police station?
- The GAL finds out that a caseworker brought the foster child to a police station for a discussion about possible involvement in burglaries and did not tell the GAL about doing this – what should the GAL do? Would it make any difference if the prosecuting attorney told the caseworker to do this?

- You represent Bobby, a 12 year old who has been in care for a year, he loves his foster home and has done well there and tells you that he wants to be adopted. His birth parents have made little or no progress with their substance abuse problems but the agency thinks the parents deserve more time to work on their problems and that Bobby just likes the material things his more middle class foster parents can provide. Do you file the TPR on behalf of Bobby?
- What if Bobby has a 16 year old sister who doesn't want to be adopted? Is there a conflict?

- You represent 2 children who have been in foster care over a year. They are 13 and 10 years old. They like and are doing well in their foster home. The mother, who has serious drug problems, gives birth to a new baby who has some medical issues and the baby is immediately removed and the court assigns you to represent the baby as well. The two older children want their new brother to be with them. The foster mother indicates that she cannot under any circumstances take another child into her home at this time, particularly one with medical needs. What do you do? Is there a conflict?

- 11 year old client tells GAL that she does not want to attend her permanency hearing at court “because the Judge is stupid and treats me like a baby and it doesn't matter what I say anyway” What should GAL do?
- 15 year old client has pretty serious behavior problems, is adamant about wanting to go to next court appearance so he can “tell that f--king Judge what a real a--hole he is for putting me in this place; he will be sorry if he does not send me home.” Should you let the child come to court?

- 14 year old client tells GAL “I don't want you to be my lawyer, you always tell the Judge something different from what I want. This is not what the lawyers do on TV - you are a bad lawyer . I will just talk for myself” What should GAL do?

- You made several home visits to your clients and were shocked at the conditions in the home, you are questioning why the agency has not taken the children out of the home as it is so dirty and unsafe. You have discussed this with the caseworker who now thinks the children should be removed. The prosecutor says she will be subpoenaing you to testify as a witness regarding the condition of the home. Can she do that? What should you do? Does it matter if you really agree that it is in the children's best interests to be removed?

- o 12 year old client has disclosed to caseworker that she is being sexually assaulted by her stepfather. When you talk to her, she tells you the same. Then you talk to the child's 15 year old brother, who you are also appointed to represent, and he says – "I know my sister is lying, she told me she was going to make this up." Is there a conflict? Who should you represent?
- o Does it matter if the older brother tells you that he does think that it is likely that his sister is lying but he hates the stepfather anyway and would like him to be made to leave the home?

- o You represent 17 year old Jon and his 2 year old sister Sue. Their mother has had a long term mental illness and is not currently in treatment or taking her meds. The agency wants to file a TPR and free both children for adoption. John is adamant that he does not want to be adopted and that he wants to go home to his mother with Sue who he has cared for since her birth. You think due to his adamant position that it is in his best interests to return home but you do think it is in Sue's best interests to be adopted. Do you have a conflict?

You make a home visit to see your clients and the mother, who is represented, says to you, "Can I talk to you about....."

1. ...how the children are doing?"
2. ...about the case?"
3. ... if my lawyer is a good lawyer?"

You are at court and the caseworker approaches you and the prosecutor is not around and says "Can I talk to you about....."

same as above

- o Thank you for inviting me to talk
- o Thank you for all your good work

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