

The Guardian Ad Litem: Parent for the Child in Juvenile Court Proceedings

by Robert E. Wheeler



“We remind the juvenile court and counsel that this case involves impressionable children in their formative years, not impersonal flotsam and jetsam adrift on a sea of indecision or, much worse, societal insensitivity or apathy.”

—*In re Interest of L.D. et al.*, 224 Neb. 249 at 263, 398 N.W.2d 91 (1986)

Long before the federal Adoption and Safe Families Act of 1997, the Nebraska Supreme Court said:

A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.—*In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

Robert E. Wheeler



Robert E. Wheeler graduated *with distinction* from the University of Nebraska–Lincoln College of Law in December, 1979. He was employed as an attorney with Health and Human Services from 2000 to December 2005. He was generally active as a guardian ad litem for 16 years before that. Wheeler is no longer actively practicing law. He lives in North Platte.

The news media too often must report of children mired in foster care, of children in the juvenile justice system that have been treated as impersonal flotsam and jetsam adrift on a sea of indecision or societal insensitivity and apathy. In such reports, some party is often blamed. Frequently it falls on the Nebraska Department of Health and Human Services (“the Department”). Sometimes the judge is blamed. It is at times suggested that a CASA could have made a difference for the child. Seldom is the focus on the county attorney, who prosecutes such cases, or the guardian ad litem (GAL), who has the power to prosecute the case once appointed, or the parents’ or guardians’ defense attorneys who are bound by the same Juvenile Code.

What fit parent would permit his or her child to languish in foster care and juvenile court proceedings? None. Neither should the child’s GAL, who stands in lieu of a parent for the juvenile in the proceedings in which he or she was appointed. *Neb. Rev. Stat.* Section 43-272.01.

The GAL is more than a parent for the child. As an attorney, the *Rules of Professional Responsibility* require that he or she conform to requirements of the law, Preamble; advocate competently for the best interests of the child, Rule 1.1; act with reasonable diligence and promptness in representing the child, Rule 1.3; and communicate effectively with the child, Rule 1.4.

The Nebraska legislature has set the standard for the guardian ad litem, all parties and the court in *Neb. Rev. Stat. Section 43-246*: the Juvenile Code is to be construed: (1) to provide for the juvenile’s safety, protection and development of



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capacities; (2) to provide intervention under the Code with due regard for parental rights and capacities; (5) to achieve the purposes of the Code within the home, where possible, to consider relatives as a preferred potential placement, and to make reasonable efforts to preserve and reunify the family, if required; (6) to promote adoption, guardianship, or other permanency when the juvenile cannot be return home within the limits provided by the Code; and (7) to assure a fair hearing which protects the various parties' legal rights

So, you are an attorney and have been appointed as GAL for a child in a juvenile proceeding. First, do you have the time to effectively advocate the best interests of this child? If so, how do you effectively advocate for the best interests of your child? Your duties are set out in *Neb. Rev. Stat.* § 43-272.01, and they will be discussed in detail below. Tools will be offered for efficient and timely representation of your child's best interests.

Calendar Important Dates

Calendar important dates in your office system and place a checklist in your child's file:

- Promptly, no later than two weeks, visit with your child and become acquainted with his or her placement. *Neb. Rev. Stat.* § 43-272.01(2)(d)(i).

- As soon as possible, no later than two weeks, determine that reasonable efforts were made to prevent the removal. § 43-283.01.

• 30 days

1. Consider a request for probable cause hearing, § 43-256, or for mental or physical evaluations of your child. § 43-258.
2. Determine that you have a copy of the HHS or guardian's report to the court of the location of placement and the juvenile's needs with regard to 43-246(1) (*assuring the child's rights to care, protection, safe and stable environment and development of capacities*). § 43-285(3); 43-1312.

- **90 days**, adjudication must be had if proceeding under neglect or abuse, unless good cause is shown. § 43-278.

• Six months

1. Adjudication hearing must be had if proceeding for a law violation. § 43-277.
2. Check on court advisement to the parents following adjudication of dispositional options and possible consequences. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).
3. Check on timeliness of disposition.
4. Check on the progress under the Department's plan.
5. Visit your child in his or her placement. § 43-272.01(2)(d).

6. File your dispositional report and make recommendations (*your court may have a form it requires*). § 43-272.01.

7. If there is a basis for termination of parental rights, and it appears to be in the best interests of your child to do so, proceed promptly on permanency.

• One year

1. Be certain a review hearing is held on the record at least once each six months that your child is in out-of-home care. § 43-1313.

2. Visit with your child in his or her placement. § 43-272.01(2)(d).

3. File your dispositional report and make recommendations. § 43-272.01.

4. Check on permanency hearing. § 43-1312(3); § 43-285(4). The permanency hearing may be included in a review hearing and need not be a separate proceeding. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43 (2002).

5. If the facts indicate that reunification is not reasonably likely to occur in a timely manner, a basis for termination of parental rights exists, and it is in the best interests of the juvenile to do so, consult with your caseworker about proceeding to permanency. *Neb. Rev. Stat.* § 43-1312(2). If no one is moving forward on permanency, or willing to do so, initiate action.

• 15 months

1. Determine if and when your child may be in out of home placement for 15 of 22 months. At that time determine if the Department has made the appropriate report to the court and if the State has filed for termination of parental rights, 43-292.02, or has requested an exceptions hearing, 43-292.03.

2. Visit your child in his or her placement. § 43-272.01(2)(d).

3. If no action has been taken toward permanency, confer with the State and consider filing the appropriate motion or petition yourself.

- Calendar each six months thereafter to review permanency for your child and to assure review hearings timely occur on the record.

Get to know your child

Neb. Rev. Stat. § 43-272.01(2)(d)(i) requires that the GAL consult the child promptly and at least once every six months, to become familiar with the placement and needs of the child, and to submit a report at every dispositional hearing under subpart (f). Visit your child in his or her home or placement.

Communicate with your child, the parents, the foster parents, the case workers, and the parties

Although your child does not dictate to you the terms of his or her best interests, nonetheless, the *Nebraska Rules of Professional Conduct* require that you promptly communicate with your child, considering his or her capacity to understand. Rule 1.14. Any wise parent would do the same.

Become acquainted with those persons of significance in your child's life. § 43-272.01(2)(d) generally requires that the GAL make every reasonable effort to become familiar with the needs of the protected juvenile, including inquiry of the most current caseworker, foster parent, or other custodian.

The Department has regular meetings with the parents and other significant persons to discuss development of a plan and progress under it. The GAL should be notified of those meetings and should attend them on a regular basis. It would be wise that the GAL advise the Department and the attorney of represented persons at such meetings of the GAL's intent to attend.

The GAL must be careful in communicating with any party that is represented by an attorney.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.—*Nebraska Rules of Professional Conduct*, Rule 4.2.

Determine if any fit and willing family is available for placement

If a child must be removed from the parental home, suitable relative placement should be examined immediately. Part of your assessment of whether that family is appropriate for placement should include the willingness and ability of the relative to protect the child from the parents if the parents continue to present an unreasonable risk to the child.

The Department is required to include a report of appropriate relative placement in the plan, *Neb. Rev. Stat.* § 43-246(6), and in the permanency plan, § 43-1312. Failure to examine relative placement early puts the child's stability and permanency at unnecessary risk later. If the case proceeds to termination of parental rights, the Department is required by § 43-1312 to examine relative placement. The State's obligation to file termination of parental rights under the circumstances described in *Neb. Rev. Stat.* § 43-292.02 is not required under subpart (3)(a) if the child is being cared for by a relative.

Whereas the best interests of the child prevail at all stages of the juvenile proceedings, even with the issue of relative placement, nonetheless, examination of a relative at that late

stage of proceeding threatens unnecessary disruption to the child's security and development. It is much better, and more respectful of positive family bonds, to examine appropriate relative placement at the outset.

Request of the worker all information in the possession of the Department concerning the health and safety of your child

All information that the Department gathers concerning a reported abused or neglected child, or a child in its custody, is confidential except as specifically authorized by the Child Protection Act and sections 28-734 to 28-739. *Neb. Rev. Stat.* § 28-725; § 43-3001. Likely, the Department will consider that granting you the information would be appropriate as consistent with the purposes of the law. If there is any question concerning that, you should request an order early in the case directing that such information be shared with you. § 43-3001(2).

Identify the risks to your child

Communicate with the Department in its assessment of the risks to your child and of the strengths of the family. Share your own assessments and ideas.

Identify the best interests of your child

The foremost purpose and objective of the Nebraska Juvenile Code is to protect and promote the juvenile's best interests. *In re Interest of Andrew S.*, 14 Neb. App. 739, ___ N.W.2d ___ (2006); *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). The Juvenile Code must be construed to assure the rights of all juveniles to care and protection. *Neb. Rev. Stat.* § 43-246. For these reasons, strict rules of evidence do not apply at dispositional hearing. Nonetheless, the proceedings must be fundamentally fair. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). Get the information concerning the best interests of your child into evidence.

In re Interest of Aaron D., 269 Neb. 249, 691 N.W.2d 164 (2005) involved a proceeding for termination of parental rights. The State failed to call witnesses who could have testified to the juvenile's best interests, and so the Court was denied that evidence. The Supreme Court observed that "the State seems to have forgotten that the focus of this proceeding is not on [the parent], but [the juvenile]. . ."

In all proceedings keep the focus on the best interests of your child.

Determine that reasonable efforts are being made

If your child was removed from the home pursuant to subdivision (3) of *Neb. Rev. Stat.* § 43-248, the court may enter



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an order continuing detention or placement upon a written determination that continuation of the juvenile in his or her home would be contrary to the health, safety, or welfare of such juvenile and that reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of § 43-283.01. § 43-254. Be certain that you have such an order if the child continues in foster care.

Reasonable efforts must be determined in the context of the juvenile's health and safety. That is the paramount concern. *Neb. Rev. Stat. § 43-283.01(1). In re Interest of DeWayne G., Jr., and Devon G.*, 263 Neb. 43, 54, 638 N.W.2d 510, 519 (2002) noted that this statute changes the emphasis from that previously placed on reunification to the health and safety of the child, which should not be left too long in foster care

A parent (*and your child*) is entitled to a reasonable efforts hearing, but that is not necessarily a "separate hearing." *DeWayne G, supra*.

Actively participate with the Department to assess your child's risks and to develop a plan

The juvenile court has the authority under *Neb. Rev. Stat. § 43-284* to make disposition and implement a plan. The purpose of that plan is to correct the conditions underlying the adjudication. *In re Interest of P. M. C.*, 231 Neb. 701, 437 N.W.2d 786 (1989). The planning should include a contingency plan operating concurrently with efforts at reunification with the parents. The contingency plan does not need to interfere with the primary plan, and it must not, but in the event the primary plan fails, your child should not suffer unnecessary delay for lack of a contingency plan.

In re Interest of M.R., J.R., and N.R., 228 Neb. 47, 52, 420 N.W.2d. 924, 927 (1988) requires that the provisions of the plan be material to correcting the conditions on which the adjudication was obtained.: "Otherwise, a court-ordered plan . . . is nothing more than a plan for the sake of a plan . . ."

A juvenile court is not required to order or implement a rehabilitation plan for the parent if the plan has very little chance of success and is not in the best interests of the child. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998) the Court ruled that no rehabilitation plan was required where the child's substantial medical needs resulted from injury caused by parental abuse necessitating 24-hour daily nursing care for the child. All planning must be engaged with a view toward permanency.

Be sensitive to conflict between your own determination of the best interests of your child and your child's wishes

The GAL represents the best interests of the child. An attorney for the child represents the wishes of the child. *See*

In re Guardianship of Robert D., 269 Neb. 820 (2005). If the child is 14 years of age or older, or if the child is sufficiently mature to express his or her opinion, and that opinion conflicts with your own determination of what is in the best interests of the child, advise the court of the conflict.

Work with those willing to work with you

As any parent, you may rely upon other professionals and work with them. You don't need to do it all. Your job is to see that what needs to be done in the best interests of your child is done. Active communication is the key. Determine what are the County Attorney's plans for prosecuting the case and how you can assist to the degree they are consistent with your own. Communication with the parents' attorney may be helpful in conveying your goals to the parents and in soliciting their cooperation. Such communication and openness can help reduce unnecessary adversarial confrontations. If it does not, it may nonetheless help define the areas of concurrence and of conflict.

File your reports each six months and prior to all dispositional hearings

Nebraska Rules of Professional Conduct, Rule 3.7 provides, generally, that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. A GAL can avoid problems by treating the report to the court as a trial brief, setting out what the GAL has done, expects to produce as evidence and recommends. The report is not evidence. If the parties can stipulate to the evidence set out, great. If they cannot, the GAL produces the evidence as in any other trial.

When a guardian ad litem's report does not contain objectionable hearsay, it is an efficient means of communicating the facts that the guardian has learned to the parties and to the judge, if properly admitted into evidence, but a report is not somehow made admissible because it was prepared by a guardian ad litem appointed by a court pursuant to a statute. Hearsay within such reports remains hearsay.—*Joyce S. v. Frank S.*, 6 Neb. App. 23 at 33, 571 N.W.2d 801 (1997).

Prepare the case for your child as you would any other litigation

The primary function of the guardian ad litem is to give the judge the necessary information by way of admissible evidence so the judge may issue an order which is in the best interests of the ward and which will be upheld on appeal. If the court does not issue such an order, the guardian ad litem should appeal.—*Joyce S., supra* at 33.

Neb. Rev. Stat. § 43-272.01 empowers the guardian ad litem to present evidence and cross examine witnesses and to file motions or petitions in the case in the best interests of the juvenile. As in any other case, you will assess the areas of

concurrency and make a determination whether the lead actions of others, such as the prosecutor, are adequate for your purposes, and the degree to which you should initiate action.

In *In Re Interest of R.G.*, 238 Neb. 405 at 426, 470 N.W.2d 780 (1991) the Court upheld *Neb. Rev. Stat. § 43-272.01*:

It necessarily follows that a guardian ad litem will adduce such evidence as he or she concludes will serve the interests of the juvenile and argue in favor of such disposition as the guardian concludes is best for the juvenile. The question is not who adduced the evidence and persuaded the juvenile court, but what does the evidence prove and was the juvenile court's ruling correct?

In *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450 (1999) the Court confronted a challenge that the statute unconstitutionally permitted the GAL to both argue and testify. The Supreme Court, at 460, the Court ruled that, as applied, it was not:

However, the record reflects that the guardian ad litem limited her role at the termination hearing entirely to that of an advocate. She never testified, she was never asked to testify, and neither she nor any other party offered one of her reports into evidence at the termination hearing.

Actively resist unnecessary delay

Because of the provisions of *Neb. Rev. Stat. § 43-246*, practice in juvenile court is not a raw adversarial proceeding. Nothing in the law permits a parent to sacrifice the child's safety or health for the parent's self-protection or convenience. Nor does it permit a parent's attorney, as an officer of the court, to do anything that would sacrifice the child's rights under the juvenile code for the benefit of his or her client.

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Nebraska Rules of Professional Conduct, Rule 4.4 (a). "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.1.

Nonetheless, unnecessary delay and frivolous action occurs. To the degree that such action impinges on the rights of the juvenile to safety, timely justice and permanency, the GAL has a duty to resist it.

Nonetheless, defense attorneys will seek to delay adjudication and permanency. Resist such delay. Support action in progression of your child's case, and if it is not forthcoming from the county attorney, file it yourself. If a request for a continuance is well-founded, stipulate it. If it is not, make a

record of your objection to it. If continuances persist over your objection, threatening the health and safety of your child, appeal it. *Joyce S.*, *supra* at 33.

In order to appeal a decision of the court, it must be a final order. *Neb. Rev. Stat. § 25-1901*. Ordinarily, continuances are not final orders. However, when they are excessive and affect a substantial right of the juvenile to safety and permanency, they are final and appealable. *In re Interest of Enrique P.*, 14 Neb. App. 453, ___ N.W.2d ___ (2006).

Respect bonding between your child and the foster parents

Hopefully a bond will develop between your child and the foster parents. That is necessary to your child's healthy development. While that bond must not, alone, interfere with healthy bonding of your child with the natural parents, nonetheless it is hopefully a valuable asset of your child worth protecting and nourishing.

In re Interest of Teela H., 4 Neb. App. 608 at 620, 547 N.W.2d 512, 520 (1996) contains an extensive discussion of attachment and bonding, and it warns against misuse of a child's attachment to a foster parent as a ground to deny reunification:

We suggest that a legal system which allows removal of a neglected or abused child from its parent, placement in foster care during parental rehabilitation, and then removal from foster care and return to the natural parent has, of necessity, opted for the resilient "child psyche" concept. Therefore, in the instant case, that Teela has manifested separation anxiety, by itself, seems patently insufficient to deny reunification—to conclude otherwise would be to make rehabilitation and reunification a sham.

In that case, the concept was introduced as a "concern" that the Court had with an attitude expressed at the hearing appealed from as well as the position taken on appeal. Nonetheless the Court held, 4 Neb. App. at 621, 547 N.W.2d at 521:

... But it seems clear that consideration of the psychological impact upon Teela, if separated from her foster parents, is indeed an appropriate consideration, in the mix of factors to consider, in situations such as this.

Even in the process of reunification, the foster parents can be an important temporary anchor for your child during the process. The question is whether continuing that bond is in the best interests of your child.

Pursue timely permanency for your child

When a guardian ad litem is appointed in a juvenile criminal proceeding in county court, that GAL's authority does



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not extend to instituting new and separate proceedings in the juvenile court. *In re Interest of Valentin V.*, 12 Neb. App. 390, 674 N.W.2d 793 (2004). However, all that needs to be done for the protection, safety and permanency of the juvenile can be done by the GAL in the juvenile court case of appointment. The GAL may file motions and petitions for actions within the jurisdiction of the juvenile court. *Neb. Rev. Stat.* § 43-272.01(2)(h). That includes petitions for termination of parental rights, adoption and guardianship. § 43-247 (10).


The “concept of permanency is not simply a ‘buzzword.’” *In re Interest of Sunshine A.*, 258 Neb. 148 at 158, 602 N.W.2d 452 at 460 (1999). Actively pursue permanency for your child from the start of the case to its conclusion.

Boldly advocate for your child

Billups v. Scotts, 253 Neb. 287, 571 N.W.2d 603 (1997) encourages the guardian ad litem to be active in representing

the ward, as though acting under retainer. Nonetheless, the guardian ad litem is entitled to absolute immunity from damages arising out of the performance of those duties.

Enjoy your child and become a source of joy and hope to your child

Be a source of joy and hope for your child. Look at the psychological and counseling reports on your child. Does your child have a positive vision of his or her future? If so, help nourish and encourage it. If not, help your child to dream and then to move in concrete ways to realize those dreams. Enjoy your child! 



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