

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1377

Adding Civil Rule 90.6 concerning appointment of child custody investigators and Civil Rule 90.7 concerning appointment of guardians ad litem in custody proceedings.

IT IS ORDERED:

1. The Civil Rules are amended to include new Civil Rule 90.6, which provides:

Rule 90.6. Appointment of Child Custody Investigator.

(a) Appointment. In an action under AS 25.20, AS 25.24, or AS 18.66, the court may appoint an expert under Evidence Rule 706 to investigate custody, access, and visitation issues and provide an independent opinion concerning the child's best interests. If the parties cannot afford a private custody investigator, the court may appoint the court custody investigator to conduct the investigation and provide an expert opinion.

(b) Qualifications. (1) A custody investigator should possess knowledge, skill, experience, training, or education that allows the custody investigator to conduct a thorough and impartial investigation and offer an informed opinion to the court regarding custody and visitation issues. Specifically, the custody investigator

should have an understanding of the following as appropriate to the case:

(A) child development from infancy through adolescence;

(B) impact of divorce and parental separation on a child;

(C) unique issues related to families involved in custody disputes;

(D) domestic violence and substance abuse and their impact on children;

(E) Alaska statutes and rules relating to custody determinations;

(F) the ability to communicate effectively with children and adults;

(G) the ability to communicate recommendations orally and in writing; and

(H) other qualifications appropriate to the particular case.

(2) Upon request of a party, a custody investigator or prospective custody investigator shall provide to the parties a written summary of relevant education and experience.

(c) Disclosure of Conflicts. The custody investigator shall disclose any relationships or associations between the investigator and any party which might reasonably cause the investigator's impartiality to be questioned. This disclosure must be made no later than 10 days after appointment.

(d) Report.

(1) Deadline for Filing and Contents. The court shall specify the date by which the custody investigator must file and serve a written report. The report must describe the investigation, including who was interviewed and what records were reviewed,

summarize the information obtained, and explain the custody investigator's conclusions and recommendations utilizing the applicable statutory factors.

(2) Admission of Report into Evidence. Unless otherwise ordered, the custody investigator's report is deemed to be admitted into evidence upon filing and may be reviewed by the court before the hearing or trial. A party may require the custody investigator to appear at a hearing or trial to testify about the report. To preserve this right, the party must include the custody investigator on the party's final witness list. The party must also take appropriate steps to ensure the custody investigator's presence at the hearing or trial, which may include requesting the issuance of a subpoena.

(3) Meeting with Parties. The custody investigator may meet with the parties jointly or separately at any time to discuss the investigation and the investigator's conclusions in order to facilitate a voluntary resolution of the issues.

(e) Investigation. Unless the court has limited the scope of the investigation, a custody investigation should usually include:

(1) individual interviews with each parent;

(2) individual interviews with new spouses, live-in partners, or significant others of each parent;

(3) individual interviews with or observations of each child in the family;

(4) observation of parent-child interactions;

(5) review of the court file and other documents provided by the parties;

(6) criminal and child protection record checks on the parents, new spouses, and other people living in the household;

(7) review of relevant records pertaining to the child and household members, subject to applicable privileges;

(8) review of personal references provided by friends or family members of the parents;

(9) in-person or telephone interviews with other individuals who have information about the family, as the investigator believes is necessary.

(f) **Release of Records.** Unless otherwise specified in the appointment order, the custody investigator may request a party to execute a release authorizing the investigator to inspect and copy confidential records pertaining to the child or to the party. Within ten days after receiving a request for a release, a party must either execute the release or file a motion for a protective order under Civil Rule 26(c). A motion for a protective order must be accompanied by a certification that the party has conferred or attempted to confer with the custody investigator in an effort to resolve the dispute without court action. If the party fails to respond, the custody investigator may notify the court and the court shall enter an order directing that the records be released.

(g) Contact with Parties and the Court.

(1) Contact with Parties. Unless otherwise ordered, a custody investigator may communicate with a party who is represented by an attorney without prior notice to the attorney.

(2) Contact with Court. Unless all parties consent, a custody investigator shall not engage in ex parte communications with the court concerning a pending case except for scheduling and other administrative purposes when circumstances require.

(h) Discovery. A party may depose a custody investigator appointed under this rule after completion of a report. Documents and records in the possession of the custody investigator are discoverable under Civil Rule 30(b)(5) and Civil Rule 34 as though the custody investigator were a party to the action subject to any limitations set by the court as to the use and dissemination of confidential records.

(i) Compensation. Fees and costs for a private custody investigator will be divided equally between the parties unless the court finds good cause to change this allocation.

Commentary.— Evidence Rule 706 authorizes the court to appoint independent experts in civil or criminal litigation. An expert appointed under Rule 706 must advise the parties of the expert's findings, may be deposed by either party, and may be called to testify by either party or the court.

When a private custody investigator is being appointed, the court may ask the parties to suggest individuals for appointment.

A full custody investigation should usually include all of the elements listed in paragraph (e). Some of these elements may be dispensed with if the court has limited the scope of the investigation, either by narrowing the issues that the custody investigator should address or by limiting the tasks that the investigator should perform. If the court has appointed a private custody investigator, for example, the court may agree to dispense with some of the elements of a full investigation in order to reduce the cost to the parties. In addition, for budget reasons, the presiding judge of the judicial district may enter an administrative order limiting the tasks that court custody investigators will routinely perform. Even when the court has requested a full

investigation, the custody investigator has discretion to dispense with interviews or record checks that are clearly unwarranted in a particular case.

Paragraph (e) also indicates that the custody investigator should review relevant records of the child and other household members.

Relevant records may include school records, medical records, alcohol or drug abuse treatment records, and records regarding incidents of domestic violence.

2. The Civil Rules are amended to include new Civil Rule 90.7, which provides:

Rule 90.7. Appointment of Guardian Ad Litem in Child Custody Proceedings.

(a) When Guardian Ad Litem May Be Appointed. In an action under AS 25.20, 25.24, or 18.66 involving custody, support, or visitation of a child, the court may appoint a guardian ad litem for the child only when the court finds separate representation of the child's best interests is necessary, such as when the guardian ad litem may be expected to present evidence

not otherwise likely to be available or presented, or the proceeding is unusually complex.

Commentary.— AS 25.24.310 authorizes the court to appoint a guardian ad litem in any action involving custody, support, or visitation of a child. AS 25.24.310(c) states in part:

Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon motion of either party or upon its own motion, appoint an attorney or other person or the office of public advocacy to provide guardian ad litem services to a child in any legal proceeding involving the child's welfare. The court shall require a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child.

Courts should not routinely appoint guardians ad litem in custody, support, and visitation proceedings. In most instances, the child's best interests are adequately protected and presented by the

parties. In most contested proceedings in which professional input is warranted, a child custody investigator (whether public or private) should be appointed instead of a guardian ad litem. The child custody investigator can provide the court and the parties with an independent analysis of the dispute and may serve as a catalyst to settlement without adding another party to the proceeding.

(b) Qualifications. (1) A guardian ad litem should possess knowledge, skill, experience, training, or education that allows the guardian ad litem to conduct a thorough and impartial investigation and effectively advocate for the best interests of the child. Specifically, the guardian ad litem should have an understanding of the following as appropriate to the case:

(A) child development from infancy through adolescence;

(B) impact of divorce and parental separation on a child;

(C) unique issues related to families involved in custody disputes;

(D) domestic violence and substance abuse and their impact on children;

(E) Alaska statutes, rules, and supreme court decisions relating to custody, support, and visitation;

(F) the ability to communicate effectively with children and adults; and

(G) other qualifications appropriate to the particular case.

Further, the guardian ad litem should possess the knowledge and skills to effectively negotiate settlements on behalf of the child and to effectively advocate the child's best interests in contested litigation.

(2) Upon request of a party, a guardian ad litem or prospective guardian ad litem shall provide to the parties a written summary of relevant education and experience.

(c) **Appointment Order.** An order appointing a guardian ad litem must include findings why the appointment is necessary and must set forth the role of the guardian ad litem, the duties to be performed by the guardian ad litem in the case, deadlines for completion of these duties to the extent appropriate, the duration of the appointment, and compensation as provided in paragraph (m). If the court denies a motion for appointment of a guardian ad litem, the court must make findings to explain the denial. An order appointing a guardian ad litem should authorize the guardian ad litem access, without further release, to all confidential and privileged records of the child, including but not limited to psychiatric records, psychological treatment records, drug and alcohol treatment records, medical records, evaluations, law enforcement records, and school records.

Commentary.— If the court determines that the appointment of a guardian ad litem is appropriate in a particular case, the court may ask the parties to suggest individuals for appointment.

There is no right to a peremptory change of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be addressed by trial courts through motion practice.

The appointment order should authorize the guardian ad litem to review confidential and privileged records pertaining to the child. To review records pertaining to a parent, the guardian ad litem must file a motion requesting access to those records unless the parent agrees to sign a release.

(d) Disclosure of Conflicts. The guardian ad litem shall disclose any relationships or associations between the guardian ad litem and any party which might reasonably cause the guardian ad litem's impartiality to be questioned. This disclosure must be made no later than 10 days after appointment.

(e) Role of Guardian Ad Litem. The guardian ad litem shall represent and advocate the best interests of the child. The court may appoint an attorney to advise or represent a non-

attorney guardian ad litem if the court finds that legal advice or legal representation of the guardian ad litem is necessary to represent the child's best interests. The guardian ad litem shall be treated as a party to the proceeding for all purposes, except as otherwise provided in this rule.

Commentary.— When custody is contested, the court has discretion to appoint a custody investigator, a guardian ad litem, and/or an attorney for the child. See AS 25.24.310(a), (c). The roles of a custody investigator, a guardian ad litem, and an attorney for the child are different and must be clearly distinguished:

- *custody investigator: A custody investigator is an expert witness appointed by the court. The custody investigator's duty is to conduct a thorough investigation and give an expert opinion on the custody arrangement that is in the best interests of the child. A custody investigator does not participate in court proceedings, other than to testify as an expert witness.*

- guardian ad litem: A guardian ad litem has the duty to conduct a thorough factual investigation. Based on this investigation, the guardian ad litem must decide what course of action is in the child's best interests. The guardian ad litem must then advocate this course of action, regardless of whether the child agrees with the guardian ad litem's position. The guardian ad litem participates as a party in court proceedings that affect the child, but only testifies in exceptional circumstances and then only as to factual matters. The guardian ad litem never testifies as an expert witness.

The guardian ad litem must be served with copies of all pleadings and papers relating to the child, see Civil Rule 4(i), and must be given notice of all court appearances and conferences involving issues that affect the child. The guardian ad litem's rights include the right to appear and participate at hearings, engage in motion practice, conduct discovery, introduce evidence, examine and cross-examine witnesses, make objections, and make opening statements and closing arguments.

The guardian ad litem's advocacy need not be confined to custody and visitation issues. If included within the scope of the appointment, the guardian ad litem should be prepared to participate in decisions about any special education or psychological needs of the child (such as counseling) and child support and other financial issues related to the child.

- attorney for child: A child's attorney represents the child, and it is the child who ultimately decides what position will be advocated in court. The attorney's duty is to conduct a thorough investigation, advise and consult the client, and zealously advocate the client's position in court. See *Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975) (concerning child's right to select attorney when child's interests are hostile to parents' interests).

The court may appoint an attorney to advise or represent a non-attorney guardian ad litem. If the court takes this action, the court should take care to specify the scope and duration of the appointment and the attorney's compensation.

(f) **Duty to Investigate.** The guardian ad litem shall investigate the pertinent facts of the case.

(1) The guardian ad litem shall review and consider any child custody investigation already conducted in the case and confer with the investigator. The guardian ad litem shall promptly conduct any further investigation necessary to carry out the order of appointment.

(2) If no child custody investigation has been done, the guardian ad litem shall either conduct an appropriate investigation or arrange for a custody investigation under Civil Rule 90.6. The investigation shall be conducted as soon as reasonably possible after the appointment.

Commentary.—In developing a position, the guardian ad litem should usually solicit and receive input from professionals and other persons with experience or evidence related to the family, such as mental health professionals, teachers, day care providers, medical providers, close relatives of the child, and other adults residing in the home of either parent.

The guardian ad litem may move for an order requiring the child or one or both parents to undergo evaluation or assessment related to psychological, substance abuse, or other issues raised in the investigation.

Paragraph (m) requires a guardian ad litem to seek court approval before hiring a private custody investigator to conduct an investigation. If the parties cannot afford a private custody investigator, the court may appoint the court custody investigator to conduct the investigation. See Civil Rule 90.6(a).

(g) Contact with Child, Other Parties, and the Court.

(1) Contact with Child. The guardian ad litem may meet with the child as often as necessary to ascertain and represent the child's best interests. An attorney for a party shall not have independent contact with the child without the consent of the guardian ad litem or a court order. A party or attorney shall not arrange for mental health evaluations or assessments of the child without the consent of the guardian ad litem or a court order.

(2) Contact with Other Parties. A guardian ad litem may communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication should not occur outside the attorney's presence.

(3) Contact with Court. Unless all parties consent, a guardian ad litem shall not engage in ex parte communications with the court concerning a pending case except for scheduling and other administrative purposes when circumstances require.

(h) Trial or Hearing Brief. The court shall set a deadline for the guardian ad litem to file a trial or hearing brief. The brief must describe the guardian ad litem's investigation, including who was interviewed and what records were reviewed, analyze the facts that the guardian ad litem believes will be presented, explain the position taken by the guardian ad litem utilizing the applicable statutory factors, and address other matters the guardian ad litem believes to be appropriate. If there is a conflict between the guardian ad litem's position and the child's preference, that conflict must be disclosed in the brief.

Commentary.— The guardian ad litem's brief cannot be treated as testimony or as evidence of any fact unless agreed to by the parties. Absent a stipulation, facts discussed in the guardian ad litem's brief must be proved at trial.

In many cases, the parties will not know the guardian ad litem's position or what facts the guardian ad litem has relied on until they receive the guardian ad litem's brief. Ideally, that brief should be due at least 30 days before the trial or hearing date so that the parties have sufficient time to prepare evidence in order to respond at trial. An early due date is also desirable because the guardian ad litem's brief often serves as a catalyst for settlement. At a minimum, the brief should be filed before the parties' briefs are due so that the parties can address the guardian ad litem's position in their briefs.

If there is a conflict between the guardian ad litem's position and the child's preference, the court may appoint a separate attorney to represent the child. The court should take this action only if the child's preference cannot be presented adequately by one of the parties. If the court appoints a separate attorney for the child, the court may either discharge the guardian ad litem or continue the

guardian ad litem appointment to represent what the guardian ad litem believes to be in the child's best interests.

(i) Testimony.

(1) The guardian ad litem shall not testify at the trial or hearing unless:

(A) the testimony relates to an uncontested issue;

(B) the testimony relates to the nature and value of services rendered by the guardian ad litem in the case; or

(C) the testimony is necessary to present factual evidence on a material issue that is not available from another source.

(2) If the guardian ad litem intends to testify, the guardian ad litem shall file and serve notice of this intent with the trial or hearing brief. The notice must identify the subject of the guardian ad litem's testimony.

(3) Upon receiving notice that the guardian ad litem intends to testify, the court should consider whether the guardian ad litem can still effectively represent the best interests of the child. If not, the court may discharge the guardian ad litem, appoint another guardian ad litem, or appoint an attorney for the guardian ad litem or the child.

(4) If the guardian ad litem testifies, the guardian ad litem may be cross-examined as any other witness.

Commentary.— Subparagraph (i)(1) reflects the principles of Alaska Rule of Professional Conduct 3.7(a), which under most circumstances prohibits an attorney from acting as an advocate in a proceeding in which the attorney is likely to be a witness.

In opening statements and closing arguments, a guardian ad litem is free to comment on the evidence and to suggest conclusions that the court should draw from the evidence. But the statements themselves are not and cannot be treated as testimony or evidence.

(i) Discovery.

(1) Discovery of Documents in Guardian Ad Litem's Possession. A party may obtain discovery of documents in the possession, custody, or control of the guardian ad litem, subject to the following limitations:

(A) the documents must be discoverable under Civil Rule 26(b)(1); and

(B) trial preparation materials as defined in Civil Rule 26(b)(3) are discoverable only as permitted by that rule.

(2) Discovery Regarding Guardian Ad Litem's Testimony. If the guardian ad litem has served notice that the guardian ad litem intends to testify, a party may obtain discovery from the guardian ad litem about the substance of this testimony.

(3) Other Inquiry. A party may obtain other discovery from a guardian ad litem only as permitted by the court upon a showing of good cause. The court may permit a party to question a guardian ad litem about the guardian ad litem's professional

qualifications and experience or the guardian ad litem's actions in the case. But this inquiry must be conducted in the presence of the court.

(k) Duty to Maintain Confidentiality. The guardian ad litem shall not disclose communications made by the child or reveal information relating to the child, except as necessary to carry out the representation, unless:

(1) the guardian ad litem determines that disclosure is in the best interests of the child;

(2) disclosure would be permitted under Alaska Rule of Professional Conduct 1.6(b) as if the guardian ad litem were the child's lawyer;

(3) disclosure is required under paragraph (h) (duty to tell the court that child's preference differs from guardian ad litem's position); or

(4) disclosure is permitted by court order or by law.

Commentary. — *A guardian ad litem should advise the child that statements made by the child will ordinarily be kept confidential but may be disclosed if the guardian ad litem determines that disclosure is in the child's best interests and in the other circumstances described in this rule.*

(1) Privileges.

(1) The guardian ad litem has a privilege to refuse to disclose and to prevent anyone other than the child from disclosing confidential communications made by the child. This privilege does not apply if disclosure of the communication is required by law or if the court finds there are compelling reasons to reveal the communication.

(2) The attorney-client privilege does not apply to confidential communications between the child and an attorney guardian ad litem.

Commentary. — *An attorney serving as a guardian ad litem does not act as legal counsel for the child but rather as a party to the proceeding. Therefore, the attorney-client privilege does not*

apply. But the policy behind the attorney-client privilege is equally compelling in the guardian ad litem-child relationship: to encourage the child to talk openly and candidly to the guardian ad litem so that the guardian ad litem can make the best possible determination about what is in the child's best interests. Therefore, this rule adopts a limited privilege for confidential communications between an attorney or non-attorney guardian ad litem and the child. It also allows the guardian ad litem to protect confidential communications made by the child to other persons.

(m) Compensation. The guardian ad litem, an attorney for a guardian ad litem, and expert witnesses used by the guardian ad litem will be compensated at a rate that the court determines is reasonable. Fees and costs for a private guardian ad litem will be divided equally between the parties unless the court finds good cause to change this allocation. The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. The appointment order, or order authorizing the guardian ad litem to hire expert witnesses, must specify the hourly rate to be paid to the guardian ad litem, attorney, or expert witness, the maximum fee that may be incurred without further authorization of the court, how the fee will be allocated between

the parties, and when payment is due. Unless otherwise ordered,
bills must be submitted on a monthly basis and must state the total
amount billed to date.

DATED: September 16, 1999

EFFECTIVE DATE: April 15, 2000

/s/
Chief Justice Matthews

/s/
Justice Eastaugh

/s/
Justice Fabe

/s/
Justice Bryner

/s/
Justice Carpeneti