

2021 EDITION

Juvenile Law and Practice in Virginia

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Continuing Legal Education
by the Virginia Law Foundation

VIRGINIA LAWYERS PRACTICE HANDBOOK

JUVENILE LAW AND PRACTICE
IN VIRGINIA

Sixth Edition

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 Virginia CLE[®]
Publications

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CHAPTER 12

GUARDIAN AD LITEM PRACTICE

12.1 INTRODUCTION

Guardian ad litem (GAL) work is crucial to the safety and protection of children throughout the commonwealth. Because it is often difficult to get practical training and tips for a sustainable and effective GAL practice, the purpose of this chapter is to provide a resource guide for GALs. Every jurisdiction has different policies, but the general skills, principles, and law contained in this chapter should be applicable in every GAL practice in Virginia.

Standards governing and ethics opinions involving GAL practice have been addressed in other chapters in this book. Likewise, the law related to foster care cases and Children in Need of Services (CHINServ) or Children in Need of Supervision (CHINSup) is also addressed in other chapters as well as in the course necessary for GAL certification. Therefore, this chapter will focus on (i) an overview of the court process in cases involving the majority of GAL appointments, namely custody and visitation, foster care, and CHINS; (ii) highlights of the law most often used in cases involving GALs; (iii) practical tips necessary for an effective GAL practice; (iv) why a trauma-informed practice is necessary; and (v) how to avoid burnout through self-care.

12.2 OPENING A GAL CASE

An opening file checklist is helpful so that, regardless of the type of case, the GAL has a standard procedure for opening every file.¹ The opening routine can include the following: conflict checks, letters of introduction² or phone calls of introduction to the parties, criminal record searches, social media searches, and a review of court pleadings. The GAL will then have a baseline understanding of the history of the case and the parties involved before meeting with the parents or the child.

¹ See Appendix 12-1 (Opening File Checklist).

² See Appendix 12-2 (Example of Introductory Letter to Parent).

12.3 CUSTODY AND VISITATION CASES

12.301 Initial Court Appearance. Every juvenile and domestic relations district court has its own policies, so it is important for GALs to develop a good relationship with the clerks and not be afraid to ask questions. While some courts will have an initial “status” or “GAL report” date before scheduling the hearing, other courts only appoint GALs to final hearings in the case. While a GAL is still getting a feel for the practice in a jurisdiction, it is important to clarify what is scheduled to happen on the date listed on the appointment order.

If the initial date on the appointment order is set for a GAL report, review, or status, that is the GAL’s opportunity to inform the court of the positions of the parties and request any temporary relief that may be necessary to protect the safety of the child or stabilize the child’s environment until the court can hear the case on the merits and make a final ruling. For example, at this initial appearance, the GAL can request drug testing of the parents or that foster care prevention services be ordered, and the court can put temporary custody and visitation orders in place. If the recommendation will be for a temporary order, the GAL should bring a draft order to court.³

In order to be in a position to recommend a temporary order at this initial stage, the GAL must speak to both parents in advance of the court appearance and have a face-to-face meeting with the child. While there may not be time to complete a full investigation, it is important to understand the issues that are in dispute, whether there are safety concerns that need to be addressed, and how the child is doing. Additionally, if the parties have worked out an agreement, the GAL can draft the order and present it to the court at that initial court appearance, and the case can be closed.⁴ Of course, the GAL must sign off on whatever the agreement is, which means that the GAL must agree that the order is in the child’s best interest.

12.302 Face-to-Face Meetings with the Child. During face-to-face meetings with children for custody and visitation, the GAL needs to explain his or her role. It is important for children to recognize that their preferences are being heard. It is also important for children to understand that it is the role of the GAL to provide a best interest recommendation to the court and that sometimes what the GAL thinks is best is not what the child may want.

³ See Appendix 12-3 (Temporary/Final Custody and Visitation Order).

⁴ See *Id.*

Children need to understand that their express wishes will be heard by both the judge and the child's parents *if* that is what the child wants. Some children want their wishes to be known, but some children who feel pressured by both parents do not want their parents to know what they genuinely want. Some children have strong feelings about what their wishes are. For example, some children love going back and forth between homes so that they can have equal time with both parents, while other children want to be "home" in one home and visit the other parent on weekends. Giving children the opportunity to express their wishes while at the same time not putting any pressure on them to make any decisions requires a careful balance. Children need to understand that ultimately the decision is not up to them. It is not a burden any child should carry, and every child should understand that. The GAL will make a best interest recommendation, and the judge will ultimately make the decision.

Depending on the ages of the children it is often helpful to bring coloring books or other fidget or sensory toys. Some children are nervous when talking to a stranger, and drawing or squeezing on a stress ball can help them manage their anxiety. Some children also talk more while walking or playing outside. It is important for the GAL to be flexible and try to gauge what would make the child the most comfortable during this face-to-face time.

GALs should wear comfortable, casual clothing in order to be able to sit on the floor and play with toys or walk in the backyard with children. The more comfortable children are, the easier it will be to get them to open up.

Finally, it is always important to recognize that the GAL is not a therapist. Many children have experienced trauma, and it is not the GAL's role to question children as a therapist would. In cases involving children who are working with a mental health professional, it may be best to have face-to-face time with the therapist present if meeting with the GAL will cause anxiety or undue stress. Of course, this should be discussed beforehand with the parents and therapist.

12.303 Investigation. The parents hold the most important information about the children GALs are appointed to represent. It is important during the initial meeting with each parent to spend a lot of time simply listening. There will be time later to circle back and ask the hard questions that will no doubt be raised by the other parent. If a parent does not feel heard, it will undermine the GAL's credibility and impair his or her ability to do the job. During the initial conversation, it is important to make sure each parent understands the GAL's role and how the investigation will be conducted. That initial conversation should answer questions as to whether the child has any medical, emotional, behavioral, or academic concerns that need to be further

investigated. If any of those concerns are raised, the GAL should decide at the beginning whether records are needed or whether appointments should be made to speak directly to the professionals involved. It is also important during the initial conversation to inform each parent that if they have evidence they want the GAL to see, such as emails, text messages, documents, and the like, they need to get that evidence to the GAL for review in advance of trial. Likewise, if there are people the parents want the GAL to speak to, it is important that they provide the names and email addresses or phone numbers for anyone they think may have information that is germane to the case.

12.304 What to Expect in the Courtroom. In the vast majority of the juvenile and domestic relations district court custody and visitation cases, the GAL will be the only attorney involved in the case. While it is not the GAL's responsibility to put on the case for either of the parents, it is the job of the GAL to make sure that the court hears the independent evidence that is necessary to protect the safety of the child so that the court can make findings that are in the child's best interest. Accordingly, the GAL should subpoena necessary witnesses for the trial. In the final custody and visitation hearing, the GAL will have the opportunity to cross examine both parents during their cases in chief and then to present evidence and provide an oral report to the court with recommendations.

12.305 Recommendations. Recommendations must be based on a best interest analysis under section 20-124.3 of the Virginia Code and should include whether the parties will have joint legal custody or one party will maintain sole custody and which visitation or parenting schedule is in the child's best interest. It is often helpful to specify what joint legal custody means and include in the recommendations ways to ensure the parents are communicating.⁵ The GAL should include in the recommendation a holiday and summer schedule as well. Holidays can be incredibly stressful for children, and having a clear holiday schedule can make them more enjoyable for everyone involved.⁶

The recommendation should also include additional proposed terms that are in the child's best interest, such as therapy for the child, co-parenting counseling for the parents, and when and where the child will be exchanged. Additionally, in cases involving substance abuse by a parent, it is often necessary to include provisions related to alcohol and drugs, including restricting

⁵ See Appendix 12-4 (Standard Joint Legal Custody Terms).

⁶ See Appendix 12-5 (Example of Standard Visitation and Holiday Schedule).

use and providing for testing in order to keep children safe in the care of a parent who struggles with substance abuse.⁷

12.306 Written Versus Oral Reports. Some jurisdictions prefer written reports, while others prefer oral reports. If the jurisdiction prefers a written report, the report needs to be filed five days in advance of any dispositional hearing.⁸ Because of the concerns over hearsay contained in the report, many jurisdictions have moved away from written reports and simply have the GAL provide an oral report and recommendations at either the beginning or the end of trial.

Even if the jurisdiction takes oral reports, it is best not to blindside parents. All parties should know the preliminary recommendations before the hearing that day. The GAL should make sure that all parties understand the recommendation is subject to any additional evidence that may be heard at trial, but everyone involved should have an idea of what the GAL's recommendation will be when they walk into court for trial. If the GAL is working on a case with the other attorneys involved, it is helpful to schedule a phone conference at least a week in advance of trial with those attorneys to share thoughts and provide preliminary recommendations. Alternatively, the GAL may choose to email preliminary written recommendations a week in advance to the attorneys involved. In many cases, the GAL's recommendation can help settle a case.

12.307 Applicable Law to Custody and Visitation Cases.

A. Custody Defined. Virginia Code section 20-124.1 sets forth the definitions of custody that every GAL must understand and be able to convey to parents.

“Sole custody” means that one person retains responsibility for the care and control of a child and has primary authority to make decisions concerning the child.

“Joint custody” means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child’s primary residence may be with

⁷ See Appendix 12-6 (Examples of Alcohol and Drug Provisions in Custody Orders).

⁸ Va. Code § 16.1-274(D); see *Standards to Govern the Performance of Guardians ad Litem for Children*, Item H, www.vsb.org/docs/sections/family/galstandards.pdf.

only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

B. Best Interest Analysis. Virginia Code section 20-124.3 sets forth the best interest factors that the court must consider in determining custody and visitation. These are the same factors that a GAL should take into consideration when making a best interest recommendation for a child.

In determining best interests of a child for purposes of determining custody or visitation arrangements, including any pendente lite orders pursuant to § 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;