Survey of Family Law Cases 2004-2013

2011 Family Law Survey

GUARDIANS, SPECIAL ADVOCATES, AND CHILD REPRESENTATIVES

In In the Matter of Minor Child D.I.S., and Sidman v. Sidman, 249 P.3d 775 (Colo. Mar. 21, 2011), the Supreme Court addressed whether, in seeking to **terminate a guardianship established by parental consent**, fit parents may invoke the constitutional presumption that they make custodial decisions in the best interests of their child.

D.I.S. was born in 1999. Soon after his birth, mother developed severe post-partum depression that prohibited her from providing care for the child. While father attempted to care for both mother and D.I.S., the situation became untenable. The child was eventually placed in the care of the his brother and sister-in-law, the child's paternal aunt and uncle ("the guardians"). Father executed a power of attorney to the guardians and signed a letter addressed to the guardians detailing the reasons for placing his child in their care, with the understanding that the guardians would "support [father's] efforts to visit with and be in D.I.S.'s life and ultimately be reunited with D.I.S. in [the parents'] home."

Seven months later, the guardians petitioned the El Paso County District Court for guardianship of D.I.S., asserting this would allow them to travel out of state with D.I.S., provide him with medical insurance, and make emergency medical decisions on his behalf. While reluctant to agree, the parents signed consents to the guardianship, inserting the word "temporary" in the language granting their consent. The parents also provided an addendum explaining their preference to extend the power of attorney rather than enter into a guardianship, and that their consent to the guardianship rested on assuming that the guardianship, based as it was on a joint agreement with their relatives, would support ultimate reunification of D.I.S. with the parents.

NOTE: DENVER CHILD VISITATION

In April 2004, the parents initiated reunification discussions with the guardians. Neither father nor mother had visited D.I.S. with regularity; mother's first visit occurred in June of 2004, over three years after the guardians assumed care of D.I.S. Father's visits were more consistent, occurring approximately two to three times per year. The guardians viewed the parents' inconsistent visitation with D.I.S. as a lack of commitment to their son. Throughout the entirety of the guardianship, the parents financed D.I.S.'s care.

In June 2006, the parents filed a motion to terminate the guardianship. Prior to the hearing, the district court magistrate entered two orders. In the first, dated August 16, 2006, the magistrate determined that the motion to terminate guardianship would be decided under the best interests of the child standard. The second, dated June 22, 2007, ruled that the parents were not entitled to a presumption that their decisions regarding the custody of D.I.S. were in his best interests, and that this presumption had been extinguished when the parents consented to the placement of the child with the guardians. The order further assigned the parents the burden of proof, by a preponderance of the evidence, to show that termination of the guardianship was in the best interests of D.I.S.

At the hearing on the parent's motion to terminate guardianship in August 2007, the court found that mother had resolved any health issues that prevented her from parenting D.I.S. The trial court ruled that,

by consenting to the guardianship, parents implicitly lost the constitutional presumption that they make care, custody and control decisions in the best interests of their child, and could not invoke this presumption in seeking to terminate the guardianship.

The Supreme Court reversed the Court of Appeals and held that, in a guardianship established through parental consent under C.R.S. §15-14-204(2)(a), parents delegate the day-to-day care, custody, and control of their child to the guardians as provided through the court's guardianship order. Parents may not interfere with the guardian's day-to-day decision-making, except in accordance with limitations contained in the order. Just as the fit parents' decision to consent to a guardianship is presumed to be in the best interests of the child, so too their decision to seek termination of the guardianship and regain care, custody, and control of the child is presumed to be in the best interests of the child, unless the guardianship order contains an express provision limiting the parents from asserting this presumption. In the absence of such a limitation in the guardianship order, when fit parents seek to terminate the guardianship, guardians bear the burden of demonstrating by a preponderance of the evidence that termination of the guardianship is not in the best interests of the child.

A recent dependency and neglect (D&N) case decided by the Supreme Court made a significant holding as to the nature of the role of Guardians ad litem in D&N proceedings. In People v. Gabriesheski, 262 P.3d 653 (Colo. 2011) the Supreme Court held that because a child in a D&N proceeding is not the client of a court-appointed guardian ad litem (GAL), the **attorney-client privilege and confidentiality** do not strictly apply. In reaching its decision, the Court noted that the role of the GAL is to represent the best interests of the child, not the child himself or herself.

Mark Gabriesheski was charged with two counts of sexual assault on a child by one in a position of trust. A Petition in D&N was filed in the juvenile court and a GAL was appointed as required by the juvenile court. Prior to trial, the child recanted her accusations, and the prosecution gave notice of its intention to call the GAL as a crucial witness who allegedly had knowledge of attempts by the mother to pressure her daughter to recant. The defense objected on the grounds that all communications between the child and GAL were confidential and inadmissible in the absence of appropriate consent or waiver pursuant to the statutory attorney-client privilege and duty of confidentiality imposed on attorneys by rule 1.6(a) of the Colorado Rules of Professional Conduct.

The trial court ruled that the GAL would not be permitted to testify at trial. It concluded that Colo. R.P.C. 1.6, in conjunction with Chief Justice Directive 04-06, imposed a duty of confidentiality on the GAL, which could only be waived by the child. The Court of Appeals upheld the trial court's ruling.

The statutes are silent as to the existence of an attorney-client relationship between a statutorily appointed GAL and the child in a D&N proceeding. While all GALs appointed to serve in D&N proceedings must be credentialed as attorneys licensed to practice, they are ultimately tasked with acting on behalf of the child's health, safety, and welfare. See C.R.S. §19-3-203. Rather than representing the interests of either the petitioner or respondent in the litigation, or even the demands or wishes of the child, the GAL is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child.

The Chief Justice Directives do not purport to designate an attorney-client relationship between a GAL and the child who is the subject of a D&N proceeding. Nothing in the term "guardian ad litem," which on its face indicates merely a guardian for purposes of specific proceedings or litigation, suggests an advocate to serve as counsel for the child as distinguished from a guardian, charged with representing the child's best interests.