

GUEST COLUMN

How GALs became BIAs

"Let's get a BIA."

This is often a solution in a particularly acrimonious custody case.

Allegations of child abuse, parental alienation, relocation and or scheduling kids' activities without regard to an access schedule can drive many of us to

seek a court order for a best interest attorney (BIA) to represent the minor

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child(ren).

We use this tactic to get the matter settled or reign in our clients and relieve some of the stress all around.

BIA appointments have become an invaluable tool in wading through the turbulent waters of parental tug of war. How did this come about?

For years, courts have had the authority to appoint attorneys to represent minors in custody disputes. They did so pursuant to the authority of a statute that merely provided for the same, without any guidance on protocol, duties of the appointed attorney, or process.

A variety of procedures gradually developed which varied greatly from court to court. Attorneys came to be known by the term "guardian *ad litem*" (GAL).

While there were differences, it was presumed that GALs were acting at the behest of the court and had a duty to advocate for the child's best interest.

Court of Special Appeals decisions provided some guidance, but no one

seemed to consider that the GALs duty might be the same as a lawyer representing a party who had engaged him or her for representation.

Also, most presumed that GALs had a limited form of immunity from suits by an aggrieved parent alleging negligence, because they were considered to be acting for the Court.

The State Administrative Office of the Courts then formed a committee to recommend guidelines for attorneys appointed to represent children, and provide for uniform process and procedures throughout the state.

In 2006, the proverbial bomb dropped. A case had been quietly winding its way through a trial court and the Court of Special Appeals, whereby a GAL was accused — by the mother of the minor child who was the subject of the litigation — of negligence and shirking of his duty to his client, the minor child.

Later that year, the Court of Appeals in *Fox v. Wills* (390 Md. 620) declared that GALs not only had no immunity but were not acting on behalf of the court in any manner, and had a duty to represent and advocate for the child as a client, essentially in the same manner as representing any other client.

The decision sent shockwaves through the family law community, and an *ad hoc* group was formed to advocate for a legislative remedy.

Space does not permit a detailed list of those involved, but the effort was led by Delegate Kathleen Dumais, the MSBA Family Law Section Council, representatives of the judiciary, various local bar association groups, the Montgomery County Roundtable and the Maryland Psychological Association.

Much of the early focus was to gain some sanction for some type of immunity. It was thought that qualified attorneys would decline appointments otherwise, as one parent was almost

always aggrieved once a GAL took a position.

The Maryland Trial Lawyers Association and other groups that purport to advocate for abused children then united to oppose any legislative remedy. Next, they launched a vigorous public relations campaign and lobbying effort.

Individual legislators were besieged with e-mails and letters, there was an endless stream of articles in a variety of publications, and the process extended even to talk radio.

A bill was crafted to provide immunity and to ensure authority for attorneys to represent the best interest of minors. Efforts to reach common ground between the interest groups proved fruitless.

The initial reception before legislative committees was frosty. Debate focused on the request for immunity. Accusations flew from the opposition that monetary considerations were the motivating factor.

Lost in the initial debate was the real reason for the legislation — to preserve this crucial tool for providing a degree of protection for children.

Ultimately, those proposing the legislation withdrew the immunity provision with the knowledge that the Guidelines for Representing Children in Custody Cases in Maryland was in the works, and adherence to those might provide a safe harbor from negligence actions.

With the immunity provision withdrawn, the legislation passed and was codified as Section 1-202 of the Family Law Article. Maryland Rule 9-205.1 followed soon thereafter, along with the guidelines.

Thanks to the efforts of a group of lawyers, judges and mental health professionals, we have maintained this crucial tool. The system and process also have improved, and the children of Maryland are better for it.

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