WASHBURN UNIVERSITY
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Children and Family Law Center

presents

Children and Parents in Need of Care:
Constitutional Rights and Reasonable Efforts

September 12, 2014
Topeka, Kansas
Children and Parents in Need of Care: Constitutional Rights and Reasonable Efforts

Friday, September 12, 2014

12:15-1:00 Registration

1:00 Welcome - Linda Elrod, Director, Children and Family Law Center.

1:10-2:25 Constitutional Rights of Parents and Parens Patriae in CINC Cases:
In the Name of Best Interests
Hon. Jean Schmidt, Shawnee County District Court, Topeka, KS
Bud Dale, Law Offices of Bud Dale, Topeka, KS

This presentation will outline the constitutional rights of parents, then delineate how these are affected by various court findings and rulings in the child in need of care process. The rights of parents change at different points in the process and range from due process protections for fundamentally fair procedures to requirements for “reasonable efforts” at reintegration prior to any effort at termination of parental rights. Effective advocacy for parents involves dynamic appraisal of when parents can assert their rights, holding the State accountable for reasonable efforts at reintegration, and helping parents utilize services to remediate the reasons for State intervention.

2:35 - 3:50 Reasonable Efforts: We Know It When We See It?
Emily Hartz, Sloan Law Firm, Lawrence, KS

"Reasonable efforts" are the requirement for reintegration and the standard by which parents are held in determining whether to terminate rights. What are reasonable efforts? To what standard should the State be held in its efforts to reintegrate children with their parents? How does the fundamental interest to parent one's own child come into play? This presentation reviews what has been interpreted as reasonable efforts both under ASFA and the Kansas Code for the Care of Children. This information is geared towards assisting parent's counsel in client advocacy both in the courtroom and with the agency and service providers working with the family.

4:00 - 4:50 Ethical Considerations for Lawyers Representing Parents in CINC Cases
Bethany Robelis, Kansas Legal Services, Topeka, KS

This presentation will review the minefield of ethical problems that erupt when representing a parent in a Child in Need of Care case. The presenter will utilize the mistakes of those who have gone before us and relate these dilemmas to the Kansas Model Rules of Professional Conduct for Client-Lawyer Relationships (e.g., specifically Diligence; 1.6 Confidentiality; 1.7 to 1.9 Conflicts; and, of course, 1.8 subsection k).
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Sincerely,

Shawn Leisinger, Executive Director
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4. Click "Accept" at the bottom of this page.

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E-mail address:

Phone:

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Constitutional Rights of Parents and *Parens Patriae* in CINC Cases: In the Name of Best Interests

presented by

The Honorable Jean Schmidt and Bud Dale
Constitutional Rights & *Parens Patriae* in CINC Cases: In the Name of Best Interests

Honorable Jean M Schmidt  
District Judge, Shawnee County, Kansas  
&  
Milfred Dale Ph.D., J.D.  
Topeka, KS  

September 12, 2014

This presentation will outline the constitutional rights of parents, then delineate how these are affected by various court findings and rulings in the child in need of care process. The rights of parents change at different points in the process. These rights range from due process protections for fundamentally fair procedures to requirements for "reasonable efforts" at reintegration prior to any effort to terminate parental rights. Effective advocacy for parents involves dynamically appraising when parents can assert their rights, holding the State accountable for reasonable efforts at reintegration, and helping parents utilize services to remediate the reasons for State intervention.

The relationship between parents, children, and the state is arguably the most fundamental relationship in a society. The social attitudes and legal norms embedded in this triangle determine the way we raise children and provide the basis of social continuity within a nation.

Constitutional Rights & *Parens Patriae* in CINC Cases: In the Name of Best Interests

Parental Preference Doctrine: Presume Parents Acting in Best Interests of Children


- In re Guardianship of Williams, 869 P.2d 661 (Kan. 1994).

Best Interests of the Child is a legal concept that describes the Parent-Child-State Relationship.

Different from child's welfare or well-being, which exclusively focused on the child.

K.S.A. 38-2201... Policy of State. (b) The code shall be liberally construed to carry out the policies of the state which are to:

1. Consider the safety and welfare of a child to be paramount in all proceedings under the code;
2. Provide that each child who comes within the code... shall receive the care, custody, guidance, control and discipline that will be serve the child's welfare and the interests of the state, preferably in the child's home and recognizing that the child's relationship with such child's family is important to the child's well-being;
Constitutional Rights & Parens Patriae in CINC Cases:
In the Name of Best Interests

3. Make the ongoing, physical, mental, and emotional
   needs of the child decisive considerations in
   proceedings under this code;
4. Acknowledge that the time perception of a child differs
   from that of an adult and to dispose of all proceedings
   under this code without unnecessary delay;
5. Encourage the reporting of suspected child abuse and
   neglect;
6. Investigate reports of suspected child abuse and
   neglect thoroughly and promptly;

7. Provide for the protection of children who have been
   subject to physical, mental, or emotional abuse or
   neglect or sexual abuse;
8. Provide preventative and rehabilitative services,
   when appropriate, to abuse and neglected children
   and their families so, if possible, the families can
   remain together without further threat to the
   children;
9. Provide stability in the life of a child who must be
   removed from the home of a parent; and,
10. Place children in permanent family settings, in
    absence of compelling reasons to the contrary.
(Why doesn't #10 say "parent's home??"

Constitutional Rights & Parens Patriae in CINC Cases:
In the Name of Best Interests

“State Action” Doctrine

Constitutions, both federal and state, protect individuals
from state action, not the actions of private individuals.
Legally, the State Action Doctrine applies the Fourteenth
Amendment, including due process and equal protection
clauses, to state and local governments.

Authority for State Action: Parens Patriae Doctrine.
Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

The parens patriae doctrine evolved during the seventeenth and eighteenth centuries to justify state intervention as a kind of “parent of the nation.” In the nineteenth century, child savers expanded the parens patriae doctrine in two ways.

First, it was expanded to protect dependent children and delinquents.

Second, it became the underpinning for child protection programs.

Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

State actors must provide private individuals with:

Due Process:

Notice and an opportunity to be heard in a meaningful way at a meaningful time

Due Process clause prohibits state and local government officials from depriving persons of life, liberty or property without legislative authorization ("heightened protection against government interference with certain fundamental rights and liberty interests").

Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

The Due Process Test is a three-part balancing test.

Every statute discriminates against someone. $1 & Rich

1. The importance of the interest at stake;
2. The risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and
3. The government’s interest.

(Parent-State Relationship / Child-State Relationship)
Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

• Why aren’t we simply talking about doing what is in the “best interests of children”?

• Because when talking about “best interests” the legal concept includes the constitutional rights of parents.

• “Children and Parents in Need of Care”

Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

Historical Development of Parental Rights

• The Constitution does not mention parental rights.

• The “Domestic Relations Exception” to Federal Court jurisdiction (fears of founders & state’s better suited).

• The Parental Decision-Making Cases (1922-2000)

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• The Parental Decision-Making Cases (versus State Laws)

- Meyer v. Nebraska, 262 US 350 (1923) (overturning statute forbidding teacher from teaching anything other than English. Also affirmed parent’s autonomy to decide children could learn German).

- Parental rights included the freedom “to marry, establish a home and bring up children.”
Constitutional Rights & *Parens Patriae* in CINC Cases: In the Name of Best Interests

- *Pierce v. Society of Sisters*, 268 US 510 (1925) (parents could choose private school for their children, prevailing over statute that would have required all children to attend public school to "standardize").

- Parental rights included "the liberty of parents and guardians to direct the upbringing and education of children under their control."

- "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

- *Prince v. Massachusetts*, 321 US 158 (1944) (upheld on (5-4 vote) conviction of a mother of a 9-year-old girl who brought child to preach on the streets and distribute literature, noting "the family itself is not beyond regulation in the public interest" and right to religion does not allow parent to expose children to the community, etc.)

- It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter" but . . .


- "The foregoing cases suggest specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance (1st, 3rd, 4th, 5th, 9th, 14th).

- The present case, then, concerns a relationship lying within the zone of privacy created by fundamental constitutional guarantees . . . We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system.
**Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests**

- **Santosky v. Kramer**, 455 US 745, 753-754 (1982) (requiring that the State must demonstrate parental unfitness by clear and convincing evidence in order to terminate parental rights).

- The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."

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**Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests**

- **Smith v. Organization of Foster Families**, 431 US 816 (1977) (pitting four foster families against biological families regarding custody of children in foster care placements. Foster parents argued that their psychological relationship with the child and status as their "psychological family" should afford them some level of constitutional protection. Court did not rule on foster families' rights, but held the procedures of the State of New York for removing the children from foster care were unconstitutional).  

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**Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests**


- Brennan "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."
### Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

- **Stewart** (joined by Chief Justice Berger & Reinquest):
  - One of the liberties protected by the Due Process Clause, the Court has held, is the freedom to "establish a home and bring up children." *Meyer v. Nebraska*. If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter." *Prince v. Massachusetts*.

### Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

- **Troxel v. Granville**, 530 US 57 (2000) (holding that "the interest of parents in the care, custody and control of their children – is perhaps the oldest of fundamental liberty interests recognized by this Court" and striking down a statute allowing anyone to petition for visitation based on best interests of the child was too broad and infringing on that fundamental parental right).

- Troxel requires courts to give "special weight" to a fit parent’s decision to deny non-parent visitation that could only be overcome by compelling gov't interest & clear facts supporting it (Grandparent’s rights).

### Constitutional Rights & Parens Patriae in CINC Cases: In the Name of Best Interests

- **Stanley v. Illinois**, 405 US 645 (1972) (finding a statutory presumption that an unwed father was unfit for custody of his children was unconstitutional under equal protection argument).

- "Procedure by presumption is always cheaper and easier than individualized determination."
Constitutional Rights & *Parens Patriae* in CINC Cases: In the Name of Best Interests

Rights of Unwed Fathers (continued)


Parental Rights of Nonresidential (or Absent) Fathers

- Rights of determined fathers

  In Matter of T.S., 74 P.3d 1009 (Kan. 2003) (finding court can place child with noncustodial parent who wishes to assume custody before considering the possibility of reintegration into the home from which the child was removed).

- Rights of presumed fathers

- Rights of putative fathers
Constitutional Rights & *Parens Patriae* in CINC Cases: In the Name of Best Interests

**Effects of the Presumption of Unfitness**

  - The burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption would operate.
  - Scenarios where person has rehabilitated themselves to the point that presumption no longer applies.

**Recommendations**

- DCF/KVC social workers need more training on legal issues, including the development of policies and procedures consistent with statutory frameworks and prevailing case law (example: flow chart regarding applicability and effect of presumptions of unfitness and additional newborn children).
- Need for improve connecting the Case Plan to Goals in the case that are directly relevant to the reasons the children and parents have come into contact with the State.

- K.S.A. 38 2202 should be rewritten with additional emphasis on behavioral specificity of the reasons the State would define a child as a child in need of care (materials from Minnesota might be prove helpful on this task).
- This behavioral specificity can also create more helpful goals for parents and workers, as well as the tracking of behavior changes and progress towards goals.
Reasonable Efforts: We Know It When We See It?

presented by
Emily Hartz
Reasonable Efforts in Kansas

Emily A. Hartz

Roadmap

- Discuss three statutory situations requiring reasonable efforts
- Explain case law guidance in finding reasonable efforts
- Provide Kansas case examples
- Provide case examples from other states
- Critique court application of the reasonable efforts standard

Three Situations Requiring Reasonable Efforts

- Initial Removal
- Permanency Planning
- Termination of Parental Rights
Situation #1: Initial Removal

- Children are normally removed from the home due to an emergency.
- Temporary custody hearing held within 72 hours for child to remain in custody – K.S.A. 58-22-42.
- To order temporary custody under K.S.A. 58-22-43(f), the court must find probable cause for one of the following:
  1. Child is dangerous to self or others.
  2. Child is not likely to be available within the jurisdiction of the court for future proceedings; or
  3. Health or welfare of the child may be endangered without further action.

Situation #1: Initial Removal

To remove a child from a parent at a temporary custody hearing, the court must find probable cause for one of the following (K.S.A. 58-22-43)(f)(1)(a):

1. The child is likely to sustain harm if not immediately removed from the home;
2. Allowing the child to remain in home is contrary to the welfare of the child; or
3. Immediate placement of the child is in the best interest of the child;

AND

Probable cause that reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child’s home.

OR


Situation #1: Initial Removal

- Burden of Proof: Probable Cause
- May be appealed
Situation #2: Permanency Planning

- Trial must be held to decide whether child is a CINC within 60 days after petition filing - K.S.A. 38-2251(c)
- Burden of Proof that Child is a CINC: Clear and Convincing Evidence - K.S.A. 38-2250

Situation #2: Permanency Planning

- If child is declared a CINC, an initial permanency plan must be submitted to the court within 30 days of adjudication - K.S.A. 38-2262(b)
- Among other things, permanency plan must
  - Include a plan for reintegration if viable - K.S.A. 38-2262(b)(2)
  - Assess child and family needs - K.S.A. 38-2262(b)(3)
  - Describe services for the child, child's parents, and child's foster parents if appropriate - K.S.A. 38-2263(c)(4)

Situation #2: Permanency Planning

- Permanency hearing required within 12 months of removal and at least every 12 months, K.S.A. 38-2264(d), or within 30 days of court finding reintegration may not be a viable option - K.S.A. 38-2264(e)
- Designed to determine progress toward accomplishment of a permanency plan - K.S.A. 38-2264(f)
- Court finds "whether reasonable efforts have been made by appropriate public or private agencies to rehabilitate the family and achieve the permanency goal in place at the time of the hearing" - K.S.A. 38-2264(f)
Situation #2: Permanency Planning

- Statutes do not appear to include a burden of proof for determining whether reasonable efforts have been made at permanency hearings.
- Trial court may review and modify permanency plan at permanency hearings – K.S.A. 58-2264(e).
- Permanency hearing order may not be appealed because it is not considered permanent – In re B.W., No. 101,410, 2009 Kan. App. Unpub. LEXIS 1006 (Dec. 18, 2009).

Situation #3: Termination of Parental Rights

At a permanency hearing, if the court finds that "reintegration is not a viable alternative" and that "adoption or appointment of a permanent custodian might be in the best interests of the child," the county or district attorney shall move to terminate parental rights or appoint a permanent custodian within 30 days, and the court must hear the motion within 40 days – K.S.A. 58-2264(g)(3).

Situation #3: Termination of Parental Rights

The court may terminate parental rights or appoint a permanent custodian for a CINC when (K.S.A. 58-2264(2))

The court finds by clear and convincing evidence:

That the parent is unfit

By reason of conduct or condition

Which renders the parent unable to care properly for a child

AND

The conduct or condition is unlikely to change in the foreseeable future.
Situation #3: Termination of Parental Rights – Unfitness

- K.S.A. 58-2264(b) lists 4 non-exclusive unfitness factors:
  Among the factors: Failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family – K.S.A. 58-2264(b)(7)
- Specific situations that may indicate unfitness:
  abandonment, surrenderring, identity of parent unknown, sexual intercourse felony – K.S.A. 58-2264(a)(4)

Situation #3: Termination of Parental Rights – Unfitness

The court shall consider four additional factors when the child is placed outside the home (58-2264(d)):
(1) Failure to assure care of child in the parental home when able to do so.
(2) Failure to maintain regular visitation.
(3) Failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home; and
(4) Failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay.
(court may disregard incidental visitations, contacts, communications or contributions)

Situation #3: Termination of Parental Rights – Unfitness

- If unfit, the court may terminate parental rights if in the best interests of the child – K.S.A. 58-2264(g)(3); if not, the court may instead appoint a permanent custodian – K.S.A. 58-2264(g)(2).
Situation #3: Termination of Parental Rights – Unfitness

- Unfitness Burden of Proof: Clear and Convincing Evidence
- Appellate court may overrule only if trial court was irrational – In re JR, No. 104,972, 2013 Kan. App. Unpub. LEXIS 274 (May 27, 2013)

Reasonable Efforts Defined

Reasonable Efforts

- States agencies are required to make reasonable efforts "to preserve and unify families" in order to receive federal funding. 42 U.S.C. § 671(a)(15)(D)
- Kansas adopted to receive federal funds
- Neither federal nor Kansas statutes define reasonable efforts
- Initial Removal – little case law defining at this stage, possibly because emergency exception normally applies
- Permanency hearing – little case law defining because permanency orders not appealable
Reasonable Efforts
Termination of Parental Rights Hearing

- Agencies have an obligation "to assist the parent in accomplishing case objectives designed to correct the parent's conduct or condition that caused the removal of the child from the home." In re J.R., No. 304,975, 2013 Kan. App. Unpub. LEXIS 379, *15 (May 27, 2013).

- But "[a]n agency is not required to exhaust any and all resources to rehabilitate the parent. Furthermore, the agencies must pursue their rehabilitation efforts with the best interests of the child in mind, recognizing that a child's perception of time differs from that of an adult." Id. at *14.

Reasonable Efforts
Termination of Parental Rights Hearing

- Kansas case law makes clear that a reintegration plan is not necessary to show reasonable efforts, and parental rights may be terminated even if there was never a reintegration plan. See in re J.G., 12 Kan. App. 2d 44, 53, 734 P.2d 1195 (1987).

Kansas Case Examples of Reasonable Efforts
Kansas Case Examples - Initial Removal
- Background
- Trial Court Finding at CINC Hearing
- Parent Claimed
- Appeals Court Found

Kansas Case Examples - Termination
- Timeline
- Parent Actions
- Agency Efforts
- Parent Claimed
- Appeals Court Found

Kansas Case Examples - Termination
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Kansas Case Examples - Termination
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- Parent Claimed
- Appeals Court Found
Case Examples From Other States

**California Case Example - Termination**

*In re T.M., 46 Cal. Rptr. 3d 774 (Cal. Ct. App. 2009)*

- Timeline
- California Law
- Parent Claimed
- Appellate Court Found

**Texas Case Example - Termination**

*In the Interest of J.R.S., No. 2-08-034-CV, 2009 Tex. App. LEXIS 762 (Feb. 5, 2009)*

- Timeline
- Texas Law
- Parent Actions
- Agency Efforts
- Parent Claimed
- Appellate Court Found
Arkansas Case Example

- Timeline
- Arkansas Law
- Parent Actions
- Agency Efforts
- Parent Claims
- Appeals Court Found

Critique of Reasonable Efforts Interpretation
- Substantive Due Process Violations
- Best Interest of the Child

Substantive Due Process
  1. Comparison of “private and governmental interests at stake” id. at 340
  2. “Fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards.” id. at 343
  3. “Public interest,” including “administrative burden and other societal costs associated with” the potential safeguard id. at 347.

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9/2/2014
Substantive Due Process

- Courts may not correctly applying the clear and convincing evidence standard from Santosky

  Matthews Test Analysis
  1. Private Interest: right to parent is a fundamental right
  2. Current procedure fairness and value of additional safeguards fairness is low due to ease of removal, and additional safeguards would be beneficial in protecting parental rights
  3. Public Interest: interest of protecting children may be achieved through self placement and interest of facilitating adoptions may not be realized

Best Interest of Child

- Reasonable efforts are important because they benefit child
- Children have strong bond with parents and could be harmed without reasonable efforts or if reasonable efforts are discontinued too soon

Contact Information

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Ethical Considerations for Lawyers Representing Parents in CINC Cases

presented by
Bethany Roberts
Ethical Considerations for GALs and Parent Attorneys in CINC Cases

Bethany Roberts
Managing Attorney
Kansas Legal Services, Topeka

Competing Proposals

- AAML
- ABA
- NACC
  - National Association of Counsel for Children
- ALI

1.1 Client-Lawyer Relationship:
Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
1.2 Scope of Representation

- (a) abide by client’s decisions
- (c) limit the scope of the representation if the limitation is reasonable under the circumstances and client gives informed consent
- (d) lawyer shall not counsel a client to engage in criminal or fraudulent behavior but can discuss legal consequences of behavior

Diligence

1.3 Client-Lawyer Relationship: Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.
  - Comment 1 - Lawyer shall pursue a matter on behalf of a client despite opposition.
- Lawyer shall act with commitment and dedication to the interest of the client.
- Workload should be controlled so that each matter can be handled adequately.

Diligence cont.

- Comment 2
  - Procrastination
  - Client's interest can be adversely affected by the passage of time.
  - Unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.
- Administrative Order 100
  - Independent investigation
  - Continuing investigation and ongoing contact with the child are mandatory.
1.4 Communication

- (a) Lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with requests for information.
- (b) Lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- Supreme Court Rule 110A
  - Explain the court proceedings and the role of the guardian ad litem in terms the child can understand.

1.6 Confidentiality

- Lawyer shall not reveal information relating to representation.
- Kansas Ethics Opinion 97-5: if there is not lawyer client relationship, then no confidentiality exists.

Conflicts

- 1.7 Current Clients- a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
- 1.9 Duties to Former Clients- A lawyer who has represented a client shall not then represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client.
3.3 Candor Toward the Tribunal

- A lawyer shall not knowingly make a false statement to the tribunal or fail to correct a false statement of material fact or law previously made to tribunal.

3.5 Impartiality and Decorum of the Tribunal

- A lawyer shall not (c) communicate or cause another to communicate as to the merits of a cause with a judge or official before whom an adversary proceeding is pending except in specific situations:
  1. in the course of official proceedings in the cause;
  2. in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if unrepresented;
  3. orally upon adequate notice to opposing counsel or the adverse party if unrepresented;
  4. as otherwise authorized by law or court rule.

3.7 Lawyer as Witness

- (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.
- Supreme Court Rule 110A
  - GAL may not act as a witness or testify.
4.1 Transactions with Persons other than Clients: Truthfulness in Statements to Others

- In the course of representing a client, a lawyer shall not knowingly:
  - (a) make a false statement of material fact or law to a third person; or
  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.

4.2 Transactions with Persons other than Clients: Communication with Person Represented by Counsel

- 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.

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STANDARDS FOR GUARDIANS *AD LITEM*

(a) **Generally.** Unless the appointing judge authorizes departure from these standards for good cause, these standards apply when the judge appoints a guardian *ad litem* for a child in a case under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 *et seq.*; the Revised Kansas Juvenile Justice Code, K.S.A. 38-2301 *et seq.*; and the Kansas Family Law Code, K.S.A. Chapter 23. The judge must:

(1) issue an order appointing the guardian *ad litem* on a form substantially in compliance with the judicial council form; and

(2) ensure compliance with this rule.

(b) **Prerequisite and Continuing Education.**

(1) **Requirements.**

(A) **Number of Hours; Timeframe.** As a prerequisite to appointment, a guardian *ad litem* must complete at least 6 hours of education, including 1 hour of professional responsibility. An appointed guardian *ad litem* also must participate in continuing education consisting of at least 6 hours per year.

(B) **Areas of Education.** Areas of education should include, but are not limited to:

- dynamics of abuse and neglect;
- roles and responsibilities;
- cultural awareness;
- communication skills, including communication with children;
- information gathering and investigatory techniques;
- advocacy skills;
- child development;
- mental health issues;
- permanency and the law;
- community resources;
- professional responsibility;
- special education law;
- substance abuse issues;
- school law; and
- the revised code for care of children.

(2) **Waiver of Prerequisite.** The appointing judge may waive the prerequisite education when necessary to make an emergency temporary appointment. The educational requirements must be completed within 6 months after appointment.

(3) **Continuing Education Requirements; Judicial Approval.** If approved by the Continuing Legal Education Commission, the education hours required by paragraph (1) also can be counted
to satisfy Supreme Court Rule 803’s continuing legal education requirements. These standards do not modify the minimum total hours annually required under that rule. The appointing judge may approve prerequisite education and continuing education hours not otherwise approved by the Continuing Legal Education Commission.

(4) **Recordkeeping.** Each guardian *ad litem* must maintain a record of the guardian’s participation in prerequisite and continuing education programs. Upon request of the appointing judge, the guardian must provide evidence of compliance with this subsection.

(c) **Guardian Ad Litem Duties and Responsibilities.** A guardian *ad litem* must comply with the following standards:

(1) **Conducting an Independent Investigation.** A guardian *ad litem* must conduct an independent investigation and review all relevant documents and records, including those of social service agencies, police, courts, physicians, mental health practitioners, and schools. Interviews — either in person or by telephone — of the child, parents, social workers, relatives, school personnel, court-appointed special advocates (CASAs), caregivers, and others having knowledge of the facts are recommended. Continuing investigation and ongoing contact with the child are mandatory.

(2) **Determining the Best Interests of the Child.** A guardian *ad litem* must determine the best interests of the child by considering such factors as:

- the child's age and sense of time;
- the child's level of maturity;
- the child's culture and ethnicity;
- degree of the child’s attachment to family members, including siblings;
- continuity;
- consistency;
- permanency;
- the child's sense of belonging and identity; and
- results of the investigation.

(3) **Representing in Court.** A guardian *ad litem* must:

(A) file appropriate pleadings and other papers on the child’s behalf;

(B) represent the best interests of the child at all hearings;

(C) present all relevant facts, including the child’s position;

(D) submit the results of the guardian’s independent investigation and the guardian’s recommendations regarding the child’s best interests; and
(E) vigorously advocate for the child’s best interests by:

(i) calling, examining, and cross-examining witnesses;

(ii) submitting and responding to other evidence; and

(iii) making oral and written arguments based on the evidence that has been or is expected to be presented.

(4) **Explaining to the Child.** A guardian *ad litem* must explain the court proceedings and the guardian’s role in terms the child can understand.

(5) **Making Recommendations for Services.** A guardian *ad litem* must recommend appropriate services for the child and the child’s family.

(6) **Monitoring.** A guardian *ad litem* must monitor implementation of service plans and court orders.

(d) **When Recommendation Conflicts With Child’s Wishes.** If the child disagrees with the guardian *ad litem’s* recommendation, the guardian must inform the court of the disagreement. The court may, for good cause, appoint an attorney to represent the child’s expressed wishes. If the court appoints an attorney for the child, that individual serves in addition to the guardian *ad litem*. The attorney must allow the child and the guardian to communicate with one another but may require the communications to occur in the attorney’s presence.

(e) **Participation Limited by Rules of Professional Conduct.** An attorney in a proceeding in which the attorney serves as guardian *ad litem* may submit reports and recommendations to the court and testify only as permitted by Kansas Rule of Professional Conduct 3.7(a).