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Elizabeth Holt, Editor
eholt@kingballow.com

GUARDIAN AD LITEM

Lack of authority by guardian *ad litem* prevents contempt

by [Andrew Coffman](mailto:acoffman@kingballow.com)
acoffman@kingballow.com

Does a guardian *ad litem* have the ability to file contempt charges against a parent? According to Tennessee Statutory law, maybe, but only if the guardian *ad litem* has the authority to act and is serving the child at the time the contempt petition is filed.

Appointment of guardian *ad litem*

The father and mother were divorced in Maryland in 2006, and the mother was designated the primary residential parent of the parties' child. A guardian *ad litem* was originally appointed by the Tennessee trial court in 2008 "to serve in the best interests of the minor child in a petition to modify the parenting time." Six months later, the father filed a petition to modify his child support and the parenting plan alleging that he had bought a house near the residence of the mother and child and was therefore able to spend more time with child. Approximately one year from the original appointment, the guardian *ad litem* filed a motion requesting the court to hold the father in contempt for failing on three occasions to return the child after his visitation, as required by the parenting plan. The father, relying on Supreme

Court Rule 40A, Section 9(a)(4), asserted the guardian *ad litem* lacked authority to file the motion for contempt. As a result, the trial court entered an order releasing the guardian *ad litem* and appointing her as the child's "attorney *ad litem*."

During this time, Tennessee amended its law on guardians *ad litem* to allow a guardian *ad litem* to "take any action that may be taken by an attorney representing a party pursuant to the Rules of Civil Procedure." After the amendment took effect, the attorney *ad litem* and the court referred to her as the "guardian *ad litem*." Although the custody issue was resolved when the court issued a final order disposing of the custody matter, the father in 2012 filed a petition to modify his child support obligation. Five years after being appointed, the guardian *ad litem* filed a "motion for emergency hearing and motion for contempt" due to emotional abuse and medical neglect. In May of that year, the court entered an order holding the father in contempt on four counts, sentencing him to 40 days in jail, suspending all of his parenting time and reducing his contact with his daughter to one telephone call per week. Upset, the father appealed.

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Note from the Editor

Are you familiar with the laws that affect families? As editor of *Family Law Comment* newsletter, my goal is to provide you with updates on cases in areas such as parental rights, child custody, alimony, divorce and other family law issues. Stay up to date with the issues that affect you and [subscribe here](#) to receive the *Family Law Comment* newsletter on a monthly basis. Please feel free to [let us know](#) what topics you would like to see discussed.

Court rules father failed to prove he lived in fear

by [Chris Barrett](#)

cbarrett@kingballow.com

What happens when a party fails to establish details that allege fear for one's safety when seeking to extend an order of protection? According to the Tennessee Court of Appeals, the extension shall be denied.

Mother's erratic behavior

Five years after the parties' divorce, the father petitioned the court for an order of protection. In his petition, the father alleged the mother had become verbally and physically abusive to the older daughter and himself and had driven her vehicle with the children while intoxicated. As a result of the mother's repeated abusive acts toward the oldest daughter and the mother's behavior in general, the father claimed he feared for the safety of his family. Consequently, the court granted the father an ex parte order of protection and set a date for a full hearing. Prior to the hearing, the parties reached an agreement and the court entered a one-year order of protection without conducting a hearing. The parties agreed the mother would have three 15 minute phone calls with the children per week and would be permitted to attend the children's extracurricular functions and sporting events. She would be prohibited, however, from approaching either the children or the father at the events.

One month prior to the order of protection becoming expired, the father filed a petition to modify the permanent parenting plan. He then filed a motion to consolidate the order of protection hearing with the parenting plan modification hearing. As a result, a hearing was subsequently held and the trial court granted the father a one-year extension of the order of protection. The terms of the order of protection were substantially similar to the previous order. The mother appealed.

Order of protection

An ex parte order of protection may be issued upon the showing of immediate and present danger of abuse to the petitioner. Within 15 days of the ex parte order of protection being entered, a hearing shall be held to determine whether to dissolve the ex parte order or, if domestic abuse, stalking or sexual assault

has been established by the preponderance of the evidence, extend the order of protection for one-year. Once an order of protection has been entered, a party seeking to extend the order of protection has a less onerous burden than seeking the entry of an ex parte order of protection. The party only needs to prove the "allegation of domestic abuse, stalking or sexual assault by the preponderance of the evidence as opposed an immediate and present danger of abuse."

No allegations established

The only issue on appeal was whether the trial court erred in granting the extension of the order of protection. The court of appeals first noted orders of protection are appropriate in a number of circumstances, including where one party puts an adult or minor in fear of physical harm. In looking to the evidence, the court of appeals concluded the trial court's order provided no particular findings of fact for an extension to be approved. The procedure of how the original order of protection was implemented was relevant to the court's determination.

The evidence established the original ex parte order was entered due to physical and verbal abuse. Before the final hearing, the parties entered into an agreed order of protection for one year. Consequently, the court of appeals determined it was not until the father sought renewal of the protective order that the trial court had the opportunity to make a fact determination on whether the order of protection was appropriate. The court of appeals then reviewed the allegations provided by the father at trial and noted that, although the mother had approached the children at more than one soccer game and talked with them in violation of the order of protection during the year, the father failed to provide any specific dates or evidence to establish his alleged "ongoing fear due to the mother's violent and erratic behavior." Furthermore, the father testified he had not been in fear of the mother during the year preceding the extension of the order of protection. As a result, the court of appeals concluded there was insufficient evidence to support the trial court's finding an extension of the order of protection was appropriate. Accordingly, the order of protection was vacated.♦

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Guardian ad litem in Tennessee

A guardian *ad litem* may be appointed by a court in custody proceedings to adequately protect a child's best interest. When a guardian *ad litem* is appointed, the order must provide not only the specific duties to be performed, but the duration of the appointment. If a duration is not provided, the appointment automatically terminates when the order disposing of the child custody proceeding becomes final. In Tennessee, the role of the guardian *ad litem* is to gather

and present facts in the child's best interest. In 2011, however, the guardian *ad litem*'s role was amended to allow one to take any action an attorney may take while representing a party.

Lack of authority

On appeal, the father asserted the guardian *ad litem* lacked the authority to file the contempt proceeding. The Tennessee Court of Appeals ultimately agreed finding the guardian *ad litem* did not have the authority to file the emergency motion seeking a con-

tempt of court ruling. The court's decision rested not on the authority of the guardian *ad litem* in general, but instead on whether the guardian *ad litem* was currently serving the child. In this instance, the final order of the trial court addressing the custody of the child was entered just over a year before the motion for contempt was brought. Because the final order ended the guardian *ad litem*'s relationship with the child, the guardian *ad litem* had no authority to act. Consequently, the court of appeals reversed the father's contempt

charges and suspension of his parenting time.

Keep in mind

Tennessee's family law is complicated. It is important to make sure you have a professional to walk you through each step of a custody battle to avoid procedural actions, including acts which violate the law or prevent a party from having standing to file a motion. ♦

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San Diego, California 92121
Phone: (858) 597-6000
Fax: (858) 597-6008

To contact the editor:

Phone: (615) 726-5426
Fax: (888) 688-0482
E-mail:
eholt@kingballow.com

TERMINATION OF RIGHTS

Parental rights terminated following murder conviction

by [Sean McLean](#)
smclean@kingballow.com

After nearly 20 years of marriage, a Tipton County father murdered his wife and mother of his children. He was immediately apprehended and subsequently convicted of the crime. Consequently, the couple's two children were sent to live with the deceased mother's cousin. Three years later, the father was sentenced to life in prison. Seven years later, the cousin petitioned the court to terminate the father's parental rights and to allow her to adopt the two children. The father opposed the cousin's petition asserting his post-conviction appeal was pending and the children would be able to make their own decision in a matter of years. In denying the father's assertions, the trial court found the evidence established the father killed his children's mother and, as a result, not only were grounds for termination established, but termination was in the children's best interest. The father appealed the best interest of the child analysis.

Parental rights

A biological parent has the right to the care and custody of their child, which is a liberty interest protected by the due process clauses of the federal and state constitutions. Although the right is fundamental and superior to the claims of other persons, it is not absolute. The right will continue without interruption unless the right has been relinquished, abandoned, or the parents

have engaged in conduct requiring its limitation or termination. Because of the profound consequences of a decision to terminate parental rights, courts apply a higher standard of proof, clear and convincing evidence. Evidence that meets the clear and convincing evidence standard establishes the truth of the facts asserted is highly probable and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

Grounds for termination

A party seeking termination of parental rights of a biological parent in Tennessee must first prove at least one of the statutory grounds for termination under the Tennessee Code. These grounds include a parent being confined to a correctional facility for a criminal act for ten (10) or more years when the child is under the age of eight (8) and whether the parent has been convicted of the intentional and wrongful death of the child's other parent. Once a statutory ground has been established, the proposed termination must be shown to be in the child's best interest.

The best interest does not become paramount until grounds for termination exists. Upon becoming the overriding factor, the best interest will be viewed from the child's perspective. The best interest analysis is fact driven with a number of factors to be considered, including, but not limited to 1) the adjustment by the parent of circumstances and conduct to make it safe and in

the child's best interest to be at the parent's home; 2) the regular visitation or contact; 3) the meaningful relationship between the parent and child; 4) the effect of change in caretakers; and 5) the brutality, physical, sexual, emotional, or psychological abuse or neglect toward a member of the family or household.

Court's analysis

After analyzing the evidence presented, the court of appeals concluded the father's murder of his wife and the children's mother clearly satisfied the statutory grounds for termination. The court turned its attention towards whether termination of the father's parental rights was in the best interest of the children. It noted that, as a result of his incarceration, the father was unable to provide a stable home or financial support for the children. Furthermore, the children testified they did not want any contact with the father and expressed a desire to be legally adopted by the cousin. Finding the father disabled himself from participating in his children's life and that the children need stability and legality, the court of appeals found termination of the father's parental rights was in the best interest of the children. Accordingly, the father's parental rights were terminated and the cousin was able to proceed with adopting the children. ♦



"In Two Shakes of a Lamb's Tail"- Granted, a lamb is known to shake its tail twice as fast as most any other animal, but the expression seems to be an extension of a more popular British phrase, "in two shakes." Both refer to something done instantaneously, yet one was coined in the mid-1800s and refers to a small sheep, while the other dates back much later and has to do with the quick shaking of a dice box just before those dice are rolled.

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