CHAPTER 13
THE ATTORNEY ADVOCATE'S ROLE IN OTHER PROCEEDINGS

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§ 13.1 Introduction [1]

N.C.G.S. § 7B-601 defines the Attorney Advocate's role .Section 7B-601 provides the court with the authority to appoint the attorney advocate and also sets out the duties of the Guardian ad Litem program.[2] This statute states that the GAL and attorney advocate have standing to represent the juvenile in all actions "under this Subchapter where they have been appointed." The attorney advocate has neither the authority nor the obligation under his or her appointment to take actions that do not fit within the scope of those duties set out in the statute. This does not mean that any action taken that is outside the scope of the duties set out in the statute is automatically inappropriate or problematic; rather, every action must be evaluated on a case by case basis and the attorney may very well be able to play a role in proceedings outside the child protection case that is beneficial to the child without exceeding the scope of the attorney's statutory authority.

One key phrase of section 7B-601 which speaks indirectly to the role of the attorney and guardian ad litem in matters outside the child protection proceedings is the duty articulated in the statute to "report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court." Thus, the attorney advocate and volunteer are not responsible for taking every action necessary to meet the child's needs but are instead responsible for determining what the child's needs are, informing the court of those needs, and asking the court to address those needs that are not being met. Action could mean asking DSS or a service provider to take a specific action or address a particular situation; or it could mean asking the court to order DSS or a service provider to do the same. When there are matters outside the scope of the child protection proceedings, addressing the child's needs and protecting the child's best interests might mean informing the court of such matters and asking the court or the child's legal custodian to get someone to address the child's needs; it might also mean using the powers of persuasion to get an individual or agency to deal with things a certain way; or it might mean pointing the child in the right direction so that the child can address his or her own needs. In some situations, it may be appropriate for the attorney to choose to assist the child outside the scope of his or her role as attorney advocate, understanding that such assistance may not be compensated by the GAL program.

Nevertheless, the subject of the attorney advocate's role in other proceedings is not clearly defined. This chapter seeks to examine some of the issues related to the attorney's role in other proceedings but the reader is cautioned to remember that much of what is stated in this chapter consists of mere advice or a statement of GAL policy and that neither case law nor statutes have played much of a role in these issues.

§ 13.2 When Child Is Involved in a Criminal Proceeding as Victim, Witness, or Defendant

A. Introduction and GAL Policy

The Guardian ad Litem Program sometimes has child clients who are involved in a criminal proceeding as a victim, witness, or even as the defendant. In these situations, questions often arise as to the role of the GAL Attorney Advocate (AA). Although the AA lacks statutory authority to be involved in cases

[1] Note: Ilene Nelson originally contributed much to this chapter.

[2] The statute refers to the "program's" duties, which the GAL program has taken to mean the volunteer, attorney, and GAL staff acting as a team.

that do not relate to Chapter 7B proceedings,[3] the AA can take actions that carry out the AA's duty of representation of the child's best interests in the abuse/neglect/dependency case.

It is important to remember that defense attorneys and prosecutors are often unaware of or do not consider that the child has a GAL or another attorney appointed in the child protection proceeding -- especially where the criminal case is unrelated to the abuse/neglect/dependency case. It is therefore essential to let them know, from the beginning, that the child has an attorney advocate and it is good for the AA to have a conversation with them about the role that the GAL and AA would like to play in the criminal proceedings. When a parent is charged with a crime arising from the same actions alleged in an abuse or neglect petition, the AA should also inform defense attorneys, parent's attorneys, prosecutors, and other attorneys that the AA represents that child and that they must obtain permission from the AA to talk to the child.[4]

B. When the Child-Client Is Petitioned as a Delinquent or Undisciplined Juvenile

If a petition is filed alleging that the child is a delinquent or undisciplined juvenile, the AA can use the power of persuasion when necessary to promote the child's best interests in the abuse/neglect/dependency case. The AA can contact the child's defense attorney, court counselor, and the district attorney to find out more about the case and, under proper court authority, can share information about the child that might be helpful in achieving a satisfactory outcome for the child-client.[5] It is critical that a child know that this communication is being contemplated and to consult the child regarding his or her wishes.

The AA may be able to provide information that would influence the decisions of the prosecutor or guide the direction of the child's representation by his or her criminal attorney, even though the child's attorney in the criminal matter represents the wishes, and not the best interests, of the child. Consider, for example, the issue of whether to transfer the child to adult court. If the Attorney Advocate has information about important treatment needs of the child, this information should be shared since it may be impossible for a child to receive appropriate services and to meet his best interests in the abuse/neglect/dependency case if he is incarcerated in the adult prison system.[6] Furthermore, this information must be considered before a judge can transfer the matter to superior court. [*See* 7B-2203(b)]

C. When the Child Is a Victim or Witness

The influence a GAL or AA might have on the criminal procedure for the benefit of the child-client should not be underestimated.

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[3] The attorney's authority is limited by 7B-601 wherein the attorney has "standing to represent the juvenile in all actions under this Subchapter where they have been appointed." Here, "Subchapter" refers to the Subchapter I of the Juvenile Code relating to abuse, neglect, and dependency.

[4] RPC 61 and RPC 249 directly address these issues and should be utilized when necessary. See § 1.6.E. and § 12.9.C. of this manual for more information. Note that the prohibition is on attorneys or their agents talking to a represented person.

[5] Such information may only be shared pursuant to 7B-3100 or pursuant to court order. For more information on agency sharing of information, see § 1.9. Note that the child's attorney in the criminal matter is not an "agency" the GAL would be permitted to share information with pursuant to 7B-3100 and the GAL would need a court order to share information with the attorney.

[6] See footnote 5 on the importance of making sure there is authorization for sharing information.

1. In criminal matters relating to abuse or neglect

Section 7B-601(b) of the North Carolina General Statutes states that "the court may authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein the juvenile may be called on to testify in a matter relating to abuse." While the statute speaks to the GAL, the GAL program has generally interpreted that to mean the GAL and/or the attorney advocate. This statute speaks to a very limited power to accompany the juvenile, does not confer standing in a criminal matter, and does not even address the role of the GAL or AA in a matter that is not "relating to abuse." However, this does not mean that the attorney has no role to play.[7]

2. Victim's rights and physical protection

If the child is a victim, rather than the perpetrator of a criminal act, the same powers of persuasion (as discussed above for delinquency matters) can be utilized. For example, a GAL or AA might convince the prosecutor to request that a restraining order be attached to any release or probationary sentence imposed on the defendant to protect the child victim (especially applicable when the defendant is not a party to the abuse or neglect proceedings and therefore not under the jurisdiction of the juvenile court).

3. Protection from further trauma

When the child is a victim and/or a witness, the GAL or AA can also be instrumental in protecting the child from some of the trauma of interviews and testimony, and is authorized by 7B-601(b) to accompany the child in certain cases. The AA may suggest to the prosecutor that he or she move to have the child testify outside the presence of the accused and/or in a nontraditional courtroom setting.[8] In addition, the AA may work with the district attorney to ensure that there are no unnecessary repetitive interviews and to encourage the implementation of other strategies to make the testimonial role of the child appropriate to meet that child's needs.

§ 13.3 When Child Is Involved in Civil Litigation

A. Introduction and GAL Policy

If a child is called as a witness or is a party in a civil matter unrelated to the child protection proceeding, neither the GAL nor the attorney advocate have standing under 7B-601 to represent the child in that civil matter.[9] As discussed earlier in the section on criminal proceedings, this does not mean that the GAL and AA cannot play an indirect role in protecting the child's rights in these proceedings. In fact, if the civil proceeding affects the child's best interests in the child protection proceeding, then the GAL and AA have a *duty* to take the appropriate steps in the civil proceedings, including filing a motion to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure if necessary and appropriate. When there is no connection between the child's best interests in the

[7] NOTE: Rule 7.1 of the North Carolina General Rules of Practice contemplates appointment of a guardian ad litem: "When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney from a list of pro bono attorneys approve by the Chief District Court Judge, as guardian ad litem for such minor victim or witness."

[8] For more information on testimony in nontraditional settings, see § 7.2.E. in this manual on evidence.

[9] See footnote 2.

abuse/neglect/dependency case and the civil matter, the GAL and AA can still facilitate promotion of the child's interests and protection of the child's welfare by helping to make sure that the child gets appropriate representation in the civil matter.

B. When Child May Have a Civil Cause of Action

In the course of the child protection proceedings, the AA may identify a potential cause of action affecting the legal rights of the child that is outside the scope of the AA's representation of the child. GAL program policy prohibits an attorney advocate from representing a GAL client in any fee-generating legal case. While taking a fee generating case would not necessarily violate the Rules of Professional Conduct, this is a GAL Program policy because the Program and anyone associated with it must, at all times, avoid even the appearance that there could be a conflict or a confusion in roles. The role an attorney plays in a fee generating case is different than the role an attorney plays in representation of the child's best interests in a child protection proceeding. This policy helps to ensure that best interest representation remains pure, eliminating the possibility that roles could become confused and eliminating any possibility of appearing as though a decision made in the course of representation of an abused or neglected child could ever be motivated by personal financial gain instead of a child's best interests. Although the attorney advocate is not an employee of the Administrative Office of the Courts (AOC) or the Guardian ad Litem Program, the Attorney Advocate's actions are a direct reflection on the GAL Program and Program has an interest in avoiding even the appearance of a conflict in order to preserve its credibility and effectiveness. This prohibition is part of the Attorney Advocate's contract for services.

If pursuit of the civil claim will not be adverse to the best interests of the child in the child protection proceedings, then the attorney advocate may take appropriate steps that will result in these legal rights being protected though independent representation. One way to accomplish this may be by an application to the court, pursuant to North Carolina General Statute G.S. 35A-1221, for appointment of a "guardian of the estate" for the child.[10] It would then be the duty of the guardian of the estate to assess the merits of the case and pursue any potential claims on behalf of the child, including retaining independent counsel if the guardian is not an attorney. If the AA has information that would be pertinent to the potential claim, the AA can share this information with the guardian of the estate or the child's independent attorney only upon receipt of a court order allowing such disclosure.

C. When Child Is a Witness or Defendant

When a child is called as a witness in a civil proceeding, the AA's duty to the child in the collateral proceeding depends on whether the litigation will affect the child's best interests and legal rights as related to the child protection proceeding. The scope of the attorney advocate's involvement in such proceedings will be determined by the attorney advocate's duty to protect the child's legal rights in the child protection proceedings.

Examples of situations that might impact a child's best interests could include a child testifying in a domestic violence action brought by one of the child's parents or in an alimony proceeding relating to the parent's divorce. In such a situation, the attorney advocate may need to accompany the child to a deposition or hearing in order to protect the child's legal rights in the child protection proceeding. Furthermore, if testifying in the civil action will be traumatic to the child, then the attorney advocate may want to use the power of persuasion to convince attorneys that the child should be protected from such trauma, as discussed in section II.C. above.

[10]When the guardian of the estate is likely to be an attorney known to the GAL program or GAL attorney, however, the program or GAL attorney could ask that attorney to request appointment of himself or herself as guardian of the estate.

A child may also be called as a witness in an action that will have no effect on her legal rights and no impact on the child protection proceedings, for example, a car wreck. Although in cases such as these the attorney advocate has no duty to the child-client, the attorney could provide *general* support and advice regarding the child's role as witness. However, since the attorney-advocate does not represent the child-client in the civil proceedings, the attorney should avoid giving any *specific* advice regarding specific testimony or the particulars of the case.

If the child is named as a party in a civil matter, a guardian ad litem must be appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure to represent the child's best interests. This guardian ad litem is separate and apart from the volunteer GAL serving in the child protection proceeding. Although the attorney advocate has no duty to represent the child in the civil proceeding, the attorney advocate may assist the child by petitioning the court for the appointment of a Rule 17 guardian ad litem[11] when one has not been appointed.

§ 13.4 Emancipation

A. Introduction and GAL Policy

A child of sixteen years of age or older must show financial independence to be able to be emancipated. It is therefore rare for a child-client of the GAL Program to seek emancipation. Emancipation proceedings are separate actions before the juvenile court. There is no provision for court-appointed counsel or GAL and no attorney fees are available.

If the child wants to be emancipated and the GAL believes emancipation is in the child's best interest, the GAL and AA may assist with the proceedings because it is not a fee-generating proceeding and there should be no conflict of interest.[12] If the GAL does not believe emancipation to be in the child's best interest, the GAL and AA should not assist the child with the petition and, in fact should counsel her against it, even though she is entitled to initiate the petition with or without the GAL's approval or assistance.

Therefore, the first issue for the GAL and AA to determine is whether they think it is in the child's best interest to be emancipated. According to the emancipation statutes, G.S. 7B-3500 through 7B-3509, the child will have the burden of showing by a preponderance of the evidence that emancipation is in his or her best interests. The court is to consider, among other things, the child's ability to function as an adult as well as her employment status and stability of living arrangements. G.S. 7B-3504. The GAL will therefore need to get to know the child well enough to form her own opinion regarding emancipation before offering assistance with a petition for emancipation. This can be done, in part, by asking that the child formulate detailed plans and actions with respect to finances, housing, and education. The court will expect to hear about such plans, and the GAL should be able to assess the child's ability to function as an adult in the process of observing these plans.

[11] See Rule 17 of the North Carolina Rules of Civil Procedure for details.
[12] See footnote 10.

B. The Emancipation Procedure

At common law, several methods of emancipation existed. However, the only method of common law emancipation that survived the most recent revisions of the North Carolina Juvenile Code is emancipation by marriage. *See* G.S. 7B-3509, *see also* G.S. 51-2(a). All other common law forms of emancipation have been superceded by statute. *See id*. However, as part of the Juvenile Code revisions, the legislature created a procedure by which a minor can request emancipation from his or her parent, guardian, or custodian. *See* G.S. 7B, Article 35 (2007). By statute, a minor may file a civil complaint for emancipation. *See* G.S. 7B-3500. The child is the only individual with standing to bring this action. *See id*. Any juvenile who is sixteen (16) years or older and has resided in the same county or federal territory in North Carolina for a minimum of six (6) months prior to the date of filing may request emancipation. *See id*.

1. Petition and summons

The petition for emancipation must include the following information: The minor's full name, birthdate, and state and county of birth; the name and last known address of the parent, guardian, or custodian; and the minor's address and how long he or she has resided there. *See* G.S. 7B-3501. In addition, the petition must include the minor's reasons for requesting emancipation and a summary of how the minor plans to meet his or her needs and living expenses. The petition may include a statement of employment and wages earned, which must be verified by the employer. A certified copy of the minor's birth certificate must be attached to the petition, and the petition must be signed by the minor and verified. *See id*.

A copy of the petition and summons must be served on the parent, guardian, or custodian, who shall be named as respondents. *See* G.S. 7B-3502. The summons must include the time and place of hearing. If personal service cannot be achieved (for example, if there is no known address for the respondent(s)), then another means of service pursuant to Rule 4(j) of the Rules of Civil Procedure is acceptable. The respondent(s) may file a written answer within thirty (30) days of service of process. *See id*.

2. Hearing and determination

None of the parties have the right to request a jury trial. *See* G.S. 7B-3503. At the hearing, the court shall permit all parties the opportunity to present evidence and cross-examine witnesses. The minor has the burden to show by a preponderance of the evidence that emancipation is in his or her best interest. The court has the authority, with reasonable cause, to order the minor to be examined by a psychiatrist, licensed clinical psychologist, physician, or any other expert the court may choose, in order to evaluate the mental or physical condition of the minor. The court may also order an investigation by the Department of Social Services or a juvenile court counselor. It is important to note that no husband-wife or physician-patient privilege applies in these proceedings. *See id*.

The court must review the following factors in its determination: (1) parental need for the minor's earnings, (2) the minor's ability to function as an adult, (3) the minor's need to be able to contract as an adult or to marry, (4) the employment status of the minor and stability of the minor's living arrangements, (5) the extent of discord existing between the minor and his or her family, (6) the minor's rejection of parental supervision or support, and (7) the quality of parental supervision and support. *See* G.S. 7B-3504.

A final decree of emancipation must include findings that (1) all parties are properly before the court or have been duly served and failed to appear and time to answer has expired, (2) the minor has shown a proper and lawful plan for adequately providing for his or her own needs and living expenses, (3) the minor is knowingly seeking emancipation and fully understands the ramifications of such action, and (4) emancipation is in the best interest of the minor. *See* G.S. 7B-3505. If the court determines that these four criteria have not been met, then the court shall order the proceeding dismissed. *See id*.

3. Costs [7B-3506]

The court may order any party to pay the costs of the action or may order the costs remitted for good cause. The clerk of court may charge an additional fee for giving the minor a certificate of emancipation, which lists the name of the minor, that the minor has been emancipated by court decree, and is sealed by the clerk of court.

4. Legal effect [7B-3507]

Once the court has issued the decree of emancipation, the minor has the same rights to make contracts and conveyances, to sue and be sued, and to transact business as an adult. The parent, guardian, or custodian is relieved of all legal duties and obligations that may arise in regard to the emancipated minor and is divested of all rights over and to the child. The decree of emancipation is irrevocable.

The decree of emancipation does not relieve the emancipated minor from responsibility to support his or her parents under G.S. 14-326.1 (establishing criminal liability for any person of full age and sufficient means who fails to maintain and support his or her parents if the parents are unable to support themselves). In addition, the decree does not interfere with the emancipated minor's right to inherit by intestate succession.

5. Appeals [7B-3508]

Either the minor or the parents (guardian or custodian) may appeal the court's decision. Appeals are made directly to the court of appeals. Notice may be given either in open court at the hearing or in writing within ten (10) days after the entry of the order. Pending the appeal, the court may enter a temporary order regarding custody or placement of the petitioning minor as the court finds to be in the best interests of the petitioner or the state.

§ 13.5 Abortion [13]

A. Introduction and GAL Policy

An attorney advocate may encounter a situation where a child-client becomes pregnant and questions arise surrounding abortion. While parental consent is required for minors who seek abortions in North Carolina, the statute provides an opportunity for the minor to seek a court order allowing her to bypass the parental consent requirement. (This is described in further detail below.) The judge does not decide whether the child should have an abortion, just whether the minor is of sufficient maturity to make her own decision. If an AA wishes to assist the minor in gaining access to the courts to seek a judicial

[13] Note: Thanks to Stacy Strohauer, who researched and wrote most of the text in this section on abortion.

bypass, the AA can direct the child to Planned Parenthood or to any available list of attorneys willing to accompany minors to court in such situations. It is not the duty of the attorney advocate to actually represent the child in the proceeding itself, and the AA cannot bill the GAL program for any time spent assisting the child in such proceedings.[14]

B. The Constitutionality of Abortion Procedures

The current legal status of a woman's constitutional right to terminate a pregnancy is largely found in *Roe v. Wade*, 410 U.S. 113 (1973). In this case, the Supreme Court sets out the constitutional basis for the individual's right to have an abortion, the interests of the state with which the individual rights must be balanced, and permissible limitations and regulations that the states may place on the right to have an abortion. *See id*.

The Supreme Court begins its opinion by stating that "the Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152. The constitutional right to such personal privacy is founded in the Ninth Amendment, stating that "certain rights shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX, and by the Fourteenth Amendment, stating in part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States." U.S. Const. amend. XIV. The protected areas of privacy include "fundamental" personal rights, or those "'implicit in the concept of ordered liberty,'" *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)). These personal rights extend into areas related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Roe*, 410 U.S. at 152-153. This right to personal privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id*. at 153.

The Court in *Roe* asserts that while the Constitution protects a woman's right to an abortion, this is not an absolute right. 410 U.S. 113 (1973). At some point in the pregnancy, the state's interests in "safeguarding health, in maintaining medical standards, and in protecting potential life" compel limitations on, and regulations of, the right to terminate a pregnancy. *Id*. at 154. From the end of the first trimester, but prior to viability of the fetus, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id*. at 163. For example, a state may impose regulations on who performs the abortion, as to their licensure and qualifications, and on the facility in which the procedure can be performed. Moreover, the *Roe* Court declared that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164. *See also Stenberg v. Carhart*, 530 U.S. 914 (2000).

Throughout the first trimester of pregnancy, the "trimester test" set out in *Roe* dictates that the physician and patient must be free to determine, without the influence of state regulations, whether the pregnancy should be terminated, and they may effectuate the decision free from interference by the state. *See id*. at 163. *But see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Manning v. Hunt*, 119 F.3d 254 (1997). The Supreme Court later rejected this part of the test, calling it an overstatement to describe the right to decide to have an abortion as a right void of any state interference. *Manning* 199 Fd. at 260 (citing *Casey*, 505 U.S. at 875). The Court redefined the right to an abortion as the right " 'to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id*. at 260 (citing *Casey*, 505 U.S. at 875). This redefinition allows state regulation of abortion decisions in ways related to maternal health throughout the first trimester. *See* G.S. 14-45.1(a) (2007).

[14] Any such time would be considered separate and apart from the AA's role as a GAL attorney.

Although *Roe v. Wade* was decided in 1973, its holding was very recently challenged and upheld by the United States Supreme Court in *Stenberg v. Carhart*, stating that "this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose." 530 U.S. 914 (2000). Similarly, the North Carolina Supreme Court stated that "[t]he central holding of Roe - - that a woman has a fundamental right to chose to have an abortion- -has not eroded." *Manning v. Hunt*, 119 F.3d 254, 260 (4th Cir. 1997).

C. Abortion Rights in North Carolina

North Carolina General Statute § 90-21.6 defines abortion as

> *the use or prescription of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant, for reasons other than to save the life or preserve the health of an unborn child, to remove a dead unborn child, or to deliver an unborn child prematurely, by accepted medical procedures in order to preserve the health of both the mother and the unborn child.*

G.S. 90-21.6(2) (2007). Under North Carolina law, it is lawful "to advise, procure, or cause" an abortion in the first twenty weeks of a woman's pregnancy "when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions. G.S. 14-45.1(a) (2007). After the twentieth week of pregnancy, it is lawful to advise, procure, or cause an abortion "if there is substantial risk that the continuance of the pregnancy would threaten the life or gravely impair the health of the woman." G.S. 14-45.1(b). These provisions are valid notwithstanding any of the criminal penalty provisions of North Carolina General Statute sections 14-44 and 14-45. *See* G.S. 14-45.1(b).

D. Abortion Rights for Minors in North Carolina

A minor has a constitutional right to terminate her pregnancy through an abortion procedure. *See Jackson v. A Woman's Choice, Inc.*, 130 N.C.App. 590 (1998) (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979)). However, this right in North Carolina is subject to both the above limitations based on the stage of pregnancy and by a parental consent prerequisite. *See* G.S. 90-21.7 (2007). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, the United State Supreme Court "established that a state may require a minor to obtain the consent of a parent as a prerequisite to obtaining an abortion, provided there is an adequate judicial bypass mechanism." *In re Doe*, 126 N.C. App. 401, 405 (1997) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833).

North Carolina law requires that, prior to performing an abortion upon an unemancipated minor, the physician obtain the written consent of the minor and the minor's parent, guardian, custodian, or grandparent with whom the minor has been living for at least six months prior to obtaining consent. *See* G.S. 90-21.7(a). G.S. 90-21.7(b) provides the requisite bypass of parental consent, permitting the pregnant minor to petition the district court for a waiver of the consent requirement if (1) none of those from whom consent may be obtained is available "within a reasonable time or manner"; or (2) all such persons refuse to consent to the abortion; or (3) the minor elects not to seek consent from such a person from whom consent is required.

A judicial bypass mechanism "is unconstitutional if it unduly burdens the right of a woman to choose to terminate her pregnancy." *Doe*, 126 N.C. App. at 405 (citing *Bellotti v. Baird*, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979)). An undue burden is created when a provision effectively results in a "substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." *Doe*, 126 N.C. App. at 405-406 (citing *Casey*, 505 U.S. 833). The constitutionality of North Carolina's parental consent statute with a judicial bypass was challenged in *Manning*, and the Supreme Court of North Carolina upheld the consent requirement and bypass as a constitutionally valid means of protecting the state's interests regarding minors seeking abortions. *Manning v. Hunt*, 119 F.3d 254 (1997). The court discussed the usefulness of the statute as an avenue for discovering sexual abuse and for keeping parents involved with the minor at such a difficult time. *See id*.

North Carolina General Statute section 90-21.8 provides the procedure through which a minor may petition the court for a waiver of parental consent. The minor may petition the district court and participate in the proceedings on her own behalf or through a guardian ad litem.[15] The minor or guardian ad litem shall be given assistance in preparing and filing the petition, and the court "shall ensure the minor's identity is kept confidential." G.S. 90-21.8(b). The minor has the right to court appointed counsel. *See* G.S. 90-21.8(c). The court must rule on the petition within seven days of its filing, unless the minor requests an extension. *See id*. The district court "shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the parental consent shall be waived." G.S. 90-21.8(d).

The statute dictates that a court must waive the parental consent requirement if the court finds "(1) [t]hat the minor is mature and well informed enough to make the abortion decision on her own; or (2) [t]hat it would be in the minor's best interests that parental consent not be required; or (3) [t]hat the minor is a victim of rape or of felonious incest under G.S. 14-178." G.S. 90-21.8(e). The district court must address all three prongs of the statute and must waive the consent requirement if any prong is met. *Doe*, 126 N.C. App. 401, 408. The mandatory consideration of these three factors serves to direct the court in its inquiry as to the ability of the minor to make the abortion decision herself for "[i]t is not the role of the trial court to substitute its decision as to which options available to the pregnant minor should be chosen; instead, the court is to determine whether the minor is mature and informed enough to make the decision on her own." *Doe*, at 407.

The minor has a right to appeal the district court's ruling in a *de novo* hearing in superior court. G.S. 90-21.8(h). The minor must file the notice of appeal within twenty-four hours of the issuance of the district court's order. There is no right to appeal to the court of appeals, but the minor may petition the court of appeals for a *writ of certiorari* to determine if the evidence supports the lower court's findings of fact and if these findings support the court's conclusions of law. *Doe*, 126 N.C. App. at 408. In the event of a medical emergency that "so complicates the pregnancy as to require an immediate abortion," the parental consent requirement does not apply. G.S. 90-21.9.

Under North Carolina law, a Class One misdemeanor is committed by one who "intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement" of the parental consent statutes discussed above. N.C. Gen. Stat. § 90-21.10 (2007). The court held in *Jackson v. A Woman's Choice, Inc*., 130 N.C. App. 590 (1998), that

[15] "Guardian ad litem" as used here was almost certainly referring to a Rule 17 GAL under the Rules of Civil Procedure and not to a GAL working under the supervision of the GAL program, because 7B-1200 and 7B-601 make it clear that program GALs are to represent children petitioned to be abused, neglected, or dependent (only) in proceedings under the Juvenile Code.

G.S. 90-21.7 "contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of the purported written consent for an abortion to determine the validity of the writing." *Id*. at 594. The intent of the legislature is not to impose such criminal liability on health care providers acting in good faith. Furthermore, to do so would constitute an undue burden to the right of a woman to terminate her pregnancy. Thus the court held that "the unknowing and unintentional failure to obtain actual parental consent is not a violation of the statute." *Id*. at 595.

§ 13.6 Child's Inheritance Rights [16]

A. Introduction and GAL Policy

Inheritance rights, like many others, are tangential to an AA's work as a child advocate in juvenile court. However, it is important to make sure that these rights are protected and that child clients get all they are entitled to. As with other civil claims, the AA should make sure that a guardian of the estate is appointed for the purposes of pursuing inheritance rights. [17] That guardian can hire counsel to represent the estate. The attorney advocate should not become involved in this situation other than to assure that the child is properly represented and that important information in the child's best interest is shared pursuant to court order.

B. North Carolina Statutes

1. Termination of Parental Rights

A child's right to inheritance when parental rights have been terminated is controlled by G.S. 7B-1112, which provides that a parental rights termination order "permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent . . . ," G.S. 7B-1112 (2007). However, "the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued."[18] *Id*.

2. Adoption

Once the child has been adopted, he or she is "entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents." G.S. 29-17(a) (2007). *See Headen v. Jackson*, 255 N.C. 157 (1961); *Greenlee v. Quinn*, 255 N.C. 601 (1961). However, the child is no longer entitled by succession to any of the natural parent's property or the property of their heirs. *See* G.S. 29-17(b). An exception to this exists when the natural parent "has previously married, is married to, or shall marry an adoptive parent." G.S. 29-17(e).

3. Emancipation

When a juvenile obtains a final decree of emancipation from his or her parent(s), the parent, guardian, or custodian is relieved of all his or her legal duties or obligations to the juvenile. G.S. 7B-3507(2) (2007). However, the petitioner's right to inherit property is *not* severed or altered by a final decree of emancipation G.S. 7B-3507.

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[16] Note: Thanks to Stacy Strohauer, who researched and wrote the text for this section on a child's inheritance rights.
[17] See § 13.3.B. above regarding appointment of guardian of the estate. Note, again, that whether the GAL will be able to bill for time spent on such actions will depend on the particular payment plan and contract the attorney is working under.
[18] Note the fact that the statute does not provide an exception for the parent's right to inherit from the child.

4. Custody or guardianship with no TPR

When a child has been placed out of the home but parental rights have not been terminated, the child's inheritance rights are not affected by the out-of-home placement unless and until an adoption is finalized. The issue is discussed generally in 59 Am Jur 2d § 7, which states that "[t]he appointment of a guardian for a child does not do away with the relation or relieve either the parents or the children of their mutual obligations to each other." *See also* 39 Am. Jur. 2d § 77. This is certainly the case with inheritance rights in North Carolina. *See* G.S. 7B-1112. Additionally, G.S. 35A-1227 addresses the issue of funds owed to minors in a guardian's care, identifying ways for the minor to receive any property or funds to which the minor is entitled, including insurance proceeds and testamentary transfers of property. There is no indication that the minor is stripped of his inheritance rights while in the care of a guardian. *See* G.S. 35A-1227 (2007).

§ 13.7 Children Born in Other Countries [19]

A. Introduction

Applicable federal and state laws, regardless of the child's lawful status within the United States, protect every child present in the United States. This means that laws protecting children against maltreatment apply to all children within a court's jurisdiction. When, however, a child protection petition is filed on behalf of a child born outside of the United States who is not a United States citizen, the GAL and attorney advocate may face unusual circumstances, depending on the child's legal status within the United States. The child may be in the country illegally ("undocumented")[20] or the child may have a visa. Therefore, a preliminary task for the GAL is to determine whether the child is lawfully present in the United States.

B. Organization of Immigration System

On March 1, 2003 the Immigration and Naturalization Service (INS) ceased to exist and the Department of Homeland Security (DHS) began to carry out immigration services and enforcement. DHS is divided into three bureaus: (1) Citizenship and Immigration Services (CIS); (2) Immigration and Customs Enforcement (CPB); and (3) Customs & Border Protection. It is CIS that administers immigration benefits.

C. Lawful Permanent Residency

A "lawful permanent resident" (LPR) has permission to live and work permanently in the United States, absent certain criminal conduct. An LPR is often referred to as a "green card" holder. An LPR may travel in and out of the United States, and can apply to become a United States Citizen or acquire citizenship.

[19] Note: Debra Sasser contributed to this section in the 2002 edition.
[20] "Undocumented" refers to a person who does not have permission to be lawfully present in the United States.

D. Undocumented Children

If a child is in the country illegally, the child is subject to deportation. There are immigration options that will allow undocumented minors to permanently remain and work in the United States. Because of the increased number of undocumented child clients, it is important to be familiar with immigration options that can be utilized. Note that Attorney Advocates are not expected to file immigration documents—this aspect of a child client's case should be referred to an immigration attorney; however, the attorney does have the responsibly for asking questions on undocumented status; ensuring that juvenile court orders reflect the proper criteria to allow the child to pursue immigration options; and have a general understanding of the impact undocumented status may have on a child client.

Undocumented children in the foster care system are not entitled to certain benefits such as Medicaid and IV-E financial assistance due to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law 104-193, [28] limited federal public benefits to qualified aliens. For example, federal adoption assistance under IV-E of the Act is limited to qualified aliens pursuant to 8 U.S.C. 1641(b) that includes certain permanent residents or refugees. Additionally, the child will not qualify for Medicaid. Do note that in some cases, North Carolina can provide assistance using state funds through the State Adoption Assistance Project that would allow for case monthly adoption assistance an vender payments, but not Medicaid.

E. Visas

A child born outside of the United States to parents who are not United States citizens can lawfully be present in the United States if the child has a visa issued by the DHS. The type of visa dictates the terms of the child's lawful presence in the United States. If a child's stay in the United States violates the terms of his or her visa (e.g., stays beyond the term allowed by the visa), the child may be deported.

1. Non-Immigrant Immigrant Visas

Non-immigrant visas allow individuals to come to the United States on a time-limited basis. Examples of non-immigrant visas are H-visas (work-related); B-visas (tourism); and F-1 visas (education).

2. Immigrant Visas

Immigrant visas allow individuals to reside and work in the United States permanently. An undocumented child who has been the victim of a serious crime and cooperated with law enforcement may qualify for a U-visa. An undocumented child has been the victim of severe forms of human trafficking may qualify for a T-visa.

Two examples of immigrant visas involve children born abroad whom United States citizens have or will adopt. The IR-3 visa indicates that United States citizens adopted the child abroad before bringing the child to the United States. The IR-4 visa indicates that the child was either adopted abroad by United States citizens but needs to be readopted in the United States or has been brought to the United States for adoption by United States citizens.

There is also an avenue to LPR through the Violence Against Women Act (VAWA) that an immigration attorney may explore on behalf of a self-petitioning child who has an abusive parent.

F. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status ("SIJS") allows undocumented children who are in state court dependency proceedings to apply for lawful permanent residency.[21]

a. Requirements

In order for a juvenile to be eligible to apply for SIJS, the court must make **specific findings** in a **court order**. [22]

1. The child must be under the **jurisdiction of a dependency court** proceeding such as abuse, neglect, or dependency.

    - The court must retain jurisdiction throughout the SIJS application process. It is imperative to identify the issue early in a case, particularly with youth clients.

    - In North Carolina, if the SIJS applicant reaches eighteen before the adjustment of status is granted, then the application fails.

    - Note that in immigration practice, this jurisdiction can include dependency, delinquency and probate (guardianship) court.

2. The child must be **dependent on a juvenile court or** place in the **custody of a state agency** or department of social services.

    - This criterion is met in North Carolina if an undocumented child is adjudicated abused, neglected or dependent and placed out of home.

    - The court should make it clear that it made its findings and orders **based on abuse, neglect or abandonment of the child**, as opposed to just to get the child immigration status.

3. The child must have been "**deemed eligible for long-term foster care**."

    - What this criteria means in North Carolina is that reunification efforts are ceased, and another permanency plan has been implemented. It is appropriate to identify potential SIJS cases as part of regular concurrent planning for undocumented children.

4. The court or some administrative agency must rule that it is **not in the child's best interest to be returned to his or her home county.**

    - To conclude that it is contrary to best interests to return a child to his or her country of origin, it is suggested that sufficient evidence should be presented. For example, that the consulate of the child client's country of origin was contacted in an effort to locate appropriate family members.

[21] *See* 8 U.S.C. § 1101 (a)(27)(j) and the regulations at 8 C.F.R. § 204.11.
[22] See sample order in Appendix.

5. The child must be under the age of 21 and unmarried.

    - In North Carolina the child SIJS applicant would have to be less than eighteen to allow the retention of jurisdiction.

b. Benefits of SIJS

A child who successfully petitions for SIJS will become a lawful permanent resident with the right to remain lawfully in the United States, work legally, qualify for in-state tuition at college, and, in five years, apply for United States citizenship. The child is eligible for Medicaid and if adopted, federal adoption assistance.

c. Risks of SIJS

If the application is denied, the child might be deported since the DHS is now on notice that the child is an illegal alien. For this reason, it is very important to screen each case to determine the child's eligibility for the status. To protect the child's best interest, the AA should consult with or refer the case to an immigration specialist.

d. Resources

The Immigrant Legal Resource Center, a nonprofit legal center with expertise in laws affecting immigrant children, offers free telephone consultation, a free SIJS manual, updates on new developments, and, in some areas, free training. Contact the ILRC by telephone at (415) 255-9499, email at aod@ilrc.org. or mail at 1663 Mission St., Suite 602, San Francisco, CA 94103. Information and informative downloads at www.ilrc.org.

In the case of your particular child client, it is best to consult with an immigration law attorney. In North Carolina, the North Carolina Justice Center has an Immigrants Legal Assistance Project. You can contact the NCJC by phone at (919) 856-2570. The website is www.ncjustice.org and physical address at 224 S. Dawson Street, Raleigh, North Carolina, 27601.