



# When Your Child Has an Independent Representative

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**A**t the outset, we need to be clear that the terms used for children's representatives and the statutes and rules that govern their roles vary greatly among jurisdictions, sometimes even among judges in the same jurisdiction. This article sets out general information, but if your child has a representative in your case, you should always ask your lawyer or the judge to explain the specifics involved in your case.

## How Does a Child Get a Representative?

There are several ways that your child may have a representative (either a lawyer or nonlawyer) in your court case. The judge might have decided that your child should have representation, even if nobody requests it. Either you or another party in your case may have asked the judge to appoint a representative for your child, and the judge agreed. The judge then officially appointed the representative, and in most cases the appointment order will describe

the purpose of the appointment and the rights and duties of the representative.

Sometimes a party to the case or someone else, such as a grandparent or other relative, will privately retain a lawyer to represent the child. In that case, the judge might have to approve of the representation in order to allow the lawyer to participate in the case on behalf of the child. That person may or may not need to be officially appointed in order to be recognized as the child's lawyer. It is important to understand that who pays for the lawyer is irrelevant to who makes decisions. A lawyer for the child owes a duty to the child or to the court, depending on the nature of the role, and whoever pays that person does not have the right to tell the lawyer what to do or not to do. A third-party who pays for the child's representative has no right even to get information from the representative. There is no attorney-client relationship between the child's representative and the person paying.

## Roles of Child Representatives

As mentioned above, the roles and terms vary among the states. This article describes the roles and terms as they are used in the American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases approved by the ABA House of Delegates in 2003.

### *Attorney Representatives*

All attorneys are bound by their state's ethical rules, even when representing children. An attorney representative will investigate the case, and the court order may include authorization to receive the child's medical, psychological, school, law enforcement, and other records without the need for parental authorization. There are two basic roles for children's lawyers. If the lawyer is "client-directed," (which may be called "attorney for the child" or "attorney ad litem" in Texas) the lawyer advises and follows the direction of the child. Some courts still use the term "guardian ad litem" (GAL) for any lawyer representing a child, even if the lawyer is acting in a client-directed role, so you should clarify the meaning with your lawyer, especially if the representative is called a GAL. The client-directed role is the same role that your lawyer has with you. If you and your lawyer disagree on a position to be taken in the case, your lawyer may try to persuade you otherwise; but in the end, so long as it is supported by the facts and the law, your lawyer will take the position you want, even if the lawyer disagrees with it. That is true with lawyers for the child as well. The lawyer has a responsibility to communicate with your child in a developmentally appropriate way and does not involve the child in decisions not related to the child (such as property division and spousal support). But on issues directly affecting the child, such as those regarding parenting time, other contact with parents, school choice, and extracurricular activities, the child's lawyer will advocate for the child's expressed position or will take no position if that is the child's direction.

A different role may be called a "best interests attorney" or GAL as mentioned above, or "amicus attorney" in Texas. Lawyers serving in this role also advise the child and must express the child's wishes unless the child objects, but they can advocate for a position other than what the child wants if the representative determines that a different position is in the child's best legal interest. As with a client-directed lawyer, a lawyer serving in this role presents evidence (witnesses and exhibits), cross-examines other parties' witnesses, and can object to exhibits. The representative acts like any other lawyer, is able to file motions and legal memoranda, and advocates a position based on the evidence presented. A legal memorandum or closing argument can advocate a position based on the evidence presented to the court, which is different from expressing a personal opinion.

A lawyer serving in either role does not testify or write a report. General ethical rules prohibit lawyers from becoming witnesses in their cases. Some judges still expect GALs to write a report, but under the ABA Standards, this is inconsistent with acting as a lawyer. Any lawyer representing a child is bound by the ethical rules pertaining to all lawyers, so if you have your own lawyer, the child's lawyer cannot have contact with you without your lawyer's consent other than simply to schedule a time to meet with or speak to your child. If your lawyer wants you to talk to the child's lawyer, your lawyer must be present or must communicate to the child's lawyer that this is permitted.

### *Non-attorney Representatives*

Your child may have a non-attorney court-appointed special advocate (CASA), court-appointed advisor (CAA), or GAL. This role is sometimes considered to be "the eyes and ears of the court," and the representative's duty is to the court. The CASA, CAA, or GAL may have special qualifications in areas related to the case, such as very young children or infants, special education, medical, or psychological disabilities. A lawyer may be appointed to serve in this capacity, especially if the lawyer possesses special qualifications apart from being a lawyer, but under the ABA Standards, that lawyer is not acting as a lawyer and should not also be filing motions, calling witnesses, or performing other tasks that only lawyers may perform.

A CASA, CAA, or GAL also investigates the case, and the court order generally includes authorization to receive the child's medical, psychological school, law enforcement, and other records without parental authorization. A representative in this role is generally expected to write a report and/or to testify and is subject to cross-examination by the other parties.

## How to Interact with the Child's Representative

The child's representative is not there to take sides between the parents, but the child's representative may take positions that align in some instances with some or all of the positions of one or both parents. It is important for you to cooperate with the representative by allowing private communication with the child. For younger children or shy older children, the representative may ask you to be present for one or more warm-up meetings with the child. You should not tell the child what to say (or not say) to the representative, and you should not question the child about their conversations with the representative or what the child's position will be. It is important that you do not, directly or through friends or other relatives, try to influence the child about what positions to take (an experienced child representative will be able to recognize this kind of coaching and may hold it against you).

With your lawyer's consent, if you are represented, let the child's representative know about relevant background information, current issues or problems, and future plans. You should tell the representative if the child is aware of any or all of this. Let the representative know if there are any key people such as teachers, coaches, neighbors, or relatives who have important information. If so, it is helpful to also provide their contact information. You should understand that the child's representative is not an evaluator. The information provided will be used for context for the representative to understand how to investigate the case and to advise the child.

Don't ask the child's representative for updates or feedback. You are not the client; the child is. Don't ask the representative to get information for you or give information to you. That is not part of the representative's role. Even if the representative's position seems to be aligned with yours, that person does not represent you. This sometimes becomes a problem for clients who do not have their own lawyers. It may seem easy to get advice from the child's lawyer or to seek assistance in getting things done. But that would infringe on the representative's duties to the child and/or the court. There may be circumstances when the representative takes an action or position which seems to benefit you as well as the child, but this does not open a door for you to use the child's representative in a dual capacity.

Do listen carefully if the representative is expressing concerns to you or to your lawyer about you or making recommendations for things you should or shouldn't do because they upset the child or may otherwise affect the child's position at mediation, trial, in negotiations, or at trial. Does the representative think you are unduly influencing the child? Does the representative say that the child feels caught in the middle of having to report on the other parent, carry messages, or ask for or deliver child support payments? Does the representative say that the child is upset by hearing a parent, relatives, or friends badmouthing the other parent? Does the representative think that you need more information about the child's special needs, medical condition, activities, or interests that the child wants to pursue? Is the representative concerned about substance abuse, mental health, or domestic violence issues? Knowing about these concerns gives you an opportunity to address the situation early enough to change things, which may affect the position the representative takes and the decisions the court makes.

It is important not to try to pull the child's representative into other issues involved in your case that do not directly affect the child (such as spousal maintenance or property division). Some child's representatives will deal with child support, but others do not. A court order appointing the representative may detail what the scope is. In any event, don't ask the representative to get information for you or give information to you.

## Child's Representatives Put the Focus on the Child

The child's representative is a knowledgeable person the child can talk to about the legal case affecting the child's life. Children know that something is going on. Their routines are changed. Parents may no longer be living together. They may argue or not speak to each other. Nobody may be telling the children what is going on, or they may be being told too much. The child's representative can answer their questions in a safe context. The representative can curate the court-related information provided to the child. The representative can help the child to understand that the parents or the judge, not the child, will be responsible to make the final decisions, but that the child's perspective will be considered.

The child's representative may be able to keep the case focused on the child's perspective and offer alternatives that neither side has considered but that serve the child's interests and wishes. Maybe neither parent realized how important something was to the child, but once you know, maybe you can agree that your parenting plan will accommodate that. Because the child's representative is solely focused on the child's needs and interests, that person is often pivotal in negotiating an agreement between the parties. A suggestion coming from the child's representative does not generally elicit the kinds of defensive rejection that the same suggestion coming from the other parent might. The child's representative gives your child a voice in a situation that greatly affects the child and prevents the child from getting lost in the parents' disputes. **FA**



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