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## The Child's Representative Law

### After *In re Marriage of Bates*

When it created the child's representative in 2000, the legislature sought to combine the best features of the attorney for the child and the GAL. But a recent supreme court case casts a cloud on the law's future.

By **Rebecca J. Whitcombe**

**S**ection 506 of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") allows a minor child to be independently represented in proceedings that involve his or her support, custody, visitation, education, parentage, property, or general welfare.<sup>1</sup> For years, only two types of representatives were available – the guardian ad litem (GAL) and the attorney for the child.<sup>2</sup> Each had strengths and weaknesses, but often neither seemed capable of fully meeting the child's needs.

That changed effective 2000 with the enactment of an amendment to section 506 creating the child's representative, an attorney-for-the-child/GAL hybrid designed to combine the best features of both. But in its recent ruling in *In re Marriage of Bates*,<sup>3</sup> the Illinois Supreme Court found the new law unconstitutional as applied in that case, raising new questions about whether and when the child's-representative option is the best choice.

This article explains why the child's representative came into being and discusses the *Bates* decision and its implications.

#### History of the child's representative law

Under Illinois law, a GAL acts basically as a stand-in for the child and is therefore a party to the proceeding. He or she advocates for the best interests of the child – against the child's wishes if necessary – makes recommendations to the court, has investigatory powers, and is subject to being called as a witness and cross-examined at trial.<sup>4</sup> The GAL cannot invoke the attorney-client privilege to keep the child's confidences and may make recommendations to the trial court only on specified issues. (See sidebars on pages 27-29 for more about the role and appointment of the GAL, attorney for the child, and child's representative.)

An attorney for the child, on the other hand, acts solely as an attorney and is bound to advocate the child's wishes. However, the attorney's communications with the child are privileged and confidential. He or she cannot be called as a witness at trial and plays essentially the same advocacy role as do attorneys for the other parties.<sup>5</sup>

The shortcomings of a system that offers only these two options are described in the report of an ISBA

task force on attorneys for minors:

Children need the assurance of client confidentiality, especially in divorce, custody and visitation cases where they are often torn between two warring parents. An attorney role is appropriate here. On the other hand, to expect a child-client to be able to make informed decisions and to direct the goals of the litigation is often unrealistic. To advocate for a child's position when what the child wants is harmful defies common sense and practical considerations. Nonetheless, that is what the attorney, *strictly as attorney*, must do.<sup>6</sup>

Though Illinois law permitted an attorney to serve simultaneously as GAL and attorney for the child such dual service created an inherent conflict that arguably intensified the problem it was designed to solve.<sup>7</sup>

In response, the Illinois legislature in 1999 amended section 506 to create a third option, called a "child representative," designed to combine the best features of the attorney for the child and the GAL. The child's representative was to have "the same power and authority to take part in the conduct of the litigation as does an attorney for a party," including the duty of confidentiality, while "possess[ing] all the powers of investigation and recommendation as...a guardian ad litem," along with the power to act contrary to the child's wishes when doing so furthers the child's best interests.<sup>8</sup>

But the new hybrid was subject to criticism of its own. Parents in particular complained that the statute allowed the child's representative to submit recommendations without being required to testify about their underlying bases, thus violating parents' due process right to cross-examine the representative. This was the central issue in both the second district<sup>9</sup> and supreme court<sup>10</sup> *Bates* opinions.

#### GAL: role and requirements

Although amended section 506 defines the role of and requirements for a child's representative in some detail, it does neither for the attorney for the child or the GAL. Their roles and requirements must thus be gleaned from case law.

Far more cases have addressed the GAL's than the attorney's role. The appointment of a GAL is subject to trial court discretion, and failing to appoint one is not an abuse of discretion where the child's interests are being adequately promoted at trial, such as through the testimony of the child's psychologist, therapist, custody evaluator, baby-sitter, or other such witnesses. See *In re Marriage of Ricketts*, 329 Ill App 3d 173, 768 NE2d 834 (2d D 2002).

Although it is an abuse of discretion to appoint a GAL over a party's objection absent an evidentiary showing of its necessity, *Robin v Robin*, 45 Ill App 3d 365, 374, 359 NE2d 809, 815 (1st D 1997), the trial court does have express statutory authority to appoint one sua sponte if the child's interests conflict with the parents' or are not properly represented by the parents. *In re Custody of D.A.*, 201 Ill App 3d 810, 822, 558 NE2d 1355, 1361 (1st D 1990).

The GAL acts as a party to the litigation on the child's behalf. *In re Marriage of Apperson*, 215 Ill App 3d 378, 385, 574 NE2d 1257, 1261 (4th D 1991). The GAL's primary concern is the child's best interests, *In re Marriage of Karonis*, 296 Ill App 3d

86, 91, 693 NE2d 1282, 1286 (2d D 1998), and thus he or she is not bound by the child's wishes (although the guardian ad litem can and should take them into consideration if the child is able to express a meaningful preference). Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 Ill Bar J 458 (Sept 2001). One appellate court has written as follows:

The duty of a guardian *ad litem* is "to call the rights of the minor to the attention of the court, to present their interests and claim for them such protection as under the law they are entitled." [Citation omitted]. The imperative and guiding principal by which a guardian *ad litem* operates is to act in the best interests of the minor.

*In re Griesmeyer*, 302 Ill App 3d 905, 914, 707 NE2d 72, 78 (1st D 1998).

The guardian ad litem has broad powers of investigation and is frequently asked to make recommendations to the trial court on specific issues, as is stated in section 506. In performing its investigation, the guardian ad litem may consider evidence otherwise inadmissible at trial. *Karonis*, 693 NE2d at 1286. These broad investigative powers stem from the compelling public policy interest in preserving the child's welfare and protecting his or her best interests above all else. *Id.*

## The *Bates* case

**The facts.** In *Bates*, both parties filed post-decree motions, including petitions to modify custody, terminate unallocated support, and modify visitation. Although one of the parties petitioned for the appointment of a GAL, the trial court instead appointed a child's representative.

At trial, the wife filed a motion to order the child's representative to testify or, in the alternative, to strike his written recommendation. Her motion also requested that section 506 of the IMDMA be declared unconstitutional as a denial of procedural due process because it did not allow her to cross-examine the child's representative about the underlying factual basis for his recommendation.

The trial court denied the wife's motion but ordered that the child's representative's report be redacted and removed from the court file. Ultimately, however, the trial court did consider the child's representative's report in making its determinations regarding custody, visitation, and support.<sup>11</sup>

**Second district ruling.** The second district affirmed the trial court, holding that section 506 is not unconstitutional because there are fact settings, like the one presented in *Bates*, where a child's representative must be required to testify despite the express statutory language to the contrary.

The court noted that section 506 expressly allows a child's representative to be appointed "subject to the terms or specifications the court determines."<sup>12</sup> In the appellate court's view, the child's representative would act as a child's advocate in one of three situations, and only in the third would a child's representative be required to testify.

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**The supreme court  
found that allowing  
cross-examination did  
not contravene any  
government interest –  
what about the  
government interest in  
protecting the child's  
best interest?**

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### Attorney for the child: role and requirements

Few cases have addressed the role of an attorney appointed to represent the child, probably because until the 2000 amendment to section 506, the most common way of representing a child's interests was to appoint a GAL. The few relevant cases indicate that this appointment, like that of a GAL, is subject to trial court discretion, *Stuckert v Brownlee*, 138 Ill App 3d 788,

793, 486 NE2d 395, 398 (2d D 1985), and that failure to appoint an attorney for the child is not an abuse of discretion if the child's interests are vigorously asserted at trial through other means. Moreover, an attorney should not be appointed without a showing that doing so is necessary to serve the child's best interests. *In re Marriage of Brophy*, 96 Ill App 3d 1108, 1116, 421 NE2d 1308, 1314 (1st D 1981).

Given the paucity of case law, it must be assumed that the attorney for the child acts in a capacity similar to that of attorney for either party. An attorney for the child must advocate for the child's wishes as long as the child can adequately and maturely express them. Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 Ill Bar J 458, 459 (Sept 2001). He or she must also protect confidential communications and cannot testify at trial any more than could an attorney for either party. *Id.* As such, it has been recommended that an attorney be appointed only when the child is mature enough to express a meaningful preference. *Id.* at 462.

First, the court opined, a child's representative could make a recommendation based solely on the evidence at trial. In this situation, the child's representative is the equivalent of an attorney for the child or one of the parties, and the reasons for prohibiting the child's representative from being called as a witness are self-evident.

Second, the child's representative can make a recommendation based on information obtained from witnesses and/or investigators. The court interpreted section 506(a) to allow a party in this situation to ask the court to condition the child representative's recommendation on disclosing the factual sources that underlie it. This includes disclosing witnesses and investigators so that other parties can examine them.

Finally, the child's representative can make recommendations based on his or her own observations as a direct witness. In this situation, the court wrote, the child's representative "has stepped out of his attorney role and has become a witness who may be called and questioned at trial as any other witness under the terms or specifications as determined by the court."<sup>13</sup>

The court thus construed section 506 to create this hybrid role for the child's representative, notwithstanding the express prohibition in 506(a)(3) of a child's representative being called as a witness. Because the section also allows for the appointment of more than one attorney for the child, the court opined, another may be appointed to serve as attorney if the child's representative is called to testify.

The second district thus held that section 506 is not unconstitutional because it does not deprive a party of the right to cross-examine. The court found that the trial court erred in not ordering the child's representative to testify in this case. Because the child's representative's recommendation was partly based upon personal observation, the petitioner had a right to cross-examine him. However, because the recommendation did not figure significantly in the trial court's ruling, the appellate court found the error harmless and affirmed the trial court's ruling.

The wife petitioned the Illinois Supreme Court for leave to appeal, and the court took the case.

**Supreme court ruling.** Last October 28, 2004, the Illinois Supreme Court released its opinion and, like the second district, found the trial court in error.<sup>14</sup> Also like the second district, the supreme court found that the error was harmless and upheld the trial court's decision on behalf of the father.

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**Given its due process analysis, it seems strange that the**

Unlike the second district, however, the supreme court held that section 506(a)(3) of the IMDMA is unconstitutional – though only as applied in this case – because it deprived the wife of her due process right to cross-examine the child's representative insofar as his recommendations were based on his own observations. The court specifically held that the second district's statutory construction was error, because the language of the statute is clear and unambiguous and thus must be given its plain and ordinary meaning.<sup>15</sup>

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its face.**

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Having found that the express statutory language had to be met head on, the supreme court next engaged in a due process analysis. It found that the wife had a fundamental right to the companionship, care, custody and management of her child and that the statutory prohibition against calling child's representatives as witnesses created a serious risk of erroneous deprivation of the wife's custodial rights.

Also, the court held that allowing the wife to cross-examine the child's representative would impose no fiscal or administrative burdens on the state, nor would it be contrary to any government interest. Based on this balance of interests and burdens, the court held section 506(a)(3) to be unconstitutional as applied.<sup>16</sup>

Notwithstanding this conclusion, the court found that the child's representative's report was essentially cumulative of other evidence, that the denial of due process was harmless error, and that the custody modification ordered by the trial court was supported by the manifest weight of the evidence. Thus, the supreme court upheld the trial court's decision.

### The meaning of *Bates*

Given its due process analysis, it seems strange that the supreme court did not find the statute unconstitutional on its face rather than merely as applied in this case.

The first part of the court's two-part analysis is a general discussion of cross-examination as an essential component of due process. The court indicates that child's representatives are just as susceptible as any other witnesses to errors in observation and inadvertent bias:

The proper weight to be given the report of a child's representative may be influenced by many factors, including his training and experience, the contacts between the representative, the parties, and the child, and the existence of any bias or tendency to favor one gender of parent over the other. Cross-examination is likely to affect the trial court's assessment of the worth of the representative's recommendations in many cases.<sup>17</sup>

If all witnesses – including child's representatives – are susceptible to biases and errors, and if all child's representatives are empowered under the language of section 506(a)(3) to conduct investigations and make recommendations, then it would seem that all child's representatives should be subject to cross-examination. Yet this result is forbidden by the language of the statute, arguably making it unconstitutional on its face. But the court refused to go that far.

#### *Bates* and parental alienation syndrome

*Bates* attracted attention in the popular press in part because the trial court conducted a *Frye* hearing and concluded that "parental alienation syndrome" was a generally accepted scientific theory and that evidence about it is thus admissible. PAS is defined as the systematic effort of one parent to turn the child against the other.

The Illinois Supreme Court kept its distance from the theory in *Bates*, writing as follows: "In view of the sparse record challenging the general acceptance of the PAS principle, allowing [the husband's expert's] parental alienation syndrome testimony was not an abuse of discretion. We note, however, that PAS is now the subject of legal and professional criticism, and our holding in this case does not foreclose further challenges to the validity or general acceptance of that concept in future cases." *Bates*, 2004 WL 2403721 at \*19.

For more, see Gloria Carr, *Woman loses appeal to Supreme Court, but says custody case to help others*, Aurora Beacon News, November 18, 2004, online at <<http://www.suburbanchicagonews.com/beaconnews/archives/build/a18custody.htm>>; see also J. Michael Bone and Michael R. Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, Fla Bar J, Vol 73 No 3 at 44 (March 1999), online at <<http://www.fact.on.ca/Info/pas/walsh99.htm>>

The second part of the court's analysis invokes its opinion in *Bernat v Bicek*,<sup>18</sup> in which it found the Domestic Relations Act of 1949 unconstitutional. The basis of that holding was that the Act had vested unlimited investigatory authority to a master in chancery but did not allow parties to cross-examine the master or provide any evidence to rebut the evidence used by the master.

The court stated that section 506(a)(3) "suffers from the same infirmities" as the statute in *Bernat* by depriving a parent of the ability to cross-examine the child's representative when faced with an adverse recommendation.<sup>19</sup> Again, this analysis would seem to render section 506(a)(3) unconstitutional in all cases, not just as applied to this specific case. The supreme court refused to do so, yet gave no indication of the circumstances under which the statute would pass constitutional muster.

#### Child's representative: role and requirements

Prior to the amendment of section 506, some trial courts appointed attorneys to serve a dual role similar to that of a child's representative, even though they had no statutory authority to do so.

For example, in *In Re Marriage of Pool*, 118 Ill App 3d 1035, 455 NE2d 887 (3d D 1983), the trial court appointed an attorney to act as both attorney for the child and GAL. The attorney made a custody recommendation to the trial court based in part on his interviews with individuals who did not testify at trial. He also based his closing argument on facts not admitted into evidence.

The Third District Appellate Court held that the attorney's recommendation was improperly based on his personal opinion, but did not reverse the trial court because no objection was made to the attorney's testimony at trial. *Id* at 1040, 455 NE2d at 891. Although the Fourth District Appellate Court in *In re Marriage of Wycoff*, 266 Ill App 3d 408, 415, 639 NE2d 897, 904 (4th D 1994), refused to follow *Pool* insofar as it held that a GAL may not make a recommendation as to custody, the case illustrates why child advocates called for creation of the child's representative.

In an apparent effort to avoid confusion, section 506(a)(3) of the IMDMA details the child's representative's duties. In short, child's representatives are to argue what they "find[] to be in the best interests of the child after reviewing the facts and circumstances of the case." 750 ILCS 5/506(a)(3). The child's representative has the same power and authority to participate in the litigation as does an attorney for a party but, again, also possesses "all the powers of investigation and recommendation as does a guardian ad litem." *Id*.

Like a GAL, a child's representative is not bound by the child's wishes but should consider them in making a determination about the child's best interests. Like an attorney for the child, a child's representative cannot be called as a witness and cannot disclose confidential communications made by the child. *Id.* Section 506(a)(3) also contains guidelines for the training requirements of the child's representative, and section 506 generally allows for appointing more than one attorney to represent the child if good cause is shown and specific findings are made.

It is unclear why the legislature chose to be so specific about the child's representative role but not that of the attorney for the child or GAL. Perhaps it was assumed the scope of those two positions had been determined by the courts and was understood by practitioners. Whatever the reason, under the current statute only the child's representative's role is defined in depth.

In the wake of *Bates*, courts may well refrain from appointing child's representatives in hopes of avoiding the ordeal of a constitutional challenge to section 506(a)(3) by the parent who receives an unfavorable recommendation. As for child's representatives who do receive appointment, how should they view their role in light of the supreme court's opinion? If they base their opinions on personal observation, are they automatically subject to cross-examination, and thus essentially playing the role of GAL? Or should they refrain from making the personal observations that would allow an in-depth investigation, thereby avoiding cross-examination but effectively becoming an attorney for the child? These are questions that courts or the legislature will surely be called upon to address.

### **Whither the child's representative?**

The legislature created the child's representative role because it believed that children need special representation – someone to work in their best interests who can do more than merely advocate for them but also observe and investigate, yet who is not subject to being called as a witness. When the supreme court found that allowing cross-examination was not contrary to any government interest, they did not consider the government's interest in protecting the *child's* best interest.

Had they done so, they might have reached a different conclusion. As it is, the utility of the child's representative option is in doubt.

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1. 750 ILCS 5/506 (2003).
  2. 750 ILCS 5/505 (1998).
  3. 2004 WL 2403721 (Ill Sup Ct 2004).
  4. See generally Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 Ill B J 458 (2001).
  5. *Id.*
  6. Robert K. Downs and John T. Phillips, *The Illinois State Bar Association Task Force on Minor Children*, Family Law (the newsletter of the ISBA Section on Family Law), Vol 42, No 6 (June 1999).
  7. *Id.*
  8. 750 ILCS 5/506(a)(3) (2003).
  9. *In Re Marriage of Bates*, 342 Ill App 3d 207, 794 NE2d 868 (2nd D 2003).

10. *In Re Marriage of Bates*, 2004 WL 2403721 (Ill Sup Ct 2004).
  11. *Bates* at 209-212, 794 NE2d at 869-872. For another perspective, see Deborah A. Carder and Abigail M. Chiesa, *The Bates Decision: The Rationalization of an Unconstitutional Child's Representative Statute*, DCBA Brief (the Journal of the DuPage County Bar Association), Vol 16 Issue 3 (November 2003).
  12. *Bates* at 213, 794 NE2d at 873, quoting 750 ILCS 5/506(a)(3)(2000).
  13. *Bates* at 214, 794 NE2d at 873.
  14. *Bates*, 2004 WL 2403721 (Ill Sup Ct 2004).
  15. *Id* at \*11.
  16. *Id* at \*12.
  17. *Id*.
  18. 405 Ill 510, 91 NE2d 588 (1950).
  19. *Bates*, 2004 WL 2403721 at \*12.
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