



Serving as a AMC After Carrubba v. Moskowitz: What Every Judge and Lawyer Should Know

By Professor Carolyn Wilkes Kaas and Sharon Wicks Dornfeld

The 2005 case of *Carrubba v. Moskowitz*, 274 Conn. 533 (2005), changes the legal landscape for Attorneys for the Minor Children (AMCs) but has been a well-kept secret. Perhaps it is because it is a legal malpractice case rather than a family case, or because the exact holdings are about immunity and standing, or because the case name doesn't sound like a family case.

The appointment of counsel for a minor child in a custody dispute between parents is governed by Connecticut General Statutes (C.G.S.) § 46b-54. Although the statute is essentially unchanged since 1974, the meaning has remained something of an open question. Only a few vaguely worded statutes (C.G.S. §§46b-54, 46b-129a,

46b-135, 46b-136, 45a-520, 45a-717, and 45a-133) and a handful of cases (*Newman v. Newman*, 235 Conn. 82 (1995), *Schult v. Schult*, 241 Conn. 767 (1997), *Ireland v. Ireland*, 246 Conn. 413 (1998), and *In re Tayquon H.*, 76 Conn. App. 693 (2003)) provide guidance on the roles and expectations of advocates for children. Our state, like most others, has not adopted a comprehensive set of standards for either AMCs or for Guardians *ad Litem* (GALs). Hence, the practice of appointing child advocates and the models of advocacy employed have tended to vary from judge to judge and from lawyer to lawyer.

Previous court decisions have avoided directly answering this question, or have offered only limited guidance to clarify and define the role of AMC. *Carrubba* finally answers the central question of the AMC debate: is the AMC limited to advocating for the stated goals and preferences of the child client, or does the attorney have a "hybrid" role, requiring him or her to act in the best interests of the child.

The Supreme Court's Decision in Carrubba v. Moskowitz

On the surface, the questions before the Court in *Carrubba* did not directly implicate the issue of the proper role or duties of AMCs or GALs, but rather

concerned the immunity of an AMC and the standing of a parent to sue his child's court-appointed attorney for malpractice. In order to decide whether an AMC is immune from suit, however, both our Appellate and Supreme Courts found it necessary to define the role of the AMC.

In addition to deciding that AMCs and GALs are immune from suit and that parents lack standing to sue them, both the Appellate and Supreme Courts defined the role of the AMC as a "hybrid" role. Both Courts also found that a court-appointed attorney for a minor child has a duty to both the child and, simultaneously, to the court to act in the child's best interests.

The Facts and Background of the Case

Attorney Emily Moskowitz was appointed by the Superior Court to represent two minor children in the dissolution action between their parents. After the divorce, the father brought a post-judgment motion and then sought to disqualify Attorney Moskowitz from representing the children in the family matter. The court denied his motion to disqualify.

Thereafter, Mr. Carrubba initiated a lawsuit against Attorney Moskowitz. In his first count, the father alleged that

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When Attorneys Interview Children: Points for Consideration

By: Dr. Wendy Habelow

Guardians *ad Litem* and Attorneys for Minor Children typically are called upon to interview children in the course of their duties to families and the courts. Talking to children in the context of the family court system has several purposes: providing the court with information to guide decisions that are in a child's best interests; yielding developmental, psychological, educational and social data that can be incorporated into an attorney's recommendations for the family; supporting or protecting the child as the family moves through the legal process; and providing a child with a secure venue to talk about feelings, needs and perspectives regarding the family and the future.

There are some general guidelines that an attorney should consider when preparing to interview a child. First, it will be helpful to the child and the process if the attorney utilizes language that supports and strengthens a child's relationships with both parents and protects the family's ability to foster healthy bonds. The attorney must avoid language suggesting that he favors one parent over the other.

Second, consider communicating to a child that while his feelings and opinions are valid, he will not be making adult-level decisions or be asked to pick between his parents. An attorney can clarify that a child's information will be used to inform the adults - parents,

attorneys, and court personnel - so they can make the best possible arrangements for the child. Asking a child "What would you like your parents to know?" rather than "What would you like to see happen?" preserves the parents' roles as chief decision-makers for the family, while enabling the child to feel that his voice is being heard.

Third, children often are aware that legal proceedings are occurring. Attorneys must balance the need to validate this awareness and to provide the child with enough information to assist them in coping with the divorce, without overemphasizing the role of the court or exposing the child to potentially damaging information. When providing this information, an attorney should take into account the child's developmental level and alliances with both parents and extended family members. Attorneys also should be cognizant of shielding the child from aspects of the legal process and family business that might be overwhelming, traumatic or simply adult-oriented. Such information might include parental health or mental health issues, domestic violence issues, sexual matters, or financial information.

Fourth, attorneys may find themselves in the position of needing to correct children's misperceptions about divorce and the legal process. Too often, children have been exposed to adult-oriented top-

ics and have been brought into the middle of adult conflicts. In these cases, attorneys can provide children with accurate information about legal aspects of divorce, as well as dispel myths that children either have generated themselves or which have been transmitted to them via other parties.

Finally, children often view divorce as an end to their lives. They experience a myriad of uncomfortable feelings such as anger, sadness, hopelessness, vulnerability and isolation from their peers. Attorneys can provide comfort to children by conveying a sense of hope about their future. An attorney can reassure children that this turbulent time will not last forever, and that they have two parents who love them and want what is best for them. A child also can benefit from hearing that the attorney will work to resolve the family's issues as best and as quickly as possible so that everyone can return to leading 'normal' lives.

Bearing all this in mind, there are two crucial elements that must be balanced when interviewing children: (1) the need to obtain accurate and useful information, and (2) the need to protect the child as much as possible from being harmed by the legal process. An attorney may wish to consider holding interviews with parents prior to interviewing a child. This will enable the attorney to gather information about the child's history, likes and dislikes, and overall functioning which will facilitate a smoother entry into the child's world, helping the child view the attorney as more genuine and attuned. There are steps that can be taken to achieve this balance. The first step in interviewing a child is building rapport, which helps a child feel as comfortable as possible with the attorney's involvement and this can occur in a variety of ways. 'Entering the child's world' will increase the child's sense of comfort. Meeting in a child-friendly location, such as a mall, playground or

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the defendant intentionally or negligently caused him emotional distress. The second count, brought as his son's "next friend," alleged legal malpractice. After the trial court granted the defendant's Motion to Dismiss, the Appellate Court affirmed, holding that the defendant was entitled to qualified quasi-judicial immunity and thus, could not be sued by the father. It also concluded that the plaintiff lacked standing to sue on behalf of his son.

The Supreme Court agreed with the trial and appellate courts that the father lacked standing to bring a claim on behalf of the child. The Supreme Court also affirmed the Appellate Court's ruling that the father could not sue his children's attorney on his own behalf, going beyond the Appellate Court's holding by concluding that AMCs are entitled to absolute immunity.

The Court's Determination of the Role of the Attorney for the Minor Child

In order to determine whether the Court should extend absolute immunity to attorneys appointed to represent children, the Supreme Court adopted the United States Supreme Court's three-prong test for immunity, set forth in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), namely: "[1] whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law ... [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties ... [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official." *Carrubba* at 541, citing *Butz* at 513 - 517.

The Court quickly concluded that the second prong is easily met. The "threat of litigation from a disgruntled parent" would "interfere with the independent decision making required by

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From the Issue Editors

Guardians *ad Litem* and Attorneys for the Minor Child. Who are we? What do we do? Why do we do it? Good questions. To some of the members of the bar, we are the lucky ones who get the plum assignments from the court, always speaking with "goodness and light," and who get court orders for payment; a regular nirvana. To the parents, we are an intrusion in their lives and they do not understand why they have to cooperate with us or pay for the intrusion. Sometimes they see us as allies who will obviously see that their views are totally correct and will gang up on their spouse and advocate for what they want at a fraction of the cost. However, they are quick to turn on us when that is not the case. For the pro se population that many of us serve, we are "the family lawyer" who will do everything for them and will make all their problems disappear in the legal system. For some judges, we are there to make these nasty cases go away, so that they will not be in the position of having to choose one parent over another and run the risk of an appeal or of a grievance against them - in other words we should settle the darn thing. For those of us representing children, we tend to view it like firemen who run into a burning building trying to contain the elements (lawyers, extended family, angry parents, court, DCF and the like) while preventing the child or children from getting torched by the process. Many of us do get burned along the way, by getting stiffed on fees for hard work done, often at moment's notice. We are quick to get left holding the bag - "will you take \$10 a week on a \$5,000 tab?" and have to deal with the aftermath of domestic battles that can leave families ravaged and children scarred.

So what is it we do anyway? We try to protect parents and lawyers from foolishly spending a family's most important asset, our client's childhood. We are there to prevent the fight from spilling over into the classroom, the soccer field, the dance recital, Christmas morning, and birthdays. We are there as the vanguards of memories: summer vacations, awards ceremonies, bar mitzvahs, and just plain old riding of bikes. We are there to remind parents that when all is said and done, it is not the time they spend with the child that counts, but the times that their children remember with them. We seek to let the children grow up without bombs going off overhead: "The Police are here again" or "We will go to court" or "Tell your Father/Mother what you really think." We are there to prevent a child from having to choose one parent over the other, but at the same time let them know: courts and judges care. We are there to get them out of the burning embers of their parent's divorce as unscathed as possible, and to protect them, their privacy, their money, and their ability to just plain be children along the way.

Why do we do it? We do it because of the kids, who, believe it or not, can be resilient, funny and can remind us that we are helping them when they most need it. We do it because it draws a certain skill set and talents out of us that can be like endorphins for runners. We do it because we draw strength from our shrinking community upon whom we rely for support, education and endurance. We do it because we need to.

This edition is for those who are part of this fire brigade. It is meant to give practical advice, suggestions and ideas as to how to improve our skills and techniques. It is to let you know that you are not alone and that, while these cases can take a toll, there are others who understand. Classes in this are not taught in law school and rarely by the bar, so we solicited articles from practitioners that are meant to help you as you ply your craft. These articles are meant to advance this field and give you hope and protection as you face evidentiary arguments, to help you understand your role and the expectations that go with it, and to give you some sense of relief as you respond to the grievance.

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A View from the Bench

Qualities of a Good Child Advocate (GAL/AMC)

By Hon. Holly Aberly-Wetstone, Presiding Judge

Regional Family Trial Docket at Middletown

I have had the privilege of presiding over the Regional Family Trial Docket for nearly four terms and have had the opportunity to observe many attorneys and mental health professionals serve in the role of Guardian ad Litem (GAL) or Attorney for the Minor Child (AMC). AMCs and GALs serve as the eyes and ears of the court outside the courtroom, presenting evidence essential to the court in making a decision regarding the best interests of children.

The most effective advocates for a child share a number of common qualities:

- Child advocates should know how to relate to the child in a developmentally appropriate manner. A book or a course on child development can be helpful in gaining these skills. One GAL testified that she always sits on the floor when speaking to a young child so they are on the same eye level. Other advocates take the child out of the house/office to a more informal setting getting to know the child away from a location that might be frightening or intimidating to a child. A first-rate advocate always sees the child more than once and in more than one location, including observing how the child interacts with his parents. A number of advocates have observed children in school or at a sports activity to see how a child interacts with peers, classmates, and figures of authority. Many GALs attend PPT meetings so they know what the child's educational needs are. If the advocate has a good rapport with an older child, he may be able to assist the child and parents in making visitation as pleasant as possible. In one case, a 14 year old girl was resisting visits with her father. The AMC made a visit to the father's home and found the child was sleeping on the floor in a sleeping bag. The AMC urged the father to provide a trundle bed for his daughter so she had a place

to sleep and could invite a friend for sleepovers. In another case, the family had two children of vastly different ages - a teen and a toddler. The father tried to do everything with both children because he felt his parenting time with each was precious. The advocate suggested to the father that he have one-on-one time in both his weekly access, as well as his vacations, so that he could engage in age appropriate activities with each child as well as allowing the siblings to bond.

- A good advocate gathers information from as many sources as possible. This includes the school, daycare, after school program, pediatrician, coaches, extended family members and the like. In one recent case, the GAL became aware that her ward didn't have any friends due to a comment from a teacher. Given that clue, she asked the child about her friendships and was told by the child that she had so many activities she had no time for friends, a significant factor for the court.
- A good advocate keeps the lines of communication open with both parents. This means not taking a position on custody or a parenting plan early in the case. A neutral position allows the child advocate to be a neutral mediator during the pendente lite portion of the case. Additionally, many cases are settled at the Regional Family Trial Docket due, in no small part, to the significant and essential assistance of the child's advocate. This would not be possible if either parent saw the GAL or AMC as favoring one parent over the other at the pretrial stage.
- A good child advocate will interact with the parents and get to know them, their parenting styles, and the crux of the custody dispute. In this capacity, if the child advocate suspects mental illness, an evaluation can be requested

and ordered early in the case so a final resolution is not delayed.

- A good advocate will ensure that the divorce case is progressing in a timely manner so his charges do not live in divorce limbo for an extended period of time. The advocate is aware that children do not experience time the same way adults do, and that a divorce that takes several years may seem like a lifetime to a child.
- A child advocate will take the time to study mediation skills to assist the parents in resolving the pendente lite disputes that cannot be resolved expeditiously by the court. Issues of this type could include extracurricular activities that the child would like to participate in, but are disputed by the parents. If the parties have to file motions and have a court hearing to resolve the matter, the sign up period for the activity will have passed before a decision is made. Summer camp and vacations often fall into this category and beg for a swift resolution in the best interest of the child.
- A child advocate will be familiar with the process of a Family Relations evaluation and a private evaluation and take part as is appropriate for the position they occupy. This can include assisting in the choice of an evaluator, making sure parents make and keep appointments, knowing when the evaluation is due, knowing when an update to the evaluation is needed, and what new issues may arise. In a recent case, the GAL was personally present during a police raid on the mother's home in which 100+ animals were removed from the home. The GAL made arrangements for the children to be turned over to their father, examined the conditions of the home during the raid, and discussed the matter with ani-

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this position” and could “deter qualified individuals from accepting the appointment in the first instance.” *Carruba*. at 543. Clearly, if parents were permitted to sue AMC's, the occurrence would be frequent, as nearly every contested custody case results in one or both parents being disgruntled. Unquestionably, the ability of the parents to sue would prohibit anyone from serving as an AMC.

The Court also ruled that the third prong was satisfied because adequate safeguards protect against an AMC abusing the position: An attorney for a minor child may be removed by the court, and the attorney is “subject to discipline for violation of the Code of Professional Conduct.” *Id.* at 543.

The first prong of the test, however, required the Court to perform an analysis of the function of AMCs. Specifically, the Court found that it was necessary to determine “whether it is the duty of the attorney to serve the best interests of the child, or her duty to act as the child's advocate.” *Id.* at 539. The Court concluded that being an attorney for a child is fundamentally different from being an attorney for an adult, holding that a child's attorney must advocate for what is in the child's best interests, regardless of the child's expressed preferences.

To reach this conclusion, the Court reasoned that because the decision to appoint an AMC pursuant to C.G.S. § 46b-54 must promote the child's best interests, the AMC's “representation of the child must always be guided by that overarching goal...” *Id.* at 544.

The Court went on to comment on the manner of the AMC's representation. “[T]he attorney is not to take a passive role but should present all evidence available concerning the child's best interests. The attorney is not simply to parrot the child's expressed wishes.... Thus, this obligation imposes a higher degree of objectivity on a child's attorney than that for an attorney representing an adult.” *Id.* at 545.

The decision unmistakably requires that service as an advocate for the *Carrubba v. Moskowitz* continues on page 12

Rutkin's Rubric

By Arnold H. Rutkin

Buried toward the end of the article entitled “Serving As An AMC After *Carrubba v. Moskowitz*: What Every Judge and Lawyer Should Know,” is a sentence which should embarrass any lawyer or judge. The sentence correctly sets forth the truth about the free pass given to AMCs, namely, “The decision (*Carrubba v. Moskowitz*) also treats judicial oversight in a cursory manner. Parents, it is held, lack standing to complain about their child's AMC but there is no discussion of how AMC misconduct might come to the court's attention if not on the complaint of a parent/party.” When you read the articles by Steve Dembo and the Q & A article with Mark Dubois, Chief Disciplinary Counsel of the Statewide Grievance Counsel, you realize that there is no oversight regarding the conduct of GALs and AMCs, and there is virtually no accountability.

Not all GALs/AMCs (hereinafter referred to as “child advocates”) are created equal. At the present time, other than law school, there is no special training. There is no requirement to take a full year's course in child development and, since many of our cases involve dysfunctional families, there is no requirement that child advocates take a course in family systems and abnormal psychology. All you need is a JD. Some of us think that because we have children or grandchildren, that qualifies us to be child advocates. After all, we raised children and that makes us experts, doesn't it? We would be very critical of a Family Relations Counselor who was untrained. Yet, we allow lawyers with no real training to do the work of an expert. There are some child advocates who became child advocates because it seemed like an easy way to be in the field, as you could do family work without really learning the skills of a trial lawyer, including the case law or the rules of evidence-kind of like some people who think that owning a house makes them qualified to be a real estate agent.

There are some lawyers who are child advocates who have never had children or been married or both. While I believe that being a parent does teach a certain amount of child development, this can be learned other ways. And it is axiomatic from the cases we see in court, having children does not necessarily a good parent make you. There are lawyers who I regularly recommend to my clients to be the child advocate who are not married and/or have never had children. These lawyers have taken the time to get the training and are skilled in understanding the behaviors of children. They have either had courses or meet regularly with mental health professionals to get the information and training required and have excellent judgment.

Child advocates are not the only lawyers who need this training. Lawyers who do family law should be required to take the same courses. The lawyers who represent the parents are the first line of defense (and offense) in potential child custody cases. Early intervention by the court system does little to help if untrained bombers, usually the ones who only represent the husband or the wife, get their hands on vulnerable clients. The first thing we want to know in a new case is: who is representing the other side?

In the early days of the Regional Family Trial Docket (RFTD), there were training courses offered by the court. Many of the best child advocates today attended those courses. We have many dedicated mental health professionals (MHPs) who volunteer as special masters at the RFTDs. There are likewise many of us who volunteer, year in and year out, as special masters in the RFTDs in Middletown and Waterbury and their local JD's. I think it is time to repeat those programs started by Judge Joseph Steinberg, who is the founder of the RFTD.

While this issue is extremely informative, it is also a love-in by and for the people who do this kind of work. Yes it is difficult, stressful and sometimes even dangerous, though less so now that they have gotten the “Get Out of Jail” card from the Supreme Court. There are many problems which need to be discussed.

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Gennarini: What Does it Really Mean

By: Campbell Barrett

It is well established in Connecticut that a trial court may consider the preference of a minor child when fashioning custody or parenting access orders. Indeed, this function has been codified in Connecticut General Statutes (C.G.S.) § 46b-56(c), providing that "in making or modifying any order [for the custody or care of a child]...the court may consider...(3)any relevant and material information obtained from the minor child, including the informed preferences of the child....". In addition, C.G.S. §46b-57, concerning third party custody actions, permits a court to "give consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference." The questions arise, however, how a trier of fact learns of a child's custodial preference, and what steps may be taken, in both a constitutional and evidentiary context, to insulate children from the crucible of their parents' litigation. These questions were squarely answered by the Appellate Court in the case of *Gennarini v. Gennarini*, 2 Conn. App. 132, 477 A.2d 674 (1984).

Undeniably, *Gennarini* is the seminal case in Connecticut concerning the articulation of a minor child's preference in contested custody and access litigation. The case is frequently cited and addresses a number of constitutional and evidentiary issues surrounding the voice of the child in these difficult matters, including the permissible procedure under which courts may take the direct testimony of minor children. The case is also rich in *dicta* and includes a scholarly discussion of the circumstances in which a child's otherwise hearsay statements may be expressed to the court. This article will discuss the various holdings of *Gennarini* and how the case is utilized - and perhaps misapplied - by members of the bar in contested custody and parental access cases.

Gennarini involved a post-judgment motion to modify visitation filed by the plaintiff-mother. During the course of the hearing on the motion, the trial court (Sullivan, J.) conducted a private *in camera* interview of the parties' minor child for purposes of determining the child's preference

with respect to the issues raised in the mother's motion. The defendant-father objected to the interview being conducted in the absence of the parties and their counsel, based on the claim that he had a constitutional right to be present and participate. The court rejected the father's arguments, granting the mother's motion, thus substantially limiting the father's access time with the child. The father appealed.

The Appellate Court (Borden, J.) reversed the decision of the trial court, concluding that, absent the consent of both parties, it is a due process violation for a fact finder to conduct an *in camera* interview of a minor child. The court determined that neither of the two principal justifications advanced in support of this procedure - the necessity of determining a child's preference for purposes

child.

- 2) Questioned whether the testimony elicited during an *in camera* interview is sufficiently reliable, given the emotional "maelstrom" that children involved in contested cases may find themselves in and the "transient" nature of the feelings that children possess in this regard.
- 3) Determined that a parent must be present during the interview in order to give the trial court his or her interpretation of the child's demeanor during the testimony.
- 4) Determined that the fundamental need for the perception of fairness in contested custody and parental access cases was undercut by a procedure that permitted secret evidence.

The Appellate Court concluded that

Undeniably, Gennarini is the seminal case in Connecticut concerning the articulation of a minor child's preference in contested custody and access litigation.

of a custody or access determination, or the desire to obtain this information in a setting that is not unduly traumatic to the child (which necessarily must be outside the presence of the parents) - sufficiently outweigh the due process requirements of fair notice and the reasonable opportunity to be heard.

Moreover, the court determined that both of these justifications may be based on faulty assumptions. The court's holding in this regard is particularly interesting in that the court's reasoning and language lend themselves to application in cases where a child's preference is at issue. Specifically the court:

- 1) Questioned whether the preference of a child is in fact such a critical component of custody cases in general, given that the weight of the preference varies greatly from case to case depending on the age and maturity of the

the only constitutionally permissible manner in which a trial court can take the direct testimony of a minor child in a contested access custody case - absent the consent of both parents to a private interview - is to hold a full hearing in the presence of the parents and their counsel. This is commonly referred to as a "*Gennarini* Hearing."

The decision to request a *Gennarini* Hearing is both difficult and nuanced. It is a tactical determination that is dependent on a number of factors, including the perceived strength of the child's preference, the possibility that the child might equivocate upon examination, and, perhaps most importantly, the desire to insulate the child from the traumatic experience of an *in-court* examination. It is also important to consider the distinct possibility that a trier of fact may determine that a parent who willingly subjects a child to the ordeal of testifying is not acting

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Standing to Seek Disqualification of the Guardian Ad Litem or Attorney for the Minor Child in a Family Court Proceeding

By: Steve Dembo

Connecticut's Appellate and Supreme Courts have recognized that "both court-appointed Guardians *ad Litem* and attorneys provide invaluable services to the children of Connecticut and the judicial system alike, and are, generally speaking, grossly underpaid, if paid at all". See generally, *In Re Tayquon H.* 76 Conn App. 693, 701, 821 A.2d, 796 (2003).

Although the judiciary recognizes the role of the Guardian *ad Litem* (GAL) and the Attorney for the Minor Child (AMC), it is often the case that one or both parents are dissatisfied with their recommenda-

C.G.S. §45a-132 governs the appointment of a Guardian *ad Litem* in any proceeding in the Probate Court, Superior Court and Family Support Magistrate Division. Subsection (d) states that the appointment of a Guardian *ad Litem* may be made with or without notice and further provides in subsection (f) that "the Guardian *ad Litem* may be removed by the judge or magistrate which appointed him without notice, whenever it appears to the judge or magistrate to be in the interests of the ward or wards of the guardian." (See also Practice Book Section 25-62 authorizing the court to appoint a Guardian *ad Litem* for a minor involved in any family matter).

matter of the decision, as opposed to a general interest that all members of the community share.... Second, the party must also show that the ...decision has specially and injuriously affected that specific personal or legal interest.... Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Missionary Society of Connecticut v. Board of Pardons & Paroles*, 278 Conn. 197, 201-202, 896 A.2d 809 (2006).

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause... Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it... [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction... The objection of want of jurisdiction may be made at any time... [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention.... The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Frillici v. Westport*, 264 Conn. 266, 280, 823 A.2d 1172 (2003). A Motion to Dismiss is the vehicle to raise the issue of lack of standing.

Parents in family law cases have limited rights to seek the removal or disqualification of a child's attorney or Guardian *ad Litem*.

Most if not all of the decisions which address the removal of a Guardian *ad Litem* or AMC discuss the concept of standing.

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.... Two broad yet distinct categories of aggrievement exist, classical and statutory.... Classical aggrievement requires a two part showing. First, a party must demonstrate a specific personal and legal interest in the subject

tions and/or opinions and seek to have such individual removed from his or her case. This article will briefly address the authority of the court to appoint a GAL and AMC and discuss the right of a parent to seek the removal of same.

(i) Authority of the Court to Appoint GALs and AMCs

Connecticut General Statutes (C.G.S.) §46b-54 titled "Counsel for Minor Child. Duties" is the statutory authority upon which a court may appoint counsel for any minor child or children at any time after the return date of a complaint. This statute permits appointment of counsel on the court's own motion, at the request of either party or legal guardian of any child or at the request of a child who is of sufficient age and capable of making an intelligent request.

(ii) Removal/Disqualification

Parents in family law cases have limited rights to seek the removal or disqualification of a child's attorney or Guardian *ad Litem*. The relevant decisional law provides that parents lack the requisite standing to file such motions with respect to a

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child's wishes "must be subordinated" to the duty to serve the child's best interests. *Id.* at 546.

The Court noted, however, that as a child gets older, she becomes more mature and more articulate, and is more likely to prefer a result that happens also to be good for her. Thus, the role of a lawyer for an older child may shift towards more traditional advocacy, but it does so only because the tension between the "dual obligations" is less, not because the job is necessarily different.

Having defined the role of an AMC as "hybrid," and an AMC as ultimately a proponent of the child's best interests, it was easy for the Court to conclude its functional immunity analysis by ascertaining that the role of a child's counsel is integral to the judicial process and "most closely resembles a guardian ad litem." *Id.* This, in turn, permitted the Court to follow the other jurisdictions which have "almost unanimously accorded guardians ad litem absolute immunity." *Id.* at 547. Finally, the Court concluded that both GALs and AMCs need absolute immunity to ensure that they can "function without the worry of possible later harassment and intimidation from dissatisfied parents." *Id.* at 547.

The Court found that a parent lacked standing to bring a legal malpractice claim either individually or as the child's "next friend." The Court agreed with the Appellate Court that "parents lack the necessary professional and emotional judgment to further the best interests of their children." *Id.* at 552. Because the child's attorney was responsible for acting in the best interests of the child, the parent cannot object to those actions taken in furtherance of the child's best interests. Further, neither court wished to permit a parent to "penetrate the shield of immunity" merely by bringing a lawsuit in the child's name as "next friend." *Id.*

THE IMMEDIATE IMPACT OF CARRUBBA:

The Court's bold decision establishing a "hybrid" role for AMCs answers one of the important questions in fami-

ly law that has gone unanswered for years.

The opinion also provides some practical guidance. It expands on the *Ireland v. Ireland*, 246 Conn. 82 (1998), holding that, unlike GALs, AMCs may not testify as witnesses or submit written reports. It also confirms the *Ireland* language: "An attorney for the child should participate in legal proceedings by submitting trial briefs, questioning witnesses, giving oral argument, and, generally, by functioning in a manner similar to an attorney for an unimpaired adult." *Ireland* at 440. However, Carrubba clearly directs counsel to use those tools to serve the best interests of the child. "[T]he attorney is not to take a passive role but should present all evidence available concerning the child's best interests." *Id.* at 545. The AMC's duty, therefore, is to ensure that all relevant evidence is brought before the Court, whether or not it supports the child's expressed position. It should go without saying that the AMC must also ensure that the child's own wishes are made known to the Court, although the Court never articulates this expectation.

As the Supreme Court agreed with most of the Appellate Court's reasoning, it presumably approved the Appellate Court's more detailed description of the practical aspects of the AMC's job as well. "Those attorneys serve as counselors, advisers, negotiators, conciliators and investigators. More than advocates, those attorneys also must attend to the special emotional needs of their young clients..." Further, in discussing the "blurred" distinction between a Guardian *ad Litem* and an Attorney for the Minor Child, the Appellate Court notes that "[o]ften, appointed attorneys for the minor child will speak with social workers, counsel for the parents and teachers, as well as family and friends..." *Carrubba v. Moskowitz*, 81 Conn. App. 382, 394 (2004). The Appellate Court also describes the assistance an AMC provides to the court because he or she acts as "an independent fact finder and can assist the court in determining relevant evidence free from the parents' bitterness." *Id.* at 393.

Carrubba will likely in most cases - and should - eliminate dual appointments of both GALs and AMCs on behalf of the minor child, thereby avoiding confusion to the child, duplication of efforts, and extraordinary expense. The convenience of appointing a lawyer as GAL, who is able to testify, is familiar with the process and other counsel, and often is known to the court, should not outweigh these advantages. Presumably, there may also be situations in which it is more appropriate to appoint a classic Guardian *ad Litem*, as, for example, when there are significant mental health issues. The Supreme Court makes no mention of such an appointment.

Carrubba does not resolve all outstanding questions about representing children in custody cases. Unfortunately, AMCs and judges still lack a comprehensive set of standards to govern the representation of children. The decision also treats judicial oversight in a cursory manner. Parents, it is held, lack standing to complain about their child's AMC, but there is no discussion of how AMC misconduct might come to the court's attention if not on the complaint of a parent/party.

Despite the Court's acknowledgment that representing children requires a special expertise, there is no discussion of what particular training or experience should be necessary to qualify a lawyer to serve as an AMC, or whether the cloak of absolute immunity should impose a special obligation on attorneys serving children to meet higher standards of ethics and competence than is expected of attorneys for adult parties.

Questions and problems may remain, but there is no dispute that *Carrubba v. Moskowitz* is a very significant case. The pronouncement that the AMC's first duty is to the child's best interests, and that the AMC's role is hybrid, is a big step towards uniformity and consistency in the representation of children. There is more work to be done before all children are represented only by well-trained, well-paid, and competent counsel. In the meantime, no lawyer practicing family law, or judge sitting on a custody case, should be unfamiliar with the legal malpractice case of *Carrubba v. Moskowitz*. •

Interview Children

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ice cream shop, and engaging in child-friendly behaviors, such as eating, playing games, coloring, or taking a walk, all help normalize the situation for the child by approaching the child at his developmental level. The attorney should explain the purpose of his involvement with the child and family using language as neutral and developmentally appropriate as possible, and give the child opportunities to ask questions throughout the interview.

The next step, after rapport building, is securing relevant information, which is best accomplished by asking the child open-ended or feelings-oriented questions. It is necessary to gauge the pacing of the interview by observing the child, how easily he can engage and how comfortable he seems with the interview process. An attorney should have an understanding of child development in order to know how to tailor questions and discuss themes that are suitable for children of varying ages. In addition, it will be useful to ascertain the child's awareness of the current family conflict in order to provide feedback regarding the child's experiences of the current situation. It also is important to discuss the parameters of confidentiality with the child, so he is clear about how interview information

will be shared. Throughout the process of interviewing, an attorney must continually evaluate a child's psychological sophistication, temperament and family circumstances in order to maintain rapport, protect the child, and procure the most pertinent information.

As part of the interview process, it is important to respect a child's boundaries. This means that the attorney should be aware of not seeming to push a child to be comfortable with the interview setting or with providing information if he seems reticent or unwilling. Children come to a professional's office with innate temperaments, as well as biases, and moving slowly and cautiously tends to provide children with the most comfort, which, in turn, will encourage them to provide necessary information. It also is important that the attorney not appear to try to convince a child that their perceptions or experiences are wrong or untrue. As the relationship strengthens and trust builds, some gentle challenging can take place. However, such challenges should occur as reframing statements and indirect questions that serve to expose a child to a different point of view. For example, a child may put forth that a parent does not love them because that parent is leaving the home. Rather than contradict the child's feelings and experience, consider validating what the child expressed by saying, "I can see

how it would seem that way to you" and then asking the child to think about whether that parent may show love for the child in other ways.

It also is crucial that an attorney maintain a neutral demeanor and avoid asking a child questions or entering into a discussion that directly or indirectly lead a child to believe that they need to choose between their parents. However, attorneys do need to gather information about the nature of a child's interactions with and feelings about both parents. So how does one ask questions in such a way as to support a child's positive relationships with both parents? Typically, questions that serve as a window into a child's life will be the least inflammatory. Such questions might include, "Who do you usually ask to help you with your homework?", "Who bought you that great toy?", "What games do you play with your Mom/Dad?" These will yield great insight into how the child and parents function and the quality of the family relationships than directly asking a child, "Which parent do you want to live with?"

Throughout the divorce process it is important to remember that the children are the innocent bystanders of their parents' conflict. A good advocate for the children can recognize this, and by following the above tips, reduce the amount of stress the children experience. •

A View from Bench

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mal control officers and the police to determine the danger to her wards. The GAL's information was invaluable to the Family Relations Counselor conducting the evaluation.

- A child advocate will be familiar with current case law and statutes, as well as trends in custody cases. The Connecticut Bar Association and local bar associations hold regular seminars on a variety of topics in Family Law for both the new and experienced lawyer.
- The child advocate should be familiar with community resources that can help the family transition through the divorce process: this would include programs

such as PEACE, Avon, CT; Kids First, Middletown, CT; PACT, New Rochelle, NY; COPE, Brookfield and Sandy Hook, CT; FOCUS ON KIDS, through CT Council of Family Service Agencies; Connecticut Resource Group, Waterbury, CT; The Family Mediation Center, Birmingham Group Health Services, Ansonia, CT; Enduring Families, Branford, CT; Changing Directions, Danbury, CT. Advocates should also be aware of local programs for supervised visitation, as well as communications methods for parents including the www.OurFamilyWizard.com and www.Sharekids.com web sites.

- The AMC will be skilled in conducting direct and cross examination of trial witnesses and know when to call his

own witnesses. The AMC will know how to develop a trial strategy and use it during trial. The GAL will know how to testify and be prepared to do so. Most often it is necessary for the GAL to have his file in court and available to refresh his recollection regarding the dates of contacts, telephone calls, sources of collateral contacts, and content of discussions. The GAL should be prepared to give reasons for his recommendation based on the pretrial investigation and evidence presented at trial.

- A good child advocate, knowing that his fees are proper and necessary, should pursue whatever is required to ensure that they are paid in full and in a timely manner. This may mean filing

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A View from Bench

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a motion with the court for an initial retainer, filing for an additional trial retainer if necessary, having updated billing available at trial, and having an affidavit of attorney and GAL fees available for the court at the conclusion of trial.

- The child advocate should be familiar with the various privileges that protect children and determine when it is in their best interest to waive those privileges. Oftentimes during a dissolution, the child may be in therapy and either parent may try to call the child's therapist as a witness. The child advocate should have consulted with the therapist and determined in advance if it is in the child's best interest to waive the privilege at trial.
- The child advocate plays a crucial role in the case if a referral has been made to DCF. The advocate should communicate with DCF during the investigation and be aware of the allegations and the outcome.
- If allegations of domestic violence have been raised, the advocate must investi-

gate and do whatever is necessary to ensure the child is not in physical danger and is not a witness to violence at exchanges.

- The child advocate plays a crucial role in assisting the child in obtaining appropriate mental health services. On more than one occasion, this court has been alerted to serious depression or suicidal/homicidal thoughts being entertained by a child.
- If allegations of substance abuse have been raised, the advocate must make sure the children are never placed in harm's way. This may include bringing an emergency motion if a parent is charged with DUI or other offense involving the abuse of alcohol or drugs.
- If either parent is involved with a significant other (or if in a post judgment case, one or both of the parents has remarried), the investigation should include interaction with the significant other. In addition, if the significant other has his own children, the advocate should know how much time the blended family spends together, how they relate to each other, and how they get along.
- If a child is actively resisting visitation,

the advocate must investigate the cause of the resistance. The resistance may be due to the discouragement of a parent but just as often can be due to the non-residential parent not having adequate facilities for the child and/or not allowing the child to go about the business of being a child during the visit, e.g., the child's normal activities of play dates, sports activities, etc., being shortened or even eliminated during the visit because the parent wishes to make up for time lost with the child. In this case, the job of the advocate may be to educate the nonresidential parent.

Oftentimes, the job of the child's advocate/guardian is the most difficult in the divorce process due to the constant balancing act s/he plays. A good job requires more than just meeting once or twice with the child and making a recommendation to the court at trial if the case doesn't reach a settlement. In general, the GALs and AMCs that I have seen at the Regional Docket do an outstanding job and truly care about the welfare of their charges. Their investigation and insight have been invaluable in helping this writer make decisions that are in the best interest of the children. •

Rutkin's Rubric

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The articles written by Hon. Holly Abery-Wetstone and Dr. Wendy Habelow are a good place to start. Both articles should be mandatory reading by ALL lawyers doing family law. **THEY DO NOT APPLY ONLY TO CHILD ADVOCATES!!!!** Every single point made by both authors is critical to the successful management and preparation by every lawyer in the case. The predominant theme in Judge Abery-Wetstone's article is preparation with a capital P. Cases which are sloppily handled and sloppily prepared will potentially damage the family and the children. Having been a special master many times, there is nothing more frustrating than an unprepared lawyer in a custody case. Unfortunately, it happens frequently. These cases should not be taken if you can't put in the necessary time and that goes for the child advocates, too!

Prior to the decision in *Carrubba*, members of the Family Law Section were active-

ly working on a protocol to help child advocates determine whether to be GALs, AMCs or a hybrid. Unfortunately, their efforts were cut short with the short cut offered in *Carrubba* by the Supremes. *Carrubba*, in my view, has threatened the very integrity of the position of "child advocate." Prior to *Carrubba* we used GALs for younger children. Their depositions could be taken and they could be called as witnesses. (Whether a report could or should be written by the GAL is a separate issue). The GAL frequently functioned as an evaluator and is still encouraged to do investigations and fact collecting, frequently without the training of a Family Relations Counselor or therapist. Since *Carrubba*, a child advocate without direction from the court, can decide whether to be an AMC or a hybrid. If an AMC, the child advocate can take depositions but cannot be deposed, can put on witnesses but cannot be a witness. However, this same lawyer can also decide to be a hybrid and can advocate best interests WITHOUT being able to be

deposed or cross examined. This is what happens when the Supreme Court starts practicing law again, without the experience of the real life issues of practicing family law.

Unfortunately, Professor Kass in her analysis of *Carrubba* forgot her course in due process and paid lip service to the problem of lack of judicial oversight and lawyer accountability and training. Fortunately, *Carrubba* seems not to be followed by many child advocacy lawyers in the real world. They at least understand and feel the conflict of interest with their roles and the need for separation of function and INTEGRITY.

Another but related problem is the statutory issue of waiver of privilege by the GAL. Can an AMC, even acting in the hybrid role, waive the privilege of a child for parents who do not agree? It could happen with no opportunity for the lawyers for the parties to be able to examine the AMC's decision.

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Rutkin's Rubric

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One of my favorite issues is the subject of the child advocate talking to the parties. This is an area where I think the lawyer for a party could be subject to a grievance or malpractice claim. Many lawyers simply let their clients have conferences with the AMCs without their presence. Admittedly, I do that on rare occasion. However, there is the matter of lack of confidentiality in such a conference. In most situations, I permit the meeting but sit in the back of the room and listen. Usually, I only speak during the meeting if I think my client left out some important information which I think the child advocate should have. I assume you wouldn't let the lawyer representing the adverse party have a conference with your client without your being present. How can you know what is said by your client unless you are there?

Let's be candid. As I said at the outset, all child advocates are not equal. Not equal in training, experience, maturity and oh yes, integrity. We owe it to the clients and the children to make sure that a judge makes the decision where necessary, rather than a biased or uninformed AMC doing so. It is up to the lawyers of the parties to facilitate the job of the child advocate while at the same time affording our clients the due process and professionalism to which they are entitled. The problem can best be identified by one of the edited and deleted comments of one of the "blue ribbon" GAL participants in the article in this issue. Here is a quote from that lawyer as to the question of whether he/she should submit a written report. Most of the GALs said yes. However, one said, "No way, cross examination is hard enough to withstand, I am not giving my colleagues a "road map" of my case." Even though I am Executive

Editor of this newsletter, I have not inquired as to this lawyer's name. In my view, he/she should reconsider some other specialty. Family Relations Counselors and court appointed evaluators do file reports and they are subject to discovery depositions and examination at trial. Judges are supposed to make the decisions in these cases-not GALs or AMCs. If you can't stand the heat, get out of the kitchen!

The better the training we all have, the better the parties and the children will be served. We owe them the best that we can be at what we do and that means training and preparation. There are many child advocates who are thoughtful and humble about the amount of power and leverage they have by virtue of the lack of judicial guidance and oversight. It is that thoughtfulness, humility and integrity which makes them successful and so helpful to the lawyers representing the parties. •

Highlights

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the plaintiff one-third "of his income as an attorney...to be paid at the same time he receives his own salary and bonus" until December 31, 2001, and one-quarter of that income thereafter, until December 31, 2012. *Id.* at 379.

A dispute arose about whether the defendant's contribution to his retirement plan and his auto allowance were part of his "income as an attorney." Each party claimed that the agreement was unambiguous, thereby precluding the use of parole evidence in determining the parties' intent. The plaintiff claimed that the language unambiguously indicated the inclusion of those items; the defendant claimed that the language unambiguously indicated their exclusion. Because the defendant did not include the retirement contributions and the car allowance in calculating his payment to the plaintiff, she filed a motion for contempt.

The court then analyzed the definition of income, noting.

Net earned income for a wage earner is the gross amount of salary, wages or commissions, less all deductions by the employer for obligatory statutory or contractual obligations of the employee. Withholding of income taxes, FICA, and wage garnishment are examples of deductions required by law. Union dues, insurance premiums and some deductions for pension plans are examples of deductions authorized by contract. Optional deductions, such as for IRAs, profit sharing plans, stock purchases, and credit union deposits are not proper deductions for a determination of net earned income for alimony or other financial orders ... The latter deductions are optional and inure to the benefit of the employee. They are basically within the control of the employee and would allow him to establish the amount of his own net

income were he allowed to deduct them from gross income. *Sunbury v. Sunbury*, 13 Conn. App 651, 661-662 (1988), rev'd on other grounds, 210 Conn. 170 (1989)

Considering the above definition of income, the contributions to the defendant's retirement plan were optional and therefore considered income. Additionally, the phrase "to be paid at the time he receives his salary and bonus" merely referred to the timing of the payment, and did not limit the components of the defendant's income to merely salary and bonus. Accordingly, the court found that the defendant had violated the terms of the separation agreement.

Rather than ruling on the contempt motion, the court ordered further evidence as to whether the defendant's violations were intentional and "without reasonable explanation." Although no decision was rendered on the plaintiff's contempt motion, this decision provides a clear analysis of the separation agreement as a contract and of the parole evidence rule.

Highlighting Inconsistencies

In *Ranfone v. Ranfone*, 40 Conn. L. Rptr. 560 (Conn.Super., 2006, Frazzini, J.) the defendant filed a motion to reargue the court's order issued as part of its dissolution judgment. The trial court had awarded the Wife 50% of the value of the Husband's Connecticut Municipal Employees Retirement System pension plan, valued as of the date he becomes eligible to begin collecting his share of the pension. *Id.* at 560:

At the time of trial, each of the parties was nearly 40 years of age, and the Husband clearly was not yet eligible to begin collecting his share of the pension.

In his motion to reargue, the Husband's claim, that the court lacks authority to award the plaintiff any portion of the pension he earns after the date of the dissolution, was rejected.

The trial court, as authority to support its decision, cited

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Gennarini

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in the child's best interest and that by extension he or she is not an optimal custodial parent. This is certainly an inherent risk in seeking a *Gennarini* Hearing, as evidenced by the Appellate Court's express reference to the procedure as a "distasteful choice."

In almost certain recognition of the undesirability of subjecting a child to the ordeal of testifying, the Appellate Court in *Gennarini* goes to great length to set forth alternate ways in which a trial court can learn of a child's custodial preference. Indeed the court references the "spectrum of available" choices that exist in the event that parents do not agree to an in-chambers interview in their absence, with the extremes of, on one end, having the child's preference not expressed to the court, and, on the other end, having the child testify as an ordinary witness. In between these two extremes, the court identifies some middle ground, such as having the court understand the child's preference from the contents of the Family Relations report, and "from the testimony of the domestic relations officer and any experts or other witnesses, who have had contact with the child." *Id.* at 139. The court, relying heavily on the New Jersey Supreme Court case of *Callen v. Gill*, 81 A.2d 495 (N.J., 1951), held that these types of statements were not necessarily hearsay because the purpose of the court hearing the remarks attributed to the child were not to weigh the truth of the statements but rather to learn the child's temperament, disposition and reaction when making them, falling under the state of mind exception to

the hearsay rule.

This secondary holding in *Gennarini* dealing with the child's "state of mind" is perhaps the most frequently cited, and perhaps misapplied, aspect of the case. It is often relied on for the proposition that a parent can simply testify to what a child has told them about a custodial or access preference. This is directly contrary to the decision in *Gennarini*, which was clear that this type of testimony must be for the purposes of looking into the "child's mind and not to establish the truth or falsity of other matters set up as facts." To permit a parent to testify about a child's preference in order to prove that preference would be antithetical to the entire *Gennarini* decision, and would encourage a practice of parental inquisition and pressure in virtually every custody or access case.

Some trial courts have even taken the view that the Appellate Court's language in *Gennarini* expressly precludes a parent from testifying concerning a child's state of mind in this context, and that the usage of the words "domestic relations officer and any experts or other witnesses" references a specific class of individuals having contact with the child, but with no interest in the outcome of the litigation, such as teachers, pediatricians, therapists, and guardians *ad litem*. Although there is no written decisional law expressly sanctioning such a rule, it is certainly logical, and would seem consistent with the underlying basis of all exceptions to the hearsay rule, to wit: that the individual offering in-court testimony exhibits sufficient credibility to be of aid to the court - a trait that a parent involved in custody litigation would certainly appear to lack. Moreover, the

approach would appear to be consistent, at least from a factual standpoint, with the relevant law from sister states that have addressed the issue: New Jersey in *Callen v. Gil*, supra, where the mother's counselor was permitted to testify about conversations he had with the child to demonstrate the child's emotional state; Washington in *Betts v. Betts*, 473 P.2d 403 (Wash. Ct. App., 1970), where the child's foster parent, who was not a party to the litigation, was permitted to testify about conversations she had with the child to demonstrate the child's state of mind; and Utah in *Kallas v. Kallas*, 614 P.2d 641 (Utah, 1980) where the child's statements to a psychologist were admitted to demonstrate the child's state of mind. Perhaps most importantly, by requiring the testimony to come from a "non parental source", it would also dissuade parents from pressuring a child for an articulation of a particular custodial or access preference - an abhorrent practice that would be encouraged if a parent were permitted to testify about the child's state of mind.

Gennarini goes beyond simply establishing a constitutionally adequate procedure under which a child can be called as witness in a contested custody proceeding. Indeed, it expressly condones this procedure as being "distasteful" and establishes less traumatic, and perhaps more effective, measures by which a trial court can ascertain a child's preference for purposes of C.G.S. §§ 46b-56 and 46b-57. These alternate measures are almost always preferable from a tactical point of view, and, more importantly, reduce the exposure that children have to their parents' custody and access litigation. •

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Hansen v. Hansen, 80 Conn.App. 609 (2003), and *Bender v. Bender*, 258 Conn. 733 (2001).

Hansen did uphold and enforce a separation agreement providing that the pensioner's deferred compensation be valued and divided at the time the pension benefits became available to the pensioner. However, *Hansen* was decided on the basis of contract interpretation and enforcement, rather than on the classification, valuation and distribution of assets.

Finding that there was no ambiguity in the separation agreement, the clear meaning of the separation agreement was enforced, which provided the Wife with a share in pension benefits subsequent to the dissolution of the parties' marriage. The court in *Ranfone*, however, found that *Hansen* "held that a court may award to a spouse a portion of retirement benefits earned by his or her former spouse subsequent to the date of dissolution." *Id.* at 560. This clearly is an expansion of the holding in *Hansen* which concerned only the enforcement of an agreement, not the ability of the trial court, in the absence

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Guardian Ad Litem

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child's attorney, unless it can be demonstrated that the child's advocate has acted in a way that directly prejudices the parent's claim(s). *Schult v. Schult*, 40 Conn. App. 675 (1996); *Strobel v. Strobel*, 64 Conn. App. 614, 620 (2001); *Lord v. Lord*, 44 Conn. App. 370 (1997). This rule of law was expressly extended to guardian ad litem in the cases of *Rubenstein v. Rubenstein*, 2004 WL 574531 (Conn. Super., Devine, J.) and *Wilkinson v. Weigand*, 1997 WL 446256 (Conn. Super., Munro, J.).

The rationale for this rule of law was discussed by the Appellate Court in *Taft v. Bettcher*, 35 Conn. App. 421, 428 (1994). "The purpose of appointing counsel for a minor child in a dissolution action is to ensure independent representation of the child's interest... In child custody proceedings, parents lack the necessary emotional judgment to further the best interest of their children. Neither parent could be relied on to communicate to the court the children's interest where those interests differed from his or her own interest. A parent's judgment is or may be clouded with emotion and prejudice due to the estrangement of husband and wife". *Id.* As recognized by Judge Munro in *Wilkinson*, supra, "as a matter of public policy, it would be troubling for a parent/guardian to be able to challenge a Guardian *ad Litem's* continued appointment each time the parent/guardian becomes disillusioned with the work or position of the Guardian ad Litem".

The Connecticut Supreme Court in the case *Carrubba v. Moskowitz*, 274 Conn 573, 877 A.2d 773 (2005) recently had the opportunity to address the related issue of the right of a parent to assert a claim of legal malpractice against an attorney appointed to represent a child in a family court proceeding. The Supreme Court, Borden, J. held that the father, as next friend to his minor child, lacked standing to bring such litigation against the attorney. The Supreme Court held:

"We recently noted that the United States Supreme Court, in *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), stated

that, "to establish next friend status, a person: (1) 'must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate...[and] must have some significant relationship with the real party in interest'; and (2) 'must provide an adequate explanation-such as inaccessibility, mental incompetence, or other disability-why the real party in interest cannot appear on his own behalf

The Supreme Court in In Re Christina M., gave parties standing to raise claims when their status as parents is challenged.

to prosecute the action.' . Under normal circumstances, parents of a minor child satisfy both prongs of this test because they are presumed to act in the best interests of the minor child. We agree with the Appellate Court, however, that, in a custody dispute, "parents lack the necessary professional and emotional judgment to further the best interests of their children. Neither parent could be relied on to communicate to the court the children's interests where those interests differed from his or her own.... A parent's judgment is or may be clouded with emotion and prejudice due to the estrangement of husband and wife." *Carrubba* at 402-403. (Internal quotation marks omitted, citations omitted.)

Balanced against the parent's limited rights is the long standing principal in Connecticut jurisprudence that Judges of the Superior Court have an independent obligation to oversee the legal rights and representation of minor children. See *Aphorp v. Backus*, 1 Kirby (Conn.) 407, 409-410 (1788) (holding that "[t]he court under whose inspection the suit [by the minor's next friend] is prosecuted, is bound to take care for the infant; and if

the prochein ami is not a responsible and proper person, or misconducts the suit or institutes one not apparently for the benefit of the infant, will displace him, and, if need be, appoint another."

Most recently, in November 2006, the Connecticut Supreme Court had the opportunity in a Juvenile case to address the concept of standing by parents to assert the constitutional rights of their children. *In Re Christina M.* et, al. 280 Conn 474 (2006) Contrary to the decisional law cited earlier in this article, the Supreme Court expressly held that:

[t]he rights of the respondents are inextricably intertwined with those of their children. The ruling at issue involves irrevocable interference with their status as parents and the legal disposition of their rights in the proceeding necessarily could affect and alter the rights of the respondents with respect to their parental rights. Theirs is not an abstract concern. Inadequate representation of the children, either as a Guardian ad Litem or as their counsel, could harm the respondents because the roles help shape the court's view of the best interests of the children, which serves as the basis upon which termination of parental rights is determined. We therefore, conclude that the respondents have standing to raise their claim before this court". *Id* at 487.

Interestingly, the State of Connecticut claimed in *In Re Christina M.* supra, that the parents lacked standing to assert claims and cited *Strobel*, supra, *Lord*, supra, and *Schult*, supra. The Supreme Court easily distinguished these cases as not involving an irretrievable destruction of the fundamental family relationship *In Re Christina M* at 486, note 6.

The Supreme Court in *In Re Christina M.*, gave parties standing to raise claims when their status as parents is challenged because the proceeding involves the potential of an irrevocable loss. This is a right which has slight precedential value in the family court. Given the ability to initially pursue and seek modifications of custody and access, the rights of parents to move to disqualify or remove a Guardian *ad Litem* or an Attorney for the Minor Child remains limited. •