

Understanding the Ethical and Procedural Variances of FOCs or GALs in Family Court

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While at the outset, a Friend of Court (FOC) and Guardian ad Litem (GAL) may appear to have similar roles and purposes in a family court proceeding, it is important to request the most appropriate role for your case, as there are ethical and procedural differences regarding these roles.

The FOC conducts an investigation as to the best interest of the children and reports their findings and recommendations to the Court. See KRS 403.300 and FCRPP 6. The GAL, however, acts as legal counsel for the child and is subject to the Supreme Court Rules regarding attorney conduct.

FOC's Duty is to Disclose to Parties, GAL's Duty is to Child Client

After the FOC's initial investigation has been completed and their report submitted to the Court, they act as a witness who can testify to the details of their investigation and recommendations in their report. As such, the FOC is subject to cross examination, including a review of the sources of information gathered through the course of their investigation in the same manner and method as any other witness. The FOC can also present hearsay statements that underlie their report, so long as the procedural requirements under KRS 403.300 are satisfied. See *Van Gansbeke v. Van Gansbeke*, 700 S.W.3d 263 (Ky. App. 2024) and *Greene v. Boyd*, 603 S.W.3d 231 (Ky. 2020). These hearsay statements can be from therapists or medical professionals treating the child or even from the child themselves.

The procedural requirements to admit the FOC's report and statements as evidence are contained in KRS 403.300(3), which require the FOC to make available "...the investigator's file of underlying data, and report, complete texts of diagnostic reports made to the investigator [...] and the names and addresses of all persons whom the investigator has consulted." Furthermore, KRS 403.300(3) also

requires that the FOC's report must be filed "at least ten (10) days prior to the hearing," as another due process safeguard. The type of evidence that is introduced through the FOC is ordinarily not permitted under the Rules of Evidence, so it must only be allowed when the KRS 403.300 requirements are satisfied because "[w]ithout those procedural safeguards, there are no due process protections." *Adair v. Emberton*, 694 S.W.3d 52 (Ky. App. 2024).

A GAL, like other counsel, should not be made a witness to the proceeding or be cross-examined on their position on behalf of their client. SCR 3.130 (3.7). Furthermore, the GAL is also bound by the Kentucky Rules of Evidence regarding admissibility of evidence, including those pertaining to hearsay. So, while the FOC can present hearsay statements of the minor child in an evidentiary hearing, the GAL cannot. The GAL should not present statements to the court beyond those contained in their motions filed on behalf of their client and opening and closing arguments at trial. See *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). The GAL also has duties to their client pertaining to safeguarding work product and maintaining client confidentiality in accordance with SCR 3.130 (1.6) and invoking attorney/client privilege in accordance with KRE 503. While the FOC's records and entire file may be discoverable, the GAL's file is to be protected in the same manner that counsel's file for a parent is protected under the Supreme Court Rules.

FOC's and GAL's Consideration of Child's Wishes Under KRS 403.270

As the FOC is an investigator/witness, they cannot file substantive motions on behalf of the minor child in the same manner that legal counsel would. The FOC typically reviews the

motions pending before the court and investigates those matters to make a recommendation as to the best interest of the child. The best interest factors are enumerated in KRS 403.270 and include, among other factors, the wishes of the child. A recommendation by the FOC as to the child's best interest would be based on a weighing of these factors. While the child may express their wishes to the FOC, which is noted in the FOC's report, it is merely one facet of the FOC's investigation that

is to be considered when issuing recommendations. The FOC may then be cross-examined if their ultimate recommendations are not in line with the child's wishes.

The GAL must consider and present the wishes of the child in light of the KRS 403.270 best interest factors in a different manner than the FOC. Often times the best interests of the child and the child's wishes are in line, so the GAL shares that position through their responses or objections to motions or in arguments at trial. In other instances, the child's wishes and the GAL's position as to what is in the child's best interest may not always be in line. Though the child is the GAL's client, and certain duties are owed by counsel to client regarding their wishes, Kentucky case law delineates the wishes of the child client and what is in the child's best interests pertaining to what can be disclosed to the court. When there is a disagreement between the GAL and child client as to what relief is in the child's best interest, the GAL must inform the court of the conflict without presenting any fact-based explanation. See *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014).

Considerations When Requesting FOC or GAL

Understanding these fundamental differences between the roles of FOC and GAL will ensure that you request the one that will best assist the court in reaching a custody or parenting time determination in your case, as their roles are not synonymous or interchangeable. The facts of the case may lend themselves to favor one over the other depending on whether the child needs a legal advocate or a

factual investigator. There are also occasions where both a GAL and an FOC can and will be utilized in the same case, particularly in cases that involve higher conflict between the parents. As both positions are separate and distinct from each other, one case could have both a GAL who advocates a legal position on behalf of their child client, and an FOC who investigates the matter and reports to the court with their recommendations. In such instances, the GAL could provide the FOC with any necessary collateral information that support their client's position and the FOC could present the minor child's hearsay statements in a hearing that the GAL could then cross-examine.

Once an individual is appointed as either GAL or FOC, they should remain in that designated role until relieved and not be redesignated later as the other to prevent any due process violations for the parties or the child. If a GAL was initially appointed but you believe the court would benefit from having an FOC investigate and report their recommendations to the court, then a new professional should be requested for that role instead of relabeling the GAL to an FOC. As the GAL has ethical obligations to their minor child client, it would be violative of the Rules to then become a witness, privy to confidential client information, testifying in the matter at hand. Likewise, an FOC should not later become a GAL as their prior access to certain information, including the statements of the parties who may be represented by counsel, may not have been provided or disclosed had they originally been counsel for the minor child. Orders of appointment for FOCs typically grant them access to any and all records needed for their investigation and ability to interview the parties; however, a GAL may need to obtain the same or similar information through traditional legal processes such as depositions or formal discovery.

The roles of both GAL and FOC come under judicial review with fair frequency, with the two roles being refined and further delineated by the higher courts. So, while it is essential to understand the distinction between those roles and how they can impact your case, it is also important to pay close attention to the ever-changing case law as those roles continue to be reshaped according to ethical and procedural requirements that apply to each.

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