

Supreme Court Rule 40

by Thomas Miller

Supreme Court Rule 40, adopted in February 2002, consists of guidelines for lawyers appointed to represent children as guardians ad litem in neglect, abuse and dependency proceedings in juvenile court. It does not apply to other types of proceedings in juvenile court, and it does not apply to proceedings in other courts that involve child custody or related issues. If you are a court-appointed GAL in a juvenile court dependency-neglect or abuse case, these guidelines apply to you. It does not matter who the petitioner is. The impact that Rule 40 has on you will depend on the way that you and your court previously perceived the role of a GAL. To me the guidelines emphasize three themes:

1. The child, not the court, is your client.

You have a dual function: to advocate for the best interests of the child and to ensure that the

child's concerns and preferences are effectively advocated. Your role is both active (including investigation, litigation and, where appropriate, appellate advocacy) and interactive (you must be in frequent contact with your client, especially while court proceedings are pending).

The guidelines' definition of "child's best interests" is illuminating: "a determination of the most appropriate course of action based on *objective* consideration of the child's specific needs and preferences." (emphasis added) As part of this definition, the guidelines list 17 specific factors that the GAL should consider, in consultation

with experts when appropriate, in determining the best interest of the child. In addition, the list of factors set forth in *T.C.A.* § 36-6-106 should be considered in the case of visitation or custody disputes between parents.

The guidelines also enumerate many specific responsibilities and duties of a GAL in every case. Others may apply in a specific situation. The intent is clear: the GAL should actively conduct his own investigation, participate fully in all aspects of litigation, attend all meetings and hearings concerning his client, and represent the client on appeal. This includes filing an appeal where appropriate.

The GAL must also establish and maintain an interactive relationship with the child, as with any client. The age and developmental level of the child determines the type of contact. He should explain the nature of the proceedings and what to expect at each hearing or review. He should respectfully consider the child's preferences.

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Letter from the Chair

By Deb House

Greetings, section members. It is an honor to be asked to lead the Juvenile and Children's Law Section for the coming year. We had a great meeting during the TBA convention in Memphis and have plans for several exciting projects during the coming months.

One of our first projects will be to sponsor a CLE event on representing children in domestic violence cases. The CLE will be in Nashville on December 1. Please mark your calendars and plan to attend this TBA program.

Your executive council has been meeting regularly via conference call to develop the work of our section. We will continue to meet monthly and hope to produce a written work plan that will be shared with all section members. If there are any issues relating to

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Letter from the Immediate Past Chair

by Randy Haynes

This has been a tremendous year for the Tennessee Bar Association Juvenile and Children's Law Section! We formed our section, installed officers, prepared for our CLE programs, had a number of meetings, and in general got things going. Many of the members of this section were involved with the Juvenile Justice Commission for several years. This section came out of our desire to have a section to deal with children's matters, and here we are.

We have a good start and will continue to mature as a group to make juvenile and children's law better in Tennessee.

It has been my distinct honor to be a part of this section, and I have really enjoyed the responsibilities of leadership during this first year. So many folks have led us to this second year I wanted you all to know them. We could not have done the job we have were it not for **Lynn Pointer** of the TBA. She has been an inspiration to getting things done, has organized our meetings, made calls and emails, planned for

food at the meetings, arranged for teleconference meetings, reminded me of things I need to do, informed our leadership committee, attended our meetings, helped with minutes, and generally promoted our plan. What a great job she has done for us all!!

Deb House became the new chair at the TBA meeting in Memphis. Deb has done excellent work this year developing this newsletter. She is enthusiastic about the section, and will do a great job in her leadership. Please help Deb to move this section on.

Linda Seely has chaired the CLE group for us and has performed miracles in getting our CLE off the ground. Boy, what an asset to any group Linda is! She is always present and helpful with anything you need and has encouraged this group to become an effective section. Thanks Linda!!

There are many other folks who have made the section a success. Most of you have attended meetings during the year, and the results show that a new section can be successful with good and caring people as members. We have a good start and will continue to mature as a

group to make juvenile and children's law better in Tennessee.

Several projects will be carried on for next year. Many of us are very enthusiastic about a reorganization for Juvenile Court. We have accumulated some documents, and plan to work over the next few years to allow the Supreme Court and Legislature to become aware of our problems. We need consistency, proper organization, a reasonable appeals process, and proper funding for children and courts. How can we hope to make life better for children if everything we do has to be funded at the end of the line? Surely our children need a better effort from the state and courts, but we need to tell the decision makers what we think needs to be done to improve the system.

Also many of us are very concerned with the level of pay involved for attorneys working with children. We must push every year for improvements of the funds needed and allocations required to permit attorneys to represent children. We have many good lawyers taking on these responsibilities, but they must get paid. You cannot work as a Guardian ad Litem or a court appointed counsel in juvenile court and survive on the money made available. Secretaries, rent, phone, professional tax, supplies, office equipment, and everything else it takes to make a successful law practice cannot be done with the amount of money paid for juvenile service. Many of us lose money in Juvenile Court, and that cannot be continued.

We also need to encourage new lawyers to work with the juvenile courts. This is a primary consideration for wanting this section to become active. Training, assistance with procedures, mentors, and a real sense that there are seasoned lawyers that will try to help a new lawyer. We need to encourage lawyers to sign up for this section and give the TBA a chance to help them do a better and efficient job for children and their parents. The courts need to know that there are attorneys in this state who are committed to making improvements in the quality and professionalism of attorneys practicing before them.

Finally, it has been an honor and one of the best experiences I have had working with this section. I have met many wonderful people, and feel that

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By Lisa Roose-Church Staff Reporter of *The Daily News Journal*, Murfreesboro, Tenn.
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The Power to Care Law Enables Families to Care For Kids in Special Circumstance

Across the county, more than 6 million children (about one in 12 children) are living in households headed by grandparents and other relatives, according to AARP statistics.

Tennessee has more than 126,000 children living in households headed by grandparents and other relatives. "There are literally thousands of families where there is a grandparent or other relative taking care of a child," said Brian McGuire, legislative director for AARP.

Although the caregivers are overseeing their grandchildren's day-to-day care, they have not had the legal authority to perform some basic tasks, such as enrolling that child in school. That has changed, however, thanks to the "Power of Attorney for Care of a Minor Child Act," which Gov. Phil Bredesen signed on May 5. By unanimous vote, the Tennessee Senate passed the bill on April 9. The Tennessee House of Representatives followed suit on April 17 with a vote of 89-4.

"It's important because it makes it possible for Tennessee citizens with children to have a nonjudicial way of granting limited powers to a caregiver in circumstances in which those are needed," said Sen. Larry Trail, D-Murfreesboro, who sponsored the bill. "This allows the parent to do it in the same format as you would do power of attorney. Typically, a parent will need to place a child temporarily with a grandparent or other relative on a short-term basis, for medical reasons, or military duty or other reasons," said Mary Liz Knish, spokeswoman for AARP.

"Even if everyone in the family is in agreement as to the temporary placement of the child with the relative," she said, "that relative caregiver currently has to go to a court and file a petition for custody simply to be able to enroll the child in school or obtain medical treatment for the child. Such 'lawsuits' unnecessarily create stress within otherwise harmonious families. Family members essentially have to sue each other in order to obtain the legal documentation currently required to demonstrate that they have authority simply to enroll the child in

school," Knish said. "These types of matters also place a considerable strain on courts that are already dealing with too many cases and too little resources."

However, the "Power of Attorney for Care of a Minor Child Act" provides for a simple power of attorney authorization for grandparents and others (who are called 'kinship caregivers') to enroll a child in their care in school or obtain medical, dental and mental health attention for the child. It also provides for the child's food, lodging, housing, recreation and travel.

This authorization form, which is being developed by the state Department of Children's Services, and AARP, which lobbied for the legislation, relieves families from having to pay attorney fees to draw up power of attorney documents.

"If they want to see a lawyer, that's fine," McGuire said. But, the idea here is to get this form developed ... so it's out there, filled out and signed by a parent and caregiver. It's a legal document that doesn't have to be filed with the court and doesn't cost any money.

The form will be distributed to school districts across the state, McGuire said. It also will be available on AARP's website, he noted. The power of attorney lasts, McGuire said, as long as it lasts. "It can be rescinded by either party at any time," he said, noting that the document in no way affects the parents' rights regarding the custody, care and control of the minor. "The caregiver does not have legal custody of the minor child," McGuire said.

Smyrna resident Linda Love, who cares for her four grandchildren on a daily basis, said this type

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Only then can the GAL make an objective determination of the child's best interests. If you take a position after merely talking to the case manager, reviewing the pleadings, and saying "Hello" to your client, you have not complied with Rule 40.

Your clients who have been neglected or abused may be surprised that anyone cares about what they have to say. Giving them a voice in the process may help restore their self-esteem and may help them accept the eventual outcome, whether they are pleased with it or not.

2. Sometimes there is a conflict between the child's best interest and the child's preferences. Rule 40 addresses this situation and provides instructions to the GAL when such a conflict arises. The GAL must never simply ignore the child's own wishes. Importantly, the child should fully understand the resolution process and know that his preferences and wishes will continue to be presented to the Court even though you believe that his preferences are not in his best interest.

When you are appointed GAL for a sibling group, be especially aware of the potential for an ethical conflict. I was once appointed GAL for 5 siblings. Two years later, after parental rights had been terminated, the oldest child was prosecuted for aggravated sexual battery on one of his siblings that allegedly occurred when they had lived with their mother. Clearly, I could not continue to represent the entire group.

3. The GAL is to function as a lawyer, not as a witness or special master. Therefore, the GAL may not testify in any proceedings in which he or she serves as GAL, except in those extraordinary circumstances specified by Supreme Court Rule 8, §§ EC 5-9, 5-10 and DR 5-101. He or she should not submit a "report and recommendations" to the Court.

Prior to the enactment of these guidelines, many juvenile courts expected or required the submission of a report from the GAL. Indeed, it was often given great weight by the judge. In some jurisdictions, the prohibition of such reports will be the most dramatic effect of Rule 40. But the GAL is to present the results of his or her investigation and the conclusion regarding the child's best interest in the same manner that any other lawyer presents his or her case on behalf of a client: by examining and cross-examining witnesses, abiding by the rules of evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.

Rule 40 underscores the importance of effective, informed advocacy for children and assures that the child's voice will be heard. In fact the proposed ABA guidelines for attorneys representing children in divorce and custody cases mirror many of Rule 40's provisions. ■

Thomas Miller is a solo practitioner who is found regularly in juvenile court. He represents both children and parents. He received his J.D. from Nashville School of Law in 1994.

Letter From the Chair

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the representation of juveniles and children that you would like the section to address this year, please give me a call or email me. We will put all ideas on the agenda for future council meetings. If you are interested in serving on the executive council, we are looking for new members.

I want to remind you that we have a listserv set up for discussion of issues relating to the representation of juveniles and children. Please use this valuable tool when you need input on issues you are seeing in your local area. We all benefit from these discussions.

I want to thank each of you for your membership in this great TBA section. This is YOUR section and we will work to address the issues that are important to you. Again, please feel free to contact me to discuss any issues related to juveniles and children. You can call me at: (423) 479 8577, ext. 107 or email me at dhouse@laet.org. Thank you, Deb House. ■

Deb House currently works with Legal Aid of East Tennessee as the associate director of the Southern Region. She has been with Legal Services for 15 years and graduated from the University of Tennessee College of Law in 1988.

This is based on an original article written by Claudia Johnson, Staff Writer for *The Pulaski Citizen, Giles Free Press*, and printed with the permission of the publisher.

Fowlkes Bill Gives Power of Attorney to Grandparent Caregivers

Grandparents and others taking care of minor children will have fewer problems with obtaining medical care when a new law takes effect in Tennessee.

On May 5 Governor Phil Bredesen signed the kinship caregiver bill, known as the Power of Attorney for Care of a Minor Child Act, into law. By a vote of 89-4, the Tennessee House of Representatives passed the bill, which was sponsored by Rep. Joe Fowlkes, and the Senate bill sponsored by Sen. Larry Trail passed the full Senate.

The bill provides for a simple power of attorney authorization for grandparents and others to enroll a child in their care in school or obtain medical attention for the child. The new law states that except where limited by federal law, the caregiver holding a valid power of attorney will be assigned the rights, duties and responsibilities that would otherwise be assigned to the parent, legal guardian or legal custodian. The power of attorney does not transfer legal custody to the caregiver.

The Tennessee Department of Children's Services will develop a simple form and distribute it to schools across the state to relieve families from having to pay attorney fees to draw up a power of attorney document. Tennessee will become one of only a few states in the nation with this type of law for school enrollment. About two dozen other states have passed similar legislation for access to medical care.

In fact, according to Mary Bissell with the Children's Defense Fund, the Tennessee law in comparison to others across the country, is both the broadest in terms of who is covered, meaning anyone, including non-relatives who are taking care of the children, and in ease of use, requiring a simple form without need to prove child's residency.

Across the country, more than six million children, approximately one in 12 children, are living in households headed by grandparents or other

relatives. Tennessee has more than 126,000 children living in households headed by grandparents or other relatives who are primary caregivers for children whose parents cannot or will not care for them due to substance abuse, illness and death, abuse and neglect, economic hardship, incarceration, divorce, domestic violence, and other family and community crises.

In response to the growing numbers of these kinship care families, state legislatures, public and private agencies and grassroots coalitions in Tennessee and across the country have begun to expand services and supports for children living with kin inside and outside of the foster care system.

Tennessee has more than 126,000 children living in households headed by grandparents or other relatives who are primary caregivers...

To guard against fraud and abuse, the law provides that any adult accepting the power of attorney, as well as the parent, guardian or other legal custodian, who enrolls a student in a school system while fraudulently representing the child's current residence or the parent's hardship or circumstances for issuing the power of attorney, is liable for restitution to the school district for an amount equal to the per pupil expenditure for the district in which the student is fraudulently enrolled.

The American Association of Retired Persons (AARP) will be working with several partner organizations to make sure school officials, head start programs, health care providers, attorneys and families across the state are aware of the new law and have access to the power of attorney form and how it can be used, according to Mary Liz Knish, AARP Tennessee Communications Director. ■
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The Power To Care

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of legislation will help Tennessee's residents. I remember registering my own children for school and the red tape and medical details you have to get, like shots, she said. This legislation, Love said, would help cut that red tape and stress for grandparents or other relative caregivers taking care of young children. Love helps to provide care to her 3-year-old granddaughter, Aaliyah Greenwood, who also lives with her; 5-year-old grandsons Shayne Love and 4-year-old Kenny Love; and granddaughter Eternity Kelly, 7, whose mother is on active military duty. We were blessed with our children, and we're doubly blessed with our grandchildren, Love said.

Sue O'Brien, director of the St. Clair Street Senior Center, also praised the legislation. It's prevalent in today's society, she said. "Many times grandparents are put in the position of caring for their grandchildren without the recognized legal authority to pursue medical attention or other things. It's a handicap. I am very supportive of the bill and anything it might contain to help grandparents who are caring for their grandchildren," she added. This bill gives the grandparents the right to protect the grandchild without taking away their child's authority over (their) own child.

O'Brien said she hopes the St. Clair center can become involved with the issues facing grandparents in this situation by developing educational and social programs for grandparents and grandchildren. While the St. Clair center does that to some degree now with programs like its intergenerational storytelling events and magic show, she hopes the center can broaden its programs in the future.

The bill came about as a direct result of a statewide Kinship Summit held in November 2001. A priority identified at the summit was the

need to establish medical attention without having to file a petition in court in situations in which the family has agreed for the relative to care for the child. Numerous states have enacted similar legislation involving medical and/or educational consent. Those states include: Arkansas, Mississippi, Missouri, Florida, Virginia, Louisiana, Oklahoma and North Carolina, Knish said. Tennessee's legislation, Knish noted, is broader than the other states in terms of who is covered and in ease of use.

Susan Brooks, a member of the statewide Kinship Advisory Board whose group helped identify this need, said that Tennessee's bill could be used as a model for other states. A number of states have either medical or educational consent laws of some type, said Brooks, a clinical professor at Vanderbilt Law School. I would say it's fair to say there are more states that have medical consent provisions at this point than the education consent. I would say Tennessee is a leader in the sense that we have now found a way to work with all of the stakeholders involved in the education system to come up with a law that they feel comfortable with as a vehicle for enrolling children in school, she said.

Physicians who honor the power of attorney form in good faith can also feel comfortable, Brooks said, because the law protects them from liability. This means that physicians would not be subject to criminal action for honoring a power of attorney form. The legislation says specifically that medical professionals who honor this in good faith won't be held liable, she said, and the same is true in the educational system. ■

The bills are HB0573 and SB0526. Tennessee Department of Children's Services on the net: <http://www.state.tn.us/youth/>

Letter from the Immediate Past Chair

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the bar is able and willing to make juvenile law better. We have a great responsibility. No one will see children as we do. It is our duty to continue to serve this section and to make the future better for people needing to come into juvenile court. To that end I believe we can make the attorney's experiences better with a commitment to do whatever is required to let everyone know that those legal professionals working with children are the "cream of the

crop" and will do whatever is required to make the life of children in Tennessee better because we care!! Thanks for a great year! ■

Randy Haynes is a member of the firm of Weeks, Anderson and Bake in Nashville. He is a graduate of the Nashville School of Law, and was a member of the TBA Juvenile Justice Commission, which recommended the creation of the TBA Juvenile & Children's Law Section.

New Legislation Gives Families the "Power to Care"

by Susan L. Brooks

Tennessee has a new law of great interest to attorneys and others who work with families facing temporary hardships. It is called the "Power of Attorney for Care of a Minor Child Act" and was signed by Governor Bredesen on May 5, 2003. Currently, it can be found at Public Chapter 71, but it will be codified as §34-6-301 et seq.

The law came about, in part, as a direct result of the Statewide Kinship Summit, which was held in November of 2001. Over 100 relative caregivers, state agency personnel, legislators, judicial officers, attorneys, and other concerned citizens met over two days. A priority identified at the summit was the need to establish authority for relative caregivers to enroll a child in school or to obtain medical attention without having to file a petition in court in situations in which the family has agreed for the relative to care for the child.



Tennessee has a new law of great interest to attorneys and others who work with families facing temporary hardships... called the "Power of Attorney for Care of a Minor Child Act"...

Very often, a parent will agree to place a child temporarily with a relative on a short-term basis, for medical or other hardship-related reasons. Prior to this law, even if everyone in the family was in agreement as to the temporary placement of the child with the relative, that relative would have had to go to a court and file a petition for custody, simply to be able to enroll the child in school or to obtain medical treatment for the child. Such "lawsuits" created unnecessary stress within otherwise harmonious families. Family members essentially had to sue each other in order to obtain the legal documentation that was required to demonstrate they had authority simply to enroll the child in school or obtain medical attention for the child. Having to resort to this sort of drastic, adversarial action does not make sense when all family members are in agreement regarding the temporary arrangement.

These types of matters also placed a considerable strain on courts that were already dealing

with too many cases and too little resources. Courts previously were forced to schedule judicial time and to administer the paperwork necessary to process these cases. Using the courts' precious resources and docket time in this manner was costly and inefficient.

In the end, the law was a product not only of the efforts of kinship care advocates, but also of a unique level of collaboration and cooperation by The Department of Education, the Tennessee School Board Association, the Tennessee Secondary School Athletic Association, and the Tennessee Department of Children's Services. Additional support was provided by the AARP, the Administrative Office of the Courts, the Tennessee Council of Juvenile and Family Court Judges, and, last but not least, the TBA. Moreover, excellent leadership was provided by the legislative sponsors, Representative Joe Fowlkes, and Senator Larry Trail, both of whom are attorneys.

As enacted, the new law includes, but is not limited to family members. Parents can transfer the temporary power of attorney to any adult, as long as all the adults involved with the child are in agreement.

The power of attorney can be executed using a simple form that will be available soon at all offices of the Department of Children's Services as well as on the web site of the AARP in Tennessee (www.aarp.org).

Nevertheless, it should be understood that transferring the power of attorney for these limited purposes does not in any way confer custody on the relative caregiver. Parties seeking legal custody still need to go through the court process.

Numerous states have enacted similar legislation, involving medical and/or educational consent. They include: Arkansas, Mississippi, Missouri, Florida, Virginia, Louisiana, Oklahoma, and North Carolina.

In sum, by allowing family members to use the "Power of Attorney" vehicle in these consensual situations, harmonious families can now solve their own short-term difficulties and children can obtain necessary medical and educational services without unduly involving precious judicial resources. ■



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FOR THE children

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