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Appointing a GAL? The Language You Use Is Important!

BY HON. DONALD BERNARDI (RET.)

Judges in Illinois often appoint a guardian ad litem in a wide range of cases, including those involving minors in guardianship or juvenile matters. These appointments are often made in probate to protect the interests of a minor who may be entitled to property. Finally, it is common that the courts make such appointments in cases involving adults with disabilities. I must admit that I never gave much thought about the form of the appointment order. Sometimes, it is nothing more than a docket entry by the judge. However, a recent case in our Supreme Court suggests that both judges and practitioners ought to pay careful attention to the purpose of this appointment.

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Civility, Sincerity, and Other Compelling Negotiation Concepts: Tips From an American President

BY EDWARD CASMERE

Few negotiations have the depth, breadth, and impact of those that occur in the theater of American politics. Politicians generally, and U.S. presidents specifically, have given us plenty of diplomacy-related examples (good and bad) over the years. While many of the political negotiations take place behind closed doors and we are not, to borrow a phrase from *Hamilton: An American Musical*, "in the room where it happens," sometimes the sage negotiation insights from the political realm are on full display for the entire world to see. Take John Fitzgerald Kennedy's inaugural address as president of the United States in 1961 for example. In that speech President Kennedy provided a number of timeless insights on negotiation. Perhaps the most notable is this passage:

"So let us begin anew--remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear. But

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Appointing a GAL? The Language You Use Is Important!

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This topic has been discussed in the ISBA's Child Law Section's newsletter in an article written by Judge Martin Mengarelli. I recommend it to those interested in this issue.

In 2019, the Illinois Supreme Court decided a case involving the scope of orders for attorneys appointed as a guardian ad litem. Justice Garman delivered this opinion in the case of *Alexis Nichols F/K/A/ Alexis Brueggeman V. David Fahrenkamp et al.*, 2019 Il 123990. The plaintiff suffered injuries in a motor vehicle accident and received a settlement. Due to her age as a minor, the probate court appointed her mother as guardian to administer her estate and appointed the defendant as her guardian ad litem.

Several years after the probate case, the plaintiff minor sued the mother claiming that a portion of the settlement funds was for her mother's benefit alone. This litigation resulted in a partial recovery for the minor. However, the balance of the plaintiff's claims was excluded by the court because the GAL had approved the expenditures. Subsequently, the plaintiff initiated this lawsuit against the GAL, alleging legal malpractice because he approved the expenses that were allegedly not in the plaintiff's best interests.

The defendant GAL asserted that a guardian ad litem had quasi-judicial immunity and thus was not liable for negligence. The Circuit Court agreed and entered summary judgment for the GAL. The Appellate Court reversed this decision finding the GAL must protect his ward's assets and interests and thus had a duty to act as an advocate on behalf of the minor.

The supreme court, in its opinion, discussed the origin of quasi-judicial immunity in the common-law and noted that it extended beyond the judges themselves to other actors in the judicial process. The court suggested that there was no uniformity in either case law or statutes regarding the functions or immunities of the GAL. Thus, it reasoned that rather than looking at the title to determine immunity, the court should look at what role the GAL was asked to perform.

The opinion discussed the function of a guardian ad litem in the Illinois marriage and dissolution of marriage act because the defendant suggested that it characterizes his appointment. 750 ILCS 5/101 et sec. (West 2016). In this act, the legislature provided three mechanisms to address the interests of minors: the child's attorney, child representative, and the guardian ad litem. The court reasoned that among these three positions, the GAL is most associated with the judicial process.

The court then looked at *In re Mark W.*, 228 Ill. 2d. 365, 375 (2008), where the circuit court had the authority to appoint a GAL to report on the best interests of the mentally disabled parent whose child was alleged to be abused and neglected. This case was filed under the Juvenile Court Act and the court described the GAL role as,"'the eyes and ears of the court' and not as the ward's attorney."

The plaintiff, however, urged the supreme court to adopt the language in the probate act, which required the GAL to appear in the case and defend the ward. In contrast, the defendant suggested his duties arose from the marriage and dissolution act, which required that he make a recommendation as to the minor's best interests.

In resolving the issues, the supreme court noted that in the early cases under the probate act of 1975, the GAL acted much like a traditional attorney. However, recent amendments to the marriage act and other cases suggest that the meaning of the GAL is evolving. In the 1995 amendment to the probate act involving adults with disabilities, the act provides the court may appoint a GAL "to report to the court concerning the respondent's best interests consistent with the provisions of this section." 755 ILCS 5/11a-10a. The court noted that this leaves only section 11 – 10.1 of the probate act with an inconsistent

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obligation for appointed GAL's. In that section, the court may appoint a GAL in minor guardianship cases to "represent the minor in the proceeding." 755 ILCS 5/11-10.1. The supreme court suggested that the role of the Guardian ad Litem in the case law in the 21st century has become that of a reporter or witness, not that of an advocate.

The court indicated that since the text of the various acts does not use the term GAL in the same way, the appointment, in this case, does not identify the defendant's role. The trial court's order states only that "[t]he court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN." The meaning of the appointment was resolved when the supreme court ruled as follows, "Nevertheless, we may still conclude that Fahrenkamp's role, in this case, corresponded to a guardian ad litem under the current version of the Marriage Act and *In re Mark W.*"

The supreme court then held that a guardian ad litem who submits recommendations to the court on the child's best interest is protected by quasi-judicial immunity.

This case presents a clear direction for both judges making GAL appointments and to any attorney who may be practicing as a GAL. The nature of the appointment and duties requested by the court will determine whether the GAL is protected by quasi-judicial immunity. In Fahrenkamp, the supreme court concluded, "When a circuit court appoints someone to a position like guardian ad litem, it should specify that appointee's role in the order of appointment." (emphasis added)

Therefore, in some cases, it would appear to be preferable to practitioners that the GAL order is clear that their role is to submit recommendations to the court regarding the ward's best interests. This language would identify the role that is being undertaken by the attorney, and provide the protection from liability the respondent enjoyed in this case.■

Civility, Sincerity, and Other Compelling Negotiation Concepts: Tips From an American President

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let us never fear to negotiate."

Little did President Kennedy know that a handful of months later his commitment to the "let us never fear to negotiate" mindset would face the ultimate test during the Cuban Missile Crisis. Because Kennedy and Soviet Premier Nikita Khrushchev did not fear to negotiate, the world was pulled back from the brink of global nuclear war. Aside from the standalone power of President Kennedy's speech, that passage provides a list of five very compelling negotiation concepts. Civility. Weakness. Sincerity. Proof. Fear. In this article we will briefly explore each of those in the context of negotiations.

Civility. In today's culture of cancellation, contempt, and seemingly obligatory outrage, reasonable disagreement and differences of opinion cease to exist and are distorted into insult and offense. Compromise has somehow transformed into a dirty word. But we can, and must, find a way to disagree without being disagreeable. As lawyers, one might argue, that is our job. We are hired to vigorously represent our client's interests in a professional manner. Aside from practicing our profession at a higher level of discourse and intellect, being civil in our negotiations greatly increases their chances of success. Snarky comments, insults, or sardonic one-liners seemingly designed to collect "likes" on social media do nothing to help bring opposing sides closer together. They are divisive. As President Kennedy noted, civility is not a sign of weakness. It is quite the opposite. If you can maintain your civility even during the most difficult negotiations it is a sign of tremendous strength. It is also a zero-cost move in a negotiation that enhances how people feel, which in turn enhances the prospect of an agreement.

Weakness. Any negotiation is likely to involve parties that harbor some concerns, hold negative views, or believe that the other side's position has weaknesses. Those concerns, negative views, or weaknesses may be legitimate, potential, or merely perceived. Regardless, perception is reality. So, stop pretending that reality doesn't exist. Put it on the table. Address the perceived negatives issues head-on, so you can move on. You can acknowledge them without conceding they are accurate. Discussing negative perceptions allows parties to feel heard and understood – even if the parties don't agree with the other side's perspective. Identifying "weaknesses" can move parties into a collaborative problem-solving mindset that many negotiation theorists believe is a path to successful and sustainable resolutions.

Sincerity. Lawyers have only one true portable asset, their reputation. Nothing defines a reputation like integrity and character. Do not squander any of that just to "win" any particular negotiation. It will backfire. Moreover, negotiations will be more successful when negotiators are genuine, candid, and authentic (all synonyms for sincere, by the way) because people feel safe negotiating with people with those traits. Nelson Mandela, who is described in Robert Mnookin's book *Bargaining with the Devil* as "the greatest negotiator of the twentieth century," was "respectful but never fawning or sycophantic," and "a negotiator with whom one could make concessions and yet maintain one's self-respect." When negotiators trust each other, even if they don't like each other personally, more deals get done.

Proof. Trust, but verify. And expect your negotiation counterpart to do the same. At some point you may be challenged, or may need to challenge, some assertion or view expressed in the negotiations. You have to be able to back up your position when the time is right.

Fear. Don't be afraid to challenge your assumptions – you might be entirely wrong about the other side's motivation. If you have some fear, you need to analyze what is causing it. You may not be in the right negotiation, with the right party, at the right time. Don't be afraid to talk about the proverbial elephants in the room, as they never go away by simply being ignored. Finally, don't be afraid to let the other side talk (and actually listen to what they are saying). Afterall, you are *negotiating* to an agreed result, not *litigating* to a verdict.

In President Kennedy's inaugural address we also see a few of examples of other effective negotiation techniques. Such as this statement: "[f]inally, to those nations who would make themselves our adversary, we offer not a pledge but a request . . . ." In a negotiation, making a request or seeking permission to provide information, give a different point of view, or to even make an offer empowers the other side to invite you to do so. They tell you if they are ready to receive the information, and accordingly won't feel as though you are forcing it on them. After all, they literally asked for it. Making such a request is not a sign of weakness, it is a psychological checkpoint to see if they are ready to accept whatever information you are about to deliver. If they aren't, then you are wasting your time, because whatever you say will not have the desired effect.

Kennedy's speech also gives us (using the powerful rhetorical device of repetition) examples of a negotiation strategy focusing on collaborative problem-solving: "*Let both sides* explore what problems unite us instead of belaboring those problems which divide us." "*Let both sides*, for the first time, formulate serious and precise proposals . . . ." "*Let both sides* seek to invoke the wonders of science instead of its terrors . . . ." "*Let both sides* unite to heed in all corners of the earth . . . ." "And if a beachhead of cooperation may push back the jungle of suspicion, *let both sides* join in creating a new endeavor . . . ."

President Kennedy's inaugural address provides a number of examples of negotiation concepts that can help broker successful deals. Lawyers would do well to seek out and learn negotiation lessons and examples from across disciplines. Every negotiation is a unique event. Accordingly, it is extremely difficult to prescribe hard and fast rules, or "always" and "never" guidelines. The concepts discussed in President Kennedy's inaugural address, however, are a few timeless lessons that negotiators should keep in mind as they prepare for, and conduct, negotiations.■

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Illinois Supreme Court Reaffirms Common Law Rule of Successor Nonliability

BY JOSHUA D. LEE

The Illinois Supreme Court's recent decision in *Department of Human Rights v. Oakridge Healthcare Center, LLC*[1] reaffirms that the common law rule of successor nonliability controls in Illinois. In that case, a former of employee of Oakridge Rehabilitation Center, LLC (Oakridge Rehab) filed a complaint with the Illinois Department of Human Rights. She alleged that Oakridge Rehab had discriminated against her based on age and disability in violation of the Illinois Human Rights Act. The former employee's case was taken up by the Illinois Human Rights Commission and an administrative law judge ultimately recommended that she be awarded compensation for the alleged discrimination. The Commission adopted the administrative law judge's recommended award and granted a motion to enforce the award against Oakridge Rehab.

While its former employee's discrimination claims were making their way through the administrative process, Oakridge Rehab terminated its operations and transferred substantially all of its assets to another company, Oakridge Healthcare Center, LLC (Oakridge Healthcare). The agreement governing the transfer of assets from Oakridge Rehab to Oakridge Healthcare stated that Oakridge Healthcare would not be the successor to Oakridge Rehab. It also made clear that Oakridge Healthcare did not assume Oakridge Rehab's liabilities.

When Oakridge Rehab failed to satisfy the award against it, the state filed a complaint in the circuit court alleging that Oakridge Healthcare was liable for the award as successor to Oakridge Rehab. Oakridge Healthcare moved for summary judgment on the basis that the state could not establish an exception to Illinois's common-law rule of corporate successor nonliability. The state opposed the motion, arguing that the circuit court should abandon the common-law rule of successor nonliability and adopt the less restrictive successor liability standard federal courts employ in labor law cases.

The circuit court granted Oakridge Healthcare's summary judgment motion, but the appellate court reversed. Noting that it "[had] not specifically addressed a successor corporation's liability for employment

discrimination," the appellate court held the federal standard for corporate successor liability should apply in Illinois employment discrimination cases.[2]

The supreme court disagreed. It held that, under the well-established rule of successor nonliability, "a corporate successor is not subject to any debts or obligations incurred by the entity that previously operated the business."[3] The purpose of this rule is to provide certainty to *bona fide* purchasers of corporate assets that they will not be held liable for unassumed liabilities of the predecessor corporation. Thus, Illinois, like most other United States jurisdictions, recognizes only four limited exceptions to the rule of successor nonliability: (1) the transferee agreed to assume the transferor's liabilities, (2) the transaction amounts to a merger or consolidation or a *de facto* merger of the transferor and the transferee, (3) the transferee is a mere continuation or reincarnation of the transferor, or (4) the transaction was entered into for the fraudulent purpose of avoiding liability for the transferor's obligations.[4]

The court rejected the state's argument that it should adopt a fifth exception mirroring the broader exception to successor nonliability applied in federal labor law cases. It noted that the looser federal standard is premised on the unique status of collective bargaining agreements under federal law.[5] Those issues are not present in employment discrimination cases brought under state law. Thus, there was no compelling reason to abandon the well-settled principle of corporate successor nonliability.[6] And because the state failed to establish one of the four exception to the general rule of successor nonliability, summary judgment for Oakridge Healthcare should have been affirmed.[7]

The *Oakridge Healthcare* opinion makes clear the longstanding rule of corporate successor nonliability is alive and well in Illinois. As the court noted, providing *bona fide* purchasers of corporate assets the certainty that they will not be responsible for liabilities they did not assume promotes "the salability of marginal businesses to avoid the loss of jobs, community resources, and revenues that result when a business is shuttered."[8] ■

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1. 2020 IL 124753.
2. 2019 IL App (1st) 170806, ¶ 51.
3. *Oakridge Healthcare*, 2020 IL 124753, ¶ 20 (citing *Vernon v. Schuster*, 179 Ill. 2d 338, 344-45 (1997)).
4. *Id*.
5. *Id*. at ¶ 24 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964)).
6. *Id*. at ¶¶ 21, 27-33.
7. *Id*. at ¶ 53.
8. *Id*. at ¶ 29.

Recent Appointments and Retirements

1. The circuit judges have appointed the following to be associate judge:
   - Michelle M. Schafer, 1st Circuit, 9/15/2020

2. The following judges have retired:
   - Hon. Carol A. Kipperman, Associate Judge, Cook County Circuit, 9/11/2020
   - Hon. Scott J. Butler, 8th Circuit, 9/30/2020

3. The following judges have resigned:
   - Hon. Stephen P. McGlynn, 20th Circuit, 9/18/2020
   - Hon. David W. Dugan, 3rd Circuit, 9/23/2020
   - Hon. Franklin U. Valderrama, Associate Judge, Cook County Circuit, 9/24/2020■