



CASA/GAL

3/31/2006

In **J.M. v. N.M.**, 844 N.E.2d 590 (Ind. Ct. App. 2006), the Court affirmed the Arbitrator's decree of dissolution with written findings of fact and conclusions of law, which the trial court signed and made an order of the court. This summary addresses only Father's contentions that the guardian ad litem's (GAL) actions, including participation in the arbitration, served as bases for reversing the arbitrator's and trial court's restriction of Father's parenting time.

The child was born September 20, 1998. Before and after the child's birth the Father experienced and was treated for obsessive compulsive disorder, "severe anxiety," major depression, post-traumatic stress disorder, and an "alcohol problem." In October 2004, Father filed a petition for dissolution and the parties entered into an agreed provisional order providing for, among other things, parenting time for Father, but specifying that Father "shall not consume alcohol either before his parenting time or during his parenting time" and that, if Mother reasonably believed he was impaired from alcohol consumption, she could cancel the visit unless Father submitted to a breathalyzer test administered by law enforcement and the results showed no more than a .02 blood alcohol content. In January 2005, Mother filed a verified petition to modify parenting time alleging instances in which Father appeared to have consumed alcohol and forcibly, over Mother's objection, took the child from the marital residence; berated the child after a soccer practice—severely affecting the child; and displayed an explosion of rage in the kitchen of the marital residence. The petition urged that it was in the child's best interests for Father's parenting time "to be conducted in a therapeutic setting" and requested that the parenting time be supervised by Choices, a counseling service. Mother and Father entered into an agreed order providing that Father's parenting time would be supervised by Choices, "in a manner approved of by" the GAL; the parties would "follow the recommendations and requests of Choices and the" GAL regarding parenting time issues; and Mother would dismiss her petition. The parties participated in mediation and the GAL attended two of the three sessions. Father's supervised parenting time went well and in May 2005, Choices, the GAL, and the parties agreed to a three-step transition to unsupervised parenting time. Father and the child went to the library in June 2005, during the last visit of the second-step arrangement, whereby Father would meet the child at Choices, take him away and spend a set amount of parenting time, then return to Choices where Father and the child would meet individually with the Choices counselor. At the library, the child told Father he had a loose tooth and Father tried to pull the tooth. At first Father tried to pull it with his fingers and then with a pair of scissors he obtained

from the librarian. The child was crying and asked Father to stop, but Father continued to try to pull the tooth. On return to Choices, Father did not wait to meet with the counselor, and the child told the counselor “that his dad had scared him” and described the incident. Both the counselor and Mother noted that the child was very upset. When the counselor later heard from the Father, the Father “didn’t deny that it happened.”

In mid-August 2005, the parties agreed to submit to binding arbitration. On August 18, the Arbitrator met with the parties and GAL, at which time the parties entered into some procedural agreements and the Arbitrator overruled the Father’s objection to the GAL’s participation in the arbitration process. At the start of the two-day hearing, Father renewed his objection to participation by the GAL in the proceedings. During the proceedings, the GAL was allowed to cross-examine witnesses. A report from the Choices counselors was included in the GAL report submitted to the Arbitrator; it recommended therapeutically supervised parenting time, and that the Father undergo a psychological evaluation to include a drug and alcohol assessment. The Arbitrator admitted the GAL’s report into evidence over Father’s objections which were based on the Rules of Evidence. In doing so, the Arbitrator noted that no such objection had been raised by Father during the August 18 meeting, which “discussed all of the matters” and, at which time, Father only objected to the GAL’s “participation in asking questions.” The GAL testified that she had consistently recommended that Father undergo an evaluation about “alcohol and medication.” The GAL’s report: (1) described the child’s account of Father’s loudly berating the child regarding his performance during his soccer game and “screamed” at him “for a long time;” (2) described the child’s account of the loose tooth incident; (3) reported that, when the GAL discussed the loose tooth incident with Father, he “stated that dentists use needle-nose pliers, and that if he had had those he would have used them and nothing would have been wrong with that;” and (4) concluded with the recommendation that Father’s parenting time be supervised at Choices. Father’s counsel questioned the GAL extensively on her report. The Arbitrator’s decree of dissolution provided, among other things, that Father have therapeutic parenting time through Choices until it was determined that unsupervised parenting time would not endanger the child’s physical health or significantly impair the child’s emotional development.

The GAL’s participation in the arbitration hearing, including the examination and cross-examination of witnesses, was within statutory authority and did not constitute an abuse of discretion. *Id.* at 601. Father argued that there was no statutory authority allowing the GAL to examine and cross-examine witnesses as she had in the arbitration proceeding. The Court cited to (1) the various statutes authorizing the appointment of GALs and defining a GAL’s role in protecting the best interests of the child, including I.C. 31-15-6-1 which provides that a GAL “may subpoena witnesses and present evidence regarding the supervision of the action, or any investigation and report that the court requires of the” GAL; and (2) caselaw holding that the GAL “is a party to the proceedings.” The Court noted:

It is undisputed that the GAL herein was properly appointed, and that Father agreed to her appointment in the initial agreed provisional order. Inasmuch as the statute authorizes representation of the GAL by an attorney, it is arguable that

such authority inherently includes the GAL's ability to examine and cross-examine witness. Further, the GAL's participation in the arbitration hearings was of a nature encompassed by her authority as an "officer[] of [the] court," to "research[], examin[e], advocat[e], facilitat[e], and monitor[]" [the child's] "situation" from the time of her appointment through the hearings in order "to represent and protect [his] best interests" as a determination on parenting time was being made. I.C. 31-15-6-5, 31-9-2-50, 31-15-6-3.

Id.

There is no merit to the contention that the GAL's presence during the arbitration hearing was barred by the separation of witnesses order. The Court stated that it had previously found no error in the GAL's participation in the arbitration proceeding, and previously noted that the GAL is "a party to" such a proceeding. Id.

GAL's post-arbitration questioning of Father's witness did not render her participation in the arbitration proceeding improper where Father failed to show any prejudice he suffered because of it. Id.

Even if the GAL's report and testimony were erroneously admitted by the arbitrator, sufficient evidence from other sources supported the parenting time determination and, thus, Father's evidentiary objections and argument did not require reversal of the parenting time determination. Id. at 602. In response to Father's argument that the arbitrator had erroneously overruled his objections at the arbitration hearing to the admission of the GAL's report based upon Indiana Evidence Rules 602, 701, 702, and 702 (B), the Court noted that (1) as the arbitrator had found, Father had posed no such objections at the August 18th pre-arbitration meeting, at which time the admission of the report was discussed; (2) Father had the opportunity to question the GAL extensively about the contents of her report, and to use statements therein in his questioning of other witnesses; and (3) traditional rules of evidence do not always apply in arbitration proceedings. Id. at 601-02.