

**IS THERE ROOM FOR ANOTHER ADVOCATE? A PROPOSAL FOR
INCORPORATING GUARDIANS AD LITEM IN MILITARY COURTS-MARTIAL**

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Table of Contents

I. Introduction	1
II. Roles, Responsibilities, and Appointment of Victim Representatives	3
A. Special Victims' Counsel	4
B. Article 6b, UCMJ Representative.....	8
C. Guardian ad Litem	11
D. Potential Conflicts of Interest.....	13
III. Recommendation for Guardians ad Litem in Military Courts-Martial	16
A. Scope of Guardian ad Litem Representation in Courts-Martial.....	17
B. Appointment of Guardians ad Litem by Memoranda of Agreement.....	20
IV. Conclusion.....	24
Appendix A. Sample Memorandum of Agreement (MOA)	1

When victims do not receive the support and help they need after the crime, they may suffer “secondary” injuries. They may be hurt by a lack of understanding from friends, family, and the professionals they come into contact with—particularly if others seem to blame the victim for the crime (suggesting they should have been able to prevent or avoid it). Police, prosecutors, judges, social service providers, the media, coroners, and even clergy and mental health professionals may contribute to such secondary injuries.¹

I. Introduction

It is late Friday night and you arrive home just in time for your cell phone to ring. Criminal Investigation Command (CID) Special Agent Kevin Heart calls with a newly opened investigation. Ten-year-old F.M., reported to her babysitter that F.M.’s stepfather, an Army sergeant, abused her. The babysitter immediately told F.M.’s mother, who called F.M. a liar and asked the babysitter to not say anything to anyone. The babysitter, uneasy about the mother’s reaction, brought F.M. to CID the next time she watched the child.

Military law requires that a victim be notified of the availability of assistance from a Special Victims’ Counsel (SVC) at the time of the report of an alleged sex-related offense; this notification shall be made prior to any interviews by military investigators or other interviews by government representatives.² For a victim who lacks capacity to act on his own behalf, either because he is a minor under the age of 18 or is an incapacitated adult, the Family Advocacy Program (FAP)³ is responsible for both “[a]ssess[ing] reports of spouse

¹ *How Crime Victims React to Trauma*, THE NAT’L CTR FOR VICTIMS OF CRIME (2008), <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/how-crime-victims-react-to-trauma>.

² 10 U.S.C. § 1044e(f) (2015). Notification shall be made “upon report of an alleged sex-related offense or at the time the victim seeks assistance from a Sexual Assault Response Coordinator, a Sexual Assault Victim Advocate, a military criminal investigator, a victim/witness liaison, a trial counsel, a healthcare provider” *Id.* § 1044e(f)(1).

³ The Family Advocacy Program (FAP) is defined as “[a] program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence. FAPs consist of coordinated efforts designed to prevent and intervene in cases of family distress, and to promote healthy family

and child abuse to identify potential Family problems and intervene as necessary to prevent injury to the parties involved” and reporting “all allegations of child abuse to the local [Child Protective Services] CPS authorities pursuant to existing [Memoranda of Agreement] MOAs and State and Federal laws.”⁴ At the time of F.M.’s report to CID, CID would notify FAP of the allegation of child abuse and FAP would notify the local CPS authorities. If the alleged abuse was sexual, in addition to FAP and CPS notification, CID would immediately notify F.M. of her option to speak to an SVC prior to completing the CID report of abuse.

In the case of a victim who lacks the capacity to act on his own behalf, there are multiple parties who can potentially be appointed to represent his rights during a military court-martial proceeding. First, there is the SVC⁵ who advocates on behalf of victims of sexual assault.⁶ Second, a military judge shall appoint an Article 6b representative to assume the rights of a victim who lacks capacity.⁷ Third, if the SVC believes that the parent or guardian

life.” U.S. DEP’T OF DEF., DIR. 6400.1, FAMILY ADVOCACY PROGRAM (FAP) encl. 1, para. E1.1.4 (23 Aug. 2004).

⁴ U.S. DEP’T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 2-4 (30 Oct. 2007) (RAR, 13 Sept. 2011) [hereinafter AR 608-18].

⁵ The portions of this paper addressing the role of the Special Victims’ Counsel is limited to the role and responsibilities of the Army Special Victims’ Counsel. Each branch of service has a Special Victims’ Counsel or Victims’ Legal Counsel with different roles and responsibilities. The scope of this paper is limited to the Army Special Victims’ Counsel.

⁶ 10 U.S.C. § 1044e; THE JUDGE ADVOCATE GENERAL, SPECIAL VICTIMS’ COUNSEL HANDBOOK THIRD EDITION (Apr. 2016) [hereinafter SVC HANDBOOK] at 1. “Any individual eligible for military legal assistance under 10 U.S.C. Section 1044 or AR [Army Regulation] 27-3 who alleges sexual assault is eligible for SVC representation. . . .” *Id.* at 2. “Sexual assault is defined to include any sex-related offense under Articles 120, 120a, 120b, 120c, 125c of the UCMJ, or an attempt under Article 80, UCMJ to commit one of the enumerated offenses.” *Id.* at n.4.

⁷ UCMJ art. 6b(c) (2016).

In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the military judge shall designate a representative from among the representatives of the estate of the victim, a family member, or another suitable individual to assume the victim’s rights under this section. However, in no event may the individual so designated be the accused.

of the incapacitated victim is acting or making decisions harmful to the victim, the SVC has the authority granted by The Judge Advocate General (TJAG) of the Army to recommend a guardian ad litem (GAL) be appointed by a state civil or criminal court.⁸ While all three representatives work to protect and exercise the legal rights of a victim, each has a different and potentially conflicting role and responsibility to the victim.

This primer will begin by outlining the roles and responsibilities of a SVC, an Article 6b representative, and a GAL. It will then discuss the potential conflicts of interest that may arise between the three disciplines, and specifically address the scope and importance of a GAL's representation in a military court-martial. The primer will conclude with a recommendation for appointing a GAL in military courts-martial, because although the Army TJAG has granted the authority to recommend the appointment of a GAL, the process for requesting a state civil or criminal court to appoint one for representation in a court-martial is not defined.

II. Roles, Responsibilities, and Appointment of Victim Representatives

Navigating the criminal justice system, and in particular the military criminal justice system, can be confusing to crime victims. More so than adults, children and other victims

Id. The National Defense Authorization Act (NDAA) for Fiscal Year 2017 included a section entitled the "Military Justice Act of 2016" and was signed into law on Dec. 23, 2016, but has not taken effect as of the date of this paper. The Act has amended this article to read:

In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, *may* assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5105, 130 Stat. 2000 (2016) (emphasis added). This change was made to align the article with the Crime Victims' Rights Act, 18 U.S.C. § 3771. MIL. JUST. REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS, at 102 (2015) [hereinafter MILITARY JUSTICE REVIEW GROUP].

⁸ SVC HANDBOOK, *supra* note 6, para. 5-4c.

who lack capacity may have difficulty understanding their rights in court.⁹ To assist victims with both understanding and exercising their rights, there are three victim representatives available for appointment for the duration of the military court-martial process.

A. Special Victims' Counsel

Special Victims' Counsels advocate on behalf of victims of sexual assault.¹⁰ Special Victims' Counsels are specially trained and appointed judge advocates whose duty is to “represent the best interests of their clients, even when the clients’ interests do not align with the Government. The SVC’s primary duty is to his/her client and no other person, organization, or entity. Special Victims’ Counsels empower victims by fostering the victims’ understanding of the military justice and administrative processes.”¹¹

The SVC has a duty of loyalty and confidentiality to the victim, regardless of the victim’s

⁹ Wendy M. Seiden, *The Case for Representation of Child Victims and Witnesses*, LEWIS AND CLARK, www.lclark.edu/live/files/5452 (last visited Mar. 16, 2017).

¹⁰ 10 U.S.C. § 1044e. Victims eligible for SVC representation are:

- (1) Members of the armed forces who are on active duty.
- (2) Members and former members entitled to retired or retainer pay or equivalent pay.
- (3) Officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay.
- (4) Members of reserve components not covered by paragraph (1) or (2) following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary), for a period of time (prescribed by the Secretary) that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.
- (5) Dependents of members and former members described in paragraphs (1), (2), (3), and (4).
- (6) Survivors of a deceased member or former member described in paragraphs (1), (2), (3), and (4) who were dependents of the member or former member at the time of the death of the member or former member, except that the eligibility of such survivors shall be determined pursuant to regulations prescribed by the Secretary concerned.
- (7) Civilian employees of the Federal Government serving in locations where legal assistance from non-military legal assistance providers is not reasonably available, except that the eligibility of civilian employees shall be determined pursuant to regulations prescribed by the Secretary concerned.

10 U.S.C. § 1044(a) (2015).

¹¹ SVC HANDBOOK, *supra* note 6, at 1.

capacity.¹² If a victim lacks capacity, the SVC must be familiar with the rules governing the SVC program as well as Army Regulation (AR) 27-26 Rule 1.14 which governs professional conduct for lawyers when the lawyer's client has a disability.¹³ The key to the SVC's representation is that, regardless of their capacity, the victim is the client.¹⁴ If the victim is a minor, and the SVC determines that the child has the requisite development and maturity to make considered decisions on their own behalf, the SVC will enter into a representation agreement directly with the child.¹⁵ If the SVC determines that the child does not have that ability or, in the case of an incapacitated adult, the SVC will enter into a representation agreement with the victim's parent or guardian and explain to both the victim and the parent or guardian that, though the agreement is not directly with the victim, the SVC's loyalty is solely to the victim.¹⁶ The SVC's duty is to act and advocate in a manner which expresses what the victim wants, while ensuring that

the child who possesses the capability to make considered decisions has the right to make his or her own decisions about the case, just like any adult client. As long as the client's decisions or actions are not illegal, unethical, or influenced by third parties, the client's decisions should be respected, even if the SVC disagrees with them.¹⁷

At the time of the initial report, or at any time during the reporting or court-martial process, when an eligible victim exercises the right to request representation by a SVC, the

¹² SVC HANDBOOK, *supra* note 6, para. 5-3a.

¹³ *Id.* para. 5-1a; U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS Rule 1.14(b) (1 May 1992) [hereinafter AR 27-26].

¹⁴ SVC HANDBOOK, *supra* note 6, para. 5-2.

¹⁵ *Id.* para. 5-2a(1).

¹⁶ *Id.* para. 5-3.

¹⁷ *Id.* para. 5-2f.

SVC is appointed as the victim’s advocate.¹⁸ When the SVC is appointed to a victim filing an unrestricted report of sexual assault,¹⁹ the attorney-client relationship is formed and “the SVC will serve the Staff Judge Advocate (SJA), Chief of Military Justice, Senior Defense Counsel (SDC), the Criminal Investigation Division (CID), the Special Victim Witness Liaison (SVWL), and the Sexual Assault Response Coordinator (SARC)/Victim Advocate (VA)/Family Advocacy Program (FAP) with a notice of representation.”²⁰ Due to the attorney-client relationship between the SVC and the victim, the Trial Counsel (TC), Defense Counsel (DC), or any other third-party may not communicate with the represented victim without the SVC’s consent.²¹

¹⁸ 10 U.S.C. § 1044e (2015).

¹⁹ There are two types of reporting options for victims of sexual assault, restricted and unrestricted. 10 U.S.C. § 1565b(a)(4) (2015). A restricted report of sexual assault is a

[r]eporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals . . . and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an investigation. The victim’s report . . . will NOT be reported to law enforcement or to the command

U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, at 121 (7 July 2015). Restricted reports are confidential, therefore, a victim who files a restricted report is entitled to Special Victim Counsel (SVC) assistance, but there would be no notification to any outside party of that assistance. *See* SVC HANDBOOK, *supra* note 6, para. 1-4a. An unrestricted report of sexual assault is provided to law enforcement for investigation and is what triggers the appointment of an SVC as the victim’s advocate throughout the investigation and court-martial process. *See id.* para. 4-1.

²⁰ SVC HANDBOOK, *supra* note 6, para. 5-3a.

²¹ 10 U.S.C. § 1044e(c); SVC HANDBOOK, *supra* note 6, para. 4-2. Additionally, the National Defense Authorization Act (NDAA) for Fiscal Year 2017 included a section entitled the “Military Justice Act of 2016” and was signed into law on Dec. 23, 2016, but has not taken effect as of the date of this paper. The Act has added the following provision as Article 6b(f), UCMJ:

(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victims' Counsel or other counsel for the victim, if applicable.

(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.

The SVC has limited standing in an Army court-martial and often works with the government representative, usually the TC, to ensure that not only is the victim's voice heard, but that the victim's rights are protected.²² A victim has the right to be heard through his SVC on "issues implicating [Military Rule of Evidence] MRE 412 (rape shield), MRE 513 (psychiatrist-patient privilege), MRE 514 (victim advocate-victim privilege), MRE 615 (exclusion of the victim from trial), and any other matter where the client's interests or rights are at stake."²³ This right to be heard can be exercised both by motions and argument before the military judge.²⁴ Additionally, a victim has the right to petition the Army Court of Criminal Appeals (ACCA) for a writ of mandamus to quash a deposition order or to order compliance by the preliminary hearing officer if the victim believes that the preliminary hearing officer has violated Article 6b, Uniform Code of Military Justice (UCMJ), MRE 412, MRE 513, MRE 514, MRE 615, or Article 32, UCMJ.²⁵ As the victim's attorney, the SVC can assist with the filing of these writs on behalf of the victim to protect the victim's rights.²⁶

Returning to the introduction scenario, if the abuse F.M. reported was sexual abuse, upon

National Defense Authorization Act § 5105.

²² SVC HANDBOOK, *supra* note 6, para. 4-3.

²³ SVC HANDBOOK, *supra* note 6, para. 4-4c.

²⁴ U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL (1 Nov. 2013) [hereinafter RULES OF PRACTICE], at 4 ("[A]ll Rules of Court apply to SVCs (whether military or civilian counsel representing victims), including but not limited to the rules on motions practice in Rule 3.").

²⁵ UCMJ art. 6b(e) (2016); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203(d)(2)(B)(g) (2016) [hereinafter MCM] (requiring The Judge Advocate General to establish the process for writ processing to the Courts of Criminal Appeals); *EV v. United States*, 75 M.J. 331 (2016) (finding that a victim cannot appeal a decision by the Courts of Criminal Appeals denying a writ of mandamus to the U.S. Court of Appeals for the Armed Forces because that court lacks jurisdiction); *Randolph v. HV*, No. 16-0678, 2017 WL 485883 (C.A.A.F. Feb. 2, 2017) (finding that an accused cannot appeal a decision by the by the Courts of Criminal Appeals granting a victim a writ of mandamus to the U.S. Court of Appeals for the Armed Forces because that court lacks jurisdiction).

²⁶ SVC HANDBOOK, *supra* note 6, para. 8-1.

the report to CID Special Agent Heart, Agent Heart would notify F.M. of her right to SVC representation prior to conducting her interview with CID.²⁷ If F.M. accepted SVC representation, at their first meeting the SVC would determine the ability of F.M. to exercise her rights and make decisions in her case. The attorney-client relationship is formed if the SVC determines that F.M. has the requisite capacity to enter into an attorney-client relationship. At that point, the SVC would notify the parties involved in the case, and accompany and represent F.M. during all interviews, the preliminary hearing, motions hearings, and all other stages leading up to and through the court-martial process. The SVC's duty is to advocate for what F.M. wants, to include potentially arguing to a military judge that a military no contact order be lifted or that F.M.'s stepfather be released from pretrial confinement if that is what F.M. wants, no matter what the SVC thinks is best.²⁸

B. Article 6b, UCMJ Representative

The Article 6b representative is another potential representative that can be appointed by the military judge to assist victims who lack capacity. Rule for Court Martial (RCM) 801(a)(6) requires that a military judge appoint a representative to assume the rights of a victim who is a minor, or who is incompetent, incapacitated, or deceased.²⁹ This representative can be a "family member, a representative of the estate of the victim, or another suitable individual."³⁰ The rule does not require that this representative be an

²⁷ *Id.* para. 2-1; *see also* 10 U.S.C. § 1044e(f)(1) (2016) ("the victim of an alleged sex-related offense shall be offered the option of receiving assistance from a Special Victims' Counsel upon report of an alleged sex-related offense.").

²⁸ *See* UCMJ art. 6b (2016).

²⁹ MCM, *supra* note 25, R.C.M. 801(a)(6); *but see* National Defense Authorization Act § 5105 (removing the requirement that a military judge designate a representative, instead stating that an appropriate party may assume the victim's rights under Article 6b).

³⁰ MCM, *supra* note 25, R.C.M. 801(a)(6).

attorney.³¹ The factors that a military judge looks at when designating this representative include: the age and maturity of the representative, the relationship of the representative and the victim, the location of the proposed representative, the costs associated with the representative being appointed, the willingness of the person to serve in the role, whether the proposed representative has been appointed as a guardian in another court proceeding, the preference of the victim, any delay to the court-martial by having the representative appointed, and any other relevant information that may impact the appointment.³² This representative essentially steps into the victim's shoes and has the ability to exercise the victim's rights on behalf of the victim.³³ These rights include the right to receive notice of case proceedings, the right to be "reasonably heard at such hearings," and the right to confer with the government representative.³⁴

The TC initiates the appointment of an Article 6b representative.³⁵ Upon notification by the TC of the requirement for an Article 6b representative, the military judge determines how the representative is selected and if an Article 39(a), UCMJ session is required prior to the written appointment.³⁶ Rule for Court-Martial 801 does not address how and when the

³¹ *Id.*

³² *Id.* at 801(a)(6)(A).

³³ *Id.* at 801(a)(6).

³⁴ *Id.* at 801(a)(6)(A).

³⁵ *Id.* at 801(a)(6)(B)(i). "As soon as practicable, trial counsel shall notify the military judge, counsel for the accused, and the victim(s) of any offense(s) properly before the court when there is an apparent requirement to appoint a designee under this rule." *Id.*

³⁶ *Id.* at 801(a)(6)(B); *see also* UCMJ art. 39(a) (2016) (explaining that once a case has been referred to a court-martial, the military judge may conduct hearings outside of the presence of court-martial members to "hear[ing] and rule [ruling] upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court" and to "perform[ing] any other procedural function which may be performed by the military judge under this chapter." These hearings "shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.").

Article 6b representative may be heard in court.³⁷ However, reading RCM 801 and Article 6b together, the Article 6b representative may petition the military judge to file motions and speak to the court on the victim's behalf, as well as file petitions for writs of mandamus to the Court of Criminal Appeals; though the representative is not required to be an attorney, these rights are conferred upon the victim, and by extension the Article 6b representative, to exercise.³⁸

The Article 6b representative is different from and independent of the SVC. First, the Article 6b representative is not an advocate for the victim, he is merely the person assuming the victim's rights.³⁹ Second, a military judge can appoint the Article 6b representative in all types of cases, both where the victim has a right to a SVC and in cases where the victim does not have that right.⁴⁰ Third, due to their different responsibilities, the relationship between the Article 6b representative and SVC may be minimal. The SVC is an advocate while the Article 6b representative's role is to ensure the victim's rights are being exercised in accordance with the law.⁴¹ Finally, the relationship between the SVC and the victim is that of attorney-client, so the SVC would not be able to breach that privilege to discuss specific matters about the case and representation of the victim with the Article 6b representative.⁴²

Revisiting the introduction scenario, no matter what type of abuse F.M. alleges, due to her age, the TC would notify the military judge of the requirement to appoint an Article 6b

³⁷ MCM *supra* note 25, R.C.M. 801(a)(6)(B).

³⁸ *Id.* at 801(a)(6); UCMJ art. 6b(e) (2016).

³⁹ UCMJ art. 6b (2016).

⁴⁰ *Id.* at art. 6b(b).

⁴¹ *See* SVC HANDBOOK, *supra* note 6, para. 5-2f; MCM, *supra* note 25, R.C.M. 801(a)(6).

⁴² 10 U.S.C. § 1044e(c) (2015).

representative to assume the legal rights of F.M.⁴³ Since F.M.’s stepfather is the party accused of the abuse, looking at the factors in RCM 801(a)(6), the military judge could appoint F.M.’s mother as the Article 6b representative. F.M.’s mother would receive notice of all hearings throughout the court-martial and have the ability to reasonably be heard at each. She could file motions and petition to argue in front of the court, as well as prepare and submit petitions for writs of mandamus to the ACCA to protect F.M.’s rights. F.M.’s mother would be able to exercise all of the rights afforded to F.M. on her behalf.

C. Guardian ad Litem

The final representative that could be appointed by a military judge to assist a victim that lacks capacity is a GAL. A GAL is an advocate who can be appointed for all crime victims who lack capacity, and whose sole duty is to “protect the best interests of the child.”⁴⁴

Unlike the SVC or Article 6b representative, the role of the GAL is to provide “an independent voice in the litigation, and is charged with protecting the child’s best interest rather than the child’s viewpoint.”⁴⁵ The GAL may communicate with the court on behalf of the child or incapacitated victim’s best interests.⁴⁶ The GAL is charged with conducting an “independent assessment of the best interest of the minor” and making a recommendation to the court regardless of what the victim says or desires.⁴⁷

⁴³ See UCMJ art. 6b(b) (2016) (“In this section, the term “victim of an offense under this chapter” means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice).”).

⁴⁴ 18 U.S.C. § 3509(h)(1) (2012).

⁴⁵ Mark Hardin, *Guardians ad Litem for Child Victims in Criminal Proceedings*, 25 J. Fam. L. 687, 689 (1986-87).

⁴⁶ *Id.* at 689-90.

⁴⁷ *Id.* at 690.

State courts appoint GALs upon notification of or recognition that a child needs protection during a court proceeding, including allegations of abuse by a custodial parent or guardian.⁴⁸ The UCMJ does not currently have a provision that provides the authority or process for a military judge to appoint a GAL in a court-martial. Additionally, although the Special Victims' Counsel Handbook (SVC Handbook) instructs SVCs to request appointment of a GAL if they deem it necessary, it provides no guidance for making that request.⁴⁹ In fact, the term "guardian ad litem" is only used once in the Manual for Courts-Martial when addressing who can be present when a military judge is interviewing a child to determine if remote live testimony would be appropriate in a court-martial.⁵⁰

The Fiscal Year (FY) 2014 National Defense Authorization Act (NDAA) authorized the appointment of a "Legal Guardian for Certain Victims" in Article 6b.⁵¹ While discussing creation of the implementation rules for this change, there was confusion about what authority a military judge had to appoint a guardian who could, in practice, "erode a

⁴⁸ See e.g. MINN. STAT. § 260C.163 Subd. 5(a) (2016) ("The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings . . . that the parent or guardian is indifferent or hostile to the minor's interests, and in every proceeding alleging a child's need for protection or services . . ."); VA. CODE ANN. § 16.1-266 (2005) ("Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected . . . the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child . . .").

⁴⁹ SVC HANDBOOK, *supra* note 6, para. 5-4c.

⁵⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(5) (2016) [hereinafter MCM].

In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem.

Id.

⁵¹ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 287, 288-89 (2013).

parent/guardian’s ability to make decisions for or act on behalf of the child.”⁵² The FY 2015 NDAA modified the language to “Appointment of Individuals to Assume Rights for Certain Victims” and changed the words from “legal guardian” to “representative.”⁵³ As previously discussed, the Article 6b representative is not an appointed legal guardian, but an appointed representative who assumes the rights of the victim. This leaves a gap for a victim who lacks capacity to have an individual to act purely in their best interest.

D. Potential Conflicts of Interest

The roles and responsibilities of the SVC, Article 6b representative, and GAL can directly conflict. The potential for conflicts of interest prevents one individual from serving in multiple roles. The SVC advocates for the victim’s express wants and has the right to participate in courts-martial on behalf of the victim, but does not do an independent assessment of the victim’s circumstances to determine what is in the victim’s best interest.⁵⁴ The Article 6b representative is not an advocate but a representative able to assume the rights of a victim who lacks capacity and has the implied right to participate in courts-martial based on the assumption of the victim’s rights, but he does not conduct an independent assessment of the victim’s circumstances to determine what is in the victim’s best interest.⁵⁵ The GAL makes an independent assessment of the totality of the victim’s situation and advocates for what is in the best interests of the victim, however, there is no provision for a GAL to be heard or participate in a military court-martial.

⁵² Email from John Meixell, Chief, Legal Assistance Policy Division, to author (Dec. 8, 2016, 1619 EST) (on file with author).

⁵³ National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 127 Stat. 74, 76 (2014).

⁵⁴ 10 U.S.C. § 1044e (2015); RULES OF PRACTICE, *supra* note 24, at 4.

⁵⁵ UCMJ art. 6b (2016).

If F.M. wants her stepfather out of pretrial confinement, the SVC would advocate for his release because that is F.M.'s express desire. Whether or not there is an SVC representing the victim, the appointed Article 6b representative would also advocate for F.M.'s stepfather's release by assuming F.M.'s rights and acting on her behalf. However, the GAL would look at the totality of F.M.'s situation to see if it is really in her best interest to have him return to the home. The SVC Handbook acknowledges and addresses this potential conflict by stating that the SVC cannot serve as both the SVC and the GAL, as the "SVC has a separate responsibility to represent the client's interests, even if they differ from the GAL's interests."⁵⁶ The SVC's advocacy and the GAL's advocacy would directly conflict with one another; however, they both have the ability to petition the court to be heard. Both the SVC and the GAL could potentially conflict with the Article 6b representative if they believe the Article 6b representative is not exercising all available rights on behalf of the victim.

Based on the introduction scenario, if F.M.'s mother does not believe the allegations made by F.M., she may not be the best person to represent the rights of F.M. Article 6b lists "legal guardian," "legal representative," and "family member" as the first recommendations for the representative of a victim who lacks capacity.⁵⁷ However, what if the SVC or TC reasonably believe that although F.M.'s mother may want to assume F.M.'s rights, she will not act in F.M.'s best interests? Rule 1.14 of AR 27-26 states that a lawyer "may seek appointment of a guardian . . . only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."⁵⁸ Further, the SVC Handbook recommends that if the SVC

⁵⁶ SVC HANDBOOK, *supra* note 6, para. 5-2c(1). ("the SVC will do what is in the child's legal interests").

⁵⁷ UCMJ art. 6b(6) (2016).

⁵⁸ AR 27-26, *supra* note 13, Rule 1.14(b).

believes it is necessary, the SVC should coordinate to appoint a GAL to represent the minor or incapacitated victim.⁵⁹ This decision is based on a determination by the SVC that the “parent/guardian’s actions are objectively unreasonable and harmful to the child” particularly when “[t]he parent/guardian does not believe the child, and is actively impeding the investigation, or otherwise acting against the best interests of the child victim.”⁶⁰

If the reported abuse is not sexual abuse and F.M. does not have the right to SVC representation, does Rule 1.14 allow the TC to recommend another party if the mother requests to be the Article 6b representative? Does the TC have the right to tell the mother that she cannot be the Article 6b representative? Does the mother have the right to speak to the military judge about being appointed as the Article 6b representative? If the accused believes that the mother will assist his case by participating, will the DC request the mother be appointed as the Article 6b representative?⁶¹ The duty of the TC is to “prosecute in the name of the United States” and, therefore, cannot align herself too closely to the victim’s rights as it may ethically implicate the responsibility to the public and the rights of the accused.⁶² Does the TC have an obligation to recommend that a GAL be appointed to represent F.M.?

All of these questions deserve answers and the inclusion of the GAL in the military court-martial process answers some of them. The GAL would be able to protect F.M.’s rights if

⁵⁹ SVC HANDBOOK, *supra* note 6, para. 5-4c.

⁶⁰ *Id.* para. 5-4b.

⁶¹ See MCM, *supra* note 25, R.C.M. 801(a)(6)(B)(iii) (“At the discretion of the military judge, victim(s), trial counsel, and the accused may be given the opportunity to recommend to the military judge individual(s) for appointment.”).

⁶² UCMJ art. 38(a) (2016); see also Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 Lewis & Clark L. Rev. 559, 561 (2005), <http://digitalcommons.pace.edu/lawfaculty/122/>.

the military judge appointed F.M.'s mother as the Article 6b representative. If the appointment of a GAL was initiated in every case with a minor or incapacitated victim, the victim's rights would be protected and the TC, SVC, or any other party would not need to be concerned about violating rules or be required to make the threshold determination of whether a GAL is necessary.

All three representatives, the SVC, Article 6b representative, and GAL, serve important roles in representing victims who lack capacity to ensure that their rights are both fully represented and protected. In military courts-martial, there are provisions for representation by SVC's and Article 6b representatives, but no such authorization or provision exists for a GAL. Not having this representative available to advocate on behalf of and protect the best interests of a victim does the victim a disservice and remedial steps should be taken.

III. Recommendation for Guardians ad Litem in Military Courts-Martial

Victims who lack capacity are in need of an additional advocate in the courts-martial process to ensure their rights are exercised and protected. Allowing a GAL to participate in the military court-martial process brings the court-martial process in line with the Child Victims' and Child Witnesses' Rights Act.⁶³ This act allows for a court to appoint and pay for "a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child."⁶⁴ This GAL is authorized to attend all proceedings throughout the court process, has access to all documents and records to "effectively advocate for the child," and the GAL is entitled to inform the court about what

⁶³ 18 U.S.C. § 3509 (2009).

⁶⁴ *Id.* § 3509(h)(1).

is in the best interest of the victim.⁶⁵ The 2017 NDAA modified portions of Article 6b to bring it in line with the Crime Victims’ Rights Act, however, the article should now be modified to allow for the use of GALs to bring the UCMJ in line with the Child Victims’ and Child Witnesses’ Rights Act.⁶⁶ Without these changes, the UCMJ fails to afford victims who lack capacity all of their statutory rights in a military court-martial.

A. Scope of Guardian ad Litem Representation in Courts-Martial

Different approaches have been proffered to allow for the appointment and participation of a GAL in military courts-martial; however, none of them resolve the ultimate concern of ensuring a victim’s rights are fully protected and exercised. First, as previously discussed, the FY 2014 NDAA added language to Article 6b to allow a military judge to appoint a “legal guardian,” and that language was subsequently changed to “representative” in the FY 2015 NDAA.⁶⁷ Second, Lieutenant David Berger suggested modification of Article 46, UCMJ to allow the convening authority to appoint a commissioned officer or a judge advocate to be a GAL prior to referral of a case to court-martial, and after referral, a military judge would have that same power.⁶⁸

⁶⁵ *Id.* § 3509(h)(2).

Duties of guardian ad litem.— A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney’s work product, necessary to effectively advocate for the child.

Id.

⁶⁶ Portions of Article 6b, UCMJ were modified to make it more consistent with the Crime Victims’ Rights Act, 18 U.S.C. § 3771. MILITARY JUSTICE REVIEW GROUP, *supra* note 7, at 102.

⁶⁷ Compare National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 287, 288-89 (2013) with National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 127 Stat. 74, 76 (2014).

⁶⁸ Lieutenant David A. Berger, *Proposed Changes to Rules for Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance with the Child Victims’ and Child Witness’ Rights*

The issue with Lieutenant Berger’s proposed change is “[p]ublic welfare is an area, in particular, that the federal government has not only failed to regulate, but has specifically mandated that the states regulate.”⁶⁹ For example, the Child Abuse Prevention and Treatment Act (CAPTA) has provided federal funding to states “in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations, including Indian Tribes and Tribal organizations, for demonstration programs and projects.”⁷⁰ This indicates the federal government has left the power of dealing with these issues to the states. The CAPTA goes a step further and defines the federal role in this arena, which is “supporting research, evaluation, technical assistance, and data collection activities; establish[ed] the Office on Child Abuse and Neglect; and mandate[s] Child Welfare Information Gateway.”⁷¹ By limiting the role of the federal government, absent explicit statutory authorization, a military judge may not take the authority to appoint a GAL from the state.⁷² To implement this change, the law needs modification to take the power from the states to allow federal judges, specifically military judges, to deal with these matters.

Expanding the Army’s SVC program to allow for the SVC to represent victims of all types of abuse, not just sexual abuse, is another potential approach. The Marine Corps have Victims’ Legal Counsel (VLC) who are specially trained judge advocates whose duty is to

Statute, June 1999, ARMY LAW. 19, 27. It should be noted that this paper was published in 1999 before the implementation of the Army Special Victims’ Counsel Program.

⁶⁹ State ex rel. Children, Youth & Families Dep’t v. Debbie F., 120 N.M. 665, 668 (1995).

⁷⁰ CHILD WELFARE INFORMATION GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2011).

⁷¹ *Id.*

⁷² Berger, *supra* note 68, at 26-27.

“provide legal advice, legal counseling, and representation” to eligible victims of “sexual assault, domestic violence, child abuse, and other crimes punishable under the Uniform Code of Military Justice (UCMJ).”⁷³ The Marine VLC program is an expanded version of the Army’s SVC program. However, even if the Army SVC program were expanded to represent victims of other crimes, this expansion would not allow for the independent assessment that a GAL provides. Expanding the rights of Army SVCs would be faster to implement than a change to the UCMJ, as the SVC already has authority to participate in all parts of a military courts-martial.⁷⁴ However, as noted above, the SVC is acting and advocating according to the victim’s desires.⁷⁵ If the victim’s desires are not in his best interest, the afforded rights are not fully exercised or protected. There would still be a gap for the GAL to conduct an independent assessment of the victim’s circumstances and make recommendations based on the victim’s best interest.

Expanding the definition and rights of an Article 6b representative is a third approach. The definition of Article 6b representative could be modified to allow the representative to advocate on behalf of the victim who lacks capacity instead of merely assuming her rights. With family member and legal guardian/representative of the estate listed as the first recommendation for an Article 6b representative, one could assume that the appointed person will assume the victim’s rights and act in her best interest.⁷⁶ However, the language of Article 6b does not indicate an ability to advocate on behalf of the victim and there is no

⁷³ STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, THE U.S. MARINE CORPS VICTIMS’ LEGAL COUNSEL MANUAL para. 1001-02 (Apr. 2016).

⁷⁴ SVC HANDBOOK, *supra* note 6, para. 4-3.

⁷⁵ *Id.* para. 5-2f.

⁷⁶ UCMJ art. 6b(c) (2016).

independent assessment of the victim's situation required to determine what is in her best interest.

A GAL's responsibilities could encompass those of an Article 6b representative because by assuming the victim's rights to be present and heard at all proceedings, the GAL is acting in the victim's best interest. However, an Article 6b representative could not be a GAL because there is no independent assessment that the representative must conduct to determine what is truly in the victim's best interests. For example, if F.M.'s mother, as the non-accused legal guardian, is appointed as the Article 6b representative, her bias may influence her exercise of F.M.'s rights. Even if the language of Article 6b required an independent assessment, the individual's biases may interfere, as the representative is often a family member or other close relative.⁷⁷ A neutral party, free of biases, is necessary to conduct a truly independent assessment of the situation to protect F.M.'s rights. That neutral party is the GAL.

B. Appointment of Guardians ad Litem by Memoranda of Agreement

Integrating the state's action into the court-martial process is the best solution. This ensures the protection of victims' rights, brings the UCMJ in line with the Child Victims' and Child Witnesses' Rights Act, and prevents states from losing the power to adjudicate issues regarding children and families residing in their states. This can be done by utilizing the laws currently in place as a starting point. Army Regulation 608-18 indicates a preference for and provides samples of MOAs that Army installations can enter into with the communities surrounding the installation to "establish a cooperative relationship with local communities in identifying, reporting, and investigating child and spouse abuse cases; in

⁷⁷ *Id.* at art. 6b(6).

protecting abused victims from further abuse in both emergency and nonemergency situations; and in providing services and treatment to Families in which child abuse has occurred.”⁷⁸

These MOAs allow state social services to investigate reports of child abuse and neglect, place victims in protective custody, and petition state courts for the removal of children from homes on military installations.⁷⁹ The MOA language should be expanded to require that, for victims who lack capacity, upon the initiation of an investigation into allegations of abuse or neglect by a service member occurring on a military installation, social services petition the state court to request the appointment of a GAL.⁸⁰ Since military courts-martial only have jurisdiction over service members,⁸¹ it would allow those cases that could potentially lead to a court-martial to have a GAL involved at the initiation of the investigation.

In addition to modifying the UCMJ to allow for the appointment of a GAL utilizing a MOA, it should be further amended to afford the appointed GAL many of the same rights as an SVC in courts-martial. The UCMJ allows SVC representation of sexual abuse victims in all aspects of the court-martial process.⁸² The UCMJ should expand to allow for a GAL to represent victims who lack capacity, regardless of the crime, in all aspects of the court-

⁷⁸ AR 608-18, *supra* note 4, para. 2-11.

⁷⁹ Memorandum of Understanding Between US Army Garrison, Fort Knox, Kentucky and Kentucky Cabinet for Health and Family Services Department for Community Based Services Salt River Trail Service Region (Shepherdsville, Kentucky), subject: Abuse and Neglect of Children of Military Families (30 June 2010) [hereinafter Abuse and Neglect of Children Memo]. *See also* AR 608-18 *supra* note 4, para. D-1a (“State civil laws generally apply to persons on the installation, but those State civil laws requiring enforcement by State officials (for example, child protection laws) only apply to the extent that Federal laws and military regulations do not conflict with State law . . . and the installation commander invites the State authorities, by agreement or otherwise, to exercise their authority on the installation.”).

⁸⁰ A sample Memorandum of Agreement (MOA) is located in Appendix A.

⁸¹ *See* MCM, *supra* note 25, R.C.M. CHAPTER II.

⁸² *See* UCMJ art. 6b(b) (2016); SVC HANDBOOK, *supra* note 6, chap. 4.

martial process. The amendment would state that once a state court appoints a GAL, he, as a recognized representative of the victim, receive many of the same rights as a SVC in representing a victim throughout all stages of the court-martial process. This would include accompanying the victim to interviews, ensuring the victim's rights are protected at hearings, and if necessary, petitioning to file motions and arguing before the military judge. The appointment of the GAL would not preclude a victim that lacks capacity from also being represented by an SVC; as previously discussed, the two representatives have different roles and responsibilities. The UCMJ changes to allow for appointment and utilization of a GAL in the court-martial process would ensure protection of a victim's rights.

There are potential issues with appointing a GAL in this manner. First, there would be a requirement for reimbursement of funds for the GAL's time and work. If the case went to a court-martial, reimbursement could be paid in the same manner that the convening authority currently pays for expert witness fees.⁸³ The MOA could include details on an established fee schedule, and upon notification of an investigation triggering the requirement for a GAL, the SJA would immediately contact the convening authority for authorization for employment and to fix the fee schedule. This would cause additional work for the SJA, but would allow immediate employment and integration of the GAL into the victim's case from the very first report of abuse.

Another potential issue is that, depending on the size of the community outside of the military installation, there may not be enough trained GALs to support the installation's courts-martials. Many states require that a GAL be an attorney and others have mandatory

⁸³ MCM, *supra* NOTE 25, R.C.M. 703(d).

training and education requirements.⁸⁴ Smaller communities may not have enough trained individuals to meet the demand of military courts-martial. A possible solution is to extend the MOA to neighboring larger cities as well and coordinate travel for the GAL as part of the fee schedule. This would ensure both availability of GALs and prevent a small pool of GALs from potentially becoming overwhelmed by courts-martials on an installation.

Applying these proposed UCMJ changes to F.M.'s case, upon the report of abuse to CID, regardless of the type of abuse, CID would notify FAP and the state social services. If the reported abuse is sexual and the SVC believes that F.M.'s mother is not acting in F.M.'s best interest, the SVC can notify FAP about the issue and request that they contact the state social services for a GAL appointment.⁸⁵ Per the previously established MOA, social services would immediately petition the state court to appoint a GAL to represent F.M. The SJA would be notified through the channels outlined in the MOA and contact the convening authority for approval of the fee schedule to pay for the GAL's services. The GAL would contact the child, and the SVC in the case of a sexual abuse allegation, and begin independently assessing the child's best interests. The GAL would participate throughout the entire investigation into the allegations and be able to assess F.M.'s entire situation to make recommendations to the court. If F.M. tells her SVC or her Article 6b representative that she wants her stepfather to return to the home, the GAL could independently assess whether that

⁸⁴ See e.g. VA. CODE ANN. § 16.1-266.1A (2005).

[t]he standards shall, insofar as practicable, take into consideration the following criteria: (i) license or permission to practice law in Virginia, (ii) current training in the roles, responsibilities and duties of guardian ad litem representation, (iii) familiarity with the court system and general background in juvenile law, and (iv) demonstrated proficiency in this area of the law.

Id. See also KAN. DIST. CT. R. 110A(b) (2012) (identifying education and training required for guardians ad litem appointment).

⁸⁵ SVC HANDBOOK, *supra* note 6, para. 5-4c.

is what is in F.M.'s best interest and make appropriate recommendations. If the SVC or Article 6b representative are not fully exercising F.M.'s rights and the GAL believes that additional assistance is needed, she would be able to petition the military judge to speak on behalf of the best interests of F.M.

Any potential issues in implementing the recommended changes to the UCMJ should not stand in the way of the implementation of GALs in military courts-martial. The GAL's ability to represent the best interests of a victim who lacks capacity in all aspects of a court-martial is something that needs to be addressed. The UCMJ has been updated to strengthen victims' rights and the SVC program was implemented to allow for a judge advocate to exercise the rights of and advocate on behalf of victims of sexual assault.⁸⁶ However, victims of other crimes who lack capacity are left to navigate the court-martial process without a representative to protect their best interests. Unfortunately, even when entitled to a SVC, the victim's full rights are not protected.

IV. Conclusion

It is well established in military and civilian law that victims need help navigating the criminal court system. For victims who lack capacity, this assistance is required not only because of a lack of knowledge about the system and the ability to be heard and acknowledged by the court, but may also be due to the victim's relationship to the perpetrator. In cases of sexual assault, the SVC is available to assist the victim throughout the court-martial process and exercise the victim's rights. However, in cases where the victim has been subject to other types of abuse, there is no right to independent

⁸⁶ Compare National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 287, 288-89 (2013) with National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 127 Stat. 74, 76 (2014).

representation. Additionally, in cases of sexual assault where the victim is unable to express his desires or whose desires are not in his best interest, there is no one to act in the victim's best interest. The inclusion of a GAL to the court-martial process would allow for victims who lack capacity to have a representative able to truly and independently assess his case and act purely in the best interest of the victim in exercising and protecting his rights.

Appendix A. Sample Memorandum of Agreement (MOA)⁸⁸

**MEMORANDUM OF AGREEMENT
BETWEEN
US ARMY GARRISON, FORT KNOX,
KENTUCKY AND
KENTUCKY CABINET FOR HEALTH AND FAMILY
SERVICES DEPARTMENT FOR COMMUNITY BASED
SERVICES
SALT RIVER TRAIL SERVICE
REGION
(SHEPHERDSVILLE, KENTUCKY)**

SUBJECT: Abuse and Neglect of Children of Military Families

1. PURPOSE. This Memorandum of Agreement (MOA) establishes written procedures to integrate the exercise of jurisdiction vested in the Kentucky Cabinet for Health and Family Services, Department for Community Based Services (DCBS) and Fort Knox, Kentucky, in matters involving the abuse and neglect of children of military families. These procedures are to be followed by the DCBS and the Fort Knox Family Advocacy Program (FAP). This agreement does not purport to create additional jurisdiction or to limit or modify existing jurisdiction vested in the parties. This agreement supersedes all previous agreements between DCBS authorities and Fort Knox pertaining to child abuse, neglect, and misconduct.

2. REFERENCES:

- a. Army Regulation (AR) 608-18, the Army Family Advocacy Program, Rapid Action Review 13 Sept 2011.
- b. 42 U.S.C. § 5101, The Child Abuse Prevention and Treatment Act.
- c. Kentucky Revised Statutes (KRS) Chapters 600-645, Unified Juvenile Code.
- d. Kentucky Administrative Regulations (KAR) Title 922, Cabinet for Health and Family Services Department for Community Based Services Protection and Permanency.

3. AUTHORITY. The state of Kentucky, through the DCBS and under the authorities listed above, is responsible for the protection of abused children within the Commonwealth of Kentucky. The commanding general of Fort Knox, by virtue of his inherent authority as commander, and through the specific authority granted to him under the Army Family Advocacy Program (Army Regulation 608-18) is responsible for the protection of abused children of military Families within the command as well as for maintaining law, order, and discipline on the installation. The commanding general's authority to provide protection for children of military Families is limited, however, by the lack of a Federal judicial framework in which the status of children can be adjudicated and, where appropriate, judicially managed remedies can be mandated. Therefore, Fort Knox relies upon the DCBS to exercise its authority, where necessary, in cases of abused children of military families. The exercise of the

⁸⁸ This sample MOA was created by merging information located in a sample Memorandum of Understanding and Appendix E of AR 608-18. Information not found in the listed documents was added by the author and is italicized. Abuse and Neglect of Children Memo, *supra* note 79; AR 608-18, *supra* note 4, para. E-1.

Court's jurisdiction in cases of child abuse arising on the installation is supported by Congressional deference to and reliance upon state child-related statutes (see, for example, The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101), and by developing case law that upholds the exercise of state civil jurisdiction within areas of exclusive Federal legislative jurisdiction, where that exercise of state authority, as is contemplated by this agreement, will not undermine Federal sovereignty.

4. SCOPE / LIMITATIONS: Fort Knox and DCBS mutually agree that the following limits apply to this agreement.

a. That for those children residing on Fort Knox who need protection from child abuse and neglect, to include foster care placement, the laws of the Commonwealth of Kentucky as set forth in Kentucky Revised Statutes (KRS) Unified Juvenile Code and Kentucky Administrative Regulations (KAR) shall apply.

b. That for those children residing off post, but within the Commonwealth of Kentucky, who need protection from child abuse and neglect, the laws of the Commonwealth of Kentucky as set forth in KRS and KAR, relating to juvenile services, shall apply.

c. That Fort Knox and DCBS further agree that the definitions of terms that shall apply to this Memorandum are those set forth in Army Regulation 608-18 and in the KRS Unified Juvenile Code.

d. That the Case Review Committee (CRC) for child abuse and the Department of Social Work Service, Ireland Army Community Hospital, Fort Knox, Kentucky, are the primary organizations responsible for administering this agreement on Fort Knox.

e. It is understood and agreed by and between the parties hereto that the United States Army will not pay or reimburse for services provided by DCBS.

f. The Provost Marshal (PM) coordinates all law enforcement activity on Fort Knox and is primarily responsible for investigating crimes involving child abuse on the installation. The PM coordinates such investigations with the U.S. Army Criminal Investigative Command and Federal and state law enforcement authorities, as appropriate.

g. The PM serves as the report point of contact (RPOC), for Fort Knox and receives all reports of child abuse occurring on or off post. The RPOC notifies all agencies required to be notified by regulation and this MOA.

5. DCBS shall perform the following in support of this agreement:

a. Investigate reported cases of child abuse and neglect on Fort Knox in accordance with the Kentucky Unified Juvenile Code and the Standards of Practice of DCBS.

b. To the extent permitted by law, notify the FAP Social Work Service (SWS) of all investigations of suspected or substantiated child abuse and neglect cases involving Army

families who are residents of Ft. Knox. DCBS will request support from the FAP as appropriate and will provide pertinent information to FAP for presentation to the CRC. DCBS will report or make information accessible to FAP/SWS on the status of these cases on an as needed basis, including investigative findings.

c. Provide appropriate protective services, including case management services to all active cases, and as appropriate, utilize the CRC as a resource.

d. DCBS or any interested party may file a petition in District/Family Court for the removal of abused and/or neglected children from the home of parents/guardian and regarding the placement of these children per KRS 620.070.

e. *DCBS will coordinate with the County Attorney/District/Family Court to establish a list of available attorneys and an appropriate fixed fee schedule for payment of services as a Guardian ad Litem (GAL) in courts-martial on Fort Knox. This list of attorneys will be updated as necessary, but must be updated quarterly. The fixed fee schedule will be similar to the fixed fee schedule utilized by public defenders in the District/Family Court.*

f. *DCBS or any interested party may file a petition in District/Family Court for the appointment of a GAL to protect the best interests of the child if they believe the situation is appropriate. The GAL would be appointed by the District/Family Court, and upon appointment would submit their name to the Fort Knox Staff Judge Advocate for approval. Once approved, any fees incurred by the GAL in preparation for prosecution by the Fort Knox Office of the Staff Judge Advocate will be paid directly to the GAL according to the previously approved fixed fee schedule.*

g. Promptly secure emergency protective custody for children determined to be in imminent danger or at risk of serious injury and notify SWS of placement.

h. Whenever possible, coordinate intended visits to installation agencies/units/organizations in advance to arrange necessary cooperation and/or assistance of Fort Knox officials.

6. FORT KNOX shall perform the following in support of this agreement:

a. Immediately report all suspected cases of child abuse and neglect to DCBS Centralized Intake.

b. Provide access to Fort Knox and government housing areas to DCBS social services workers as needed. Such access to housing areas is necessary to investigate and work with families to protect children and to effect the reunification of children who have been removed from their parents' custody.

c. Upon request of a DCBS social worker, provide police escorts for social services workers to specified locations on post.

d. Provide or coordinate medical care/examination for involved children, in accordance with

applicable regulations.

e. Coordinate and support the local CRC in accordance with AR 608-18.

f. Encourage individuals with knowledge of suspected cases of child abuse and neglect to report directly to DCBS.

g. Through the CRC, Department of Social Work, Ireland Army Community Hospital, Fort Knox, KY will provide the following:

(1) Notify DCBS of scheduled CRC and /or FAP staff meetings involving mutual child abuse and/or neglect cases.

(2) Support DCBS in all phases of its work on Fort Knox.

(3) Provide assistance to DCBS in evaluating, assessing, and determining an appropriate family services case plan with the family upon request for child abuse and neglect cases and in arranging required treatment services from military and civilian agencies.

(4) Obtain Medical records, background and central registry checks and provide findings to DCBS within twenty-four hours of referral.

(5) Upon request of DCBS, provide documentary and /or testimonial evidence, as required and in accordance with applicable law and regulations, in support of DCBS efforts before the District/Family Court.

(6) Fort Knox will provide access to children in possible need of protection while at on-post schools without prior notification of parents.

7. RESPONSIBILITIES: All Parties agree to the following:

a. Work cooperatively to provide services for abused or neglected children and their families.

b. Utilize the Lincoln Trail Advocacy and Support Center for interviews, counseling and/or medical examinations to the extent practicable and when it is the best interest of the child.

c. Jointly investigate referrals involving allegations of sexual abuse, as dictated by the KRS.

d. During joint investigations, DCBS will work cooperatively with Ft. Knox Military Police, CID, and/or PM.

e. Address day-to-day delivery problems and concerns to their respective inter-agency contact persons. If service delivery or administrative problems cannot be resolved, they will be referred through the respective chain of command for resolution.

f. Review this MOA on an annual basis and recommend any proposed changes to the Garrison Commander, Fort Knox, KY or to the Commissioner of DCBS.

g. This MOA may be amended with the mutual agreement of the parties.

h. This MOA shall be effective upon the signatures of the parties below and will remain in effect until terminated by either party, or their authorized agents, by thirty (30) days written notice.

8. LIABILITY. DCBS and Fort Knox shall assume responsibility for their own program delivery and conduct of their own staff. Fort Knox will not provide medical care of DCBS employees, except for life-threatening emergencies as outlined in Army Regulation 40-3.

9. CONFIDENTIALITY. All parties to this agreement agree to abide by all laws and regulations governing the confidentiality of patient information and further agree to vigorously safeguard privileged information in accordance with HIPPA and applicable laws, statutes, ordinances, or regulations.

10. EFFECTIVE DATE: IN WITNESS WHEREOF, this Memorandum of Agreement is executed by the parties of this the _____ day of _____, 20_____.

(Signature)
(Name)
Presiding Judge
(County)
State of Kentucky

(Date)

(Signature)
(Name)
County District Attorney
(County)
State of Kentucky

(Date)

(Signature)
(Name)
Director
Kentucky Cabinet for Health and Family
Services Dept. for Community Based
Services Salt River Trail Service Region

(Date)

(Signature)
(Name)
Major General, USA
Commanding
Fort Knox, Kentucky

(Date)