

# Representing the Child as Best Interests Attorney

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In 2007, Patricia Aksamit filed for divorce from husband Greg Krahn in Maricopa County Superior Court. The couple had two minor children together, ages five and eight. [Child custody](#) was a contested issue--both parents sought sole legal custody with parenting time going to the other spouse.

During the divorce proceedings, the family court appointed a Best Interests Attorney (BIA) for the children. Appointing a BIA was well within this court's discretion. Simply stated, under Arizona law the BIA's job is to "represent the minor children's best interests." No more, no less.

As a family law attorney in a representative capacity, the Best Interests Attorney does not testify as a witness. She is not sworn in, as the witness-spouses are. She doesn't give testimony on "her knowledge and experience" of the child's family or as an expert on family dynamics generally. But in *Aksamit v. Krahn*, that is exactly what the BIA did. Why? Because the court specifically told the BIA to "give me a report."

After the BIA's oral report was given, the Aksamit court ruled in favor of Patricia. She would get child custody, and Greg would get parenting time.

Greg wasted no time in filing his appeal. He argued that the family court erred when it relied on testimony from the BIA. Furthermore, Greg argued that the error was so prejudicial to his case that the judge's order should be vacated. On March 18, 2010, the appellate court agreed with Greg and vacated the custody and parenting order. The parties would have to return to the trial court and re-litigate those issues.

Domestic disputes are often contentious, but mishandling the Best Interests Attorney was costly for both parties--they paid in legal fees, stress, instability, and time.

We have a pretty clear idea of what is not a Best Interests Attorney's job. But what is within the BIA's scope of authority?

There are three appointments that a judge can make when minor children are involved in domestic proceedings. The court can appoint any of the following:

- 1) a Best Interests Attorney,
- 2) a Child's Attorney,
- 3) a Court-Appointed Advisor.

Of the three appointees, only a Court-Appointed Advisor (CAA) gives testimony as a witness or otherwise gives a report in court about child matters. The CAA may not be an attorney at all. The other two appointees are attorney positions--they act in a legal "representative capacity"--as advocates for the children.

Three different jobs, three different roles. There is no cross-over between appointee obligations. In fact, a Best Interests Attorney and a Child's Attorney can call the Court-Appointed Advisor as a witness and cross-examine him over his advisory report.

In the Aksamit case, the court directed the Best Interests Attorney to provide a report, which the BIA did. That's an appropriate directive to a Court-Appointed Advisor, but not so to a BIA. To make the matter clearly prejudicial to Greg, the court based its decision in part on the BIA's report which, of course, resulted in Greg's getting parenting time, but not child custody.

### **What exactly is the job of the Best Interests Attorney?**

Family Court Rule 10(E) makes plain that every BIA "shall participate in the conduct of the litigation to the same extent as an attorney for any party." That is, the BIA attends and participates at trial, at evidentiary hearings, she offers evidence, examines witnesses, and so on, concerning the child.

For guidance in establishing the scope of Arizona's BIA duties, the Court of Appeals looked to the American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases. The appellate court drew a distinction between the Child's Attorney and the BIA, as follows:

On the one hand, the Child's Attorney is a "lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client." That is, a lawyer representing the minor child as a client.

On the other hand, the Best Interests Attorney is a "lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives." That is, a lawyer investigating and then advocating the best interests of the child in the litigation.

Two things are certain after the Aksamit case. First, the BIA doesn't submit reports and doesn't testify as a witness. And, second, "attorney" really does mean attorney.

### **Resources:**

Aksamit v. Krahn, 1 CA-CV 08-0806 (Ariz. App. 2010)

Ariz. R. Fam. L.P. Rule 10

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