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COURT-APPOINTED PARENTING EVALUATORS AND GUARDIANS AD LITEM: PRACTICAL REALITIES AND AN ARGUMENT FOR ABOLITION

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A. Introduction

This article describes the practical realities of child custody recommendations by court-appointed parenting evaluators and guardians ad litem. It argues that given these realities, the role of such persons should be abolished from child custody practice. Only with this course will the problems with their use be eliminated. Children will be better protected by the courts.

B. The Evaluation Process

Parenting evaluators and guardians ad litem investigate custody arrangements and report back to the court with their recommendations.[2] In some states, the guardian ad litem does not make a "recommendation," but instead provides his position via a brief.[3]

Evaluators and guardians ad litem are also known as custody investigators, forensic experts and law guardians.[4] Evaluators are usually psychologists or social workers; guardians ad litem are often lawyers. Sometimes guardians ad litem are lay persons, for example, with the CASA program.[5] Many, if not most of these persons are hardworking and conscientious.

1. Appointment

It is not uncommon for an evaluator/guardian ad litem to be appointed via nomination or suggestion.[6] With this situation, attorneys can and do advocate for the appointment of evaluators/guardians ad litem whose views are compatible to their cases. For example, if a father claims that the mother is alienating him from the child, the father's attorney might suggest evaluators known to find alienation determinative.

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In some courts, it is permissible for attorneys to contact evaluators/guardians ad litem prior to appointment. Such contact can be ostensibly to verify availability. Its real purpose may be to "test the waters" regarding one's case. If the reaction is favorable, the attorney will move forward to advocate appointment. If the reaction is unfavorable, the attorney may look elsewhere. Certain attorneys also tend to work with certain evaluators/guardians ad litem. In other words, they develop business relationships. With these circumstances, the person appointed can be pre-aligned to one side.

2. Investigation

Once appointment is made, the lobbying campaign continues. Each side provides the evaluator/guardian ad litem with information including multiple level hearsay.

Evaluators/guardians ad litem also typically meet with the parents and the children. Evaluators/guardians ad litem may contact third parties. They may also conduct or commission psychological (profile) testing for the parents or the children.[7]

3. Report

The results of the investigation, any psychological testing and recommendations of the evaluator/guardian ad litem are typically summarized in a report filed with the court.[8] In these reports, the evaluator/guardian ad litem may or may not rely on applicable law. This phenomenon has been documented in at least one reported decision. *See Gilbert v. Gilbert*, 664 A.2d 239, 242 at fn. 2 (Vt. 1995) (describing survey results).[9]

Evaluators/guardians ad litem may also rely on their own personal, social or cultural values. Paul S. Appelbaum, M.D. states:

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> When an evaluator recommends [a child's placement] we are learning not about the relative capacities of the parties but, instead, about the relative values of the evaluators.[10]

4. Trial

By the time of trial, the evaluator/guardian ad litem is in the position of defending his report and recommendations. In states where the guardian ad litem files a brief, he is in the position of defending the brief.

Factors encouraging this phenomenon include the need of the evaluator/guardian ad litem to maintain his reputation, to thereby gain more appointments.[11] He may also be concerned that the judge will reduce his fees if his recommendation or brief does not prevail.[12]

At this point, the evaluator/guardian ad litem's recommendations can become more strongly stated, *i.e.*, more "black and white". The recommended parent may thus be portrayed as more clearly "good" and the other as more clearly "bad." But the reality may be in the middle, *i.e.*, that like all of us, neither parent is perfect.

At trial, the evaluator/guardian ad litem typically testifies about his report and recommendations. This testimony typically includes hearsay previously provided by the parties.[13] Repeated yet again, its substance can become grossly distorted—like a story repeated multiple times as part of a children's "telephone game."[14]

Evaluator/guardian ad litem testimony can also include opinions on credibility.[15] The author has seen as a basis for such opinions, a parent's psychological profile, for example, that a parent has an "elevated lie scale." The author has observed such testimony to be extremely prejudicial.[16]

The above situation is quite different from the admission of an investigator's testimony in other contexts. For example, an investigator in a criminal trial would not be allowed to testify as to his or her recommendations regarding conviction, as to hearsay, or as to his or her opinion on witness credibility.[17]

C. Judicial Reliance on Evaluators/Guardians Ad litem

Most judges perceive evaluators/guardians ad litem as neutral investigators or advisors.[18] Evaluator-psychologists can be held in especially high esteem.

With this status, the reports and recommendations of an evaluator/guardian ad litem can become the factual and legal standard for trial. The burden of the non-recommended party is thus to disprove a factual and legal standard. The burden of the recommended party is merely to provide corroboration for the standard. In *Gilbert*, 664 A.2d at 242, the Supreme Court of Vermont found such burden-shifting so unfair as to require reversal.

A related problem is the legitimization of improper evidence through the evaluator/guardian ad litem. In one record reviewed by this author, the evaluator testified that the mother's family was "manipulative" and dishonest. On cross-examination, the evaluator conceded that as a basis for her opinion, she was relying on unsigned written statements provided by the father. Had the father sought to admit these statements through himself, they would have been viewed as hearsay, lacking authenticity and self-serving. But admitted as they were through the evaluator, their thrust (manipulative/dishonest) was instead perceived as fact. Such "fact" was then incorporated into the court's decision; the child was removed from the mother's primary care.

With the perceived neutrality of evaluators/guardians ad litem, their positions are often determinative.[19] But as described above, evaluators/guardians ad litem are not neutral. Once they make their recommendations, they are in the position of defending them; they have conflicts of interest including concerns about their future appointments and fees.

D. Reforms

The poor quality of custody evaluations has been reported in the literature.[20] Proposed reforms have ranged from making changes designed to improve their quality, to their complete elimination.[21]

Perhaps the most common approach has been to establish evaluation standards. In Washington State, for example, there are now court rules that require guardians ad litem to maintain documentation that substantiates their recommendations.[22] Minimum standards have also been imposed through case law. *See, e.g.*, *Patel v. Patel*, 555 S.E.2d 386, 390 (S.C. 2001).[23]

Another approach has been to redefine the role of the guardian ad litem as a lawyer for the child. With this approach, the guardian ad litem does not make a recommendation, but instead provides his position via a brief. As noted above, this approach is already used in some states. It is also promoted by the ABA's "Standards of Practice for Lawyers Representing Children in Custody Cases," which call for the appointment of a "Best Interests Attorney."[24] The Best Interests Attorney does not act as a witness or make reports and recommendations.[25] He files briefs and makes arguments.[26]

In Wisconsin, guardians ad litem have this role.[27] Professors Raven Lidman and Betsy Hollingsworth report that these persons nonetheless function like traditional guardians ad litem, *i.e.*, they in effect give reports and recommendations.[28] A similar phenomenon has been noted in New York. There is a "recurring problem" that courts expect the attorney for the child to give a recommendation.[29]

The concept of the Best Interests Attorney is, regardless, flawed. He represents the child's best interests, which is the ultimate issue before the court. There is the potential for the court to be usurped, or to at least not consider the evidence as carefully because he has already made the best interests determination.[30]

The conflicts of interest described above also continue to exist. As with a traditional guardian ad litem, the Best Interests Attorney has concerns about his future appointments and fees. Once he submits his brief, he is in the position of defending it. There are also problems with the evidence. As with a traditional guardian ad litem, the Best Interests Attorney relies on hearsay.[31]

E. Evaluators/Guardians ad Litem Should be Eliminated from Child Custody Proceedings

Another way to look at the use of evaluators/guardians ad litem is that they act as a filter or prism between the court and the evidence.[32] They are like "spin doctors." They tell the court what it sees, which can make a difference as to the court's perception.[33] The court's normal decision-making function is distorted so that children are harmed. Attorney Richard Ducote states:

> [I]n domestic violence and abuse cases, where courts are even more eager to appoint GALS, children are frequently ending up in the custody of the abusers and separated from their protecting parents. This tragedy does not happen in spite of the GALS, but rather because of the GALS.[34]

Richard Wexler, Executive Director of the National Coalition for Child Protection Reform, makes a similar point regarding the CASA program:

> [W]e conclude that the only real accomplishment of CASA is to encourage the needless removal of children from their homes.[35]

The distortion of the court's decision-making ability cannot be rectified by reforms that leave the filter of the evaluator/guardian ad litem in place. The only reform that will eliminate the problem of the filter is the elimination of the filter itself. Evaluators/guardians ad litem must be eliminated from child custody practice.

F. Conclusion

Evaluators and guardians ad litem are often hard working and conscientious. There are, however, fundamental problems with their role. They cause the court's normal decision-making function to be distorted. Wrong decisions are made.

Court-appointed evaluator and guardians ad litem must be eliminated from child custody practice—for the sake of the children.

Endnotes

1. Margaret Dore is an attorney in private practice in Seattle, Washington. Her published decisions include: *In re Guardianship of Stamm*, 91 P.3d 126, 133 (Wash. Ct. App. 2004) (reversing due to the improper admission of guardian ad litem testimony), and *Lawrence v. Lawrence*, 20 P.3d 972, 974 (Wash. Ct. App. 2001) (use of the "friendly parent" concept in a child custody case "would be an abuse of discretion"). *Lawrence* was nationally recognized. *See, e.g.*, Wendy N. Davis, *Family Values in Flux*, 87 ABA Journal 26 (October 2001). Ms. Dore is a former law clerk to the Washington State Supreme Court and the Washington State Court of Appeals. She worked for the United States Department of Justice. She is Vice Chair of the Elder Law Committee of the ABA Family Law Section. She was nominated for the 2005 Butch Blum/Law & Politics "Award of Excellence." She is a graduate of the University of Washington School of Law. She has an M.B.A. in Finance and a B.A. in Accounting. She passed the C.P.A. examination in 1982. Further information about Ms. Dore and her practice can be viewed at www.margaretdore.com.

This article is based on: Margaret K. Dore, *Parenting Evaluators and GALs: Practical Realities*, King County Bar Association, *Bar Bulletin*, December 1999.

2. *See, e.g., Stamm*, 91 P.3d at 130 ("In both guardianship and custody cases, the role of the GAL is the same: to investigate and supply information and recommendations to the court . . .").

3. *See* Raven C. Lidman and Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 271, and 277, fn. 106 (1998) (describing the guardian ad litem's role in Wisconsin as a lawyer for the child, "they can make arguments and file briefs, but they cannot testify themselves nor offer new factual material in reports").

4. *See, e.g.*, Lidman and Hollingsworth, *supra* at 255, fn. 2.

5. The Court Appointed Special Advocate Program (CASA) was founded by a Seattle judge. *See* www.nationalcasa.org/htm/about.htm. There are more than 900 CASA programs in operation throughout the country, which are also known as Volunteer Guardian ad Litem Programs. *Id.*

6. *See*, for example, Wash. Rev. Code 26.12.177(2)(a) (2005) ("The parties may make a joint recommendation for the appointment of a "guardian ad litem . . .").

7. *Cf.* Margaret A. Hagen, PhD, *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice*, Regan Books, Chapter 8 (1997); and *Higginbotham v. Higginbotham*, 857 So. 2d 341, 342 (Fla. Dist. Ct. App. 2003) (fourteen psychological tests performed on parents, seven psychological tests performed on children).

8. Lidman and Hollingsworth, *supra*, at 278, ¶ 3.

9. A similar issue is reported in the Comments to the Washington State Superior Court Guardian ad Litem Rules, as follows:

> Apparently GALs are not following statutory requirements, nor are the courts consistent in enforcing them.

GALR 2, Washington State Bar Association Comment, § (p).

10. Paul S. Appelbaum, M.D., "*The Medicalization of Judicial Decision-Making*", The Elder L. Rep., Vol. X, No. 7, February 1999, p. 3, ¶1, last line.

11. Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case of Abolition*," 3 Loy. J. Pub. Int. L. 106, 146 (2002):

> One of the particularly stealthy problems of GALs is the conflict of interest issue. This most commonly occurs when a GAL fights to keep a child in the custody of a parent previously endorsed and exonerated by the GAL, despite mounting proof that the parent is indeed abusive and the GAL erred. . . . In such instances, GALs have forcefully opposed the introduction of new abuse evidence and instead have increased the blame on the non-abusive parent. . . . [T]he GAL hopes to avoid any judicial finding that suggests his or her incompetence and jeopardizes future lucrative GAL appointments.

12. Professors Raven Lidman and Betsy Hollingsworth make a similar point. Lidman and Hollingsworth, *supra* at 302, ¶ 2. *See also*, Margaret A. Hagen, *supra* at 207-08.

13. *Cf.* Lidman and Hollingsworth, *supra* at 279.

14. *Cf. Gilbert v. Gilbert*, 664 A.2d 239, 243 (Vt. 1995) (describing the guardian ad litem's facts as "double or triple hearsay when reported").

15. *Id.*

16. *Cf. Marriage of Luckey*, 868 P.2d 189, 194 (Wash. Ct. App. 1994) ("the use of profile testimony is unfairly prejudicial"). *See also*, *State v. Carlson*, 906 P.2d 999, 1002-03 (Wash. Ct. App. 1995):

> [No] witness may give an opinion on another witness' credibility. . . . An expert opinion [on credibility] will not "assist the trier of fact" . . . because there is no scientific basis for such an opinion, save the polygraph, and the polygraph is not generally accepted as a scientifically reliable technique. (footnotes omitted).

17. Lidman and Hollingsworth, *supra* at 279.

18. *Cf. Stamm*, 91 P.3d at 129, *quoting Fernando v. Nieswandt*, 940 P.2d 1380 (Wash. Ct. App. 1997) (the guardian ad litem acts as a "neutral advisor to the court").

19. *See* Lidman and Hollingsworth, *supra* at 297, 2d ¶ ("[m]ore often, . . . [t]he judge merely confirms the guardian ad litem's decision").

20. *See, e.g.*, Dana Royce Baerger, et al. *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. Am. Acad. Matrim. Law., 35, p. 36 ("Concern regarding the generally poor qualify of [child custody evaluations] has prompted some commentators to suggest an end to the use of [evaluations] in divorce proceedings"); Timothy M. Tippins, *Custody Evaluations-Part I: Expertise by Default?*, N.Y. L. J., 7/15/03, p. 3, col. 1, Conclusion ("If the custody recommendation is little more than a personal value, judgment, intuition, or an educated guess, rather than a conclusion compelled by reliable and valid scientific research, it should not be received"); and Lidman and Hollingsworth, *supra*, at 301 ("Soon thereafter . . . [the parents] learn that this *guardian ad litem* is a mere mortal getting information from here and there, frequently not verifying anything . . .").

21. *See, e.g.*, Matrimonial Commission Report to the Chief Judge of the State of New York, Hon. Sondra Miller, Chairperson, February 2006, (www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf), p 46 ("Proposed reforms from many different sources have ranged from eliminating the use of forensics altogether to instituting changes that will insure the quality and proper use of the reports . . ."); and Ducote, *supra* at 115 ("Guardians ad litem must be abolished in private custody cases . . .").

22. The Superior Court Guardian ad Litem Rules (GALR) were adopted by the Washington State Supreme Court in 2001. *See* GALR § 2(p) and *http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=GALR*.

23. *See also*, *Stamm*, 91 P.3d at 130 (limiting the admissibility of guardian ad litem testimony to that which is helpful under ER 702); and *Heistand v. Heistand*, 673 N.W.2d 531, 311-12 (Neb. 2004) (reversing because the guardian ad litem had been allowed to testify as an expert).

24. The Best Interests Attorney" is defined as 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." American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, p. 2, § II.B. (Approved by the American Bar Association House of Delegates, August 2003) (http://www.afccnet.org/pdfs/aba.standards.pdf#search='ABA%20Standards%20of%20Practice%20for%20Lawyers%20Representing%20Children').

25. *Id.*, p. 3, § III.B.

26. *Id.*, p. 6, § III.G.

27. Lidman and Hollingsworth, *supra* at 271, and 277, fn. 106 (describing the guardian ad litem's role in Wisconsin as a lawyer for the child, "they can make arguments and file briefs, but they cannot testify themselves nor offer new factual material in reports").

28. Lidman and Hollingsworth state:

> The Wisconsin courts' opinions have an exasperated tone as they repeatedly reiterate that these guardians ad litem must perform lawyer-like functions: they can examine and cross-examine witnesses, and they can make arguments and file briefs, but they cannot testify themselves nor offer new factual material in reports. Trial courts, parents'

> attorneys, and guardian ad litem-lawyers have been chastised for "lapses" such as: . . . permitting the guardian ad litem to file a "report" twenty days after the close of trial; or allowing the guardian ad litem to file a preliminary report and make an oral report to the court after closing arguments. But Wisconsin appellate courts do not reverse for these lapses. Instead the reviewing courts characterize preliminary reports as briefs and oral reports as arguments. (Footnotes omitted).

Lidman and Hollingsworth, *supra* at 271.

29. Matrimonial Commission Report, *supra* at 43.

30. *Cf. C.W. v. K.A.W.*, 774 A.2d 745, 749 (Pa. 2001) (the trial court's reliance on the guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a non-judicial officer"); and *Hastings v. Rigsbee*, 875 So. 2d 772, 777 (Fla. Dist. Ct. App. 2004) ("The overarching problem in this case is that the trial court effectively delegated its judicial authority to the parenting coordinator").

31. *See e.g.*, ABA Standards of Practice, *supra* at § V.E.

32. *Cf. Small Justice: Little Justice in America's Family Courts*, Education Supplement, p. 6, Intermedia Inc., Seattle WA 2001 (describing evaluators and guardians ad litem as a filter). *See also* http://www.intermedia-inc.com/title.asp?sku=SM03&subcatID=29.

33. *Id.*

34. Ducote, *supra* at 135-36 (footnote omitted).

35. National Coalition for Child Protection Reform, press release, p. 1 (http://www.law.capital.edu/adoption/news_cases/documents/NATIONAL_COALITION_response.pdf#search='Caliber%20%26%20Wexler%20%26%20CASA%20%26%202122006'); *see also* http://www.nccpr.org/.

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