

Runyon v. Zacharias

Court of Appeals of Tennessee, At Jackson

November 14, 2017, Session; January 23, 2018, Filed

No. W2016-02141-COA-R3-CV

Reporter

556 S.W.3d 732 *; 2018 Tenn. App. LEXIS 26 **; 2018 WL 526712

BENJAMIN RUNYON v. LISA ZACHARIAS

Subsequent History: Appeal denied by Runyon v. Zacharias, 2018 Tenn. LEXIS 307 (Tenn., May 17, 2018)

Prior History: Tenn. R. App. P. 3 [**1] Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Shelby County. No. CT-005120-15. Robert L. Childers, Judge.

Disposition: Judgment of the Circuit Court Affirmed.

Core Terms

guardian ad litem, appointment, trial court, immunity, custody proceeding, best interests of the child, attorney-client, guardian, quasi-judicial, duties, issues, ad litem, contends, custody, confidential information, order of appointment, divorce action, best interest, divorce, litem's, motion to dismiss, allegations, terminate, mandates, special master, responsibilities, disclosure, functions, requires, parties

Case Summary

Overview

HOLDINGS: [1]-A guardian ad litem did not have quasi-judicial immunity from a child's claims as Tenn. Code Ann. § 36-4-132(c) did not provide absolute immunity, and under Tenn. Sup. Ct. R. 40A, § 6(b), the guardian was not performing quasi-judicial responsibilities; [2]-The guardian continued to function as the child's guardian ad litem even though he had turned 18 where no order disposing of the issues had become final, as required by the appointment order; [3]-Tenn. Sup. Ct. R. 40A did not create an attorney-client relationship, but as a licensed attorney, the guardian was subject to the Rules of Professional Conduct, but within the

parameters and exceptions of Rule 40A and the appointment order; [4]-A claim that the guardian had improperly disclosed confidential information was properly dismissed where the appointment order expressly authorized disclosure of information to the court.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1 [↓] **Motions to Dismiss, Failure to State Claim**

A Tenn. R. Civ. P. 12.02(6) motion to dismiss challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a Rule 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss admits the truth of all of the relevant and material allegations contained in the complaint, but asserts that the allegations fail to establish a cause of action.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2 [↓] **Complaints, Requirements for Complaint**

Tenn. R. Civ. P. 8.01 merely requires a plaintiff to state the facts upon which a claim for relief is founded.

Complaints need not contain detailed allegations of all the facts giving rise to the claim, but they must contain sufficient factual allegations to articulate a claim for relief. The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level. However, courts are not required to accept as true assertions that are merely legal arguments or legal conclusions couched as facts.

Civil Procedure > ... > Responses > Defenses,
Demurrers & Objections > Motions to Dismiss

HN3 [↓] Defenses, Demurrers & Objections, Motions to Dismiss

When considering a motion to dismiss, courts must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. A trial court should grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > ... > Responses > Defenses,
Demurrers & Objections > Motions to Dismiss

Civil
Procedure > ... > Pleadings > Complaints > Require
ments for Complaint

HN4 [↓] Standards of Review, De Novo Review

An appellate court reviews the trial court's legal conclusions regarding the adequacy of the complaint de novo.

Family Law > Child Custody > Guardians Ad Litem

HN5 [↓] Child Custody, Guardians Ad Litem

Simply stated, *Tenn. Sup. Ct. R. 40A* authorizes the trial court presiding over a custody proceeding to appoint an attorney as a guardian ad litem when the court finds that the children's best interests are not adequately protected by the parties and that separate representation of the children's best interests is

necessary. *Tenn. Sup. Ct. R. 40A, § 3(a)*. The rule also defines guardian ad litem to mean a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding. *Tenn. Sup. Ct. R. 40A, § 1(c)*. Thus, a Rule 40A guardian ad litem must be a licensed attorney.

Family Law > Guardians > Appointment

Family Law > Child Custody > Guardians Ad Litem

HN6 [↓] Guardians, Appointment

Tenn. Sup. Ct. R. 40A differs from prior rules and practices involving guardians ad litem in custody proceedings in that a *Rule 40A* guardian ad litem functions as a lawyer, not as a witness or special master.

Estate, Gift & Trust Law > Estate
Administration > Conservators &
Guardians > Guardians for Missing & Unknown
Heirs

Family Law > Guardians > Duties & Rights

HN7 [↓] Conservators & Guardians, Guardians for Missing & Unknown Heirs

Pursuant to *Tenn. Code Ann. § 34-1-107(d)(1)*, the guardian ad litem in a guardianship or conservatorship proceeding owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.

Family Law > Child Custody > Guardians Ad Litem

HN8 [↓] Child Custody, Guardians Ad Litem

Tenn. Sup. Ct. R. 40A directs that the appointment of a guardian ad litem shall be by written order of the court that shall set forth the reasons for the appointment, and the specific duties to be performed by the guardian ad litem. *Tenn. Sup. Ct. R. 40A, § 4(a)-(b)*. Additionally, the court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties. *Tenn. Sup. Ct. R. 40A, § 4(c)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9 [↓] Standards of Review, De Novo Review

Statutory interpretation presents a question of law and appellate review is de novo with no presumption of correctness.

Governments > Legislation > Interpretation

HN10 [↓] Legislation, Interpretation

When courts review a statute, they are to apply the plain and ordinary language of the statute absent an ambiguity. When the words of a statute are plain and unambiguous, the assumption is that the legislature intended what it wrote and meant what it said. The pertinent language must be applied without any forced or subtle construction extending its import.

Family Law > Child Custody > Guardians Ad Litem

HN11 [↓] Child Custody, Guardians Ad Litem

Under *Tenn. Code Ann. § 36-4-132(c)*, any guardian ad litem appointed by the court pursuant to *Tenn. Code Ann. § 36-4-132* shall be presumed to be acting in good faith and in so doing shall be immune from any liability that might otherwise be incurred while acting within the scope of such appointment. Such immunity shall apply in all proceedings in which such guardian ad litem may act.

Family Law > Child Custody > Guardians Ad Litem

HN12 [↓] Child Custody, Guardians Ad Litem

The Court of Appeals of Tennessee, at Jackson, finds no ambiguity within *Tenn. Code Ann. § 36-4-132(c)*. The statute confers immunity when a guardian ad litem, in good faith, acts within the scope of his or her appointment. While the guardian ad litem is presumed to act in good faith, this presumption may be rebutted.

Thus, if and to the extent *Tenn. Code Ann. § 36-4-132(c)* may apply, there is merely a presumption that the guardian ad litem acted in good faith.

Family Law > Child Custody > Guardians Ad Litem

HN13 [↓] Child Custody, Guardians Ad Litem

Under Tenn. Sup. Ct. R. 40A, § 6(b), the guardian ad litem shall not function as a special master for the court or perform any other judicial or quasi-judicial responsibilities.

Governments > Courts > Judges > Judicial Immunity

HN14 [↓] Judges, Judicial Immunity

To be entitled to quasi-judicial immunity, the actions of the person seeking immunity must be closely related to the justifying purposes behind the particular immunity doctrine being invoked. Although quasi-judicial immunity, which is a form of immunity similar to absolute judicial immunity, has been extended to persons other than judges over the years to persons whose functions are an integral part of or intimately related to the judicial process, the party claiming absolute immunity bears the burden of establishing the justification for the claim.

Family Law > Child Custody > Guardians Ad Litem

HN15 [↓] Child Custody, Guardians Ad Litem

Although *Tenn. Sup. Ct. R. 40A* does not expressly state what happens if a child in the custody proceeding reaches the age of majority before the case is concluded, it is implicit from review of the rule that the guardian ad litem's role continues until an order terminating the appointment of the guardian ad litem is entered or when the trial court order or judgment disposing of the custody or modification proceeding becomes final. Tenn. Sup. Ct. R. 40A, § 5. Additionally, Tenn. Sup. Ct. R. 40A, § 4, states that the order appointing the guardian ad litem shall specifically set forth the duration of the appointment. Tenn. Sup. Ct. R. 40A, § 4(b)(4).

Family Law > Child Custody > Guardians Ad Litem

[HN16](#) [↓] Child Custody, Guardians Ad Litem

The appointment of the guardian ad litem does not terminate as to one or all of the children until the trial court enters an order to that affect, or the court enters an order or judgment that disposes of the custody or modification proceeding. Tenn. Sup. Ct. R. 40A, § 5.

Family Law > Delinquency &
Dependency > Dependency Proceedings

Family Law > Guardians > General Overview

[HN17](#) [↓] Delinquency & Dependency, Dependency Proceedings

Tenn. Sup. Ct. R. 40 only applies to neglect, abuse, and dependency proceedings in juvenile court. Tenn. Sup. Ct. R. 40(a).

Family Law > Guardians > General Overview

Family Law > Child Custody > Guardians Ad Litem

[HN18](#) [↓] Family Law, Guardians

Tenn. Sup. Ct. R. 40A applies in custody proceedings, other than an abuse or neglect proceeding in juvenile court, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, and contested adoptions. Tenn. Sup. Ct. R. 40A, § 1(a).

Governments > Courts > Rule Application &
Interpretation

[HN19](#) [↓] Courts, Rule Application & Interpretation

In interpreting the Rules of the Tennessee Supreme Court, the goal is to ascertain and give effect to the Supreme Court of Tennessee's intent in adopting its rules.

Family Law > Child Custody > Guardians Ad Litem

Legal Ethics > Client Relations > Representation

[HN20](#) [↓] Child Custody, Guardians Ad Litem

Although a Tenn. Sup. Ct. R. 40A guardian ad litem does not prepare a report for the parties or the court, nor does the guardian ad litem make a recommendation concerning custody, this new role does not create an attorney-client relationship with the children in a custody proceeding.

Family Law > Child Custody > Guardians Ad Litem

Legal Ethics > Client Relations > Representation

[HN21](#) [↓] Child Custody, Guardians Ad Litem

Tenn. Sup. Ct. R. 40A mandates that the guardian ad litem is appointed to represent the best interests of the child, Tenn. Sup. Ct. R. 40A, § 3(d), and to satisfy his or her duties in an unbiased, objective, and fair manner. Tenn. Sup. Ct. R. 40A, § 8(a). Rule 40A further mandates that the trial court enter a written order that states the reasons for the appointment, the specific duties to be performed by the guardian ad litem, and as much detail and clarity as possible concerning the guardian ad litem's duties. Tenn. Sup. Ct. R. 40A, § 4(a)-(c). Moreover, and significantly, not only does the trial court specify the duties of the guardian ad litem, the trial court is to also exercise effective oversight of the guardian ad litem's role, Tenn. Sup. Ct. R. 40A, § 4(c), which are concepts and restraints that are foreign to the typical attorney-client relationship.

Family Law > Child Custody > Guardians Ad Litem

Legal Ethics > Client Relations > Representation

[HN22](#) [↓] Child Custody, Guardians Ad Litem

Unless the order of appointment states otherwise, Tenn. Sup. Ct. R. 40A requires that the guardian ad litem conduct an investigation to determine the best interests of the child, including the child's emotional needs and the child's vulnerability and dependence upon others. Tenn. Sup. Ct. R. 40A, § 8(b)(1)(i)-(iv). The rule also requires that the guardian ad litem present facts for the court's consideration. Tenn. Sup. Ct. R. 40A, § 6. If the intent of the rule was to create an attorney-client relationship, there would be no need for these mandates

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because the guardian ad litem would simply function as any attorney would in the representation of any client. Moreover, these mandates are inconsistent with the typical attorney-client relationship. For these reasons, it is apparent from considering Rule 40A in its entirety that the Supreme Court of Tennessee did not intend for a Rule 40A guardian ad litem to have a typical attorney-client relationship with the child or children whose best interests he or she is appointed to represent.

Family Law > Child Custody > Guardians Ad Litem

[HN23](#) [↓] **Child Custody, Guardians Ad Litem**

If a child over the age of 12 asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem is required to take the action set forth in Tenn. Sup. Ct. R. 40A, § 8(c).

Family Law > Child Custody > Guardians Ad Litem

[HN24](#) [↓] **Child Custody, Guardians Ad Litem**

Tenn. Sup. Ct. R. 40A, § 8(b)(5), mandates that the guardian ad litem shall consider the child's expressed objectives without being bound by those objectives.

Family Law > Child Custody > Guardians Ad Litem

Legal Ethics > Client Relations > General Overview

[HN25](#) [↓] **Child Custody, Guardians Ad Litem**

Considering the entirety of *Tenn. Sup. Ct. R. 40A*, it is apparent that the Supreme Court of Tennessee did not intend to create an attorney-client relationship between a guardian ad litem and the child or children whose best interests he or she represents. Nevertheless, because all *Rule 40A* guardians ad litem are licensed attorneys, they are subject to the Rules of Professional Conduct in the performance of their duties, subject to the parameters of and pursuant to exceptions arising from *Rule 40A* and an order of appointment.

Family Law > Child Custody > Guardians Ad Litem

Legal Ethics > Client Relations > Duties to Client

[HN26](#) [↓] **Child Custody, Guardians Ad Litem**

Because a guardian ad litem must be an attorney, he or she is subject to the Rules of Professional Conduct in the performance of his or her duties in a legal proceeding. However, the scope and extent to which the Rules of Professional Conduct apply are subject to the exceptions mandated by the order of appointment and *Tenn. Sup. Ct. R. 40A*.

Legal Ethics > Client Relations > Duties to Client > Duty of Confidentiality

[HN27](#) [↓] **Duties to Client, Duty of Confidentiality**

The Preamble to the Rules of Professional Conduct identifies exceptions to the rules of confidentiality by providing that a lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law. Tenn. Sup. Ct. R. 8, Preamble § 5.

Legal Ethics > Client Relations > Duties to Client > Duty of Confidentiality

[HN28](#) [↓] **Duties to Client, Duty of Confidentiality**

Tenn. Sup. Ct. R. 8, DR 1.6, of the Rules of Professional Conduct, which pertains to the disclosure of confidential information, provides an exception that permits the disclosure of confidential information if the disclosure is impliedly authorized in order to carry out the representation.

Counsel: Dorothy J. Pounders and Timothy M. Ginski, Memphis, Tennessee, for the appellant, Benjamin Runyon.

Robert V. Redding and Sadia S. Staton, Jackson, Tennessee, for the appellee, Lisa Zacharias.

Judges: FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S. AND KENNY W. ARMSTRONG, J., joined.

Opinion by: FRANK G. CLEMENT JR.

Opinion

[*735] This is an action against an attorney who previously served as a *Tenn. Sup. Ct. R. 40A* court appointed guardian ad litem for the benefit of the plaintiff and his two younger siblings in their parents' divorce. Plaintiff alleges that he had an attorney-client relationship with the guardian ad litem, and the guardian ad litem violated the attorney-client relationship by disclosing confidential information to the divorce court after he was 18 years old. The guardian ad litem denies any liability or actionable conduct, insisting that all of her actions were pursuant to *Tenn. Sup. Ct. R. 40A* and the Order Appointing Guardian Ad Litem in the divorce action. The trial court dismissed the complaint [**2] pursuant to *Tenn. R. Civ. P. 12.02(6)* upon a finding that the complaint failed to state a claim because the guardian ad litem's duties in the divorce action did not terminate when the oldest child turned 18 due to the fact that the custody proceeding concerning his two younger siblings was still ongoing, and the order of appointment authorized the guardian ad litem to disclose to the court confidential information that may affect the best interests of the children. Finding no error, we affirm.

OPINION

On January 6, 2012, attorney Lisa Zacharias ("Defendant") was appointed as guardian ad litem of three minor children, including the oldest, Benjamin Runyon ("Plaintiff"), to represent the best interests of the children in their parents' divorce action. Plaintiff was still a minor when the divorce trial began on November 16, 2012; however, he turned 18 on November 27, 2012, and the trial did not conclude until January 17, 2013.¹

Three years later, Plaintiff commenced this civil action against Defendant claiming breach of confidentiality in her roles as his guardian ad litem and as his attorney. He contends that Defendant presented evidence to the court during his parents' divorce action that was confidential information [**3] and the disclosure of which violated the attorney-client relationship because they were disclosed to the court after he turned 18 years of age. These claims rest on the factual allegations in

paragraph 11 of the complaint which reads:

11. The trial of the foregoing divorce proceeding was held in December 2012. At the trial, confidential psychological records of [Plaintiff] (herein "confidential information") had been intentionally and wrongfully disclosed by [Defendant] to the Court in Division VII without the knowledge, authority or consent of [Plaintiff].

[*736] Plaintiff contends Defendant's actions caused him "embarrassment, humiliation, emotional pain and mental anguish, as well as harm to his relationship with others."

Defendant filed a *Tenn. R. Civ. P. 12.02(6)* Motion to Dismiss based upon quasi-judicial immunity. When the trial court denied the motion, Defendant filed a Motion to Stay Discovery and a Motion for Protective Order while she pursued an interlocutory appeal. During the hearing on the motions, the trial court *sua sponte* reversed its prior ruling and dismissed the case. In dismissing Plaintiff's complaint, the trial court relied on *Tenn. Sup. Ct. R. 40A* concluding that a *Rule 40A* guardian ad litem represents the "best interests" [**4] of the children in a custody case, as distinguished from representing a child or the children in the context of an attorney-client relationship. Furthermore, the court relied on the *Rule 40A* order of appointment which authorized Defendant to collect "confidential information regarding the children, including: the children's educational, medical, and mental health records," and granted Defendant authority to release this confidential information "as it may be necessary for, or greatly aid, the resolution of the issues." Therefore, the trial court found that Defendant was specifically authorized to release this information to the court. In conclusion, the court stated the following:

I find that the complaint fails to state a cause of action upon which relief can be granted because, as a matter of law, the plaintiff has only alleged that . . . confidential information of the plaintiff was disclosed to the court in Division VII, which is clearly protected under *Supreme Court Rule 40A* and the order of January 6, 2012, from Judge Fields.

This appeal followed.

ISSUES

Plaintiff and Defendant both raise issues on appeal. For her part, Defendant contends the trial court erred in

¹ Circuit Court Judge Donna M. Fields presided over the divorce action, the trial of which was held over fifteen non-consecutive days in November and December of 2012 and January of 2013.


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failing to dismiss the complaint based on quasi-judicial **[**5]** immunity of a guardian ad litem while acting pursuant to and within the scope of her appointment in the divorce action.


For his part, Plaintiff contends:


1. The trial court erred in holding that the guardian ad litem continues to function as such upon the child reaching the age of 18.
2. The trial court erred in holding that no attorney-client relationship exists between a guardian ad litem and the minor children under an appointment pursuant to *Tenn. Sup. Ct. R. 40A*.
3. The trial court erred in holding that the Defendant's disclosure of the child's confidential information to the court was proper.

STANDARD OF REVIEW

HN1  A *Tenn. R. Civ. P. 12.02(6)* motion to dismiss challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). The resolution of a *Rule 12.02(6)* motion to dismiss is determined by an examination of the pleadings alone. *Id.* A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010)).


HN2  *Tennessee Rule of Civil Procedure 8.01* merely requires a plaintiff to state "the facts upon which a claim for relief is founded." *Id.* at 427 (citing *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986)). Complaints "need **[*737]** not contain detailed **[**6]** allegations of all the facts giving rise to the claim," but they "must contain sufficient factual allegations to articulate a claim for relief." *Id.* (quoting *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98, 103-04 (Tenn. 2010)). "The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Id.* However, courts are not required to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. *Id.* (quoting *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997)).


HN3  When considering a motion to dismiss, courts "must construe the complaint liberally, presuming all

factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* at 426 (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007)). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.* (quoting *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)). **HN4**  We review the trial court's legal conclusions regarding the adequacy of the complaint de novo. *Id.*; *Brown*, 328 S.W.3d at 855.

ANALYSIS

I. *Tennessee Supreme Court Rule 40A*

In order to analyze the issues presented in this appeal, it is necessary to appreciate the scope and purpose of *Tenn. Sup. Ct. R. 40A*, which went into effect in 2009. **HN5**  Simply stated, *Rule 40A* authorizes the trial court presiding over a custody proceeding **[**7]** to appoint an attorney as a guardian ad litem "when the court finds that the child[ren]'s best interests are not adequately protected by the parties and that separate representation of the child[ren]'s best interests is necessary." *Tenn. Sup. Ct. R. 40A § 3(a)*. The rule also defines "Guardian Ad Litem" to mean "a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding." *Tenn. Sup. Ct. R. 40A § 1(c)*. Thus, a *Rule 40A* guardian ad litem must be a licensed attorney.

It is also necessary to recognize that **HN6**  *Rule 40A* differs from prior rules and practices involving guardians ad litem in custody proceedings in that a *Rule 40A* guardian ad litem "functions as a lawyer, not as a witness or special master." See *Tenn. Sup. Ct. R. 40A § 9*, adv. comm. cmt. As the comments of the Advisory Commission reveal, unlike prior practice and procedure:

(1) A *[Rule 40A]* guardian ad litem may not be a witness or testify in any proceeding in which he or she serves as guardian ad litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Rule of Professional Conduct 3.7.

(2) A *[Rule 40A]* guardian ad litem is not a special master, and should not submit a "report and recommendations" to the court but may file a pre-trial brief/memorandum as any attorney in any other case. The guardian ad litem **[**8]** may advocate the position that serves the best interest of the child

by performing the functions of an attorney, including but not limited to those enumerated in Supreme Court Rule 40(d)(7).

(3) The [Rule 40A] guardian ad litem must present the results of his or her investigation and the conclusion regarding the child's best interest in the same manner as any other lawyer presents his or her case on behalf of a client: by calling, examining and cross examining witnesses, submitting and responding to other evidence in conformance with the rules of evidence, and making oral and [*738] written arguments based on the evidence that has been or is expected to be presented.

Tenn. Sup. Ct. R. 40A § 9, adv. comm. cmt.²

HN8[↑] Supreme Court Rule 40A directs that the appointment of a guardian ad litem "shall be by written order of the court" that shall set forth "the reasons for the appointment," and "the specific duties to be performed by the guardian ad litem." Tenn. Sup. Ct. R. 40A § 4(a) — (b). Additionally, "[t]he court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties." Tenn. Sup. Ct. R. 40A § 4(c).

Other pertinent sections in Rule 40A provide that the role of the guardian ad litem is "to represent the child's best interests" by gathering facts and presenting facts for the court's [**9] consideration subject to the Tennessee Rules of Evidence." Tenn. Sup. Ct. R. 40A § 6 (emphasis added). Section 8 of Rule 40A states that a guardian ad litem shall satisfy his or her duties "in an unbiased, objective, and fair manner." Tenn. Sup. Ct. R. 40A § 8(a). It further instructs that:

(b) A guardian ad litem shall:

(1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child, which can include, but is not limited, to ascertaining:

(i) the child's emotional needs, such as nurturance, trust, affection, security,

achievement, and encouragement;
 (ii) the child's social needs;
 (iii) the child's educational needs;
 (iv) the child's vulnerability and dependence upon others;
 (v) the child's need for stability of placement;
 (vi) the child's age and developmental level, including his or her sense of time;
 (vii) the general preference of a child to live with known people, to continue normal activities, and to avoid moving;
 (viii) the love, affection and emotional ties existing between the child and the parents;
 (ix) the importance of continuity in the child's life;
 (x) the home, school and community record of the child;

(xi) the willingness and ability of the proposed or potential caretakers [**10] to facilitate and encourage close and continuing relationships between the child and other persons in the child's life with whom the child has or desires to have a positive relationship, including siblings; and

(xii) the list of factors set forth in Tenn. Code Ann. § 36-6-106.

(2) obtain and review copies of the child's relevant medical, psychological, and school records as provided by Section 7.

(3) within a reasonable time after the appointment, interview:

(i) the child in a developmentally appropriate manner, if the child is four years of age or older;

[*739] (ii) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and

(iii) the parties to the suit;

(4) if the child is twelve (12) years of age or older, seek to elicit in a developmentally appropriate manner the reasonable preference of the child;

(5) consider the child's expressed objectives without being bound by those objectives;

(6) encourage settlement of the issues related to the child and the use of alternative forms of

²It is important to distinguish the role of a Rule 40A guardian ad litem from that of a guardian ad litem in a guardianship or conservatorship proceeding. HN7[↑] Pursuant to Tenn. Code Ann. § 34-1-107(d)(1), "[t]he guardian ad litem [in a guardianship or conservatorship proceeding] owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party."

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dispute resolution; and
 (7) perform any specific task directed by the court.

(c) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in **[**11]** the child's best interest, the guardian ad litem shall:

(1) fully investigate all of the circumstances relevant to the child's position, identify every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;

(2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

(3) if, after fully investigating and advising the child, the child continues to urge the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian shall take all reasonable steps to:

(i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position; and

(ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

Tenn. Sup. Ct. R. 40A § 8.


Section 9 of Rule 40A states that "[a] guardian ad **[**12]** litem appointed in a custody proceeding is entitled to all rights and privileges accorded to an attorney representing a party, including but not limited to the right to . . . take any action that may be taken by an attorney representing a party pursuant to the Rules of Civil Procedure."


With the foregoing in mind, we shall now address the issues raised by the parties.


II. QUASI-JUDICIAL IMMUNITY

Defendant argues that she is entitled to quasi-judicial immunity; therefore, the trial court erred in initially denying her motion to dismiss. She relies on Tenn.

Code Ann. § 36-4-132(c), mainly the statute's legislative history, for the proposition that guardians ad litem have absolute immunity from suit. Plaintiff argues that the plain language of the


statute does not provide quasi-judicial immunity. We agree with Plaintiff. The legal question presented requires us to interpret the statute. HN9  "Statutory interpretation, of course, presents a question of law and our review is de novo with no presumption of correctness." Beard v. Branson, 528 S.W.3d 487, 495 (Tenn. 2017).

HN10  When we review a statute, we are to apply the plain and ordinary language of the statute absent an ambiguity. Lipscomb v. Doe, 32 S.W.3d 840, 844 **[*740]** (Tenn. 2000); see also Biscan v. Brown, 160 S.W.3d 462, 473 (Tenn. 2009). "When the words of a statute are plain and unambiguous, the assumption is 'that the **[**13]** legislature intended what it wrote and meant what it said.'" McClain v. Henry I. Siegel Co., 834 S.W.2d 295, 296 (Tenn. 1992) (quoting Federal Exp. Corp. v. Woods, 569 S.W.2d 408, 410 (Tenn. 1978)). "The pertinent language must be [applied] 'without any forced or subtle construction extending its import.'" Worley v. Weigel's, Inc., 919 S.W.2d 589, 593 (Tenn. 1996) (quoting Federal Exp. Corp., 569 S.W.2d at 410). A court may only consider evidence outside of the statute "when the plain language of the statute does not directly address the issue or leads to an absurd result. . . ." Lipscomb, 32 S.W.3d at 844.

HN11  Tenn. Code Ann. § 36-4-132(c) reads:

Any guardian ad litem appointed by the court pursuant to this section shall be **presumed** to be acting in good faith and in so doing shall be immune from any liability that might otherwise be incurred while acting within the scope of such appointment. Such immunity shall apply in all proceedings in which such guardian ad litem may act.

(emphasis added).

HN12  We find no ambiguity within Tenn. Code Ann. § 36-4-132(c). The statute confers immunity when a guardian ad litem, in good faith, acts within the scope of his or her appointment. While the guardian ad litem is presumed to act in good faith, this presumption may be rebutted. Thus, if and to the extent Tenn. Code Ann. § 36-4-132(c) may apply, there is merely a presumption that the guardian ad litem acted in good faith.

Construing the complaint liberally and giving Plaintiff the benefit of all reasonable inferences, as we are required [**14] to do when ruling on a Rule 12.02 motion to dismiss, and recognizing that Tenn. Code Ann. § 36-4-132(c) does not provide absolute immunity to court-appointed guardians ad litem, we affirm the trial court's decision to deny Defendant's Motion to Dismiss based on quasi-judicial immunity.

We have also determined that Defendant is not entitled to quasi-judicial immunity under Tenn. Sup. Ct. R. 40A because she was not functioning as a special master for the court and she was not performing any other judicial or quasi-judicial responsibilities. This is evident from the literal reading of Rule 40A which states, in pertinent part, that HN13 [↑] "[t]he guardian ad litem shall not function as a special master for the court or perform any other judicial or quasi-judicial responsibilities." Tenn. Sup. Ct. R. 40A § 6(b).

HN14 [↑] To be entitled to quasi-judicial immunity, the actions of the person seeking immunity must be closely related to the justifying purposes behind the particular immunity doctrine being invoked. Bryant-Bruce v. State, No. M2002-03059-COA-R3-CV, 2005 Tenn. App. LEXIS 615, 2005 WL 2384696, at *6 (Tenn. Ct. App. Sept. 27, 2005) (citing Nixon v. Fitzgerald, 457 U.S. 731, 755, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982)). Although quasi-judicial immunity, which is a form of immunity similar to absolute judicial immunity, has been extended to persons other than judges over the years to persons whose functions are an integral part of or intimately related [**15] to the judicial process, "the party claiming absolute immunity bears the burden of establishing the justification for the claim." 2005 Tenn. App. LEXIS 615, [WL] at *6-7 (citing Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993); Burns v. Reed, 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)). Here, Defendant has failed to establish a factual or legal justification for her claim of quasi-judicial immunity under the statute or Rule 40A; therefore, she is not entitled to quasi-judicial immunity.

[*741] III. WHEN DOES THE ROLE OF A GUARDIAN AD LITEM CEASE?

Plaintiff argues that upon his reaching the age of 18, Defendant ceased to function as his guardian ad litem. This contention is premised on the notions that the guardian ad litem relationship only applies to minors and that the custody proceeding as it pertained to him

became moot when he turned 18.

Notwithstanding the fact that Plaintiff turned 18 during the trial in the custody proceeding, Defendant contends the guardian ad litem appointment was not terminated because the custody proceedings continued after Plaintiff turned 18, and no order was entered terminating her appointment. Defendant also relies on the trial court's reasoning that "just because Plaintiff turned 18 the Court did not lose power or authority to adjudicate the custodial, parenting, support and visitation rights of the remaining [**16] minors. [The Court] recognized that the considerations involved the presence or absence of the Plaintiff, as well as did the support issues if he was owed no support." We agree.

HN15 [↑] Although Rule 40A does not expressly state what happens if a child in the custody proceeding reaches the age of majority before the case is concluded, it is implicit from review of the rule that the guardian ad litem's role continues until an order terminating the appointment of the guardian ad litem is entered or "when the trial court order or judgment disposing of the custody or modification proceeding becomes final." Tenn. Sup. Ct. R. 40A § 5. Additionally, Section 4 of Rule 40A states that the order appointing the guardian ad litem shall specifically set forth "the duration of the appointment." Tenn. Sup. Ct. R. 40A § 4(b)(4). Here, the order appointing Defendant stated that the guardian's appointment "shall terminate: **automatically when the Court's order or judgment, disposing of the issues which brought about this appointment, becomes final. . . .**" (emphasis in original). Therefore, the appointment of Defendant as the guardian ad litem for all three children remained in effect, even after Plaintiff turned 18 years old, since no "order or judgment" disposing of the issues had become [**17] final.

The foregoing notwithstanding, Plaintiff argues in his brief that "Rule 40A states that the Guardian Ad Litem may only act on behalf of the child within a custody proceeding in which 'legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, and contested adoptions.'" Tenn. R. Sup. Ct. 40A, § 1." The deficiency with this argument is that it ignores the plain language of Rule 40A and the written order of appointment. It also fails to recognize the fact that all issues pertaining to the support, education, or welfare of a child who turns 18 during custody proceedings are not automatically moot.

For example, if the child has special needs, the parents may have a duty to continue to support the child. See Tenn. Code Ann. § 36-5-101(k). Additionally, if the child has not graduated from high school, the parents' responsibilities concerning the support, education, or welfare of the now 18-year-old continue until he graduates. See Tenn. Code Ann. § 34-1-102(b) ("Parents shall continue to be responsible for the support of each child for whom they are responsible after the child reaches eighteen (18) years of age if the child is in high school. The duty of support [**18] shall continue until the child graduates from high school or the class of which the child is a member when the child attains eighteen (18) years of age [or] graduates, whichever occurs first.") Accordingly, the mere fact that a child in a custody proceeding [*742] turns 18 does not automatically render issues concerning the custody, care, and support of that child moot. Moreover, the mere fact that the oldest of three minor children, for whom the guardian ad litem was appointed, has turned 18 would not terminate the guardian ad litem's appointment or duties. Thus, HN16 [↑] the appointment of the guardian ad litem does not terminate as to one or all of the children until the trial court enters an order to that effect, or the court enters an order or judgment that disposes of the custody or modification proceeding. See Tenn. Sup. Ct. R. 40A § 5.

For the foregoing reasons, we affirm the trial court's ruling on this issue.

IV. THE PROFESSIONAL RELATIONSHIP BETWEEN A GUARDIAN AD LITEM AND CHILD PURSUANT TO A TENN. SUP. CT. R. 40A APPOINTMENT

Plaintiff contends the trial court erred in finding that Defendant did not have an attorney-client relationship with him. Plaintiff asserts that the enactment of Tenn. Sup. Ct. R. 40A removes the guardian ad litem's impartial, quasi-judicial [**19] function and requires that the guardian ad litem function as an advocate and attorney for the minor child.³ Therefore, Defendant

³Plaintiff also contends that Tenn. Sup. Ct. R. 40 has a bearing on the issues in this case. We, however, have determined that Rule 40 does not apply to the issues in this case because HN17 [↑] Rule 40 only applies to "neglect, abuse and dependency proceedings" in juvenile court. See Tenn. Sup. Ct. R. 40(a). The parents' divorce action was not a "neglect, abuse and dependency proceeding[]" in juvenile court; therefore, Rule 40 is not applicable. HN18 [↑] Rule 40A, however, applies in custody proceedings, other than an abuse or neglect proceeding in juvenile court, "in which legal or

served as his legal advocate, which gives rise to the attorney-client relationship.

For her part, Defendant argues that the parameters of her professional relationship with Plaintiff and his younger siblings were established and controlled by the terms of the Order Appointing Guardian Ad Litem in the custody proceedings and by Tenn. Sup. Ct. R. 40A. Relying on the order and Rule 40A, Defendant contends she was not appointed to serve as Plaintiff's attorney, but to serve as a Rule 40A guardian ad litem whose duties were to represent "the best interests" of Plaintiff and his younger siblings in the manner and to the extent the order and Rule 40A mandated. Stated another way, Defendant contends neither she nor Plaintiff had the authority to rewrite the Order Appointing Guardian Ad Litem or Rule 40A in order to create a consensual attorney-client relationship.

In ruling on Defendant's motion to dismiss, the trial court found that Rule 40A requires the guardian ad litem to represent the child's best interest and not the child. Specifically, in its oral ruling the court stated, "I think the Supreme Court chose these words [**20] with care, 'represent the best interest of a child or children in a custody proceeding.' Not represent the child or children, but the best interests." We agree.

As stated above, when we review a statute, we are to apply the plain and ordinary language of the statute absent an ambiguity. Lipscomb, 32 S.W.3d at 844. HN19 [↑] In interpreting the Rules of the Tennessee Supreme Court, "our goal is to ascertain and give effect to th[e] Court's intent in adopting its rules." Thomas v. Oldfield, 279 S.W.3d 259, 261 (Tenn. 2009).

It is undisputed that Defendant and Plaintiff never entered into a consensual attorney-client relationship. It is also undisputed that Defendant's role during the [**743] custody proceedings in the divorce action commenced with the entry of the Order Appointing Guardian Ad Litem. It is also undisputed that the appointment was made pursuant to Rule 40A.

As Plaintiff correctly states, Rule 40A differs from the prior rule in that the guardian ad litem now functions as a lawyer, not as a witness or special master. This change in the role of Rule 40A guardians ad litem has

physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, post divorce, paternity, domestic violence, and contested adoptions." Tenn. Sup. Ct. R. 40A § 1(a).

been recognized by the Tennessee Board of Professional Responsibility, which stated in Formal Ethics Opinion 2013-F-157 (Dec. 6, 2013):

Like [Rule] 40, [Rule] 40A provides that the [guardian ad litem] is an attorney appointed **[**21]** to represent the best interest of the child, but does not specifically provide that the child is the client of the [guardian ad litem]. Even so, Commentary to [Rule] 40A § 9 provides, in part, that the "current rule 40A differs from the prior rule in that the Guardian Ad Litem now functions as a lawyer, not as a witness or special master. The Guardian Ad Litem does not prepare a report for the parties or the court, nor does the Guardian Ad Litem make a recommendation to the parties or the court concerning custody. . . ." The rule further provides that the [guardian ad litem] does not perform any other judicial or quasi judicial responsibility and must satisfy their duties and responsibilities in an impartial, unbiased, objective and fair manner.

(citations omitted).⁴

HN20^[↑] Although a Rule 40A guardian ad litem does not prepare a report for the parties or the court, nor does the guardian ad litem make a recommendation concerning custody, this new role does not create an attorney-client relationship with the children in a custody proceeding. This is evident from the literal wording of Rule 40A and the order of appointment.

HN21^[↑] Rule 40A mandates that the guardian ad litem is appointed to represent "the best interests of the child," **[**22]** Tenn. Sup. Ct. R. 40A § 3(d), and to satisfy his or her duties "in an unbiased, objective, and fair manner." Tenn. Sup. Ct. R. 40A § 8(a). Rule 40A further mandates that the trial court enter a written order that states "the reasons for the appointment," "the specific duties to be performed by the guardian ad litem," and "as much detail and clarity as possible concerning the guardian ad litem's duties." Tenn. Sup. Ct. R. 40A § 4(a) — (c). Moreover, and significantly, not only does the trial court specify the duties of the guardian ad litem, the trial court is to also "exercise effective oversight of the guardian ad litem's role," Tenn. Sup. Ct. R. 40A § 4(c), which are concepts and restraints that are foreign to the typical attorney-client relationship.

HN22^[↑] Unless the order of appointment states otherwise, Rule 40A requires that the guardian ad litem conduct an investigation to determine "the best interests of the child," including the child's emotional needs and "the child's vulnerability and dependence upon others." Tenn. Sup. Ct. R. 40A § 8(b)(1)(i)-(iv). The rule also requires that the guardian ad litem "present[] facts for the court's consideration." Tenn. Sup. Ct. R. 40A § 6. If the intent of the rule was to create an attorney-client relationship, there would be no need for these mandates because the guardian ad litem would simply function as any attorney would in **[**23]** the representation of any client. Moreover, these mandates are inconsistent with the typical attorney-client relationship. For these reasons, it is apparent from considering Rule 40A in its entirety that the Supreme Court did not intend for **[*744]** a Rule 40A guardian ad litem to have a typical attorney-client relationship with the child or children whose "best interests" he or she is appointed to represent.

We also acknowledge, as Plaintiff asserts, that HN23^[↑]] if a child over the age of 12 asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem is required to take the following action:

(1) fully investigate all of the circumstances relevant to the child's position, identify every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;

(2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

(3) if, after fully **[**24]** investigating and advising the child, the child continues to urge the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian shall take all reasonable steps to:

(i) subpoena any witnesses and ensure the production of documents and other evidence that might tend to support the child's position; and

(ii) advise the court at the hearing of the wishes of the child and of the witnesses subpoenaed and other evidence available for the court to consider in support of the child's position.

⁴ Although the Board of Professional Responsibility's opinions are persuasive, the ethics opinions do not have the force of law. State v. Jones, 726 S.W.2d 515, 519 (Tenn. 1987).

Tenn. Sup. Ct. R. 40A § 8(c).

Plaintiff argues that the foregoing responsibilities indicate that the Supreme Court intended for the Rule 40A guardian ad litem to serve as an attorney representing the child. We respectfully disagree. If this were true, there would be no need for a Rule 40A order of appointment. Instead, the court would simply appoint an attorney to represent the child. Moreover, if the Supreme Court's intent was to create an attorney-client relationship, there would be no need for a rule or court order that assigns specific duties for the guardian ad litem to perform or which allows the court to exercise "oversight of the guardian ad litem's role."⁵ Tenn. Sup. Ct. R. 40A § 4(c). Furthermore, **[**25]** this argument ignores HN24^[↑] Rule 40A's mandate that the guardian ad litem shall "consider the child's expressed objectives **without** being bound by those objectives." Tenn. Sup. Ct. R. 40A § 8(b)(5) (emphasis added).

HN25^[↑] Considering the entirety of Rule 40A, it is apparent that the Supreme Court did not intend to create an attorney-client relationship between a guardian ad litem and the child or children whose best interests he or she represents. Nevertheless, because all Rule 40A guardians ad litem are licensed attorneys, they are subject to the Rules of Professional Conduct in the performance of their duties, subject to the parameters of and pursuant to exceptions arising from Rule 40A and an order of appointment.⁶

[*745] V. DISCLOSURE OF CONFIDENTIAL INFORMATION

HN26^[↑] Because a guardian ad litem must be an attorney, he or she is subject to the Rules of Professional Conduct in the performance of his or her duties in a legal proceeding. However, the scope and extent to which the Rules of Professional Conduct apply are subject to the exceptions mandated by the order of appointment and Rule 40A.

HN27^[↑] The Preamble to the Rules of Professional Conduct identifies exceptions to the rules of

⁵ See Tenn. Sup. Ct. R. 40A § 8(b)(7) (mandating that the guardian ad litem shall "perform any specific task directed by the court.")

⁶ This is also evident from the Advisory Commission Comment that "a guardian ad litem who runs afoul of the conflict-of-interest provisions of the Rules of Professional Conduct is subject to appropriate disciplinary action." Tenn. Sup. Ct. R. 40A § 4, adv. comm. cmt.

confidentiality by providing that "[a] lawyer should keep in confidence information relating to **[**26]** representation of a client **except so far as disclosure is required or permitted by** the Rules of Professional Conduct or **other law**." Tenn. Sup. Ct. R. 8, Preamble § 5 (emphasis added). In this case the "other law" is Rule 40A and the order of appointment.

Moreover, and significantly, HN28^[↑] Rule 1.6 of the Rules of Professional Conduct, which pertains to the disclosure of confidential information, provides an exception that permits the disclosure of confidential information if "the disclosure is impliedly authorized in order to carry out the representation." As noted above, Rule 40A and the order appointing Defendant as the guardian ad litem for Plaintiff and his two younger siblings expressly authorized the disclosure of confidential information if and to the extent Defendant believed the disclosure to be in the children's "best interests."

Here, the order appointing Defendant as guardian ad litem provided Defendant with the following authority:

The GAL shall hereby have the authority to and shall maintain confidentially of such information obtained by and related to the GAL, **except: as expressly permitted to be disclosed under this or other provision of this order** or other executed release, or as permitted pursuant to another order from the Court, or **as it may be necessary **[**27]** for, or greatly aid, the resolution of the issues.** The file of the GAL shall otherwise remain confidential and not discoverable.

(emphasis added).

In Plaintiff's complaint, the only factual basis for the alleged wrongful disclosure of confidential information was that Defendant disclosed information "to the Court in Division VII without the knowledge, authority or consent of [Plaintiff]." In dismissing the case, the trial court reasoned that since the order appointing Defendant guardian ad litem expressly authorized disclosure of information to the court, Plaintiff's complaint failed to state a claim. We agree.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Benjamin Runyon.

FRANK G. CLEMENT JR., P.J., M.S.



Neutral

As of: December 12, 2018 10:29 PM Z

In re Jackson H.

Court of Appeals of Tennessee, At Nashville

September 15, 2015, Session; October 28, 2016, Filed

No. M2014-01810-COA-R3-JV

Reporter

2016 Tenn. App. LEXIS 811 *; 2016 WL 6426742

IN RE JACKSON H.

Subsequent History: Appeal denied by In re Jackson H., 2017 Tenn. LEXIS 101 (Tenn., Feb. 15, 2017)

Prior History: Tenn. R. App. P. 3 [*1] Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Williamson County. No. 2014205. Robbie T. Beal, Judge.

Disposition: Judgment of the Circuit Court Affirmed.

Core Terms

guardian ad litem, circuit court, juvenile court, neglect, appointed, dependency, argues, issues, notice, award fees, communications, award of fees, discovery, contempt, indigent, subpoena, subject matter jurisdiction, attorney's fees, motion to quash, time expended, adjudicate, frivolous, petitions, juvenile, limits

Case Summary

Overview

HOLDINGS: [1]-Guardian ad litem fees (GAL) were reasonable because the GAL's petition for dependency and neglect and her motion to hold the mother in criminal contempt were the motions and pleadings set forth in Tenn. Sup. Ct. R. 40(d)(7), which regarded the responsibilities and duties of a GAL, and the juvenile court specifically authorized the GAL's action; [2]-Tenn. Sup. Ct. R. 13 did not limit the fees that could be awarded to the GAL because there was nothing deceptive in a GAL accepting compensation as limited by the rule and later requesting that payment be made by the parents when it appeared that they were financially able to do so; [3]-The compensation limits of Rule 13 did not necessarily apply when a parent was

found to be financially able to defray a portion or all of the cost of the child's representation.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

Family Law > Delinquency & Dependency > Dependency Proceedings

HN1 [Download] **Reviewability of Lower Court Decisions, Timing of Appeals**

Any appeal from a final order or judgment of the juvenile court in a dependency and neglect proceeding must be perfected within ten days, excluding nonjudicial days, following the entry of the juvenile court's order. Tenn. Code Ann. § 37-1-159(a) (Supp. 2016).

Family Law > Family Protection & Welfare > Children > Proceedings

HN2 [Download] **Children, Proceedings**

Indigence is not the only basis for appointing a child a guardian ad litem. Tenn. Code Ann. §§ 37-1-126(c)(1), 37-1-150(g)(1) (2014). A court may also appoint a guardian ad litem upon its own motion if a parent's interest conflicts with the child's. Tenn. Code Ann. § 37-1-150(a)(1). There are instances in which a parent may be financially able to defray a portion or all of the cost of a guardian ad litem.

Family Law > Family Protection &
Welfare > Children > Proceedings

HN3 [↓] Children, Proceedings

Under *Tenn. Code Ann. § 37-1-150(d)(1)*, if, after due notice to the parents and after affording them an opportunity to be heard, the court finds that they are financially able to pay all or part of the reasonable compensation for a guardian ad litem, the court may order them to pay the same and prescribe the manner of payment. *Tenn. Code Ann. § 37-1-150(d)(1)*. Even if a child is indigent and a guardian ad litem is appointed, the court may order a child's parents to pay a portion or all of the cost associated with the guardian ad litem if the parents have the financial ability to do so. *Tenn. Code Ann. § 37-1-150(g)(1)*.

Civil Procedure > Appeals > Standards of
Review > Abuse of Discretion

Evidence > ... > Presumptions > Particular
Presumptions > Regularity

Civil Procedure > Discovery &
Disclosure > Discovery

HN4 [↓] Standards of Review, Abuse of Discretion

The court of appeals reviews pretrial discovery decisions under an abuse of discretion standard. A court abuses its discretion when it applies an incorrect legal standard, reaches an unreasonable result, or bases its decision on a clearly erroneous assessment of the evidence. In reviewing the trial court's exercise of discretion, the court of appeals presumes that the decision is correct and reviews the evidence in a light most favorable to upholding the decision.

Family Law > Family Protection &
Welfare > Children > Proceedings

HN5 [↓] Children, Proceedings

The child is the client of the guardian ad litem, and the guardian ad litem is to function as lawyer. *Tenn. Sup. Ct. R. 40(c)(1), (f)*.

Family Law > Family Protection &
Welfare > Children > Proceedings

HN6 [↓] Children, Proceedings

By rule, the responsibilities and duties of a guardian ad litem include advocating the position that serves the best interest of the child by petitioning the court for relief on behalf of the child and filing and responding to appropriate motions and pleadings. *Tenn. Sup. Ct. R. 40(d)(7)*.

Family Law > Family Protection &
Welfare > Children > Proceedings

HN7 [↓] Children, Proceedings

Communications with a child's medical providers are necessary for a guardian ad litem to carry out his or her responsibility and duty to conduct an independent investigation of the facts. *Tenn. Sup. Ct. R. 40(d)(1)(iv), (viii)*.

Civil Procedure > Attorneys > Appointment of
Counsel

Family Law > Family Protection &
Welfare > Children > Proceedings

Civil Procedure > ... > Costs & Attorney
Fees > Attorney Fees & Expenses > Basis of
Recovery

HN8 [↓] Attorneys, Appointment of Counsel

The compensation that may be received by counsel appointed for indigent defendants is limited. *Tenn. Sup. Ct. R. 13*. These limitations also apply to guardians ad litem appointed in certain types of cases.

Family Law > Family Protection &
Welfare > Children > Proceedings

HN9 [↓] Children, Proceedings

A parent's financial status may change over the course of a case or new evidence may come to light indicating that an initial finding of indigence was incorrect. In such instances, after notice and a hearing, a court is

authorized by statute to order the parent to pay certain costs, including the reasonable compensation. *Tenn. Code Ann. § 37-1-150(d)(1)*. There is nothing deceptive in a guardian ad litem accepting compensation as limited by Tenn. Sup. Ct. R. 13 and later requesting that payment be made by the parents when it appears that they are financially able to do so.

Civil Procedure > Attorneys > Appointment of Counsel

Family Law > Family Protection & Welfare > Children > Proceedings

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

HN10 [↓] **Attorneys, Appointment of Counsel**

The compensation limits of Tenn. Sup. Ct. R. 13 do not necessarily apply when a parent has been found to be financially able to defray a portion or all of the cost of the child's representation. *Tenn. Code Ann. § 37-1-150(g)(1)*. When a parent is able to defray a portion or all of the costs of a guardian ad litem, those funds are ultimately paid over to the Administrative Office of the Courts (AOC). If the AOC receives funds greater than the total amount which appointed counsel or the guardian ad litem has claimed and has been reimbursed pursuant to Rule 13, then any such excess funds shall be paid to the appointed attorney. *Tenn. Code Ann. § 37-1-150(g)(5)*. Such a statutory requirement would be unnecessary if fees were limited by Rule 13.

Civil Procedure > Appeals > Frivolous Appeals

HN11 [↓] **Appeals, Frivolous Appeals**

By statute, when an appeal is found to be frivolous, certain damages may be awarded: When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal. *Tenn. Code Ann. § 27-1-122* (2000). The statute must be interpreted and applied strictly so as not to discourage legitimate appeals. A

frivolous appeal is one utterly devoid of merit.

Counsel: Connie Reguli, Brentwood, Tennessee, for the appellant, Elizabeth H.

David R. Grimmett, Nashville, Tennessee, for the appellee, Dawn Michelle Lipford.

Judges: W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Opinion by: W. NEAL MCBRAYER

Opinion

This appeal involves a challenge to fees awarded to a guardian ad litem. The juvenile court ordered the child's parents to each pay half of the fees awarded. After the juvenile court made its fee award, Mother appealed to the circuit court. The circuit court conducted a de novo hearing and found the fees awarded reasonable. On appeal to this Court, Mother raises several issues with respect to the award, including a lack of notice that fees would be assessed to the parents, improper limits on discovery, unauthorized and unnecessary actions by the guardian ad litem, and violations of Supreme Court Rules. The guardian ad litem argues Mother's appeal to the circuit court was untimely and requests that we vacate [*2] the decision of the circuit court and remand with instructions to dismiss the appeal. We do not find the appeal to the circuit court to be untimely, but we do find the award of fees to the guardian ad litem appropriate. Therefore, we affirm the judgment of the circuit court.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. PROCEEDINGS BEFORE THE JUVENILE COURT

Jackson H.'s involvement with the juvenile justice system began in May of 2013, when he was thirteen. His mother, Elizabeth H. ("Mother") filed a petition in the Juvenile Court for Williamson County, Tennessee, alleging that Jackson was an unruly child.¹ The juvenile

¹ State statute defines an "unruly child" as a child who:

court placed Jackson on in-home detention, but many other petitions² followed. Ultimately, Jackson made several appearances in juvenile court.

The juvenile court appointed Michelle Lipford (the "GAL" or "Ms. Lipford") as guardian ad litem on June 3, 2013. As required by *Tennessee Code Annotated* § 37-1-126,³ the court also assessed a nonrefundable administrative fee of \$50. But the court made no determination regarding whether Jackson's parents possessed the financial resources to contribute to the cost of a guardian [*4] ad litem.

On July 15, 2013, a magistrate held a review hearing in which Jackson, his counsel, his parents, the GAL, and a representative of the Department of Children's Services participated. Although new petitions alleging criminal impersonation and violation of county probation had been filed only three days prior, the magistrate relieved

(A) Habitually and without justification is truant from school while subject to compulsory school attendance under § 49-6-3007;

(B) Habitually is disobedient of the reasonable and lawful commands of the child's parent(s), guardian or other legal custodian to the degree that such child's health and safety are endangered;

(C) Commits an offense that is applicable only to a child; or

[*3] (D) Is away from the home, residence or any other residential placement of the child's parent(s), guardian or other legal custodian without their consent. Such child shall be known and defined as a "runaway".

Tenn. Code Ann. § 37-1-102(b)(23) (Supp. 2016).

²In addition to unruly behavior, subsequent petitions alleged violations of in-home detention, county probation, and curfew; being away from home without a parent's consent; assault; criminal impersonation; driving without a license; unauthorized use of a vehicle; possession of drug paraphernalia, a legend drug without prescription, and a controlled substance; introduction of contraband into a penal facility; failure to report an accident and to stay within a traffic lane; theft under \$500; and vandalism under \$500. By our count, twenty-six petitions related to Jackson's behavior or actions were filed between May 6 and December 16, 2013.

³*Tennessee Code Annotated* § 37-1-126 provides, in part, that "[t]he parents, legal custodians or guardians of a child who is appointed a guardian ad litem shall be assessed by the court an administrative fee . . ." *Tenn. Code Ann. § 37-1-126(c)(1)* (2014).

Ms. Lipford of her responsibilities as guardian ad litem.

On December 6, 2013, Jackson's counsel filed a motion to withdraw. The motion alleged that counsel had "received a handwritten note at his office (presumably delivered by the child's mother) purporting to be the communication of Jackson [] stating [his] wish to terminate the attorney-client relationship." The motion further alleged that counsel "suspect[ed] that the communication in question may not have been the knowing and voluntary act of [Jackson]."

Three days later, on December 9, 2013, the juvenile court entered an order reappointing Ms. Lipford as guardian ad litem. In addition to noting the numerous petitions filed [*5] against Jackson, the court found that Jackson "may be a dependent, neglect[ed] or abused child" and directed the GAL to investigate the dependency, neglect or abuse issues. The court further ordered the GAL to "file a dependency petition if the investigation warrants." Like the previous order, the order reappointing Ms. Lipford assessed an administrative fee to Jackson's parents but was silent as to whether his parents were indigent.

On December 17, 2013, Ms. Lipford filed a petition to adjudicate Jackson dependent and neglected. In the petition, the GAL alleged that "almost all" of the charges against Jackson "accrued while the child was in Mother's care" and that it was "practically impossible for Mother to supervise" Jackson. Mother and Jackson's father ("Father") divorced in 2010, and the GAL claimed Jackson's behavior was "better when he [wa]s in Father's care." The GAL requested that Jackson "remain in the legal custody of his Mother and Father and the physical custody of his Father, and reside in Father's home under his close supervision, pending [Jackson's] acceptance into residential placement and pending the final disposition of [the dependency and neglect petition]."

Mother initially requested [*6] a continuance of the preliminary hearing on the petition to obtain counsel, but at a hearing held on January 8, 2014, both Mother and Father waived their right to counsel and signed written waivers to that effect.⁴ Following the hearing, the juvenile court entered an order⁵ continuing the preliminary hearing but also restricting Mother's

⁴ Apparently, the waiver of counsel was limited only to the January 8, 2014 hearing as both parents subsequently retained counsel.

⁵ Only a portion of the order is included in the record.

communications. Specifically with respect to Mother, the order provided as follows:

4. With the exception of communications with her attorney(s), Mother shall not convey in any form the statements, opinions, or legal positions of the Guardian *ad litem* to any person or entity without the Guardian *ad litem's* prior permission. Mother shall direct any persons seeking or requiring the statements, opinions, or legal positions of the Guardian *ad litem* to the Guardian *ad litem*. The intent of this order is to avoid miscommunication and/or misrepresentation, whether intentional or otherwise, and is not intended to infringe on mother's communication with her attorney.

5. Mother shall not seek publicity or media attention which may compromise the child's right to privacy and confidentiality in these proceedings. The intent of this Order is to maintain the child's [*7] confidentiality and to protect the child from unwanted attention or embarrassment.

On January 13, 2014, the GAL filed an amended petition to adjudicate Jackson dependent and neglected. In her amended petition, the GAL again alleged that Jackson's behavior was "better when he [wa]s in Father's care than when he [wa]s in the care of his Mother." But the GAL also alleged that "Mother's actions and/or inactions with regard to the child's care and supervision pose a threat to the child's safety and well-being to the extent that allowing him to remain in Mother's custody places him at substantial risk of harm."

On January 31, 2014, the juvenile court held a hearing on the amended petition. As reflected in the court's subsequently entered order, Mother and Father and their respective counsel attended the hearing. Among other matters, the order addressed the issue of the fees of the GAL. The order provided as follows: "Neither parent is indigent. Consequently, the Guardian *ad litem* fees should not be submitted to the Administrative [*8] Office of the Courts for payment by the state, but instead should be paid by [Father] and [Mother], with each bearing responsibility for fifty percent of the fees." The court directed the GAL to "submit an Affidavit of Fees either at the conclusion of the Adjudicatory Hearing or upon the final disposition of the case."

Thereafter, on February 20, 2014, the GAL filed a petition for criminal contempt against Mother. The GAL alleged that Mother had willfully violated prior juvenile court orders "by sending an email with medical records attached to a number of people and/or entities, not all of

whom have legitimate professional interest in the child's medical or psychological care or treatment, and not all of whom are known to the [GAL]." The GAL also alleged that the email "attributed a number of statements, positions, actions and/or inactions to the [GAL], many or most of which were inaccurate or fabricated."

At a hearing held on March 4, 2014, the GAL announced her intention to voluntarily dismiss the amended petition to adjudicate Jackson dependent and neglected. The reasons for the voluntary dismissal are not known, although the order memorializing the dismissal reflects that a plea [*9] agreement involving Jackson placed him in the care of his Father. The order memorializing the dismissal also directed the GAL to "submit a record reflecting the time expended on this case for which she is seeking compensation, along with an Affidavit of Fees." The order also relieved Ms. Lipford of her responsibilities in the case.

On March 10, 2014, the GAL filed an affidavit of her fees, which reflected her hourly rate and the total number of hours for which she was seeking compensation. The GAL attached to the affidavit a detailed statement showing the dates services were rendered, the time devoted in rendering the service on the date in question, and a description of the services rendered.

The juvenile court entered an order awarding the GAL fees of \$5,454 for the period from December 5, 2013, to March 7, 2014. The court found, having reviewed the GAL's affidavit, that the fees were reasonable. In accordance with its previous order finding the parents not indigent, the court ordered each parent to pay one-half of the award.

B. PROCEEDINGS BEFORE THE CIRCUIT COURT

Mother appealed the award of fees to the Circuit Court of Williamson County, Tennessee.⁶ Mother also served a subpoena *duces* [*10] *tecum* on the GAL. The subpoena commanded the production of "[a]ll emails, records, letters, correspondence, text messages, interview notes, Administrative Office of the Courts payment submission forms, orders of appointment, and any other documents and correspondence created by

⁶ By statute, "[a]ny appeal from any final order or judgment in an unruly child proceeding or dependent and neglect proceeding . . . may be made to the circuit court that shall hear the testimony of witnesses and try the case de novo." *Tenn. Code Ann. § 37-1-159(a)* (Supp. 2016).

you, relied upon by you, received by you, and sent by you as Guardian ad Litem for Jackson [H.]."

For her part, the GAL moved to quash the subpoena. She also resubmitted the same affidavit of her fees that she filed with the juvenile court. The circuit court granted the motion to quash.

The court later conducted a hearing on the GAL's fees. Despite suggestions from the court that Mother should examine the GAL regarding her fee affidavit, Mother was the only witness to testify. Mother's testimony largely focused on her position that Jackson's behavioral issues were the result of a medical condition and her efforts to get Jackson the treatment she felt he needed. She claimed both [*11] the juvenile court and the GAL frustrated her efforts. In her view, the GAL's actions "[a]most destroyed" Mother and her son.

On August 28, 2014, the circuit court entered an order concluding that Ms. Lipford's fees were reasonable. The court awarded the full amount of fees requested, \$5,454, and also ordered Mother and Father to each pay one-half of the amount awarded.

II. ANALYSIS

Mother identifies seven issues on appeal. As we perceive them, Mother's issues are actually fourfold: (1) whether the trial court appropriately ordered the parents to pay the fees of the GAL; (2) whether the trial court erred in quashing Mother's subpoena *duces tecum* and limiting discovery; (3) whether the fees of the GAL were unreasonable, either because they were unnecessary or outside of the GAL's authority; and (4) whether the amount that may be awarded is limited by Tennessee Supreme Court Rule 13. The GAL argues that the circuit court lacked subject matter jurisdiction to consider Mother's appeal of the award of fees, and we should vacate the circuit court's order and remand with instructions to dismiss Mother's appeal. If the circuit court did have subject matter jurisdiction, the GAL argues that Mother's appeal to this Court is frivolous, [*12] entitling the GAL to an award of attorneys' fees on appeal. We consider the circuit court's subject matter jurisdiction first.

A. SUBJECT MATTER JURISDICTION OF THE CIRCUIT COURT

HN1 Any appeal from a final order or judgment of the juvenile court in a dependency and neglect proceeding must "be perfected within ten (10) days, excluding nonjudicial days, following the entry of the

juvenile court's order." Tenn. Code Ann. § 37-1-159(a) (Supp. 2016). The GAL argues that the ten-day period began to run from March 14, 2014, the day the juvenile court's order awarding fees was entered. If that is the case, Mother's notice of appeal, which was filed on April 21, 2014, was untimely.

Based on our review of the record, we find Mother's appeal to the circuit court was timely. Although the juvenile court did award fees to GAL on March 14, 2014, the order awarding fees did not resolve all outstanding claims of the GAL for fees. On the same day that she filed her fee affidavit, the GAL also filed a motion to quash subpoena *duces tecum* in which she requested "costs and/or fees associated with [the motion to quash]." The juvenile court resolved the request for additional fees in its order granting the motion to quash, which was not entered [*13] until April 11, 2014. Mother timely appealed from the order entered on April 11, 2014, and the circuit court possessed subject matter jurisdiction to consider the award of fees to the GAL. Therefore, we may consider the issues raised by Mother with respect to the circuit court's award of fees.

B. AWARD OF GUARDIAN AD LITEM FEES

As an initial matter, we should note that HN2 indigence is not the only basis for appointing a child a guardian ad litem. See Tenn. Code Ann. §§ 37-1-126(c)(1), 37-1-150(g)(1) (2014). A court may also appoint a guardian ad litem upon its own motion if a parent's interest conflicts with the child's. *Id.* § 37-1-150(a)(1). Our statutes recognize that there are instances in which a parent may be financially able to defray a portion or all of the cost of a guardian ad litem.

1. Trial Court's Authority to Order Payment by the Parents

HN3 Under Tennessee Code Annotated § 37-1-150(d)(1), "[i]f, after due notice to the parents . . . and after affording them an opportunity to be heard, the court finds that they are financially able to pay all or part of the [reasonable compensation for a guardian ad litem], the court may order them to pay the same and prescribe the manner of payment." Tenn. Code Ann. § 37-1-150(d)(1). Even if a child is indigent and a guardian ad litem is appointed, the court may order a child's parents [*14] to pay a portion or all of the cost associated with the guardian ad litem if the parents have the financial ability to do so. *Id.* § 37-1-150(g)(1). Mother argues that she was not given notice in a timely fashion that she might be responsible for the GAL's fees. In its consideration of the issue, the circuit court found that

Mother was not notified prior to January 31, 2014, that she might be responsible for the fees of the GAL and that the juvenile court "erred in not notifying the parents sooner." However, the circuit court declined to find the notice insufficient.

While we agree that notice was not handled in an ideal manner, under the unique circumstances of this case, we conclude that the notice given to Mother was sufficient under the statute. Both parents were represented by counsel at the hearing on January 31, 2014, and the record does indicate that Mother objected to the juvenile court's indigence finding at the hearing. We also note that at no time has Mother contended that she was indigent or lacked the means to pay all or part of the reasonable compensation of the GAL. In her motion to set aside the order for fees to be paid to Ms. Lipford, Mother made no mention of her ability to pay the [*15] fees. Instead, Mother argued that there was "no provision in law for paying a Guardian ad Litem who non-suits the actions they have initiated."

2. Trial Court's Limitation on Discovery

In the proceedings in the circuit court, Mother served a subpoena *duces tecum* on the GAL demanding that the GAL appear at the office of Mother's attorney on June 8, 2014, with the following records: "All emails, records, letters, correspondence, text messages, interview notes, Administrative Office of the Courts payment submission forms, orders of appointment, and any other documents and correspondence created by you, relied upon by you, received by you, and sent by you as Guardian ad Litem for Jackson [H.]" In granting the GAL's motion to quash, the trial court limited the discovery that Mother could obtain on the issue of fees:

[T]he motion to quash is granted; and the Guardian ad Litem is obligated to provide a detailed time list of the time expended on the above styled matter to Mother's counsel. The Mother's attorney is further allowed to cross-examine the Guardian ad Litem as to the time expended by the Guardian ad Litem, but this Court will not require the Guardian ad Litem to turn over work-product [*16] which was created in preparation for the case.

On appeal, Mother essentially argues that the circuit court erred because none of the documents sought were privileged. Mother argues that: (1) there is no attorney/client privilege under *Tennessee Code Annotated § 23-3-105* between a guardian ad litem and a child; (2) the communications sought were between the GAL and persons related to Jackson's medical care

and potential placement; (3) the GAL non-suited the petition to adjudicate dependency and neglect, and therefore, there was no reason to deny parents access to the information; (4) there is no case law supporting a work-product privilege for a GAL; and (5) a GAL's role is to provide evidence on the best interest of a child.

HN4 [↑] We review pretrial discovery decisions under an abuse of discretion standard. *West v. Schofield*, 460 S.W.3d 113, 120 (Tenn. 2015). A court abuses its discretion when it applies an incorrect legal standard, reaches an unreasonable result, or bases its decision on a clearly erroneous assessment of the evidence. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). In reviewing the trial court's exercise of discretion, we presume that the decision is correct and review the evidence in a light most favorable to upholding the decision. *Lovlace v. Copley*, 418 S.W.3d 1, 16-17 (Tenn. 2013).

We find no abuse of discretion by the circuit court in granting the [*17] GAL's motion to quash or limiting discovery. Certainly, Mother's arguments misapprehend the relationship between the GAL and Jackson. *Supreme Court Rule 40* states that HN5 [↑] "[t]he child is the client of the guardian ad litem" and that the guardian ad litem is "to function as lawyer." *Tenn. R. Sup. Ct. 40(c)(1), (f)*. Beyond that, the document request by Mother was overly broad given that the great majority of services for which the GAL sought compensation related to court appearances and conferences or meetings with interested parties and attorneys. The only documents that the GAL created for which she sought compensation were proposed orders of the court, which were readily available to Mother.

3. Trial Court's Reasonableness Determination

The circuit court awarded the GAL the full amount of the fees she requested, \$5,454, which is the same amount the GAL requested from the juvenile court. Mother argued to the circuit court that the fees were unreasonable. In rejecting Mother's argument, the circuit court found that Mother's proof was insufficient to rebut the GAL's assertion of reasonableness:

The third issue presented is whether the line item entries in the Affidavit of Fees filed by the Guardian ad litem are reasonable. The Court has carefully [*18] reviewed each of the line item entries. With respect to the December 19, 2013 line item, the Court has some concern over the discussion time spent with attorneys but also finds that this time was combined with preparation time

for the preliminary hearing and that in combination, the time expended was more than reasonable. The Court finds that the meeting time with the Court Appointed Special Advocate is reasonable. The February 25, 2014 conference time of 1.2 hours gives the Court some concern, but in context with the combined amount of preparation time, the Court finds the time expended to be acceptable. The Court finds the remaining line item fees to be reasonable as well.

On appeal to this Court, Mother again argues the fees are unreasonable. The fees awarded include time associated with the petition for dependency and neglect and the motion to hold Mother in criminal contempt, and Mother submits that the GAL was not authorized to make either filing. We disagree.

The GAL had authority to file the petition for dependency and neglect and the contempt motion by virtue of both the Rules of the Supreme Court and the orders of the juvenile court. HN6 [↑] By rule, the responsibilities and duties [*19] of a guardian ad litem include "[a]dvocating the position that serves the best interest of the child" by "[p]etitioning the court for relief on behalf of the child and filing and responding to appropriate motions and pleadings." Tenn. R. Sup. Ct. 40(d)(7). We conclude that the petition for dependency and neglect and the motion to hold Mother in criminal contempt are just such motions and pleadings. In addition, the juvenile court specifically authorized the GAL's action. In reappointing Ms. Lipford, the juvenile court ordered her to investigate issues of dependency, neglect or abuse and further ordered her to "file a dependency petition if the investigation warrants." When it became concerned that Mother was communicating Jackson's individually identifiable health information to third-parties, the juvenile court authorized the GAL to "initiate contempt of court proceeding against anyone" believed to be in violation of court orders.

Mother also submits that the fees were unreasonable because the GAL's actions were either counter-productive or unproductive. Mother claims that the GAL's actions interfered with Jackson's medical care because the GAL "direct[ed] medical providers to communicate with her instead of mother and by creating such chaos [*20] that even the medical providers . . . did not know who [they] could talk to and who [they] couldn't." We find no proof of Mother's claim in the record beyond the fact that the GAL did communicate with Jackson's medical providers. But HN7 [↑] such communications are necessary for a guardian ad litem

to carry out her responsibility and duty to conduct an independent investigation of the facts. *See id.* 40(d)(1)(iv), (viii).

Finally, Mother claims that the petition for dependency and neglect and the motion to hold Mother in contempt were unproductive because they were both ultimately dismissed by the GAL. The circuit court considered this argument and rejected it:

Mother's proof on this issue consisted of the fact that the petition was eventually non-suited and the volume of medical proof that the mother had obtained. The record in this case convinces the Court that there were psychological issues with medical and behavioral components and that the child has a very uncommon diagnosis of PANDAS⁷ disorder. The Court in [sic] not comfortable holding the Guardian ad litem to the standard of being able to recognize all that occurs with this disorder and makes no finding with regard to whether the Guardian ad [*21] litem was right or wrong in filing a petition to adjudicate dependency and neglect against the mother or why the Guardian ad litem subsequently non-suited the petition. Only if the Guardian ad litem was acting wrongfully should she be denied fees and that was not the case here. The Guardian ad litem was acting on her judgment as to the child's best interests and it cannot be said that she was unreasonable in her actions.

We also reject the argument. For her fees to be reasonable, the GAL did not have to be successful in her filings, although results are among the factors that may be considered. *See, e.g., Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 185 (Tenn. 2011)* (applying the factors found in Rule of Professional Conduct 1.5(a)(1)-(10) in determining a reasonable attorney's fee regardless of the client's age).

4. Application of Supreme Court Rule 13

HN8 [↑] The compensation that may be received by counsel appointed for indigent defendants is limited. *See* Tenn. R. Sup. Ct. 13. These limitations also apply to guardians ad litem appointed in certain types of cases. *Id.* Upon her initial appointment, the GAL sought fees under Supreme Court Rule 13, which includes the compensation limitations, and was paid by the Administrative Office of the Courts [*22] ("AOC").

⁷PANDAS is an acronym for "pediatric autoimmune neuropsychiatric disorders associated with streptococcal infections."

Mother claims that it was a "deceptive practice" for the GAL, upon her reappointment, to have sought an award of fees from Mother and Father. Mother also claims that the GAL should be subject to the compensation limits found in Rule 13, even though the parents were found not to be indigent by the juvenile court.

We conclude that Supreme Court Rule 13 does not limit the fees that may be awarded to the GAL in this case. First, HN9 a parent's financial status may change over the course of a case or new evidence may come to light indicating that an initial finding of indigence was incorrect. In such instances, after notice and a hearing, a court is authorized by statute to order the parent to pay certain costs, including the reasonable compensation. Tenn. Code Ann. § 37-1-150(d)(1). We find nothing deceptive in a guardian ad litem accepting compensation as limited by Supreme Court Rule 13 and later requesting that payment be made by the parents when it appears that they are financially able to do so.

Second, our reading of Tennessee Code Annotated § 37-1-150 indicates that HN10 the compensation limits of Supreme Court Rule 13 do not necessarily apply when a parent has been found to be "financially able to defray a portion or all of the cost of the child's representation." Id. § 37-1-150(g)(1). When a parent is able to defray a portion or *23 all of the costs of a guardian ad litem, those funds are ultimately paid over to the AOC. If the AOC "receives funds greater than the total amount which appointed counsel or the guardian ad litem has claimed and has been reimbursed pursuant to Tennessee Supreme Court Rule 13, then any such excess funds shall be paid to the appointed attorney." Id. § 37-1-150(g)(5). Such a statutory requirement would be unnecessary if fees were limited by Supreme Court Rule 13.

C. ATTORNEY'S FEE ON APPEAL

Having considered Mother's arguments, we must now address the GAL's request for an award of attorney's fees incurred on appeal under Tennessee Code Annotated § 27-1-122. The GAL contends that Mother's appeal is frivolous. HN11 By statute, when an appeal is found to be frivolous, certain damages may be awarded:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the

judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122 (2000). The statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." See Davis v. Gulf Ins. Grp., 546 S.W.2d 583, 586 (Tenn. 1977) (citing the predecessor *24 to Tennessee Code Annotated § 27-1-122). A frivolous appeal is one "utterly devoid of merit." Combustion Eng'g, Inc. v. Kennedy, 562 S.W.2d 202, 205 (Tenn. 1978). We do not find this appeal devoid of merit or any indication that it was undertaken for delay. Therefore, we decline to award the GAL her attorney's fees on appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

W. NEAL MCBRAYER, JUDGE

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Guardian Ad Litem: The Difference Between Winning And Losing

What To Do When The Guardian Ad Litem Is Not Doing A Thorough Job

Those that have been involved in custody litigation are probably aware of the important role that a Guardian ad Litem (GAL) can play in the outcome. In fact, when both parties otherwise appear suitable, the GAL's report can sometimes be the tie-breaker for the Judge or Magistrate hearing the case. The input from the Guardian ad Litem is usually taken very seriously by the Court due to the fact it is thought to come from someone that is in a neutral position, has only the best interests of the children in mind, and has almost unfettered access to relevant information, such as the home life of both parents, the children's school teachers and counselors as well as other important persons. In short, having a favorable Guardian ad Litem report can be the difference between winning and losing.



But, what is a party supposed to do when they do not feel the Guardian ad Litem put forth sufficient time and effort to make an informed recommendation to the Court? Like every other profession, there are really good GALs and there are some pretty lazy ones as well. As a practitioner in both domestic relations and juvenile courts, I know first-hand that some GALs put in the minimum effort to gather information and draft their report and recommendation to the Court, even though their opinion is extremely important to the ultimate decision. This frustrates attorneys and clients alike. Sure we can put the Guardian ad Litem on the stand and try to minimize the importance of their opinion in the court's eyes by attacking the GAL's credibility.

However, if the case still goes sideways, the Guardian ad Litem report will remain as part of the record for the appellate court to see; and the trial court is given great latitude to evaluate the credibility of all witnesses, including the *Guardian ad Litem*. Therefore, if the trial Court gives weight to the GAL's opinion, notwithstanding attacks on his or her thoroughness, the appellate court likely won't disturb that finding. It would certainly be better to have the lazy GAL's report not considered at all rather than trying to show the court why it should put little, if any, credence on his or her recommendation. Is there a way to force the trial court to disregard the Guardian ad Litem altogether?

The answer is "maybe." By making a record and objecting to the trial court utilizing any report or testimony of an uninformed Guardian ad Litem, a party may be able to show the appellate court that the trial court "abused its discretion." In a somewhat recent decision out of the 4th district

court of appeals, there is now appellate language indicating that if the Guardian ad Litem did not do a sufficient job of investigation, according to the state-wide standards for GALs enacted by the Supreme Court of Ohio in Superintendence Rule 48, a party can move to strike the Guardian ad Litem report and recommendation from the record, effectively nullifying the adverse recommendation altogether.

While litigants have always had the right to move the trial court to strike a GAL's report and recommendation, based upon general notions of bias or incompleteness, this appellate opinion evaluated the GAL's efforts against the requirements of Superintendence Rule 48.

In *Nolan v. Nolan*, 2012 Ohio 3736 (2012), the appellate court went into detail about the rule governing the specific tasks that a Guardian ad Litem is supposed to do as part of their assignment and determined that if the Guardian ad Litem falls well below the minimum standards of Rule 48, it may be an abuse of discretion for the trial court to consider the GAL's report and testimony. This is a big win for those of us that feel that a Guardian ad Litem is very useful in the resolution of custody disputes, but only when the Guardian ad Litem does a competent, thorough job; when the Guardian ad Litem is not diligent in the investigatory stages of the case, his or her recommendation is something less than an educated guess as to what is in the children's best interest.

The *Nolan* Court was quick to point out, however, that the Rules of Superintendence do not carry the force of law and do not create any substantive rights in individuals but "are general guidelines for the conduct of courts." Nonetheless, with the advent of these guidelines, at least trial courts have some objective standard to hang their hat on when deciding that a GAL's report and/or testimony should be discarded. In other words, prior to the promulgation of Rule 48, there was nothing that specifically delineated the tasks a Guardian ad Litem was required to do; and it was very difficult to show an appellate court that the trial court abused its discretion in considering a substandard GAL's position. Now that there is a rule listing these minimum standards, attorneys can put the pressure on trial courts to strike the GAL's report and testimony by pointing to the tasks the Guardian ad Litem failed to undertake.

So, what are the minimum standards prescribed by Rule 48? Here is what the rule states, in part: "A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. In order to provide the court with relevant information and an informed recommendation as to the child's best interest, a guardian ad litem shall, at a minimum, do the following, unless impracticable or inadvisable because of the age of the child or the specific circumstances of a particular case:

- a. Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present;
- b. Visit the child at his or her residence in accordance with any standards established by the court in which the guardian ad litem is appointed;
- c. Ascertain the wishes of the child;
- d. Meet with and interview the parties, foster parents and other significant individuals who may have relevant knowledge regarding the issues of the case;
- e. Review pleadings and other relevant court documents in the case in which the guardian ad litem is appointed;
- f. Review criminal, civil, educational and administrative records pertaining to the child and, if appropriate, to the child's family or to other parties in the case;
- g. Interview school personnel, medical and mental health providers, child protective services workers and relevant court personnel and obtain copies of relevant records;
- h. Recommend that the court order psychological evaluations, mental health and/or substance abuse assessments, or other evaluations or tests of the parties as the guardian ad litem deems necessary or helpful to the court; and
- i. Perform any other investigation necessary to make an informed recommendation regarding the best interest of the child."

When The Guardian ad Litem Fails

In summary, if the *Guardian ad Litem* failed to perform some or most of the above-listed tasks, then your attorney should move the court to exclude the testimony and recommendation as not being competent or credible evidence in the ultimate decision. If you do not prevail, you will have an argument on appeal that the trial court abused its discretion in not granting your motion. For more information about Superintendence Rule 48, click to read an article titled [A Dramatic New Guardian Ad Litem Rule in Ohio](#) we posted in June of 2009.

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HYPOTHETICAL ONE

Yesterday, Julie (aged 5) and Shawn (aged 7) were left alone in their mother's house between 8:00 am and 4:30 pm while their mother was at work. At 4:30, Shawn called 911 and told them that he had accidentally shot his sister Julie with his mother's gun. When the police arrived at the home, they found Julie bleeding as a result of gunshot wounds to her hand and chest. She is currently in the hospital in critical condition.

The gun that Shawn used to shoot his sister was under the mother's bed on the floor, within easy reach of the children. When the police searched the mother's house, they found six baggies of a substance they believed to be marijuana on the floor next to the gun.

DCS has filed an emergency petition to remove the children from the home. The children were in the custody of the mother – Marie Jenkins. The Court had previously given custody to Ms. Jenkins as the father – Arthur Cram – did not provide a safe environment for the children.

You have now been appointed to represent the children as a GAL.

HYPOTHETICAL TWO

Magda's three children were removed from her home and placed in DCS custody following a report from the school that the oldest child, Sharon, aged 6, came to school dirty, tired and hungry. The teacher inquired and Sharon was able to explain that she witnessed a fight between her mother and her mother's boyfriend in the house the night before. She said there had been a "party" at the house. She also said she was up all night, trying to comfort her younger siblings, Bobby, aged 4, and Brianne, aged 12 months. Sharon told the teacher that she left the house when her mother and the boyfriend were still asleep. She stopped at a neighbor's house to ask them to give food to her brother and sister. The teacher also reported that she had already been concerned about Sharon due to her violent outbursts followed by silence.

DCS immediately inspected Magda's house and found it to be filthy and in complete disarray. There was overturned furniture and beer cans in almost every room. There was no fresh food in the refrigerator or in the cupboards. Bobby and Brianne both appeared scared, dirty and hungry.

When questioned by DCS, Magda and her boyfriend Sam both minimized the fight. They said that there had been a party and others brought the beer and didn't clean up. She said she planned to clean the house and go grocery shopping the next day.

Magda has a GED and some college credits. She is not working but receives some benefits. Sam works at a warehouse. He financially supports Magda and the children.

The children were evaluated by a pediatrician who found no evidence of physical abuse. Sharon is doing well in school; Bobby shows no developmental delays; Brianne shows some delays, as she doesn't crawl and doesn't babble.

Over the past three years, DCS has received four reports regarding Magda. All the reports claimed neglect. None were substantiated. On each occasion, the children made no claims of neglect, the home appeared adequate, and Magda provided clean urine samples. According to the file, Magda successfully completed an outpatient drug program two years ago. Neighbors claim that there appears to be drug activity at the home since Sam moved in.

Sam entered Madga's life several months after she finished the drug program. He is from California and has no family in Tennessee. The couple moved in together after dating for approximately two months and have now lived together for a little over a year. Sam was arrested for domestic violence with his previous girlfriend, but the case was dismissed for failure to prosecute. Sam told the DCS worker that Sharon "hates him and won't do anything he tells her to;" that Bobby calls him "Daddy;" and that he adores Brianne. He is not the biological father of any of the children, although he wants to adopt Brianne.

Sharon's biological father is in prison for manslaughter and will not be released for another five years. Bobby and Brianne have the same father. His parental rights were terminated earlier this year as he failed to have any contact with the children.