MBA
MEMPHIS BAR ASSOCIATION

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June 30, 2008

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Bldg.
401 7th Ave. N.
Nashville, TN 37219

Re: Proposed Supreme Court Rule Governing the Appointment of Guardians ad Litem for Minor Children in Divorce and Post-Divorce Proceedings

Dear Mr. Catalano:

The Memphis Bar Association commends the Supreme Court for proposing a rule regarding Guardians Ad Litem (herein referred to as "GAL") which is clearly thoughtful and considerate of children in matters of divorce, the judiciary who preside over such cases, and the attorneys who are appointed to represent the minor children. We genuinely appreciate the time and efforts of the drafters of this proposal.

A subcommittee of the MBA's Divorce & Family Law Section, which included GALs, family law practitioners, and judges, reviewed the proposed rule and suggested proposed comments, which the MBA House of Delegates and Board of Directors has endorsed. Although overall we are supportive of the proposal, we respectfully submit the following remarks for consideration.

1. The proposal sets forth within the "Definitions" provision that the GAL shall assist the Court in making a determination for "the best interest of the child". In contrast, within the" General Guidelines", "Conflicts of Interest of the GAL", and "Duties of the GAL" provisions, it is set forth or there is reference that the GAL "shall represent the child or children."

   We strongly agree with the proposal's definition that the role of the GAL should be to assist the Court by representing the best interest of the child or children. In such representation, the GAL often stands in the shoes of the child to protect the child. However, what may be in the child's best interest may not always be the same as the child's preference. In such instances, so to avoid apparent conflicts, pursuant to the Tennessee Rules of Professional Conduct (herein referred to as "TRPC"), there needs to be a mechanism in place to address such an issue.

Historically, Attorneys ad Litem have been appointed for this very reason, to represent the child's preference thus allowing the GAL to continue to assist the Court while representing the child's best interest.

We respectfully submit that to clear up this potential confusion, the Rule should remain unchanged in the "Definitions" provision, and in the other provisions where there is reference to the GAL "representing the child or children," it should rather be worded that the GAL represents "*the best interest* of the child or children." Further, language could be added such as, "If the child's preference differs from what the GAL deems to be in his or her best interest, then the GAL shall have the duty to immediately address this issue with the Court and Counsel for the parties."

2. The proposal sets forth within the "General Guidelines" provision that the GAL shall act in accordance with the TRPC. The "Conflicts of Interest" provision sets forth that the appointing Court must determine that the GAL has "no conflicts of interests under the Rules of Professional Conduct." In contrast, additional language of the "Conflicts of Interest" provision sets forth the term "conflict(s) of interest" without reference to the TRPC, and moreover describes such term to be without limitation.

We support that the Rule should define the term "conflict(s) of interest" as outlined in the TRPC. We are concerned that by not continuing to define this term as such throughout the Rule, parents who disagree with the position of the GAL may be encouraged to create conflicts with the GAL in order to manipulate the process in their favor. Respectfully, we submit that to avoid any potential for misinterpretation, anywhere that the term "conflict(s) of interest" appears in the Rule, it should be followed by "as defined within the TRPC."

3. The proposal sets forth within the "Definitions" provision that the GAL shall assist the Court. In contrast, the proposal sets forth within the "General Guidelines" provision that the report of the GAL is to assist the parties and shall be submitted only to the parties.

As stated previously, we strongly agree that the GAL should be appointed to assist the Court. It appears somewhat confusing that the guidelines provision states that the GAL is to present his or her written investigation results only to the parties to assist the parties. We are of the position that in Toms v. Toms, 98 S.W. 3d 140 (Tenn. 2003) the Supreme Court correctly set forth guidelines and rationale for the report of the GAL. In relevant part, the Toms decision states:

> "Although a guardian ad litem's report is not admissible evidence, we hold that **such a report may be reviewed by a trial court.** To hold otherwise would effectively undermine the important role played by a guardian ad litem. A **guardian ad litem's report is a tool to be used by the parties and the court.**
>
> …it assists the parties in preparing for an evidentiary hearing. The report also may assist the trial court by providing an overview of the evidence and by allowing the court to determine which of the issues are contested." 98 S.W. 3d at 144. (Emphasis added)

In addition to assisting with preparation and an overview of evidence and contested issues, the report of the GAL also plays an important role for possible settlement and a source to express the child's preference.

Further, the language of the proposal sets forth that the report of the GAL is to be provided to the parties. Counsel for the parties may benefit from reviewing the report and counsel may keep such report confidential. We are concerned that providing the report to the parties, as opposed to Counsel for the parties, may unintentionally leave the report vulnerable to lack confidentiality, or potentially be read by the child, or worse, used by a parent to confront the child with his or her disclosures.

To cure the above concerns, we respectfully submit that with regard to the report of the GAL, the Rule set forth, "A report prepared by a guardian ad litem shall be provided only to counsel for the parties and to the court; the report shall not be filed with the court, nor is it admissible into evidence at trial except for impeachment purposes."

4. The proposal sets forth in the "Compensation for the GAL" provision that fee disputes should heard promptly by a Judge other than the appointing Court.

We strongly agree that if there are disputes regarding the fees of a GAL, there should be a prompt hearing. However, we believe that the best Court to hear such a dispute is the appointing Court. We believe that the appointing Court, who has heard the details of the case and therefore is most familiar with the level of its complexity, can also make the most informed ruling as it relates to the reasonableness of the fees associated with that case.

Therefore, we respectfully submit that the language setting forth that a prompt hearing should be held if there is a fee dispute should remain, however that there need not be the requirement that the same be conducted by a judge other than the appointing court.

5. In the proposal's "Orders of Appointment" provision, the language sets forth that the appointing Judge shall require the parties to pay "a sum" necessary to compensate the GAL. In contrast, in the same paragraph, there is reference to a "deposit" for expenses.

We are concerned that the term "sum" may be misconstrued to be a total for all fees of the GAL. It would be very difficult for the appointing Court to know at the onset of the appointment what the total fees of the GAL shall be. It would be reasonable for the Court to contemplate generally what the anticipated initial fees may be for the GAL, and to require the parties to pay such amount.

In keeping with our interpretation, we respectfully submit that instead of using the term "sum," the Rule use the language "initial deposit."

6. Lastly, there are two points in the proposal where there is some confusion as to reference.

One, the "Orders of Appointment" provision section (1)(iv) references Rule(c)(6). We could not find Rule (c)(6) within the body of the proposed Rule.

Two, the "Conflicts of Interest" provision references the attorney ad litem. The attorney ad litem is not defined within the body of the proposed Rule, nor is the attorney ad litem addressed in any other provision of the proposed Rule. Since the definitions and duties of the attorney ad litem are not defined within this proposed Rule, it may be difficult to determine when conflicts may arise for the attorney ad litem, under this proposed Rule.

Respectfully, we therefore submit that references to Rule (c)(6) and an attorney ad litem be deleted.

Thank you again for the opportunity to express our comments. Please feel free to contact us for any questions or for continued dialogue regarding the proposed Rule.

Yours very truly,

Amy Amundsen, President
Memphis Bar Association

Aubrey Brown, Chair
Divorce & Family Law Section

Hon. John R. McCarroll, Jr.
Circuit Court, Division I

Hon. James F. Russell, Jr.
Circuit Court, Division II

Hon. Robert L. Childers
Circuit Court, Division IX

JOSEPH L. HORNICK
attorney & counselor-at-law

M2008-00656-SC-RL2-RL

1 April 2008

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

In Re: Proposed Rule Governing Appointment of Guardian
Ad Litem for Minor Children in Divorce and Post-Divorce Proceedings

Dear Mr. Catalano:

This letter will serve as my comment to the Supreme Court setting forth my steadfast opposition to the proposed rule governing appointment of guardian *ad litems* for minor children in divorce and post-divorce proceedings.

It appears to me that we are attempting with this rule to take another function away from the judiciary, which was elected to make these calls. Although I may be mistaken, courts already have the ability to appoint a guardian *ad litem* if they see fit. However, this seems to mandate the appointment and further remove the judiciary from their elected duties.

But the biggest obstacle to this proposed rule should be the burden that it will place on local bar associations. There is already a strain on local bar associations as it seems like Public Defenders offices are becoming more and more active in seeking conflicts of interest in criminal cases and local attorneys are being forced to take over to a greater extent in criminal cases. Furthermore, with the explosion of the juvenile court system, there is already a strain on resources because of the need for guardian *ad litems.*

This rule would only further dilute the ability of local attorneys, especially in rural areas, to practice law. With the rising costs of litigation, which we as attorneys must share the blame in, the costs of divorce and post-divorce proceedings is already out of hand; proof of this being that the Supreme Court, and local courts, is becoming being more and more active in helping pro se litigants. Rising costs have increased by several the number of pro se litigant programs which is a direct result of the cost of litigation.

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This rule places the burden of paying the costs of the guardian *ad litem* on the parties. It is becoming increasingly difficult for individuals to afford divorce and post-divorce litigation and adding another attorneys' fee in to the mix will only further complicate the problem. Unfortunately the guardian *ad litem* is appointed and ordered by the court to do a job and should the parties not pay, work done by the guardian is simply for naught, further burdening the local bar associations.

Attorneys are already underpaid in appointed cases because the fees paid by the State are so miniscule. In this case, under this rule, attorneys would simply be stuck without payment and preempted by conflict from being retained at a future date in matters. It appears that this rule only places another burden on those attorneys who actually get appointed in these cases, those that actually have to live in the court room, while those unaffected by the rules continue to make the rules without realizing the actual strain and burden placed on the system.

Again, I as a sole practitioner am adamantly opposed to this rule and do not believe it to be in the best interest of anyone involved, from the parties to the attorneys. Hopefully our Supreme Court will consider the effects of this propped rule on those who actually will see it in use and understand that it is only a further burden on an already stressed system.

Sincerely,

Joseph L. Hornick
JLH/af
Enclosures

M2008-00656-SC-RL2-RG

STATE OF TENNESSEE
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April 10, 2008

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Bldg.
401 7th Ave. N.
Nashville, TN 37219

Re: Proposed Supreme Court Rule On Guardians Ad Litem
Dear Mr. Catalano:

I am a member of the Supreme Court committee that was appointed to review the status of guardians ad litem in Tennessee and assist in the drafting of a proposed rule for consideration by the court.

The Supreme Court has now published for comment a proposed rule regarding Guardians Ad Litem. As a member of the Supreme Court committee, I have previously documented my dissent from that part of the proposed rule dealing with the use of the GAL report. I now publicly voice my dissent from this part of the proposed rule.

It has been my position that any Supreme Court Rule pertaining to the use of Guardian Ad Litem reports should mirror the Supreme Court's decision in *Toms v. Toms*, 98 S.W. 3d 140 (Tenn. 2003). The court in *Toms* found that a GAL's report is hearsay and therefore not admissible into evidence. The court further found that "[i]n lieu of the written report, a guardian ad litem should testify at the trial or hearing and be subject to cross-examination." The GAL's testimony must conform to the Tennessee Rules of Evidence, i.e. hearsay evidence is not admissible, non-hearsay evidence or evidence which is an exception to the hearsay rule is admissible.

The court, however, went on to state:

> "Although a guardian ad litem's report is not admissible evidence, we hold that such a report may be reviewed by a trial court. To hold otherwise would effectively undermine the important role played by a guardian ad litem. A guardian ad litem's report **is a tool to be used by the parties and the court**.

…it assists the parties in preparing for an evidentiary hearing. The report also may assist the trial court by providing an overview of the evidence and by allowing the court to determine which of the issues are contested." 98 S.W. 3d at 144. (Emphasis added)

The *Toms* decision remains the law in Tennessee subject to being changed by the proposed rule.

The apparent rationale for denying a copy of the GAL's report to the trial judge is the potential that undue weight might be given to the report even though the judiciary is instructed in *Toms* that the report is not to be considered as evidence. Is this not what trial judges do every day, ie deciding what is or is not evidence? We are trained not to consider that which is inadmissible in reaching our decisions. The Supreme Court has instructed us in the limited use we can make of the GAL's report and we are bound by its ruling.

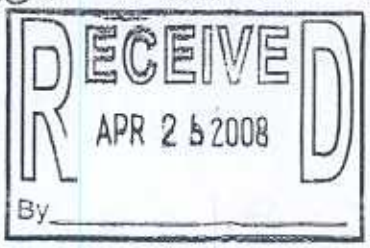
From a policy standpoint, the fact that the parties are aware that the court knows the results of the GAL's investigation and what the evidence is likely to be is a major factor in getting cases resolved without the lasting alienation that can result from a full hearing. These reports have been a useful tool to trial courts in the most difficult cases and I believe it would be a disservice to the litigants, the bar and the courts to disallow the court's review of the reports.

I respectfully dissent from the language set out in (c) General Guidelines…(4) which states that a report prepared by a guardian "shall be provided only to the parties". I would suggest that the sentence read: **"A report prepared by a guardian ad litem shall be provided only to counsel for the parties and to the court; the report shall not be filed with the court, nor is it admissible into evidence at trial."**

Yours very truly,

Arnold B. Goldin
Chancellor

M2008-00658-SC-RL2-RL



Danielle Malmquist
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Memphis, TN 38138

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

April 18, 2008

RE: Proposed Rule of Guardian ad Litem

To: Clerk of the Supreme Court Mr. Catalano,

This letter is in response to your proposed Guardian ad Litem rule, which I **OPPOSE**.

> *This is the worst kind of immunity bill, protecting lawyers at the expense of children"*
>
> - *George Trolley, Trial Lawyers Association*

The Tennessee Legislature has already proposed four (4) new bills in 2008 regarding the role of the Guardian ad Litem, herein referred to as "GAL". By creating a Rule that contradicts the proposed Legislative bills, the AOC is creating a recipe for chaos in the Family Courts. The Judges and GAL will be faced with contradictions between the statute and the rule.

Below I have outlined four (4) points that will discuss the problems with the proposed GAL Rule set forth by the AOC.

(1) **There is no current Legislation that governs the role of GAL:**

Currently, in Tennessee there are no laws that govern the role of the GAL in Circuit or Chancery Court cases. Prior to October 2006, all GALs appointed in juvenile court dependency and neglect cases and in Chancery/Circuit Court domestic cases were operating under Tennessee Supreme Court Rule 40. In October 2006, Tennessee legislation amended Rule 40 to not apply to Circuit/Chancery court domestic cases for GALs. The result of this amended law has been a lack of accountability for the GALs in Chancery/Circuit Court. Since Rule 40 was amended in domestic cases, GALs are currently not operating under any laws and therefore have "free reign". For example, in my personal case, my children's GAL would claim that she was not under Rule 40 when we wanted to depose her, but then claim that she was under Rule 40 when it suited her. In conclusion, we need to create clear legislation that forces court appointed GALs to be accountable for their actions.

(2) **Multiple Conflicting Roles of the GAL:**

It is my understanding that the role of the GAL was created to, "protect the best interest of the children". However, in many cases, including my own, the GALs have used their affiliation with the court system to create exorbitant legal fees by only taking on cases that involve affluent parents…without regard for the children. In most cases, the GALs final decision is not based on the "best interest of the children", but instead on his or her relationship with the parties' attorneys, the financial status of the parties and their own political agenda. Simply put, the focus of the role of a GAL in domestic cases involving children is lost. In my case, the GAL refused to remove herself although she was the President of a non-profit organization that received significant amounts of funding from the father's company, Fed Ex. Another example of the many hats that a GAL wears during a divorce is best described in the telephone call she made to me when my ex and I were arguing over a painting. The GAL telephoned me and stated if I did not give him the painting, she would make sure I never saw my children again. Upon the close of my case, I reported her misconduct to the State of Tennessee, and she accepted a "guilty" plea bargain from the State, attached as exhibit A.

A factor that needs to by considered when addressing the issue of conflict of interest is that typically the litigants are not aware of a conflict that a GAL assigned to the case may have. In my case, I was not aware of the conflict until I recognized the obvious bias of my GAL and did some investigative research…nearly six months into the case. A GAL should be required by law to disclose any conflicts upfront; if this does not occur, there should be a severe consequence, such as loss of their immunity and potential suit by litigants.

I have had many attorneys tell me the best role they can play in Family Law is the role of the GAL; GAL are paid their hourly attorney rate and their immunity precludes them from having to carry malpractice insurance. The problem here is that our children are the ones that suffer for the financial benefit of the court appointed attorneys.

In conclusion, a GAL's role in the courts needs to be completely limited or abolished. Since there are no clear laws that govern the exact role of the GAL, they have unlimited amount of discretion to abuse the parties without any consequences, due to their quasi-judicial immunity.

(3) Financial Burden on the Families:

The financial burden of a court appointed GAL creates significant strain on the parties. Seventy percent (70%) of litigants are unable to afford the cost of their own attorney, but when a court forces a second attorney on the case and the parties must split the fees, many are forced into bankruptcy by the State. The State has joined the attorneys in making the divorce market into a cottage industry. There needs to be some clarification. The testimony by parents that has been provided to the Tennessee General Assembly was strictly dealing with GALs in Circuit and Chancery Courts and not in Juvenile Courts. With that being said, there is a reason that you find a different type of individuals that become GALs in Juvenile court vs. Circuit and Chancery court GALs. GALs in Juvenile Court are paid for by the state with laws that cap the GAL fee to $40.00 out of court time and $50.00 in court time. In Circuit and Chancery Court cases, the fees are not set by law and GALs can charge any rate they want. The GAL in

my case was charging $200.00/hour to represent my children. Since, my children are minors I was required to pay ½ of all her fees, even though I never signed a written contract. The GAL on my children's case would find ways to generate billing at a rate of $200.00/hour; she would require that she supervise the visitations between my children and me; she would require that she be on the telephone when I called my children; she would require that she be present at my children's doctors' appointments, etc.

The GALs role was originally created by the higher courts to ensure the small voices of those that are most vulnerable to the system – the children, not as a profit making business. It goes beyond reason and logic to allow GALs appointed by the courts to use the children, the adults of our future, for their own personal and financial gain. If the Tennessee law requires GALs to be licensed attorneys in domestic cases, then why are they not held to the same standards and accountability measures that Tennessee requires of private practice attorneys?

In conclusion, the courts need to abolish the role of the GAL in high conflict cases. In severe abuse and neglect, it should be the state that bears the burden of the cost of an appointed GAL - not the parties.

(4) **Built in Bias:**

Regardless of evidence, Judges tend to side with the GAL in every case. This built in bias that Judges have does not provide litigants an unbiased opportunity to have their day in court due to the evolutionary role of the court appointed GAL. In conclusion, by defining CLEAR laws (and not a rule) that court appointed GAL and Judges are required to follow, we are able to create accountability.

Let us all work together to make sure that the role of a GAL in Tennessee is not a self-serving act, but one that serves the best interests of the children. Many GALs do honorable work, but there needs to be a real consequence for those who do not. I have confidence that attorneys who already work zealously for children will continue to represent these children and their interests to the best of their ability. However, the AOCs response to dealing with the epidemic problem of the GAL is to create a Rule which provides GALs with more immunity and Judges with more discretion is very concerning, since this only creates more problems for litigants and their children. It should not be about protecting the Lawyers and Judges, but protecting our children.

In summary, I **OPPOSE** this proposed rule governing appointment of GAL for minor children in divorce and post-divorce proceedings. The proposed rule creates even more immunity for GALs and provides Judges with greater discretion to abuse the litigants.

Thank you,

Danielle Malmquist

Danielle Malmquist
Shelby County

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Friday, April 25, 2008

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
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RE: Proposed GAL Rule

Mr. Catalano,

I am writing in opposition to the proposed Supreme Court rule for Guardians Ad Litem in divorce cases. I have been practicing law for more than ten years and a majority of my practice is family law. I am also a "Train the Trainer" attorney for the Supreme Court's program for training Guardians Ad Litem for Juvenile court work. In my opinion, the proposed rule is convoluted and confusing, and would be overly cumbersome to the divorcing parties, their attorneys and the trial court.

There is already a statue which makes the appointment of a GAL available to divorce court judges (T.C.A. 36-4-132 (a). Section (b) assesses the GAL fees to the parties as the court deems equitable. Section (c) of affords almost complete immunity to the GA when acting within the scope of the appointment. In my experience, judges and chancellors have used this statute to appoint a GAL when requested by one or both parties. GALs are not requested or appointed frivolously for the simple reason that they must be paid in most cases by the parties. In those cases where one or both parties are indigent, the Court and the appointee are painfully aware that the GAL may not be paid at all. Generally a conference or hearing is held to structure the "scope

of the appointment." I have had GALs appointed in several different courts and I have never had a problem with the current arrangement.

The proposed Rule, for all its paragraphs and subparagraphs, still makes a GAL appointment discretionary with the Court, although it requires the Court to consider numerous factors when making the decision and it then requires an order to be entered which must recite the court's findings of fact and itemize the duties of the GAL. This will necessarily require a hearing on already crowded dockets. For those cases in which a GAL is needed or desired at the outset of a case, that may create an unjust delay.

The proposed rule requires the court to enter an Order itemizing the GAL's duties and several other aspects of their involvement. One duty which is not addressed is whether the GAL must participate in mediation concerning the parenting plans. If nothing else is changed in the proposed rule, this needs to be specifically addressed one way or the other. If a GAL must go to mediation, that is another attorney whose schedule must be accommodated. It is already difficult to arrange mediation times. The statutes now require parties to participate in mediation within 180 days after the divorce is filed. That may seem like an eternity to the litigants, but in attorney time, that is pretty fast for newly filed cases.

One portion of the proposed rule which is deeply troubling to me is that the rule allows the GAL to be a fact witness. This puts the GAL in the position of investigating for the parties and or the court. This is a bad idea. Combined with the statute granting immunity to the GAL, I cannot fathom how this would work to do anything except foster suspicion, mistrust, and antagonism among the attorneys and the litigants. The GAL should have to prove their case just like any other attorney.

I also join in the well-reasoned objections to the rule stated by Joseph Hornick.

Kindest Regards,

Dan Kidd

MAY - 6 2008

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Monday, May 05, 2008

Mike Catalano, Clerk
Tennessee Court of Appeals
100 Supreme Court Building
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Nashville, TN 37219-1407

RE: Proposed RULE for Guardian ad Litems

Dear Mr. Catalano,

In response to the new proposed Rule allowing the trial courts to appoint a Guardian ad Litem on every domestic case, I would state the following:

ISSUES:

1. This rule purports to give authority to the Courts and to Guardian ad Litems that **confound the roles** of persons within the litigation process.
2. This rule gives the Court to power to **delegate authority** which is unauthorized.
3. This rule will create **unduly burdensome** costs, scheduling complications, and protract litigation in a process that is already difficult for families.
4. This should **not even be in the rules**....If the Supreme Court wants this to be considered it should be passed to the legislature.

1. This rule allows GALs the authority to interview witnesses, parties, children and other professionals that may be involved in the case without the oversight of the parties' attorneys. This rule allows GALs to prepare reports full of hearsay and opinions that will unduly sway a court without following the proper rules of evidence. This rule will allow GALs to testify as witnesses and have the immunity provided under T.C.A. 36-4-132.

2. The GAL will be preparing reports that are full of opinions, recommendations and rulings. The Court is not authorized to give this power to another person.

There is no way the parties' attorneys will know what they have investigated and the basis of the report until it has been issued.

3. This rule will make the complicated divorce process in Tennessee even more difficult. For instance, if GALs can testify, you can be sure the attorneys will want to depose them prior to the trial. This will add an additional $3,000 to $5,000 per litigant. Because of course, the GAL will want to be paid for the time they are being deposed. It will make scheduling difficult. It is already difficult to coordinate two attorneys; this will add another layer of scheduling conflicts. GALs can be bought. This has already been shown in Memphis. Further, the courts will assume that both parties should pay equally to the fees of the GAL and yet the parties will have no control over how much time they are spending. There is no requirement on the GAL to be reasonable in their fees or to spend equal amounts of time on both sides of the case. AND they never do.

4. This should not even be a rule. The Supreme Court needs to pass this to the legislature who is currently considering GAL legislation. This RULE has not been circulated to the members of the bar. It shows the intent of the Courts to simplify their jobs, delegate authority, and continue to create a costly, burdensome and unfair system for litigants.

If you want to do a professional evaluation, the members of the judiciary should review such articles as:

1. Dore, Margaret, *Court-appointed Parenting Evaluators and Guardians ad Litem; Practical Realities and an Argument for Abolition*, Divorce Litigation, Vol 18, No. 4 (2006)
2. Lidman, Raven and Hollingsworth, Betsy, *The Guardian ad Litem in Child Custody Cases; The Contours of Our Judicial System Stretched Beyond Recognition,* 6 George Mason Law Review 255, 279 (1998).
3. *The Guardianship of Stamm,*, 121 Wn. App. 830, 91 P 3rd 12 (2004) – reversal of improper GAL testimony.

There are a multitude of professional resources setting forth the problems that can be encountered. Tennessee should be proactive instead of incorporating rules that have been shown to be detrimental to the process.

I oppose this rule.

Regards,

Connie Reguli

Law Offices of Margaret K. Dore, P. S.

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Appeals
Bankruptcy
Child Custody
Elder Law

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About Margaret K. Dore

Margaret Dore, J.D., M.B.A., is a fourth generation attorney and Seattle native. She has been licensed to practice since 1986. She was one of nine nominees for the 2005 Butch Blum/Law & Politics Award of Excellence.

Ms. Dore's successful cases include *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004), which limits the admissibility of guardian ad litem testimony. She also prevailed in the nationally recognized case, *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001). For commentary on *Lawrence*, see Wendy N. Davis, *Family Values in Flux*, ABA Journal, Vol. 87, p. 26, October 2001.

Ms. Dore is a former law clerk to Justice Vernon Pearson of the Washington State Supreme Court. She also served as law clerk to Judge John Petrich of the Washington State Court of Appeals. She worked one year with the United States Department of Justice,

Office of the United States Trustee (bankruptcy practice).

Ms. Dore's education includes: her law degree from the University of Washington School of Law; an M.B.A. in Finance from the University of Washington School of Business; and a B.A. in Accounting from the University of Washington School of Business (Cum Laude and Phi Beta Kappa). She passed the CPA Examination in 1982.

Ms. Dore is active in the American Bar Association (ABA). She is Chair of the Elder Law Committee of the ABA Family Law Section.

Ms. Dore is also a member of the Washington State Bar Association, including the following sections: Creditor-Debtor; Elder Law; Family Law; and Real Property Probate & Trust Law. She is a member of the King County Bar Association.

Ms. Dore's writings have appeared in a number of publications, and she periodically gives seminars.

Law Offices of Margaret K. Dore, P. S.

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Publications

- Margaret K. Dore, *Ten Reasons People Get Railroaded into Guardianship*, 21 American Journal of Family Law 148, Winter 2008.
- Margaret K. Dore, *The Time is Now: Guardians Should be Licensed and Regulated Under the Executive Branch, Not the Courts*, Washington State Bar Association, Bar News, March 2007.
- Margaret K. Dore, *A Call for Executive Oversight of Guardians*, King County Bar Association, Bar Bulletin, March 2007.
- Margaret K. Dore, *The Case Against Court Certification of Guardians: The Case for Licensing and Regulation, National Academy of Elder Law Attorneys*, NAELA News, Vol. 18, No. 1, February/March 2006.
- Margaret K. Dore, *Parenting Evaluators and GALs: Caselaw Tactics and Strategies* (a presentation for the King County Bar Association Family Law Section) September 8, 2006.
- Margaret K. Dore, *Court-Appointed Parenting Evaluators and Guardians ad Litem: Practical Realities and an Argument for Abolition*, Divorce Litigation, Volume 18, No. 4, April 2006;
- Margaret K. Dore, *The Stamm Case and Guardians ad Litem*, King County Bar Association, *Bar Bulletin*, June 2005, Washington State Bar Association Elder Law Section Newsletter, Winter 2004-2005, p. 3;

- Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 Loyola Journal of Public Interest Law 41 (2004);

- Margaret K. Dore, *Blinded by Tradition: The Politics of Medicine vs. Optometry, Journal of Optometric Vision Development* , Vol. 33, No. 1, Spring 2002

- Margaret K. Dore, *The "Friendly Parent Concept: Anything But Friendly*, Washington State Bar Association, Family Law Section Newsletter, Fall 2001;

- Margaret K. Dore and J. Mark Weiss, *Lawrence and Nunn Reject Friendly Parent Concept*, Domestic Violence Report, Vol. 6, No. 6, August/September 2001;

- Margaret K. Dore and J. Mark Weiss, *Washington Rejects "Friendly Parent" Presumption in Child Custody Cases*, Washington State Bar Association, Bar News, August 2001;

- Margaret K. Dore, *The Friendly Parent Concept (Access to Justice Denied)* , Washington State Trial Lawyers Association (WSTLW) Trial News, May 2001;

- Margaret K. Dore, *Parenting Evaluators and Guardians ad Litem: Practical Realities*, King County Bar Bulletin, December 1999; and

- Margaret K. Dore, *The "Friendly Parent" Concept -- A Construct Fundamentally at Odds with the Parenting Act, RCW 26.09*, Washington State Bar Association, Family Law Section Newsletter, Spring 1999 and King County Bar Association, Bar Bulletin, March 1999.

The *Stamm* Case and Guardians ad Litem

by Margaret K. Dore, Esq.[1] *© 2004*

On June 1, 2004, the Washington State Court of Appeals issued *In re Guardianship of Stamm v. Crowley*, 121 Wash. App. 830, 91 P.3d 126 (2004). *Stamm* is the first Washington State case to address the admissibility of guardian ad litem testimony in a guardianship case. It limits the admissibility of such testimony.

Stamm is part of a national trend by courts to define the proper role of guardians ad litem and also parenting evaluators who perform similar functions. This article discusses *Stamm* as well as this trend and the situation in other states. The article concludes with a discussion of implications for guardianship practice.

A. Stamm Limits Admissibility

With the issuance of *Stamm*, the Washington State Court of Appeals limits its prior guardian ad litem case, *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997). *Fernando*, a child custody case, seemed to state that a guardian ad litem's recommendations and testimony are always admissible. *Id.* at 107-08. *Stamm*, by contrast, limits admissibility to testimony which is helpful to the trier of fact under ER 702. A guardian ad litem is not to be a mere vehicle for hearsay. *Stamm* states:

> We ... hold that the trial court has discretion under ER 702 to permit a [guardian ad litem] to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may ... state the basis for those opinions, including hearsay.
>
> This is not to suggest, however, that all information relied upon by a [guardian ad litem] should automatically be recounted at trial. The [guardian ad litem's] testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay. ...
>
> The testimony of a [guardian ad litem] must be carefully evaluated to ensure it is indeed helpful to the fact finder. An opinion formed on inadequate or unreliable grounds cannot be helpful. (Footnotes omitted).

Stamm, 121 Wn. App. at 837-8.

Stamm also limits admissibility by providing that a guardian ad litem is not to testify as to his or her assessments of credibility. *Stamm* states:

> [A guardian ad litem's] subjective assessments of credibility are irrelevant. Questions of credibility and the weight to be given to evidence are matters solely within the province of the fact finder.

Stamm, 121 Wn. App. at 839.

B. Reversible Error

In *Stamm*, the guardian ad litem had testified that her recommendations "depended upon her assessment of credibility" and that her role was to act as the "eyes and ears" of the court. *Id.* at 840. The jury followed her recommendations "almost to the letter" so that a guardianship was imposed. *Id.* at 843. *Stamm* reversed due to the "substantial likelihood" that her testimony had encroached on the jury as fact finder. *Stamm* states:

> [W]e must conclude the [guardian ad litem's] improper description of her role was prejudicial and there is a substantial likelihood that [her] improper testimony [on credibility] affected the jury's verdicts.

Id. at 844.

C. A National Trend

Stamm is part of a national effort to increase the reliability of outcomes in cases involving guardians ad litem and parenting evaluators. There is also a small, but growing, movement urging the elimination of such persons from court proceedings.[2] Even supporters concede there can be problems. For example, Meredith Lynn Hardy and Nancy Bradburn-Johnson, state:

> [A]necdotes were given of [guardian ad litem] abuses ... which centered on the futility of challenging a [guardian ad litem] once appointed and of the difficulties in challenging [their] recommendations in court. ...
>
> Many of the concerns voiced have a legitimate factual foundation. (footnotes omitted)[3]

Since publication of this commentary, the Washington State Supreme Court has adopted new court rules, the "GALRs."

In other states, it appears that Tennessee has imposed the most stringent restrictions on guardians ad litem. For child custody abuse and neglect cases, Tennessee no longer has guardian ad litem reports and recommendations. The reasoning for this change is described below:

> Those who have supported the continuation of this practice ... have asserted that allowing the [guardian ad litem] to gather and synthesize evidence and make recommendations enables the judge to dispose of the case more efficiently because the judge can rely on the [guardian ad litem] as a kind of expert witness/special master.

continued on page 6

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May 6, 2008

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Re: Proposed Guardian ad Litem Rule

Dear Mr. Catalano:

This letter is in support of the new rule governing the appointment of Guardians ad Litem for minor children in divorce and post-divorce proceedings. I have served as a Guardian ad Litem for adults in Chancery Court, and am presently serving as a Guardian ad Litem in cases before the Juvenile Court in Knox County, Tennessee. I would offer some suggestions to modify the proposed rule. Those suggestions are respectfully submitted below.

On a finding of indigency, I would prefer that the Court approve compensation for Guardians ad Litem on a form promulgated by the Administrative Office of the Courts (AOC). The Court can determine the indigency of one or both of the parties in a divorce, and the special circumstances of the child.

If the parties can afford to pay for a Guardian ad Litem, I would recommend the payment of a deposit into the office of the Clerk or the Clerk & Master. Any deficit in the deposit or the fee charged by the Guardian ad Litem should be taxed as Court costs. This would greatly aid the Guardian ad Litem in receiving at least a retainer for services provided, and would permit the Clerk to collect these costs.

The proposed rule seems to make the presumption that the Court has reviewed written reports from a Guardian ad Litem in adult conservatorship cases. For that reason, and because of the special circumstances involving children in divorce, I believe a written report is an appropriate tool for the Court to use. In Juvenile Court, the Guardian ad Litem acts as an advocate for the child, and the Court may wish for the Guardian ad Litem to present evidence in Court on behalf of his client, in the same manner as the attorneys for the parents.

A Guardian ad Litem is not needed in every divorce. In uncontested cases, the Judge should be able to make the appropriate findings as to the adequacy of provisions for the welfare of the children. In some contested cases, the decision may not require the expense and time needed by the Guardian ad Litem to make a report and present evidence. However, I believe that a rule, clearly stating that the Court can and should appoint a Guardian ad Litem in appropriate cases, will enable the Court to better review the status of the children before it, and to make appropriate decisions concerning their custody and care.

Thank you for the opportunity to comment in favor of this proposed rule.

Very truly yours,

John W. Routh

JWR/gab

M2008-00656-SC-RL2-RL

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May 14, 2008

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RE: Guardian Ad Litem Conundrum

Dear Mr. Caralano:

As a legal profession we should rethink our current and proposed rule changes regarding guardian ad litems (GAL). Opinions differ under what circumstances a GAL should be appointed, their duties, their functions within the court system and how they are to be paid. Also, what limitations, if any, are to be placed on judges on what information should be heard and how they should consider evidence.

The issues raised by divorcing parents relating to the welfare of the children are important to the children, the parties, the legal system, our state and our civilized society as a whole.

We articulate our allegiance to due process and effective assistance of counsel. We provide an attorney to all who are in jeopardy for a loss of life and liberty (child physical and mental abuse), except to the most helpless members of our society, our minor children. Custody decisions not only affect liberty but also their physical and emotional well-being.

The system needs changing. The current proposal, while made in good faith with lofty intentions overlooks underlying principles. These principles are fair representation for all.

Has the time come to go from a GAL system to an attorney ad litem (AAL) system. Let the AAL investigate, prepare and present the evidence for the children and put on proof, cross examine and argue. That would leave the judges to concentrate on making decisions about the admissible evidence. The AAL should be funded as the criminal public defenders are now funded. The constitutional protection AAL would provide are the same as those provided to criminal defendants. Certainly our children deserve the same.

Most Sincerely,

K. Karl Spalvins

KKS:ep

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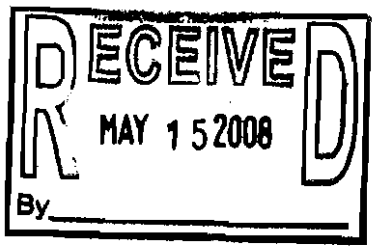

May 14, 2008

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Nashville, TN 37219-1407

RE: Proposed Rule Governing Appointment of Guardians Ad Litem For Minor Children In Divorce and Post Divorce Proceedings

Dear Mr. Catalano:

I am writing to voice my concerns over the proposed rule governing appointment of guardians ad litem for minor children in divorce and post divorce proceedings.

My primary concern is that the proposed rule limits representation of a minor child by a lawyer as it provides that a lawyer will serve in the role of next friend and not in the role of advocate. I cannot agree that a guardian ad litem should present the case as a fact witness. I think that the proposed rule should be aligned more closely with Rule 40 of the Rules of the Supreme Court. I am enclosing an article that I shared with the Knoxville Bar Association to highlight the differences in the proposed rule and Rule 40.

Secondly, I think that any report produced by the Guardian Ad Litem, if one is prepared at all, should be filed with the court and made a part of the trial court record. This assures fairness in the proceeding, and provides the Court with a tool to be used according to *Toms v. Toms*, 98 S.W. 3d 140 (Tenn. 2003). If the guardian ad litem acts as next friend, then it is paramount that the report be filed and presented to the Court, as well as the parties. The reasoning used by the Court in *Toms* remains applicable and I do not understand how or why the proposed rule would change the rule of law regarding the report, especially since the proposed rule makes it incumbent upon the guardian to prepare a report.

Finally, I ask you to consider that in a divorce case, we are dealing with two presumably fit parents who have a fundamental right to rear their child as they see fit. It seems that the proposed rule is expanding the role of guardian ad litem to that of *parens patriae* when perhaps certain factors outlined in the proposed rule allowing for the appointment of a guardian ad litem have not risen to a level to justify intervention. I think the proposed rule outlining circumstances for appointment of a guardian ad litem should be more narrowly tailored to provide for

appointment of a guardian ad litem only when circumstances suggest dependency and neglect as defined in T.C.A. 37-1-102(12).

Thank you for the opportunity to comment on this proposed rule.

With kind regards,

Linda G. Shown

Linda G. Shown

Enc.

GUARDIANS AD LITEM--Advocate or Next Friend?

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If you have practiced law in juvenile court, circuit court, or chancery court, you have probably had an opportunity to practice law as a guardian ad litem. I consider it some of the most important work that we as attorneys perform. However, I recently became aware of important changes that may be coming to the divorce law arena regarding the appointment of guardians ad litem for minor children in divorce and post divorce proceedings. A deadline of June 30, 2008 has been set for comments on the proposed rule governing the appointment of guardians ad litem for minor children in divorce and post divorce proceedings currently under consideration for adoption by the Supreme Court. You can view the proposed rule by visiting the website for the Administrative Office of the Courts at www.tncourts.gov.

With the advent of Rule 40 of the Rules of the Supreme Court, I think that the representation of children was elevated to a level that was long overdue. After all, we are attorneys, and we are trained to think and perform our duties like attorneys. When I reviewed the proposed rule pertaining to representation of children in divorce and post divorce proceedings, it became clear that the duties of a guardian ad litem appointed in circuit or chancery court will be very different from those duties of a guardian ad litem appointed in juvenile court. One would think that consistency across the court system would be an important consideration for the proposed rule. Here is a short comparison of the two rules:

First, in juvenile court, the role of guardian ad litem is advocate; i.e., performing the role of guardian ad litem as an attorney and doing those tasks inherent to the work of an attorney. The definition of a guardian ad litem clearly supports this premise. In Rule 40(b)(1), a guardian ad litem is defined as ". . . a lawyer appointed by the court to advocate for the best interests of a child and to ensure that the child's concerns and preferences are effectively advocated."

Compare this to the definition of a guardian ad litem in divorce and post divorce proceedings where the key term of advocate is missing from the definition of guardian ad litem. The proposed rule defines a guardian ad litem as ". . . an attorney, licensed to practice law in the state of Tennessee and in good standing, appointed by the court to assist the court in making a determination for the parenting and best interests of the child, including child support, allocation of parenting responsibilities, and establishment of residential schedule." The role of the guardian ad litem is the role of next friend.

Another key difference in the rules is that a guardian ad litem appointed in divorce and post-divorce proceedings can look forward to testifying as a fact witness. The proposed rule in section (c)(3) states: "[N]otwithstanding the foregoing, a guardian ad litem may testify at a trial or hearing as a fact witness pursuant to the Tennessee Rules of Evidence, and shall be subject to cross examination." Contrast that to the rule in juvenile court, where Rule 40(f)(1) makes it abundantly clear that " [A] 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 §§ EC 5-9,5-10 and DR 5-101." The rule states that a guardian ad litem is to serve as a

lawyer for the minor child. Serving as a lawyer to the minor child is clarified further in Rule 40(f)(3) which states: "[T]he 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 written arguments based on the evidence that has been or expected to be presented." In other words, a guardian ad litem in juvenile court has to support his or her position regarding the best interests of the child with proof that is competent and presented in court—heresay is intended to be and is greatly reduced. The rule clearly specifies that the child is the client of the guardian ad litem.

It appears that the intention of the proposed rule for the divorce and post divorce proceedings is to limit representation for the child, and in fact, the proposed rule does not delineate the child as the client of the guardian ad litem in divorce and post divorce proceedings.

And there remains a question regarding the use of heresay, albeit reliable heresay, that may be admitted by way of testimony from the guardian ad litem. By having the guardian ad litem present her case by way of testimony in divorce court in lieu of presenting her case through witnesses and other admissible evidence as is the rule in juvenile court, there is more opportunity for out of court statements to be taken for the truth of the matter asserted. I think that this may be an unintended result of the rule, especially in view of the rules pertaining to the reports of the guardian ad litems.

The rules regarding the report of a guardian ad litem are that divorce court allows a report to be provided to the parties, and juvenile court does not allow a report to be produced at all. In divorce and post divorce proceedings, the guardian ad litem is to produce a report, but it is not to be furnished to the court-- it is to be furnished to the parties only. In juvenile court, the guardian ad litem is not to submit a "report and recommendations" to the court, and the rule is silent regarding submission of a report to the parties. Now review the case of *Toms v. Toms*, 98 S.W. 3d 140 (Tenn. 2003). In *Toms*, the Supreme Court held that:

"[A]lthough a guardian ad litem's report is not admissible evidence, we hold that such a report may be reviewed by a trial court. To hold otherwise would effectively undermine the important role played by a guardian ad litem. A guardian ad litem's report is a tool to be used by the parties and the court. The report may assist the parties by: 1) alerting the parties to the identity of potential witnesses who may be interviewed; 2) highlighting the testimony, both favorable and unfavorable, that may be presented at trial; and 3) providing a third party's view of the facts of the case. In short, it assists the parties in preparing for an evidentiary hearing. The report also may assist the trial court by providing an overview of the evidence and by allowing the court to determine which of the issues are contested. *Id.* At 144.

At least one commentator on the proposed rule, who happens to be a Chancellor

and a member of the Supreme Court committee that drafted the proposed rule, has submitted a very well written letter to voice his concerns regarding the part of the proposed rule that only allows reports to be presented to the parties and not to the court.

I submit that additional concerns must be addressed. When circumstances necessitate the appointment of a guardian ad litem in divorce and post divorce proceedings, isn't testimony by the guardian ad litem in effect putting into evidence the unwritten report in a manner that is not as effective as calling witnesses? Isn't the child entitled to have the guardian ad litem to have the duty to advocate on behalf of the child using all the tools available to the lawyer as is the rule in juvenile court? The role of guardian ad litem should be to ensure that the child's best interest is advocated in a manner that is the most effective and I ask you to determine whether this proposed rule accomplishes this objective.

Finally, the rules regarding the compensation of the guardian ad litem merit a discussion. In juvenile court, the rules for compensation of appointed guardians ad litem are set out, in detail, in Rule 13 of the Rules of the Supreme Court. In divorce and post divorce proceedings, the proposed rule sets out the provisions for compensation of the guardian ad litem, and even provides for monies to be paid in advance to cover the estimated costs and fees of the guardian ad litem. Note that the order of appointment must include findings of fact in support of the appointment of a guardian ad litem, the duties, scope of the access to the child, the duration of the appointment, and the provisions for payment of costs and fees of the guardian ad litem. Importantly, you will want to note that the proposed rule specifically indicates that state funds are not available to pay guardians ad litem appointed in divorce and post divorce proceedings when serving as guardian ad litem for a child of indigent parents.

In summary, I hope that you will consider reviewing this proposed rule and commenting as you think appropriate. We have an important opportunity for discourse regarding a population that has been under served in the past. We should encourage a step forward, not a step back in the representation of the child. We are advocates, and children are in need of advocates when the situation between the parents has deteriorated to the point that a third party has to be appointed to inquire into the matter. Whether or not you agree with the law that allows appointment of guardians ad litem in divorce and post divorce proceedings (and by the way, it has been on the books for a number of years), now is the time to comment on the way that statute is to be applied.

M2008-00656-SC-RL2-RL

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June 6, 2008

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Re: Proposed Supreme Court Rule on Guardians *ad Litem*

Dear Mr. Catalano:

After meeting with some members of the Memphis Bar Family Law Section today and with Judge James Russell, Judge for Division II of the Shelby County Circuit Court, I volunteered to send this separate letter on the specific topic of **Attorneys *ad Litem*** as they relate to **Guardians *ad Litem.*** With regard to the recommendations of the Committee and Judge Russell, I am in complete agreement with those as written.

Initially, I want to generally thank the Justices for taking the time to compose this Proposed Rule and for their dedication to this project specifically. I was contacted for input on this Rule, because of my long-standing curiosity and apprehension regarding the use of the term and of the position of "Attorney *ad Litem*" in the courts of Shelby County. I take some responsibility in this confusion, since it was I who first brought the term AAL to the Family Law Section in the mid to late early 1990s. We were in the process of developing a training program for GALS, and I advised the committee about the availability of another advocate for children – the Attorney *ad Litem.* Never in my wildest dreams did I contemplate that AALS would be used to represent GALS, and, thus, layer yet another expense. To explain:

The terms "Guardian *ad Litem*" and "Attorney *ad Litem*" are legal terms of art, as this Court is aware. In a sampling of states other than Tennessee, where both advocates are used in divorce and other child-related matters, the two are defined thusly:

Guardian *ad Litem* – The states of Texas, North Carolina, Utah, Florida, Arkansas, Wyoming and Virginia (to name only a few) define the role of a GAL as someone who represents the **children's best interests** in divorce and other family-related cases.

Attorney *ad Litem* – The states of Florida, Arkansas, Texas, Georgia and Delaware define the role of an AAL as an attorney who represents the **child's legal interests.** In a family case, an AAL would be an advocate for the child or children in the same capacity as the attorneys who represent the parents.

Somehow in Shelby County, Attorneys *ad Litem* have been appointed to represent the Guardians *ad Litem* – not the children. I have been unable to find any circumstance or situation in any other state wherein an AAL is appointed to represent the interests (legal or otherwise) of a GAL. In fact – quite the contrary. In all other states researched, the Attorney *ad Litem* is an advocate (in the true sense of the word) for a child or disabled person.

Confusion surrounding these two terms/positions still exists in Tennessee. Our committee has recommended that in the Proposed Rule, the term "Guardian *ad Litem*" be consistent throughout the Rule – that the GAL's duty is to represent the **best interests** of the child or children. Perhaps another rule is in order for an Attorney *ad Litem,* since the duties of an AAL are so dissimilar to the duties of a GAL.

Additionally, the Committee discussed the most common circumstances in which AALS have been appointed to represent GALS in the Shelby County courts. The general consensus is that when one or both parties create, imagine or genuinely detect a conflict between the GAL and one or both parties and/or the child, the Court appoints an Attorney *ad Litem* to represent the GAL. If the situation is so dire as to require representation for the GAL, then the Court certainly has the authority to appoint a lawyer for the GAL. That attorney should just simply be called the attorney for the GAL.

Finally, in an effort to minimize and/or eliminate the circumstances under which the GAL would need representation and that pursuant to **(e) Conflicts of Interest of the Guardian *ad Litem,*** I would suggest that the alleged conflict be raised immediately upon the party becoming aware of such alleged conflict to avoid manipulation, and in keeping with the Committee's recommendation, that the conflict be governed by the Rules of Professional Conduct as they apply to conflicts of interest. For example, in **(e)(2)** the first sentence could perhaps read:

> **(2) Any party who, at any time becomes aware of an *actual* conflict of interest between the guardian ad litem and any party to the proceeding or knows of any other reason why such person should not be appointed or should not continue to serve as guardian ad litem may file a motion with the court setting forth the nature of the conflict or other reason and a request that the guardian ad litem be disqualified from appointment or from further service in the case. *The motion must be filed as soon as practicable upon the party's discovery of the alleged conflict*. Such motion shall then be set by the clerk of the court . . ., etc."**

Finally, in **(e)(3)** and in keeping with the Committee's recommendation -- this section will also refer to the Rules of Professional Conduct as a guide to the Court to make a determination on the alleged conflict. For example, mere disagreement with the GAL'S report, recommendations, statement of services rendered, etc. shall not be grounds sufficient to create a conflict. In Shelby County, these slights or perceived conflicts seem to be the reasons why parties allege a conflict against the GAL, when there is not an actual conflict under the Rules of Professional Conduct. Some litigants have learned to inappropriately manipulate the system to their advantage, and with the proposed additions, it is this Committee's opinion that perceived and/or alleged conflicts will be substantially reduced.

Thank you for your attention to this matter.

Sincerely,

Joy Bomar

JOY T. BOMAR

jtb

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED RULE GOVERNING APPOINTMENT OF GUARDIANS AD LITEM FOR MINOR CHILDREN IN DIVORCE AND POST-DIVORCE PROCEEDINGS	)))))	No. M2008-00656-SC-RLL2-RL Filed: June 20, 2008

REQUEST FOR EXTENSION OF TIME FOR COMMENT
BY THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, George T. Lewis; its General Counsel, William L. Harbison; and, its Executive Director, Allan F. Ramsaur respectfully requests that this Honorable Court extend the deadline for comments in the above matter until July 31, 2008.

On April 1, 2008, the Tennessee Supreme Court issued an order soliciting comment on the adoption of a new rule of the Supreme Court governing the appointment of guardians ad litem for minor children in divorce and post-divorce proceedings. Since the issuance of that order, a working group of the 400-member Family Law Section, a subcommittee of the Standing Committee on Ethics & Professional Responsibility, and the Juvenile & Children's Law Section leadership have all undertaken to review the proposed rule, develop comments, and discuss the possibility of proposing an alternative to the rule proposed in Appendix A of the order.

The leadership of these groups came together at the recently concluded Tennessee Bar Association Annual Meeting. Their recommendation, adopted by the Board of Governors on Saturday, June 14, 2008, was since there is still a great deal of work to do and since there was no consensus, that a request for an extension of time to comment should be made. During this extension period, the joint working group of the three affected entities and a representative of the Tennessee Judicial Conference panel which worked on this issue will meet weekly with the hope of developing a consensus comment to be presented to the TBA Executive Committee in July. The TBA believes that this serious effort can be of substantial assistance to this Honorable Court in the development of a rule to address the issues presented by the proposed rule. The 30-day additional time will not materially delay implementation of a new rule in this area.

Therefore, the TBA respectfully requests an extension to file comments until July 31, 2008.

Respectfully Submitted,

By: ___/s/ by permission_____

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid on June 20, 2008.

_____
Allan F. Ramsaur

M2008-656

Jennifer L. Evans
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June 24, 2008

Mike Catalano, Clerk
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RE: Proposed Rule Governing Appointment of GAL in Divorce & Post-Divorce Proceedings

Dear Mr. Catalano,

Thank you for your time in review of my correspondence. I have reviewed the proposed new rules governing appointment of guardians ad litem in divorce and post-divorce proceedings. While I agree the rules provide some much needed guidance, they also present some concerns. My practice had involved representation of children in both juvenile & domestic courts in middle Tennessee over the past eight years. Therefore I am familiar with Supreme Court Rule 40 and adhere to this rule in my practice.

It seems contradictory to implement different rule & regulations for guardians ad litem in domestic cases than in juvenile cases. My primary concern is (c)(3) which states the guardian ad litem may be called as a witness, as this is specifically prohibited in juvenile practice. If the guardian ad litem is called to testify, it will make the legal advocacy role more difficult in the litigation process. It would seem that the same procedures and rules should apply universally irregardless of the nature of the proceeding or courtroom.

Thank you for consideration of my position and please do not hesitate to contact me if I can be of any assistance.

Best regards,

Jennifer L. Evans

Jennifer L. Evans

2778 McVay Road
Memphis, TN 38119

June 30, 2008

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comments Regarding Proposed Rule Governing Appointment of Guardians Ad Litem for Minor Children in Divorce and Post-Divorce Proceedings

Dear Mr. Catalano:

I am a Tennessee attorney who litigates family law matters in Shelby County. I was also a divorce litigant in Shelby County. I have numerous concerns regarding the appointment of guardians ad litem, attorneys ad litem, and mental health professionals in divorce matters, which I will detail below.

Attorneys are not Qualified to Perform Social Work

Attorneys are not trained in psychology, social work or investigative techniques. Attorneys have no better expertise than the trial court or the parties' counsel in matters relating to child support, allocation of parenting responsibilities and establishment of a residential schedule. A guardian ad litem with no specialized training cannot provide meaningful assistance to the court. The appointment of an untrained guardian ad litem only serves to add unnecessary expense to a divorce action.

Untrained Guardians ad Litem Do More Harm Than Good

The appointment of untrained attorneys to investigate parenting-related matters in divorces has caused emotional and financial harm to litigants and their children. First, there is a widespread custom of threatening parents with taking their children away from them, placing the children in foster care, or placing them with relatives if the parent does not agree with the guardian ad litem. The message is that the children belong to the State and the guardians ad litem are an arm of the State. The parents are told that it is not advisable to question anything the guardian says or does because it may negatively affect

their future access to or relationship with their children. Sometimes guardians ad litem are appointed without a notice and hearing based on ex parte communications with the judge. These kinds of tactics are unprofessional and actually hinder the parents' ability to work out a parenting plan on their own. Unprofessional and unethical practices should not be tolerated.

Second, the lack of training leaves the guardians ad litem ignorant of social, cultural, and child development considerations. The guardians' reports are nothing more than their own personal opinion, however biased or ill-informed. This lack of training and the courts' reliance on the questionable reports leaves many litigants feeling as though they have not had their day in court and that the case was decided in favor of the person who had the financial means to pay the guardians ad litem and other court appointees.

Finally, the lack of training leads some guardians ad litem to request the appointment of a variety of mental health or social services experts, which adds expense to the case. In one case, the guardian ad litem requested the appointment of an attorney ad litem to represent her own interests at the parties' expense. One of the litigants requested that the attorney ad litem be appointed to represent the child, not the guardian ad litem. The judge approved the appointment in favor of the guardian ad litem rather than for the child. In that case, the guardian ad litem and attorney ad litem fees are in excess of one hundred thousand dollars.

Failure to Regulate Court Appointees Results in Predatory Practices

As discussed above, guardians ad litem often request the appointment of various specialists. Unfortunately, the State has failed to regulate or provide adequate oversight regarding the fees, qualifications, role, and ethical obligations for guardians ad litem, attorneys ad litem, and the various mental health professionals involved divorce litigation. As a result, predatory and unethical practices have flourished. There are attorneys and mental health professionals who have exploited and continue to exploit divorce litigants and their children. Quite often, mental health professionals are hired guns whose role is to advocate one parent's visitation objectives rather than providing much needed therapy for a hurting child.

The State should thoroughly investigate all divorce-related court appointments for the last twenty years. Every divorce litigant should be provided with a survey regarding the professional performance of the judge, the attorneys and any court appointees during the divorce. The survey should also make note of how long it took to obtain the divorce, the amount of attorney fees necessary to obtain child support and alimony, and the total amount of attorney fees involved. Divorce litigants are exceptionally vulnerable due to the emotional and financial stresses involved in divorce. The State needs to adequately protect the litigants from unscrupulous professionals.

Guardians ad Litem Should be Abolished in Divorce-Related Matters

Untrained attorneys are not qualified to provide meaningful assistance to the trial court relating to child support, allocation of parenting responsibilities and establishment of a residential schedule. Unnecessary attorney fees add to the stress and acrimony in divorce cases. Trial courts should decide child support based on the parties' income and allocate parenting responsibilities and establish a residential schedule for children based on the evidence presented at trial and statutory guidelines. Therefore, the role of the guardian ad litem in divorce matters is unnecessary and should be abolished in the State of Tennessee.

I appreciate the opportunity to provide comments to the proposed rule. Please feel free to contact me if you have questions.

Very truly yours,

Joni K. Roberts

Joni K. Roberts

Knoxville Bar Association

Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
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June 27, 2008

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407

Re: Proposed Rule Governing Appointment of Guardians Ad Litem for Minor Children in Divorce and Post-Divorce Proceedings.

Dear Mr. Catalano,

The Family Law Section of the Knox County Bar Association has convened on two occasions to discuss the Proposed Rule Governing Appointment of Guardians Ad Litem for Minor Children in Divorce and Post-Divorce Proceedings (the "Rule"). Of those present at both meetings, there was no support for the proposed Rule.

The general consensus is that there does not appear to be a need for the proposed Rule, which differs from the Tennessee Supreme Court Rule 40 applicable to appointment of the GAL in Juvenile Court. The proposed Rule begs the following questions:

- Does the Rule act to level the playing field already available to the parties who have access to discovery? And, is that the intent?
- What does the Rule really bring to the proof side of the case?
- The Rule appears to bring a quasi-decision making officer to the process – similar to a special master or court investigator, etc. Was that the intent?
- What was the initial intent for the Rule?

The following constitutes the observations of the Family Law Section of the Knox County Bar Association in response to the proposed Rule:

- The Knox County process in divorce and post-divorce cases, in the context of appointment of a guardian ad litem ("GAL"), is the same or similar to the other major metropolitan areas of Tennessee.

- Appointment of a GAL in chancery or circuit court cases is rarely needed, or utilized. The need for a GAL differs in juvenile court, than in chancery or circuit court, where the parties are oftentimes unrepresented and therefore not as knowledgeable of the resources available to assist with the case investigation or the court.

- The Rule should not be mandatory, but left to the discretion of the court. However, given the factors to be considered for appointment of a GAL under the new Rule, there is a real concern that appointment of the GAL will become routine rather than the exception based on a true case-by-case need.

- The intent of the most recent changes to the family law system has been to speed up and streamline the court system. There is a concern that the appointment of the GAL will add a whole new level of litigation to a system which is already bogged down.

- This proposal will slow down the system. It will result in increased costs and time for the court, parties and the GAL.

- Under the proposed Rule, it is unclear what role the GAL will play. The role as child advocate conflicts with the role of potential court witness and with required reporting. The conflicting roles of the GAL as set out in subsections (c) (2) and (3), are contrary to the Tennessee Rules of Professional Conduct.

- As currently proposed, the GAL has a duty to perform in accord with the child's wishes and best interest. The child's wishes and best interest may not always be the same and in such cases will present a conflict in the GAL's performance.

- The circumstances that warrant appointment of the GAL and a more clearly defined role of the GAL are needed. Once the role of the GAL is more fully defined, there will likely be a need for specialized training of the GAL, depending on what the duties will entail.

- A license to practice law does not necessarily equate to qualification as a GAL, given the proposed requirements of a GAL under the Rule. What makes someone who has gone to law school and passed the bar a resource for determining what a child's best interest is, from an expert perspective? Lawyers all have their own personal preferences as to what is in a child's best interest, which probably run the same broad gamut as the political spectrum. There are probably very few lawyers who actually received any type of education in child development.

- Depending on what role the GAL is really intended to serve under the Rule, there are other non-lawyer trained professionals who are as qualified to serve as GAL. For example, if the intent is to gather evidence for the court or parties and report it, investigators or CASA could serve that purpose.

The Family Law Section of the Knoxville Bar Association respectfully submits the foregoing comments for the Court's further consideration. As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

Sincerely,

Family Law Section of the Knoxville Bar Association

M 2008-656

RECEIVED 6-30-08

THE CIRCUIT COURT OF TENNESSEE
FOR THE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
140 ADAMS AVENUE • ROOM 212
MEMPHIS, TENNESSEE 38103
(901) 545-4022 • FAX (901) 545-5659

June 30, 2008

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Bldg.
401 7th Ave. N.
Nashville, TN 37219

RE: Proposed Supreme Court Rule Governing the Appointment of Guardians ad Litem

Dear Mr. Catalano:

I have several comments regarding the proposed rule.

1. In the "Definitions" section of the proposed rule it provides that the GAL shall assist the court in making a determination for "the best interest of the child", however, in the "General Guidelines", "Conflicts of Interest of the GAL", and "Duties of the GAL" sections reference is made that the GAL "shall represent the child or children."

I agree that the role of the GAL should be to assist the court by representing the child/childrens' best interest. In such representation, the GAL often stands in the shoes of the child to protect the child. This is necessary in some cases because the parents are either unable or unwilling to act in the child/childrens' best interest. What may be in the child's best interest may not always be the same as the child's preference. That is why the GAL should be an advocate for the child's best interest and not the child's preference. Where the child's best interest and the child's preference is in conflict the court has the ability to appoint an Attorney ad Litem to advocate the child's preference.

All references in the rule should be changed to reflect the reference in the "Definitions" section to the GAL "representing the best interest fo the child or children."

2. In the "Definitions " section of the proposed rule it provides that the GAL shall assist the court, but the "General Guidelines" section provides that the report of the GAL is to assist the parties and shall be submitted only to the parties.

I strongly believe that the GAL report should be submitted to the court to assist the court. The GAL report is simply a tool to be used by the parties and the court. From a practical standpoint, the fact that the parties are aware that the court knows the results of the GAL's investigation and what evidence the court is likely to hear at trial is often a major factor in getting cases resolved without the lasting alienation that can result from a full-blown trial. That alienation long-term can have devastating effects on a child. These reports have been a useful tool to trial courts in the most difficult cases and I strongly believe that it would be a disservice to the litigants, their children, the bar and the courts to disallow the court's review of the reports.

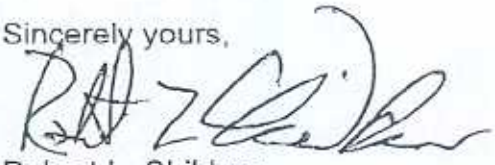
I respectfully submit that with regard to the GAL report the rule should state, "A report prepared by a guardian ad litem shall be provided only to counsel for the parties and to the court; the report shall not be filed with the court, nor be admissible into evidence at trial except for impeachment purposes."

3. The "Compensation for the GAL" section provides that fee disputes should be heard promptly by a Judge other than the appointing Court. I agree that fee disputes should be heard promptly, but I know of no reason for requiring that another judge hear those disputes in every case. I understand that there might be a legitimate reason in a particular case for the judge hearing the case not to decide the fee dispute, but in the vast majority of cases there is absolutely no reason to prolong the disposition of a case, or to cause additional expense to the parties, by requiring a different judge to hear fee disputes in every case. The judge hearing the case is in the best position and is most familiar with what has happened in the case, the complexity of the case, and to apply the factors set out in the Rules of Professional Conduct for setting reasonable attorneys fees.

4. In the "Orders of Appointment", section (4) provides that the order of appointment shall state an hourly fee which will initially be allowed as compensation for the GAL, but in section (5) there is language that the order shall require each of the parties to pay a "sum" which the appointing judge contemplates will be necessary to compensate the guardian ad litem. These sections seem to be in conflict.

It is difficult, if not impossible for a judge to know when a GAL is appointed the total sum that will be necessary to compensate a GAL. I believe it is more appropriate for the court to set an hourly fee, as provided for in section (4) and allow the court to require the parties to pay an initial deposit to help defray the fee and expenses of the GAL. I respectfully suggest that the language of section (5) be changed to provide that the order shall require each of the parties to pay a deposit to help defray the fee and expenses of the GAL, or language to that effect.

Sincerely yours,



Robert L. Childers

M 2008-656

1226 Beech Hill
Brentwood, TN 37027
July 29, 2008

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

JUL 30 2008

RE: Proposed Rule Governing Appointment of Guardian Ad Litem for Minor Children in Divorce and Post-Divorce Proceedings

Dear Mr. Catalano:

The GAL rule, as proposed, runs the risk of the unconstitutional delegation of authority, as evidenced in the attached Rule 60 Motion, filed in the Chancery Court of Williamson County, Tennessee.

Sincerely,

Cydnie B. O'Rourke

Cydnie B. O'Rourke

IN THE CHANCERY COURT OF WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

CYDNIE BROWNING O'ROURKE	)	
	)	
Plaintiff/Mother.	)	
	)	
v.	)	Case No. 27493
	)	
JAMES PATRICK O'ROURKE	)	
	)	
Defendant/Father,	)	
	)	

RULE 60 MOTION TO SET ASIDE AND OTHER RELIEF

Now comes the Mother, Cydnie B. O'Rourke, by and through counsel and moves this Honorable Court for Rule 60 Relief; to set aside the decisions of the parenting coordinator (also referred to herein as the PC); and other relief as follows:

RULE 60 RELIEF

Tennessee Rules of Civil Procedure Rule 60.02 provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper

pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The movant, Cydnie O'Rourke would show this Court that the Order of the Court dated November 2nd, 2005 is void as being constitutionally prohibited.

AUTHORITY AND PROVISIONS OF THE PARENT COORDINATOR

1. On October 19th, 2004, the court entered an Order which state in pertinent part as follows:
   a. That under the authority and jurisdiction the Guardian Ad Litem statutes, the Court hereby appoint Murphy Thomas, PhD. to serve as a Parent Coordinator for the **minor children** of the parties and the Parent Coordinator shall within the next thirty (30) days schedule individual meetings with both Mr. and Mrs. O'Rourke. It shall be the requirement of the parties that any future disputes between them concerning the minor children shall first be brought to the Parent Coordinator. Either party can ask for a meeting with the Parent Coordinator. The Parent Coordinator can convene the parties at his discretion. The Parent Coordinator may investigate an issue, ask one or both parents to meet with him to discuss the issue and interview the **minor children** as needed. The Parent Coordinator will attempt to help the parties reach an agreement. If the parents cannot agree, the Parent Coordinator shall have the sole authority to determine what should be done by the parents with regard to that specific issue. The decision of the Parent Coordinator shall be implemented by the parties when the Parent Coordinator's decision is made; provided, however, that either party if displeased with the Parent

Coordinator's decision, *may ask the Court to review the decision* under the same standards as would be applicable in other cases.

2. On or about July 21st, 2005, Dr. Murphy Thomas filed his own motion asking the Court to order cooperation between the parties on the sibling issues regarding his position. As a result of this Motion, the Court took a Parent Coordinator agreement drafted by Dr. Thomas and made it an order of the court.

3. On November 2nd, 2005, the court entered an Order which stated in pertinent part as follows:

   a. That it is in the best interest of these parties' **minor children** that Dr. Murphy Thomas should stay involved as the PC for the purpose of revolving disputes that arise between these parties pertaining to the decision-making procedures involving the parties' **minor children** and for aiding in communication and **enforcement of this Court's orders**.

   b. The Court made a specific finding that the finding of the Court set forth in the order **does not infringe** upon either party's substantive due process or equal protection rights pursuant to the constitution of the United States and the Constitution of the Sate of Tennessee.

   c. Further, the Court added, That the appointment of a Parent Coordinator for the benefit of these parties' **minor children** is consistent with the aim of the custodial or residential agreement and the findings of the Tennessee General Assembly set forth in Tennessee Code Annotated § 36-6-401 (a) and (b).

4. Attached to the Court's order of November 2nd, 2005 is a 27-page order prepared by Dr. Murphy Thomas. This order gives Dr. Thomas certain powers, such as (Section B):

   a. To hear disputes between the parents, investigate an issue, to require one or both parents to meet with him to discuss an issue, to schedule telephone calls and conferences, to interview the minor child (and any other party), to review records and documents, and to independently gather whatever information may reasonably be needed to render an informed decision,

b. To determine what should be done by the parents with regard to that specific issue, to make decisions regarding the best interest of the children and to make orders that will serve the best interest of the children.

c. To change time shared, visitation, telephone contact, transportation, education, extracurricular activities, alterations in body appearances, substance abuse testing, change time of religious observances, order psychological testing, and determine appropriate medical, mental health and counseling for the minor children.

5. In this document, the Parent Coordinator specifically states that he is not acting in the capacity of providing health related or psychological services to the parties. (Section A)

6. This same 27-page document also stated specifically the "The Parent Coordinator may not make a decision to change the legal custody of the child(ren). (Section B)

7. Further, the 27-page document stated that the PC was acting as a private judge; that he could not be sued and that he could not be compelled to testify. (Section C)

8. Further, the 27-page document gave the PC the right to conduct hearings and if a party refused to participate in said hearing, the PC was authorized to make orders "despite the party's absence or non-participation." The PC described that prior to a hearing, the party requesting intervention would: (Section E)

   a. Clearly set forth the issues in dispute
   b. Identify the specific court order that pertains to the situation,
   c. Make a copy of the section (or sections) of the court orders that pertain to the situation at issue
   d. Specify the current procedures that are going to be used to satisfy the court's order,
   e. Explain how the extant procedures do not serve the interest of the child(ren)
   f. Suggest specific modifications, and

g. Explain how the proposed changes will serve the best interest of the child(ren)

9. The PC further empowered himself to hold hearings in which the Rules of Evidence and Civil Procedures would not apply. (Section F)
   a. He was allowed to make orders orally or in writing that would take effect immediately.
   b. He was to issue a written Statement of Decision, setting forth the reasons for an order or recommendation, only if requested by a party.
   c. And any party challenging his order would have the "burden of proving that the recommendation or order should not be adopted".
10. The PC further empowered himself to communicate directly with the Judge and to initiate or receive ex parte communication with attorneys for the parties. (Section H)
11. The PC provided that he could use consultants and/or assistants to "aid the PC in the performance of the duties contained herein."
12. The PC then allocated that costs of his services. (Section L)
   a. He stated that each party would pay for 100% of the fees generated by meetings and communication with the respective party or their respective counsel.
   b. The parties would share equally in the costs of all meetings and communication with the minor child.
13. Finally, the 27-page document provided that the PC could be removed on a showing of good cause. (Section M)
   a. This document provides that upon hearing a grievance or complaint, the Court shall reserve jurisdiction to determine if either or both parties would have any liability for attorney's fees incurred by the PC.

CONSTITUTIONAL CHALLENGE

1. RIGHT TO PARENT:

   a. In *Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923),* the United States Supreme Court held that *while this court has not*

*attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment]. . . . without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly [**11] pursuit of happiness by free men.*

b. The Supreme Court of Tennessee incorporated this holding and expanded it to include a similar interpretation from the Tennessee Constitution and Declaration of Rights in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) when it found that:

   i. *A parent is entitled to the custody, companionship, and care of the child, and should not be deprived thereof except by due process of law. It is a natural right, but not an inalienable one.* ***The parents are trusted with the custody of the child upon the idea that under the instincts of parental devotion it is best for the child.***

   ii. *The right to the society of the child exists in its parents; the right to rear it, to its custody, to its tutorage, the shaping of its destiny, and all of the consequences that naturally follow from the relationship are inherently in the natural parents, and* ***they cannot be deprived of these rights without notice,*** *and upon some ground which affects materially the future of the child.*

   iii. *Parental rights constitute a* ***fundamental liberty interest*** *under Tenn. Const. art. I,§ 8. Although the right to privacy is not specifically mentioned in either the United States or the Tennessee Constitution, there can be little doubt about its grounding in the concept of liberty reflected in those two documents. The notion of individual liberty is deeply embedded in the Tennessee Constitution, and the right to privacy, or personal autonomy, the*

right to be let alone, while not mentioned explicitly in the Tennessee Constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights.

iv. *There is a right of* ***individual privacy guaranteed*** *under and protected by the liberty clauses of the Tennessee Declaration of Rights. Procreational autonomy is part of this right to privacy. The right to procreational autonomy is evidenced by the same concepts that uphold parental rights and responsibilities with respect to children. This same right to privacy protects the right of parents to care for their children without unwarranted state intervention.*

c. The Parent Coordinator agreement denies the right of the primary residential parent to make the most routine and daily decisions for the child such as the extracurricular activities of the child, what the child wears, how they wear their hair, their religious observances and their medical treatment. **Exhibit 1**, Order the Parent Coordinator Agreement, page 3

d. In the instant case the PC wrote a five-page epistle on how a teenager in the care of the Mother should use a cell phone. **Exhibit 2**, Letter on Cell phone usage

e. Further, the PC took it upon himself to make a decision about the Sammy, the youngest child also in the care of the Mother, traveling with his father to Texas. **Exhibit 3**, Email from Dr. Thomas regarding Sammy's travel

f. The PC has so authorized himself to make these decisions and further states that his decision immediately become an order of the Court **Exhibit 1**, page 7

g. In Oklahoma, *43 O.S. § 120.2(2)(a)-(f)*. provides for the appointment of a PC: The *authority* of a parenting coordinator *shall be* specified in the order appointing the parenting coordinator and *limited to* matters that *aid in the* communication of the parties and [***6] the *enforcement of the court's*

order of custody, visitation, or guardianship **Exhibit 4**, *Fultz v. Smith, 2004 OK CIV APP 64; 97 P.3d 651; 2004 Okla. Civ. App.*

h. The Oklahoma Act clearly limits the power and authority of a PC to "aid" in the "enforcement of the court's order of custody." The Act clearly makes any "decision" of a PC conditional and temporary subject to the court's review on timely objection by a party. The Act, in our view, clearly anticipates the trial court's *de novo* consideration of all the facts and circumstances of the case, grants discretionary authority to the trial court to accept or [***7] reject the PC's decision, and permits the trial court to enter "an appropriate order" as the circumstances of the case warrant, whether in agreement with or contrary to the decision of the PC.

i. In the instant case, Dr. Murphy Thomas gave himself the right to:

i. Make orders **Exhibit 1,** page 7

ii. Make the party objecting to the PC's order carry the burden of proving that the recommendation should not be adopted, **Exhibit 1**, page 8

iii. Initiate or receive exparte communication, **Exhibit 1**, page 9

iv. Directly communicate with the Judge, **Exhibit 1**, page 9

v. Appoints himself as a private judge, **Exhibit 1**, page 4

vi. Endows himself with judicial immunity, **Exhibit 1**, page 4

vii. Exempts himself from being compelled to testify, **Exhibit 1**, page

2. DUE PROCESS:

a. The United States Constitution prohibits any state from depriving any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1. Tenn. Const. art. I, § 8 states, no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land. The Supreme Court of Tennessee has held that this provision of the Tennessee

Constitution is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution. Accordingly, unless a fundamental right is implicated, a statute comports with substantive due process if it bears a reasonable relation to a proper legislative purpose' and is 'neither arbitrary nor discriminatory. *Gallaher v. Elam*, 104 S.W.3d 455 (Tenn. 2003)

b. Importantly, this right extends to the procedural rights of an individual as well as the substantive due process rights regarding the State's right to interfere with the life, and liberty interest of our private lives.
c. The agreement of the PC clearly violates the procedural as well as the substantive due process of the Movant.
d. The PC is allowed to initiate and receive exparte communications.
e. The PC is allowed to make orders that take effect immediately.
f. The movant has the burden of proving the PC's order should not be adopted by the Court.
g. The PC is not required to disclose the communications of the other person participating in the process.
h. The PC has refused to allow the Mother the opportunity to have her counsel intercede in the communication between the PC and the Mother. **Exhibit 5,** Letter dated June 14th, 2006, from Dr. Thomas directing that he will not communicate through counsel.

3. JUDICIAL IMMUNITY:
    a. *Bryant-Bruce v. State*, 2005 Tenn. App. LEXIS 615 (Tenn. Ct. App. 2005) Several varieties of immunity arise in the context of judicial proceedings. Judges are absolutely immune from suit for the acts performed in the exercise of their judicial functions. Absolute judicial immunity is supported by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability.
        i. Over the years, a form of immunity similar to absolute judicial immunity has been extended to persons other than judges. The

immunity, commonly referred to as quasi-judicial immunity, applies to persons who are not judges but whose functions are an integral part of or intimately related to the judicial process. These functions must be absolutely necessary to the proper functioning of the judicial process, and immunity for persons performing these functions arises only when the danger that they will be distracted from the performance of their duties is very great.

ii. Recognizing the possibility that disappointed litigants will vent their wrath on auxiliary court personnel, quasi-judicial immunity has been extended to persons performing functions integral to the judicial process or acting at the court's direction, such as clerks, guardians ad litem, CASA volunteers, and mediators.

b. However, neither clerks, nor guardians ad litem, nor CASA workers, nor mediators are entitled to set forth orders directing the behavior of the parties without the protection of procedural due process.

c. And, neither clerks, nor guardians ad litem, nor CASA workers, nor mediators have the financial incentive to favor one party over the other as is so in this situation. Pursuant to the Court's order and the agreement prepared by Dr. Thomas, the PC is compensated at the rate of $250 per hour. With each party paying 100% of the fees incurred by their own interaction with the PC and 50% of the fees incurred from interviews with the children. In this case, Ms. O'Rourke has paid out over $15,000 in PC fees over the last year. **Exhibit 6**, Invoices from Dr. Thomas. Dr. Thomas is not required to disclose the fees paid by each party, so any influence that may occur is not disclosed to the other party.

d. Further, since the PC agreement provides that he can only be replaced if the parties agree, then it is likely that the PC will be influenced by the party who is most favorable of his continued exercise of this authority. Dr. Thomas knows that Ms. O'Rourke has become frustrated with the lack of procedural safeguards. **Exhibit 7**, Email to Dr. Thomas from Reguli, Attorney dated May 21, 2006. Therefore, and his prejudice against her is

illustrated in the "order" he submitted on July 17th, 2006. **Exhibit 8**, Ruling of Dr. Thomas dated July 17th, 2006.

4. AUTHORITY OF THE PARENTING PLAN STATUTES:

   a. The Court's order of November 2, 2005 states that the authority under which the Court is relying is T. C. A. 36-4-401 (a) and (b); and 36-4-404 (a) (3) and (4) which state:

      i. Tenn. Code Ann. § 36-6-401

      (a) Parents have the responsibility to make decisions and perform other parental duties necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The general assembly recognizes the detrimental effect of divorce on many children and that divorce, by its nature, means that neither parent will have the same access to the child as would have been possible had they been able to maintain an intact family. The general assembly finds the need for stability and consistency in children's lives. The general assembly also has an interest in educating parents concerning the impact of divorce on children. The general assembly recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care.

      (b) The general assembly finds that mothers and fathers in families are the backbone of this state and this nation. They teach children right from wrong, respect for others, and the value of working hard to make a good life for themselves and for their future families. Most

children do best when they receive the emotional and financial support of both parents. The general assembly finds that a different approach to dispute resolution in child custody and visitation matters is useful.

ii. T.C.A.§ 36-6-404. Requirement of and procedure for determining permanent parenting plan

(a) Any final decree or decree of modification in an action for absolute divorce, legal separation, annulment, or separate maintenance involving a minor child shall incorporate a permanent parenting plan; provided, however, that this part shall be inapplicable to parties who were divorced prior to July 1, 1997, and thereafter return to court to enter an agreed order modifying terms of the previous court order. A permanent parenting plan shall:

(1) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for further modifications to the permanent parenting plan;

(2) Establish the authority and responsibilities of each parent with respect to the child, consistent with the criteria in this part;

(3) Minimize the child's exposure to harmful parental conflict;

(4) Provide for a process for dispute resolution, before court action, unless precluded or limited by § 36-6-406; provided, that state agency cases are excluded from the requirement of dispute resolution as to any child support issue involved.

iii. T.C.A.§ 36-6-406. Restrictions in temporary or permanent parenting plans.

(a) The permanent parenting plan and the mechanism for approval of the permanent parenting plan shall not utilize dispute resolution, and a parent's residential time as provided in the permanent parenting plan or temporary parenting plan shall be limited if it is determined by the court, based upon a prior order or other reliable evidence, that a parent has engaged in any of the following conduct:

(1) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting responsibilities; or

(2) **Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child as defined in *§ 36-3-601*.**

b. However, the Court fails to acknowledge that this has been a case exempted from 36-4-404 because of the history of abuse.

i. Although a hearing was not held when the Final Decree was entered, it is clear from the Marital Dissolution Agreement that there had been an Order of Protection in place while the divorce was pending. **Exhibit 9,** Final Decree of Divorce dated April 17, 2001.

ii. This fact is also evidenced by the Exparte Order of Protection and Restraining Order that was entered by the Court in November 2000 and the subsequent restraining order entered after the hearing held February 20, 2001. **Exhibit 10**, Order entered November 7, 2000 and Order entered February 22, 2001

c. The movant would show this Court that said statutes even if not exempted because of the history of abuse, do not give the Court the authority to enter an order in violation of the constitutional right to parent a child.

PARENT COORDINATOR'S FAILURE TO ADMINISTER DUTIES

Even if this Court fails to embrace the constitutional violations embedded in this document created by the Parent Coordinator, the Court should consider the Parent Coordinator's own failure to adhere to the provisions set forth therein to render some modicum of formality to the process and some limitations to his own discretion.

First matter to be brought to the Court's attention is that the Parent Coordinator designed within the Parent Coordinator agreement his own self-induced limitation against ordering a change of custody. However, the Parent Coordinator has entered into an order to change custody of Katie which has been presented twice to Mother's counsel. Dr. Thomas signed said order under the delivery of the order as "Approved for Entry". It is uncertain from the face of the document whether Dr. Thomas is holding himself out to be a party to the case or if he is acting as an attorney without a license which is strictly prohibited under the penal code in Tennessee. Said offense is classified as an A misdemeanor and is punishable under the laws of Tennessee for up to one year incarceration and a $2,500 fine. **Exhibit 11,** Proposed Agreed Order to Change Custody

The Parent Coordinator agreement clearly sets forth in Section B that the Parent Coordinator may not make a decision to change legal custody. This order clearly states that the sole custody of Katherine O'Rourke shall be changed to the Father, James Patrick O'Rourke.

Second, the Parent Coordinator has clearly gone beyond the boundaries of the 27-page document by directing the Mother to pay in advance $2,500 for Dr. Thomas to retain the services of Edward P. Silva to "address any legal issues that may be raised in the course of (his) work as a Parent Coordinator. (**Exhibit 5,** Letter from Dr. Thomas dated June 14th, 2006) PC relies upon Section K, paragraph two which states "The PC may utilize consultants and/or assistants as necessary to aid the PC in the performance of the duties contained herein. The PC will invoice our normal hourly billing rates for consultants, professional staff, research assistances, and other who may assist in this engagement. **Fees for such consultants or assistants will be detailed by the PC prior to the employment of the consultants.** In the event of a dispute regarding the allocation of such fees, the Court retains jurisdiction to resolve the dispute."

It is clear from the letter from Dr. Thomas dated June 14th, 2006, that he did not detail these fees to Ms. O'Rourke prior to the employment of the consultant/attorney, nor did he intend to.

Third, the PC has failed to follow the procedures for identifying and addressing issues that would give this process a modicum of formality. Section E, paragraph six sets forth how the issues should be presented.

The parent presenting the issues should:

b. Clearly set forth the issues in dispute
c. Identify the specific court order that pertains to the situation,
d. Make a copy of the section (or sections) of the court orders that pertain to the situation at issue
e. Specify the current procedures that are going used to satisfy the court's order,
f. Explain how the extant procedures do not serve the interest of the child(ren)
g. Suggest specific modifications, and
h. Explain how the proposed changes will serve the best interest of the child(ren)

Most recently, the Father forwarded to the PC a 12-page email demonizing the Mother and condemning every aspect of her person, her ability to parent and her mental stability. Further, he demanded that the PC meet with him and the two children, Caroline and Sammy this week. **Exhibit 12,** Email from James O'Rourke to Dr. Thomas dated June 13th, 2006.

Dr. Thomas then forwarded this email to the Mother telling her to respond to "each of the points and general issues he raises". The email fails to even get past the first step of the guidelines set forth in the PC 27-page document. **Exhibit 13,** Email from Dr. Thomas.

Attorney for the Mother, Connie Reguli, requested the Dr. Thomas follow the procedures outlined in the 27-page document. **Exhibit 14,** Letter from Attorney Reguli to Dr. Thomas dated June 23, 2006.

Dr. Thomas responded with an email that he was not required to use any 'procedures'. **Exhibit 15,** Email from Dr. Thomas dated July 3, 2006

Subsequent to Dr. Thomas' email was an email from Father's attorney, Helen Rogers, reciting the changes that the Father wanted to occur, again without regard for the procedures set forth in the 27-page document. **Exhibit 16,** Email from Helen Rogers to Dr. Thomas dated July 3, 2006.

Most recently, Dr. Thomas has devised an 'order' making changes in the Amended Parenting Plan entered August 20th, 2002 by changing the educational decision-making and residential schedule without due process. **Exhibit 8**, Emailed letter from Dr. Thomas dated July 17, 2006 / **Exhibit 17**, Amended Parenting Plan of August 2002

The 'order' of Dr. Thomas made certain findings regarding the Mother's interference with parental relationships and control of the children but has refused to consider taped conversations between the Father and daughter, Katherine, wherein the Father manipulated and influenced her opinions of the child. Therefore, material and relevant information was not considered by the Court. **Exhibit 18, (To be supplemented)** Transcripts of taped phone conversations

The Parent Coordinator process has clearly been reduced to chaos.

DISQUALIFICATION OF COUNSEL, EDWARD SILVA

Should this Court find that the PC is entitled to counsel, Edward P. Silva should be specifically disqualified for two reasons.

The first and the most significant is that most recently he has consulted with Father's counsel regarding the motion to disqualify Mother's counsel, Karla Hewitt. This is evidenced by the affidavit presented by Father's counsel in his motion for fees. **Exhibit 19,** excerpt from the Motion for Attorneys Fees filed by Attorney Helen Rogers.

Secondly, Mother's adult daughter, Shawn Sanders, consulted with P. Edward Schell, in the fall of 2005 at length about the case in hopes that he could represent Ms. O'Rourke. Mr. Schell, who is the partner of Edward P. Silva, stated that he could not represent Ms. O'Rourke because he had consulted with Helen Rogers regarding the legal

issues surrounding the role of the parent coordinator. **Exhibit 20 (to be supplemented),** Affidavit of Shawn Sanders.

Further, Attorney Edward Silva is mentioned in the Final Decree of Divorce as having played a role. **Exhibit 9,** Final Decree

The Mother specifically objects to Edward P. Silva stepping into this case to represent the PC who is purportedly a "neutral" when he (Silva) has consulted with Father's counsel on issues adverse to her interest.

WHEREIN, the Mother moves this Court for the following relief:

1. That this Court set aside the orders of November 2nd and November 5th, 2005 incorporating the Parent Coordinator Agreement of Dr. Thomas finding that it is unconstitutional.
2. Further, that the implementation of the order has been reduced to chaos in spite of the original good intentions of the Court.
3. In the alternative, that this Court find that the PC has failed to comply with the intent of the Court's purpose. Further, that the PC has failed to even comply with his own set of guidelines but failing to follow the orderly process for the consideration and addressing of parenting issues. Therein allowing the process to reduce to chaos.
4. That the PC has not followed the order by requesting attorney's fees to address constitutional issues.
5. The Edward P. Silva is specifically disqualified from representing Dr. Murphy Thomas.
6. That the PC is not authorized to sign orders presented to this Court as he is not a party to this action and is not authorized to practice law.
7. That the PC is removed for his failure to comply with his own contractual terms.
8. That the Movant be awarded her attorney's fees.
9. For other and general relief.

This is the _____ day of July 2006.

Respectfully submitted,

Connie Reguli # 16867
Attorney for Cydnie O'Rourke
LawCare - Family Law Center, P.C.
1620 Westgate Circle, Ste. 150
Brentwood, TN 37027
615-661-0122
615-661-0197 fax

CERTIFICATE OF SERVICE

I, Connie Reguli, do hereby certify that a true and exact copy of the foregoing document has been mailed and/or faxed on this the ____ day of July 2006 to:

Helen Rogers
Attorney at Law
2205 State Street
Nashville, TN 37203-1850
615-320-0600
Fax 615-320-9933

_____
Connie Reguli

DIVORCE LITIGATION

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

© 2006 by Margaret K. Dore, Esq. [1]
Seattle, Washington

A. Introduction

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

B. The Evaluation Process

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

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

1. Appointment

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

ALSO IN THIS ISSUE

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

2. Investigation

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

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

3. Report

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

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

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

4. Trial

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

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

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

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

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

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

C. Judicial Reliance on Evaluators/Guardians Ad litem

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

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

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

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

D. Reforms

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

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

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

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

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

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

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

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

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

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

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

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

F. Conclusion

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

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

Endnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. *Id.*

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

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

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

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

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

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

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

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

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

24. The Best Interests Attorney" is defined as a "lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives." American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, p. 2, § II.B. (Approved by the American Bar Association House of Delegates, August 2003) (http://www.afccnet.org/pdfs/aba.standards.pdf#search='ABA%20Standards%20of%20Practice%20for%20Lawyers%20Representing%20Children').

25. *Id.*, p. 3, § III.B.

26. *Id.*, p. 6, § III.G.

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

28. Lidman and Hollingsworth state:

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

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

Lidman and Hollingsworth, *supra* at 271.

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

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

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

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

33. *Id.*

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

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

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July 31, 2008

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: PROPOSED RULE GOVERNING APPOINTMENT OF GUARDIANS AD LITEM FOR MINOR CHILDREN IN DIVORCE AND POST-DIVORCE PROCEEDINGS

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association for filing in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Chief Justice William M. Barker, Tennessee Supreme Court
Justice Janice Holder, Tennessee Supreme Court
Justice Cornelia Clark, Tennessee Supreme Court
Justice Gary Wade, Tennessee Supreme Court
Justice William Koch, Tennessee Supreme Court
George T. Lewis, President, Tennessee Bar Association
William L. Harbison, General Counsel
Barbara Holmes, Member, TBA Board of Governors
Jeff Levy, Chair, TBA Family Law Section
Lucian Pera, Chair, TBA Standing Committee on Ethics & Professional Responsibility
Linda Warren Seely, Chair, Juvenile & Children's Law Section
Honorable Neil Thomas, Tennessee Judicial Conference Family Law Committee
Libby Sykes, Director, Administrative Office of the Courts
David Haynes, General Counsel, Administrative Office of the Courts
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED RULE GOVERNING APPOINTMENT OF GUARDIANS AD LITEM FOR MINOR CHILDREN IN DIVORCE AND POST-DIVORCE PROCEEDINGS	)	No. M2008-00656-SC-RL2-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, George T. Lewis; General Counsel, William L. Harbison; Chair, Family Law Section, Jeff Levy; and Executive Director, Allan F. Ramsaur, files this comment urging adoption of an alternative to the proposed rule.

BACKGROUND

By order entered April 1, 2008, this Honorable Court published for consideration a proposed rule (herein after Proposed Rule) governing appointment of guardians ad

litem for minor children in divorce and post-divorce proceedings. The Tennessee Bar Association immediately began consideration of the proposal and its implications for practice by family law practitioners in Tennessee, as well as its implications for attorney conduct under the Supreme Court Rule 8, Rules of Professional Conduct.

At the Annual Meeting of the Tennessee Bar Association, Tennessee Judicial Conference, Tennessee Association for Justice, and Tennessee Lawyers Association for Women in Gatlinburg a joint working group met to consider and make recommendations with respect to the proposal. As a result of the initial work, the Tennessee Bar Association Board of Governors resolved at that meeting to request additional time and made that request on June 20, 2008. This Honorable Court granted an extension of time until July 31, 2008 for comment.

The working group established by the TBA included representatives of the TBA Family Law Section, Juvenile & Children's Law Section, Standing Committee on Ethics & Professional Responsibility, the staff of the Tennessee Board of Professional Responsibility, staff of the Administrative Offices of the Courts, interested judges and others. The group reviewed rules addressing similar issues

from several sister jurisdictions. In addition, the group reviewed the American Bar Association, Family Law Section, "Standards for Practice for Lawyers Representing Children In Custody Cases" and the American Law Institute "Principles of the Law of Family Dissolution."

Based upon this extensive review and weekly meetings, the working group recommended to the Executive Committee and the TBA has adopted these comments with respect to the proposal. In summary, the recommendation is that the proposed rule as published should not be adopted, but an alternative rule drafted by the committee should guide family law practice with respect to appointment of attorneys in cases involving parenting responsibilities. In this regard, the TBA submits the following to this Honorable Court:

1. THE PROPOSED RULE GOVERNING THE APPOINTMENT OF GUARDIANS AD LITEM SHOULD NOT BE ADOPTED.

The TBA commends the drafters of the proposed rule which was published for comment with the comments now due on July 31, 2008. The TBA welcomes its focus on addressing issues related to the use of guardians ad litem across our state.

These issues include a lack of consistent definitions from judicial district to judicial district and perhaps from court to court, terms of appointment that may set out specific responsibilities, the establishment of potential conflicts of interest, lack of standards for establishing appointees' expertise, and lack of control over cost of all parties at the appointment of guardians ad litem may bring.

However, the TBA has identified significant issues that the proposed rule does not address completely. This Honorable Court has a unique opportunity in establishing a new rule to solve existing problems without creating new ones. Those significant concerns include:

- The Proposed Rule should also encompass petitions to establish parentage. (b)-Definitions
- The extensive list of factors where appointment is described as being "most appropriate" encompasses almost every divorce, post-divorce and parentage matter. It positively promotes the appointment of guardians ad litem and could well make such appointments the rule rather than the exception. (c)(1), especially (x, xi, xii, xiii and xiv). The delineation of the factors is also imprecise.

- The guardian ad litem is defined as representing the child (and not the child's best interest). (c)(2). This gives the child -- a non-party -- appointed counsel. More to the point, the attorney, pursuant to the Rules of Professional Conduct, must represent only the child's interests.
- The guardian ad litem, an attorney participating in the matter, is to be permitted to testify as well as advocate for his/her client. This is a violation of Rule 4.3 of the Rules of Professional Conduct. In addition, an attorney in almost all cases will not be an expert in the subject matter in question. Furthermore, the facts on which an appointed guardian ad litem could testify would be limited both on the basis of first-hand knowledge and because of attorney-client privilege. There will be substantial temptation for the guardian ad litem to offer opinion testimony. In any case, the court will be tempted to place undue weight on the testimony of its own appointed individual. (c)(3).
- The nature of the guardian ad litem's report -- which is to "assist the parties" but is neither to be filed with the court nor be an admissible document -- is unclear. (c)(4).
- The guardian ad litem is proposed to represent the child, but his/her access to his/her client may be limited. (d)(1)(iii).

- The provisions regarding an hourly fee do not provide sufficient scope to limit the overall cost of the appointment. (d)(4).
- The provisions requiring each party to make payment presents the risk of an economically advantaged party to seek an appointment of a guardian ad litem as a tactical move, in order to disadvantage the other party. (d)(5).
- The enumerated duties of the guardian ad litem appear to limit counsel. If the guardian ad litem is to represent the child, that attorney should have full authority to do so. (f).
- The provisions for compensation do not set limits on overall compensation. In addition, while it may be proper that this compensation not be considered as alimony or child support, it should be made non-dischargeable in bankruptcy as a domestic support obligation. The basis for assessment of costs ("equal, or in a manner that the court determines to be equitable") is self-contradictory, since equal does not mean equitable. The ban on payments by the state may be inappropriate if there are federal or other grants to make such payments. There is no reason to order that fee disputes be adjudicated by any other than the appointing judge, since that judge will be in the best position to assess the scope of the guardian ad litem's appointment, the difficulties faced by the guardian ad litem in carrying out

his/her functions and the effectiveness and value of his/her work. On the other hand, there is no provision that all challenges to the guardian ad litem's fees be on the record.

2. THE SUPREME COURT SHOULD ADOPT THE TBA PROPOSED GUIDELINES FOR ATTORNEYS APPOINTED IN CASES INVOLVING PARENTING RESPONSIBILITIES WHICH IS ATTACHED AS EXHIBIT A.

The consideration by the TBA working group on this matter arrived at the conclusion that an alternative proposal drawing upon national resources as well as the expertise of individual Tennessee practitioners and judges from multiple jurisdictions offered a better approach. The TBA offers a new Tennessee Supreme Court Rule "Guidelines For Attorneys Appointed In Cases Involving Parenting Responsibilities" ("TBA proposal") to address the concerns with the proposed rule and to meet the principles set forth below.

In completing its work, the Tennessee Bar Association was guided by the following principles:

- The existing Supreme Court Rule 40 concerning the appointment of guardians ad litem in dependency and neglect situations is effective and should remain unchanged. The TBA proposal is expressly limited to other cases where parenting responsibilities and parenting time are considered by the courts.
- The terminology needs to be standardized and be made more clear. It quickly became clear that what was meant by a "guardian ad litem" in one judicial district was something very different in another district. Until we establish uniform definitions of responsibilities and duties, statewide regulation and control will simply be ineffective.
- Continued use of the term "guardian ad litem" in these non-dependency and neglect cases was confusing and counter-productive. When this term is used, attorneys and judges tend to fall back on what each believed it means even though these definitions are different across the state. In addition, it is clear that the role of a guardian ad litem in a dependency and neglect case is in fact different from that envisaged in non-dependency and non-neglect cases. Using the same terminology for different functions could lead to confusion, especially in those courts that handle both kinds of cases.

- Most lawyers are not "experts" in non-legal matters. These matters include parenting skills and abilities, the psychological characteristics of individuals and educational matters. In some courts, guardians ad litem have been required to testify and their opinions have been given substantial weight by the courts. This is an inappropriate role for an attorney who is not otherwise an expert in child development and family dynamics.
- The concept of being an advocate for a child's best interest is difficult at best, even if the guardian ad litem does not testify. Often, the lawyer/guardian ad litem does not have the expertise to determine what is the child's best interest any better than would any other layperson. In addition, the question of who is the attorney's client, when the attorney represents the "best interest" and not the child, can cause problems. Thus, appointments of attorneys who are not otherwise qualified to assess a child's best interest must be done with special care.
- The parties to a divorce or post-divorce matter do not have a right to appointed counsel. In a non-dependency and neglect case, it would be inconsistent to give such a right to a non-party (the child), when its parents do not have such a right.
- While a child's best interest is to be taken into account by the court, the

child is not a party in a divorce or post-divorce case.

- It is crucial to limit the legal expense of any appointments made by a court, since except in unusual circumstances, this will be borne by one or both parties. Such costs may be substantial, and they need to be avoided when at all possible. Similarly, it is critical to minimize the possibility that one side, by pushing for the appointment of one or more individuals, will seek a tactical advantage over the other party, who may not be as able to afford contributing to the cost.
- The use of alternate dispute resolution and other non-confrontational approaches needs to be accommodated. Mediation and other ADR approaches have been very successful in reducing, the costs of litigation and the workload of our courts, and this needs to be promoted wherever possible.
- It is equally essential to ensure the process of appointment and remuneration is completely transparent and on the record. This will not only facilitate review by the appellate courts as necessary, but it will promote the perception of the process as open and fair. This in turn will improve the public trust and confidence in the courts.
- Finally, the judge is in each case the ultimate decision-maker. The courts need to avoid the perception of improper delegation of judicial authority.

The judicial members of the working group made it clear that they are looking for an effective, and cost-effective way to get necessary facts before the court, so that they can make appropriate decisions.

- The court has alternatives to appointments of guardians ad litem.

The TBA proposal set forth in the attached carries not only black-letter rule provisions, but also includes comments which help to illuminate the reasoning behind each of the provisions. Rather than argue each of those points, the TBA submits the proposal in its entirety for consideration by this Honorable Court.

CONCLUSION

The TBA is pleased to have been afforded the opportunity to comment on the Proposed Rule. We appreciate the focus and effort that has gone into the drafting of the proposed rule. The TBA submits the attached (Exhibit A) TBA proposal which will more clearly and consistently define the role of individuals to be appointed by each court and establish a uniform understanding of these responsibilities. We are pleased to recommend this alternative for adoption.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

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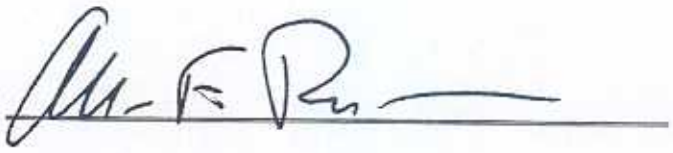
By: 

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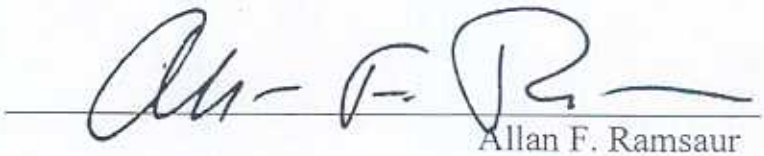
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "B" by regular U.S. Mail, postage prepaid on July 31, 2008.



Allan F. Ramsaur

EXHIBIT "A"

RULE _____, RULES OF THE TENNESSEE SUPREME COURT

GUIDELINES FOR ATTORNEYS APPOINTED IN CASES INVOLVING PARENTING RESPONSIBILITIES

Article 1. Application.

This Rule applies to all Tennessee courts exercising domestic jurisdiction in proceedings involving parenting responsibilities or parenting schedules, including parentage actions, with the express exceptions of (1) dependency and neglect proceedings and any other proceedings to which Rule 40 of these Rules applies, and (2) termination of parental rights and/or adoption cases.

Article 2. Appointment of Individuals.

a. A court may appoint an attorney who is licensed to practice law in the state of Tennessee to any one of the following positions in any proceeding to which this Rule applies. Appointments shall be limited to those situations where the assistance or input of an additional attorney is necessary in the interest of justice and/or to further the best interest of the child(ren). The court shall not appoint non-attorneys to such positions except as expressly agreed by the parties.

(1) *Parenting Assistance Attorney* is appointed for the purpose of conducting an investigation and presenting to the court facts relevant to the best interest of any child(ren) whose parenting is at issue by calling appropriate witnesses and otherwise presenting competent evidence. The Parenting Assistance Attorney shall investigate the situation of the child(ren), conduct discovery, identify and call witnesses, and otherwise participate in all legal proceedings such as depositions and hearings. The Parenting Assistance Attorney shall not make recommendations to the court, advocate specific positions or make legal argument.

(i) The Parenting Assistance Attorney does not represent the child(ren) and no attorney-client relationship is formed between the child(ren) and the Parenting Assistance Attorney.

(ii) The responsibility of the Parenting Assistance Attorney is to assist the trial court by conducting a best interest investigation and presenting evidence relevant to the best interest of the child(ren) at any trial or hearing.

(iii) Unless otherwise ordered by the court, the Parenting Assistance Attorney shall file and serve upon all parties no later than ninety

(90) days after appointment, a proposed witness/exhibit list and a summary of the facts that will be brought before the court. In addition, the Parenting Assistance Attorney shall provide copies of all documents obtained in the course of his or her duties to all parties as soon as reasonably possible after it has been determined that such documents are likely to be used at trial, subject to whatever protective orders are deemed appropriate by the court. Such copies are to be provided upon payment to the Parenting Assistance Attorney of the reasonable costs of duplication.

(iv) The Parenting Assistance Attorney may obtain discovery by any means provided under the Tennessee Rules of Civil Procedure, obtain subpoenas to compel the attendance of witnesses or the provision of documents, call and examine witnesses and cross-examine witnesses called by the parties at depositions, hearings and other proceedings. The Parenting Assistance Attorney may not, however, make legal argument or adjudicate on any matters involving the children.

(v) The Parenting Assistance Attorney may participate in any negotiations or mediation in order to facilitate resolution of parenting issues.

(vi) The information gathered by the Parenting Assistance Attorney is not confidential under RPC 1.6, nor is it protected by the work-product privilege. A trial court may, however, limit dissemination of medical, other health-care related, educational, or other sensitive information by means of a protective order.

(vii) The Parenting Assistance Attorney shall not testify in any proceedings.

(2) *Child's Best Interest Attorney* is an attorney licensed to practice law in the State of Tennessee and appointed for the purpose of both fulfilling the functions of the Parenting Assistance Attorney *and* advocating for the best interests of the child(ren).

(i) The Child's Best Interest Attorney does not represent the child(ren) and no attorney-client relationship is formed between the child(ren) and the Child's Best Interest Attorney.

(ii) The Child's Best Interest Attorney shall participate in all aspects of the proceedings related to the child(ren) in the normal manner that a lawyer participates in proceedings, e.g., by investigating the matter fully, interviewing relevant potential witnesses, issuing

subpoenas, calling witnesses at depositions, hearings or other legal proceedings, cross-examining witnesses, submitting pleadings and arguments to the court, and otherwise participating fully in any proceedings involving parenting issues.

(iii) In advocating for the child(ren)'s best interests, the Child's Best Interest Attorney shall bring to the court's attention the child(ren)'s preferences, and shall indicate to the court where the child's preference is not the same as what the Child's Best Interest Attorney has concluded to be the child(ren)'s best interest. The child(ren) may testify as permitted under Tenn. Code Ann. §36-6-106(a)(7)(A) and (B). In any event, neither the child(ren)'s preferences, nor the conclusions of the Child's Best Interest Attorney are in any sense determinative; determining the child(ren)'s best interest is uniquely the responsibility of the court and is a non-delegable judicial function.

(iv) Unless otherwise ordered by the court, the Child's Best Interest Attorney shall file and serve upon all parties no later than ninety (90) days after appointment, a proposed witness/exhibit list and a summary of the facts that will be brought before the court. In addition, the Child's Best Interest Attorney shall provide copies of all documents obtained in the course of his or her duties to all parties as soon as reasonably possible after it has been determined that such documents are likely to be used at trial, subject to whatever protective orders are deemed appropriate by the court. Such copies are to be provided upon payment to the Child's Best Interest Attorney of the reasonable costs of duplication.

(v) The Child's Best Interest Attorney may obtain discovery by any means provided under the Tennessee Rules of Civil Procedure, obtain subpoenas to compel the attendance of witnesses or the provision of documents, call and examine witnesses and cross-examine witnesses called by the parties at depositions, hearings and other proceedings, and may make legal argument. The Child's Best Interest Attorney may not, however, adjudicate on any matters involving the children.

(vi) The Child's Best Interest Attorney may participate in any negotiations or mediation in order to facilitate resolution of parenting issues.

(vii) The information gathered by the Child's Best Interest Attorney is not confidential under RPC 1.6, nor is it protected by the work-product privilege. A trial court may, however, limit dissemination

of medical, other health-care related, educational, or other sensitive information by means of a protective order.

(viii) The Child's Best Interest Attorney shall not testify in any proceedings.

(3) Where all parties give specific assent in advance, the court may appoint for any child(ren) a *Parenting Master*. The Parenting Master is an attorney licensed to practice law in the State of Tennessee appointed to assist the parties to identify disputed issues, reduce misunderstandings and mis-communications, clarify parenting priorities, develop methods of collaboration between the parties and comply with all court orders. Where all parties give specific assent in advance, the Parenting Master may additionally be empowered to make limited temporary decisions for the child, such as one-time modification of the parenting schedule to accommodate specific events. Any such decisions shall be subject to court review on an expedited basis upon the request of any party. The purpose of such authority is to foster timely decision-making.

(i) The Parenting Master is not a mediator pursuant to Supreme Court Rule 31 and confidentiality provisions of that Rule do not apply.

(ii) The Parenting Master shall not testify in any proceedings. This does not exempt the Parenting Master from the provisions of the reporting statute concerning child abuse.

b. The court shall include, in the order of appointment for a Parenting Assistance Attorney or a Child's Best Interest Attorney, the authority to obtain the child(ren)'s medical, other health-care related, educational, financial, insurance or other records or information protected from disclosure by any statute or other law. The Parenting Assistance Attorney and/or Child's Best Interest Attorney may also seek authority to obtain similar information on the parties and/or any other existing, proposed or potential caregiver. If the court grants such authority, which it shall for good cause shown, it shall also (1) require the party whose records are sought to sign any necessary authorizations, (2) request such authorizations from persons not a party to the action and (3) determine the scope of any protective order. The court may take into account the refusal or failure of any person to provide such authorization in its determination of the ultimate issues in the case.[1]

[1] The Tennessee Bar Association is concerned that a court may be unable to order a litigant to sign an authorization for the release of mental health and alcohol and drug treatment records or face a negative inference regarding said records, because such an order might conflict with federal law or the U.S. or Tennessee Constitution given the special protections afforded to this type of medical information. The Tennessee Bar Association did not have sufficient time to fully study this issue and make recommendations, but does encourage further inquiry into the matter.

Providers or holders of records shall release such records to the appointee as soon as administratively feasible upon receipt of a subpoena or written request accompanied by a copy of the order of appointment.

c. Nothing in this Rule precludes the appointment of other individuals recognized by existing law, e.g., a court-appointed expert under Tenn. R. Evid. 706, a special master for parenting-related issues under Tenn. R. Civ. P. 53, or a guardian ad litem for an incompetent adult under Tenn. R. Civ. P. 17.

Article 3. Order of Appointment.

a. *Initiation.* A court may appoint a Parenting Assistance Attorney or Child's Best Interests Attorney on its own initiative or upon the motion of either party. A court may appoint a Parenting Master if the parties agree that such a person should be appointed. If a court intends to appoint a person under this Rule on its own initiative, then the court shall provide reasonable notice and afford the parties a right to a hearing on the record prior to entry of any order of appointment.

b. *Training.* All persons appointed under this Rule shall be required to undergo initial and continuing training under guidelines promulgated from time to time by the Administrative Office of the Courts, unless such training is waived for good cause shown. Such waivers shall generally be granted only where a trained individual is not available but the appointment is still required to be made.

c. *Factors Governing Appointment.* The court shall appoint a Parenting Assistance Attorney or a Child's Best Interest Attorney only when such appointment is specifically found to be necessary in the interest of justice and/or to promote the best interest of the child(ren). The court must specifically consider the nature of the disputed issues between the parties; the apparent ability of the parties to present competent evidence concerning the child(ren)'s best interest; other available methods of obtaining necessary information, including social service investigations and evaluations by mental health professionals; and the ability of each party to afford the cost of such appointment. The court may appoint a Parenting Master only upon the agreement of all parties.

d. *Mandatory Consideration of Financial Factors.* In determining whether to make any appointment under this Rule, the court shall consider the extent to which the parties are able to afford the reasonable costs thereof, the extent to which further proceedings are contemplated, the respective ability of the parties to pay the applicable costs and fees and the availability of outside funding or pro bono or reduced-fee services.

e. *Order of Appointment.*

(1) When a court determines that it is necessary to make an appointment, the court shall enter a written order of appointment containing the following:

(i) The specific factors underlying the Court's determination that the appointment is necessary under this Rule;

(ii) The exact nature of the appointment, i.e., whether the person appointed is to act as an Parenting Assistance Attorney or a Child's Best Interest Attorney or a Parenting Master;

(iii) Any additional specific duties imposed upon the person appointed;

(iv) The scope access of the person appointed to the child(ren);

(v) The duration of the appointment;

(vi) An hourly fee which will initially be allowed as compensation for the performance of the services provided under this Rule. The order may also specify a maximum total fee that is provisionally authorized by the court;[2]

(vii) A provision authorizing the release of medical, psychological, other health-care related, educational, and other records of the child to the person appointed under this Rule; and,

(viii) Provision for payment of the applicable costs and fees.

(2) Upon entry, a copy of the order of appointment shall be provided to the appointee and to each of the parties or their counsel.

f. *Payment of Fees and Expenses.*

(1) The order of appointment shall require payment into the office of the Clerk of the Court in which the case is pending, a sum which the court contemplates will be necessary to compensate the person appointed under this Rule, except in such cases as the court determines other assets are available to pay the person, outside funding is confirmed to be available, or the person appointed accepts the appointment pro bono. The initial allocation of this cost between the parties shall be determined by the court based upon the ability of each party to make such payment from reasonably available financial resources and/or each party's income.

[2] The TBA was unable timely to resolve whether the hourly fee should specifically take into account the complexity of the case as well as the experience and customary fees charged by the appointee or should be left solely to court discretion.

(2) The parties' respective shares of the final cost of the appointment under this Rule may reflect a reallocation from the initial deposit. The cost is to be divided equitably and not necessarily equally. The final allocation shall be based upon the income and financial resources available to each party, the conduct of the parties and any abuse of the legal process by either party. Such allocation shall be made in the court's final order resolving all issues between the parties and is to be supported by findings of fact by the court.

(3) If the order of appointment provides a maximum total fee, then any fees beyond the maximum total fee so established must be approved in advance by the court by a written order. If novel or difficult legal or factual issues arise after entry of the order of appointment, the court may, in its discretion, increase the hourly rate of the person appointed under this Rule. The specific reason(s) for any such increase is to be entered in the order increasing the hourly rate.

(4) Persons appointed under this Rule shall maintain, and present to the court when payment is sought, records showing the time expended on the matter and any expenses incurred. When seeking payment, the person appointed under this Rule shall file an affidavit setting forth the time expended and expenses incurred, stating the total compensation sought, and requesting payment for time and/or expenses. The affidavit requesting payment shall be served upon all parties in accordance with Tenn. R. Civ. P. 5.

(5) All fees and expenses awarded to a person appointed under this Rule shall be reasonable under RPC 1.5.

(6) Any objection to the affidavit requesting payment shall be filed within a reasonable period after service of the affidavit. If no objection is filed within 15 days, and upon determination by the court that the request is reasonable, the court shall enter an order awarding the fees and expenses and allocating payment of the fees and expenses in accordance with this Rule. If objection is timely filed, then the court shall conduct a hearing regarding the affidavit requesting payment. The only objections permitted are that the fees and/or expenses are not reasonable under RPC 1.5 or that the fees and/or expenses are not related to the duties of the person appointed under this Rule. Following the hearing, the court shall enter an order awarding the fees and expenses determined to be reasonable under RPC 1.5 and related to the duties of the person appointed under this Rule and allocating payment of the fees and expenses in accordance with this Rule.

g. *Termination of Appointment.*

(1) Unless the appointing court specifies otherwise, the appointment of a person under this Rule terminates automatically when the order or judgment disposing of the proceeding becomes final.

(2) The court may sua sponte or upon motion of the person appointed under this Rule, or of any party, terminate or modify any appointment made under this Rule based upon whether:

(i) the cause that led to the appointment still exists;
(ii) the appointment is contributing to protection of the best interest of the child(ren);
(iii) there has developed a conflict of interest under the Rules of Professional Conduct;
(iv) the appointment remains a cost-effective method of achieving the court's objectives; and
(v) the appointee is unable or unwilling to continue to serve.

h. *Other.*

(i) All computations of time under this Rule are to be made pursuant to Tenn. R. Civ. P. 6.

EXHIBIT "A"

Comments

[1] The court hearing matters involving children is generally presumed to be fully capable of making decisions regarding each child without the need to make appointments of individuals to assist it in doing so. The parties and their counsel are also generally presumed to be fully capable of determining what evidence should be presented and the need for outside experts. Nevertheless, there will be occasions when the court affirmatively finds that an appointment of a suitable individual will assist the court in making findings of fact and in establishing arrangements in the best interest of the child(ren).

[2] This Rule clarifies and systematizes the roles to which attorneys may be appointed in divorce and legal separation proceedings involving parenting disputes, post-divorce and post-legal separation proceedings involving parenting modification disputes, any parentage proceeding under Tenn. Code Ann. § 36-2-301 *et seq.* involving a parenting dispute, any proceeding involving a dispute about a parenting schedule, or any proceeding involving the allocation of parenting responsibilities (as parenting responsibilities are defined in Tenn. Code Ann. § 36-6-402), with the express exception of dependency and neglect proceedings, to which Rule 40 applies, termination of parental rights and adoptions. Rule 40 remains in full force and effect.

[3] Children do not become parties to a divorce, legal separation, parentage, or other parenting-related proceedings, although they are deeply affected by such proceedings and have a decided interest in them. Attorneys serving disinterestedly in a role traditionally known as "guardian ad litem" have long provided valuable services to children and trial courts in this state. Moreover, experience shows that such attorneys often have helped to ameliorate the potentially deleterious effects of the adversarial system upon children who are the object of contested parenting proceedings. Many years ago, this Court recognized in passing that parenting litigation sometimes involves a context that obscures the access of the trial court to the best interest of the involved children and the valuable assistance that can be provided by a separate attorney appointed to be involved without having direct duties to either parent. *Luke v. Luke*, 651 S.W.2d 219, 221 n. 1 (Tenn. 1983).

[4] Historically, the precise role of the person appointed as "guardian ad litem" in parenting-related proceedings appears to have been implied but not expressly defined, and a measure of ambiguity also arises from the numerous senses in which the term "guardian ad litem" has come to be used under Tennessee law. In many respects, the system has functioned effectively. Greater precision is needed, however, to delineate the role more clearly.

[5] The term "guardian ad litem" has so many different senses and usages that the continued employment of the term in cases involving parenting disputes risks ambiguity. Given the potential for ambiguity and the statutory and rule-based role of guardians ad litem under Rule 40 of this Court, new terminology should be adopted to clarify for children, litigating parents,

trial courts, counsel, and persons appointed to fill the role (or roles) traditionally called "guardian ad litem" in order to ensure the most effective functioning possible in domestic litigation.

[6] This Rule adopts the general policy of this State and the courts to move away from the terms "custody" and "visitation" in favor of "primary residential parent" and "alternate residential parent", and to speak in terms of allocation of parenting responsibilities and parenting time.

[7] The roles described in this Rule fall within the meaning of the term "guardian ad litem" in Tenn. Code Ann. § 36-4-132, as well as within *Winchester v. Little*, 996 S.W.2d 818, 826 (Tenn. App. 1998) and/or any other provision of law describing immunity. The term "guardian ad litem" should not be used in the proceedings covered by this Rule and more particularly described in Article I, and no appointment of an individual designated as a "guardian ad litem" should be made in such cases.

[8] Trial courts should be sparing in making appointments under this Rule, being mindful of the costs involved and the ability of the litigating parties to engage their own experts if necessary. Trial courts should not routinely appoint persons under this Rule in parenting proceedings. The American Law Institute aptly summarized the restraint that should be exercised by saying: "Appointments, investigations, evaluations services, or tests should not be ordered . . . unless at no cost to the persons involved, or at a cost that is reasonable in light of the financial resources of the parents." American Law Institute, *Principles of the Law of Family Dissolution* § 2.13(7) (2003).

[9] Neither party is to be impoverished or disadvantaged financially beyond what they can reasonably afford to pay in the allocation of costs, either in advance or upon entry of the final order of the court.

[10] No presumption exists that an appointment should be made. As the *Principles of the Law of Family Dissolution* aptly point out, despite the benefits that can accrue from appointment of a person in the traditional role of "guardian ad litem," significant negative effects can also flow from the appointment of such a person. *See* American Law Institute, *Principles of the Law of Family Dissolution* § 2.13 *Comment b* (2003). No bright line rule exists for when such a person should be appointed, and trial courts should consider the potential benefits and the potential negative effects upon the particular facts present in each proceeding. Appointment of a Parenting Assistance Attorney or Child's Best Interest Attorney may be most appropriate in cases involving the following factors, but these factors are not all-inclusive, nor are they limiting as to when an appointment can be made. In each case, promoting the interest of justice and the best interest of the child(ren) is the paramount consideration.

(1) Requests for extraordinary remedies such as supervised parenting time, suspension of parenting time, or the placement of a child with a non-parent.

(2) Past or present child abduction or the risk of future abduction.

(3) Past or present family violence.

(4) Special physical, educational, or mental health needs of a child.

(5) A heightened level of acrimony between the parties that requires intervention.

(6) Past or present mental health problems of the child, a party, or any existing, proposed or potential caregiver.

(7) Inappropriate adult influence or manipulation of the child(ren)'s expressed preferences.

(8) The apparent need for additional evidence that may not be made available to the court without such appointment.

(9) Specific issues particular to the proceeding that would be best addressed by a lawyer appointed to address only those issues, which the Court should specify in its appointment order.

[11] Trial courts are encouraged to seek to appoint persons under this Rule who will serve *pro bono publico* in appropriate cases. Members of the bar are encouraged to accept appointments under this Rule *pro bono publico* (*see* RPC 6.1).

[12] The legal positions taken by the Child's Best Interest Attorney are not "recommendations" binding upon the court nor are they "recommendations" or findings or fact such as are made by a special master after hearing evidence.

[13] The Child's Best Interest Attorney must be disinterested, but is not required to remain or be neutral. The attorney is to advocate for the best interest of the child(ren) as the attorney discerns such best interest.

[14] The Parenting Assistance Attorney, the Child's Best Interest Attorney or the Parenting Master shall be allowed contact with the child(ren) without the presence of counsel for any party; the Attorney shall be governed by Rule of Professional Conduct 4.3. The Parenting Assistance Attorney or the Child's Best Interest Attorney shall also have reasonable access to the parties, by subpoena if necessary, and each party shall have the right to have his or her counsel present. The Parenting Master shall have access as agreed by the parties and contained in his/her order of appointment.

[15] The Child's Best Interest Attorney shall advocate the best interest of the child(ren) according to the judgment of the Child's Best Interest Attorney.

[16] Witness/exhibit lists compiled by the Parenting Assistance Attorney or Child's Best Interest Attorney, as well as that Attorney's summary of the facts, shall be made available to the parties within 90 days of appointment or as otherwise ordered by the court. The expectation is that such information will help reduce the duplication and costs of discovery, facilitate negotiations and settlement of cases, and permit the development of rebuttal evidence. Early provision of documents that are anticipated will be used at trial should also help serve to reduce costs and promote settlement and permit development of rebuttal evidence, but it is unreasonable for the Parenting Assistance Attorney or the Child's Best Interest Attorney to bear the costs of duplicating these documents for each party.

[17] Conflicts of interest for any individual appointed under this Rule shall be judged according to RPC 1.7. As with any situation involving a conflict of interest, any party may move to disqualify a person appointed under this Rule for a conflict of interest. Any such motion shall specify the manner in which a conflict of interest exists under RPC 1.7.

[18] A determination of best interest of the child(ren), while not fully described by these factors, should be guided by the requirements of T.C.A.§ 36-6-106(a).

[19] Fees for Appointees under this Rule should never be assessed as alimony or child support, but they are to be considered domestic support obligations necessary for the support of the child(ren) and be non-dischargeable in bankruptcy.

[20] This Rule applies only to the appointment of a Parenting Assistance Attorney, a Child's Best Interest Attorney and/or, with the agreement of the parties, a Parenting Master. It does not restrict the authority of the court to appoint non-attorneys to serve in the role of special advocates for a child or children. Such appointees may not act in a manner which other rules or statutes reserve for licensed members of the bar. Such volunteers may be invaluable to the court in order to assist appointed attorneys in investigation of the case, or may assist the child or children in adjustment to changed circumstances or surroundings, and may perform any number of other necessary duties which do not require the knowledge, skill, and ability of an attorney. Further, to the extent that these persons gain first-hand knowledge which is not of a hearsay nature, those persons may be called as fact witnesses, and may testify as to facts within their knowledge to the extent not prohibited by other rules.

[21] The following provisions of Rule 8 of the Rules of the Tennessee Supreme Court, the Rules of Professional Conduct (RPC), governing the attorney-client relationship or the attorney/neutral-party relationship, have no application to a Parenting Assistance Attorney: RPC 1.2, 1.4, 1.6, 1.14, 2.1, 2.2, 2.3, 2.4.

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NASHVILLE

Vice-Chair
Children and Family Affairs
Select Committee on
Children and Youth

Member of Committees
Health & Human Resources
Consumer & Employee Affairs

Subcommittee Chair
Domestic Relations

Member of Subcommittees
Employee Affairs
Mental Health
Public Health and Family Assistance

July 24, 2008

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano,

I am submitting my comments to the proposed GAL guidelines.

I am commenting to section 1 part XI. Inappropriate adult influence or manipulation (sometimes called PAS) otherwise known as Parental Alienation Syndrome shall never be used in any court motion or proceeding. This term and theory is junk science. The author of the theory of PAS is also the author of disturbing theories on pedophilia. He believes that all children are born with sexual needs and only society makes children feel bad about it. (see attached).

GALs should be chosen by random selection and if a conflict of interest between the GAL and any party to the proceeding is perceived by any party the court must appoint another GAL to the case. If a GAL takes a case knowing that there has been a previous contact, the GAL shall not be allowed to serve as such for this contact for a period of 7 years or they face punishment.

Sincerely,

Sherry Jones
State Representative
District 59

Dr. Richard Gardner: A Review of His Theories and Opinions on Atypical Sexuality, Pedophilia, and Treatment Issues

by Stephanie J. Dallam, RN, MSN, FNP

Reference: Dallam, S. J. (1998). Dr. Richard Gardner: A review of his theories and opinions on atypical sexuality, pedophilia, and treatment issues. *Treating Abuse Today*, 8(1), 15-23.

Introduction

Richard A. Gardner, M.D., is a prominent forensic expert with an extensive career of evaluating children, especially during custody disputes between parents. He is considered a leading authority in the field and has even been described as the "guru" of child custody evaluations (Quinn, 1991). Gardner has developed numerous theories and instruments on issues related to children and his work continues to serve as a basis for decisions affecting the welfare of children in courtrooms across the nation. In 1992, an article in *The National Law Journal* described Gardner "as one of the most prominent--some say dangerous--voices espousing the 'backlash' theory that there is an epidemic of vindictive women falsely accusing fathers of child sex abuse to gain leverage in child-custody disputes" (Sherman, 1993, p. 1). While Gardner 's theories about mass sexual abuse hysteria have been widely criticized, his views on bona fide child sexual abuse and his treatment recommendations for working with incestuous families have largely been ignored. This article provides an in-depth exploration of Gardner 's views on pedophilia and his therapeutic approach to working with families in which a child has been molested by a parent.

Gardner 's Background

Gardner is a practicing child psychiatrist, adult psychoanalyst, and clinical professor of child psychiatry at the College of Physicians and Surgeons at Columbia University . He has authored more than 250 books and articles with advice directed towards mental health professionals, the legal community, divorcing adults and their children (Sherman, 1993, p. 45). Gardner 's private publishing company, Creative Therapeutics, publishes his many books, cassettes, and videotapes. Gardner also has his own agent and maintains a website [1] which advertises his materials. Information available on Gardner 's website indicates that he has been certified to testify as an expert in approximately 300 cases, both criminal and civil, in more than 24 states. Gardner typically testifies for the defense in child sexual abuse cases.

Gardner 's Theory of Atypical Sexuality

"The younger the survival machine at the time sexual urges appear, the longer will be the span of procreative capacity ..."

Gardner (1992, pp. 18-32) has developed his own theory concerning the evolutionary benefits of deviant sexual practices or paraphilias. Gardner proposes that many different types of human sexual behavior, including pedophilia, sexual sadism, necrophilia (sex with

corpses), zoophilia (sex with animals), coprophilia (sex involving defecation), klismaphilia (sex involving enemas), and urophilia (sex involving urinating), can be seen as having species survival value and thus do "not warrant being excluded from the list of the `so-called natural forms of human sexual behavior.'" Such paraphilias may serve nature's purposes by their ability to enhance the general level of sexual excitation in society and thereby increase the likelihood that people will have sex, which then contributes to the survival of the species (Gardner, 1992, p. 20).

As part of his theory, Gardner (1992, pp. 24-5) proposes that pedophilia serves procreative purposes. Although the child cannot become pregnant, a child who is drawn into sexual encounters at an early age is likely to become highly sexualized and thus will crave sexual experiences during the prepubertal years. Such a "charged up child" is more likely to transmit his or her genes in his or her progeny at an early age. Gardner (1992, pp. 24-5) states: "The younger the survival machine at the time sexual urges appear, the longer will be the span of procreative capacity, and the greater the likelihood the individual will create more survival machines in the next generation."

Gardner 's Views on Pedophilia

"The sexually abused child is generally considered to be the victim," though the child may initiate sexual encounters by "seducing" the adult.

Despite Gardner 's emphasis on false allegations of sexual abuse, he admits that genuine sexual abuse of children is widespread and that the vast majority ("probably over 95%") of all sex abuse allegations are valid (Gardner, 1991, p. 7, 140). In fact, Gardner (1992, p. 670) considers sexual activities between adults and children to be a universal phenomenon which exist to a significant degree in every culture in the world. Similarly, "intrafamilial pedophilia (that is, incest) is widespread and ... is probably an ancient tradition" (Gardner, 1991, p. 119).

Gardner (1991, p. 118) suggests that Western society's is "excessively moralistic and punitive" toward pedophiles. Gardner maintains that "the Draconian punishments meted out to pedophiles go far beyond what I consider to be the gravity of the crime." The current prohibition of sex between adults and children is an "overreaction" which Gardner traces to the Jews.

It is of interest that of all the ancient peoples it may very well be that the Jews were the only ones who were punitive toward pedophiles. Early Christian proscriptions against pedophilia appear to have been derived from the earlier teachings of the Jews, and our present overreaction to pedophilia represents an exaggeration of Judeo-Christian principles and is a significant factor operative in Western society's atypicality with regard to such activities (Gardner, 1992, pp. 46-7).

Gardner (1992, p. 15) states: "There is good reason to believe that most, if not all, children have the capacity to reach orgasm at the time they are born." In addition, some children experience "high sexual urges in early infancy" and "the *normal* [italics in original] child exhibits a wide variety of sexual fantasies and behaviors, many of which would be labeled as `sick' or `perverted' if exhibited by adults" (Gardner, 1991, p. 12). Gardner (1986, p. 93) notes that "the sexually abused child is generally considered to be the victim," though the child may initiate sexual encounters by "seducing" the adult. Gardner (1986, p. 93) suggests that if the sexual relationship is discovered, "the child is likely to fabricate so that the adult will be blamed for the initiation."

The view that pedophilia is a sickness and a crime is a reflection of Western society's present position on this subject. As a product of Western culture, Gardner (1992, p. 49) states: "I too have come to believe that sexual activity between an adult and a child is a reprehensible act. However, I do not believe that it is intrinsically so; in other societies and other times it may

not be psychologically detrimental." "The determinant as to whether the experience will be traumatic is the social attitude toward these encounters" (Gardner 1992, pp. 670-1).

Gardner 's Treatment Recommendations for Sexually Abused Children

Gardner (1991, p. 66) notes that he does not conduct therapy for sex abuse, unless he is "100 percent convinced that the abuse has indeed taken place." In addition, Gardner (1992, p. 535) states: "It is *extremely* important for therapists to appreciate that the child who has been genuinely abused may *not* need psychotherapeutic intervention" [italics in the original].

There is a whole continuum that must be considered here: from those children who were coerced and who gained no pleasure (and might even be considered to have been raped) to those who enjoyed immensely (with orgastic responses) the sexual activities. (Gardner, 1992, p. 548).

Treatment is only warranted if the child is symptomatic in important areas of his or her life, such as in home, school or in relationships with peers (Gardner, 1992, p. 536). If treatment is needed, Gardner (1992, p. 536) recommends that a single therapist should be used and the whole family (including the perpetrator) should be included in the therapy. Gardner (1992, p. 528) warns against choosing a therapist who assumes that a sexual encounter between an adult and a child will necessarily cause the child to suffer severe psychiatric disturbances, as such a therapist will be "compromised in the treatment of these children."

Of relevance here is the belief by many of these therapists that a sexual encounter between an adult and a child--no matter how short, no matter how tender, loving, and non-painful--automatically and predictably must be psychologically traumatic to the child. (Gardner, 1992, pp. 670-1)

According to Gardner : "The determinant as to whether the experience will be traumatic is the social attitude toward these encounters" (Gardner, 1992, pp. 670). Although children should be protected from further abuse, Gardner (1992, p. 537) recommends that special care should be taken by the therapist to not alienate the child from the molesting parent. The removal of a pedophilic parent from the home "should only be seriously considered after all attempts at treatment of the pedophilia and rapprochement with the family have proven futile" (Gardner, 1991, p. 119). Even pedophiles who abuse children outside of the home should first be given the opportunity for community treatment. "If that fails then and only then should some kind of forced incarceration be considered" (Gardner, 1991, p. 119). Conversely, Gardner (1992, p. 590) notes that people who have exhibited an ongoing pattern of pedophilia are not likely to be cured, and that meaningful therapy cannot occur with either the child or the father if there is a high risk of recurrence.

Therapy with the Child

Gardner (1992, p. 535) views post-traumatic stress disorder (PTSD) as "nature's natural form of systemic desensitization." Gardner recommends that the mother be discouraged from involving herself with litigation [2] as "it will interfere with the natural desensitization process and will subject the child to a wide variety of interrogations that will inevitably be damaging" (Gardner,1992, p. 577). Moreover, legal and psychiatric investigation of the trauma may cause more psychological damage to the child than that done by the abuse (Gardner, 1988, p. 75). The PTSD-desensitization process involves repetition of the trauma verbally, emotionally, and during fantasy play (Gardner, 1992, p. 532). The child becomes preoccupied with thoughts and feelings about the trauma. Each time the child relives the experience, it becomes a little more bearable (Gardner 1988, p. 75). Over time "the preoccupations diminish often to the point where they may be entirely forgotten" (Gardner, 1992, p. 536). Eventually, the process may help the child to "bury the whole

incident" (Gardner, 1988, p. 75). According to Gardner (1992, p. 536): the goal of therapy should be to "facilitate the desensitization process, not artificially prolong it" with psychotherapeutic "muckraking."

If the child feels guilt about participating in the sexual activities with adults, Gardner (1992, p. 549) recommends that the child be told that in other societies such behavior is considered normal and that our society has an exaggeratedly punitive and moralistic attitude about adult-child sexual encounters.

Older children may be helped to appreciate that sexual encounters between an adult and a child are not universally considered to be reprehensible acts. The child might be told about other societies in which such behavior was and is considered normal. The child might be helped to appreciate the wisdom of Shakespeare's Hamlet, who said, "Nothing's either good or bad, but thinking makes it so." (Gardner, 1992, p. 549)

Gardner notes that the child may exhibit strong sexual urges when the abuse discontinues. These children should be encouraged to masturbate (1992, pp. 580, 585).

Therapy with the Mother

> **"Perhaps she can be helped to appreciate that in the history of the world his behavior has probably been more common than the restrained behavior of those who do not sexually abuse their children."**

Treatment for the mother should center around defusing her anger at her husband and helping her to become more sexually responsive to him.

If the mother has reacted to the abuse in a hysterical fashion, or used it as an excuse for a campaign of denigration of the father, then the therapist does well to try and "sober her up".... Her hysterics ... will contribute to the child's feeling that a heinous crime has been committed and will thereby lessen the likelihood of any kind of rapproachment with the father. One has to do everything possible to help her put the "crime" in proper perspective. She has to be helped to appreciate that in most societies in the history of the world, such behavior was ubiquitous, and this is still the case. (Gardner, 1992, pp. 576-7)

According to Gardner (1992, p. 584-5), mothers of sexual abuse victims are often passive, masochistic, social isolates who were often themselves sexually molested during childhood. As a result, residual anger toward her sexual molester may be interfering with her relationship with her husband. Gardner suggests that the therapist should help her to reduce such residual anger. Gardner (1992, p. 585) states: "Perhaps she can be helped to appreciate that in the history of the world his behavior has probably been more common than the restrained behavior of those who do not sexually abuse their children." In addition, the mother is likely to have sexual problems and may consciously or unconsciously sanction the abuse because of her own sexual inhibitions.

She may never have achieved an orgasm--in spite of the fact that she was sexually molested, in spite of the fact that she had many lovers, and in spite of the fact that she is now married. (Gardner, 1992, p. 585)

Gardner (1992, pp. 585) suggests that the therapist should help her achieve sexual gratification. Gardner notes that "verbal statements about the pleasures of orgastic response are not likely to prove very useful. One has to encourage experiences, under proper situations of relaxation, which will enable her to achieve the goal of orgastic response." Gardner (1992, p. 585) suggests that vibrators can be extremely useful in this regard, and "one must try to overcome any inhibition she may have with regard to their use." Gardner (1992, p. 585) states: "Her own diminished guilt over masturbation will make it easier for her to encourage the practice in her daughter, if this is warranted. And her increased sexuality

may lessen the need for her husband to return to their daughter for sexual gratification."

Therapy with the Pedophilic Father

> **"He has to be helped to appreciate that, even today, [pedophilia] is a widespread and accepted practice among literally billions of people."**

Gardner (1992, p. 588) does not believe in doing therapy with fathers who deny committing sexual molestation. If father desires treatment, the therapist should focus on enhancing his self-esteem. This is accomplished by helping him to appreciate that "there is a certain amount of pedophilia in all of us" and that "pedophilia has been considered the norm by the vast majority of individuals in the history of the world" (Gardner 1992, pp. 592-3).

He has to be helped to appreciate that, even today, it is a widespread and accepted practice among literally billions of people. He has to appreciate that in our Western society especially, we take a very punitive and moralistic attitude toward such inclinations. He has had a certain amount of back (sic) luck with regard to the place and time he was born with regard to social attitudes toward pedophilia. (Gardner, 1992, p. 593)

In addition to feeling sorry for his own misfortune, the father should be helped to feel pity for the child for having been "a victim in a society that considers his [the father's] behavior a heinous crime and/or a mortal sin" (Gardner 1992, p. 592). If the father feels no guilt, then the therapeutic goal is to increase it. Gardner (1992, p. 594) notes that the father may rationalize that pedophilia is an ancient tradition, a worldwide practice, and that there is nothing at all to be guilty about.

Such fathers have to be helped to appreciate that although what they say on this point is true, this does not justify its practice in *our* [italics in original] society, even though our society overreacts to it. It is because our society overreacts to it that children suffer. (Gardner, 1992, p. 594-5)

Despite the molesting father's "bad luck" regarding the place and time he was born, he "must learn to control himself if he is to protect himself from the Draconian punishments meted out to those in our society who act out their pedophilic impulses" (Gardner 1992, p. 594). However, therapy with the father should not be spent focusing on the primary problem -- sexual molestation. Instead, therapy should be spent "talking about other things" as the goal of therapy is "to help people forget about their problems" (Gardner, 1992, p. 592).

Case Example: The Girl and the Bus Driver

> **". . . except for a certain amount of sexual frustration that was not gratified â€¦ the 4-year-old had not been significantly traumatized by these encounters."**

In his book, *True and False Accusations of Child Sex Abuse* , Gardner (1992, pp. 608-12) provides a case example of his treatment of a 4-year-old child ("Jane") who was the victim of extra-familial child sexual abuse. Jane's mother consulted Gardner because her daughter was sexually acting out. The child later revealed to her mother that she was being molested by her nursery school bus driver. The driver had rearranged her route so that the little girl was the last child dropped off. Prior to taking the child home, the bus driver would park in an abandoned parking lot and sexually molest the child. The mother brought the situation to the attention of the school authorities and the bus driver reluctantly admitted that she had indeed molested the child. The school dismissed the driver. The mother sought Gardner 's opinion on whether she should report the bus driver to the police.

Gardner strongly discouraged reporting the child molester to the police. (According to Gardner , this event happened in the late 1970s -- before mandated reporting.) Gardner states: "I discouraged the mother from doing so with the argument that the child would be

subjected to a series of police investigations and might possibly be involved in a criminal trial. Although such reporting might be of some benefit to society, there was no question that Jane herself would be psychologically damaged. Furthermore, I told the mother that it would make it much more difficult for me to treat Jane because such exposures would interfere with the natural desensitization process, would be likely to enhance guilt, and would have other untoward psychological effects." The mother complied and the bus driver was not reported.

Gardner determined that the child had been molested at a frequency of two to three times a week over a period of two to three months. The bus driver would masturbate Jane, but not to orgasm. Gardner (1992, p. 612) concluded that "except for a certain amount of sexual frustration that was not gratified, the 4-year-old had not been significantly traumatized by these encounters."

Comparison of Gardner 's Views with Those of NAMBLA

The North American Man/Boy Love Association (NAMBLA) is a political, civil rights and educational organization that advocates sex between adult males and male children. Mary De Young (1989), associate professor of sociology at Grand Valley State University , outlined the arguments used by NAMBLA to justify, normalize, and/or rationalize sex between adults and children. NAMBLA members were found to utilize four major strategies: denial of injury; condemnation of the condemners; appeal to higher loyalties; and denial of the victim. Although literature by NAMBLA is not cited by Gardner , similar strategies are mirrored throughout his writings (See Figure 1).

Figure 1: How Gardner 's Views Compare with Those of the North American Man/Boy Love Association (NAMBLA)

NAMBLA	GARDNER
1. Denial of Injury	
Redefines adult sexual behavior with children in positive terms. Contrary to popular belief, no injury or harm is incurred by children from engaging in sex with adults. Any harm that follows is due to the inappropriate and prejudicial reactions of ignorant people and society.(De Young, 1989).	Sexual activities between adults and children are a universal phenomenon which may be part of the natural repertoire of human sexual activity. Such encounters are not necessarily traumatic; the determinant as to whether the experience will be traumatic is the social attitude toward these encounters. (Gardner, 1992, pp. 1-43; 1992, p. 525; 1992 pp. 670-71).
2. Condemnation of the Condemners	
Redirects the condemnation and censure it has received from larger society back on the society itself. Thus, those who condemn sex between adults and children are characterized as hypocritical and deserving of condemnation themselves. Professionals in the field of child sexual abuse, criminal justice and mental health systems are mocked and	Therapists and lawyers are motivated by a combination of money, sex and power to fuel a national sexual abuse hysteria. Professionals who do child sexual abuse evaluations are portrayed as poorly trained, ill-qualified, and incompetent people who ask leading questions and utilize coercive techniques which are likened to physical torture. Many unlicensed therapists are "charlatans, and/or psychopaths, and/or

accused of engaging in the same or even more victimizing or exploitative acts as those for which NAMBLA members are accused. The "protectors" of children are the real perverts, the real child abusers, who take advantage of the innocence and inexperience of children to spread guilt and fear of sex with adults. (De Young, 1988; 1989).	incompetents." Investigation of sexual abuse claim may cause greater damage than that done by the abuse. (Gardner, 1988, p. 75; 1991, p. 126; 1991, pp. 45-89; 1992, p. 526).
3. Appeal to Higher Loyalties	
Normalizes pedophilia by insisting that the interests of a higher principle are being served. This higher principle is the liberation of children from what it characterizes as the repressive bonds of society. NAMBLA portrays itself as an organization that promotes the freedom of children to live and love as they please. (De Young, 1989).	Gardner claims pedophilia is the norm in most cultures and our Western culture is excessively inhibited. Gardner believes that, in the history of the world, men who sexually abuse their children have "probably been more common than the restrained behavior of those who do not sexually abuse their children." Gardner theorizes that pedophilia is a natural phenomenon which may enhance the survival of the species. (Gardner, 1992, pp. 1-43; 585).
4. Denial of the Victim	
The child is reconceptualized as having deserved or brought on the deviant behavior. Children are viewed as seducing adults and thus the responsibility of offending individuals for their behavior and its consequences is diminished. (De Young, 1989).	"Normal children exhibit a wide variety of sexual fantasies and behaviors, many of which would be labeled as 'sick' or 'perverted' if exhibited by adults." Gardner believes that most children have the capacity to reach orgasm at the time they are born, and may develop strong sexual urges during the first few years of life and initiate sexual encounters with adults. "At the present time, the sexually abused child is generally considered to be the victim," though the child may initiate sexual encounters by "seducing" the adult. If the sexual relationship is discovered, "the child is likely to fabricate so that the adult will be blamed for the initiation." (Gardner, 1986, p. 93; 1992, p. 12; 1992, p.15).

Conclusion

Dr. Richard A. Gardner is a prominent forensic expert whose work has served as a basis for courtroom decisions affecting the welfare of children across the nation. His theories regarding pedophilia and paraphila as well as his recommendations regarding therapeutic treatment for the sexually abused child, the child's mother, and the pedophiliac father are unique and do not appear to fall within the mainstream of generally accepted clinical practice.

ENDNOTES

1. http://www.rgardner.com

2. Gardner is an ardent critic of mandated reporting and has lobbied Congress to abolish mandated reporting and immunity for those who report abuse (Gardner, 1993).

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