CURRENT ISSUES CONCERNING GUARDIANS AD LITEM AS EXPERT WITNESSES
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The following is an outline of three recent cases that raise issues concerning the proper role of the Guardian ad Litem, and whether a GAL must be qualified as an "expert" in order to offer "opinion" testimony, and whether the GAL can rely on and present hearsay evidence in support of his/her recommendations to the Court concerning the best interest of the minor child.

In ***S.G. v. D.C.*, 13 So.3d 269, 274 & n. 5 (¶ 13) (Miss. 2009)**, the Court briefly mentioned the "expert witness" issue concerning the qualifications of a Guardian ad Litem to offer "opinion testimony" under the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and adopted by the Mississippi Courts in *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 35-40 (Miss. 2003). **However, the Court did not offer a detailed analysis of how the Daubert standard applied to GALs in general.** Rather, the Court discussed the limitations imposed on a GAL by Daubert in offering opinion testimony without having proper qualifications.

In *S.G. v. D.C.*, the Court criticized the GAL for offering the opinion the minor child had been coached or brainwashed into making false disclosures of alleged sexual abuse, without also presenting to the trial court the evidence from numerous counselors and therapists who were of the opinion that the child had been truthful in making the disclosures of abuse. Id. at 282-83 (¶ 58). Without addressing the broader issue of whether GALs must be qualified as "experts" in regard to the opinion testimony that GALs generally offer in making recommendations to the courts about the "best interests" of children, the Court held that a GAL may not offer an opinion discounting or ignoring the opinions of qualified professionals concerning the truthfulness of a child's disclosures about sexual abuse, if the GAL is not specifically trained and qualified in the field of forensic examinations and/or sexual abuse. Id. at 274 (¶ ¶ 13-15).

The holding in *S.G. v. D.C.* was cited with approval in *Jones v. Jones*, 43 So.3d 465, 480 (¶ 37) (Miss.App. 2010), where the Court of Appeals explained that **"guardian ad litem qualifications should be based on the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)." (emphasis added).** However, the Court again did not address exactly how the *Daubert* standards applied to GALs in regard to the general opinion testimony that may be offered to the trial court about the best interest of the minor children.

In *Jones*, the Court held that the GAL **was not qualified as an expert "in the area of child sexual abuse or investigation thereof by training, certification, or experience," and therefore, the GAL was not qualified to "investigate child sexual abuse or to render an expert opinion in such matters."** Id. at 480 (¶ 37) (emphasis added). In addition, the Court criticized the GAL for failing to properly investigate the issue with the assistance of a qualified professional, noting: **"Glaringly absent from the guardian ad litem's report is any kind of**

qualified expert opinion, DHS investigation, law enforcement investigation, or other expert inquiry as to allegations of child sexual abuse raised by [plaintiff's] counsel." Id. at 480 (¶ 37). Under these circumstances, the Court of Appeals concluded:

> ¶ 40. **Due to the lack of assistance or investigation by a qualified professional in the area of child sexual abuse, we remand so that the chancellor may obtain necessary assistance in such matters to assist the court prior to making any factual determination as to whether evidence of sexual abuse exists and any related custody matters.** ... In S.G., 13 So.3d at 274(¶ 13), the court surmised that without a qualified expert assessment, the guardian ad litem's recommendations provided only personal opinions of the guardian ad litem that she was not qualified to render. The conclusion, therefore, lacked a factual basis since there was no appropriate inquiry. **Similarly, in this case, as stated, the record fails to reflect that the guardian ad litem possessed the qualifications to investigate child abuse, to determine substantiation, to interview children regarding allegations of sexual abuse, or to make any expert conclusions as to whether the allegations were substantiated or not.** The determination as to whether sexual abuse occurred is a factual determination to be made by the chancellor. Here, the chancellor was not provided any factual information regarding any inquiry as to the sexual abuse of the children **AND NO QUALIFIED OPINION OF ANY FACTS DERIVED THEREFROM.** Thus no accurate conclusion could properly be drawn. We, therefore, reverse the issue of Steven's unsupervised visitation, and remand this case for further proceedings consistent with this opinion.

Jones, 481 (¶ 40) (emphasis added). Thus, in *Jones*, the only substantive issue addressed by the Court of Appeals was to affirm the fact that a GAL may not offer opinion testimony concerning sexual abuse unless the GAL has the appropriate qualifications to be recognized as an expert witness in that field.

Finally, in *McDonald v. McDonald*, 39 So.3d 868, 883-84 (¶ 51) (Miss. 2010), the Supreme Court addressed the issue of whether Guardians ad Litem should be deemed **"experts,"** and whether GALs can rely on and/or offer opinions based on hearsay testimony. The majority opinion by Justice Randolph (joined by 4 justices, with Justices Pierce, Waller and Graves concurring in part) held that the issue of whether Guardians ad Litem could offer testimony at trial concerning hearsay statements obtained in the course of their investigation was controlled by the Rules of Evidence. In addition, the Court rejected the mother's arguments that the GAL acted beyond her authority by offering hearsay testimony without being qualified as an expert. Id. at 883 (¶ 50).

The mother contended that the GAL exceeded the proper role of a GAL by offering hearsay testimony, " ... as well as taking 'on a role as a litigant/expert' by providing a written report to the court, making recommendations, discussing the views of the court-appointed

counselor, filing a motion, testifying, examining witnesses, and meeting ex-parte with the chancellor." Id. at 882 (¶ 47). **However, other than matters involving the hearsay issue, the Court held that the in carrying out her duties, the GAL "was simply following the provisions of the GAL statute and the pronouncements of this Court."** Id. at 882 (¶ 48) (citing *S.G. v. D.C.*, 13 So.3d 269, 282 (Miss.2009)). The Court noted that the GAL in *McDonald* "did not offer the type of testimony criticized in S.G. ... [but merely] reported on matters required by her appointment, and consistent with a GAL's duties as outlined in S.G." Id. at 882 (¶ 48).

These duties included "... the affirmative duty to zealously represent the child's best interest ... [by being a] vigorous advocate free to investigate, consult with [the children] at length, marshal evidence, and to subpoena and cross-examine witnesses." Id. at 883 (¶ 49). The Court had previously "emphatically proclaim[ed] to the bench and bar that ... the guardian must submit a written report to the court during the hearing, or testify and thereby become available for cross-examination by the natural parent." Id. at 883 (¶ 49) (citing D.J.L. v. Bolivar County Department of Human Services ex rel. McDaniel, 824 So.2d 617, 623 (Miss. 2002)). The Court concluded that "... the GAL would have been derelict in her duty to zealously represent the boys' best interests if she had failed to interview the boys, consider the opinions of experts, marshal evidence, make an independent recommendation, question witnesses, submit reports, and make herself available for cross-examination." Id. at 883 (¶ 49).

The facts in *McDonald* are complex, as this case involved three separate trial court proceedings that were all appealed and consolidated. In the first case, the GAL provided a written report that contained hearsay statements obtained from individuals during the course of her investigation. In addition the GAL also testified at the hearing, and the trial court overruled the mother's objection and allowed the GAL to offer testimony about the hearsay statements that the GAL had obtained from the children's teachers. **The Supreme Court held that allowing such testimonial hearsay was error. However, the Court noted specifically that the hearsay contained in the GAL's written report involved an issued that was not properly before the Court. Even though the Court held that the chancellor erred in allowing the GAL to offer testimonial hearsay at the hearing, the majority opinion affirmed the Chancellor's decision without offering any analysis to show that the error was harmless.**

The hearsay issues in regard to the second and third hearings were based on **testimonial hearsay offered by the GAL, as no additional written reports were submitted by the GAL.** In regard to the second case, the mother objected to the oral report of the GAL, because it involved **"hearsay testimony from a nonexpert witness."** Id. at 877 (¶ 26). The Chancellor overruled the objection noting that the objection was whether the case law and the applicable rules "allow for a [GAL] to simply regurgitate what's been said to him or to her," and the chancellor noted: "The historical practice is that we allow it in the same way that we allow an expert to regurgitate hearsay. It's patently hearsay but - - I'm going to allow it." Id. at 878 (¶ 26).

However, on appeal, the Supreme Court concluded that the mother had waived the

hearsay issues raised in Case Two. Because the mother had entered an agreed order after the testimony at the hearing was concluded, and the Chancellor had not been forced to issue a formal decision in regard to the issues asserted at the hearing, the hearsay issues in Case Two were deemed moot on appeal. Id. at 878 (¶ 26) & 884 (¶ 53).

In regard to the third hearing, the GAL presented only an oral report, and the mother **objected on grounds other than hearsay,** and the chancellor overruled those objections. During the GAL's oral report, which included hearsay, the Court noted that the mother did not object to those portions of the testimony that might have been subject to hearsay rulings. Therefore, since **"there was no contemporaneous objection to testimony based on hearsay,** the trial court was not afforded an opportunity to rule on specific testimony on the hearsay evidence issue." Id. at 884-85 (¶ 54). Therefore, the majority opinion concluded that the hearsya issue had not been properly preserved for appeal in Case Three.

The mother also contended in *McDonald* that the rules of evidence which prohibit hearsay necessarily required the repeal of Miss. Code Ann. § 43-21-121(3)which sets forth the duties of a guardian ad litem to "investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest." **However, the Court rejected that argument and held that the statutory duties of the GAL were consistent with the traditional roles required of a GAL, which predate the enactment of the statutes.** Miss. Code Ann. § 43-21-121(3) (Rev.2009). The Court noted that the duties of a GAL to investigate are not governed by the rules of evidence.

Justice Dickinson issued a specially concurring opinion in *McDonald* which holds that GALs must be qualified as "experts" under the Mississippi Rules of Evidence in order to offer "opinion testimony" about any issue. However, the court did not address the specific standards under *Daubert* by which an attorney could be qualified as an "expert" in the field of Guardian ad Litem work.

The primary issue addressed in the specially concurring opinion in *McDonald* was whether the GAL can offer testimony at a hearing that is based on "hearsay" information that the GAL obtained in the course of the investigation. Justice Dickinson (with four other justices) held that **testimonial hearsay by a GAL is prohibited**, **unless one of the traditional hearsay exceptions recognized under the Rules of Evidence applies.** This opinion was written specifically to counter Justice Pierce's Concurring Opinion (joined by two justices) in *McDonald*, which argued that under the Youth Court Rules, when a chancery court is addressing issues of abuse and neglect that initially arise in the context of a custody proceeding, the Youth Court rules and procedures may be followed by the chancellor. This would mean that hearsay testimony from the GAL would be admissible, as hearsay is allowed under the Youth Court Procedures where the rules of evidence are relaxed.

OVERVIEW OF THE CASES

A. In S.G. v. D.C., 13 So.3d 269 (Miss. 2009), the Court held:

1. The GAL can serve three distinct roles:

   a. **Advisor to the Court** - - conducts investigation and prepares written report but **does not actively participate in the hearing**

   b. **Child's attorney** - - advocates what the child wants, just as an attorney for an adult

   c. **Hybrid Role - - BEST INTEREST ATTORNEY** - - conducts an investigation and makes a comprehensive report to the Court of the information discovered; then makes recommendations as to the best interest of the child and **actively participates in the hearing by examining and cross-examining witnesses.**

   d. The Court held that the GAL may be allowed to cross-examine witnesses, but the Court did not explain the full scope of the GAL's role as an attorney in the litigation. As a practical note, some trial courts have held that the GAL may fully participate in the trial by calling witnesses, while others limit the GAL to merely cross-examining witnesses, and still other chancellors do not allow the GAL to actively participate in the hearings at all.

2. The Court also noted in footnote 5 that the GAL **may be qualified as an expert in appropriate circumstances.** The Court referenced the Daubert standard for qualifying expert witnesses. However, the real issue addressed by this footnote and this section of the opinion was the fact that the GAL was not an expert in the area of sexual abuse, and thus could not render opinions on this issue, i.e., that sexual abuse had not occurred.

3. The Court explained that the chancellor should clearly define the duties and role of the GAL in the Order of Appointment. However, this role can be revised and expanded as needed during the course of the litigation.

4. The GAL erred in substituting his opinion on the issue of sexual abuse for the opinions of the child's counselors and therapists, because the GAL was not qualified as an expert on the issue of sexual abuse or forensic evaluations. Unless the GAL has special training, the GAL cannot ignore the opinions rendered by qualified professionals on an issue such as sexual abuse.

B. JONES v. JONES, 43 So.3d 465, 480 (Miss. App. 2009)

1. The GAL erred in failing to obtain for the child the services of a counselor who was an expert in the area of sexual abuse.

2. The Court criticized the GAL because there was no inquiry made directly to the children about inappropriate touching or sexual contact, and because **the GAL was not qualified as an expert in the area of sexual abuse.**

3. The GAL Report failed to reflect the involvement of any social worker, child psychologist, or other expert trained in the area of sexual abuse

4. Absent special training, a GAL is not qualified to render expert opinions in the area of sexual abuse. In appropriate cases, the GAL must request a court-appointed qualified expert when specialized training is needed in the area of counseling, therapy or sexual abuse.

C. McDONALD v. McDONALD, 39 So.3d 868 (MISS. 2010)

FACTS: Three different custody decisions by the trial court were consolidated for this appeal. In Case One, the Court held that it was error for the chancellor to allow the Guardian ad Litem to inject **testimonial hearsay as substantive evidence at trial**; however, the Court affirmed the Chancellor without specifically analyzing whether this error was "harmless." [¶¶ 47 & 51 and footnote #7.] This holding appears to be contradicted in ¶ 63, where the majority held that the chancellor's **"judgments on legal questions were not in error.**"

In Cases Two and Three there were no additional written reports by the GAL, but rather, only verbal reports offered at the emergency hearings. The Court held that the issue of improper hearsay by the GAL through her testimony had been waived by the entry of an agreed order (Case Two), or had not been properly preserved through contemporaneous objections (Case Three) in regard to the hearsay issues that were asserted on appeal.

1. Justice Randolph wrote the majority opinion which was joined by four justices. That opinion specifically noted that **the issue of whether hearsay in the GAL's report would require the entire report to be excluded was not before the Court,** apparently because those issues had been waived or not properly asserted. The Court stated in Footnote 7:

> FN7. Hearsay testimony should not to be confused with a GAL's written reports, which sometimes, by their very nature, will include statements,

which, if offered into evidence at trial to prove the truth of the matter asserted, would be inadmissible hearsay, unless they qualify under one of the exceptions to the rule against hearsay. Any such inadmissible hearsay, however, would not require exclusion of the entire report. **This issue is not before the Court this day.**

2. In spite of the majority's holding that the trial court's admission of hearsay testimony by the GAL was error, the majority opinion concluded: "¶ 63. We affirm the judgments of the Chancery Court of Rankin County. **The judgments on the legal questions are not in error**, and substantial evidence exists to support the findings of fact."

3. Justice Dickinson wrote a **SPECIALLY CONCURRING OPINION** which was joined by four Justices, including Randolph. This opinion was written specifically to disagree with Justice Pierce's concurring opinion (joined by 2 justices) that approved of the GAL offering hearsay testimony, pursuant to the Youth Court Rules and traditional practice in this area. Justice Pierce noted: "

4. Justice Dickinson identified the following governing principles:

a. The GAL may not offer **testimonial hearsay** as substantive evidence at trial if the proceedings are not conducted pursuant to the Youth Court Rules. [¶ ¶ 65-66.]

b. Justice Dickinson noted: "¶ 68. Certainly I agree that guardians ad litem - - properly appointed under Rule 706 and qualified as experts under Rule 702 may rely on hearsay in reaching their opinions. **But hearsay used to support an expert's opinion is quite different from hearsay admitted as substantive evidence.**"

c. Thus, the rule affirmed by five Justices is that if a Guardian ad Litem is appointed and qualified as an expert under Miss. R. Evid. 702 and 706, then the GAL may rely on hearsay in reaching her opinions, and the GAL can include hearsay statements in her written report. However, the GAL may not offer hearsay as substantive testimony unless it is admissible under one of the applicable rules of evidence.

d. Justice Dickinson did not address the standards for qualifying a GAL as an expert in McDonald, but in *S.G. v. D.C.*, 13 So.3d 269, n. 5 (Miss. 2009), he had referenced the Daubert standard. The only formal requirement for serving as a GAL is 6 hours annually of training approved by the judicial college.

5. **JUSTICE PIERCE CONCURRING OPINION** (2 justices joined): The Concurring opinion by Justice Pierce (a former chancellor) noted that "Guardians ad litem are sometimes appointed in child-custody cases pursuant to Mississippi Code Sections 43-21-121 and 93-11-65." **These statutes involve mandatory appointments that are required in cases alleging abuse and neglect of the child. Justice Pierce approved this special rule for GALs apparently out of concern for empowering the trial courts to take immediate action to protect children from abuse and neglect.**

Section 93-11-65 directs the appointment of a guardian ad litem in matters where charges of abuse or neglect have been made and requires "proceedings in chancery court on the abuse or neglect charge shall be confidential in the same manner as provided in youth court proceedings." Miss.Code Ann. § 93-11-65(4) (Rev.2004).

In such cases, GALs appointed under Miss. Code Ann. § 93-11-65(4) are appointed pursuant to the procedures set forth in Miss. Code Ann. § 43-21-121, and traditionally, the Rules of Evidence have been relaxed in youth court proceedings. In Interest of T.L.C., 566 So.2d 691, 700 (Miss.1990). Therefore, Justice Pierce concluded that when guardians ad litem are appointed pursuant to either of these two statutes, the rules of evidence may be relaxed.

Justice Pierce recommended that Mississippi adopt the procedure followed in Massachusetts, where the courts have held that "Guardian ad litem reports may properly contain hearsay information. All that is required is that the guardian ad litem be available to testify at trial and that the source of the material be sufficiently identified so that the affected party has an opportunity to rebut any adverse or erroneous material contained therein." Id. at 888-89 (¶ 72). HE also noted that "... the majority, if not all, of the chancellors in Mississippi follow this procedure - - and are correct in doing so." Id. at 889 (¶ 73).

JUSTICE PIERCE RECOMMENDED: "As a member of the Supreme Court Rules Committee on Civil Practice and Procedure, I recommend we adopt a rule specifically for guardians ad litem with guidance from chancellors, practitioners, guardians ad litem and other interested parties."