


The Role of the Guardian Ad Litem

Shirley T. Kennedy
Mississippi College School of Law




The GAL in Mississippi

What Is The Training Requirement?

Miss. Code Ann. § 43-21-121(4) states:

"The court may appoint either a suitable attorney or a suitable layman as guardian ad litem. In cases where the court appoints a layman as guardian ad litem, the court shall also appoint an attorney to represent the child. From and after January 1, 1999, in order to be eligible for appointment as guardian ad litem, such attorney or lay person must have received child protection and juvenile justice training provided by or approved by the Mississippi Judicial College within the year immediately preceding the appointment."

If an allegation of abuse or neglect arises during a custody proceeding, Miss. Code Ann. 93-5-23 and 93-11-65 provide that the guardian ad litem appointed must meet the qualifications set out in 43-21-121(4).




What Duties Does a GAL Have in Mississippi?

In the Interest of R.D., 658 So. 2d 1378 (Miss. 1995)

"The guardian ad litem is one primarily charged with, and looked to, for the protection of children's interests when judicial proceedings arise"

"Judges have an obligation to appoint a guardian ad litem to represent every minor alleged to be abused or neglected under the guardian ad litem statute, and failure results in violation of the child's due process rights to representation."

"Children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses."





What Duties Does a GAL Have in Mississippi?

In the Interest of D.K.L. (Miss. 1999)

Miss. Code Ann 43-21-121 (3)

"In addition to all other duties required by law, a guardian ad litem shall have the duty to protect the interest of a child for whom he has been appointed guardian ad litem. The guardian ad litem shall investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest. The guardian ad litem is not an adversary party and the court shall insure that guardians ad litem perform their duties properly and in the best interest of their wards. The guardian ad litem shall be a competent person who has not adverse interest to the minor. The court shall insure that the guardian ad litem is adequately instructed on the proper performance of his duties."





What Duties Does a GAL Have in Mississippi?

The Statute Requires That the GAL Perform the Following Duties:

- Independently investigate
- M**ake recommendation to the court or enter reports as necessary
- B**e a competent person
- N**ot have an adverse interest to the child
- R**eceived adequate instruction, and
- R**eceived training by the Mississippi Judicial College within the preceding year.





Must the GAL Personally Interview the Child?



YES

In its 2001 decision in *M.J.S.H.S. v. Yalobusha County DHS*, the Court has also made it clear that the GAL must personally interview the child for whom he is serving as GAL.



Must the GAL Personally Interview the Child?

- Visiting with the children to ascertain their current status
- Being prepared to testify as to the present health, education, estate and general welfare of the children, which means interviewing the children, their current custodians, and prospective adoptive parents.
- Reviewing records, such as school grades and current medical and/or psychological records, in addition to any records already held by social workers and therapists.
- Some contact with the parent who objected to his or her termination of his/her parental rights.



Do you have to independently verify everything you have been told?

D.J.L. v. Bolivar County DHS, August 22, 2002

- The GAL must make certain to make a record that he interviewed the children.
- He must submit a written report or testify.
- Always maintain an open mind when you are doing the investigations





Role of GAL's in TPR & Contested Adoptions

E.M.C. v. S.V.M. and W.S.M., 695 So. 2d 576, 581 (Miss. 1997)

"It makes little difference whether the parties referred to the proceeding as an adoption proceeding or termination of parental rights proceeding: the two are not separable under those circumstances and the appointment of a GAL is mandatory."

In the Interest of R.D. and B.D., 658 So. 2d 1378,1384 (Miss. 1995)

"The children's due process rights to representation cannot and will not be ignored by this Court. Whether requested or not, judges have the obligation to appoint a GAL to represent every minor alleged to be abused or neglected the statute requires."

● ● ● When Must a GAL be Appointed?

Mandatory Appointment

- ✓ **Miss Code Ann 4-21-121(1) Youth Court Cases**
 - ✗ When a child has no parent, guardian or custodian;
 - ✗ When the youth court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;
 - ✗ When the parent is a minor or person of unsound mind;
 - ✗ When the parent is indifferent to the interest of the child or if the interests of the child and the parent, considered in the context of the cause, appear to conflict;
 - ✗ In every case involving an abused or neglected child which results in a judicial proceeding

- ✓ **Miss Code Ann 93-5-23 Chancery Court cases involving abuse**
 - ✗ The court may investigate, hear and make a determination in a custody action when a charge of abuse and /or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121 who shall be an attorney. The procedure to be followed

● ● ● When Must a GAL be Appointed?

Mandatory Appointment

- ✓ **Miss Code Ann 93-15-107(1) Termination of Parental Rights**
 - ✗ A guardian ad litem must also be appointed during termination of parental rights proceedings
 - ✗ Lutrell v. Kneisly, 477 So. 2d 1384 (Miss. 1983)

- ✓ **Miss Code Ann 93-17-8 Contested adoption or adoption agency involved**
 - ✗ Whenever an adoption becomes a contested matter, whether after a hearing on a petition for determination of rights under Section 93-17-6 or otherwise

● ● ● When May a GAL Be Appointed?

Discretionary Appointment

- ✓ **Miss Code Ann 9-5-89 Infant or defendant of unsound mind**
 - ✗ The court may appoint a guardian ad litem to an infant or defendant of unsound mind. . . . [if] the court shall consider it necessary for the protection of the interest of such defendant."

- ✓ **Miss Code Ann 43-21-121(1)(f) Any other instance when in child's best interest**
 - ✗ "In any other instance where the youth court finds appointment of a guardian ad litem to be in the best interest of the child."

● ● ● When is the Proper Timing of Appointment

Miss Code Ann 43-21-121(2)

The guardian ad litem must be appointed at the earliest time possible. The guardian ad litem shall be appointed by the court when custody is ordered or at the first judicial hearing regarding the case, whichever occurs first.



● ● ● What is the Duty of the Judge to Ensure the GAL is Qualified?

- The GAL must be competent
- The GAL must have no adverse interest to the child
- The GAL must be adequately instructed on the proper performance of this duties.

"The guardian ad litem shall be a competent person who has no adverse interest to the minor. The court shall insure that the guardian ad litem is adequately instructed on the proper performance of his duties. Upon appointment of a guardian ad litem, the youth court shall continue any pending proceedings for a reasonable time to allow the guardian ad litem to familiarize himself with the matter, consult with counsel and prepare his participation in the cause."
Miss. Code Ann. 43-21-121(5); In the Interest of R.D., 658 So. 2d at 1383.a



● ● ● Who Can Serve as GAL? Must They Be an Attorney?

Miss Code Ann 43-21-121(4)

"The youth court may appoint either a suitable attorney or a suitable layman as guardian ad litem. In cases where the court appoints a layman as guardian ad litem, the court shall also appoint an attorney to represent the child."

Miss Codes Ann 93-5-23 and 93-11-65

"If there is an allegation of abuse or neglect arising during a custody proceeding, the guardian ad litem must meet the qualifications set out in 43-21-121(4)."

Miss Code Ann 93-17-8(b)

In a contested adoption, the guardian ad litem appointed "shall be an attorney, however his duties area as guardian ad litem and not as attorney for the child."

M.R.C.P. 17(d)

"Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint an attorney to serve in that capacity."



Must a Judge Follow the GAL's Recommendation?

While the court is not bound to follow the recommendations of the GAL, it must consider them, therefore it is imperative that the GAL in the course of representation of child's interest make sure that there is a record of his recommendation.

This record will become a part of the court file.
S.N.C. and J.H.C. v. J.R.D., Jr. (March '00) | *C.L.B. v. D.G.B.*, 812 So. 2d 980 (Miss. 2002)

Set down a prospective rule, that requires trial courts to include a summary review of a GAL's qualifications and recommendations in their findings of facts and conclusions of law.

The Chancellor is required to state his or her reasons for not accepting the recommendation of the GAL only in cases where the appointment of the GAL is obligatory



What is the suitable fee? How does a GAL get paid?

Fee Guidelines

- The fees of a GAL in Youth Court are paid by the county as authorized by its Board of Supervisors.
- Upon order of the Youth Court, the Guardian ad Litem shall be paid a reasonable fee as determined by the youth court judge or referee out of the county general fund as provided under Section 43-21-123.
- To be eligible for such fee, the guardian ad litem shall submit an accounting of the time spent in performance of his duties to the court. Miss. Code Ann. 43-21-121(6)
- The reasonableness of the fee is "based on the normal amount of compensation paid to guardian ad litem in the locality." *In the Interest of L.D.M.*, 872 So. 2d 655 (Miss. 2004).



What is the suitable fee? How does a GAL get paid?

What is Reasonable

- **Fee?** Our Supreme Court has not drawn a model of an accounting, but I advise you read and study the 2004 case of *In re L.D.M.*, 872 So. 2d 655 (Miss. 2004)
- In Chancery Court, the parties are going to be responsible for payment of the Guardian ad Litem fees.
- In Chancery Court, consider a request to the Court that the parties deposit funds with the Clerks' registry before you begin work as GAL. In this circumstance, funds are available to draw as needed.



What Should a GAL Report Contain & "Look Like"

I. Prepare every written document as though it will be reviewed by the Mississippi Supreme Court

- What Happened?
- When Did it Happen?
- Why Did it Happen?

re L.D.M., 848 So. 2d 181 (Miss. 2003)





What Should a GAL Report Contain & "Look Like"

II. Prepare the document to quickly educate the Trial Judge as well as any Appellate Judge

- The Who, What and Where must be presented near the top of the presentation
- The Recommendation is the portion that will be reviewed by most parties
- During the Investigation
 - Speak w/ Everyone
 - Explore All Options
 - Review Documents
 - Express Your Own Opinions



What Should a GAL Report Contain & "Look Like"

III. Formatting Your Report

- Identify Yourself as the GAL
- When You Were Appointed/ Why You Were Appointed
- Name of Minor You are Representing
- List of Those Whom You Have Met With/Interviewed, and their Relationship to the case
- List of Locations You have Visited During Your Investigation
- Outline the Documents You Have Reviewed
 - Chancery/Youth Court Files
 - Statutes and Laws Concerning GAL Duties
 - Statutes and Laws Concerning Your Case



What Should a GAL Report Contain & "Look Like"

Example Disclaimer

"All facts and events provided herein have been disclosed to the Guardian ad Litem by the persons who are indicated. The Guardian ad Litem has based her report on the conclusion that all facts provided here are completely true and accurate as they were given to her during the interview process. As this is a pending case, any new or conflicting evidence that could arise may alter the view and opinion of the Guardian ad Litem. Therefore, I reserve the right to modify my report and recommendation after hearing all testimony."



What Should a GAL Report Contain & "Look Like"

IV. Give a Short Case History of the Circumstances Surrounding the Case

V. Analysis Section "The Meat"

- Relevant Information From the Investigation and Review of Documents and Any Other Tangible Evidence.
- Paragraphs of Results From Each Interview w/ Witnesses
- Determination of Child Custody: Albright Factor**
- Child Custody Modification:** Material Changes in Circumstances/Affects on Child
- Termination of Parental Rights:** Statutory Ground Existence, Proper Serving of Parties etc.



What Should a GAL Report Contain & "Look Like"

VI. Conclusions & Recommendations

- Include a Certificate of Service
- Deliver the Report to the Attorneys and File it with the Court at Least Several Weeks Prior to the Hearing.





Ethical Considerations

- If you know there is a problem with the pleadings, is it your duty as GAL to bring it to the Judge's attention?
 - Bring it to the attorney's attention and let him cure it before the hearing. The attorney will appreciate you not embarrassing him before the judge and you have a duty to the child's best interest to may certain the adoption could not be later set aside.
- Does the ex parte rule apply to the GAL?
- Can you go and talk to the judge about the case off of the record?
 - If you are short of an agreement, all conversations should be before all counsel or put on the record. We often utilize a status conference with the Chancellor to discuss important issues that cannot wait until the final hearing
- What if the child is lying and I believe him or her? Am I liable?

Other Duties Required by Mississippi Law

1. Protect the interest of the child
2. Investigation the circumstances of the child
3. Make recommendations to the Court or provide written reports as necessary to hold paramount the child's best interest.
4. Accept legal notices within the litigation for the child
5. Have no adverse interest (conflict) with eh child
6. Be diligent in the study of the child's case
7. Participate in the case.

