

**SUMMARY OF THE ROLE OF THE GUARDIAN
AD LITEM IN CHILD PROTECTION CASES**

- I. DEVELOPMENT OF THE GUARDIAN AD LITEM AS BEST INTEREST ATTORNEY**
- A. 1992 ABA Policy Adopted concerning Guardians ad Litem (February 1992)**
The ABA requests every state and territory meet the full intent of the Federal Child Abuse Prevention and Treatment Act (CAPTA), whereby **every child in the United States who is the subject of a civil child protection related judicial proceedings will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.**
- B. 1996 ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES.** (These standards apply in Child Protection Cases where DCPS is involved.)
As of 1/8/2019, these standards were available at:
https://www.americanbar.org/groups/family_law/resources/standards_of_practice_reports_recommendations/
- C. 2003 ABA STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING CHILDREN IN CUSTODY CASES INVOLVING ALLEGATIONS OF ABUSE OR NEGLECT** (These standards apply in custody actions between parents.)
As of 1/8/2019 these standards were available at:
<https://www.americanbar.org/groups/litigation/committees/childrens-rights/advocacy/>
- C. 2006 National Conference of Commissioners on Uniform State Laws - - UNIFORM REPRESENTATION OF CHILDREN IN ABUSE NEGLECT AND CUSTODY PROCEEDINGS ACT** (recognized **three different roles for lawyers representing children: “advisor to the court,” child’s attorney”** and **“best interest attorney”**) (as of 2/23/2012 this was available at
http://apps.americanbar.org/legalservices/probono/nccusl_act_rep_children.pdf)
- D. The CAPTA Reauthorization Act of 2010:** On December 20, 2010, President Obama signed Public Law 111-320, a five-year reauthorization of the federal Child Abuse Prevention and Treatment Act (CAPTA). CAPTA is an important source of funding for child welfare agencies and a source of funding for some innovative dependency court programs. Last reauthorized in 2003, **CAPTA has for 36 years influenced law, policy, and practice changes in state and county child protective services (CPS),** particularly through its state grant eligibility

requirements. Child welfare system advocates should be aware of several key aspects of the CAPTA Reauthorization Act of 2010.

E. DECEMBER 2009 - - MISSISSIPPI SUPREME COURT ADOPTED THE UNIFORM RULES OF YOUTH COURT PRACTICE.

1. Rule 2(a) of the URYCP provides that the Youth Court Rules are also to be applied in the chancery courts, when the allegation of abuse or neglect first arises in the course of a child custody proceeding. However, as a practical matter, most chancery courts do not follow the Youth Court Rules.

F. August 2011 - - the ABA ADOPTED the “MODEL ACT GOVERNING REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT AND DEPENDENCY PROCEEDINGS” (as of 2/23/2012 this was available at http://www.caichildlaw.org/Misc/ABA_Resolution.pdf).

The Model Act provides more detail than the 2003 Model Rules, and recommends that every child in an abuse/neglect case or a termination of parental rights proceeding have “**child’s attorney**,” and if needed, a “**best interest attorney**” as well. This has been described as the most comprehensive policy concerning the child’s representative’s role in dependency cases in the past fifteen years. The Model Act gives legislatures concrete language to adopt that provides attorneys with long-needed uniform guidance to lawyers representing children. The Model Act includes guidance for lawyers representing a child with diminished capacity. It allows a state to use a rebuttable presumptive age (e.g., 10 years old) to establish a child’s ability to direct the representation.

II. TRADITIONAL ROLE OF GUARDIAN AD LITEM IN CHILD PROTECTION CASES UNDER MISSISSIPPI LAW.

A. Historically the role of the GAL in Mississippi has been as a “**BESTS INTERESTS ATTORNEY**,” who advocates not what a child might want, but rather, what the GAL believes is in the child’s best interest. However, there are few specific statutes or rules governing GALs, so understanding the scope of duties requires analysis of the relevant case law.

B. The term “guardian ad litem” is **mentioned 128 times in the Mississippi Code and Mississippi Court Rules**. However, only a handful of the statutes provide any guidance as to substantive duties of the GAL in regard to child protection cases. These are primarily in the statutes governing child custody proceedings in chancery court, termination of parental rights and adoptions, and the Youth Court Act.

1. **Miss. Code Ann. § 9-5-89** authorizes the chancery courts to “appoint a guardian ad litem to any infant or defendant of unsound mind, and allow him suitable compensation payable out of the estate of such party, but the

appointment shall not be made except when the court shall consider it necessary for the protection of the interest of such defendant”

2. The Youth Court Act statutes are located at Miss. Code Ann. § 43-21-101, et seq. (West 2011). **Miss. Code Ann. § 43-21-121(3)** provides that “[i]n 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 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.”**
3. **Miss. Code Ann. § 93-15-107(1)** provides that “[i]n an action to terminate parental rights ... [a] guardian ad litem shall be appointed **to protect the interest of the child.”**

C. MISSISSIPPI RULES FOR APPOINTING GAL

1. Rule 17(d) of the Mississippi Rules of Civil Procedure provides in part: (d) Guardian Ad Litem; How Chosen. 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. **In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for his service rendered in such cause, to be taxed as a part of the cost in such action.**
Miss.R.Civ.P. 17(d).

OFFICIAL COMMENT: **“If the rights of an unborn or unconceived person are before the court, that person may also be represented by a guardian ad litem.** Infants and persons under a legal disability may sue by their next friends. Rule 17(c) gives the court the discretion to appoint guardians ad litem when deemed necessary. For an example of when the appointment of a guardian ad litem was held unnecessary to protect an infant, see *Hutton v. Hutton*, 233 Miss. 458, 102 So.2d 424 (1958). The rule also sets forth the general, professional qualifications for a guardian ad litem.

Rule 17(d) provides that when the appointment of a guardian becomes necessary, the court shall appoint an attorney to serve in that capacity,

whose compensation shall be determined by the court and taxed as a cost of the action. Rules 17(c) and (d) are adapted from Miss. Code Ann. § 9-5-89 (1972). See also, Griffith, Mississippi Chancery Practice, § 34 (2d ed. 1950).

2. GAL APPOINTMENTS IN YOUTH COURT

Miss. Code Ann. § 43-21-121 provides:

Appointment of guardian ad litem

(1) The youth court shall appoint a guardian ad litem for the child:

- (a) When a child has no parent, guardian or custodian;
- (b) When the youth court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;
- (c) When the parent is a minor or a person of unsound mind;
- (d) 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;
- (e) In every case involving an abused or neglected child which results in a judicial proceeding; or**
- (f) In any other instance where the youth court finds appointment of a guardian ad litem to be in the best interest of the child.**

(2) 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.

(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 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.

(4) 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 an appointment as a 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 such appointment. The Mississippi Judicial College shall determine the amount of child protection and juvenile justice training which shall be satisfactory to fulfill the requirements of this section. The Administrative Office of Courts shall maintain a roll of all attorneys and laymen eligible to be appointed as a guardian ad litem under this section and shall enforce the provisions of this subsection.

(5) 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.

(6) 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.

(7) The court, in its sound discretion, may appoint a volunteer trained layperson to assist children subject to the provisions of this section in addition to the appointment of a guardian ad litem.

3. RULE 13, MISSISSIPPI UNIFORM RULES OF YOUTH COURT PRACTICE

(a) Appointment of guardian ad litem. The court shall appoint a guardian ad litem for the child **when custody is ordered or at the first judicial hearing regarding the case, whichever occurs first,**

- (1) when a child has no parent, guardian or custodian;
- (2) when the court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;
- (3) when the parent is a minor or a person of unsound mind;
- (4) 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;
- (5) in every case involving an abused or neglected child which results in a judicial proceeding; or**
- (6) in any other instance where the court finds appointment of a guardian ad litem to be in the best interest of the child.**

In cases where the court appoints a layperson as guardian ad litem, the court shall also appoint an attorney to represent the child. Upon appointment of a guardian ad litem, the court shall continue any pending proceedings for a reasonable time to allow the guardian ad litem to become familiar with the matter, consult with counsel and prepare for the cause.

(b) Qualifications of guardian ad litem. The court shall only appoint as guardian ad litem a competent person who has no adverse interest to the minor and who has received, in accordance with section 43-21-121(4) of the Mississippi Code, the requisite child protection and juvenile justice training provided by or approved by the Mississippi Judicial College within the year immediately preceding such appointment.

(c) Duties of guardian ad litem. The guardian ad litem, in addition to all other duties required by law, shall:

- (1) protect the interest of a child for whom he/she has been appointed guardian ad litem; and**
- (2) investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest.**

The court shall insure that guardians ad litem perform their duties properly and in the best interest of their wards.

(d) Reasonable fees. The guardian ad litem shall be paid a fee in the performance of duties pursuant to section 43-21-121(6) of the Mississippi Code. The court may order financially able parents to pay for the reasonable fees of the guardian ad litem, or a portion thereof, pursuant to section 43- 21-619 of the Mississippi Code.

(e) Appointment of volunteer trained layperson to assist children. The court may appoint a volunteer trained layperson to assist children, in addition to the appointment of a guardian ad litem, pursuant to section 43-21-121(7) of the Mississippi Code.

(f) Appointment of an attorney if conflict exists. If there is a conflict between the child's preferences and the guardian ad litem's recommendation, THE COURT SHALL RETAIN THE GUARDIAN AD LITEM TO REPRESENT THE BEST INTEREST OF THE CHILD AND APPOINT AN ATTORNEY TO REPRESENT THE CHILD'S PREFERENCES. The court shall then continue the

proceedings for a reasonable time to allow the newly appointed attorney to prepare for the cause.

(g) Appointment of attorney in delinquency matters. In delinquency matters, if a guardian ad litem is appointed, the guardian ad litem and the legal defense counsel for the child cannot be the same person.

[Adopted effective January 8, 2009.]

4. CHANCERY COURT APPOINTMENTS OF GAL

In Chancery Court, the appointment of a guardian ad litem is mandatory in cases involving the termination of parental rights. Miss. Code Ann. § 93-15-107(1) (West 2018) (A guardian ad litem shall be appointed to protect the interest of the child in the termination of parental rights. However, the chancellor has discretion to waive the appointment of a GAL if there is a voluntary surrender of parental rights by the biological parents.

A GAL is also mandatory in contested adoption proceedings. Miss. Code Ann § 93-17-8 (West 2018). The chancellor has discretion to waive appointment of a GAL in an uncontested adoption.

Miss. Code Ann. § 93-5-23 (West 2018) also provides that the appointment of a GAL is mandatory in child custody cases where allegations of abuse or neglect are at issue in any child custody proceeding.

Miss. Code Ann. § 93-5-23 (West 2018) provides in part:

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws

establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

...

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. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

5. CHANCERY COURT CASES INVOLVING ALLEGATIONS OF ABUSE OR NEGLECT THAT FIRST ARISE IN A CUSTODY PROCEEDING

UNIFORM YOUTH COURT RULE 2(A)(2) - - PROCEEDINGS SUBJECT TO THESE RULES:

“(2) any Chancery Court proceeding when hearing pursuant to Miss. Code Ann. § 93-11- 65(4) an allegation of abuse or neglect of the child that first arises in the course of the custody or maintenance action.”

OFFICIAL COMMENT: “Chancery Court may hear allegation of abuse or neglect ... All proceedings on the abuse or neglect charge shall be conducted in accordance with these rules.”

See Miss. Code Ann. § 43-21-151(1)(c): “When a charge of abuse of a child FIRST ARISES IN THE COURSE OF A CUSTODY ACTION between the parents of the child already pending in the chancery court and no notice of such abuse was provided prior to such chancery proceedings, the chancery court may proceed with the investigation, hearing and determination of such abuse charge as a part of its hearing and determination of the custody issue as between the parents, notwithstanding the other provisions of the Youth Court Law. The proceedings in chancery court on the abuse charge shall be confidential in the same manner as provided in youth court proceedings.

III. THE ROLE OF GUARDIANS AD LITEM IN CHILD PROTECTION CASES

A. TRADITIONAL ROLE OF THE GUARDIAN AD LITEM AS THE “BESTS INTERESTS ATTORNEY”

1. Mississippi Statutes

- a. Numerous statutes in Mississippi refer to persons appointed to represent the **best interests** of wards as the “guardian ad litem.” See Miss. Code Ann. § 9-5-89 (incompetents) and § 43-21-121 (Youth Court Act)
- b. **Miss. Code Ann. § 9-5-89** provides for the appointment of a guardian ad litem “to any infant or defendant of unsound mind, . . . but the appointment shall not be made except when the court shall consider it **necessary for the protection of the interest of such defendant . . .**”
- c. **Miss. Code Ann. § 43-21-121(3)** provides that “[i]n 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 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.”
- d. The GAL must advocate for the best interest of the minor child. **Miss. Code Ann. § 93-15-107(1)** provides that “[i]n an action to terminate parental rights . . . [a] guardian ad litem shall be appointed **to protect the interest of the child.**”

2. **IF THE APPOINTMENT OF THE GAL IS MANDATORY, (i.e. in cases involving termination of parental rights or allegations of abuse and neglect) THE TRIAL COURT SHOULD ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH INCLUDE:**

- a. A SUMMARY OF THE GUARDIAN AD LITEM’S QUALIFICATIONS AND RECOMMENDATIONS;
- b. WHETHER THE COURT TRIAL AGREES OR DISAGREES WITH THE RECOMMENDATIONS; AND

c. THE SPECIFIC REASONS WHY THE COURT REJECTS THE GAL'S RECOMMENDATIONS

B. GENERAL DUTIES OF THE GUARDIAN AD LITEM SERVING AS THE BEST INTEREST ATTORNEY

1. PRETRIAL DUTIES

- a. Conduct thorough, continuing, and independent discovery and investigations.
- b. Understand and articulate the legal standards that will be applicable in the case based on the issues asserted, and develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.
- c. Stay apprised of other court proceedings affecting the child, the parties and other household members.
- d. Investigate all issues within the scope of the appointment.
- e. Take any necessary and appropriate action to expedite the proceedings.
- f. Participate in, and, when appropriate, initiate, negotiations and settlement discussions. The GAL should clarify, when necessary, that she or he is not acting as a mediator between the parties, and the GAL has no authority to require a party to do or not do anything.
- g. Participate in depositions, pretrial conferences, and hearings.
- h. File or make petitions, motions, responses or objections when necessary.
- i. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise within the scope of the original court appointment.

2. HEARINGS

- a. The GAL should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the GAL should:
- b. State on the record at the beginning of any hearing whether the GAL is acting as the Child's Attorney or a Best Interests Attorney.

- c. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.
- d. Present, examine and cross-examine witnesses and offer exhibits as necessary and appropriate.
- e. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process. (Some chancellor may allow the child to be questioned in the presence of counsel for the parties, while the parents are excluded from the courtroom.)
- f. Seek to ensure that questions to the child are phrased in an appropriate manner in regard to syntax, linguistics, and the age or level of development of the child, and that testimony is presented in a manner that is admissible.
- g. Where appropriate, introduce evidence, raise objections and make arguments concerning the child's competency to testify, or the reliability of the child's testimony, or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility.
- h. Make a closing argument, proposing specific findings of fact and conclusions of law.
- i. Ensure that a written order is made, and that it conforms to the court's oral rulings and statutorily required findings and notices.

3. EXPLAINING THE GAL'S ROLE TO THE CHILD

- a. In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the GAL will investigate and advocate the child's **best interests, but not necessarily what the child wants.**
- b. Investigate the child's views relating to the case and report them to the court unless the child requests that they not be reported
- c. Use information obtained from the child for those purposes
- d. Explain to the child in an age-appropriate manner that the GAL will not necessarily advocate what the child wants as a lawyer for a client would under normal circumstances.

4. INVESTIGATIONS

- a. The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:
- b. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;
- c. Reviewing child's social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;
- d. Contacting lawyers for the parties, and non-lawyer representatives or court-appointed special advocates (CASAs);
- e. Contacting and meeting with the parties, with permission of their lawyers;
- f. Interviewing individuals significantly involved with the child, who may in the lawyer's discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
- g. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it;
- h. Staying apprised of other court proceedings affecting the child, the parties and other household members.

5. ADVOCATING THE CHILD'S BEST INTERESTS

- a. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.
- b. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

- c. At hearings concerning custody and visitation, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.

C. OTHER ROLES FOR A GAL IN A CHILD PROTECTION CASE

- 1. **CHILD'S ATTORNEY** - - actively represents the child's preferences
- 2. **ADVISOR TO THE COURT** - - conducts an investigation and makes a report to the trial court, but does not actively participate in the hearing on the merits.

IV. ARTICLES ON CHILD ADVOCACY IN "THE MISSISSIPPI LAWYER"

The August-October 2010 issue of The Mississippi Lawyer focused on CHILD ADVOCACY and several articles discussed the role of the Guardian ad Litem, and common issues that arise in cases where a GAL is appointed:

- A. *Guardian Ad Litem... What is the Proper Role?* By Justice Jess H. Dickinson (discussing the decision in S.G. v. D.C., cited below)
- B. *Domestic Violence and Child Custody: Perpetrator Beware* By Judge Jaqueline Mask
- C. *The Status of Children's Rights: Representation, Welfare and Advocacy in Mississippi* By Elise Lowery
- D. These articles can be retrieved through the following internet link to the issue:
<http://www.msbar.org/admin/spotimages/2218.pdf>
(last visited 2/23/2012)

OVERVIEW OF RELEVANT MISSISSIPPI CASES

A. **S.G. v. D.C., 13 So.3d 269 (Miss. 2009).**

FACTS:

Father filed petition to modify child-custody order. Mother requested that visitation be held in abeyance until sexual-abuse allegations against father could be fully investigated. Maternal grandmother's motion to intervene was denied. When mother refused to comply with order granting father unsupervised visitation and absconded from the jurisdiction with the children, the Chancery Court found mother in contempt of court and awarded custody to father. The fugitive mother's appeal of custody order was dismissed, 988 So.2d 359.

Grandmother filed notice of appeal. The Supreme Court remanded for consideration of whether notice was timely filed. On remand, the Chancery Court held that grandmother's motion to intervene was not timely filed. Grandmother appealed.

The child's counselors and therapists were of the opinion that the child was a victim of sexual abuse, and the mother was convinced that the father was the perpetrator. The GAL offered the opinion that the child was not a victim of sexual abuse, and failed to disclose the contrary opinions that had been rendered by the child's counselors and therapists. Therefore, since the mother had absconded, the chancellor denied the grandmother's motion to intervene and awarded the father custody of the child.

The MSSC reversed and held:

- [1] maternal grandmother was entitled to intervene where the safety and well-being of the children were not being adequately protected by the parties;
- [2] striking of pleadings was improper sanction for mother who absconded from jurisdiction, as sanction deprived children of the court's protection;
- [3] chancellor failed to adequately define clearly the purposes for which the guardian ad litem was appointed; and
- [4] guardian ad litem appointed upon allegations of abuse was required to report both the evidence that substantiated the allegations and the evidence that did not.

The MSSC explained that the chancellor should make clear:

- (1) the relationship between the guardian ad litem and the children,**
- (2) the role the guardian ad litem will play in the trial; and**
- (3) the expectations the trial judge has for the guardian ad litem.**

Id. at ¶ 48.

The MSSC also stated that “the role to be played by a guardian ad litem is complex and not subject to a simple, universal definition.”

¶ 47. In Mississippi jurisprudence, the role of a guardian ad litem historically has not been limited to a particular set of responsibilities. In some cases, a guardian ad litem is appointed as counsel for minor children or incompetents, in which case an attorney-client relationship exists and all the rights and responsibilities of such relationship arise. In others, a guardian ad litem may serve as an arm of the court—to investigate, find facts, and make an independent report to the court. The guardian ad litem may serve in a very limited purpose if the court finds such service necessary in the interest of justice. Furthermore, the guardian ad litem's role at trial may vary depending on the needs of the particular case. **The guardian ad litem may, in some cases, participate in the trial by examining witnesses. In some cases, the guardian ad litem may be called to testify, and in others, the role may be more limited.**

With this in mind the Court recognized that the GAL can serve three distinct roles:

1. **Arm of the Court** - - appointed to investigate and present to the court all necessary and material information which might affect the court's decision. Id. at ¶ 43. (Does not actively participate in the trial.)
2. **Child's attorney** - - guardian ad litem serves as the child's lawyer, with all the duties, responsibilities, and privileges required by the attorney-client relationship, which includes advocating for what the child wants, just as an attorney for an adult would.
3. **Hybrid Role - - BEST INTEREST ATTORNEY.** Id. at ¶ 57.
 - a. **investigate the allegations** before the court
 - b. **process the information** found
 - c. **report to the court all material information** which weighs on the issue to be decided by the court, including information which does not support the recommendation; and
 - d. if requested, **make a recommendation** to the court about the custody arrangement that would be in the best interest of the children.

The GAL **“is an active representative of the children.** He is charged with seeing to their best interest. He has a duty not only to his clients, the children, but also to the Court to conduct his duty and to make reports to the Court. And [he] has made a diligent effort in fulfilling that role....”

The GAL 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.

b. **The Court held that the Best Interest 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.

c. 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 witness 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., whether the child in this case was a victim of sexual abuse.

3. The Court explained that the chancellor should clearly define the duties and role of the GAL in the Order of Appointment. 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. The majority opinion, which was authored by Justice Randolph and joined by four other justices, initially noted the historic role of the GAL in cases involving child abuse:

¶ 47. Jennifer argues 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.

¶ 49. **The statute's provision that a GAL “shall have the duty to protect the interest of a child for whom he [or she] 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,” is 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). In *In the Interest of D.K.L.*, 652 So.2d 184 (Miss.1995), this Court held that **a GAL had failed in his duties by simply deferring to a therapist's recommendations, and not submitting his own recommendation as to the best interests of a child.** *Id.* at 188. The D.K.L. Court stated that the GAL **“did not have an option to perform or not perform, rather he had an affirmative duty to zealously represent the child's best interest.”** *Id.* In *In the Interest of R.D.*, 658 So.2d 1378 (Miss.1995), this Court held that **“children are best served by the presence of a vigorous advocate free to investigate, consult with [the children] at length, marshal evidence, and to subpoena and cross-examine witnesses.”** *Id.* at 1383 (quoting *Shainwald v. Shainwald*, 302 S.C. 453, 395 S.E.2d 441, 444 (S.C.Ct.App.1990)). See also *M.J.S.H.S. v. Yalobusha County Dep't of Human Servs. ex rel. McDaniel*, 782 So.2d 737, 740–42 (Miss.2001) (GAL failed in his duty by relying on DHS records and the

recommendations of a therapist and social worker). In *D.J.L. v. Bolivar County Department of Human Services ex rel. McDaniel*, 824 So.2d 617 (Miss.2002), this Court found no error in a GAL's cross-examination of witnesses. *Id.* at 622. **The Court also “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 623.

THEREFORE, 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.

2. The majority 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 (**thus making this a Specially Concurring Majority Opinion that has precedential weight**). 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.

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.”

D. BALLARD V. BALLARD, 255 So.3d 126 (Miss. 2017)

Facts: Husband filed for divorce. The GAL recommended that the parents have joint legal custody, with father having primary physical custody and mother having visitation. In spite of the recommendation from the GAL that the “presumption against custody based on a history of family violence” should not be applied against either parent, the Chancery Court relied on the interviews contained in the GAL report and determined that both husband and wife were unfit and that neither should be awarded custody of children because both had a past history of domestic violence. Therefore, the chancellor placed the children in the legal custody of DCPS, and in the physical custody of the paternal grandparents, until they became unable or unwilling to care for the children, or whatever placement DCPS determined was in the best interest of the children.

Holdings: The Supreme Court, Coleman, J., held that:
[1] trial court relied on inadmissible hearsay in determining that wife was unfit and in applying family-violence presumption;
[2] trial court failed to make factor findings for property division;
[3] wife was not entitled to attorney fees; and
[4] trial court was required to account for lot upon which marital home, which had burned down, formerly had been situated.
Affirmed in part, reversed in part, and remanded.

I. Guardian Ad Litem Hearsay and Custody

¶ 15. Candice takes issue with the chancellor's disposition of custody due to the chancellor's reliance upon hearsay. **Specifically, Candice argues the chancery court relied upon the guardian ad litem's reports—which consisted mostly of hearsay—and the guardian ad litem's testimony—which was based in hearsay—as substantive evidence to establish her unfitness and trigger the family-violence presumption.** To the extent that the chancellor relied on the hearsay contained in the guardian ad litem's report, we agree.

¶ 16. First, the Court notes the chancery court's failure to provide an Albright analysis. Parents enjoy—against third parties—a natural-parent presumption favoring an award of custody. In re Waites, 152 So.3d 306, 311 (¶ 14) (Miss. 2014). Only a clear showing of abandonment, desertion, immoral conduct detrimental to the child, and/or unfitness can rebut the presumption. Id. at 311–12 (¶ 15). However, the inquiry does not end once the presumption is rebutted. In re Dissolution of Marriage of Leverock & Hamby, 23 So.3d 424, 431 (¶ 24) (Miss. 2009). “If the court finds one of [the] factors [that rebuts the natural-parent presumption] has been proven, then the presumption vanishes, and the court must go further to determine custody

based on the best interests of the child through an on-the-record analysis of the Albright factors. *Id.* (emphasis added). **In other words, a finding that the natural-parent presumption has been rebutted does not end the inquiry into custody without an Albright analysis.** If, on remand, the chancery court finds that the natural-parent presumption has been rebutted, then the chancery court must go on to consider the Albright factors to determine custody in the best interest of the children. We note that, even if, upon remand, the chancellor finds enough competent evidence to engage the family-violence presumption, the presumption is a rebuttable one. Miss. Code Ann. § 93–5–24(9)(a)(I) (Rev. 2013).

¶ 17. In any event, the chancery court erred in finding Candice to be unfit and applying the family-violence presumption. **Candice argues the only “proof” presented at trial to establish her unfitness was inadmissible hearsay from the guardian ad litem.** Similarly, Candice argues the chancery court relied on inadmissible hearsay to apply the family-violence presumption against her.

¶ 18. Candice is correct that the chancery court relied heavily on hearsay testimony in determining that she was unfit and that the family-violence presumption should be triggered. **The chancery court's analysis determining Candice's unfitness focused primarily on the guardian ad litem's report and testimony and on Candice's evasive answers to questions at trial that indicated a “wariness to convey the truth.”** The chancery court concluded: “Based on the evidence as stated above, i[.].e., [Candice] failing to take responsibility for her actions or lack thereof, and continuing to blame others for her mistakes, the [chancery c]ourt finds by clear and convincing evidence that her natural parent presumption has been rebutted due to her unfitness.” Additionally, in our review of the record, we could discern only one piece of nonhearsay testimony that indicated Candice had committed any act of family violence: when **Marshall testified that Candice had beaten him with a lamp.** Other evidence suggesting Candice had inflicted violence on Marshall came almost entirely from the guardian ad litem's reports and the guardian ad litem's testimony at trial, all of which consisted of the guardian ad litem's third-party interviews. **None of the persons interviewed by the guardian ad litem testified at trial except the parties and one of Candice's daughters from a previous relationship. Despite a recommendation from the guardian ad litem in her supplemental report that the chancery court should not apply the family-violence presumption, the chancellor relied on the hearsay contained within her report to disagree with her recommendation and apply it.**

¶ 19. In *McDonald v. McDonald*, 39 So.3d 868, 882 (¶ 47) (Miss. 2010), the Court addressed “whether the guardian ad litem acted beyond her authority by offering hearsay testimony without being qualified as an expert.” The appellant in *McDonald* argued the chancery court erred in allowing a guardian ad litem to testify as to statements relayed to the guardian ad litem by teachers at a school. *Id.* at 884 (¶ 53). The *McDonald* Court set forth the “proper role” of a guardian ad litem as follows:

[A] guardian ad litem appointed to investigate and report to the court is obligated to investigate the allegations before the court, process the information found, report all

material information to the court, and (if requested) make a recommendation. However, the guardian ad litem should make recommendations only after providing the court with all material information which weighs on the issue to be decided by the court, including information which does not support the recommendation. The court must be provided all material information the guardian ad litem reviewed in order to make the recommendation. Recommendations of a guardian ad litem must never substitute for the duty of a chancellor.

Id. at 883 (¶ 48) (citing *S.G. v. D.C.*, 13 So.3d 269, 282 (Miss. 2009)).

During trial of the case, the chancellor had overruled the objection to hearsay, claiming courts in Mississippi have a “historical practice” of allowing guardians ad litem to offer hearsay testimony. Id. The majority opinion in McDonald disagreed with the chancellor's view, holding, “We find that it was error for the chancellor to find that the rules of evidence did not apply in this adversarial proceeding.” Id. Considering the above-quoted language defining the importance and role of the guardian ad litem along with the admonition issued by the McDonald Court regarding reliance on hearsay, we conclude the following: The guardian ad litem plays an important role, and—as set forth above—chancellors must consider all of the information available to the guardian ad litem when considering whether to follow the recommendation made. **However, especially when a chancellor departs from the recommendation of the guardian ad litem, as happened here, the result reached by the chancellor must be supported by admissible, competent evidence rather than hearsay.**

¶ 20. Presiding Justice Dickinson issued a specially concurring opinion in McDonald tailored to the issue of guardian ad litem testimony and hearsay. Id. at 887 (¶ 65) (Dickinson, P.J., specially concurring). His concurrence was joined by four other justices, giving the opinion precedential value. See *Sweatt v. Murphy*, 733 So.2d 207, 209–210 (¶ 7) (Miss. 1999) (noting that when at least four justices vote in favor of another justice's concurring opinion, the concurrence has “precedential value”). Addressing guardian ad litem hearsay, Presiding Justice Dickinson wrote, “Rule 1 of the Mississippi Rules of Evidence plainly says those rules apply in chancery court—and they include no exception for guardians ad litem.” Id. The *134 concurrence continued: “Certainly I agree that guardians ad litem—properly appointed under Rule 706 and qualified as experts under Rule 703—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.” Id. (¶ 68). In other words, “pure, rank, un-cross-examined hearsay” by a guardian ad litem cannot be used as substantive evidence. Id. (¶ 68).

¶ 21. A dearth of Mississippi jurisprudence squarely addresses the issue of guardian ad litem hearsay being used as substantive evidence. However, as Presiding Justice Dickinson proclaimed in McDonald, our rules of evidence apply in chancery court; and the rules prohibit, subject to listed exceptions, the use of hearsay as substantive evidence. In view of the rule, **the chancery court erred in relying on inadmissible hearsay to find Candice unfit and to invoke the family-violence presumption against Candice.** Therefore, we reverse the chancery court's disposition on custody of the three minor children and remand for further proceedings.