

**PRACTICE TIPS FOR GUARDIANS AD LITEM
IN CHILD PROTECTION CASES**

Moderator - - Randy Pierce

Panel Discussion - - Kelly Williams, Jeff Rimes, Shirley Kennedy, David Calder

1. Roles of the Guardian ad Litem.

- a. Court-appointed expert witness actively participating in the litigation by examining witnesses and marshaling evidence, and making recommendations to protect the best interest of the child.
- b. Counsel for the child acting to carry out the child's preferences.
- c. Investigator and advisor to the court who simply investigates the issues as directed by the Court, and makes a report and recommendation concerning the best interest of the child.

S.G. v. D.C., 13 So.3d 269, 282 (¶ 57-58) (Miss.2009)

2. Are GALs to be designated as "court appointed expert witnesses under MRE 706."

In *McDonald v. McDonald*, 39 So.3d 868, 883-84 (¶ 51) (Miss. 2010), the MSSC held that in order to offer opinion testimony about the best interests of a child, the GAL must be qualified as an expert witness.

Initially, the majority opinion 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 MSSC explained that the duties of the GAL include: "... 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).

In addition, Justice Dickinson wrote a SPECIALLY CONCURRING MAJORITY OPINION in *McDonald* 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 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.

In *Ballard v. Ballard*, 255 So.3d 126, 133 (¶¶ 19-20) (Miss. 2017) the MSSC relied on the expert witness standards for the GAL that were articulated in *McDonald*. The Court reversed that chancellor’s decision that disagreed with the GAL’s recommendations, but attempted to rely on the hearsay contained in the GAL’s report as substantive evidence to support the chancellor’s decision. In reversing, the MSSC explained: “Certainly ... 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.” (citing *McDonald*, 39 So.3d 868 at ¶ 68. In other words, “pure, rank, un-cross-examined hearsay” by a guardian ad litem cannot be used as substantive evidence. *McDonald*, 39 So.3d 868 at ¶ 68.

PRACTICE NOTE: The bottom line is that if a witness's testimony is critical to the decision as to what would be in the best interest of the child, that witness should be called to testify at the trial.

3. Guardians ad Litem are Court-Appointed Experts in what field?

Other than being certified through the training approved by the Mississippi Judicial College, this is not clear from the current statutes, rules and case law. However, what is clear is that a GAL is **not deemed an expert in the field of child sexual abuse**, they have received special training in that field. *Jones v. Jones*, 43 So.3d 465, 480 (Miss. App. 2009). The Court cautioned in *Jones* that the GAL is obligated to ask the Court to appoint a qualified expert in child sexual abuse if such testimony is required in a particular case. See McDonald Specially Concurring majority opinion and Ballard (recognizing GAL as court-appointed expert).

4. What is the difference between a Mandatory versus a Discretionary appointment of a GAL.

All child protection cases in YC require the appointment of a GAL to protect the child's best interest. Rule 13, URYCP. If the child's preferences differ from the GAL recommendations, a second attorney may have to be appointed for the child, to carry out the child's preferences.

In Chancery, GALs are mandatory if the chancellor determines that the allegations of abuse or neglect have merit, or if there is an claim for TPR and Adoption. If the chancellor disagrees with the GAL, the chancellor must articulate the reasons.

Chancellors may also make discretionary appointments of a GAL in cases that do not involve allegations of abuse or neglect. In these situations, some cases hold that the chancellor is **not required** to state the reasons if he/she disagrees with the recommendations of the GAL. However, it is "preferred" that the reasons for disagreement be stated, even in these cases.

5. What should you do if you receive an Order of Appointment in chancery court that simply says: "Jane Doe is hereby appointed GAL of the minor child John Jones" ?

What should be included in the Order of Appointment of the GAL?

[See the section on Duties of the GAL for a sample Order of Appointment.]

You can file a motion asking the Court for clarification of the duties assigned to the GAL. The case law and statutes provide that the chancellor should clearly define the role of the

guardian ad litem and the purpose of appointment, i.e., to serve as advisor to the court or counsel for the children. S.G. v. D.C., 13 So.3d 269, 281 (¶ 48) (Miss. 2009),

The Appointment Order should:

- o State whether the appointment is mandatory or discretionary, and whether the GAL is a court appointed expert.
- o State what is to be investigated
- o State whether court expects a written report or oral recommendation (former is usually preferred)
- o If a written report is required, set a deadline for report to be submitted.
- o Authorizes the GAL to have immediate access to the child, and to obtain the child's records from schools, counselors, health care providers, etc.

However, as a practical matter, a chancellor is often not going to know any more about the case than the allegations set forth in the pleadings. So if there is no clarification or limitation imposed by the Court, the GAL should look to the allegations set forth in the pleadings and in the facts disclosed by the parties in interviews to identify the issues that should be investigated. Seek clarification from the judge if you are not certain about the scope of your responsibilities.

6. What are the differences between Youth Court and Chancery Court in regard to the timing of the appointment of GAL.

Compare Rule 13(a) URYCP which provides: "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," and Carter v. Carter, 204 So.3d 747 (Miss. 2016) which held that in regard to appointing a GAL, Chancery Courts "have discretion in determining whether there is a legitimate issue of neglect or abuse even in those situations where one party elects to make such an assertion in the pleadings."

The chancery courts may appoint a GAL when requested by a party, or when the Chancellor determines that there is a legitimate claim of abuse or neglect that requires the appointment of a GAL.

7. Are there differences between YC and Chancery Court in regard to the definition of abuse or neglect.

In YC child protection cases, the state typically intervenes into a family and takes a minor child into state custody, and places the child in foster care, whereas in chancery, there is usually a custody dispute where abuse or neglect is alleged. The Court also held (arguably in dicta) in *Carter v. Carter*, 204 So.3d 747 (¶ 59) (Miss. 2016) that: "In determining whether the child is neglected, a chancellor may, but is not required to, refer to the definition of "neglected child" found in Section 43-21-105(1) of [the Youth Court Act of] the Mississippi Code."

8. What is the difference between a case in Youth Court involving allegations that a child has been abused or neglected, as opposed to a custody case in Chancery Court where the allegations of abuse or neglect first arise in the child custody proceedings?

Rule 2, URYCP provides that Chancery Courts should follow the URYCP when addressing allegations of abuse or neglect that first arise in a chancery court custody proceeding.

However, in *Carter v. Carter*, 204 So.3d 747 (¶ 59) (Miss. 2016), the MSSC held that the chancellor is not required to follow the definitions of abuse or neglect set forth in the Youth Court Act, and the Court may require some substantiating evidence concerning the allegations of abuse or neglect before a mandatory appointment of a GAL is required. Note that it is arguable that the holding in *Carter* conflicts with Rule 2, URYCP.

9. What information should be included in a GAL report?

The GAL is required to conduct a thorough investigation and marshal all evidence that is relevant to the issues raised in the case, and to "zealously represent the child's best interest." In re D.K.L., 652 So.2d 184, 188 (Miss.1995). The GAL must present to the trial court all material information discovered in the investigation, even if it does not support the GAL's recommendations. *S.G. v. D.C.*, 13 So.3d 269, 282 (¶ 57) (Miss. 2009)

10. Is the GAL required to make a recommendation about whether the applicable legal standards have been satisfied in a case, such as a material change in circumstances for modification of custody, analysis of the Albright factors, or termination of parental rights?

Yes, the GAL is obligated not only to investigate the relevant facts, but also to address the applicable legal standards. See *Gainey v Edington*, 24 So.3d 333, 340 (¶ 24) (Miss.App. 2009) (the guardian ad litem failed to make a recommendation as to whether or not a material change in circumstances had occurred").

NOTE: If the Albright analysis is applicable, it is strongly recommended that the

GAL prepare a detailed analysis of each factor and make a recommendation about which parent is favored under each factor.

11. The problem of "hearsay" in a GAL report.

Under the standards for opinion testimony by expert witnesses, GALs may rely on hearsay evidence obtained in the course of their investigation and interviews to formulate their opinions, **but GALs cannot offer hearsay testimony as substantive evidence at trial.** As discussed in the *McDonald* and *Ballard* cases above, as an expert witness, the GAL can rely on hearsay statements by third parties in formulating his/her opinions, but cannot offer such hearsay testimony as substantive evidence at trial. If the hearsay statements are a critical part of the GAL's recommendation, the safe course would be to subpoena the witness to testify in court, unless other arrangements are made to have the testimony admitted into evidence (i.e., request for admission, stipulation by parties, etc.).

12. How long before the hearing should the GAL report be submitted?

The Chancery Court can provide a deadline in the Order of GAL Appointment for the submission of the Report. If no deadline is set by the Court, it is recommended that the GAL submit the Report at least two weeks prior to the hearing on the merits, so that the parties will have the opportunity to subpoena any witnesses identified in the report.

It is also recommended that before the initial report is submitted, the GAL send to the attorneys for the parties a list of all witnesses interviewed, and all documents reviewed, to ask the attorneys if there are any additional witnesses who should be interviewed, or any additional documents to be reviewed. This would also provide advance notice in the event the parties want to subpoena any of the witnesses.

An added consideration is that because of the application of the hearsay rule to the GAL report, it may be advisable for the GAL to issue a subpoena to any witness who provided information that is critical to the GAL's recommendations and opinions.

13. When would a supplemental report be prepared?

While there is no set time frame, the case law generally requires that the GAL prepare a supplemental report if a substantial amount of time has passed between the initial report and the hearing on the merits. This would vary in each case, but at a minimum, if more than a few weeks have passed, the parties should be contacted so that the GAL can provide a verbal supplemental report, if needed.

14. Application of the Rules of Evidence in YC and Chancery.

The Mississippi Rules of Evidence apply in all proceedings in Chancery Court, and in the Adjudicatory Hearing in a child protection proceedings in Youth Court where the court determines whether the child has been abused or neglected. See *In re J.T.*, 188 So.3d 1192, 1202 (¶ 51) (Miss. 2016) (“We also affirm that, except where specifically superseded by a youth-court-specific rule, the Mississippi Rules of Evidence apply with full force and effect to youth-court adjudications.”)

Under the URYCP, hearsay evidence is admissible in Shelter Hearings and Dispositional Hearings in Youth Court proceedings.

15. Obtaining YC and DCPS records for use in Chancery Court.

Under Rule 6, URYCP, the GAL (or any party) can file a Motion for Writ of Assistance requesting that the Chancellor issued subpoenas duces tecum to the county Department of Child Protection Services, and to the Youth Court Clerk to obtain copies of any relevant records concerning the child. These records are to be produced directly to the Chancellor, for in camera review, and the Chancellor then decides whether the records are relevant to the Chancery Court proceedings, and whether the records should be made available to the GAL and the parties for review.

Usually, the Youth Court will also require the entry of an Order under Rule 5, URYCP allowing the records to be produced to the Chancellor, subject to the rules of confidentiality applicable to all Youth Court Records.

16. Attorney Fees for GALs. What is reasonable?

In Youth Courts, GAL fees are paid by the Counties. Rates and amounts are set by the judges, with the approval of the Board of Supervisors. This is usually based on tradition and the prevailing rates. In some counties the rates range from \$65 to \$100 per hour.

In Chancery Court GALs are usually paid by the parties. The Chancellor can apportion the cost between the parties or assess the GAL fees to pay. In some cases the chancellor will require the parties to pay a “retainer” to the GAL in advance, or deposit an amount with the clerk of Court to be paid at some later time.

17. What if you realize that there has been a procedural error by one of the parties, such as failure to use a Rule 81 summons when required, etc.

The GAL should identify any procedural defects and call these matters to the attention of the attorneys and the trial court.

18. What is the GAL's duty to bring the case to hearing if the child is in unsafe environment?

The GAL may file motions to bring any matters concerning the safety and welfare of the child to the attention of the Court. This would include filing a motion for Emergency Relief if the GAL believes that the child's safety or welfare is at risk.

19. Differences between YC Special Masters and County Court judges.

About 60 counties have Youth Court Judges that are "attorney referees." In the counties with a County Court, the County Court Judge sits as the Youth Court Judge. The County Court proceedings are often more formal, and the dockets are usually heavier in those courts.