Reliance On A Guardian Ad Litem In Custody Cases May Do More Harm Than Good

September 16, 2021 | by Matheu Nunn

As published in the New Jersey Law Journal

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Pursuant to Rule 5:8B, "[i]n all cases in which custody or parenting time/visitation is an issue, a guardian ad litem may be appointed by court order to represent the best interests of the child or children if the circumstances warrant such an appointment." (Emphasis added.)

Despite this language and the dedication of an entire Rule to the appointment of a GAL, it is infrequently requested by counsel or the court. Unfortunately, in those instances when a GAL is appointed, the role of the GAL is often not clearly defined and exceeds the authority afforded by Rule 5:8B. Moreover, some courts improperly utilize Rule 5:8B as a means to make a "call" on custody. To be sure, in most cases, the court notes its role as "parens patriae" and that its role "cannot be delegated"—only to be followed by the wholesale acceptance of the GAL's recommendations (sometimes without a hearing).

To make matters worse, in those cases in which the child's (or a parent's) mental health is at issue, the GAL does not have any experience (educational, clinical, forensic, or otherwise) in matters of psychology. In turn, many custody-based recommendations reflect commonly used custody schedules in a "typical" matrimonial case, or the musings of an attorney who is not qualified to sift through nuanced psychological issues. However, the mere fact that a GAL has been appointed should signal that there is nothing typical about the case.

The following is intended to provide guidance regarding the use and reliance upon a GAL in custody and parenting-time matters.

What Is the Role of the GAL?

The GAL is expected to serve as an additional set of "eyes" and "ears" for the court. Per the Official Comment to Rule 5:8B, the GAL is appointed to serve "as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child." The Rule further elaborates that "[i]f the purpose of the appointment is for independent investigation and fact finding, then a GAL would be appointed." As such, the Rule affords the GAL broad authority in interviewing the parties, children, experts, and other individuals; reviewing all documentary evidence; conferring with counsel, etc. The GAL is also permitted to confer with the court, upon notice to counsel, but those informal discussions should not include any findings or recommendations. Rather, the GAL is required to file a written report with the court.

Of course, notwithstanding that courts rely on GAL recommendations/reports during the pendente lite phase, a GAL's report is inadmissible hearsay. See Brun v. Cardoso, 390 N.J. Super. 409, 422 (App. Div. 2006) (declaring an MRI report addressing a central issue in the case to be inadmissible hearsay because the individual who wrote the report was not called as a witness and thus, the other party was deprived of the opportunity to cross-examine). In fact, Rule 5:8B mandates the GAL testify and be available for cross-examination. Accordingly, the court should not adopt any recommendations of the GAL prior to a hearing, including an interim one, during which the GAL is subject to cross-examination. See Milne v. Goldenberg, 428 N.J. Super. 184, 201 (App. Div. 2012) (recognizing that parties must be afforded full and ample opportunity to rebut, refute, clarify, and supplement the GAL's factual assertions and testimony). The Milne court further cautioned "the GAL's report and recommendations may never serve as a substitute for the court's exercise of its parens patriae obligation … [and] a trial judge is never bound to accept a GAL's recommendations." Id. at 202. Indeed, while a GAL serves a unique purpose in exploring and expanding upon the available evidence, the GAL should never usurp the trial judge's role.

When Should a GAL Be Appointed?

The broad language of Rule 5:8B(a) suggests a GAL may be appropriate whenever custody or parenting time is at issue, but the Official Comments direct otherwise. Specifically, "Official Comment for Rules 5:8A and 5:8B" provides that appointments are not "to be made routinely." Whether the particular circumstances of a dispute warrant a GAL will likely be left to the discretion of the court. In Issacson v. Issacson, 348 N.J. Super. 560 (App. Div. 2002), the court clarified the decision of whether to appoint a GAL will be made by the trial judge but noted, "[t]he contentious relationship of the parties and the impact of such relationships on the children appear to warrant such an appointment." Thus, a GAL is more appropriate in a high-conflict custody dispute, perhaps one that implicates issues of particular psychological importance, than in a case in which the mechanics of a parenting time schedule need to be fleshed out, but physical and legal custody are not at issue.

How Can a GAL Be Appointed?

In accordance with Rule 5:8B(a), a GAL "may be appointed by the court on its own motion or on application of either or both of the parents." It is unclear from this language whether the parties can agree upon the initial appointment of a GAL via Consent Order, but it appears that both parties have the right to respond and oppose an appointment made by the court. Cf. R.5:3-3(d) (allowing the court to independently "select" an expert without the necessity of a motion). In fact, Rule5:8B(b) explicitly affords the parties a "right to object to" the GAL "on good cause shown." The right to file an objection does not impose a time-limitation and presumably can be raised at any time during the GAL's appointment upon a showing of "good cause."

Who Can Be Appointed as GAL?

Rule 5:8B(b) provides that a GAL has the right to consent or oppose an appointment, to be relayed in writing to the court. Assuming the lack of opposition, Rule 5:8B does not set forth any required qualifications of a GAL, while the commentary to this rule generally denotes this individual "can be an attorney, a social worker, a mental health professional or other appropriate person." In high-conflict matters, it is likely other (non-party) individuals are already involved in the dispute, including but not limited to psychological experts, therapists, Parenting Coordinators, etc. It may be tempting to convert the role of an individual serving in a different capacity into a GAL, or vice versa, given their familiarity

with the matter. However, this type of crossover has been deemed impermissible. See Isaacson, 348 N.J. at 578. Aside from a conflict, however, there is little guidance and few restrictions on who should serve as GAL in any particular case.

Is a GAL to Be Considered an Expert or Fact Witness?

Rule 5:3-3 addresses the "Appointment of Experts"—specifically identifying medical, mental health, social, and economic experts. The appointment of a GAL is not referenced within Rule 5:3-3, but there is often crossover between these roles. To that point, the official commentary to Rule5:8B explicitly directs that "[i]f the primary function of the GAL is to act in the capacity of an expert, then the court should ordinarily appoint a GAL from the appropriate area of expertise." Under those circumstances, the GAL may be qualified as an expert for a designated purpose. In D'Onofrio v. D'Onofrio, 344 N.J. Super. 147 (App. Div. 2001), a custody case that featured custody evaluators and a GAL, the court-appointed GAL was appropriately qualified "as a psychological expert" to deal with visitation and the defendant's ongoing psychological issues that impacted the children "given [the GAL's] extensive credentials." Id. at 159.

Accordingly, the Order of Appointment should define the scope of the GAL's role and be tailored to select a qualified professional to undertake this endeavor. For instance, common sense dictates that it is inappropriate for an attorney without any training in the field of psychology to serve as a GAL if the primary purpose is to make recommendations regarding a child's mental health. In fact, appointment of an unqualified GAL—and the corollary issue of improper reliance on the GAL by a court—may unnecessarily subject the child to rigorous testing or a course of action that exacerbates the child's mental health issues. Of equal importance, a GAL's recommendations should be deemed akin to an "opinion" that renders the admissibility of an accompanying report or testimony contingent upon either N.J.R.E. 701 (Opinion testimony of lay witnesses) or N.J.R.E. 702 (Testimony by experts)—an important distinction in custody and parenting-time disputes. Though a GAL must be competent to address the issues at hand, the appointment of an individual for this unique role should never serve as a substitute for, or bar the use of, Rule5:3-3 expert testimony.

If you find yourself in a case with a GAL appointment, you should:

a. Object to the appointment if you believe the appointment is unnecessary (e.g., the court has its own custody evaluator; neither party seeks a GAL; the case is not "high-conflict"; and/or the case does not involve serious psychological issues);

b. Prior to the appointment, obtain the qualifications of the GAL (i.e., a matrimonial attorney's experience in custody matters may be relevant, but not the ideal field of expertise where a child's or parent's mental health is at issue);

c. Ensure that the appointment order delineates, with precision, the scope and duration of the appointment;

d. Confer with the court regarding discovery with respect to the GAL so that you have a meaningful opportunity to cross-examine the GAL;

e. Object, if appropriate, to "interim" recommendations that are not memorialized in a report and not the subject of a testimonial proceeding; and

f. Avail yourself of the right to cross-examine the GAL regarding their recommendations if the "whys and wherefores" are not present in the GAL's report.

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