

THE ROLE OF THE MENTAL HEALTH CHILD CUSTODY EVALUATOR[®]

INTRODUCTION

Guardians *ad litem* (GAL) originate from a practice in the English Court of Chancery¹ when the King, under his *parens patriae* powers, would appoint a child custody evaluator/guardian *ad litem* to protect the interests of the infant. Today, the court appoints child custody evaluators whenever it believes it necessary to protect the interests of a child in a judicial proceeding.

Most states appoint custody evaluators or guardians *ad litem* by statute. Not all states appoint licensed mental health professionals. Some appoint only lawyers, while others appoint lay individuals with minimal training. In Massachusetts, GALs are subject to Standards of Practice and appointed pursuant to G.L. Chapter 215, Section 56A:

"Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations... Said guardian ad litem shall ... report in writing to the court the results of the investigation..."

The GAL's appointment may result from a Stipulation between the parties, or be ordered directly by a judge. Costs may be shared equally or disproportionately by the parties or paid by the state or Commonwealth. The source and apportionment of payment should be included in the court's order. Generally, costs are not assessed against the parties' health insurance. Health insurance requires that services rendered arise out of a *medical necessity*. Services performed for forensic purposes do not qualify. Practitioners submitting claims for such services may find that they are in violation of their contracts with insurance companies and/or professional ethics.

PURPOSE/SCOPE/FUNCTION

Overall, a child custody evaluation is an objective assessment of the needs of the child(ren), each parent's ability to meet those needs, and that of the overall functioning of the family. The evaluator reports to the court as to the *best interests* of the child(ren) and not necessarily the best interests of one or the other parent. (This standard has been redefined in removal cases. See (Massachusetts SJC decisions) Yannas v. Yannas, Hale v. Hale, Pitney v. Williams, Rosenthal v. Maney, Mason v. Coleman; and (Canada) Gordon v. Goertz.. The GAL *does not* determine fault or blame for the divorce nor take one parent's side against the other.

A number of organizations such as the American Psychological Association, American Academy of Child and Adolescent Psychiatry, Association of Family and Conciliation Courts, as well as

many states across the US and Canada, have developed guidelines and standards for child custody evaluations. Among other factors, evaluators need to specifically address the following:

- Social, marital and parenting histories of each parent.
- Age and developmental stage of each child.
- Health of each child and the parties with reference to any special needs or problems.
- Interests and activities of each child and the role of each party in encouraging and developing such interests.
- Demonstrated capacity of each party to foster the growth and development of each child and to understand the individual needs of the child.
- Each party's demonstrated ability to provide continuity and stability of environment.
- Relationship and attachments of each child to his or her parents, siblings and any other persons who may have a significant effect upon the child.
- Demonstrated capacity of each of the parties to support an ongoing relationship between the children and the other parent.

The final product of the GAL's investigation is embodied in the report to the court. This submission, by necessity, is a summary of the relevant findings. Recommendations, while optional, are generally anticipated by the appointing judge. In generating recommendations, the evaluator must be aware of the current practices regarding visitation, supervised visitation, termination of parental rights and removal from the state of residence as well as issues surrounding sexual, physical and emotional abuse, mental illness and substance abuse. If the practitioner disagrees with prevailing practice, he or she needs to be able to thoughtfully, intelligently and professionally explain the rationale for his or her departure. Lastly, all evaluators must guard against the misuse of their influence by providing the court with an impartial, competent and objective evaluation.

GUIDELINES

In practice, the GAL goes beyond the collection of data to make actual custodial recommendations based on his or her "factual" findings. While the GAL in most states is protected by liability in a civil action as a GAL performs a quasi-judicial function and acts as a quasi-judicial officer of the court, (Massachusetts: LaLonde v. Eissner), the GAL is however, subject to cross examination, (Massachusetts: Gilmore v. Gilmore), as to the basis of his or her findings and recommendations. The GAL is further subject to review by his or her licensing body or board subsequent to the filing of a complaint.

In 1994, the American Psychological Association (APA), promulgated guidelines for psychologists: *Guidelines For Child Custody Evaluations In Divorce Proceedings*. Since then, many other states and countries have followed suit. While the original intent of these guidelines was to "promote proficiency in using psychological expertise in conducting child custody evaluations,"

they have become a *de facto* standard for assessing the conduct of a GAL. APA Guidelines also note that "[t]he scope of the evaluation is determined by the evaluator" though more recent state standards specify, in some detail, mandatory requisites. Unfortunately, each state and organization promulgating guidelines has somewhat different and sometimes conflicting requirements.

According to APA guidelines, the role of the evaluator is that of a "professional expert" who is to be objective and impartial. The evaluator is expected to develop "specialized competence" that includes knowledge of assessment procedures, as well as specific knowledge of child and family development, psychopathology, and applicable legal standards and laws relevant to divorce and custody decisions. The professional is further advised to be aware of "personal and societal biases" and to practice in a nondiscriminatory manner. Lastly, the evaluator is cautioned to avoid multiple relationships. The guidelines admonish the psychologist from accepting the evaluator role when he or she has previously served in a professional capacity for the child or family, and should decline as well from rendering opinions in custody and visitation matters, unless ordered by the court. Conversely, during the course of the investigation, the psychologist is not to accept the family or any of its members as a therapy client nor, under most circumstances, agree to serve as a Parenting Coordinator at the conclusion of the evaluation process.

Overall, the "evaluator is to gather and report factual information, use clinical knowledge to interpret that data, and formulate clinical opinions to assist the court in making custody, visitation, or other decisions related to the welfare of a child."¹

¹ Crump, *The Guardian ad litem-His Origin*, 4 WEST RES. L.J. 178,181 (1898), in Weber, Robert H. & Jacoby, Valerie A. The roles of the guardian *ad litem*. *Massachusetts Family Law Journal*, 10,1,11-20.

² Massachusetts Category E Standards for Guardian *ad litem* Appointments.

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