Point

Getting rid of the GAL: How to save your client from those expensive, unnecessary officious intermeddlers

By Robert N. Rosen

Former Gov. Jim Hodges has now signed the Private Guardian *ad litem* Reform Act which does potentially reform the law of private guardians. The Act is the result of widespread public dissatisfaction with GALs in the family court. The anti-GAL forces, the pro-GAL forces and the Bar could not agree on what it was GALs did or what they should do. The Act, therefore, is a compromise which tries to solve a number of problems. *The biggest problem, however, is that there is no need for guardians at all, and lawyers now have a golden opportunity (and, in my opinion, a duty to their clients) to do away with GALs in most custody cases.*

I have rarely been involved in a custody case in which the GAL contributed anything except to the cost. That contribution is usually significant. This is not to say that guardians cannot be useful. Of course, they can be, and there are undoubtedly some cases which guardians have helped settle or have given useful advice. But, the same would be true in a wreck case or a medical malpractice case. If there were a guardian involved, he or she could also give some useful advice to both the plaintiff and the defendant. In general, GALs merely add another lawyer with another hourly rate to talk to the same witnesses, sit at the same depositions and present an opinion which is usually as valuable (or as lacking in value) as the opinion of the lawyer for the wife or the lawyer for the husband. Many times their opinions are worthless. GALs add nothing to the litigation except another batch of subjective opinions based on their own childhood experiences, their own marriage(s) and children and their own view of the world. Family court lawyers admit all this privately to each other, while they pander to and praise GALs who are on their side.

It is, therefore, my unshakeable belief that avoiding a guardian *ad litem* is an important service to your client because: (1) it saves money; (2) does away with another wild card in the case; (3) is one less person to have to listen to, accommodate, humor and deal with; and (4) and most importantly, the GAL can always recommend against your client, which is usually fatal, as judges generally place entirely too much value on their "impartial" recommendations.

I chaired the committee of the South Carolina Chapter of the American Academy of Matrimonial Lawyers which submitted proposed language for the new statute. The most important language suggested by the Academy is now § 20-7-1545(A) which reads as follows:

> In a private action before the family court in which custody or visitation of a minor child is at issue, the court *may* appoint a guardian ad litem *only when it determines that:*
> (1) without a guardian ad litem, *the court is likely not to be fully informed about the facts* of the case *and* there is a *substantial dispute* which necessitates a guardian ad litem; or
> (2) both parties consent to the appointment of a guardian ad litem who is approved by the court. (emphasis added)

This is a major change in the law. This statute overturns the present rule that a GAL *must* be appointed. Presently, family court judges are under the impression that it is *mandatory* for them to appoint a GAL in every custody or visitation case. The intent of the new statute, however, is to do away with GALs in most cases. The statute states unequivocally that the court *may* appoint a guardian *ad litem* as opposed to *shall* do so and then *only* when it determines certain things. Thus, the law has changed 180°. The clear intent of the statute is that there will be far fewer guardians appointed at all.

Family court judges will likely find the habit of appointing guardians difficult to break. As others must do in breaking bad habits, judges should be urged to go through withdrawal. They will then be able to live without guardians. Most custody cases involve a husband who is mad at his wife because she ran off with a boyfriend; husbands who believe they are smarter than their wives and can raise the children better (which maybe they can); and fathers who want joint decision-making and joint custody as if there were no divorce. Then there are those custody cases in which the mother is a bad mother, is genuinely unfit because she is a drug addict, has mental problems or is just a lousy parent. None of these situations require a guardian. All require a common sense solution by an impartial judge. In virtually all cases, the litigants will have lawyers. The lawyers will undoubtedly bring out every bad thing there is to know about the other party and every good thing about their clients. It is possible or even likely

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that the family court judge looking out over his or her bench may see one parent represented by an incompetent lawyer and the other parent represented by a very aggressive lawyer. In that instance, the court ought to consider appointing a GAL. The new statute says the court can appoint a guardian *ad litem* if it determines that, without a GAL, "the court will likely not be fully informed about the facts of the case." A lousy lawyer may fail to inform the court about important facts. But, the adversary system works in murder cases. It works in wreck cases. And it works in custody cases. Thus, if there are two even barely competent lawyers in the case, the family court, like the common pleas court and the federal court, *will* be fully informed about the facts of the case. Of course, at any point during the pendency of the case, if the court gets the idea that both attorneys are hiding something and that the court needs its own investigator, this would be an appropriate situation for the appointment of a GAL.

The remainder of § 20-7-1545(A)(1) states that in addition to the court finding that it would not be fully informed about the facts, the court *must* also find that "there is a substantial dispute which necessitates a guardian *ad litem*." People fighting over hours of visitation or visitation in general are not involved in "a substantial dispute" which necessitates a GAL. If the statute is properly interpreted, the court ought to rarely, if ever, appoint a GAL in a visitation dispute. Many custody cases are not really "substantial disputes" either.

Section 20-7-1545(A) puts the burden on the trial judge to make findings of fact when a party makes a motion for a GAL. Whether the trial judge can appoint a GAL *sua sponte* is debatable. The judge needs to know what the case is about, how serious the parties are about custody and, even if they are serious, whether there is any real reason to have a GAL. Implicit in finding that there is "a substantial dispute," is the consideration of how the litigants are going to pay a GAL.

The proponent of appointing a GAL (including the judge if he or she acts without a motion) has a heavy burden. The party must file a motion and provide affidavits setting forth why a GAL is needed when both parties to a custody case ordinarily are aware of the facts, may depose hostile witnesses and conduct discovery. These affidavits must support a finding that without a GAL in the case, the court is likely not to be fully informed about the facts. What does that say about the lawyer making the motion? It appears that attorney should confess that he or she is incompetent and unable to present a case without the help of a GAL. "Your Honor," the pro-GAL lawyer says in effect, "I am unable to fully inform you about the facts without another lawyer, social worker or layperson helping me."

Counsel ought to point out to the court that there may be no need for a guardian *ad litem* at the beginning of a case and that a GAL can be appointed later if a party demonstrates a valid need for a GAL. A lot of these cases resolve themselves. After waiting six months to get into mediation and blowing off steam with an expensive mediator (which is now mandatory in many custody cases), the angry husband might realize that, even though his wife committed adultery, she is still a good mother. You would have saved your client thousands of dollars by avoiding having a GAL running around and learning what everyone else already knows and sitting around reading the newspaper or drinking coffee during the mediation at $150 per hour.

The remaining sections of the new Act are further arguments against appointing a GAL because unfortunately, the duties and responsibilities of a GAL are now quite extensive, expensive and burdensome. Section 20-7-1549 requires a GAL to conduct an independent, balanced and impartial investigation which must include obtaining and reviewing relevant documents, school records, medical records, meeting with and observing the child on at least one occasion, visiting the home settings if deemed appropriate, interviewing parents, caregivers, school officials, law enforcement and others with knowledge relevant to the case, obtaining the criminal history, attending all court hearings related to custody and visitation, maintaining a complete file (which is not subject to subpoena under the Act) and presenting the court and the parties with "comprehensive written reports." Now your client must pay tremendous sums for even more unnecessary make-work than was the case before the Act. GALs may now truthfully say that they have to cross every "t" and dot every "i." Is there a better reason not to have a GAL at all?

Section 20-7-1545(A)(2) provides that the court may appoint a guardian with both parties' consent. There is, however, *no* valid reason for a lawyer to *ever* consent to the appointment of a guardian. Indeed, I believe it is negligence per se and legal malpractice for a lawyer to consent. Some of my fellow family court practitioners disagree. They feel they can pick a guardian they have confidence in to "do the right thing" or help them win because of their relationship with the GAL. This, however, is extremely risky business. Section 20-7-1555 now requires disclosure by the GAL of relationships or adverse interests. In trying to get the parties to settle, the guardian is doing the same job as the mediator who can assess the situation and "do the right thing." Section 20-7-1551 now provides that GALs cannot mediate or attempt to mediate.

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Lawyers can always hire a social worker to conduct an impartial investigation for settlement purposes only. That way you do not create a monster who can run amok and turn on your client.

Another argument for not appointing a guardian is the cost. The General Assembly was clearly concerned that, in many cases, guardians overcharged clients. Section 20-7-1553 has cut off the guardian's ATM card. Section 20-7-1553 now requires the family court judge to "set forth the method and rate of compensation for the guardian including an initial authorization of a fee based on the facts of the case." Once again, the judge has to make findings of fact. GALs no longer have a blank check to intimidate litigants and badger them into paying them unlimited amounts of money. The judge has to set the fee not on some open-ended theory but based on the actual facts before the court, who the witnesses are and the time involved. If the GAL determines that it is necessary to exceed this initial fee, he or she must then move for an order for more fees. Once again, the court must make findings of fact.

Section 20-7-1553(D) provides that either party may at any time during the action petition the court to review the reasonableness of the fees and costs submitted by the GAL or the attorney for the GAL. This will create a lot of litigation. Judges will now have to decide whether the guardian's activities are reasonable or not as the case moves along. The litigants are now free to fight with the guardian prior to the final hearing and to ask the court to limit their fees and unnecessary work at any stage of the litigation. Obviously, this is another excellent reason for the judge *not* to appoint a guardian at all. If no GAL is appointed, the judge will not have to hear numerous motions about how the guardian is wasting everyone's time and the litigants' money, which is, after all, their primary job.

While the statute is far from perfect, it has struck a major blow for common sense. If the courts follow the statute, the number of GALs should decrease dramatically. Clearly the family court cannot routinely find that without a GAL the court will not be fully informed about the facts, because if that were the case, there would have been no need for the statute at all. If every case requires a GAL, the statute is meaningless. It is black letter law that the courts "start with the assumption that the legislature intended to enact an effective law, and the legislature is not to be presumed to have done a vain or futile thing in the enactment of a statute." 73 Am.Jur.2d, *Statutes*, § 164. If the General Assembly meant the family court to continue to always appoint GALs, § 20-7-1545(A) would be rendered meaningless. In construing any statute, the South Carolina Supreme Court has held that the court's purpose and the cardinal rule of statutory construction is to ascertain the intention of the general assembly. *Burns v. State Farm Mut. Auto Ins. Co.*, 377 S.E.2d 569 (S.C. 1989). Clearly the legislature intended (as it said) to "reform" the guardian system.

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the Act would not have included anything past the standard for appointments. Instead, the Act provides for qualifications, training, duties and compensation. Although many of these provisions were not new, there had been no uniformity across the state. The detail given to these provisions demonstrates a clear intention of the legislature to insure that children in custody cases have effective and competent representation.

The legislature also did not change the law surrounding court's regulation of guardian fees. Section 20-7-430(37) gave the family court the authority to determine compensation for guardians and allocate the costs. Further, the factors in determining the allocation of fees has traditionally been similar to the standards for attorney's fees awards. *See Baker vs. Wolfe*, 333 S.C. 605, 510 S.E.2d 726 (Ct. App. 1998), *citing Townsend vs. Townsend*, 323 S.C. 309, 318, 474 S.E.2d 424, 430 (1996). What was traditionally missing from most guardian appointment orders, however, was a provision for interim billing, which the Act now provides. This benefits the litigants (and their attorneys) in that they can monitor the work of the guardian and, at the same time, be able to pay the billing as it is incurred instead of in a lump sum at the conclusion of the case.

A further reason for using guardians is to promote settlement. Unfortunately, the adversarial system, particularly in the area of custody litigation, does not always promote settlement. Although the Act prohibits guardians from acting as mediators, it does not prohibit guardians from participating in settlement discussions, nor from offering possible solutions to the litigants on various issues. The guardian, speaking solely for the child's best interest, can offer valuable insight and perhaps encourage the parties to reach settlement, thereby saving not only guardian fees but also attorney's fees and other costs associated with prolonged litigation.

Although there are a number of questions in the statute which will have to be determined by case law, and the Act is far from perfect, it is a good first step in giving uniformity to the system of guardian appointment and in providing clear standards upon which to judge a guardian's services. Had the legislature intended to deprive children of adequate and effective representation in custody actions, it would have done so specifically and would not have expended the time and effort to develop standards that were essentially meaningless. Clearly, this was not the intent. Therefore, the Act should not discourage the use of guardians in custody litigation.

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