By Daniel Pollack

The Role of a Guardian Ad Litem in a Termination of Parental Rights Proceeding

Illustration by Chris Campbell

A guardian ad litem (GAL) may be appointed for many different reasons: disputes regarding child custody, visitation, support, emancipation, or alleged incapacity of a person. From the Latin "for the lawsuit" GALs are appointed by the court to act on behalf of a minor or incompetent person for a particular legal proceeding. In general, a GAL must have a close and trusting relationship with their client. While being thoroughly knowledgeable so as to be able to advocate for their client, the GAL must acknowledge that the relationship is not a therapeutic or clinical one.

In *Jones v. Brown*,[1] the Appellate Court of Mississippi outlined the general scope of a GAL's duties, "… 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."

Thousands of parents each year have their rights terminated. An Associated Press analysis[2] "of data compiled by federal officials shows some striking variations. Maryland, for example, had a rate of 10.5 parental rights terminations for every 100,000 children in 2014; at the high end of the scale, the rate per 100,000 children was 283 in neighboring West Virginia and 252 in Oklahoma." What specifically is a GAL's role in a termination of parental rights (TPR) proceeding?

This question was the subject of a recent case before the Supreme Court of Wyoming.[3] A jury determined that the Department of Family Services

See Guardian Ad Litem on page 33

had proved that the mother met the statutory grounds to have her parental rights terminated. She had continued to use methamphetamine and did not pass her required drug testing. At trial, the mother claimed that "the GAL should not be allowed to actively participate in the termination proceeding because the child was not a party, and evidence pertaining to the best interests of the child was not relevant at the trial." The court cited Wyo. Stat. Ann. § 14-2-312, in relevant part: "After the petition [to terminate parental rights] has been filed, the court **shall** appoint a **guardian ad litem** to represent the child unless the court finds the interests of the child will be represented adequately by the petitioner or another party to the action and are not adverse to that party....The Wyoming Rules of Civil Procedure, including the right of a parent, child or interested person to demand a jury trial, are applicable in actions brought under this act (emphasis added)." The court continued: "Wyo. Stat. Ann. § 14-2-312 is an unambiguous mandatory statute that does not allow the district court discretion not to appoint a guardian ad litem or not to make the appropriate record findings that no guardian ad litem is required. Furthermore, the requirement that mandatory statutes be obeyed is most compelling in cases such as this, where fundamental parent/child relationships are at risk of severance."

The mother did not object to the appointment of a GAL. Rather, she objected to the role of the GAL. To this, the court held that "termination of parental rights cannot be based solely upon the best interests of the child. However, that does not mean that the guardian ad litem cannot participate in the evidentiary portion of the trial. The statutory provisions setting forth the requirements for termination of parental rights include factors directly related to the child's well-being. In this case, those factors included: (1) a showing that the child's health and safety would be seriously jeopardized by returning to the mother ... and/or (2) a showing that the mother was unfit to have custody and control of the child...." Practically, the court expressed its difficulty in conceiving how a GAL could fulfill his or her duty to represent a child unless the GAL could have taken an "active part in all court proceedings."

"Clients' longings are grounded in their egos. Ego driven litigation can't possibly consider either the child's best interests or consequences to others."

KAREN K. GREENBERG, ATTORNEY

South Carolina attorney Gregory Forman observes that the "biggest jurisprudential issue for guardians in private TPR cases is often whether they should apply a 'best interests' standard. Normally, guardians are appointed to represent the 'best interests' of the child. In most custody and visitation cases what the guardian believes the court should do and what the guardian believes are in the child's 'best interest' are completely congruent. But not necessarily. Indeed, it is not always clear whether the GAL's role in TPR cases is to make a recommendation on the child's 'best interests' or on whether the TPR should go forward. There are greater evidentiary burdens and procedural protections for TPR cases. What sometimes might be in the child's 'best interest' may not have sufficient evidence to support a TPR. For example, someone can be a really 'crappy' parent, and the child might be much better off with a step-parent taking on the role of a parent, but if no statutory TPR ground exists, does the guardian advocate TPR or note that there is insufficient evidence to support a TPR?"

How can public human services departments work more cooperatively with GALs to the betterment of the child clients they have in common? Massachusetts attorney Karen K. Greenberg advises that "recognizing that the role of the GAL is key whenever the court is facing a determination involving a minor child. It is the GAL who impartially brings the child before the court. The GAL is entrusted with representing the 'best interests of the child' and is the only lawyer who is not an advocate for the child per se, but rather, is the advocate for the child's best interests. All other lawyers in the termination of parental rights case are charged with representing their respective clients and their clients' wants. Clients' longings are grounded in their egos. Ego driven litigation can't possibly consider either the child's best interests or consequences to others." She adds, "Public human services departments must work collaboratively with the GAL. Collaboration keeps the focus where it really should be—on the child. Parental termination of rights cases are characterized by each litigant's agenda, pitting one party against the other. The department seeks to dissolve the parent child relationship. The department, and perhaps the child's attorney, seek to highlight the parent's flaws. The parent's attorney seeks to put the department on trial. By working collaboratively, all efforts can concentrate on whether this particular parent is fit to parent this particular child. Whatever the answer, the best interests of the child must be paramount."

Reference Notes

1. 154 So.3d 919, MS. Ct. App. (2015).
2. Crary, D. (April 30, 2016). Terminating parental rights: State policies vary widely. Available at *https://apnews.com/c9fec9ee24d64f4b9e56d1425179a50e/terminating-parental-rights-state-policies-vary-widely*
3. Matter of GAC, 396 P.3d 411 (2017).

Daniel Pollack *is a professor at Yeshiva University's School of Social Work in New York City. He can be reached at dpollack@yu.edu; (212) 960-0836.*