

Court-Appointed GALs in Child Custody Cases: Are They Constitutional?

Toby Kleinman and Daniel Pollack | December 13, 2022



Family law courts often appoint attorneys or others to act on behalf of the court or to work on behalf of a child's best interest. What these individuals are called varies from state to state. For easy reference, when the appointment refers to someone appointed to work on behalf of the court, we will refer to them as a Guardian Ad Litem (GAL). Most attorneys who practice family law have, at some point, been in a case where a GAL was appointed. This article posits that, where the

appointment of a GAL is on behalf of the court, rather than to represent what the child wants as a party to the action, the appointment creates a circumstance that may be unconstitutional and a violation of an individual party's rights.

The parties in a custody action each offer to the court what they believe is in the child's best interest. Judges are supposed to approach each case independently, follow the law, and determine the relevant facts. Only then are they supposed to decide the "best interest of child." In carrying out their charge, no judge is permitted to have ex parte contact with attorneys, parties, or other witnesses in the case. They are supposed to be neutral arbiters. Our system of justice, even in the realm of family law, is an adversary one, whereby parties with opposing positions put them before a court, and then, without a jury, after a hearing, the court makes a best interest decision. Where a GAL is doing a job on behalf of the court, it is akin to the court having its own private investigator, and thereby the court, through the GAL, effectively becomes like a third party to a two-party case.

In New York, as an example,

A GAL is an officer of the court and reports to the court what he or she is doing in the case. The Judge might ask the GAL for a recommendation and what he or she think is best for the person. Most GALs are lawyers and **have a duty to the person they are assigned to and to the court** ... (emphasis added, hereafter)

Also see here and here.

Regardless of how often the use of a GAL is employed, or whether an attorney is also appointed for a child, it is clear from the above that the GAL is doing an investigation for the court. By seeking a recommendation from its investigator (GAL), the GAL has the imprimatur of the court. This is built-in judicial bias. A judge is effectively putting its own case position together, through the GAL, even before the due process rights of the parties are secured through an opportunity to be heard. This turns the adversary system on its head. Imagine a jury saying it wants to appoint an investigator in lieu of a prosecutor and defense attorney, and reach a recommendation or conclusion based on their investigator's findings. This would be ludicrous. It would challenge the fundamental basis of fairness and impartiality.

The court is supposed to hear testimony from the parties and their witnesses and to review documentary evidence put forth by them. It is not supposed to present its own facts for the parties to agree or disagree with. Ultimately, the nature of the trial process is altered with the appointment of a GAL. Parents should have the right to assume, even where there is a dispute as to what is best for the children, that they each will put forth their positions to the court as the only parties to the case. Where power is granted to a third party to interview, gather facts, and make recommendations on behalf of the court as to best interests of a child, a third party has effectively been created.

It is impossible for a GAL to "... have a duty to the person they are assigned to **and** to the court..." It is like saying one can be faithful to reunification of the family as the first priority for a family where the

safety of a child is at issue. Safety must come first. There should never be even a pretense of a dual loyalty.

A court is precluded from hearing hearsay testimony. Yet, when a report is made by an investigator, it may be filled with hearsay which the GAL relied upon to reach its conclusions. Cross-examination does not solve this issue. Even leaving the weight of the evidence up in the air for the court does not solve this problem. The problem is that the court is itself figuratively sitting in the living room of litigants and other witnesses when they are being interviewed. This is bias by design. It is an intrusion by the court, and even creates a potential for interference in the attorney-client relationship. There can be no actual interviews by the court itself. Doing so on “behalf of the court” is no different.

In New Jersey, RULE 5:8B states, in relevant part:

In all cases in which custody or parenting time/visitation is an issue, a guardian ad litem may be appointed by a court order to **represent the best interests of the child or children ... The services rendered by a guardian ad litem shall be to the court on behalf of the child. ...** The guardian ad litem shall file a written report with the court setting forth findings and recommendations and the basis thereof, and shall be available to testify and shall be subject to cross-examination thereon. In addition to the preparation of a written report and the obligation to testify and be cross-examined thereon, the duties of a guardian may include, but need not be limited to, the following:

1. Interviewing the children and parties.
2. Interviewing other persons possessing relevant information.
3. Obtaining relevant documentary evidence.
4. Conferring with counsel for the parties.
5. Conferring with

the court, on notice to counsel. 6. Obtaining the assistance of independent experts, on leave of court. 7. Obtaining the assistance of a lawyer for the child (Rule 5:8A) on leave of court. 8. Such other matters as the guardian ad litem may request, on leave of court.

The official comment regarding an attorney for a child and the appointment of a GAL states, in part:

The purpose of Rules 5:8A and 5:8B is to eliminate the confusion between the role of a court-appointed counsel for a child and that of a court-appointed guardian ad litem (GAL). The Supreme Court's Family Division Practice Committee in its 1987-1988 Annual Report distinguishes the roles. A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate for the best interests of the child and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed.

A court-appointed guardian ad litem's services are to the court on behalf of the child. The GAL acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The GAL submits a written report to the court and is available to testify. **If the purpose of the appointment is for independent investigation and fact finding, then a GAL would be appointed.** The GAL can be an attorney, a social worker, a mental health professional or other appropriate person. If 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. Attorneys acting on behalf of

children in abuse or neglect cases and in termination of parental rights cases should act as counsel for the child pursuant to Rule 5:8A rather than in the capacity of a GAL pursuant to Rule 5:8B. See, Matter of M.R., 135 N.J.155,174,638A.2d1274,1283(1994)).

In fact, it is the courts job to ultimately determine “...**what furthers the best interests of the child.**” It is the courts job to be “... **an independent fact finder, ... as to what furthers the best interests of the child,**” from the interested parties, not a GAL. While the court maintains the right to make a final decision, by accepting a report from a GAL, it is accepting facts and other information as if from the court itself. It is as if there were a third equal party in the case, when the court should not have either any intrinsic interest in the outcome of the case nor participate in putting its own facts forward to consider through someone else, i.e. a GAL.

The adversary system is fundamental to notions of fairness. Civil matters can have implications for criminal matters where the Sixth Amendment comes into play. If a judge is permitted to have its own investigator, the appointment itself not only invites bias, but it grants independence to the appointed personal investigator who, of course, is not a judge. The same can be said regarding the Fourteenth Amendment.

The Due Process Clause of the 14th Amendment requires the right to a fair and impartial hearing by a fair and impartial court. If a court has its own investigator and does its own investigation, or has someone do an investigation on its behalf, and it also gets a recommendation from that investigator, a circumstance has been created which on its face, displays bias, unfairness, and partiality.

Cross-examination does not negate the unfairness created by the third party court investigation itself. In fact, the investigator may be interviewing witnesses who themselves will not be subject to cross-examination and yet may be relied upon by a court. The constitutional right to due process, a fair and impartial hearing, requires not only the ability to examine and cross-examine witnesses but for the court to hear these witnesses, not its own witnesses.

Putting a GAL in place is usurping the role of the court where the GAL is putting facts together to convey a perspective in the child's best interests. Each parent puts forth their belief regarding what is in the child's best interests, and the court should be making a best interest decision of the facts the parents as parties put forth. One would not add a party to a civil matter as to damages in a personal injury matter. It even sounds preposterous to consider a third party there. The court is judge and jury in family matters in most states and should not have the right to be a party to the action in doing their judicious duty.

An independent expert appointed by the court is ordinarily different than a GAL. An independent expert evaluates parties and children, and reports to the parties. It is then subjected to the rigors of cross-examination. In most circumstances, the expert is not doing work on behalf of the court even where they are court-appointed. A GAL, even with cross-examination, is beholden not to the parties, but to the court. An expert who does an evaluation for the parties, even if appointed by the court, has a "carve out" in the rules which may allow that expert to rely upon others, in what would ordinarily be hearsay. A court relying upon its own investigator, even if it is an expert, creates additional bias—confirmatory bias or otherwise. This is tantamount to the court

relying upon someone it knows and trusts, and who, at the outset, will likely give the court what it wants. Indeed, the GAL may speak with people who go unmentioned in the report. The GAL can talk about reputation or other irrelevant issues to the matters before the court. For instance, in domestic violence cases, victims often may appear unhinged to an untrained person.

There is another important distinction between a court appointment of an expert and the appointment and the use of a GAL. A GAL can take a position and make a recommendation. That recommendation, on its own, can carry more weight than an expert of a party or one appointed by the court. But it cannot be judged separately where it is permissible by law.

At first glance, a GAL and an attorney for a child may seem to have the same general role. But they are not the same. A GAL can be a witness who reports information to the court. A child's attorney advocates for the wishes of the child. Just like these two functions should not be confused, a GAL and an independent expert witness are distinct.

We must embrace our adversary system, even in family court when custody matters are at issue. It's time to recognize that the role of a GAL may not pass constitutional muster.

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