Unshackling Guardians Ad Litem from the Constraints of Florida's Hearsay Rule

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Commentators, courts and state legislatures have reached an almost universal consensus recognizing the pivotal role played by Guardians Ad Litem ("GALs") in the administration of justice by protecting vulnerable children.[1] The GAL's role has been alternatively described by the courts as "important," [2] "vital," [3] "critical,"[4] "crucial,"[5] "integral"[6] and "essential".[7] Since 1974, the appo intment of GALs to safeguard the interests of minor children "has proliferated."[8] "GALs now play a central role in the family and juvenile courts of every state."[9]

Pursuant to Florida Statute §61.403 ("Florida's Family GAL Statute"), GALs are appointed as agents of the Court, serving as the next best friend of a child, and as an investigator and/or evaluator in proceedings pursuant to Chapter 61.[10] In their investigative capacity, GALs are entrusted to assess the allegations that impact the child raised by the parties, review pleadings, depositions and other filings, interview the child, the parents, and any other person having information concerning the child's welfare, and review any pertinent documents possessed by such persons, including the child or parents' medical and mental health records.[11] The GAL may "make written or oral recommendations to the court [and] shall file a written report which may include recommendations and a statement of the wishes of the child."[12] In performing this investigative role, the GAL is said to function as the "the eyes and ears of the Court."[13]

The family courts' need for an unbiased and independent third-party to champion the interests of the minor child and serve as the court's "eyes and ears" in gathering, reviewing and presenting the relevant facts is the product of an unfortunate truth: In family cases, a GAL is crucial because the acrimony and distrust between the parents is so prevalent that it often times prevents the parents from perceiving and acting in the best interest of their children.[14] In such cases, the GAL "serves a vital role ... [by rising] above the fray of the contending parties to ensure that the interest [of their minor children] are 'represented and protected.' "[15]

We have to examine, however, the effectiveness of a Guardian if this unique set of eyes and ears is silenced when the GAL is prevented from informing the Court of what was seen and heard during its investigation. Unfortunately, that is precisely what is transpiring in family courts throughout Florida. The hearsay rule is routinely successfully deployed by whichever parent is unsatisfied with a GAL's conclusions and recommendations to prevent the admission of the GAL's report into evidence and to preclude the GAL from testifying regarding the statements made to the GAL during the investigation. This makes no sense in light of the fact that hearsay evidence is admissible when a social investigation is completed pursuant to Florida Statute 61.20

Florida's District Courts of Appeal have consistently held that the hearsay rule is applicable to a GAL's report and to any testimony by the GAL based on, or regarding, out-of-court statements made to the GAL during the investigation.[16] For instance, in Scaringe, the father appealed a final order granting the mother sole parental responsibility.[17] The GAL appointed in the case testified during the final hearing as to matters that were hearsay, and the GAL's report, which contained hearsay, was admitted into evidence.[18] The Second District Court of Appeal reversed, holding that, while section 61.403(a)(5) mandates that a GAL file a written report, the report was not automatically admissible, and the hearsay rules still applied.[19] The Court then went on to conclude that, "when a guardian attempts to testify to hearsay statements and a valid hearsay objection is raised, that objection should be sustained."[20]

These Court holdings have effectively eviscerated Florida's Family GAL Statute because, "[b]y necessity, the [GAL's] report will usually contain hearsay."[21] "GAL reports commonly contain important information gathered from [various] collateral sources—family members, teachers, and treatment providers who provide invaluable insight to the court."[22] Given the impracticality of having all of these collateral sources appear in court, much of this invaluable information simply will not be available to the Judge if an ordinary hearsay objection is all that it takes to thwart

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the GAL from carrying-out his or her essential function.[23]

As noted by the Court in Scaringe, the root cause of the current predicament is the legislature's failure to expressly exclude GAL reports and testimony from the application of the hearsay rule.[24] In contrast, Florida Statute §61.20, which authorizes the trial court to order a social investigation and study,[25] specifically provides that "[t]he court may consider the information contained in the study in making a decision on the parenting plan, and the technical rules of evidence do not exclude the study from consideration."[26] However, the underlying social investigation must "be conducted by qualified staff of the court, a child placing agency pursuant to s. 49.175, a psychologist pursuant to chapter 490 or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to Chapter 491."[27] Conspicuously missing from this list are GALs.

Accordingly, "[d]espite all of the well-intended powers enacted for guardian ad litems, the lack of a statutory hearsay exception has a stifling effect on their ability to protect Florida's children at the most critical stage of the process—in court."[28] It is time to unshackle the GALs from the constraints imposed by the hearsay rule and finally permit GALs to properly perform their critical investigative role laid-out in Florida's Family GAL Statute. This outcome can be accomplished by amending section 61.403 in order to include language similar to that contained in the social investigation statute—that "the technical rules of evidence do not exclude the [GAL's report and testimony]."[29] Alternatively, the Florida Legislature can borrow from GAL statutes in other states that have already anticipated the hearsay problem and included language aimed at specifically avoiding the evidentiary pitfall suffered by Florida's Family GAL Statute. For instance, §61.403 could incorporate the language used in Montana's family GAL statute, which sets forth that "[i]nformation contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem's opinion as to the best interests of the child."[30]

The interests served by the hearsay rule, ensuring that inherently unreliable statements do not come into evidence, is critically important. However, this needs to be weighed against the necessity of a Guardian to bring to light for the Court, details of an investigation from collateral sources who are available to testify. This factor has been considered by some Courts.

Moreover, in balancing these competing interests, the fact that family cases are always heard by a Judge militates heavily in favor of admitting the GAL reports into evidence and permitting the GALs to testify in full regarding their investigations. "Because of the nature family court proceedings, where judges rather than juries predominate, the rules of evidence are often relaxed."[31] As one Court aptly put it, "[d]uring a nonjury trial, it is presumed that the court is able to sift the wheat from the chaff and select only the legal evidence."[32]

The Florida appellate courts seem overly concerned that trial courts will abdicate their responsibility by simply adopting the GAL's report and recommendations,[33] but "properly understood, the guardian ad litem does not usurp the judge's function; he aids it."[34]

Certainly, the hearsay concerns raised by GAL's report and testimony are no greater than those from social investigations, or "home studies," as they are commonly called. The Florida Supreme Court has held that the unreliability concerns associated with hearsay in general are greatly minimized in the context of social investigations because "[t]he dangers of faulty perception and narration seem alleviated by the social workers' special skills and training; falsification seems unlikely; and memory is unimportant if the report is more or less contemporaneous."[35] These same factors are present in connection with hearsay statements under § 61.403 because "GALs generally have expertise as lawyers, mental health professionals, or both."[36] Presumably, an attorney would be much more qualified than a social worker to identify and ferret-out unreliable information obtained during their investigations on behalf of the courts. If family court judges are capable of properly receiving and considering the investigations and studies conducted by social workers despite their hearsay content, then why would they be any less capable of properly assimilating the GAL reports conducted by lawyers and mental health professionals?

There is a way to address concerns about admitting potentially "unreliable" statements through a Guardian's testimony. As the current GAL statute requires the filing of a Guardian Report 20 days before a final hearing, if the time required for the filing of a report is largely extended, let's say to 60 days, any lingering concerns about unreliable statements unduly influencing the courts' decision-making process can be conclusively laid to rest if there is more than sufficient time for the party questioning the Report to independently confirm the information contained in the Report. If there is an amendment to Florida's Family GAL Statute to require that the GAL report and a list identifying the witnesses and documents upon which it is based be served on all parties at least 60 days prior to any hearing in which the report will be presented, any source can be deposed or subpoenaed to testify. By providing the

opportunity for cross-examination, which the U.S. Supreme Court has referred to as "the greatest legal engine ever invented for the discovery of truth",[37] any appreciable risk of unreliability will be eliminated.[38]

By adopting the amendments proposed herein, "the legislature can ensure that GALs are

not silenced in the very proceedings in which children most need them to speak."[39] Only by unshackling GALs from the stifling and purpose-nullifying constraints of the hearsay rule can GALs finally fulfill their vital mission of serving as the eyes and ears of the Family Court Judges, "instead of merely engaging in what might otherwise be an exercise in futility."[40] Although it is generally recognized that a Guardian's recommendations will inevitably include hearsay testimony and that by identifying the collateral sources of an interview a Court can infer what information was received by the Guardian, it only makes sense to allow the Guardian to provide complete information to a Court just as the person who conducts an investigation pursuant to Florida Statute 61.20 is permitted to provide to the Court.

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Endnotes

1 Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & Fam. Stud. 43, 43-44 (2011).

2 *See Perez v. Perez*, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) ("Guardians ad litem serve an important role ... by acting as representatives of children and promoting society's interest in protecting children from the traumas commonly associated with divorce and custody disputes.").

3 *See In the Matter of M.N. & S.N.*, 950 P.2d 674, 676 (Col. App. 3d 1997); *In the Matter of Stephanie Myer*, 1981 Ohio App. LEXIS 4942, at *9 (Ohio 5th App. Dist. 1981); *Wiencko, Jr. v. Takayama*, 745 S.E. 2d 168, 176 (Va. App. 2013).

4 *See Isaacson v. Isaacson*, 792 A.2d 525, 536 (N.J. Super. App. Div. 2002).

5 *See Auclair v. Auclair*, 730 A.2d 1260, 1268 (Md. App. 1999).

6 *See Pizzino v. Miller*, 858 N.E.2d 1112, 1121 (Mass. App. 2006).

7 *See Miller v. Miller*, 788 A.2d 717, 725 (Md. App. 2002); *In re Adoption of D.P.E.*, 2006 Tenn. App. LEXIS 551, at *7 (Tenn. App. Aug. 22, 2006); *K.C. Clark v. Alexander*, 953 P.2d 145, 153 (Wyo. 1998).

8 Boumil, et al., supra, note 1, at 44.

9 *Id.*

10 Fla.Stat. §61.403.

11 Fla.Stat. §61.403(1)-(3).

12 Fla.Stat. §61.403(5).

13 *French v. French*, 452 So.2d 647, 651 n.2 (Fla. 4th DCA 1984); *In re Marriage of Wycoff*, 639 N.E.2d 897, 904 (Ill. App. 1994); Chambers, *The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation*, 70 Ill. B. J. 510, 511 (1982).

14 *See, e.g., Ford v. Ford*, 371 U.S. 187, 193 (1962) ("Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice."); *Auclair v. Auclair*, 730 A.2d 1260, 1268 (Md. App. 1999) (noting that the courts were imbued with the power to appoint GALs based on the recognition that children often end up as "pawns in their parents' fight to prevail on issues such as custody, visitation, or child support"); *Perez v. Perez*, 769 So. 2d 389, 393 (Fla. 3d DCA 1999) (noting that litigation involving custody and visitation issues "can be particularly acrimonious", with children, who "are particularly vulnerable to the harms commonly associated with hostility and conflict between parents" at times used as "if in a game of ping-pong where the parent with the greater resources to serve the greatest number of motions wins"); *Owens v. Owens*, 685 So. 2d 1038, 1040 (Fla. 4th DCA 1997) (noting that the GAL's investigative function is fundamental "in discovering information relevant to the best interests of a child, which neither parent wishes to disclose or neglects to disclose"); Emile Kruzick & David Zemans, *In the Best Interest of the Child: Mandatory Independent Representation*, 69 DEN. U. L.R. 605, 610-12, n.7 (1992) (parents in a custody battle typically don't act in the best interest of their children).

15 *Wiencko, Jr. v. Takayama*, 745 S.E. 2d 168, 176 (Va. App. 2013).

16 *See, e.g., Scaringe v. Scaringe*, 711 So.2d 204 (Fla. 2d DCA 1998); *C.J. v. Dept. Child. & Fams.*, 756 So. 2d 1108 (Fla. 3d DCA 2000) (trial judge erred in making findings based on the GAL's report, which was hearsay); *Alexander v. Alexander*, 2007 Fla. App. LEXIS 2789, at *8 (Fla. 4th DCA Feb. 28, 2007) (finding that the admission of GAL's report over the mother's hearsay objection was erroneous).

17 *Scaringe*, 711 So.2d at 204.

18 *Id.*

19 *Id.* at 204-05.

20 *Id.* at 205.

21 *Id.* at 204.

22 Boumil, et al., *supra*, note 1, at 61.

23 *Id.* at 62.

24 *See Scaringe*, 711 So.2d at 205.

25 *See* Fla.Stat. §61.20(1).

26 Fla.Stat. §61.20(2).

27 Fla.Stat. §61.20(1).

28 Johnson-Weider, *Guardians ad Litem: A Solution Without Strength in Helping Protect Dependent Children*, 77 Fla. B.J. 87 (Apr. 2003).

29 Fla.Stat. §61.20(2).

30 Mont. Code Ann. § 41-3-112 (3).

31 Peskind, *Evidentiary Opportunities*, 25 J. of Amer. Acad. of Matrimonial Lawyers 375, 397 (May 2013).

32 *In the Interest of T.D.B.*, 597 S.E.2d 537, 543 (Ga. App. 2004).

33 *See Roski v. Roski*, 730 So.2d 413, 414 (Fla. 2d DCA 1999) ("[W]e have previously cautioned trial judges against abdicating their decision-making responsibility to a guardian ad litem... We strongly encourage trial judges to jealously guard the court's authority in such matters.").

34 *Shainwald v. Shainwald*, 395 S.E.2d 441, 444-45 (S.C. App. 1990).

35 Kern v. Kern, 333 So. 2d 17, 20 (Fla. 1976).

36 Boumil, et al., *supra*, note 1, at 44.

37 *Cal v. Green*, 399 U.S. 149, 158 (1970).

38 *Florida v. Freber*, 366 So.2d 426, 427 (Fla. 1978) (noting that the prime concern of the hearsay rule is that that the out-of-court declarant is not subject to cross-examination).

39 Johnson-Weider, *supra*, note 29, at 78.

40 *Id.*