What is a Guardian Ad Litem?– Understanding the Proper Role of a Guardian in Family Cases

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A Guardian Ad Litem ("Guardian") serves an important fact-finding role in cases that involve minor children.[1] Generally, a Guardian is appointed to investigate issues so that the court, armed with as much information as possible, can safeguard the best interest of the minor children in the case. A judge once described the role of a Guardian as "having boots on the ground" to assist the Court. Sadly, the family courts frequently become battlefields with minor children as the innocent victims in a tug-of-war fueled by resentment and animus. Especially where timesharing is hotly disputed, or in cases where relocation is sought, a Guardian can be an invaluable foot soldier assisting the court in gaining a more complete and impartial perspective.

However, frequently, the parties do not understand the true role of a Guardian, and more surprisingly, neither do many lawyers. This article addresses the proper function of a Guardian, distinguishes a Guardian from an Attorney Ad Litem, and explores some situations where it may be more appropriate to appoint an Attorney Ad Litem than a Guardian.

Perhaps the best place to start as far as what a Guardian should be is to establish what a Guardian is not. A Guardian is not a case manager. While case management is one of the more tedious and least glamorous tasks in the legal profession, it is an onus that properly falls on others and should not be assigned to the Guardian. A Guardian is also not a vehicle to subvert the hearsay rules, which have the laudable purpose of excluding unreliable testimony not subject to the rigors of cross-examination. Parties often subvert the proper role of a Guardian by attempting to employ him or her as a conduit for the introduction of hearsay evidence through their testimony or written report. A Guardian is also not a parenting coordinator or a mediator of children's issues (unless there is a court-approved agreement so stating), and despite a common misconception to the contrary, a Guardian is not the child's "advocate."

So then, what is a Guardian Ad Litem? In answering this question, the appropriate place to start is Section 61.401 of the Florida Statutes, which governs the appointment of Guardians in family cases and, on its face, dispels the misconception that a Guardian is appointed to act as an advocate for the minor children. That provision sets forth that a Guardian is to be appointed as "next friend of the child, investigator, or evaluator, [but] a [G]uardian shall not act as attorney or advocate but shall act in the child's best interest." As the Third District Court has made clear, a Guardian is "regarded as the agent of the court,"[2] a far different role than that of an advocate.

Section 61.401 further distinguishes between a Guardian and an advocate for the child by providing that a court "in its discretion may also appoint legal counsel for a child to act as attorney or advocate" and prohibiting the same person from assuming both roles. It is critically important that lawyers understand and explain this distinction to their clients. Often times, parents call the Guardian and request that a pleading or motion be filed asking for relief they believe will benefit their child. Other times, they ask a Guardian to assist them in resolving an issue. While there are instances where a lawyer or a party may reach out to a Guardian, inquire as to the Guardian's investigation on a given issue, and use that information in an effort to reach a resolution, it is impermissible for a Guardian to become involved in championing a particular party's cause. When the Guardian attempts to explain that such matters are beyond the scope of their appointment, the clients sometimes become frustrated or irate. If the Guardian's proper role is explained to them from the onset, it would temper their expectations to a realistic level and help avoid such negative interactions between Guardians and parties.

Thus, it is advisable that during the initial meeting with each parent, a Guardian inquire as to what the parents believe his or her role to be. A majority of the time, they believe the Guardian's role is that of the child's attorney. Assisting the parents in understanding the Guardian's role will assist them in explaining the role correctly to their children.

The role of a Guardian has been the subject of much analysis. For example, in *Perez v. Perez*, the Third District Court of Appeals indicated that a basic function of a Guardian is to "protect the best interests of children"

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in custody disputes.[3] The Court recognized "society's interest in protecting children from the traumas of divorce and custody disputes."[4] The Court also indicated that a Guardian's role is to function as a "representative" of the child.[5] There is, however, a clear distinction between serving as a representative of a child and advocating on behalf of a child. Although the Court recognized that the authority of a Guardian may include requesting evaluations or discovery as part of the Guardian's investigation, it was careful to point out that "the duties and responsibilities of a Guardian Ad Litem are not coextensive with those of an attorney."[6] Moreover, the Court in *Perez* also made clear that the Guardian is to act in the best interests of a child, even if the Guardian's actions are against the child's wishes.[7]

Another commonly held belief is that a Guardian is a "party" in the proceedings. While Section 61.401 does state that a Guardian appointed to a case is a "party" thereto until discharged, a Guardian is clearly not a "party" in the traditional sense of the term. According to the *Perez* case, as children are not "parties" in their parents' divorce, the Guardian acting to represent the child's best interests is not a party either.[8] While a Court will often order that a Guardian be present at hearings, at depositions, and be served with pleadings as if they were a party, this is done solely for the purpose of ensuring the Guardian has the necessary tools for the investigation. It does not make the Guardian a "party" to the litigation in the traditional sense. Therefore, while lawyers and pro se litigants often reach out to the Guardian to try and make sure they attend every hearing and participate in all case proceedings, such universal participation is typically unnecessary and beyond the scope of the Guardian's appointment.

While many non-attorneys are routinely appointed as Guardians in family cases, the confusion regarding the Guardian's proper role is highest where the person appointed is a lawyer. As the Court stated in *Perez*, "the lines separating the functions of an attorney as [G]uardian and an attorney as advocate, can become easily blurred."[9] The American Bar Association has promulgated standards for lawyers representing children in family cases (the "ABA Standards").[10] In the commentary to the ABA Standards, it is suggested that when a court appoints a lawyer as Guardian in the typical investigatory capacity, it should "make clear that the person is not serving as a lawyer, and is not a party".[11]

The ABA Standards go on to distinguish between a "Child's Attorney," which is routinely referred to as an Attorney Ad Litem, and a "Bests Interests Attorney," which is analogous to a Guardian Ad Litem.[12] The Bests Interests Attorney as contemplated by the ABA Standards provides the services for the child's best interests, but is not "bound by the child's directives or objectives."[13]

Generally, an Attorney Ad Litem should be appointed to protect the minor child in cases where the child's rights or interests are directly conflicting with the interests of the parents. Although it could be argued that in all timesharing matters that are litigated, parents are unable to elevate their children's interests above their own, for the most part, parents litigate in a manner consistent with what they believe is best for their children. Accordingly, the appointment of an Attorney Ad Litem is not typically appropriate in the run-of-the-mill divorce case. Instead, an Attorney Ad Litem is generally appointed in "dependency, abuse and neglect proceedings, termination of parental rights proceedings, and juvenile delinquency proceedings."[14] Such matters are beyond the scope of this article.

However, situations do arise in divorce proceedings where the appointment of an Attorney Ad Litem is warranted. For example, a child has a right to confidentiality as to the child's relationship with a psychologist or psychiatrist. If the child's parents desire to pierce that confidentiality in order to obtain information to use in the proceedings, but the child wishes to preserve confidentiality, then an Attorney Ad Litem should be appointed as an advocate for the child, not to ensure the child's best interests per se, but rather to protect the child's wishes.

Where a lawyer is functioning as a Guardian Ad Litem rather than an Attorney Ad Litem, it is important to explain to the child precisely what the Guardian's role is so as not to create unreasonable expectations on the part of the child. The Guardian should explain to a child that he or she is there to aid the Court in its efforts to resolve the parents' issues. A Guardian has to be mindful of not making the child feel overly empowered, which could very well worsen an already difficult situation.

In promulgating the ABA Standards, the ABA decided to eschew the concept of a Guardian Ad Litem entirely, opining that "[t]he role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations .... [and] has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate."[15]

In order to preserve the Guardian's efficacy in its invaluable role as an impartial fact-finder for the courts, it is absolutely imperative that everyone involved understand the precise nature of the Guardian's function, including Judges, practitioners, litigants and their children. It is equally imperative that the Guardian's critical fact-finding role not be diluted and undermined through the imposition and assignment of new and additional extraneous functions, tasks and obligations. As cogently stated by the American Bar Association, "[a]sking

one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient."[16]

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Endnotes

1 *Millen v Millen*, 122 So.3d 495, 497 (Fla. 3rd DCA 2013).

2 *Franklin & Criscuolo/Lienor v. Etter*, 924 So.2d 947, 949 (Fla. 3d DCA 2006).

3 769 So.2d 389, 393 (Fla. 3rd DCA 1999).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 394.

8 *Id.*

9 *Id.* at 395.

10 American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003).

11 *Id.* at 2.

12 *Id.*

13 *Id.*

14 *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 Jour. Amer. Acad. Matrimonial Lawyers 227, 233 n. 9 (Dec. 2009).

15 American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, at 2 (2003), at 2.

16 *Id.*