





# Delineating the Roles of Guardians *Ad Litem* and Custody Evaluators

## Where Do Their Labors Intersect and Where Not?

By Melissa F. Brown

In child custody disputes, the family court's main focus is always on the welfare of and the best interests of the child. *Moore v. Moore*, 300 S.C. 75, 78, 386 S.E.2d 456, 458 (1989); *Ingold v. Ingold*, 304 S.C. 316, 319-20, 404 S.E.2d 35, 36-37 (Ct. App. 1991). While there is no consensus in the legal literature about the factors that define the best interests of the child, several states have identified through statute or case law specific factors that the court should consider when making custodial determinations. Among the factors deemed relevant in South Carolina are the "psychological and emotional considerations as they relate to the child." *Woodall v. Woodall*, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996). However, these "psychological and emotional considerations" have not been defined by statute or case law, nor have they been defined in the forensic psychological literature.

To assist the court in understanding the wishes and/or needs of the child, judges often appoint a guardian *ad litem* (GAL) to represent the best interests of the child. Where it is necessary to assess the psycho-

logical condition/interests of the child or where one or both parents may have psychological issues that could affect the well-being of the child, custody evaluators are typically appointed because neither the court nor the GAL has the credentials or the requisite training to evaluate such issues. In those circumstances, often by motion of one of the parties or the GAL, the court should appoint a custody evaluator "to aid the trier of fact in determining placement of the child ..." Marc J. Ackerman & Andrew W. Kane, *Psychological Experts in Divorce Actions* 5 (5th ed. 2011). South Carolina's licensing rules, S.C. Code § 40-55-170, require that a psychologist be licensed. If the psychologist is not licensed and practicing in South Carolina, the psychologist could be found guilty of a felony and fined of up to fifty thousand dollars or imprisoned for up to one year.

### Similarities and differences between a guardian *ad litem* and a forensic custody evaluator

A GAL is appointed by the court to represent the interests of a person

who is unable to advocate for himself or herself. See South Carolina Private Guardian *ad Litem* Reform Act, S.C. Code Ann. § 63-3-830 (Supp. 2011) (codifying the guidelines from *Patel v. Patel*, 347 S.C. 281, 288-89, 555 S.E.2d 386, 390 (2001)). The GAL can be a lawyer or non-lawyer as long as all training and qualification requirements are met. A GAL is both a spokesperson for the child and an investigator who relays facts to the court that are relevant to the court's overall determination of the "best interest[s] of the child." § 63-3-830(A)(1).

A GAL's responsibilities include "conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family." § 63-3-830(A)(2). Such investigation must include "obtaining and reviewing relevant documents" as well as accessing "the child's school records and medical records." § 63-3-830(A)(2)(a). In addition, a GAL must meet and observe the child, § 63-3-830(A)(2)(b), "visit[] the home set-



things if deemed appropriate[.]" § 63-3-830(A)(2)(c), and "interview[] . . . parents, caregivers, school officials, law enforcement, and others . . ." § 63-3-830(A)(2)(d). The GAL's objective is to investigate the facts and provide the court with an unbiased, written report containing facts that directly impact the child's best interests. § 63-3-830(A)(6).

Similarly, the custody evaluator inquires into and represents the "best psychological interests of the child." American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychologist 863 (2010). However, "not all psychologists are qualified to perform child custody evaluations. Competence is gained through education, training, supervised experience, consultation, study, and professional experience." Marc J. Ackerman, *Clinician's Guide to Child Custody Evaluations* 3 (3d ed. 2006).

In South Carolina, the licensing regulations require custody evaluators to view as a minimal practice standard the American Psychological Association's Child Custody Guidelines and Ethical Code of Conduct. S.C. Code Ann. Regs. 100-4 (2011). The evaluator's role is multifaceted, serving as a psychological fact finder; as an investigator who reviews documents and interviews people with direct knowledge of the parents, child and each parent-child relationship; and as an assessor who interviews the parents, child and other relevant family members. He may also administer, score and interpret psychological tests and conduct home visits to observe each parent and child.

The custody evaluator is also a writer who integrates the information collected during the forensic assessment into a coherent, written document that provides answers to the court's specific questions outlined in its original order for custody evaluation. Finally, the evaluator is a teacher and educator. The evaluator teaches the court about the methods and procedures he used in the evaluation and explains how he obtained and analyzed the data. The evaluator then explains how his proffered opinions are relat-

ed to the data he collected as well as how his opinion compares to peer reviewed literature.

Ideally, the evaluation report is a tool for the judge to obtain a more complete picture of the parties' relative parenting strengths and weaknesses and the fit between each adult's parenting competencies and the psychological and developmental needs of each child. This is sometimes referred to as the "goodness of fit" between each parent and each child. Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations* 305 (1998).

As with the GAL's opinion, the court has discretion to decide whether to adopt the custody evaluator's recommendations. See S.C. R. Evid. 702 (indicating that an expert's opinion is allowed to assist the trier of fact to analyze a fact in issue); *Divine v. Robbins*, 385 S.C. 23, 35, 683 S.E.2d 286, 292 (Ct. App. 2009).

There are also many important differences between a child custody evaluator and a GAL. The custody evaluator is often a trained behavioral scientist who understands the process of scientific inquiry and is able to apply the principles of scientific inquiry to the custody assessment process. The custody evaluator is also an expert in many areas of behavioral science research relevant to understanding family functioning within the context of a post-separation family system. Areas of specialized knowledge include, but are not limited to, child development, adult development, child psychopathology and abnormal behavior, adult psychopathology and abnormal behavior, use of psychological tests, a child's normal and abnormal reactions to parental separation and divorce, age-appropriate parenting plans, domestic violence and its assessment within the context of child custody disputes, alienation dynamics and their assessment within the context of child custody disputes, and parental gatekeeping and its effect on a child's relationships with parents. Jonathan W. Gould & David A. Martindale, *The Art and Science of Child Custody Evaluations* 30 (2009).

Experienced child custody evalu-

ators also familiarize themselves with statutes, case law and rules of evidence that are directly relevant to the preparation of their work product so their testimony is admissible. Child custody evaluators are also familiar with research on types of bias that may affect their assessment process, their interpretation of data and their presentation of data at trial through written or oral testimony.

GALs typically function as information gatherers and are often skilled at interviewing people. A GAL has access to a broad range of documents as well as the ability to interview and observe the interactions between the parents and the child. As a lay witness, the GAL's report is based upon a broad and somewhat subjective investigation. See *Divine*, 385 S.C. at 39, 683 S.E.2d at 294 (citing S.C.R.E. 701). A GAL, even if not an attorney, can suggest that parties submit to psychological testing based on the GAL's personal observations of the individual(s). Under S.C.R.E. 701, a lay witness may present the trier of fact opinions or inferences that: "(a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of a witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." S.C.R.E. 701 (emphasis added).

When there are concerns about a parent's mental health, however, a formal psychological evaluation is needed, and the GAL should ask for such evaluations rather than making "arm-chair" diagnoses of psychological conditions. GALs and attorneys should also understand that a diagnosis of psychological disorder standing alone tells the court nothing about the person's ability to parent. The psychological evaluation **must** include information about the parent's parenting behavior as observed by third parties and as experienced by the child. Neither a GAL nor a custody evaluator should opine about a diagnosis and its relationship to parenting without having specific information about the nature and quality of the parent-child relationship.



Many different types of mental health professionals may conduct a child custody assessment. Most often, the custody evaluator is a doctoral-trained psychologist who conducts psychological testing as part of the evaluation process that includes the other methodological prongs described above. Social workers and psychiatrists may also conduct child custody evaluations. Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations* 197 (1998).

Although the law requires both the GAL and the custody evaluator to offer opinions that are free from bias, the GAL's final written report must not include a recommendation concerning which party should be awarded custody, and the GAL cannot make a recommendation about custody at the merits hearing unless requested by the court for reasons specifically set forth on the record. S.C. Code Ann. § 63-3-830(A)(2-6) (Supp. 2011) (indicating the GAL's responsibilities); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychologist 863, 864 (2010) ("[I]t is crucial that evaluators remain as free as possible of unwarranted bias or partiality."). The custody evaluator is not so constrained. See S.C.R.E. 702.

### How to pick the right evaluator

In a custody dispute, it is best to appoint a GAL early in the case. If a psychological evaluation would aid the trier of fact to determine the best interests of the child, the court, the attorneys jointly and/or the GAL, then the court should order the parties to submit to a forensic custody evaluation. As the representative of the minor child's best interests, the GAL should ensure that the forensic evaluator is competent and qualified to conduct a custody evaluation. Marc J. Ackerman, *Clinician's Guide to Child Custody Evaluations* 5 (3d ed. 2006).

### Who may conduct a custody evaluation

A "forensic examiner" is a "psychologist who examines the psychological condition of a person whose

psychological condition is in controversy or at issue." American Psychological Association, *Specialty Guidelines for Forensic Psychology* (2011) available at [www.apa.org/practice/guidelines/forensic-psychology.aspx](http://www.apa.org/practice/guidelines/forensic-psychology.aspx). Forensic psychology refers to activities in which a psychologist applies "scientific, technical, or specialized knowledge of psychology to the law" to aid the trier of fact. *Id.* The attorney(s) and/or GAL should consider several factors when choosing the appropriate forensic psychologist.

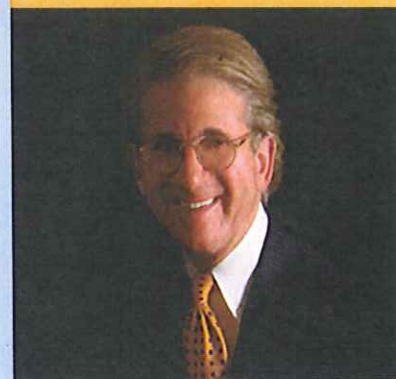
First, the interested parties should consider whether the psychologist has sufficient expertise, education and training in this area. Lyn R. Greenberg, Jonathan W. Gould, Dianna Gould-Saltman, Philip M. Stahl, *Is the Child's Therapist Part of the Problem? What Judges, Attorneys, and Mental Health Professionals Need to Know About Court-related Treatment for Children*, 37 Fam. L.Q. 241, 243 (2003). Second, they should determine whether the forensic psychologist can perform his evaluation without bias, prejudice or undue influence. *Id.* Third, they should weigh the credibility and sufficiency of the custody evaluator's previous reports. *Id.*

In some circumstances, the parties and/or GAL may choose to request the appointment of a forensic psychiatrist as the forensic evaluator. In South Carolina and North Carolina, psychologists typically conduct evaluations. In other jurisdictions, such as New York, psychiatrists are more commonly appointed. The forensic psychiatrist should also abide by the standards set forth by the American Academy of Child and Adolescent Psychiatrists' ethical standards. [www.aacap.org](http://www.aacap.org). As would a forensic psychologist, a forensic psychiatrist bases his evaluation upon the same methodology used by psychologists, except the psychiatrist typically refers the party or child to a psychologist to administer and score standard psychological tests. *Practice Parameter for Child and Adolescent Forensic Evaluations*, 50 J. Am. Acad. Child Adolescent Psychiatry 1299, 1306-07 (2011).

### Who may not conduct a custody evaluation: the treating therapist

The American Psychological Association (APA) guidelines insist that a psychologist should avoid wearing "multiple hats." American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychologist 863, 865 (2010). See also S.C. Code Ann. Regs. 100-4 (2011). For instance, the psychologist is barred from conducting a custody evaluation if he is currently or was previously the treating therapist for the couple, one of the parents or any of the children. American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychologist 863, 865 (2010). ("Psychologists conducting a child custody evaluation with their current or prior psychotherapy clients and psychologists conducting psychotherapy with their current or prior custody examinees are both examples of multiple relationships.") The reasoning for this

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bright-line rule is that therapists often become advocates for their patients. Advocacy results in biases that might undermine the independence and neutrality of the evaluation process or create the perception that objectivity is lacking.

The APA guidelines define "multiple relationships" as the circumstance when a "forensic practitioner in a professional role with a person [and is currently or previously] in a different role with the same person." American Psychological Association, *Specialty Guidelines for Forensic Psychology* at 4.02 (2011) available at [www.apa.org/practice/guidelines/forensic-psychology.aspx](http://www.apa.org/practice/guidelines/forensic-psychology.aspx). Such a relationship may impair the evaluator's ability to produce an impartial analysis. *Id.* Therefore, judges, attorneys and guardians must avoid authorizing the appointment of a party's or child's treating therapist as the forensic evaluator.

#### **How a GAL should interact with the custody evaluator**

The GAL and custody evaluator must work together to properly

assess the best interests of the child while avoiding unduly influencing the other. Marc J. Ackerman, *Clinician's Guide to Child Custody Evaluations* 5 (3d ed. 2006). The GAL should supply the forensic evaluator with all relevant documents, but the GAL's preliminary impressions and opinions should not be shared. The evaluator should take great care to avoid forming partial or biased positions. See American Psychological Association, *Specialty Guidelines for Forensic Psychology* 1.02 (2011) available at [www.apa.org/practice/guidelines/forensic-psychology.aspx](http://www.apa.org/practice/guidelines/forensic-psychology.aspx). The evaluator should keep notes of each contact with the GAL to help maintain the transparency of the process. Hidden or undocumented contacts raise questions of bias and undermine the process. Both the GAL and custody evaluator should retain all records of these investigations, including records of their interactions with each other. This is particularly true for the evaluator because the evaluator's notes are subject to subpoena, S.C.R.E. 705, but the

GAL's notes are not. S.C. Code Ann. § 63-3-830(5) (Supp. 2011).

#### **Confidentiality**

When the custody evaluation is ordered by the court, the duty of confidentiality is *to the court rather than to the patient* because the court is the evaluator's client. *Practice Parameter for Child and Adolescent Forensic Evaluations*, 50 J. Am. Acad. Child Adolescent Psychiatry 1299 (2011). The duty of confidentiality that typically belongs to the patient is implicitly waived by the patient undergoing a court-ordered evaluation. Thus, all information gathered and used in the evaluation can be disclosed to the court without violating rules of confidentiality. *Id.* at 1304. Therefore, the GAL and attorneys should remember that all information—both tangible and intangible—disclosed to the evaluator is discoverable by the court and litigants.

#### **What the guardian ad litem should be concerned with in the custody evaluator's report**

The scope of the evaluation is

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determined by the court in its order appointing the evaluator. If no specific instructions are included, evaluators must identify the questions that define the scope of their work prior to beginning their evaluation so that proper, informed consent is provided. Jonathan W. Gould & David A. Martindale, *Specific-Questions Guide to Child Custody Investigations*, 27 The Matrimonial Strategist 1, 1-3 (2009).

Further, an evaluator may only opine about which parent might make the better custodial parent if the evaluator has assessed both parents and each child. Marc J. Ackerman, *Clinician's Guide to Child Custody Evaluations* 30 (3d ed. 2006). Therefore, the GAL has the job of ensuring that the evaluator assesses all children involved in the custody dispute as well as both parents.

Once the forensic evaluator completes his evaluation, the attorneys and the GAL should evaluate the reliability of the procedures used by the evaluator in reaching his conclusions, the relationship between the data generated by his procedures

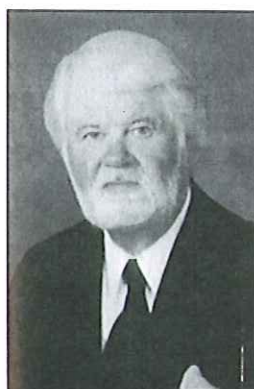
and his proffered opinions as well as the research and evidence available to support his opinions. In essence, such information is supposed to be gathered and presented in a manner that would enable another evaluator to reach the same results after reviewing the underlying information gathered to prepare the report. Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations* 381 (2d ed. 2006).

The report should summarize the information gathered during the assessment process, describe how the data led to answers to specific questions posed by the court, and explain how the data and the evaluator's interpretation led to the expert's opinion. The report should also include a summary of evaluations and interviews, interpretation of results and the evaluator's opinions and conclusions. *Id.* at 381-95. In addition, a forensic practitioner should disclose all information obtained and relied upon and even the information that the evaluator rejected during the course of his evaluation. *Supra* note 45 at 11.05.

A custody evaluation should assist the trier of fact in rendering a custody decision. The report should accurately portray the best interests of the child, while also educating the court about the methodology used and findings obtained.

Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations* 3 (2d ed. 2006). However, the ultimate custody decision based upon the child's "best interests" remains for the trier of fact to decide, see S.C.R.E. 702, and it is imperative that the GAL, the evaluator, the attorneys, the parties and the judge all understand the process and the limitations of each professional's role in that process.

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