20 Music Square West, Suite 208
Nashville, TN. 37203 USA
(615) 251 0441
Fax (615) 523 0300
www.tscmusa.com

"Maintaining a higher degree of excellence"

Sunday, May 10, 2009

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano,

I apologize for the late submittal, but I felt obligated to comment on Rule 40A

All too many times a guardian ad litem is appointed without the clear purpose being defined. Rule 40 A does just that. I work as a private investigator in Nashville with primary focus on domestic issues and child custody, with and without DCS intervention. I have witnessed GAL's work with either parent without taking the child's best interest at heart. I have witnessed GAL's abuse their position and attempt to strike back, and burden a parent, for personal reasons. Some don't competently understand the position, and won't use their position to obtain necessary factual information to support the child's best interest.

One thing I disagree on, is non consideration of the child's wishes. Sometimes acting towards a child's wishes can lead to the truth when closely examined over a period of time. A child under 12 will rarely lie unless they are being coerced or are offered an incentive by an adult in exchange for favorable information.

Something that should be considered for future use is that a guardian ad litem should have credible formal training for interviewing children under the age of 16. Interviewing children is a special skill that requires explicit knowledge and skill sets that will produce an effective interview.

Again I would like to thank the court for clear definition provided by 40 A. If you have any questions pertaining to this matter, please contact me at your earliest convenience.

Respectfully submitted,

Mitchell E Davis TN PI Lic # 5384
TSCM/Special Operations Group Inc.
20 Music Square West, Suite 208
Nashville, TN 37203 USA

KARL F. DEAN
MAYOR

MAY - 7 2009

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

BETTY ADAMS GREEN, JUDGE

JUVENILE COURT DAVIDSON COUNTY
100 WOODLAND STREET
P.O. BOX 196306
NASHVILLE, TENNESSEE 37219-6306

May 7, 2009

Dear Justices of the Supreme Court of Tennessee;

Pursuant to our letter of March 17, 2009, we outlined several concerns regarding the recently enacted Rule 40A of the Rules of the Tennessee Supreme Court. Today we, along with the members of the Juvenile Court Committee of the Nashville Bar Association, the Metro Guardian Ad Litem's office and a representative of CASA, met with Lisa Rippy and David Haines to discuss our concerns. While they clearly understood our concerns and did acknowledge that several of the issues we raised were not adequately discussed during implementation of the rule, nevertheless, they indicated there was nothing they could do at this point.

As a result of our meeting we are requesting that our letter dated March 17, 2009 be treated as a Petition for Exemption from Rule 40A for the Juvenile Courts of Tennessee who request such exemption and specifically for exemption for the Davidson County Juvenile Court. As expressed in our letter this rule, especially when applied in cases where neither party is represented by counsel, will have the potential of immediate and irreparable harm to children when the court is required to make serious custody and visitation determinations without adequate representation and presentation of crucial facts.

Sincerely,

Judge Betty Adams Green

Suzie McGowan, Chairperson
Juvenile Court Committee Nashville Bar Association

Dennis Nordhoff, Co-Chairperson
Juvenile Court Committee Nashville Bar Association

Rob Robinson
Metro Public Guardian ad Litem

THE CIRCUIT COURT OF TENNESSEE
TWENTY-FIRST JUDICIAL DISTRICT
DIVISION IV

COUNTIES:
HICKMAN
LEWIS
PERRY
WILLIAMSON

CHAMBERS OF
TIMOTHY L. EASTER
JUDGE

POST OFFICE BOX 1469
FRANKLIN, TN 37065-1469
(615) 790-5426

RECEIVED
MAR 15 2010
Clerk of the Courts
Rec'd By

March 12, 2010

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments to Supreme Court Provisional Rule 40A

Dear Mike:

Enclosed please find a letter from me on behalf of the Circuit Judges of the 21st Judicial District regarding Supreme Court Provisional Rule 40A. With the letter, I have included recommendations from both the Hickman County and the Williamson County Bar Associations.

Thank you for your assistance in seeing that the enclosed materials reach the proper office for viewing by the Supreme Court Justices. Please contact me if you have any questions.

With kindest personal regards, I remain

Sincerely yours,

Tim

Timothy L. Easter
Presiding Judge

TLE:sdg

Enclosures

RECEIVED
MAR 15 2010
Clerk of the Courts
Rec'd By ______

STATE OF TENNESSEE
CIRCUIT JUDGES, TWENTY-FIRST JUDICIAL DISTRICT
POST OFFICE BOX 1469
135 FOURTH AVENUE SOUTH, 264 WILLIAMSON COUNTY JUDICIAL CENTER
FRANKLIN, TENNESSEE 37065-1469
(615) 790-5426 • FAX (615) 790-4424 • FAX (615) 790-5047

ROBBIE T. BEAL
JUDGE, DIVISION I

JAMES G. MARTIN III
JUDGE, DIVISION II

JEFFREY S. BIVINS
JUDGE, DIVISION III

TIMOTHY L. EASTER
JUDGE, DIVISION IV

March 12, 2010

Justices of the Supreme Court of Tennessee
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments to Supreme Court Provisional Rule 40A

Dear Justices:

In accordance with the Supreme Court's Order soliciting comments regarding the operation, effect, and efficiency of Provisional Rule 40A, enclosed please find a November 5, 2009, resolution/report from the Hickman County Bar Association and a February 24, 2010, recommendation of the Williamson County Bar Association.

With limited exception, the Circuit Judges of the 21st Judicial District fully adopt these reports and recommendations. The judges of this district agree with the conclusion that a reasonable interpretation of this provisional rule does not give the guardian ad litem an effective platform for which he/she can represent the best interest of the child. The judges agree that the provisional rule is in conflict with the ethical responsibilities of an attorney guardian ad litem in custody proceedings.

We further concur that the process for the appointment of a guardian ad litem under the provisional rule is too burdensome. We believe a trial judge should have the authority to appoint a guardian ad litem in an expeditious manner whenever the trial judge determines justice requires such an appointment. We understand that the decision to make such an appointment should be exercised in a sparingly judicious manner.

The judges of the 21st Judicial District believe that the adoption of a local rule, even temporarily, as suggested by the Hickman County Bar's report, would violate Tenn. Sup. Ct. R. 18(c). Although we agree with the report's conclusions

and encourage the Supreme Court to reconsider the current provisional rule, we also agree that we cannot create a local rule or exercise inherent authority that would be inconsistent with a Supreme Court rule.

Thank you for your thoughtful consideration to these comments regarding Provisional Rule 40A. The Circuit Judges of this district wish to acknowledge and express appreciation to both the Hickman County Bar Association and the Williamson County Bar Association Rule 40A Committees for their diligent and conscientious study of the current rule. Their work has been very helpful to me and my colleagues in arriving at our view of the current rule.

Please feel free to contact me or the president of either the Hickman County or Williamson County Bar Associations should you have additional questions.

With kindest personal regards, I remain

Sincerely yours,

Timothy L. Easter
Presiding Judge

TLE:sdg

Enclosures

cc: Allston Vander Horst,
President of the Hickman County Bar Association
Jack Welch,
President of the Williamson County Bar Association
Libby Sykes,
Executive Director of the Administrative Office of the Courts
Judge James Martin, III
Judge Jeffrey Bivins
Judge Robbie Beal

Law Office
Dye & Vander Horst, P.C.

105 West End Avenue, PO Box 11, Centerville, TN 37033
Telephone (931) 729-3531 Fax (931) 729-3532

November 6, 2009

The Honorable Timothy L. Easter
Presiding Judge, 21st Judicial District
135 4th Ave S
PO Box 1469
Franklin, TN 37065

RE: Hickman County Bar Resolution and Report on Supreme Court Rule 40A

Dear Judge Easter:

Enclosed you will find the November 5, 2009 Hickman County Bar Resolution and Report on Supreme Court Rule 40A. I have enclosed copies for the other Judges. In addition, our Resolution asks for your office to forward a copy to the President of the Williamson County Bar to perhaps achieve some unified input on this issue. I have taken the liberty of doing that by copy of this letter.

Thank you and your fellow Judges in advance for your consideration of the Hickman County Bar's Resolution and Report. We obviously will be happy to meet with anyone at any time and any

Attorney Allston Vander Horst avanderhorst@dye-vanderhorst.com
Attorney Dana Dye ddye@dye-vanderhorst.com

place to further discuss what we consider a fairly serious issue and one that cannot simply be side-stepped.

Sincerely,

Allston Vander Horst

Allston Vander Horst
President, Hickman County Bar
AVH:sap

Enclosures

Cc: Ms. Patricia Wilsdorf, Attorney at Law, Sec., Hickman Co. Bar
Ms. Melanie Cagle, Attorney at Law, Vice-Pres., Hickman Co. Bar
Mr. Jack Welch, Attorney at Law, Pres., Williamson Co. Bar

RESOLUTION OF THE HICKMAN COUNTY BAR CONCERNING SUPREME COURT RULE 40A

This is a Resolution of the Hickman County Bar Association dated November 5, 2009.

Come the members of the Hickman County Bar Association and by an unanimous vote of the Hickman County Bar present on November 5, 2009 have passed the following Resolution as evidenced by the signing of this Resolution on this the 5th day of November 2009 by the President and Secretary of the Hickman County Bar Association.

WHEREAS, the Tennessee Supreme Court filed an Order on February 17, 2009 adopting Rule 40A concerning the appointment of Guardians-ad-litem in custody proceedings; and

WHEREAS, members of the Hickman County Bar Association reviewed Rule 40A in the spring of 2009 and had multiple concerns with Rule 40A; and

WHEREAS, the Tennessee Supreme Court has provided for a trial period from May 1, 2009 through April 30, 2010 to determine the effectiveness of the application of this new Rule and to solicit comments; and

WHEREAS, the Hickman County Bar Association formed a committee on August 6, 2009 to study Supreme Court Rule 40A and report back to the whole Bar; and

WHEREAS, that committee has reported back to the Hickman County Bar and the Bar has adopted the committee's report as its official position on Supreme Court Rule 40A;

THEREFORE, the Hickman County Bar Association directs the President of the Bar to submit a signed copy of the Hickman County report on Supreme Court Rule 40A and a copy of this Resolution to the Presiding Judge of the 21st Judicial District with a request that it be disseminated to the other Judges of the District and to the President of the Williamson County Bar. Further the Hickman County Bar requests the Judges of the 21st Judicial District review Supreme Court Rule 40A in light of the report of the Hickman County Bar. The Hickman County Bar would request the Judges of the 21st Judicial District to adopt a written position consistent with the findings and position of the Hickman County Bar as concerns the appointment, authority given, and operating procedures of Attorney Guardians-ad-litem in the 21st Judicial District.

The Hickman County Bar further requests after the Judges of the 21st Judicial District deliberate on this matter that the Presiding Judge forward the Report of the Hickman County Bar to the Chief Justice of the Tennessee Supreme Court and to the Director of the Administrative Office of the Courts for their consideration and appropriate dissemination.

The Hickman County Bar further requests the written position of the Judges of the 21st Judicial District be submitted with the report of the Hickman County Bar to the Chief Justice of the Supreme Court. The Hickman County Bar further requests the Judges of the 21st Judicial District to adopt temporary local Rules consistent with the Hickman County Bar's

report, pending review of Rule 40A by the Supreme Court and should the Tennessee Supreme Court not significantly modify or withdraw Supreme Court Rule 40A that those temporary local Rules be made permanent.

The Hickman County Bar Association hereby unanimously passes the above Resolution.

ADOPTED this 5th day of Nov, 2009.

President, Hickman Co. Bar

Vice-President, Hickman Co. Bar

Secretary, Hickman Co. Bar

REPORT OF THE HICKMAN COUNTY BAR ASSOCIATION CONCERNING THE RECENTLY ENACTED SUPREME COURT RULE 40A ON THE APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY PROCEEDINGS

INDEX

Introduction....3

Primary Issue....3

Issue I: Under Supreme Court Rule 40A the Appointed Guardian ad litem is Prohibited by the Restrictions Imposed under Section 9 of Rule 40A from Effectively Representing his minor Client's Best Interest....3

Resolution of Issue I....6

Secondary Issues....7

Issue II: The Appointment Process for a Guardian ad litem is too Burdensome....7

Resolution of Issue II....7

Issue III: Concerns about Supreme Court Rule 40A Section 4(d)....9

Resolution of Issue III....9

Conclusion....10

INTRODUCTION

The Hickman County Bar Association passed a Resolution on August 6, 2009 expressing concern about new Supreme Court Rule 40A which sets out a procedure for the appointment of Guardians ad litem in custody proceedings and the duties and limitations of the Guardian ad litem under this new Rule. The Bar appointed a committee to study Rule 40A and report back to the full Bar. Appointed to the committee were Allston Vander Horst, Patricia Wilsdorf and Suzie McGowan, Dana Dye and Melanie Cagle were later added to the Committee. Allston Vander Horst drew up a proposed rough draft which he subsequently modified. This draft was adopted by the committee and by the Bar in its regular meeting held on November 5, 2009. The principle concern of the Bar will be addressed first and then several secondary concerns and issues will be addressed. At the November 5, 2009 Bar meeting a resolution was passed to forward this report to the Judges of the 21st Judicial District. This report does not address all of the concerns of the members of the Bar.

PRIMARY ISSUES

I. UNDER SUPREME COURT RULE 40A THE APPOINTED GUARDIAN AD LITEM IS PROHIBITED BY THE RESTRICTIONS IMPOSED UNDER SECTION 9 OF RULE 40A FROM EFFECTIVELY REPRESENTING HIS MINOR CLIENT'S BEST INTERESTS

The overwhelming conclusion of the Bar is that no Guardian ad litem appointed under Supreme Court Rule 40A (hereinafter Rule 40A) can both comply with the Rule and effectively carry out his/her obligations to represent a minor child's best interests. Section 6 of Rule 40A, "Role of Guardian ad Litem", provides in subparagraph (a) that "the Guardian ad litem's role is to represent the best interests (of the minor) by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence."(Emphasis added) Subparagraph (b) provides that "the Guardian ad litem shall not function as a

special master" and subparagraph (c) provides that the Guardian shall act as the Guardian and not as the attorney for the child.

Under Section 8, "Duties/Rights of Guardian ad Litem", the Guardian is declared not to be a party, but can conduct investigations, obtain and review relevant medical, psychological and school records. Under subparagraph (c) of Section 8 the Guardian's responsibility shall be to interview the child and the parties, and other relevant people; to ascertain the child's expressed objectives and consider those; and encourage settlement and alternative dispute resolution. Under subparagraph (d) the Guardian shall consider the positions of the child, shall investigate those positions and shall fully discuss those with the child. Under subparagraph (d)(3) if the Guardian ad litem continues to disagree with the child's expressed wishes, he/she shall advise the court of the child's position and of any evidence supporting the child's position.

The overriding problems with Rule 40A occur in section 9, "Participation in Proceeding". Section 9(a)(4) of 40A states, the Guardian shall "attend all legal proceedings in the case, <u>but a Guardian ad litem may not take any action that may be taken only by an attorney representing a party, including making opening and closing statements, examining witnesses in court, and engaging in formal discovery pursuant to the Tennessee Rules of Civil Procedure</u>."(Emphasis added) The Guardian ad litem is given no legal authority to represent or push for the best interests of the minor child other than by providing a report under Section 9(e), and being called as a witness under Section 9(f). However, the Guardian ad litem's report cannot be admitted into evidence under Section 9(g), unless both parties agree under Section 9(d). Obviously if a report is adverse to a party in any way that party would not agree to it being allowed into evidence.

It is the position of the Bar that since under Section 9(f) the Guardian as a witness is "subject to the Tennessee Rules of Evidence" that the only testimony the Guardian ad litem would be competent to give would be admission evidence

of one or both of the parties. (There is the additional evidentiary exception for the statements of children concerning their abuse about which the Guardian ad litem could testify.) In addition the Guardian ad litem can only provide this limited testimony if a party actually calls or compels the Guardian ad litem to testify. (See Section 9(f) and (h))

It is the conclusion of the Hickman County Bar that the sole function of the Guardian ad litem under Rule 40A is to investigate the facts of a case and try to influence one party or the other by way of the Guardian ad litem's report. It appears that the Guardian ad litem's function as outlined by Rule 40A would be better served by the efforts of a Social Worker.

The Bar can think of no reasonable interpretation of Rule 40A that gives the Guardian ad litem an effective platform from which he/she can represent the "best interests of the child" and, therefore, Rule 40A is in direct conflict with the ethical responsibilities of an attorney Guardian ad litem.

Gibson's Suits in Chancery, Eighth Edition, § 3.24 provides, "A Guardian ad litem should assume whatever affirmative responsibilities are necessary for the protection of the interests and rights of his ward. The Court in appointing him gives him a primary shield, and secondary sword."

The treatise goes on to state in § 3.25,

> "Having ascertained the facts, the Guardian ad litem will then take such steps as will best promote his ward's welfare. If the object of the complaint is promotive of the welfare, he should not put any obstacles in the way of the relief sought, but should cooperate with counsel for the plaintiff in expediting the cause and making the costs as light as possible, especially if the ward may be liable for any part of such costs. If, on the other hand, the relief sought is detrimental to the rights and interests of the ward, the Guardian ad litem should vigorously resist that relief, and in every proper way assert the rights and protect the interests of his ward, using for that

purpose every available defense admissible in Equity; and should rally to his aid the relatives and friends of his ward, and should take every step that is incumbent on a faithful, diligent, skillful and zealous lawyer and Guardian." (Gibson's Suits in Chancery, Eighth Edition, § 3.25)(Emphasis added)

RESOLUTION OF ISSUE I

It is the Bar's opinion that Rule 40A should be scrapped unless Section 9 is modified to state under Section 9(a) "When the Guardian ad litem appointed in custody proceedings is an attorney that person is entitled to function as an attorney protecting the best interests of the minor child".[1] It should continue to include Section 9(a)(1)-(3) but amend (4) to state "a Guardian ad litem may take any action that may be taken by an attorney representing a party...". With these amendments the Bar also recommends that Section 9(f) be deleted in its entirety because it would be inappropriate for the Guardian ad litem to testify as a witness, and subparagraph (h) should be deleted because it would be the Guardian ad litem's ethical obligation to attend a trial or hearing to represent the minor child's best interest and, therefore, the section is superfluous. The appropriateness of preparing a report under Section 9(d) and (e) should also be reviewed. [2]

---

[1] The other way it could be scrapped is to remove "an attorney" from who is "eligible" to be a guardian ad litem under Rule 40A Section I(c)(2). Perhaps the Supreme Court eliminated the attorney function of a guardian ad litem under Section 9 to allow for the inclusion of others to be guardians ad litem under Section 1(c)(1) and (3). If this is the case, the Supreme Court has debased the value of an attorney as a guardian ad litem. It is analogous to telling a competent mechanic (attorney) he is responsible for a car (the minor), but can only change the wiper blades (Section 9). One Judge recognizing the problems presented by Rule 40A appointed an attorney as both Guardian ad Litem and Attorney-in-fact for the minor child with instructions to report to the court any conflicts between the two functions. The inherent awkwardness and problems of this approach underscore just how flawed Rule 40A is.

[2] It is difficult to reconcile some of the conflicts within Rule 40A. The Guardian ad litem is prohibited from putting on witnesses under Section 9(a)(4). However, Section 11(d) provides that the Guardian ad litem "must seek court approval before incurring extraordinary expenses such as expert witness fees. Any order authorizing the Guardian ad litem to hire expert witnesses must specify the hourly rate to be paid the expert witness,..." How is the Guardian ad litem suppose to hire expert witnesses that the Guardian ad litem has no authority to then put on the stand and examine?

SECONDARY ISSUES

II. THE APPOINTMENT PROCESS FOR A GUARDIAN AD LITEM IS TOO BURDENSOME

It is the Bar's opinion that Section 3 "Guardian ad litem Appointments" creates an appointment system that is too complex to be effective. The first concern of the Bar is that if the court was to carry out its obligations under Section3(c) in "determining whether appointing a Guardian ad litem is necessary..." the court would be potentially facing a three day or more trial just to determine the justification for the appointment of a Guardian ad litem in the event either party disagreed with the appointment. If both of the parties disagreed with the appointment of a Guardian ad litem, then there is no mechanism by which the court could gather the information required under Section 3 to make its decision concerning the need for an appointment of the Guardian ad litem. (For example, if both parents were drug dealers and implicitly agreed not to raise that as an issue against each other in a divorce they will not want a Guardian ad litem that might uncover this as an issue.)

RESOLUTION OF ISSUE II

The Bar is aware of one instance where instead of the court taking proof concerning a need for a Guardian ad litem, it asked each party, one in favor of a Guardian ad litem and the other opposing the Guardian ad litem, to submit an affidavit stating the basis for each of their positions. The Court then made its determination as to the need for an appointment of a Guardian ad litem. While this procedure is not authorized by Section 3, it certainly makes a lot of sense and avoids the potential nightmares of three day hearings on the justification of appointments of a Guardian ad litem. If there are changes considered to Rule 40A, this would be a change that would make sense for several different reasons. However, it would not be effective in a situation where neither parent wanted a Guardian ad litem.

The Bar believes Judges should have authority to appoint a guardian ad litem and such an appointment should be able to be made expeditiously and regardless of the position of the parties.

In the opinion of the Hickman County Bar, Rule 40A should be amended to state that the court has the inherent right to appoint a Guardian ad litem *sua sponte* and nothing in Supreme Court Rule 40A should be interpreted to abridge that right; that the court, therefore, may appoint a Guardian ad litem without complying with the formal process provided by Rule 40A, and may establish its own guidelines under which the Guardian ad litem will function provided those guidelines do not abridge the Guardian ad litem's ethical duties to the minor. The Court could still use as guidelines the criteria provided under Rule 40A(c). In Gibson's Suits in Chancery, Eighth Edition § 3.23, Guardians ad litem Generally Considered, the authors state that

> "In those instances not specifically required by law, the Courts shall appoint a Guardian ad litem "whenever justice requires," a phrase which connotes judicial discretion. The trial judge is required to evaluate the total situation surrounding the infant or incompetent; and then, if justice requires, a Guardian ad litem must be appointed." (Gibson's Suits in Chancery §3.23)(Emphasis added)

This tracks Tennessee Rules of Civil Procedure 17.03 which in part states, "The Court shall at any time after the filing of the Complaint appoint a Guardian ad litem..... whenever justice requires. The Court may in its discretion allow the Guardian ad litem a reasonable fee for services to be taxed as costs."(Emphasis added) At the beginning of an action or almost at any stage of a proceeding, the Court will not have enough information to be able to make Findings of Fact as required under Section 3(c) even if the Court has a strong sense a Guardian ad litem needs to be appointed. The Court should not be hamstrung by Rule 40A. If a Guardian ad litem is appointed outside of Rule 40A then obviously either party would still have a right to object to the appointment of the Guardian ad litem

and state his/her reasons on the record. It is hard to imagine a case in which an Appellate Court would find it an abuse of discretion for a Trial Court to appoint a Guardian ad litem.

III. CONCERNS ABOUT SUPREME COURT RULE 40A SECTION 4(d)

Based on a specific analysis of a case, the Bar is concerned about the process and implications of Section 4(d) which states, "The Guardian ad litem shall immediately disclose any relationships or associations between the Guardian ad litem and any party which might reasonably cause the Guardian ad litem's impartiality to be questioned. This disclosure must be made no later than fifteen (15) days after appointment." The Bar believes that this section is not clear as to whether the obligation is to report the conflict to the court or just to the parties. Our concern with disclosing the specific nature of a conflict to the court would be the potential prejudice to that particular party.

RESOLUTION OF ISSUE III

If the Guardian ad litem's disclosure can be made just to the opposing attorneys representing the parties, then Section (4)(d) should be amended so that one of the parties would have to file an objection to the Guardian ad litem continuing his/her appointment, and also provide that if there is no objection filed within fifteen days after the Guardian ad litem's notice that any such objection would be waived. The Bar also believes that Rule 40A should state that the Guardian ad litem is permitted to withdraw from a case without having to divulge the reasons for a conflict. This is consistent with Gibson's Suits in Chancery, Eighth Edition, § 3.23 which states, "The appointment (of a Guardian ad litem) must not only be made, but it must be accepted."(Emphasis added) Perhaps upon appointment a Guardian ad litem should file a Notice with the court accepting or declining the appointment, in which notice the attorney could say "for reasons that may prejudice or conflict with the interests of one of the parties or give the appearance of the same."

CONCLUSION

It is the recommendation of the Bar that until there are dramatic changes in Rule 40A that each attorney should decide for himself/herself whether he/she could be appointed as a Guardian ad litem under Rule 40A and ethically represent the best interests of the minor child. However, it is the opinion of the Hickman County Bar that an attorney Guardian ad litem cannot ethically represent the best interests of a minor under Supreme Court Rule 40A. The Bar believes that a court can and should continue to appoint an attorney as a Guardian ad litem *sua sponte* in a custody proceeding based on the court's inherent authority, and that be the recommended method of appointment until dramatic changes in Rule 40A have been made. If a Court was to specifically appoint an attorney as Guardian ad litem in a custody proceeding based on its inherent authority and outside the scope of 40A, then the Guardian ad litem fees could continue to be set as costs of the legal proceeding under TRCP 17.03. Any issue concerning an appropriate fee structure can be set under the local rules of Court.

The Bar encourages Judges of this Judicial Circuit to study the problems presented by new Rule 40A and to encourage the Supreme Court to reconsider Rule 40A to the end that dramatic changes to Rule 40A are made, or it is simply rescinded as concerns attorney Guardians ad litem. The Bar recognizes that these recommendations place a strain on the Judges of this circuit when considering the appointment of Guardians ad litem as to whether the Judges will feel obligated to only appoint attorneys as Guardians ad litem under Rule 40A now that it is in effect, but believe that the Rule is so fundamentally flawed that the only course of action for an attorney or a Judge appointing an attorney is to appoint the attorney as a Guardian ad litem under the inherent authority of the court and completely sidestep the use of Rule 40A. The Court can then set the parameters of the Guardian ad litem's duties and rights in each case or by local rule subject to the attorney's ethical obligations to represent the best interests of the minor.

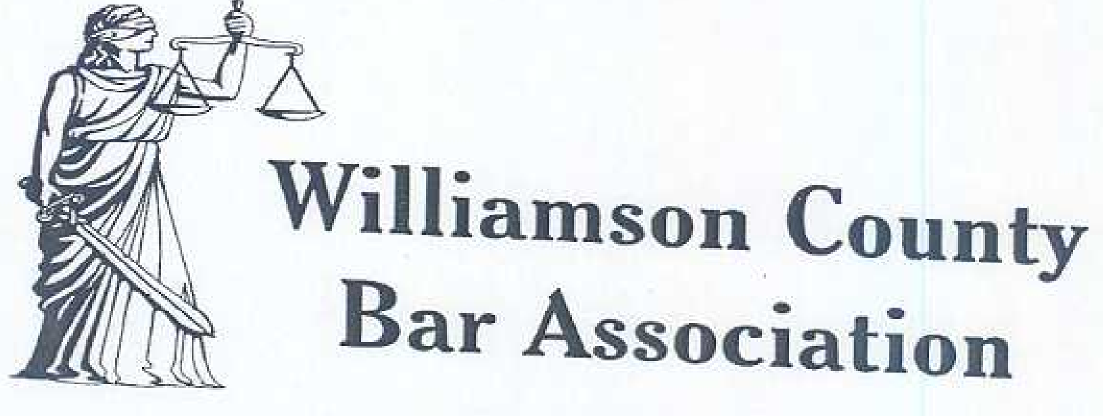
The Bar further believes even if attorneys work with the court to try and fashion a local procedure by which Rule 40A is implemented, that such a procedure cannot be crafted that both complies with Rule 40A and an attorney's ethical obligation to his/her minor client as a Guardian ad litem. (Section 4(b)(2) provides the Court shall specify the duties of the Guardian ad litem in a particular case but presumably those duties could not directly conflict with the dictates of Rule 40A.) The Hickman County Bar urges the Judges of this Judicial Circuit and the Tennessee Supreme Court to review the serious problems presented by Rule 40A and take appropriate corrective action.

Respectfully submitted this 5th day of November, 2009 by the Hickman County Bar.

ALLSTON VANDER HORST, President

MELANIE CAGLE, Vice President

PATRICIA WILSDORF, Sec./Treas.



P.O. Box 476, Franklin, TN 37065
www.wcbatn.org

February 24, 2010

The Honorable Timothy L. Easter
Presiding Judge, 21st Judicial District
135 4th Avenue, South
P.O. Box 1469
Franklin, TN 37065-1469

RE: Williamson County Bar Association's Recommendation on Supreme Court Rule 40A

Dear Judge Easter:

The Williamson County Bar Association (WCBA) was asked to review and comment on Supreme Court Rule 40A and the Hickman County Bar Association's Resolution and Report on Supreme Court Rule 40A. The WCBA's officers appointed a committee to study Rule 40A and the Hickman County Bar Association's Resolution and report to the Membership its evaluation and comments on same. Accordingly, upon report of the committee to its Membership and the Membership's approval of the committee's recommendation, the WCBA submits the following comments and respectfully requests that the Judges of the 21st Judicial District approve, adopt and forward said comments to the Tennessee Supreme Court and to the Director of the Administrative Office of the Courts for their evaluation, review and action.

Supreme Court Rule 40A, Section 3(a), providing that the court "may" appoint a guardian ad litem is in potential conflict with Supreme Court Rule 17(d)(2)(D), which requires that in proceedings to terminate parental rights, the court "shall" appoint a guardian ad litem.

Supreme Court Rule 40A, Section 3(c), provides that the court "shall consider" certain factors in determining whether appointing a guardian ad litem is necessary. This mandate unduly restricts the court and takes away its discretion to consider any and all other factors necessary to protect a child's best interest. By changing "shall" to "should"

and adding "(7) any and all other factors affecting the best interest of the child as justice requires.", the court's discretion can be restored and enlarged for the benefit of the child.

Supreme Court Rule 40A, Section 4(d), requires disclosure of relationships or associations which might reasonably cause the guardian ad litem's impartiality to be questioned. There is no directive as to whom said disclosure must be made or the extent of the content of such disclosure which causes a serious concern that such an imposition could prejudice a party or the child. While the Rules of Professional Conduct govern an attorney's obligation, a non-lawyer could cause irreparable harm in their attempt to comply with such obligation. If there are relationships or associations which might affect the guardian ad litem's impartiality, then the guardian ad litem should advise the court of that fact and then the court should address the matter as necessary without prejudicing the parties or the child.

Supreme Court Rule 40A, Section 9(a)(4), presents the most significant concern by taking away the guardian ad litem's effectiveness. While there is merit to non-lawyers being prohibited from taking "action that may be taken only by an attorney representing a party..." An attorney appointed as a guardian ad litem can only carry out their duty if sufficiently empowered to protect a child's best interest. Without the ability of an attorney guardian ad litem to take action strictly prohibited by this Section, information admissible pursuant to the Rules of Evidence and affecting the child's best interest may never get presented to the court for its consideration. If the court finds it necessary to appoint an attorney guardian ad litem because as expressed in Section 3(a), "the child's best interest are not adequately protected by the parties and that separate representation of the child's best interest is necessary", then such representative should be sufficiently empowered to carry out their obligation. Accordingly, if Section 9(a)(4) is amended from "but a guardian ad litem may not take..." to "only an attorney guardian ad litem may take..." then the attorney guardian ad litem's ability to effectively carry out their charge is restored.

Thank you for allowing the WCBA to address the problems it feels provisional Rule 40A has, does and will present if the above is not changed to reflect the concerns expressed herein.

With kindest regards, we remain

Sincerely yours,

Williamson County Bar Association, Inc.

WCBA Rule 40A Committee
Craig H. Brent, Chairman
Robert H. Plummer, Jr
Lori Thomas Reid
Joshua L. Rogers

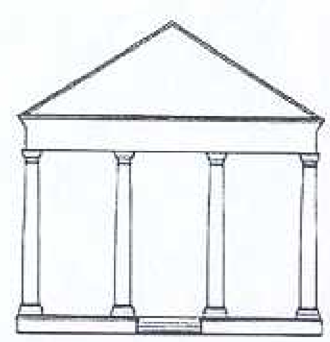
RICE, AMUNDSEN & CAPERTON, PLLC

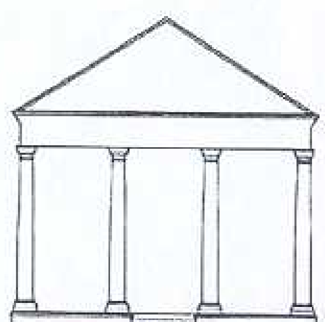
LARRY RICE †
AMY J. AMUNDSEN †*+
G. COBLE CAPERTON *

ASSOCIATES
NICK RICE
JENNIFER BELLOTT

1925-2002
GEORGE L. RICE, JR.

† Certified Family Law Specialist
* Rule 31 Family Law Mediator
+ Fellow, American Academy of Matrimonial Lawyers



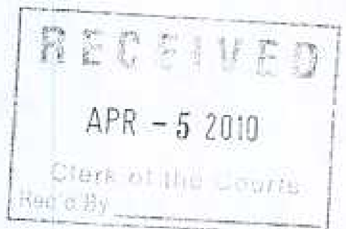


275 JEFFERSON AVENUE
MEMPHIS, TENNESSEE 38103

Phone (901) 526-6701
Fax (901) 526-6702

PARALEGALS
ANDREA SCHULTZ
CHERYL O. WESTLAKE
BARBARA L. COMPTON
TERESA A. BRENTS
MICHELLE PRESLEY-BRADY
JENNIFER S. CACY

March 31, 2010



Michael W. Catalano
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Dear Mr. Catalano,

I am writing to comment on the effectiveness of Supreme Court Rule 40A and to make some suggestions.

The practical effect of the adoption of Supreme Court Rule 40A is that Guardian ad Litems (GALs) are now rarely being used in Shelby County. Lawyers are not seeking the appointment of a GAL by the Court because the GAL's ability to perform their duties is too restricted under the Rule, and the Courts are not ordering a GAL due to the Rule's prohibition of allowing the GAL's report to be presented to the Court before a lengthy trial. The litigants and children are not having the benefit of a neutral person to provide insightful information to the court.

1. *Children whose parents are going through a divorce are not being protected,* because typically, in acrimonious divorce cases, one or both parents are suffering from mental illnesses, drug and/or alcohol problems that affect the parents' ability to know what is in the children's best interest or to act in the children's best interest. In those cases, the parents are unable to focus on the needs and the best interests of their children but instead are focused on their own needs or in getting back at their spouse.

   In Shelby County, before the adoption of Rule 40A, the Courts, through the use of GALs, were helping the children in the acrimonious divorce cases. The Courts would order both parties not to speak to the children about the divorce but rather, ordered the parties to inform the children to call the GAL if they had questions during the divorce. The GAL would conduct interviews of the parents, teachers, and friends; answer the

children's questions; and review information from school, medical records, and other sources. As a result, the GALs would assist the court in determining whether a parent was manipulating the children, influencing, or providing inaccurate information to the children. The GAL would also make recommendations to the Court which might include special counseling for the child (such as, Alatot, Alateen, or other specialized services) to assist the children through the divorce process. As a result of the GAL's assistance, the children would come out of the divorce with as little emotional damage as possible and, sometimes, even healthier than when the parents were living together.

Now, the lawyers are concluding the case without much concern for the children's well being. The implication of the Rule is that the parents' lawyers will not only represent the parent zealously but also, act in the children's best interest. However, to do so requires both sides' lawyers to interview the children, which can be terribly damaging to the children. I hope this is not what the Supreme Court intended when it passed this Rule.

2. *Children are being called as witnesses.* The Rule also promotes parents bringing their children to court to testify. In the past, the GAL would communicate to the Court what the children's positions were regarding their preference on parenting schedules. Now, counsel will be required to call the children as a witness. Oftentimes, the parent who wants the child to testify has the most control over the child and/or is manipulating the child. Rarely can the trier of fact learn this manipulation in a thirty minute interview. The truth typically comes out after several meetings with the GAL. The legislature wanted the children out of the courts by requiring mediation in custody cases, yet now, the Court is requiring the children to testify if a parent wants to use a child as a witness. That appears to be in conflict with current public policy.

3. *No protection is afforded to the GAL at depositions or at trial.* The Rule does not provide any safety to the GAL if they are deposed. According to the Rule, the court appoints an Attorney at Litem only when the child's preference differs from the GAL's opinion about what is in the best interest of the child. It is unfair to the GAL to be interrogated at a deposition without having counsel to object to improper questions. Furthermore, the Rule makes the GAL's notes and records discoverable by the parties.

4. *Unnecessary attorney fees are being incurred.* The Rule adds additional attorney fees when it offers the parents the option to have counsel present when interviewed by the GAL. Parents can now require their counsel to be present at all times which, of course, may limit what the parties would otherwise tell the GAL, limit their candor to the GAL, and add additional fees when the lawyer has to be present for interviews, telephone calls and even when the GAL goes to the party's home.

5. *GALs are limited in advocating their position.* The Rule does not allow the Report to be submitted to the Judge, unless all parties consent. If counsel for the parents can provide proposed findings of fact and conclusions of law to the Court, why should the GAL not be able to prepare such a document to the Court when the GAL is advocating

for the best interest of the child? Before the adoption of the new Rule, the GAL would submit a report (proposed findings of fact and conclusion of law) to the court. This document would often encourage parents to be more reasonable and to settle the issues since the GAL was a neutral party and represented the 'child's best interest.' The use of the GAL's report avoided a courtroom battle that oftentimes resulted in greater damage being done to the children because the courtroom battle exacerates the bitter feelings between the parents.

6. *Under the current Rule, GALs do not assist in settling cases.* Before Rule 40A, the GAL could be present at mediation, give their opinions, and assist with settling the case. The parties and mediators knew that the GAL was advocating for the child's best interest. The mediator could settle the case easier by using the GAL's findings and recommendations. Now, the parties attend mediation without the presence of a GAL and the children's best interest are not being represented. Neither the parents' counsel nor the mediator know what the children's best interest are unless they speak with the children. Again, I hope this Court is not intending matrimonial lawyers to interview children in every divorce case to determine their best interest.

Thank you for the opportunity to discuss some of the problems with the Rule. I would suggest that the GAL's work would be more valuable to the Court and litigants by providing proposed findings of fact and conclusion of law to the Court, by allowing the GAL to conduct their investigation without hindrance of the parties' lawyers and by providing the GAL with counsel for depositions and trial. The children of the State of Tennessee would benefit with more effective GALs and the children are the ones who will suffer if the current Rule remains in effect.

Sincerely yours,

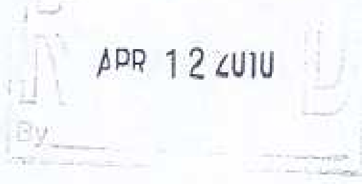
Amy J. Amundsen

THE BAER FIRM
ATTORNEYS AT LAW
ONE MEMPHIS PLACE
200 JEFFERSON AVENUE, SUITE 725
MEMPHIS, TENNESSEE 38103-8336

BAER & BAER PC

ISADORE B. BAER (1915 - 2006)
LAWRENCE E. BAER
DENNIS R. BAER
LISA A. ZACHARIAS

TELEPHONE (901) 525-7316
FACSIMILE (901) 529-1305



April 8, 2010

Mr. Michael W. Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue N.
Nashville, TN 37219-1407

Re: Comments on Supreme Court Rule 40A

Dear Mr. Catalano:

A few months ago I attended a seminar presented by David Haynes and Leslie Kinkead who urged those in attendance to go online and comment on Supreme Court Rule 40A. Unfortunately, it appears that the website is not set up to receive comments and I was directed to write this letter to your attention.

I have been involved in a domestic relations practice since 1985 both as a litigator and as a Guardian Ad Litem in Shelby County, Tennessee. I am concerned regarding a number of issues that have become apparent with the implementation of Supreme Court Rule 40A. It has been my experience that, at least initially, children's best interests are not adequately protected by the parties' or by their counsel, in that most people participating in divorce litigation are too emotionally involved to accurately perceive the emotional damage being wrought on their children and rarely have the insight to seek appropriate counseling for themselves and/or their children. Instead I have found that most parents are focused on economics, their own needs or retaliation against their spouse.

From my interpretation of the Rule, it appears that parent's lawyers are also to represent the children's best interests. In order to do so, that would require both lawyers for the parents to interview the children and that the children be called as witnesses. This has the potential to be terribly damaging to the children, not to mention the fact that it appears to be placing them squarely in the middle of the litigation. A few years ago the legislature passed a law requiring mediation prior to the court hearing a custody matter, the intent being to minimize the emotional and financial damage a contested divorce does to children. Rule 40A in a number of respects seems contrary to the current public policy and contrary to the intent of the legislature.

Upon review of Supreme Court Rule 40A, it appears that the Guardian Ad Litem is subject to be deposed; however, there appears to be nothing that would allow for the appointment of an Attorney ad Litem to protect the Guardian Ad Litem from an inappropriate line of questioning during said deposition. Further, the Rule makes the Guardian Ad Litem's notes and records discoverable by the parties, which could be extremely harmful to the children where there are cases of abuse or in cases involving parents who suffer from mental illness, drug and/or alcohol problems or anger control issues.

Further, the Rule does not allow for the Guardian Ad Litem to prepare any document to present to the court in advocating for the best interest of the child. It does not seem appropriate that counsel for the parents can provide proposed findings of facts, conclusions of law and offers of judgment, and yet the Guardian Ad Litem is prohibited from doing so.

Another concern I would express regarding Rule 40A is that it appears to add additional attorney fees when it offers the parents the option of having counsel present when interviewed by the Guardian Ad Litem. My experience is that to be an effective Guardian Ad Litem I usually have to talk to the children on numerous occasions. My interpretation of the Rule is that the parent, even after the formal interview in my office, would be able to have counsel at their home whenever I was present visiting the children. This certainly would have the effect of increasing the cost of the litigation as well as making it far more difficult to promptly and efficiently complete the interview process.

I recognize that the intent of the court in implementing Rule 40A was to limit the appointment of Guardians Ad Litem and to modify their involvement in domestic relations cases. My concern is that the court is failing to recognize that in the vast majority of the cases where a Guardian Ad Litem is involved, the Guardian Ad Litem not only assists the parties in resolving the matter without litigation but minimizes the damage done to the children.

In conclusion, I would suggest that there is potential to modify the current rule such that it encourages the court to use Guardians Ad Litem sparingly. However, if a Guardian Ad Litem is appointed, their role could be much more valuable to the court and to the litigants if the Guardian Ad Litem is allowed to provide proposed findings of fact and conclusions of law to the court. Further, if necessary, the court should be authorized to provide the Guardian Ad Litem with counsel for depositions and trial. I also recommend that the current rule be modified so as to allow the Guardians Ad Litem to conduct their investigations without the presence of both parties' attorneys. I truly believe that if the current Rule remains in effect, the actual expense to the parties

will be increased, as there will be far more litigation and the children involved in these divorces will be the ones that suffer the consequences.

As I previously stated, I do both litigation and Guardian Ad Litem work; therefore, I am aware of both sides of this issue. I am enclosing herewith a copy of an email and a letter received on a case recently concluded where I was appointed Guardian Ad Litem. I have redacted the last names. However, I want to remind you that in the vast majority of the cases involving a Guardian Ad Litem, their service rapidly assists in bringing sanity to the initial chaos and animosity. This case is a perfect example of the same. Both of these children were teenagers; both had different issues with their parents and this divorce started out with injunctions and domestic violence where the parents were not allowed to talk to each other. After meeting with the parties and both children, I made a number of recommendations that were followed by both parents. Although the father's letter is much more descriptive of his appreciation, I received a number of phone calls from the mother advising me of the progress that they had made and thanking me for my involvement. Both of these parties had obtained counsel who charged over $300.00 per hour. I believe had a Guardian Ad Litem not been appointed, this would never have been resolved as quickly, as economically, or in such a fashion that would have salvaged the relationship of the younger child and his father.

I thank you for your time and attention to this very, very important issue and I hope that you will consider modifying the current Rule as previously suggested.

Very truly yours,

Lisa A. Zacharias

LAZ/tl
Enclosure

Lisa Zacharias

From:	Tom _]
Sent:	Monday, March 15, 2010 3:57 PM
To:	Lisa A. Zacharias
Subject:	Update
TimeMattersID:	M0A619D55CD2C936
TM Matter No:	090180
TM Matter Reference:	ı GAL

Lisa,

Don't need anything from you, just giving you an update. You probably don't get many of these.

Tomorrow is the big day. Lauren and I should sign papers and be done with it. We ended up sitting down and pounding it out for ourselves and will meet at Caren's office for mutual approval then walk away, no courts, no judges. For the final PPP, we decided that Ryan should be his own master regarding what he does with whom and when. He's mature and solid. We've been operating like that for a while and it works well. I think that we both finally caught on to how to keep our conflicts to ourselves and still manage to do what's best for Ryan. I don't think Ryan and I have ever been closer or gotten along better. John Hutson has been a great help, as much for me I think, as for Ryan. He doesn't pull punches but he's fair and compassionate. I really respect and like him.

Kelsey has had a stellar senior year. She really pulled through well. She has won numerous awards in art and writing, some that have never been won by her school before. The world belongs to her. She has funding for her education, accommodations and even a little extra for personal use. At the last minute Memphis College of Art awarded her a $50,000 scholarship which she refused. Imagine that!

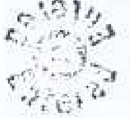
I think Lauren and I will remain friends, maybe even great friends. You never saw this part, (of course), but we were really legendary friends at one time. The divorce was, in my judgement, brutal but I never could get mean I really loved her too much. I have no regrets for not fighting dirty, as a matter of fact, I'm quite proud of it. I'm so grateful that Caren is who she is and never encouraged it either.

I thank you for your help in the beginning. It was the worst time of my life and you were the first to give me any hope whatsoever. You kept me from going over the edge.

So that's that. Take care and keep doing the good that you do. The legal arena is a very bizarre place for me and not comfortable at all. You were one of the specks of light that kept me from only seeing the darkness.

Sincerely,

Tom



Lisa,

Sorry this is behind schedule. I appreciate the help and concern for the children.

I'm having a hard time finding a counselor for Kelsey - or at least one who comes recomended and on our plan. Ryan's was great. Very excellent recomendation. He's

ENTERED

not a pushover and I think great for a 16 year old boy. Eyes opened up in 1st visit for both of us.

If you have any recomendations please email me.

Lauren.

Thankyou,

Lauren

RECEIVED BY FAX
DATE: 4-26-10

STATE OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
CIRCUIT COURT - DIVISION IX

OFFICE (901) 545-4022
FAX (901) 545-5659

ROBERT L. CHILDERS

CIRCUIT JUDGE

140 ADAMS AVENUE
MEMPHIS, TENNESSEE 38103-2018

LAW CLERK
(901) 545-4782

April 23, 2010

Michael W. Catalano
Clerk of Court
Tennessee Supreme Court
401 Seventh Avenue North
Nashville, Tennessee 37129-1407

RE: Supreme Court Rule 40A

Dear Mr. Catalano:

If the Supreme Court's intent in adopting Rule 40A was to keep judges from appointing Guardian *ad Litems* to assist courts in making the difficult decisions involving the best interests of minor children then the Court has succeeded.

Sincerely yours,

Robert L. Childers

RLC:

04/23/2010 FRI 16:40 [TX/RX NO 7123] 002

RECEIVED
APR 26 2010
Clerk of the Courts
Rec'd By ______

Robert D. Bradshaw
Attorney at Law

3204 Dell Trail
Chattanooga, TN 37411

(423) 622-2513
rbradsha@bellsouth.net

April 14, 2010

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comment on Supreme Court Rule 40A

Dear Mr. Catalano,

For seven and one-half years I have had the privilege of representing the dependent, neglected and abused children of Tennessee as a Guardian ad litem with my obligations and authority set forth in Supreme Court Rule 40. I am thankful that the people of Tennessee have sought to protect these children by providing them with legal representation in proceedings that will profoundly affect their entire lives and that the people of Tennessee have made it possible for me to do this work.

Although I have never taken a case under Supreme Court Rule 40A (and do not believe that such an appointment falls within the scope of the practice of law), I feel compelled by my concern for children to comment before the April 30, 2010 deadline. I had decided to write this letter before the recent comments appeared on the AOC website.

I believe those comments have pretty much covered the water far more cogently than any single lawyer could. The Hickman County Bar Association Report thoroughly states my concerns. Their quote from Gibson's Suits in Chancery states the proper ideal for protecting children as a Guardian ad litem. Having been a trial lawyer and not a member of the divorce bar before starting my work as a Guardian ad litem, I defer to those attorneys who have commented from a position of knowledge.

But I must ask the Court to dispose of Rule 40A for one reason. All of the children of Tennessee deserve the same protection. And when that need for protection is

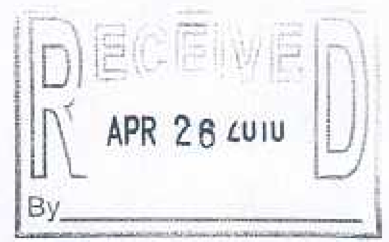
perceived by the judge hearing the case, only a knowledgeable empowered attorney can provide it.

Sincerely,

Robert Bradshaw

Robert D. Bradshaw

April 22, 2010



Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662
www.knoxbar.org

Officers

Sam C. Doak
President

Michael J. King
President-Elect

J. William Coley
Treasurer

Heidi A. Barcus
Secretary

Thomas R. Ramsey III
Immediate Past President

Board of Governors

W. Michael Baisley
Tasha C. Blakney
Mark A. Brown
Keith H. Burroughs
James M. Cornelius Jr.
Sonda L. Gifford
Timothy C. Houser
Hon. Timothy E. Irwin
Hillary B. Jones
Jason H. Long
Mary Elizabeth Maddox
Gregory S. McMillan
T. Lynn Tarpy

Executive Director
Marsha S. Wilson
mwilson@knoxbar.org

VIA E-MAIL & U.S. MAIL

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 40A Rule of the Tennessee Supreme Court

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the Proposed Provisional Rule 40A of the Tennessee Supreme Court, the Knoxville Bar Association submitted the Provisional Rule to its Family Law Section and Unmet Legal Needs of Children Committee for review. Consistent with their review and recommendations to the KBA Board of Governors, the Knoxville Bar Association submits the attached recommendations to the Court for its consideration and possible action.

As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Marsha S. Wilson
Executive Director

Enclosure

cc: Sam C. Doak, KBA President
Elaine Burke, Co-Chair, Unmet Legal Needs of Children Committee
Cheryl Rice, Co-Chair, Unmet Legal Needs of Children Committee
William Mynatt, Co-Chair, Family Law Section
Nicole Price, Co-Chair, Family Law Section

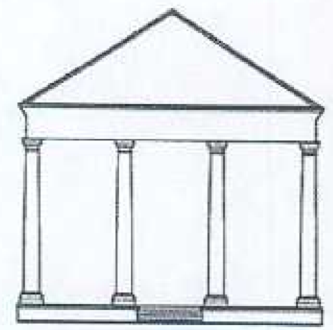
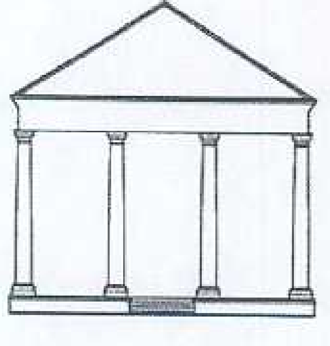
RICE, AMUNDSEN & CAPERTON, PLLC

LARRY RICE †★
AMY J. AMUNDSEN †*+
G. COBLE CAPERTON *

ASSOCIATES
NICK RICE
JENNIFER BELLOTT

1925-2002
GEORGE L. RICE, JR.

† Certified Family Law Specialist
* Rule 31 Family Law Mediator
+ Fellow, American Academy of Matrimonial Lawyers
★ Mid-South Super Lawyer

275 JEFFERSON AVENUE
MEMPHIS, TENNESSEE 38103

Phone (901) 526-6701
Fax (901) 526-6702

PARALEGALS
ANDREA SCHULTZ
BARBARA L. COMPTON
TERESA A. BRENTS
MICHELLE PRESLEY-BRADY

LEGAL ASSISTANT
CYNDY MCCRORY

April 15, 2010

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Rule 40A

Greetings:

The Tennessee Supreme Courts adoption of Rule 40A is one of the best actions by the Court in several years.

Checks and balances are important. The Guardium ad Litem problems in parenting cases show the abuse that occurs from the lack of adequate checks.

My respect for the remedial qualities of Rule 40A grows from my one time belief in the value of Guardium ad Litems. While I still believe that the right Guardium ad Litem in the right case with the right checks and balances is still valuable, the damage done by Guardium ad Litems under the previous rule has too often been horrific.

Guardium ad Litems have run up six-figure bills, aligned themselves with one party against the other and have acted on their own agendas rather than the best interest of the children. On occasions, Guardium ad Litems have considered themselves almost as unelected judges of the best interest of the children and their lack of objectivity have created disasters.

I have recently concluded a case where a good part of the over $200,000 in fees were incurred trying to undue the work of an agenda driven Guardium ad Litem who refused to disclose information and was protected from discovery by the Court. It was only with the implementation of Rule 40A that the problem began to be rectified. Quite honestly, I cannot afford to incur that kind of account receivable to try to fix the Guardium ad Litem problem that Rule 40A helps protect us

from.

There are those who seek to return to pre-Rule 40A status, but the shortcuts they champion under cut the integrity of the legal system. One of the problems is some judges have looked to the Guardium ad Litem as a help or crutch in dealing with difficult parenting issues. In my career, I have watched three failures in that regard. The Department of Human Services did investigations that where of such poor quality that they caused more harm than help. CASA stepped in and began filling those shoes but left. Attorneys performing as Guardium ad Litems was the third, best and brightest hope. But, over time it has fallen short. The bottom line is trial judges need to do the difficult job of deciding parenting issues and not push them off on compromised alternatives. Rule 40A protects lawyers when the judge tries to push a Guardium ad Litem on a lawyer with the safeguards cutout of the Guardium ad Litem appointment order.

While I have the greatest respect for my partner, Amy Amundsen, when she wrote to you, she wrote to you only on her behalf. Myself and other members of the firm believe otherwise.

1. The need for Guardium ad Litems is overstated. The statement "Now, the lawyers are concluding the case without much concern for the children's well being." is false and offensive. Over my career, I have only known one case where a lawyer has asserted a position that the lawyer did not personally believe that was in the child's best interest. Which means that the overwhelming number of lawyers advocate what they personally and professionally believe are in the child's best interests. It is then up to a neutral judge to make that determination.

2. The fear that children are being called as witnesses is without any statistical foundation and the damage an agenda driven attorney can afflict under the guise of a Guardium ad Litem pales in comparison to the extremely rare case where a judge hears from children, which is normally done in Chambers

3. Guardium ad Litems should be open to the light of discovery. Agenda driven bias, faulty investigation and other short comings are only revealed by discover and presentation in court. A judge recently prohibited discovery of a Guardium ad Litem work and then overruled the attorney objections because he could not offer proof of his objections. He could not offer proof because he was not allowed to do discovery. This circular reasoning frustrates justice and undermines the integrity of the legal system.

4. Clients should not be stripped of their attorneys. The concept that a Guardium ad Litem should be permitted to interview a party without that party's attorney and then report to the court those statements defies due process and assumes that a Guardium ad Litem is wiser, fairer and more just than a trial judge.

   To the extent that there are unnecessary attorney's fees, the addition for a third lawyer (Guardium ad Litem) creates often unnecessary attorney's fees and conflicts.

5. Guardium ad Litems reports have been abused. Guardium ad Litems typically wait to the last minute before sharing their reports with attorneys. Therefore, all the trial preparation has to be done. The thought of exempting the Guardium ad Litem report from the rules of evidence invites a repeat of the abuses that have occurred.

6. Noting in Rule 40A prohibits the Guardium ad Litems participation in mediation. Therefore, this argument is a straw man.

Rules are systems. Rule 40A is a specific system for Guardium ad Litems. Systems are developed in large part to protect from failure. In many cases the Guardium ad Litem system failed, damaging children, damaging parties, damaging court proceedings and damaging the reputation of the legal system as a whole. Rule 40A in its present form is a well designed system that balances protections from failure and usefulness in the appropriate situations.

Sincerely,

Larry Rice

LR/cm
L:\4.13.10 letter re Rule 40A.wpd

Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662
www.knoxbar.org

Officers

Sam C. Doak
President

Michael J. King
President-Elect

J. William Coley
Treasurer

Heidi A. Barcus
Secretary

Thomas R. Ramsey III
Immediate Past President

Board of Governors

W. Michael Baisley
Tasha C. Blakney
Mark A. Brown
Keith H. Burroughs
James M. Cornelius Jr.
Sonda L. Gifford
Timothy C. Houser
Hon. Timothy E. Irwin
Hillary B. Jones
Jason H. Long
Mary Elizabeth Maddox
Gregory S. McMillan
T. Lynn Tarpy

Executive Director
Marsha S. Wilson
mwilson@knoxbar.org

April 22, 2010

APR 22 2010

VIA E-MAIL & U.S. MAIL

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Provisional Rule 40A Rule of the Tennessee Supreme Court

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the Proposed Provisional Rule 40A of the Tennessee Supreme Court, the Knoxville Bar Association submitted the Provisional Rule to its Family Law Section and Unmet Legal Needs of Children Committee for review. Consistent with their review and recommendations to the KBA Board of Governors, the Knoxville Bar Association submits the attached recommendations to the Court for its consideration and possible action.

As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Marsha S. Wilson
Executive Director

Enclosure

cc: Sam C. Doak, KBA President
Elaine Burke, Co-Chair, Unmet Legal Needs of Children Committee
Cheryl Rice, Co-Chair, Unmet Legal Needs of Children Committee
William Mynatt, Co-Chair, Family Law Section
Nicole Price, Co-Chair, Family Law Section

Rule 40A. Appointment of Guardians Ad Litem in Custody Proceedings

SECTION 1. DEFINITIONS

(a) "Custody proceeding" means a court proceeding, other than an abuse or neglect proceeding, in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue, including but not limited to divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.

(b) "Abuse or neglect proceeding" means a court proceeding for protection of a child from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) "Guardian Ad Litem" means a person appointed to represent the best interests of a child or children in a custody proceeding. Persons eligible to serve as guardian ad litem include:

(1) a specially trained Court-Appointed Special Advocate;

(2) an attorney; or

(3) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;

SECTION 2. APPLICABILITY

This Rule applies to all custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, and to all custody proceedings pending on or commenced after the effective date of this Rule.

SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a guardian ad litem when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary. Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint guardians ad litem shall be exercised sparingly. In most instances, the child's best interests will be adequately protected by the parties.

(c) In determining whether appointing a guardian ad litem is necessary, the court shall consider:

(1) the fundamental right of parents to the care, custody, and control of their children.

(2) the nature and adequacy of the evidence the parties likely will present;

(3) the court's need for additional information and/or assistance;

(4) the financial burden on the parties of appointing a guardian ad litem and the ability of the parties to pay reasonable fees to the guardian ad litem;

(5) the cost and availability of alternative methods of obtaining the information/evidence necessary to resolve the issues in the proceeding without appointing a guardian ad litem; and

(6) any factors indicating a particularized need for the appointment of a guardian ad litem, including:

(i) the circumstances and needs of the child, including the child's age and developmental level;

(ii) any desire for representation or participation expressed by the child;

(iii) any inappropriate adult influence on or manipulation of the child;

(iv) the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child from the processes of litigation;

(v) any higher than normal level of acrimony indicating the parties' lack of objectivity concerning the needs and best interests of the child;

(vi) any interference, or threatened interference, with custody, access, visitation, or parenting time, including abduction or risk of abduction of the child;

(vii) the likelihood of a geographic relocation of the child that could substantially reduce the child's time with a parent, a sibling, or another individual with whom the child has a close relationship;

(viii) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child during periods of custody, visitation, or parenting time with that party;

(ix) any special physical, educational, or mental-health needs of the child that require investigation or advocacy; and

(x) any dispute as to paternity of the child.

(d) If the court concludes that appointing a guardian ad litem is necessary, the person appointed shall possess the knowledge, skill, experience, training, or education that enables the guardian ad litem to conduct a thorough and impartial investigation and effectively represent the best interests of the child.

SECTION 4. APPOINTMENT ORDER

(a) Appointment of a guardian ad litem shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

(1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;

(2) the specific duties to be performed by the guardian ad litem in the case;

(3) the deadlines for completion of these duties to the extent appropriate;

(4) the duration of the appointment; and

(5) the terms of compensation consistent with Section 12 of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the guardian ad litem's duties and authority. Providing such specificity will assist the parties in understanding the guardian ad litem's role, will enable the court to exercise effective oversight of the guardian ad litem's powers and duties, and will facilitate meaningful appellate review.

(d) A guardian ad litem shall immediately disclose any relationships or associations between the guardian ad litem and any party which might reasonably cause the guardian ad litem's impartiality to be questioned. This disclosure must be made no later than fifteen (15) days after appointment.

(e) There is no right to a peremptory change of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be addressed by trial courts through motion practice. Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

SECTION 5. DURATION OF APPOINTMENT

Appointment of a guardian ad litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment,

the appointment shall terminate automatically when the trial court order or judgment disposing of the custody proceeding becomes final.

SECTION 6. ROLE OF GUARDIAN AD LITEM

(a) The role of the guardian ad litem is to represent the child's best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence.

(b) The guardian ad litem shall not function as a special master for the court or perform any other adjudicative responsibilities.

(c) The guardian ad litem shall represent the child's best interests and not the child's wishes or preferences.

SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD

(a) Subject to subsections (b) and (c), when the court appoints a guardian ad litem in a custody proceeding, the court shall issue an order, with notice to all parties, authorizing the guardian ad litem to have access to:

> (1) the child; and
>
> (2) confidential information regarding the child, including the child's educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the child, any delinquency records involving the child, and other information relevant to the issues in the proceeding.

(b) A child's record that is privileged or confidential under law other than this Rule may be released to a guardian ad litem only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records. Information that is privileged under the attorney-client relationship may not be disclosed except as otherwise permitted by law of this state other than this Rule.

(c) An order issued pursuant to subsection (a) must require that a guardian ad litem maintain the confidentiality of information released, except as necessary for the resolution of the issues in the proceeding. The court may impose any other condition or limitation on an order of access which is required by law, rules of professional conduct, the child's needs, or the circumstances of the proceeding.

SECTION 8. DUTIES/RIGHTS OF GUARDIAN AD LITEM

(a) The guardian ad litem shall satisfy the duties and responsibilities of the appointment in an unbiased, objective, and fair manner.

(b) A guardian ad litem is not a party to the suit but may:

(1) conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child; and

(2) obtain and review copies of the child's relevant medical, psychological, and school records as provided by Section 7.

(c) A guardian ad litem appointed in a custody proceeding shall:

(1) within a reasonable time after the appointment, interview:

(i) the child in a developmentally appropriate manner, if the child is four years of age or older;

(ii) each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and

(iii) subject to section 9(c) of this Rule, the parties to the suit;

(2) seek to elicit in a developmentally appropriate manner the child's expressed objectives;

(3) consider the child's expressed objectives without being bound by those objectives;

(4) encourage settlement of the issues related to the child and the use of alternative forms of dispute resolution; and

(5) perform any specific task directed by the court.

(d) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:

(1) fully investigate all of the circumstances relevant to the child's position and identify all of the factual support for the child's position;

(2) discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.

(3) if the guardian ad litem is of the opinion that the child's best interests and the child's wishes conflict, the guardian ad litem shall advise the court ~~of the child's wishes~~ that there is a conflict and inform the child that the guardian ad litem is not acting as the child's attorney. ~~and direct the court's attention to any available information supporting the child's position~~. The Court may appoint an attorney ad litem for the minor child in appropriate circumstances. Said appointment of an attorney ad litem for an minor child

will be done only in rare cases where there is significant risk of harm to the child if his/her preference is not advocated by an attorney acting on the child's behalf.

SECTION 9. PARTICIPATION IN PROCEEDING

(a) A guardian ad litem appointed in a custody proceeding ~~is entitled to~~:

(1) shall receive a copy of each pleading or other record filed with the court in the proceeding;

(2) shall receive notice of and attend each hearing in the proceeding;

(3) may participate in case staffings by an authorized agency concerning the child; and

(4) may attend all legal proceedings in the case. ~~but~~ [A] guardian ad litem, who is a licensed attorney, they may ~~not~~ take any action that may be taken ~~only~~ by an attorney representing a party, including making opening and closing statements, examining witnesses in court, and engaging in formal discovery pursuant to the Tennessee Rules of Civil Procedure.

(b) Unless all parties consent, a guardian ad litem shall not engage in ex parte communications with the court concerning the custody proceeding except for scheduling and other administrative purposes when circumstances require and as otherwise may be authorized by law other than this Rule.

(c) A guardian ad litem may not communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication ~~should not~~ may occur outside the attorney's presence.

(d) In the event a guardian ad litem prepares a report, copies of the report shall be provided to the attorneys for the parties as well as to any and each unrepresented party, by a deadline that shall be established by the court. Unless all parties consent, the guardian ad litem's report shall not be ~~provided to the court~~ received into evidence.

(e) The guardian ad litem's report, if any, shall ~~included~~ be provided to counsel at least five (5) days prior to any dispositive hearing concerning custody and shall include:

(1) a description of the guardian ad litem's investigation, including who was interviewed and what records were reviewed;

(2) an analysis of the facts that the guardian ad litem believes will be presented;

(3) recommendations regarding the best interests of the child;

(4) the reasons for the guardian ad litem's recommendations, utilizing the applicable statutory factors;

(5) any conflict between the guardian ad litem's recommendations and the child's preferences; and

(6) any other information the guardian ad litem believes to be appropriate.

(f) Any party may call the guardian ad litem to testify as a witness. The admissibility of the guardian ad litem's testimony is subject to the Tennessee Rules of Evidence and their Rules of Professional Conduct.

(g) Although [t]he guardian ad litem's report shall not be admitted into evidence without the consent of all parties, ~~however~~ [t]he parties may use the guardian ad litem's report in preparing for an evidentiary hearing as it may allow the parties to determine which issues are contested and alert the parties to the identity of potential witnesses who may be interviewed.

(h) The court or the parties may compel a guardian ad litem to attend a trial or hearing relating to the child and to testify as necessary for the proper disposition of the custody proceeding subject to the Tennessee Rules of Evidence and in compliance with the Rules of Professional Conduct. A guardian ad litem who is a licensed attorney shall not be subject to sanctions or disqualification under the Rules of Professional Conduct by reason of his or her appearing as a witness in the case.

SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which guardians ad litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The appointment order shall specify the hourly rate to be paid the guardian ad litem, the maximum fee that may be incurred without further authorization of the court, the allocation of the fee among the parties, and when payment is due. In setting the hourly rate, the maximum fee, and the allocation, the court shall consider the financial hardship to the parties of imposing further costs in the proceedings. Consideration of this factor is particularly appropriate where the parties to the custody proceeding are the child's parents who are already represented by counsel.

(b) The guardian ad litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the guardian ad litem's fees and expenses are reasonable, the court shall consider the following factors:

(1) the time expended by the guardian;

(2) the contentiousness of the litigation;

(3) the complexity of the issues before the court;

(4) the expenses reasonably incurred by the guardian;

(5) the financial ability of each party to pay fees and costs;

(6) the fee customarily charged in the locality for similar services; and

(7) any other factors the court considers necessary.

(c) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

(1) equitably allocate fees and expenses among the parties;

(2) order a deposit to be made into an account designated by the court for the use and benefit of the guardian ad litem;

(3) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (2) to be paid into the account.

(d) The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. Any order authorizing the guardian ad litem to hire expert witnesses must specify the hourly rate to be paid the expert witness, the maximum fee that may be incurred without further authorization from the court, how the fee will be allocated between the parties, and when payment is due.

(e) To receive payment under this section, the guardian ad litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and expenses charged and supported by an affidavit in accordance with Tennessee Rule of Civil Procedure 5.
(f) Any objection to the guardian ad litem's fee claim shall be filed within thirty days after the claim is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the guardian ad litem.

(i) If the initial allocation of guardian ad litem fees and/or expenses among the parties has become inequitable as a result of the income and financial resources available to the parties at the conclusion of the custody proceeding, the conduct of the parties during the custody proceeding, or any other similar reason, the court may reallocate the fees and expenses. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.

(j) The Court shall have the discretion to tax the guardian ad litem's fees as court costs, if it is deemed appropriate.

SECTION 12. EFFECTIVE DATE

This rule shall be effective __________ ~~is adopted as a provisional rule for one year. It governs all custody proceedings as defined in Section 1(a) from May 1, 2009 through April 30, 2010. At an appropriate time during this one-year period, the Court will solicit comments regarding the operation, effect, and efficacy of this rule and, if warranted, will circulate revisions of the rule for review and comment and eventual adoption~~.

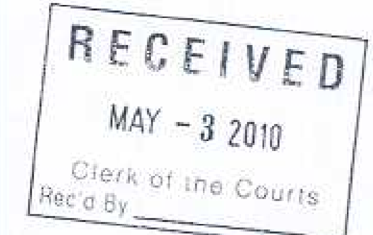
[elaine\rule40A.(1)]

Jennifer L. Evans
ATTORNEY AT LAW
Certified as Child Welfare Law Specialist

109 Fifth Avenue West
Springfield, Tennessee 37172

jenniferlevans@bellsouth.net
(615) 384-3388 - Facsimile (615) 384-9035

April 30, 2010



Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

I am writing to comment on the currently existing Supreme Court Rule 40A as a practitioner in juvenile law who primarily, almost exclusively, practices as a Guardian ad litem (GAL) for children in the Middle Tennessee area. I am specifically writing to respectfully request modifications to the current rule in order to protect children. I have purposefully waited the full year to respond in order that I may be able to convey a more detailed explanation of my experiences under this new provisional rule.

While I understand the rule may have been implemented in order to better the practice of GALs in domestic practice by more clearly defining the role of the GAL and by limiting the types of cases in which a GAL is appointed, it has woefully failed to allow GALs to fully and zealously represent the children we are entrusted to protect. The current status of the rule restricts the ability of the GAL to do the job for which this position was created. The intent of the implementation of Rule 40A may have been honorable, but it is clear that portions of the rule are not practical or effective in protecting children.

On a positive note, there are portions of the rule which I would assert have been effective and had a positive effect upon the practice. Specifically, the role of a GAL as defined in section 3, appears to have limited the types of cases requiring the services of a GAL which is important due to the limited number of attorneys who accept such appointments. The requirements of the appointment order as defined in section 4 has been helpful to my practice in clearly defining the expectations the court and litigants will have of my role as GAL. Further, I have been pleased to assist the court in drafting the standard appointment order utilized in our district.

Further, the limitations of fees paid to a GAL as stated in section 11 are understandable. While it appears this section may have motivated the passage of this entire rule, it should be remembered that one outrageous case is not the standard of a majority of the cases involving GALs. Those of us that practice in this area regularly are accustomed to such monetary limitations, as we are more often compensated primarily by the State of Tennessee at a reduced capped rate. Further, those of us that voluntarily accept these appointments do not intend to become independently wealthy in this line of work and do this work for the best interests of children.

To address the concerns and problematic issues in the rule, I would begin by referring to Section 6(a) which requires the GAL to present evidence in accordance with the Tennessee Rules of

Evidence (TRE). While this is obviously a necessity and best practice, it is contradicted by section 9(a)(4) and 9(f) which prohibits the GAL from taking any action that may be taken by an attorney representing a party including examination of witnesses and by allowing a party to call the GAL as a witness. The GAL is not allowed to present a case on behalf of the child by rendering necessary objections in trial, presenting exhibits, and calling witnesses for examination.

I have specifically encountered this issue when appointed as a GAL in a post-divorce modification matter for an eight year old child in which the two divorced parents have continually placed the child in the middle of a custodial battle by interrogating the child in their efforts to further their own causes in court. Prior to the implementation of Rule 40A, I had filed motions for restraining orders and/or contempt petitions against the parents to restrict their inappropriate behaviors to protect the child. However, with the passage of Rule 40A, which transformed my role from a legal advocate to a witness for the child, I was prohibited from filing motions or litigating these issues to protect the child I represent. Instead, I wrote a strongly worded letter to the respective attorneys, but I ask how effective is this? My pleas to the parties to act reasonable and appropriate when they are already acting unreasonable are in vain. This type of behavior in parents is often the reason for domestic disputes and the reason for the appointment of GALs, so it is often wasteful to attempt to resolve the matter without court intervention. I need the ability to act as an attorney and file the necessary pleadings before the Court with notice to all parties and request injunctive relief on behalf of the child I am appointed to protect. I assert that I am being prevented from effectively advocating and protecting the child I was appointed to represent because of the current restrictions under rule 40A.

If the intent of the current rule for the GAL is to act as a non-lawyer/witness for the child, then the rule should be modified to apply to only the CASA (Court Appointed Special Advocate) volunteers. In an effort to protect children and support the non-profit organization, the parties could be mandated to submit funds to the agency as a charitable donation and the Court could appoint a CASA to the child in the case.

As a result of the current status of Rule 40A, I am requesting local judges to remove my name from the list of attorneys accepting appointments as GAL in domestic cases. I would prefer to be the legal advocate for children in cases in which I can utilize my law license in advocating for the child's best interest and receive less compensation from the state than to continue being restricted from fully protecting the children as necessary in each case.

I respectfully request modifications to Supreme Court Rule 40A which will coincide with the role the GAL performs in dependency/neglect and termination of parental rights matters. This standard is much more appropriate for the protection and advocacy of children. Thank you for your time and consideration.

Best regards,

Jennifer L. Evans

Jennifer L. Evans

STEWART M. CRANE

ATTORNEY AT LAW

Mailing Address:
577 PICKLE ROAD
LOUDON, TN 37774

Telephone (865) 986-1668
Facsimile (865) 986-4228
E-mail: smcrane@wildblue.net

Knoxville Office:
9111 CROSS PARK DRIVE, SUITE D-200
KNOXVILLE, TN 37923

RECEIVED
AUG 09 2010
Clerk of the Courts
Rec'd By

August 4, 2010

Michael Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: provisional Rule 40A, Rules of the Supreme Court of Tennessee

Dear Mr. Catalano:

I noticed an apparent conflict in the provisions of Rule 13, §1(d)(2)(D) and §3 of provisional Rule 40A of the Rules of the Supreme Court of Tennessee. Rule 13, §1(d)(2)(D) requires the appointment of a guardian *ad litem* for the Child(ren) in all contested termination of parental rights cases. §2 of provisional Rule 40A makes Rule 40A applicable to all "custody proceedings," which are defined in §1(a) of Rule 40A. §1(a) does not specifically include proceedings for termination of parental rights in the definition of "custody proceedings." §3 of Rule 40A makes appointments of guardians *ad litem* discretionary in custody proceedings. Depending upon the intention of the Tennessee Supreme Court to make appointments of guardians *ad litem* mandatory or discretionary in contested proceedings for termination of parental rights, I suggest that the final version of Rule 40A should eliminate this apparent conflict as follows:

1) the definition of custody proceedings in §1(a) of Rule 40A should be amended to specifically include or exclude proceedings for termination of parental rights,

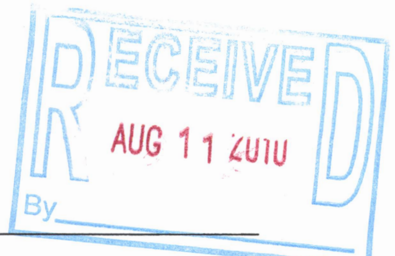
2) §3 of Rule 40A should be amended to state that appointments of guardians *ad litem* are mandatory in contested proceedings for termination of parental rights, if the Tennessee Supreme Court intends that they should continue to be mandatory, as they are currently under §1(d)(2)(D) of Rule 13.

If the Tennessee Supreme Court intends to make appointments of guardians *ad litem* discretionary in contested proceedings for termination of parental rights, then §1(d)(2)(D) of Rule 13 should be deleted to eliminate the conflict with current §3 of Rule 40A.

Yours truly,

Stewart M. Crane
B.P.R. No. 011257

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



IN RE: PETITION TO AMEND RULE 21, SECTION 4.07, RULES OF THE TENNESSEE SUPREME COURT (Mentoring Experience)	)	**NO. M2010-00913-SC-RL1-RL**

COMMENTS OF THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Tennessee Association of Criminal Defense Lawyers (TACDL) by and through its President, Jerry P. Black, Jr., files this comment in support of the adoption of an amendment to Tennessee Supreme Court Rule 21, Section 4.07 by adding a new section on mentoring experience.

TACDL supports the concept of mentoring as a means of increasing professionalism and of ensuring competence among counsel representing the citizen accused. Attorneys performing criminal defense work often practice in small office settings, many in solo offices. Thus, they do not have the opportunity to seek advice from an attorney "down the hall." A formal mentoring program in which the mentor and mentee can obtain CLE credit enhances the likelihood that meaningful, personal training will occur. Attorneys in small practice settings will benefit from a mentor-mentee program that rewards both the mentor and mentee with CLE credit.

The proposed requirements for an approved mentoring plan make it more likely that meaningful assistance will occur. The core topics are exactly the areas in which less experienced lawyers need help. These topics are also those that are especially well suited for one-on-one discussions.

The proposed regulations recognize that one who is a successful lawyer is not necessarily equipped to be a successful mentor-teacher. The required formal training for mentors increases the likelihood that the mentoring experience will be of practical benefit to the mentee and rewarding for the mentor, as well. The fact that a mentor will undergo formalized training is evidence of his or her commitment to the mentoring process.

TACDL believes that attorneys should be eligible to participate in a mentoring program at any time during the first five years of practice in Tennessee and that participation should not be limited to attorneys entering the practice of law within five years of graduating from law school. Attorneys, particularly in light of the recent economic situation, may make different career choices more than five years after law school. TACDL sees attorneys entering criminal defense practice and accepting court appointments who did not previously engage in defense work. These may be exactly the attorneys who could benefit from a mentor-mentee relationship. Thus, TACDL would urge amending the regulations in order to provide for increased mentoring opportunities.

The proposed mentoring program is an important step in addressing the needs of novice attorneys. TACDL urges the Court to approve the proposed rule.

Respectfully submitted,

Jerry P. Black, Jr. BPR 002069
President, Tennessee Association of
Criminal Defense Attorneys
University of Tennessee College of Law
1505 W. Cumberland Avenue
Knoxville, TN 37996-1810

M2009-1926

SEAL OF THE TENNESSEE JUDICIARY 1796

RECEIVED
SEP - 7 2010
By________

State of Tennessee

708 Metropolitan Courthouse
Nashville, Tennessee 37201

Walter C. Kurtz
Senior Judge

(615) 880-2710
Fax (615) 880-3359
walterkurtz@jis.nashville.org

August 30, 2010

Mike Catalano, Appellate Court Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comment
Supreme Court Rule 40A

Dear Mr. Catalano,

The Supreme Court has invited comments regarding provisional Rule 40A (Guardians Ad Litem).

My comment specifically addresses Section 9 of SCR 40A. In the last two years I have had considerable experience with domestic relations cases and the use of a Guardian Ad Litem (GAL). The limits placed on the GAL by Section 9 makes the GAL's position confusing and of limited use to the court.

The GAL should be able to act as a lawyer. I do recognize that there are occasions when juvenile judges use GALs who are not attorneys. My comment does not address that situation, but only addresses the use of a lawyer as GAL. I do agree that the GAL should not be allowed to take formal discovery; however, he/she should be able to subpoena witnesses, present witnesses, examine witnesses, and advocate directly to the court for the best interests of the child. The GAL, usually being a lawyer, should be able to act as a lawyer, not as a witness. While the Rule says on several occasions that the GAL is to "represent" the best interests of the child, it deprives the GAL of the necessary tools to "represent" those interests.

Often the child's best interests are only secondarily considered by the lawyers advocating for the parents. All observers of custody battles are aware of the use of children as pawns in the battle between the parents. The present SCR 40A continues to rely on those

lawyers to present the GAL views to the court. (*See* SCR 40A § 9(d)(f)(h)). The GAL's role should not be that of a witness but that of a lawyer charged with bringing non-redundant admissible proof before the court related to the best interests of the child and also advocating the best interests position in both opening and closing arguments. In an overaction to past abuses, the present rule takes the child's advocate and "neuters" him/her.

I do agree that a GAL should only be appointed when necessary and that the GAL should never become a mediator, ombudsman, special master or mini-judge. To the extent that portions of the proposed rule precludes the above abuses, those portions should be retained.

Sometimes with older children who may have a preference, the Court might appoint an Attorney Ad Litem (AAL), but an AAL is not appropriate for young children. Only a GAL can help the Court when a young child is involved and the parents cannot be counted on to represent the best interests of the child.

The present rule has successfully addressed most areas of past abuse and distortion in the use of the GAL but in doing so has made the role of the GAL sufficiently cumbersome as to limit its usefulness. I believe strongly that the GAL should be a lawyer acting on behalf of the best interests of the child, <u>not</u> just an investigator and/or witness.

Thank you for considering my input.

Yours very truly,

Walter C. Kurtz
Senior Judge

M2009-01926-SC-RL2-RL

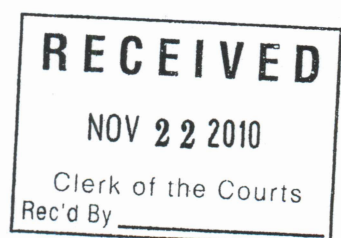
Jeffrey L. Levy
424 Church Street, Suite 2925
Nashville, Tennessee 37219

Barry Gold
410 S. Germantown Road
Chattanooga, Tennessee 37411

Shari Myers
5341 Estate Office Drive, Ste 1
Memphis, Tennessee 38119

Andrew Cate
144 2nd Avenue North, Suite 205
Nashville, Tennessee 37201

November 18, 2010



Mr. Michael W. Catalano
Supreme Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Modification of Tennessee Supreme Court Rule 40A

Dear Mr. Catalano:

We are writing, as experienced Family Law Practitioners, to provide our comments concerning what we believe are essential changes to be made to the existing Rule 40A. We were solicited to form a working group within the Tennessee Bar Association to evaluate the current provisional Rule 40A, determine its effectiveness or otherwise, and make specific proposals for its modification as necessary. Due to the pressure of time, we were not able to produce a formal report for consideration by the TBA and its Board of Governors. It must be stressed that this is not a TBA position statement.

Nevertheless the four members of our working group constitute attorneys from across the state who practice in circuit, chancery, general sessions and juvenile courts, who come from all three Grand Divisions of the State, and who have represented mothers, fathers and children (primarily as Guardians-ad-Litems). We comprise a former, current and future Chair of the TBA's Family Law Section, the current and a former chair of the TBA's Family Law Code Committee, a former Chair of the Davidson County Bar Association's Domestic Relations Committee, and a former Chair of the Family Law Section for The House of Delegates for the Memphis Bar Association.

We believe that we, as a group and individually, have the experience and expertise to comment knowledgeably on the existing Rule 40A and to make specific proposals for its improvement.

Without going into detail, it is our unanimous conclusion that the existing provisional Rule 40A is not effective. It confuses the role of the Guardian-ad-Litem and

gives specific guidance to neither judges, the parties and their counsel, nor the individual appointed to the role. The result is that, in our experience, the number of appointments are substantially down from past years, including cases where a Guardian-ad-Litem would very much have been in the best interest of the child or children. We acknowledge that one impetus for the establishment of Rule 40A was a perceived abuse by the appointment of too many Guardians-ad-Litem at too great a cost to the parties or the State. The problem, however, bluntly put, is that the existing provisional Rule 40A "threw the baby out with the bath water."

We have not addressed the issue by taking the existing provisional Rule 40A by attempting to tweak it. We frankly believe that, because it does not have a clear conception of what the Guardian-ad-Litem role should be, the existing provisional Rule 40A is fundamentally flawed. Instead, we propose that a new provisional Rule 40A be promulgated and introduced beginning January 1, 2011 and that comments be re-solicited in the fall of next year.

Two proposed alternatives for a new provisional Rule 40A are attached, as well as a proposed standard Order Appointing Guardian-ad-Litem for each alternative. We have proposed two alternatives, which are mutually exclusive, in order to reflect different concepts of what role a Guardian-ad-Litem should play.

Alternative one conceives the Guardian-ad-Litem as a court-appointed expert/investigator specifically charged with providing the court with the facts that are necessary for the judge to determine the best interest of the child or children, by way of the Guardina-ad-Litem's report and testimony. It is predicated on the fact that a Guardian-ad-Litem should be appointed only when the parents (or other parties) cannot themselves put forward the facts necessary for the court to make a best-interest determination. If the parents, because of high conflict, inability to work with counsel or other factors, cannot ensure that all such facts are brought to the court, the children by definition will not be well-served. In the typical case, where there are two mostly reasonable parties represented by competent counsel, our adversarial legal system will function well without a Guardian-ad-Litem. In this view, the Guardian-ad-Litem will have the authority and responsibility to gather the facts, present them to the court, and be subject to direct and cross-examination. The Guardian-ad-Litem is essentially a neutral, although clearly the facts that are uncovered will often lead the court to draw a particular conclusion. The individual's responsibility is to the court and to the objective truth. Different from the current Rule 40A is that this Alternative One provides the Guardian-ad-Litem with the necessary authority to be effective in his/her role, by way of suspending the hearsay objection and still be subject to cross examination (which may include impeachment, etc.). This role as "helper to the court" would be our preference, all other things being equal.

Alternative two conceives the Guardian-ad-Litem as an advocate for what the Guardian-ad-Litem concludes, after investigation, to be the best interest of the child. In this view, the Guardian-ad-Litem will function as an attorney, ensuring that the court is presented with facts that support his or her conclusion regarding the best interest of the child or children. The Guardian-ad-Litem will draft pleadings and responses, participate in discovery and pre-trial preparation, and make opening statements, call and examine witnesses, and make closing arguments at trial. This is perhaps a more familiar role for an attorney. It is proposed because we believe that the Supreme Court may already consider this a more acceptable role. It has both advantages and disadvantages: it is more in keeping with the traditional adversarial nature of legal proceedings and it more openly guides the court; on the other hand, it may place the Guardian-ad-Litem in opposition to one or both parties, and it was the allegation of friction between the Guardian-ad-Litem and one or both parties that put pressure on for the establishment of Rule 40A in the first place. Further, under Alternative Two, Guardian-ad-Litem does not "stand in the shoes of the child," so to "minimize the harms of litigation on the child" (whereas under Alternative One, the Guardian-ad-Litem is able to testify on behalf of the child).

In neither approach does the Guardian-ad-Litem "*represent* the best interest of the child". We found this description to be vague. It gives rise to confusion and ethical problems for the person appointed to the role: as attorneys, we are comfortable with the concept of representing a person or specific entity, and of preserving confidences of that client. We see ethical problems when a lawyer is charged with *representing* a concept such as best interest, rather than a particular client. Put another way, if an attorney Guardian-ad-Litem represents the "best interest of the child" - who is the client? Clearly, however, there is a need for advocacy for the best interest of the child.

Nor do we envisage the appointment of an Attorney-ad-Litem. For one thing, the concept of Attorney-ad-Litem is open to confusion. Some courts properly view it as a separate lawyer representing the child's "preferences" when those preferences differ from what the Guardian-ad-Litem concludes as the child's "best interest". Other courts view it as an attorney to represent the *Guardian-ad-Litem* when the Guardian-ad-Litem is attacked in court. We want to eliminate this confusion. We want to avoid the layering of appointments, with its dramatic cost implications for the parties and potentially the State. Finally, we want to avoid the unacceptable situation whereby a child – who is not a party to the action – is elevated over the parties themselves by having a perceived right to two lawyers. It is unacceptable that either party has no right to appointed counsel and the child has one or two.

Clearly, Rule 40A and the issues underpinning it are complex. We would be pleased to provide whatever further information we might, either in writing or in person. We look forward to assisting the Court further as it might wish.

Respectfully submitted,

Andrew Cate
Barry Gold
Jeffrey L. Levy
Shari Myers

PROPOSED MODIFICATIONS TO SUPREME COURT RULE 40A
ALTERNATIVE ONE

Language that is not italicized is from the current Rule 40A.
Language from the current Rule 40A that is omitted reflects recommendations for striking such language.
Language that is italicized highlights recommended new language.

SECTION 1. DEFINITIONS

(a) "Custody proceeding" means a court proceeding, other than an abuse or neglect proceeding, *in which matters involving parenting time with a child(ren) are at issue.*

(b) "Abuse or neglect proceeding" means a court proceeding for protection of a child*(ren)* from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) "Guardian *a*d Litem" means *an attorney who is designated by the court as an expert witness/investigator,* appointed *by the court* to *provide the court with the facts that are necessary for the court to determine the* best interests of a child or children in a custody proceeding. *A Guardian ad Litem may testify in any proceeding in which he/she serves as a Guardian ad Litem and shall participate in any alternative dispute resolution process. A Guardian ad Litem is not a Special Master and should not express recommendations. However, a Guardian ad Litem may submit a Report to the Attorneys for the parties and the Court.*

SECTION 2. APPLICABILITY

This Rule applies to all *appointments of a Guardian ad Litem in* custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, *which appointments take place* after the effective date of this Rule. *Guardians ad Litem appointed prior to the effective date of this Rule shall continue to serve under the existing terms of their appointment.*

SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a *G*uardian ad *L*item when the court finds that the child*(ren)*'s best interests are not adequately protected by the parties and that *additional investigation and disclosure of additional information are necessary of the child(ren)'s best interests.* Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint *G*uardians ad *L*item in custody proceedings. Rather, the court's discretion to appoint *G*uardians ad *L*item shall be exercised sparingly.

(c) In determining whether appointing a *G*uardian ad *L*item is necessary, the court *should* consider:

(1) the nature and adequacy of the evidence the parties likely will present;

(2) the court's need for additional information;

(4) the financial burden on the parties of appointing a Guardian ad Litem and the ability of the parties to pay reasonable fees to the Guardian ad Litem; *and*

(5) any factors indicating a particularized need for the appointment of a Guardian ad Litem, including:

(i) the circumstances and needs of the child*(ren)*, including the child*(ren)*'s age and developmental level;
(ii) any inappropriate adult influence on or manipulation of the child*(ren)*;
(iii) the likelihood that the child*(ren)* will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child*(ren)* from the processes of litigation;
(iv) any higher than normal level of acrimony indicating the parties' lack of objectivity concerning the needs and best interests of the child*(ren)*;
(v) any interference or threatened interference, *or disruption or threatened disruption of* parenting time, including abduction or risk of abduction of the child*(ren)*;
(vi) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child*(ren)* during periods of custody, visitation, or parenting time with that party;
(vii) any special physical, educational, or mental-health needs of the child*(ren)* that require investigation or advocacy; *and/or*
(viii) *any other factors necessary to address the best interests of the child(ren).*

(d) If the court concludes that appointing a Guardian ad Litem is necessary, the *court shall appoint a lawyer who has demonstrated having specialized* knowledge, skill, experience, training, *and* education that enables the Guardian ad Litem to effectively *assist the trier of fact to understand additional evidence or to otherwise better determine* the best interests of the child*(ren)*.

SECTION 4. APPOINTMENT ORDER

(a) Appointment of a Guardian ad Litem shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

(1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;

(2) the specific duties to be performed by the Guardian ad Litem in the case;

(3) the duration of the appointment; and

(4) the terms of compensation consistent with Section *11* of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the Guardian ad Litem's duties and authority. Providing such specificity will assist the parties in understanding the Guardian ad Litem's role, *and* will enable the court to exercise effective oversight of the Guardian ad Litem's *actions.*

(d) A Guardian ad Litem shall immediately disclose *in writing to the Court and Counsel for the parties* any *conflict which might cause the Guardian a Litem to become unable to perform his/her duties as set forth herein.* This disclosure must be made no later than fifteen (15) days after appointment.

(e) There is no right to a peremptory change of a Guardian ad Litem. Allegations that a Guardian ad Litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is *no longer able to perform his/her duties as set forth herein* should be *raised without delay, within 15 days of the conflict having been identified, and* should be addressed by *the* trial court through motion practice. *The Guardian ad Litem shall be provided notice of any pleadings filed with such objection(s) and any settings of related hearing(s). The Guardian ad Litem shall be permitted to fully participate at such hearing(s), to respond to such objection(s) (by presenting arguments, etc.).*

Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

SECTION 5. DURATION OF APPOINTMENT

Appointment of a Guardian ad Litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment, the appointment shall terminate automatically when the trial court order or judgment disposing of the custody proceeding becomes final. *Notwithstanding, the Guardian ad Litem may file Claims and related documents/pleadings or Responses regarding his/her fees or appointment after the termination of such appointment.*

SECTION 6. ROLE OF *THE* GUARDIAN AD LITEM

(a) The role of the Guardian ad Litem *is to provide the court with the facts that are necessary for the court to determine the* best interests of a child or children in a custody proceeding, by gathering facts and presenting facts for the court's consideration. *A Guardian ad Litem may testify as an expert witness/investigator in any proceeding in which he/she serves as a Guardian ad Litem and shall participate in any alternative dispute resolution process.*

(b) The Guardian ad *L*item shall not function as a special master for the court or perform any other *judicial* responsibilities. *However, a Guardian ad Litem may submit a Report to the Attorneys for the parties and the Court.*

(c) The Guardian ad Litem shall share findings from his/her investigation with Counsel for the parties so to aid in potential settlements of child-related issues.

SECTION 7. ACCESS TO CHILD*(REN)* AND INFORMATION RELATING TO CHILD*(REN)*

(a) Subject to subsections (b) and (c), when the court appoints a Guardian ad *L*item in a custody proceeding, the court shall issue an order, with notice to all parties, authorizing the Guardian ad *L*item to have access to:

(1) the child*(ren) with and without the parties' presence*; and

(2) confidential information regarding the child*(ren),* including the child*(ren)*'s educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the child*(ren),* any delinquency records involving the child*(ren),* and other information relevant to the issues in the proceeding.

(b) A child*(ren)*'s record that is privileged or confidential under law other than this Rule may be released to a Guardian ad *L*item only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records.

(c) An order issued pursuant to subsection (a) must require that a Guardian ad *L*item maintain the confidentiality of information released, *(*except as necessary for the resolution of the issues in the proceeding *or as ordered by the Court).* The court may impose any other condition or limitation on an order of access which is required by law, rules of professional conduct, the child*(ren)*'s needs, or the circumstances of the proceeding.

SECTION 8. DUTIES OF *THE* GUARDIAN AD LITEM

(a) The Guardian ad Litem shall: *provide the court with the facts that are necessary for the court to determine the* best interests of a child or children in a custody proceeding. *A Guardian ad Litem may testify in any proceeding in which he/she serves as a Guardian ad Litem and shall participate in any alternative dispute resolution process. A Guardian ad Litem is not a Special Master and should not express recommendations. However, a Guardian ad Litem may submit a Report to the Attorneys for the parties and the Court. The Guardian ad Litem's client is not the child(ren) or the Court. Rather the Guardian ad Litem's duty is to provide the court with the facts that are necessary for the court to determine the best interests of a child or children in a custody proceeding as an expert witness/investigator who testifies to his/her investigation relating to issues which affect the best interest of the child(ren).*

(b) A Guardian ad *L*item *shall:*

(1) conduct an investigation to the extent that the Guardian ad *L*item considers necessary to determine the best interests of the child*(ren) within the context of the case and the applicable law.*

(2) obtain and review copies of the child*(ren)*'s relevant medical, psychological, and school records as provided by Section 7.

(3) within a reasonable time after the appointment, interview:

(i) *each* child in a developmentally appropriate manner, *if possible*;
(ii) each *relevant* person who has significant knowledge of the child*(ren)*'s history and condition; and
(iii) the parties to the suit;

(4) *If the child(ren) is twelve (12) years of age or older,* seek to elicit in a developmentally appropriate manner *the reasonable preference of the child(ren);*

(5) If the child related matters which brought about the Guardian ad Litem's appointment are not settled prior to trial, then the Guardian ad Litem shall testify. If neither party chooses to call the Guardian ad Litem as a witness, then the Court, sua sponte, may call the Guardian ad Litem as a witness. If the Guardian ad Litem testifies, then the Guardian ad Litem shall also testify as to the child(ren)'s preference (if same is expressed to the Guardian ad Litem or otherwise made known to the Guardian ad Litem). If the child(ren)'s preference is not disputed, then same may be specifically set forth in a pleading of the child(ren)'s preference, which may be filed by either Counsel for the parties.

(6) participate in settlement of the issues related to the child*(ren)* and the use of alternative forms of dispute resolution; and

(7) perform any specific task directed by the court.

SECTION 9. PARTICIPATION */AUTHORITY FOR THE GUARDIAN AD LITEM*

A Guardian ad *L*item appointed in a custody proceeding is entitled to:

(1) receive a copy of each pleading or other record filed with the court in the proceeding.

(2) Unless all parties consent, a Guardian ad *L*item shall not engage in ex-parte communications with the court concerning the custody proceeding except for scheduling and other administrative purposes when circumstances require and as otherwise may be authorized by law other than this Rule.

(3) A Guardian ad Litem may directly communicate with a party who is represented by an attorney. *The parties and counsel for the parties shall cooperate with the Guardian ad Litem's investigation and reasonable requests.*

(4) A Guardian ad Litem may request for Counsel for a party to petition the Court to order testing (forensic psychological, alcohol/drug, etc.) of one or both parties. Such reasonable requests from the Guardian ad Litem shall not be sufficient evidence for the disqualification of the Guardian ad Litem, as such reasonable requests shall not be deemed reflection of an unjust bias of the Guardian ad Litem.

(5) In the event a Guardian ad Litem prepares a *written* Report, copies of the Report shall be provided to the attorneys for the parties and the court by a deadline that shall be established by the court. *The Guardian ad Litem's written Report shall not be filed in the jacket for the custody proceeding and shall not be deemed as evidence.*

The Guardian ad Litem's Report, if any, shall include:
(a) a description of the Guardian ad Litem's investigation, including who was interviewed and what records *and documents* were reviewed;
(b) an analysis of the facts *utilizing the applicable statutory factors*;
(c) *the child(ren)'s preferences if any are expressed*; and
(d) any other information the Guardian ad Litem believes to be appropriate *for the Court to consider when determining the best interest of the child(ren).*

(6) The Guardian ad Litem shall receive from Counsel for the parties/the parties notice of (and the authority to attend) each hearing in the proceeding, *including alternative dispute resolution proceedings (pursuant to Supreme Court Rule 703, the GAL shall not be subject to Supreme Court Rule 615,).*

(7) *The Guardian ad Litem may testify as an expert witness/investigator in any legal proceeding.* Any party *or the Court* may call the Guardian ad Litem to testify. *For purposes of discovery answers, the parties are not required to list the Guardian ad Litem as an expert witness that they intend to call.* The admissibility of the Guardian ad Litem's testimony is subject to the Tennessee Rules of Evidence, *except that there shall be a suspension of the objection to hearsay and hearsay within hearsay testimony. The Guardian ad Litem may be subject to cross-examination. If a transcript including the Guardian ad Litem's testimony is to be filed, it shall only be filed if it is also sealed by the Court's Clerk. If the child related matters which brought about the Guardian ad Litem's appointment are not settled prior to trial, then the Guardian ad Litem shall testify. If neither party chooses to call the Guardian ad Litem as a witness, then the Court, sua sponte, may call the Guardian ad Litem as a witness.*

(8) *If there is a request for the Guardian ad Litem to be deposed, then the Guardian ad Litem shall have the authority to file and argue, in advance of such deposition, a pleading with the Court requesting an additional deposit be made for the Guardian ad*

Litem's anticipated fees and expenses relating to such deposition. If granted by the Court, then same shall be set forth in a separate written order and such deposit shall be remitted prior to the Guardian ad Litem having to appear for such deposition. If any such transcript is to be filed, it shall only be filed if it is also sealed by the Court's Clerk. If there are allegations of inappropriate behavior during such deposition, then the Guardian ad Litem shall have the authority to call a suspension to the deposition for further direction from the court.

(9) *perform any other specific task directed by the Court.*

SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which Guardians ad Litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The appointment order shall specify the hourly rate to be paid the Guardian ad Litem, the *initial deposit* that may be *required* without further authorization of the court, the *provisional* allocation of the fee among the parties, and when payments *are* due. In setting the hourly rate, the *initial deposit*, and the *provisional* allocation, the court shall consider the financial hardship to the parties of imposing further costs in the proceedings, *and the parties' respective abilities to pay for such fees, including other resources of financial assistance to the parties.* Consideration of this factor is particularly appropriate where the parties to the custody proceeding are the child*(ren)*'s parents who are already represented by counsel.

(b) If there is a request for the Guardian ad Litem to be deposed, then the Guardian ad Litem shall have the authority to file and argue, in advance of such deposition, a pleading with the Court requesting an additional deposit be made for the Guardian ad Litem's anticipated fees and expenses relating to such deposition. If granted by the Court, then same shall be set forth in a separate written order and such deposit shall be remitted prior to the Guardian ad Litem having to appear for such deposition.

(c) The Guardian ad Litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the Guardian ad Litem's fees and expenses are reasonable, the court shall consider the following factors:

(1) the time expended by the guardian;

(2) the contentiousness of the litigation;

(3) the complexity of the issues before the court;

(4) the expenses reasonably incurred by the guardian;

(5) the financial ability of each party to pay fees and costs;

(6) the fee customarily charged in the locality for similar services; and

(7) any other factors the court considers *appropriate.*

(d) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

(1) equitably allocate fees and expenses among the parties;

(2) order a deposit to be made into an account designated by the court for the use and benefit of the Guardian ad Litem;

(3) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (2) to be paid into the account.

(e) To receive payment under this section, the Guardian ad Litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and expenses charged and supported by an affidavit in accordance with Tennessee Rule of Civil Procedure 5. *The Guardian ad Litem shall serve his/her filed claims, by U.S. Mail or as otherwise permitted by the Tennessee Rules of Civil Procedure, upon the parties/counsel for the parties.*

(f) Any objection to the Guardian ad Litem's fee claim shall be filed within thirty days after the claim is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the Guardian ad Litem. *If the parties have reviewed the claim and do not wish to file an objection, then in advance of the thirty day expiration, the Guardian ad Litem may prepare and submit a Consent Order on the Claim for Payment of Fees, signed by the Guardian ad Litem and Counsel for the parties ordered to pay for the fees, for the Court's approval of same or portion thereof.*

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the Guardian ad Litem. *The Guardian ad Litem shall be provided notice of any pleadings filed with objection(s) to the Claim and any settings of such hearing(s). The Guardian ad Litem shall be permitted to fully participate at such hearing(s), to defend his/her Claim (by presenting arguments, etc.).*

(i) If the initial allocation of *G*uardian ad *L*item fees and/or expenses among the parties has become inequitable as a result of *changes to* the income and financial resources available to the parties at the conclusion of the custody proceeding, the conduct of the parties during the custody proceeding, or any other similar reason, the court may reallocate the fees and expenses. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.

SECTION 12. *APPEALS*

The Guardian ad Litem shall not initiate an appeal; however, upon appeal of the matter by one of the parties, the Guardian ad Litem shall have the right to receive notice of the appeal.

SECTION 13. EFFECTIVE DATE

This *R*ule is adopted as a provisional *R*ule effective for from January 1, 2011 through December 31, 2011. This Rule applies to all appointments of a Guardian ad Litem in custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, which appointments take place after the effective date of this Rule. At an appropriate time during this period, the Court will solicit comments regarding the operation, effect, and efficacy of this *R*ule and, if warranted, will circulate revisions of the *R*ule for review and comment and eventual adoption.

IN THE CIRCUIT/CHANCERY COURT OF TENNESSEE FOR THE
_____ JUDICIAL DISTRICT AT _____, __________ COUNTY

_______________,
Plaintiff

vs.

No.________
Div./Part _____

_______________,
Defendant.

ORDER APPOINTING GAL
(FOR ALTERNATIVE ONE)

CAME THE PARTIES, by and through their attorney of record, on__________________, and upon statements from Counsel, considerations of the Court as outlined herein and the record as a whole, this Court finds the appointment of a GAL is for the best interest of the minor children of the parties.

Considerations: From statements of Counsel for the parties and this case's record as a whole, the Court has considered the following: (1) the nature and adequacy of the evidence that the parties are likely to present; (2) the Court's need for additional information; (3) the financial circumstances of the parties; (4) that this matter indicates a particularized need for the appointment of the GAL based on the following **alleged** factors **(underline as applicable)**: (a) the circumstances and needs of the children, with consideration of the children's ages and developmental levels; (b) inappropriate adult influence on or manipulation of the children; (c) the likelihood that the children may be called as witnesses or questioned by the Court, and the

need to minimize harm to the children from the process of litigation; (d) the higher than normal level of acrimony indicating the parties lack of objectivity concerning the needs and best interest of the children; (e) interference, or threatened interference, disruption or threatened disruption of parenting time or abduction or risk or abduction of the children; (f) conduct by a party or other person with whom the party associates which raises serious concerns for the safety of the children during parenting time; (g) special physical, educational, or mental health needs of the children that require investigation and additional information to be provided to the Court; (h) other factors where there would be a benefit of having additional investigation/evidence presented to the Court for the ultimate determination involving the children's best interest.

Appointment: Upon consideration by the Court of the foregoing, statements from Counsel, the record as a whole, and pursuant to *Tennessee Code Annotated section 36-4-132 and Sup. Ct. Rule 40A*, the Court concludes that the appointment of a GAL is necessary. This Court hereby appoints Attorney ________________ to serve as the GAL (herein after referred to as "GAL"), as expert witness/investigator for issues pertaining to the best interest of the minor children in this cause, namely: ______________ (d.o.b., ______) and d.o.b., ____________).

The Court hereby qualifies this appointed GAL as an appropriate attorney who has demonstrated having the appropriate specialized knowledge, skill, experience, training, and education to perform duties as GAL, expert witness/investigator.

The GAL's appointment shall terminate *automatically when the Court's order or judgment, disposing of the issues which brought about this appointment, becomes final*. Notwithstanding, the GAL may file pleadings and other documents regarding the GAL's fees or appointment after the termination of this appointment. The GAL shall maintain such authority beyond the appointment termination.

Conflicts:

Counsel for both parties have confirmed to the Court that they are unaware of any conflicts that exist prohibiting or causing objections to this above designated attorney to serving as the appointed GAL in this matter.

Within fifteen (15) days from the entry of this order, the GAL shall disclose in writing to the Court and Counsel for the parties any conflict which might cause the Guardian a Litem to become unable to perform his/her duties as set forth herein.

There is no right to a peremptory change of the above appointed GAL. Any future allegations of conflict, arising after the entry of this order, regarding the GAL should be addressed through motion practice.

Duties for the GAL:

The GAL shall: provide the Court with the facts that are necessary for the Court to determine the best interests of the children in this proceeding. The GAL may testify in any proceeding in this matter and shall participate in any alternative dispute resolution process. The GAL is not a Special Master and should not express recommendations. However, the GAL may submit a Report to the Attorneys for the parties and the Court. The GAL's client is *not* the child(ren) or the Court. Rather the GAL's duty is to provide the Court with the facts that are necessary for the Court to determine the best interests of the children in this matter as an expert witness/investigator who testifies to his/her investigation relating to issues which affect the best interest of the child(ren).

The GAL shall:

(1) conduct an investigation to the extent that the GAL considers necessary to determine the best interests of the children within the context of the case and the applicable law;

(2) obtain and review copies of the children's relevant medical, psychological, and school records as provided by *Section 7 of the TN Supreme Court Rule 40A;*

(3) within a reasonable time after the appointment, interview:

(i) each child in a developmentally appropriate manner, if possible;

(ii) each relevant person who has significant knowledge of the children's history and condition; and

(iii) the parties to the suit;

(4) if the children are twelve (12) years of age or older, seek to elicit in a developmentally appropriate manner the reasonable preference of the children;

(5) if the child related matters which brought about the GAL's appointment are not settled prior to trial, then the GAL shall testify. If neither party chooses to call the GAL as a witness, then the Court, sua sponte, may call the GAL as a witness. If the GAL testifies, then the GAL shall also testify as to the children's preference (if same is expressed to the GAL or otherwise made known to the GAL). If the children's preference is not disputed, then same may be specifically set forth in a pleading of the children's preference, which may be filed by either Counsel for the parties;

(6) participate in settlement of the issues related to the children and the use of alternative forms of dispute resolution; and

(7) perform any specific task directed by the Court.

AUTHORITY FOR THE GAL:

1. The GAL shall hereby have the authority to perform all of the duties and actions set forth herein above and within this order or other orders from the Court.

2. The GAL shall hereby have the authority to have access to the children, confidential information regarding the children, including the children's educational, medical, and mental health records, and agency or court files involving allegations of abuse and/or neglect of the children, any delinquency records involving the children, and other relevant information. A children's record that is privileged or confidential under law may be released to a GAL in

accordance with that law.

The parties in this matter agree by consent to permit the GAL to speak with the children's providers and teachers and obtain the children's records; and, the parties agree by consent to sign the appropriate HIPAA and education related releases for same upon the request from the GAL.

The GAL shall hereby have the authority to have access to other information relevant to the issues in the proceeding, to include but not limited to records pertaining to the parents or other caregivers. An individual's record that is privileged or confidential under law may be released to a GAL in accordance with that law.

3. The GAL shall hereby have the authority to and shall maintain confidentiality of information obtained by and released to the GAL, except as necessary for the resolution of the issues in the proceeding, and except as expressly permitted to be disclosed under this or other provisions of this order, and as it may assist the Court to determine what is in the best interest of the children. Additionally, communications between the GAL and the children, the parties, or other involved individuals shall not be audio or video taped without the GAL's written consent. If there is a violation of this provision, such tapings or references thereto shall not be permitted in any litigation.

4. The GAL shall receive, from Counsel to the parties, a copy of each pleading or other record filed with the court in the proceeding.

5. Unless all parties consent, the GAL shall not engage in ex-parte communications with the court concerning the custody proceeding except for scheduling and other administrative

purposes when circumstances require and as otherwise may be authorized by law other than this Rule.

6. The GAL may directly communicate with a party who is represented by an attorney. The parties and Counsel for the parties shall cooperate with the GAL's investigation and reasonable requests.

7. The GAL may request for Counsel for a party to petition the Court to order testing (forensic psychological, alcohol/drug, etc.) of one or both parties. Such reasonable requests from the GAL shall not be sufficient evidence for the disqualification of the GAL, as such reasonable requests shall not be deemed reflection of an unjust bias of the GAL.

8. In the event the GAL prepares a written **Report**, copies of the Report shall be provided to the attorneys for the parties and the Court *by no later than ten days prior to the final hearing on the child related matters in this case.* The GAL's written Report shall not be filed in the jacket for the custody proceeding and shall not be deemed as evidence.

The GAL's Report, if any, shall include:

(a) a description of the GAL's investigation, including who was interviewed and what records and documents were reviewed;

(b) an analysis of the facts utilizing the applicable statutory factors;

(c) the child(ren)'s preferences if any are expressed; and

(d) any other information the GAL believes to be appropriate for the Court to consider when determining the best interest of the child(ren).

9. The GAL shall receive from Counsel for the parties/the parties notice of (and the authority to attend) each hearing in the proceeding, including alternative dispute resolution proceedings (pursuant to Supreme Court Rule 703, the GAL shall not be subject to Supreme Court Rule 615,).

10. The GAL may **testify as an expert witness/investigator** in any legal proceeding. Any party or the Court may call the GAL to testify. For purposes of discovery answers, the parties are not required to list the GAL as an expert witness that they intend to call. The admissibility of the GAL's testimony is subject to the Tennessee Rules of Evidence, *except that there shall be a suspension of the objection to hearsay and hearsay within hearsay testimony*. The GAL may be subject to cross-examination. If a transcript including the GAL's testimony is to be filed, it shall only be filed if it is also sealed by the Court's Clerk. *If the child related matters which brought about the GAL's appointment are not settled prior to trial, then the GAL shall testify. If neither party chooses to call the GAL as a witness, then the Court, sua sponte, may call the GAL as a witness.*

11. If there is a request for the GAL to be deposed, then the GAL shall have the authority to file and argue, in advance of such deposition, a pleading with the Court requesting an additional deposit be made for the GAL's anticipated fees and expenses relating to such deposition. If granted by the Court, then same shall be set forth in a separate written order and such deposit shall be remitted prior to the GAL having to appear for such deposition. If any such transcript is to be filed, it shall only be filed if it is also sealed by the Court's Clerk. If there are allegations of

inappropriate behavior during such deposition, then the GAL shall have the authority to call a suspension to the deposition for further direction from the court.

12. The GAL shall perform any other specific task directed by the Court.

Fees and Expenses of the GAL:

The Court has considered that the appointment of the GAL is an additional expense to the parties in litigation, and still finds this appointment necessary. Consistent with *Federal Law*, the GAL's fees and expenses shall be deemed as a Family Support Obligation.

This GAL shall be paid at a rate of $ ______ per hour, plus costs for expenses. The GAL fees and expenses anticipated in this matter shall be a reasonable amount and related to the duties, participation, authorities, and role of the GAL.

In anticipation of time, fees and expenses to be incurred, the Court hereby sets forth $_____ as an initial deposit from which the GAL may draw for fees and expenses. The Court hereby orders the following provisional allocation between the parties for such initial deposit to be paid to the GAL: *Each party shall pay one half of the initial deposit and shall pay same directly to the GAL immediately upon the entry of this order*.

The GAL shall not be obligated to perform duties until the entire initial deposit has been made.

For any Court approved additional fees and expenses to be paid to the GAL, in excess of the initial deposit, the Court further orders the following provisional allocation between the parties: *Any court approved additional fees and expenses of the GAL, in excess of the initial deposit, shall be paid equally by the parties directly to the GAL by no later than five days after the entry of an order from the Court approving such fees and expenses.*

Reallocation between the parties of the GAL's fees and/or expenses may be ordered by the Court if deemed so appropriate by the Court, utilizing the standards set forth in *Section 11 of the TN Supreme Court Rule 40A*. Any such reallocation shall be set forth in the Court's *final* order in the proceeding and shall be supported by findings of fact.

If there is a request for the GAL to be deposed, then the GAL shall have the authority to file and argue, in advance of such deposition, a pleading with the Court requesting an additional deposit be made for the GAL's anticipated fees and expenses relating to such deposition. If granted by the Court, then same shall be set forth in a separate written order and such deposit shall be remitted prior to the GAL having to appear for such deposition.

The GAL hereby has the authority to and shall complete and file with the Court a written claim for payment, interim or final, and an affidavit of fees and expenses, supported by attaching detailed billing. The GAL shall serve such filed claims by U.S. Mail or as otherwise permitted by the *Tennessee Rules of Civil Procedure*, upon the parties/Counsel for the parties.

Any objection to the claim shall be filed with the Court, by way of motion practice, within thirty days after the claim is filed. However, if the claim is not going to be objected to by the parties, then prior to the thirty day expiration the GAL has the authority to submit to the Court for approval a proposed Consent Order regarding the fees which must also be approved for entry by Counsel for the parties.

If there is no objection timely filed, then the GAL has the authority to present (without the requirement for prior circulation) a proposed order to the Court for entry wherein the Court shall approve the claim or portion thereof, determined to be reasonable and related to the duties of the GAL.

If an objection is timely filed, the Court shall conduct a hearing, by motion practice, and the GAL shall have the authority to file a response and respond in Court to such objection. The Court shall rule on the motion by either approving or denying the claim or approving a portion thereof using a standard of whether or not the claim is reasonable and related to the duties and authorities of this GAL. An order shall be entered memorializing such ruling and the parties shall pay their portion, if any, within *five days* of the entry of the order. Any reallocation between the parties of the GAL's fees and/or expenses shall be reserved to be addressed in the final order of the Court and supported by findings of fact.

If either party does not comply with the Court's orders as it relates to payment of the fees and/or expenses of the GAL, then the GAL shall have the authority to file pleadings with the Court, present arguments to the Court, and litigate to attempt to bring the party into compliance or to otherwise collect approved fees and/or expenses. This authority for the GAL shall extend beyond the termination of the duties of the GAL and/or the entry of the final orders in this cause.

APPEALS:

The GAL shall not initiate an appeal; however, upon appeal of the Court's final ruling by one of the parties, the GAL shall have the right to receive notice of the appeal.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED AND DECREED.

____
JUDGE/CHANCELLOR

DATE:__________________________

APPROVED FOR ENTRY:

PROPOSED MODIFICATIONS TO SUPREME COURT RULE 40A
ALTERNATIVE TWO

Language that is not italicized is from the current Rule 40A.
Language from the current Rule 40A that is omitted reflects recommendations for striking such language.
Language that is italicized highlights recommended new language.

SECTION 1. DEFINITIONS

(a) "Custody proceeding" means a court proceeding, other than an abuse or neglect proceeding, *in which matters involving parenting time with a child(ren) are at issue.*

(b) "Abuse or neglect proceeding" means a court proceeding for protection of a child*(ren)* from abuse or neglect or a court proceeding in which termination of parental rights is at issue.

(c) "Guardian *a*d Litem" means a *licensed attorney* appointed *by the court* to *legally advocate for* the best interests of a child or children in a custody proceeding. *A Guardian ad Litem may not be a witness or testify in any proceeding in which he/she serves as a Guardian ad Litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Sec. EC 5-9, 5-10 and DR 5-101. A Guardian ad Litem is not a Special Master, and should not submit a Report and Recommendations to the Court. Rather, a Guardian ad Litem shall function with the same expectations, rules and authorities as any other lawyer as if he/she is advocating for a party to the lawsuit (with the sensitivities, developmental considerations, and limitations that attach to advocating for the best interest of child(ren) of different ages).*

SECTION 2. APPLICABILITY

This Rule applies to all *appointments of a Guardian ad Litem in* custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, *which appointments take place* after the effective date of this Rule. *Guardians ad Litem appointed prior to the effective date of this Rule shall continue to serve under the existing terms of their appointment.*

SECTION 3. GUARDIAN AD LITEM APPOINTMENTS

(a) Consistent with Tennessee Code Annotated section 36-4-132, in a custody proceeding the court may appoint a *G*uardian ad *L*item when the court finds that the child*(ren)*'s best interests are not adequately protected by the parties and that separate *legal advocacy* of the child*(ren)*'s best interests is necessary. Such an appointment may be made at any stage of the proceeding.

(b) Courts should not routinely appoint *G*uardians ad *L*item in custody proceedings. Rather, the court's discretion to appoint *G*uardians ad *L*item shall be exercised sparingly.

(c) In determining whether appointing a *G*uardian ad *L*item is necessary, the court *should* consider:

(1) the nature and adequacy of the evidence the parties likely will present;

(2) the court's need for additional information;

(4) the financial burden on the parties of appointing a Guardian ad *L*item and the ability of the parties to pay reasonable fees to the Guardian ad *L*item; *and*

(5) any *alleged* factors indicating a particularized need for the appointment of a Guardian ad *L*item, including:

(i) the circumstances and needs of the child*(ren),* including the child*(ren)*'s age and developmental level;
(ii) any inappropriate adult influence on or manipulation of the child*(ren)*;
(iii) the likelihood that the child*(ren)* will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child*(ren)* from the processes of litigation;
(iv) any higher than normal level of acrimony indicating the parties*'* lack of objectivity concerning the needs and best interests of the child*(ren)*;
(v) any interference or threatened interference*, or disruption or threatened disruption of* parenting time, including abduction or risk of abduction of the child*(ren);*
(vi) any conduct by a party or an individual with whom a party associates which raises serious concerns for the safety of the child*(ren)* during periods of custody, visitation, or parenting time with that party;
(vii) any special physical, educational, or mental-health needs of the child*(ren)* that require *legal* advocacy; *and/or*
(viii) *any other factors necessary to address the best interests of the child(ren).*

(d) If the court concludes that appointing a Guardian ad *L*item is necessary, the *court shall appoint a lawyer who has demonstrated having* knowledge, skill, experience, training, *and* education that enables the Guard*ian* ad *L*item to effectively *advocate for* the best interests of the child*(ren)*.

SECTION 4. APPOINTMENT ORDER

(a) Appointment of a Guardian ad *L*item shall be by written order of the court.

(b) In plain language understandable to non-lawyers, the order shall set forth:

(1) the reasons for the appointment, focusing upon the factors listed in Section 3(c) of this Rule;

(2) the specific duties to be performed by the Guardian ad *L*item in the case;

(3) the duration of the appointment; and

(4) the terms of compensation consistent with Section *11* of this Rule.

(c) The court shall provide in the appointment order as much detail and clarity as possible concerning the Guardian ad Litem's duties and authority. Providing such specificity will assist the parties in understanding the Guardian ad Litem's role, *and* will enable the court to exercise effective oversight of the Guardian ad Litem's *actions*.

(d) A Guardian ad Litem shall immediately disclose, *by way of a filed pleading*, any *conflict of interest, pursuant to the Tennessee Rules of Professional Conduct*. This disclosure must be made no later than fifteen (15) days after *entry of the order on the appointment*.

(e) There is no right to a peremptory change of a Guardian ad Litem. Allegations that a Guardian ad Litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is *unjustly* biased should be *raised without delay, within 15 days of the conflict or unjustifiable bias having been identified, and* should be addressed by *the* trial court through motion practice. Any appeal from a trial court's decision on such a motion shall be prosecuted pursuant to Tennessee Rules of Appellate Procedure 9 and 10.

SECTION 5. DURATION OF APPOINTMENT

Appointment of a Guardian ad Litem continues in effect only for the duration provided in the appointment order or any subsequent order. If no order specifies the duration of the appointment, the appointment shall terminate automatically when the trial court order or judgment disposing of the custody proceeding becomes final. *Notwithstanding, the Guardian ad Litem may file pleadings and other documents regarding his/her fees or appointment after the termination of such appointment.*

SECTION 6. ROLE OF *THE* GUARDIAN AD LITEM

(a) The role of the Guardian ad Litem is to *legally advocate for* the child*(ren)*'s best interests by gathering facts and presenting facts for the court's consideration subject to the Tennessee Rules of Evidence.

(b) The Guardian ad Litem shall not function as a special master for the court or perform any other *judicial* responsibilities.

SECTION 7. ACCESS TO CHILD*(REN)* AND INFORMATION RELATING TO CHILD*(REN)*

(a) Subject to subsections (b) and (c), when the court appoints a Guardian ad Litem in a

custody proceeding, the court shall issue an order, with notice to all parties, authorizing the Guardian ad *L*item to have access to:

(1) the child*(ren) with and without the parties' presence*; and

(2) confidential information regarding the child*(ren),* including the child*(ren)'*s educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the child*(ren),* any delinquency records involving the child*(ren),* and other information relevant to the issues in the proceeding.

(b) A child*(ren)'*s record that is privileged or confidential under law other than this Rule may be released to a Guardian ad *L*item only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records.

(c) An order issued pursuant to subsection (a) must require that a Guardian ad *L*item maintain the confidentiality of information released, *(*except as necessary for the resolution of the issues in the proceeding *or as ordered by the Court).* The court may impose any other condition or limitation on an order of access which is required by law, rules of professional conduct, the child*(ren)'*s needs, or the circumstances of the proceeding.

SECTION 8. DUTIES OF *THE* GUARDIAN AD LITEM

(a) The Guardian ad Litem shall: *legally advocate for the best interests of a child or children in a custody proceeding, without unjustifiable bias for or against a party. A Guardian ad Litem may not be a witness or testify in any proceeding in which he/she serves as a Guardian ad Litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Sec. EC 5-9, 5-10 and DR 5-101. A Guardian ad Litem is not a Special Master, and should not submit a Report and Recommendations to the Court. Rather, a Guardian ad Litem shall function with the same expectations, rules and authorities as any other lawyer as if he/she is representing a party to the lawsuit (with the sensitivities, developmental considerations, and limitations that attach to advocating for the best interest of child(ren) of different ages). The Guardian ad Litem's client is not the child(ren) or the Court. Rather the Guardian ad Litem's duty is to legally advocate for the best interest of the child(ren).*

(b) A Guardian ad *L*item *shall:*

(1) conduct an investigation to the extent that the Guardian ad *L*item considers necessary to determine the best interests of the child*(ren) within the context of the case and the applicable law.*

(2) obtain and review copies of the child*(ren)'*s relevant medical, psychological, and school records as provided by Section 7.

(3) within a reasonable time after the appointment, interview:

(i) *each* child in a developmentally appropriate manner, *if possible*;
(ii) each *relevant* person who has significant knowledge of the child*(ren)*'s history and condition; and
(iii) the parties to the suit;

(4) *If the child(ren) is twelve (12) years of age or older,* seek to elicit in a developmentally appropriate manner *the reasonable preference of the child(ren);*

(5) consider the child*(ren)*'s expressed *preferences* without being bound by those *preferences*;

(6) encourage settlement of the issues related to the child*(ren)* and the use of alternative forms of dispute resolution; and

(7) perform any specific task directed by the court.

(C) *If a child of any age expresses a preference which is inconsistent with what the Guardian ad Litem deems to be in the child's best interest, then prior to the final hearing the Guardian ad Litem shall, by way of a pleading filed with the Court, simply set forth that the child's expressed preference is inconsistent with the Guardian ad Litem's position for the child's best interest (without detail), and reserve the Court's right to call the child into chambers to testify as to the child's preference. If the preference of the child is in dispute, the specific preference shall not be set forth in the pleading. Rather, the Court shall use its discretion in determining whether or not to call the child into chambers to testify in his/her own words. If the child's preference is not disputed, then same may be specifically set forth in a pleading of the child's preference.*

SECTION 9. PARTICIPATION/*<u>AUTHORITY FOR THE GUARDIAN AD LITEM</u>*

A Guardian ad Litem appointed in a custody proceeding is entitled to *all rights and privileges accorded to an attorney advocating for a party, including but not limited to the right to:*

(1) receive a copy of each pleading or other record filed with the court in the proceeding;

(2) receive notice of, attend, *and participate in* each hearing in the proceeding, *including alternative dispute resolution proceedings, and take any action that may be taken by an attorney advocating for a party pursuant to the Rules of Civil Procedure;*

(3) petition the Court for relief on behalf of the child(ren)'s best interest;

(4) file and respond to motions, petitions, and other pleadings;

(5) participate in depositions, discovery, and pre-trial conferences;

(6) participate in settlement negotiations to seek expeditious resolutions of the case, keeping in mind the effect of continuances and delays on the best interest of the child(ren);

(7) make opening statements and closing arguments;

(8) call, examine and cross-examine witnesses, offer exhibits and introduce independent evidence in any proceeding;

(9) prepare and file briefs, legal memoranda, proposed findings of fact and conclusions of law, and pre-trial memoranda;

(10) ensure written orders are promptly entered and properly reflect the findings of the Court;

(11) petition the Court for alcohol and/or drug testing of the parties;

(12) petition the Court for psychological evaluations and/or forensic parenting assessments of the parties and/or the child(ren);

(13) conduct formal discovery to obtain information, if necessary;

(14) any other authority which is necessary for the Guardian ad Litem to be able to effectively legally advocate for the child(ren)'s best interest.

(15) perform any other specific task directed by the Court.

Unless all parties consent, a Guardian ad Litem shall not engage in ex-parte communications with the court concerning the custody proceeding except for scheduling and other administrative purposes when circumstances require and as otherwise may be authorized by law other than this Rule.

SECTION 10. EXPEDITING CUSTODY PROCEEDINGS

To the extent possible, courts shall expedite custody proceedings in which Guardians ad Litem have been appointed, using available technological and electronic means to speed the process and to minimize costs.

SECTION 11. GUARDIAN AD LITEM FEES AND EXPENSES

(a) The appointment order shall specify the hourly rate to be paid the Guardian ad Litem, the *initial deposit* that may be *required* without further authorization of the court, the *provisional* allocation of the fee among the parties, and when payments *are* due. In setting the hourly rate, the *initial deposit,* and the *provisional* allocation, the court shall consider the financial hardship to the parties of imposing further costs in the proceedings, *and the parties' respective abilities to pay for such fees, including other resources of financial assistance to the parties.* Consideration of this factor is particularly appropriate where the parties to the custody proceeding are the child*(ren)*'s parents who are already represented by counsel.

(b) The Guardian ad Litem shall be compensated for fees and expenses in an amount the court determines is reasonable. In determining whether the Guardian ad Litem's fees and expenses are reasonable, the court shall consider the following factors:

(1) the time expended by the guardian;

(2) the contentiousness of the litigation;

(3) the complexity of the issues before the court;

(4) the expenses reasonably incurred by the guardian;

(5) the financial ability of each party to pay fees and costs;

(6) the fee customarily charged in the locality for similar services; and

(7) any other factors the court considers *appropriate.*

(c) Concerning the allocation of the fee among the parties, the court may do one or more of the following:

(1) equitably allocate fees and expenses among the parties;

(2) order a deposit to be made into an account designated by the court for the use and benefit of the Guardian ad Litem;

(3) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (2) to be paid into the account.

(d) The Guardian ad Litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. Any order authorizing the Guardian ad Litem to hire expert witnesses must specify the hourly rate to be paid the expert witness, the maximum fee that may be incurred without further authorization from the court, how the fee will be allocated between the parties, and when payment is due.

(e) To receive payment under this section, the Guardian ad Litem must complete and file with the court a written claim for payment, whether interim or final, justifying the fees and expenses charged and supported by an affidavit in accordance with Tennessee Rule of Civil Procedure 5. *The Guardian ad Litem shall serve his/her filed claims, by U.S. Mail or as otherwise permitted by the Tennessee Rules of Civil Procedure, upon the parties/counsel for the parties.*

(f) Any objection to the Guardian ad Litem's fee claim shall be filed within thirty days after the claim is filed.

(g) If no objection is timely filed, the court shall file a written order approving the claim, or portion thereof, determined to be reasonable and related to the duties of the Guardian ad Litem. *If the parties have reviewed the claim and do not wish to file an objection, then in advance of the thirty day expiration, the Guardian ad Litem may submit a Consent Order on the Claim for Payment of Fees, signed by the Guardian ad Litem and Counsel for the parties ordered to pay for the fees, for the Court's approval of same or portion thereof.*

(h) If an objection is timely filed, the court shall conduct a hearing and thereafter file a written order denying the claim, or approving the claim, or portion thereof, determined to be reasonable and related to the duties of the Guardian ad Litem.

(i) If the initial allocation of Guardian ad Litem fees and/or expenses among the parties has become inequitable as a result of *changes to* the income and financial resources available to the parties at the conclusion of the custody proceeding, the conduct of the parties during the custody proceeding, or any other similar reason, the court may reallocate the fees and expenses. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.

SECTION 12. *APPEALS*

The Guardian ad Litem shall not initiate an appeal; however, upon appeal of the matter by one of the parties, the Guardian ad Litem shall have the right to receive notice of the appeal.

If an appeal is filed by either party, an Appellate Court may then remand to the Trial Court for a re-appointment or new appointment of a Guardian ad Litem for the appellate process, at which time, the Trial Court shall also set forth by written order specifics with regard to payment of the Guardian ad Litem's fees and expenses for such process.

SECTION 13. EFFECTIVE DATE

This *R*ule is adopted as a provisional *R*ule *effective for from January 1, 2011 through December 31, 2011. This Rule applies to all appointments of a Guardian ad Litem in custody proceedings in Tennessee, regardless of the court in which the proceedings are filed, which appointments take place after the effective date of this Rule.* At an appropriate time during this period, the Court will solicit comments regarding the operation, effect, and efficacy of this *R*ule and, if warranted, will circulate revisions of the *R*ule for review and comment and eventual adoption.

IN THE <u>CIRCUIT/CHANCERY</u> COURT OF TENNESSEE FOR THE
______JUDICIAL DISTRICT AT______, ___________COUNTY

_________________,
Plaintiff

vs.

No.__________
Div./Part______

___________________,
Defendant.

ORDER APPOINTING GUARDIAN *AD LITEM*
(FOR ALTERNATIVE TWO)

CAME THE PARTIES, by and through their attorney of record, on ___________________, and upon statements from Counsel, considerations of the Court as outlined herein and the record as a whole, this Court finds the appointment of a Guardian *ad litem* is for the best interest of the minor children of the parties.

Considerations: From statements of Counsel for the parties and this case's record as a whole, the Court has considered the following: (1) the nature and adequacy of the evidence that the parties are likely to present; (2) the Court's need for additional information; (3) the financial circumstances of the parties; (4) that this matter indicates a particularized need for the appointment of the Guardian *ad litem* based on the following **alleged** factors **(underline as applicable)**: (a) the circumstances and needs of the children, with consideration of the children's ages and developmental levels; (b) inappropriate adult influence on or manipulation of the children; (c) the likelihood that the children may be called as witnesses or questioned by

the Court, and the need to minimize harm to the children from the process of litigation; (d) the higher than normal level of acrimony indicating the parties' lack of objectivity concerning the needs and best interest of the children; (e) interference or threatened interference, disruption or threatened disruption of parenting time; or abduction or risk or abduction of the children; (f) conduct by a party or other person with whom the party associates which raises serious concerns for the safety of the children during parenting time; (g) special physical, educational, or mental health needs of the children, where there would be a benefit by having legal advocacy for the children's best interest; (h) other factors where there would be a benefit by having legal advocacy for the children's best interest.

Appointment: Upon consideration by the Court of the foregoing, statements from Counsel, the record as a whole, and pursuant to *Tennessee Code Annotated section 36-4-132 and Sup. Ct. Rule 40A*, the Court concludes that the appointment of a Guardian *ad litem* is necessary. This Court hereby appoints Attorney ______________________ to serve as the Guardian *ad litem* (herein after referred to as "GAL"), to legally advocate for the best interest of the minor children in this cause, namely: ________________ (d.o.b., ______________) and ________ ______ (d.o.b., ______________).

The Court hereby qualifies this appointed GAL as an appropriate attorney who has demonstrated having the appropriate knowledge, skill, experience, training, and education to perform duties as GAL.

The GAL's appointment shall terminate *automatically when the Court's order or judgment, disposing of the issues which brought about this appointment, becomes final*. Notwithstanding, the GAL may file pleadings and other documents regarding the GAL's fees or appointment after the termination of this appointment. The GAL shall maintain such authority beyond the appointment termination.

Conflicts:

Counsel for both parties have confirmed to the Court that they are unaware of any conflicts that exist for this above designated attorney to serve as the appointed GAL in this matter ("conflict(s)" as defined by the *Tennessee Rules of Professional Conduct*).

This GAL shall immediately disclose, by way of a filed pleading, any conflict pursuant to the *Tennessee Rules of Professional Conduct*. This disclosure must be made no later than fifteen (15) days after the entry of this appointment order.

There is no right to a peremptory change of the above appointed GAL. Any future allegations of conflict, arising after the entry of this order, regarding the GAL should be addressed through motion practice.

Allegations that a GAL appointment is unnecessary, that this GAL is unqualified or otherwise unsuitable, or that this GAL is *unjustly* biased should be raised without delay, within 15 days of the conflict or unjustifiable bias having been identified, and should be addressed by the Court through motion practice. Any appeal from the Court's decision on such a motion shall be prosecuted pursuant to *Tennessee Rules of Appellate Procedure 9 and 10.*

Duties for the GAL:

The GAL shall: legally advocate for the best interests of the children, without unjustifiable bias for or against a party. The GAL may not be a witness or testify in any proceeding in this matter, except in those extraordinary circumstances specified by *Supreme Court Rule 8, Sec. EC 5-9, 5-10 and DR 5-101.* The GAL is not a Special Master, and should not submit a Report and Recommendations to the Court. Rather, the GAL shall function with the same expectations, rules and authorities as any other lawyer as if the GAL is legally advocating for a party to this lawsuit (with the sensitivities, developmental considerations, and limitations that attach to advocating for the best interest of children of different ages). The GAL's client is *not* the children or the Court. Rather, the GAL's duty is to legally advocate for the best interest of the children.

The GAL shall:

(1) conduct an investigation to the extent that the GAL considers necessary to determine the best interests of the children within the context of the case and the applicable law.

(2) obtain and review copies of the children's relevant medical, psychological, and school records, as provided by *Section 7 of Rule 40A.*

(3) within a reasonable time after the appointment, interview:

(i) each child in a developmentally appropriate manner, if possible;

(ii) each relevant person who has significant knowledge of the children's history and condition; and

(iii) the parties to the suit;

(4) If the children are twelve (12) years of age or older, seek to elicit in a developmentally appropriate manner the reasonable preferences of the children; and

(5) consider the children's expressed preferences without being bound by those preferences. *[If a child expresses a preference which is inconsistent with what the GAL deems to be in the child's best interest, then prior to the final hearing the GAL shall, by way of a pleading filed with the Court, simply set forth that the child's expressed preference is inconsistent with the GAL's position for the child's best interest (without detail), and reserve the Court's right to call the child into chambers to testify as to the child's preference. If the preference of the child is in dispute, then the specific preference shall not be set forth in the pleading. Rather, the Court shall use its discretion in determining whether or not to call the child into chambers to testify in his/her own words. If the child's preference is not disputed, then same may be specifically set forth in a pleading of the child's preference.]* And

(6) encourage settlement of the issues related to the children and the use of alternative forms of dispute resolution; and

(7) perform any specific task directed by the Court.

AUTHORITY FOR THE GAL:

The GAL is entitled to all rights and privileges accorded to an attorney advocating for a party in this matter, including but not limited to the right to:

(1) receive a copy of each pleading or other record filed with the Court in the proceeding;

(2) receive notice of, attend, and participate in each hearing in the proceeding, including alternative dispute resolution proceedings, and take any action that may be taken by an attorney advocating for a party in this matter, pursuant to the *Rules of Civil Procedure*;

(3) petition the Court for relief on behalf of the children's best interest;

(4) file and respond to motions, petitions, and other pleadings;

(5) participate in depositions, discovery, and pre-trial conferences;

(6) participate in settlement negotiations to seek expeditious resolutions of the case, keeping in mind the effect of continuances and delays on the best interest of the children;

(7) make opening statements and closing arguments;

(8) call, examine and cross-examine witnesses, offer exhibits and introduce independent evidence in any proceeding;

(9) prepare and file briefs, legal memoranda, proposed findings of fact and conclusions of law, and pre-trial memoranda;

(10) ensure written orders are promptly entered and properly reflect the findings of the Court;

(11) petition the Court for alcohol and/or drug testing of the parties;

(12) petition the Court for psychological evaluations and/or forensic parenting assessments of the parties and/or the children;

(13) conduct formal discovery to obtain information, if necessary;

(14) exercise any other authority which is necessary for the GAL to be able to effectively legally advocate for the children's best interest; and

(15) perform any other specific task directed by the Court.

Unless all parties consent, a GAL shall not engage in ex-parte communications with the Court concerning the proceeding except for scheduling and other administrative purposes when circumstances require and as otherwise may be authorized by law other than this Order.

The GAL's authority for access to the children and information relating to the children:

1. The GAL shall hereby have the authority to have access to the children with and without the parties' presence.

2. The GAL shall hereby have the authority to have access to confidential information regarding the children, including: the children's educational, medical, and mental health records, and agency or court files involving allegations of abuse and/or neglect of the children, any delinquency records involving the children, and other relevant information. A child's record that is privileged or confidential under law may be released to the GAL in accordance with that law.

The parties in this matter agree by consent to permit the GAL to speak with the children's providers and teachers and obtain the children's records; and, the parties agree by consent to sign the appropriate HIPAA and education related releases for same upon the request from the GAL.

3. The GAL shall hereby have the authority to and shall maintain confidentiality of such information obtained by and released to the GAL, except: as expressly permitted to be disclosed under this or other provisions of this order or other executed release, or as permitted pursuant to another order from the Court, or as it may be beneficial to aid in the resolution of matters in the context of settlement negotiations, or as permissible under the *Tennessee Rules of Evidence*.

4. Additionally, communications between the GAL and the children, the parties, or other involved individuals shall not be audio or video taped without the GAL's written consent, unless same is being performed during a legal proceeding. If there is a violation of this provision, such tapings or references thereto shall not be permitted in any litigation.

Fees and Expenses of the GAL:

The Court has considered that the appointment of the GAL is an additional expense to the parties in litigation, and still finds this appointment necessary. Consistent with *Federal Law*, the GAL's fees and expenses shall be deemed as a Family Support Obligation.

This GAL shall be paid at a rate of $ ______ per hour, plus costs for expenses. The GAL fees and expenses anticipated in this matter shall be a reasonable amount and related to the duties, participation, authorities, and role of the GAL.

In anticipation of time, fees and expenses to be incurred, the Court hereby sets forth $_____ as an initial deposit from which the GAL may draw for fees and expenses. The Court hereby orders the following provisional allocation between the parties for such initial deposit to be paid to the GAL: *Each party shall pay one half of the initial deposit and shall pay same directly to the GAL immediately upon the entry of this order.*

The GAL shall not be obligated to perform duties until the entire initial deposit has been made.

For any Court approved additional fees and expenses to be paid to the GAL, in excess of the initial deposit, the Court further orders the following provisional allocation between the parties: *Any court approved additional fees and expenses of the GAL, in excess of the initial deposit, shall be paid equally by the parties directly to the GAL by no later than five days after the entry of an order from the Court approving such fees and expenses.*

Reallocation between the parties of the GAL's fees and/or expenses may be ordered by the Court if deemed so appropriate by the Court, utilizing the standards set forth in *Section 11 of the TN Supreme Court Rule 40A.* Any such reallocation shall be set forth in the Court's *final* order in the proceeding and shall be supported by findings of fact.

The GAL hereby has the authority to and shall complete and file with the Court a written claim for payment, interim or final, and an affidavit of fees and expenses, supported by attaching

detailed billing. The GAL shall serve such filed claims by U.S. Mail or as otherwise permitted by the *Tennessee Rules of Civil Procedure*, upon the parties/Counsel for the parties.

Any objection to the claim shall be filed with the Court, by way of motion practice, within thirty days after the claim is filed. However, if the claim is not going to be objected to by the parties, then prior to the thirty day expiration the GAL has the authority to submit to the Court for approval a proposed Consent Order regarding the fees which must also be approved for entry by Counsel for the parties.

If there is no objection timely filed, then the GAL has the authority to present (without the requirement for prior circulation) a proposed order to the Court for entry wherein the Court shall approve the claim or portion thereof, determined to be reasonable and related to the duties of the GAL.

If an objection is timely filed, the Court shall conduct a hearing, by motion practice, and the GAL shall have the authority to file a response and respond in Court to such objection. The Court shall rule on the motion by either approving or denying the claim or approving a portion thereof using a standard of whether or not the claim is reasonable and related to the duties and authorities of this GAL. An order shall be entered memorializing such ruling and the parties shall pay their portion, if any, within ***five days*** of the entry of the order. Any reallocation between

the parties of the GAL's fees and/or expenses shall be reserved to be addressed in the final order of the Court and supported by findings of fact.

If either party does not comply with the Court's orders as it relates to payment of the fees and/or expenses of the GAL, then the GAL shall have the authority to file pleadings with the Court, present arguments to the Court, and litigate to attempt to bring the party into compliance or to otherwise collect approved fees and/or expenses. This authority for the GAL shall extend beyond the termination of the duties of the GAL and/or the entry of the final orders in this cause.

APPEALS:

The GAL shall not initiate an appeal; however, upon appeal of the Court's final ruling by one of the parties, the GAL shall have the right to receive notice of the appeal.

If an appeal is filed by either party, an Appellate Court may then remand to the Trial Court for a re-appointment or new appointment of a GAL for the appellate process, at which time, the Trial Court shall also set forth by written order specifics with regard to payment of the GAL's fees and expenses for such process.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED AND DECREED.

____

JUDGE/CHANCELLOR

DATE:______________________________

APPROVED FOR ENTRY:

M2009-1926

THE MYERS LAW FIRM

5356 ESTATE OFFICE DRIVE ~ SUITE 3
MEMPHIS, TENNESSEE 38119

SHARI M. MYERS
ATTORNEY AT LAW

TEL 901.737.6433
FAX 901.737.6116
SHARIMYERS@LAWYER.COM

November 21, 2010

RECEIVED
NOV 24 2010
Clerk of the Courts
Rec'd By ________

Mr. Michael W. Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Dear Mr. Catalano,

Thank you for the opportunity to be able to comment on Tennessee's Supreme Court Rule 40A. I along with three other lawyers who practice Family Law have submitted a joint response, which is being submitted to you separately from this letter. However, I am also submitting to you this enclosed response which comes from numerous psychologists from Western Tennessee.

Having served on numerous cases as Guardian ad Litem, I have unfortunately become very aware of the detrimental effects that Rule 40A has been having on some children in Tennessee. From such concern, I contacted respected psychologists in my area, who have extensive hands-on experience with children and families whose cases have also involved the appointment of a GAL. I asked them to familiarize themselves with the specific language of Rule 40A and to provide me with comments, concerns, and suggestions so that same could be forwarded to the Supreme Court for consideration. With their review and approval, I memorialized ***their*** collective comments, concerns, and suggestions in their *"Response from Psychologists practicing in Tennessee to the Tennessee Supreme Court, Re: Tennessee Supreme Court Rule 40A."* Same is *attached hereto for your review*. They have each provided their contact information at the close of their Response, should there be questions or comments for them.

I trust that the Supreme Court will ultimately provide a modified Rule that provides actual assistance to the Judges and Chancellors who are making these difficult rulings, and most importantly a Rule that is genuinely for the children's best interest.

Again, thank you for this opportunity to comment on Tennessee's Supreme Court Rule 40A. I am available for any questions.

Sincerely,

Shari M. Myers
Encl.

Response from Psychologists practicing in Tennessee to the Tennessee Supreme Court, Re: Tennessee Supreme Court Rule 40A:

We, certified psychologists in good standing in Tennessee who are all actively practicing and have treated children and parents while a GAL has been appointed in their litigation, raise the following specific concerns with the regard to the current Rule 40A:

1. **The current Rule 40A is ambiguous as to the role of the GAL:**

In numerous provisions the Rule sets forth that the GAL shall "represent the best interest of a child" and "advocate a position," "discuss with the child and make sure the child understands the different options or positions that might be available...including the likelihood of prevailing on each option or position,""shall advise the Court" of matters, and "direct the Court's attention to any available information" regarding other matters, but also the Rule sets forth that "the GAL may not take any (legal) action."

In other provisions the Rule states that the GAL shall "conduct an investigation," "testify," "shall advise the Court" and "direct the Court's attention to any available information," but the GAL's testimony is limited to only non-hearsay presentations to the Court and the GAL's Report will not be submitted to the Court unless both sides agree to do so.

Under Rule 40A, both options: for a GAL to be an advocate and/or a witness, are seemingly unattainable since there are so many prohibitions for the GAL to be fully effective under either role. Thus, the Court is left without the true benefit for which the appointment was suppose to provide, to assist with a result for the best interest of the child.

Role of the GAL, *should be*:

A lawyer who is appointed to investigate (in a non-bias approach) allegations relating to the best interest of the child, in a pending "custody" proceeding; and to provide the Court with all relevant information from such investigation, so that the Court is able to make well informed rulings for the best interest of the child. For this role to be effective there should be a suspension of the objection to hearsay, for the GAL's limited appointment.

2. **Under Rule 40A, GAL cannot testify to hearsay or present a Report to the Court with findings of his/her investigation, unless both parties stipulate otherwise.**

a. This means that valuable and sometimes pivotal information may never be provided to the Court.

If a provider does not provide all positive information about a party, then that party will likely not submit the provider's input to the Court. If a provider has less than positive remarks about both parties, then both parties may decide not to submit any of the provider's input to the Court. The GAL, under 40A, is prohibited from providing such information. This could lead to a Court making a ruling that could potentially seriously jeopardize a child's safety.

b. This means that providers will always be called into Court as a witness or deposed, even when doing so could risk the therapeutic relationship between the child or parent and the provider, and even when undisputed facts could be provided in a less expensive and less burdensome fashion.

Under 40A, even if a provider is able to communicate with a GAL regarding the facts of a scenario or recommendations from the provider, same cannot be communicated to the Court without the provider testifying to same.

In many cases (when a provider is treating the family or both parents) after directly testifying in a case where the outcome is less favorable to one party, a patient can become angry at the provider and refuse continued treatment with the family or ex-spouse. Likewise, if a child is aware that their treating provider is sharing with their parent disclosures from that child about a parent or both (assuming the parents have signed a release for their Counsel), then that child may feel that they can no longer have a trustful rapport with that provider, and perhaps refuse continued treatment. Often, when a GAL is involved, and the GAL communicates to Counsel what the provider has indicated, and only if it is also possible that that GAL may also include same in his/her communications to the Court, then cases settle without the patient even becoming fully aware of what the provider indicated.

Under 40A, all providers (and other professionals in similar positions such as teachers, etc.) will likely always be deposed so that Counsel can obtain information directly from the provider and then use same at trial. Under 40A, even if a GAL is able to share with Counsel what the providers have stated and there is no dispute as to the accuracy of the information relayed, the provider will still be required to testify because the GAL is not able to relay the information to the Court (due to it being hearsay).

If there are concerns about the accuracy of the information provided by the GAL, and hearsay objections were suspended, then both parties' Counsel could communicate directly with the provider to check the accuracy. If there is a conflict, the provider would *only then* have to testify.

If hearsay objections were suspended and the GAL could provide accurate remarks from the provider to the Court, then there would be only limited occasions involving such a burden and expense to the provider (and to the parties) for having to testify; and again, same would assist in protecting the therapeutic relationships, as the provider would be one step removed. We have seen this work effectively in cases where parties stipulate to waive the objection to hearsay for the GAL's testimony/Report.

Another consideration is that if providers are constantly called upon to testify (as suggested under 40A) for numerous interim hearings on petitions, depositions, lengthy trials, etc., then there is a genuine possibility that experienced providers who also have to maintain their regular practice will opt not to work with children and families who are in divorce litigation. The Courts will then be left with having to rely on testimony from providers who may be less experienced or who are not established with a good reputation/less patients.

c. This means that parties are not likely to curb their bad behavior when GALs are appointed, and children will be put in the position to testify as to the bad behavior of their parents.

Under 40A, even if a child tells the GAL of what occurred, then that child will likely still have to testify as a fact witness for one of the parties, and this will place the child in the middle of the litigation and the child may appear to be taking sides with one of his/her parents. Further, children often under-report or exaggerate or even lie about incidents to protect a parent, or their own agenda. This can all be very damaging to a child.

If there is a suspension to the hearsay objection, then parties will be cognizant that the GAL may provide testimony to the Court regarding actions of a party that were relayed by a child to the GAL (or from the child to their treating provider/ therapist). This would perhaps curb the parties' bad behavior and save the child from the harms of the bad behavior and the harms of litigation.

In cases where there has been a stipulation to waive the objection to hearsay, we have observed that parents do often curb bad behavior and that children are not subject to such harms.

d. This means that children will be required to testify in almost all high conflict divorce cases, as fact witnesses.

Children are regularly the only witnesses to horrible actions displayed by one or both parents, often behind closed doors. If the GAL is not able to testify as to what was observed by the child, then the child his/herself will have to testify. This can cause long-term (even life-long) damage to the psychological state of a child, when the child is placed in such a position. Further, it also creates a role of the "reporter" or "star witness" for the child, and children can often become consumed with such a position, again damaging psychologically to a child and damaging to their academics, extra-curricular activities, and social relationships within their day to day life. The child, under 40A, is directly placed in their parent's litigation and often would become the one relied upon to support or refute allegations from a parent against the other.

Children are easily manipulated, especially at a young age, and could easily become the manipulated pawn or threatened pawn for a parent in a high conflict case. Further, the child could easily become pulled by both parents and made to feel guilty by his/her parents. This could ruin a child psychologically, not to mention how it would impact the child's own relationships, including that with a future spouse.

Children, particularly between the ages of 12-16, often are self consumed and will manipulate situations to best suit their own agenda (i.e. residing in the home with the least rules, etc.).

Children of a young age, and some who are older depending on their individual development, are often poor historians of events. Depending on the child and their developmental level, some children have no conception of time and long term effects of what they say and do.

There is no good outcome for a child who is forced to testify against or for a parent/parent's allegation. Even meeting with a Judge in chambers is a frightful experience for a child, and can easily have lasting long term harm.

It is very common for children of divorcing parents already feel a sense of guilt, and become fatalistic; many are depressed, anxious, and carry other disorders. By requiring the child to be in the middle of such litigation will only further exacerbate the child's problems or create new problems that never had existed. We are acutely aware of this impact on children.

If the hearsay objection was suspended, then in most cases the GAL could protect the child from such harms. If there are questions as to the accuracy of the child's statements, then same could be confirmed through a provider (affidavit from a provider, or other communication, or deposition) or other individual. We hope that in the very least the hearsay objections are waived for the GAL's testimony in cases that involve children under 12 years old (and for all children in a family regardless of age so long as one of the children is younger than 12 years old), when they are most vulnerable. Alternatively, the concern could be cured if a GAL is to receive specialized training to qualify him/her as an expert in the field of investigation and interviewing minors, so that their statements would be that from an expert, and not be subject to the hearsay objection.

3. **<u>Rule 40A inaccurately assumes that parents of high conflict divorces are able to consider and implement what is in their child's best interest.</u>**

More often than not, one or both parents of high conflict cases are not able to consider and implement what is in their child's best interest.

This is often a result of a parent's strong desire to ruin the other spouse and in order to do so they will manipulate a child and play "tug of war" with a child emotionally and even physically.

Many parents of high conflict divorces suffer from serious psychological disorders which may prohibit them from psychologically being able to place others, including their own children, above their own agenda. However, these individuals will not likely admit to such pathology.

4. **<u>Rule 40A submits that children at the age of four should be able to articulate their preference and be able to comprehend the impact of their preference and the "likelihood of prevailing on each position."</u>**

There is an immediate and resounding unanimous response from us that a four year old child is not capable developmentally, and for other reasons, of being able to articulate their preference intelligently and with mature reasons and at the same time able to comprehend the long-term effect of such a "position" or "objective". Not to mention that a young child regularly changes his/her opinions moment to moment, and can easily base their "position" regarding a parent on trivial matters or ones that don't align with what they want at any given time (for example, as to whether or not that parent lets them eat dessert for breakfast).

It is our professional opinion that the age of twelve is perhaps a better starting point for such a consideration from a child. However, it really depends on the individual child and his or her developmental progress as to whether or not such a child is capable of taking a "position" or "objective" while being able to process the "risks," meaning and effects of same.

It is important to keep in mind what has already been stated, that there are often factors that play a role in children's statements to include: manipulation, threats, guilt, under-reporting and over-exaggeration to protect a parent, inability to process long-term effects, a child's own agenda, a child's developmental posture.

Under 40A the GAL is not able to submit to the Court what other factors might have lead a child to such a "position," and as a result the Court may not be able to properly determine the weight to provide to same.

The above concerns are respectfully submitted to the Supreme Court of Tennessee from,
(Please feel free to contact any of us with any questions or for further comment)

Elizabeth Harris, Ph.D. (901-761-1119)

Susan A. Ross, Ph.D. (901-763-2188)

Catherine Collins, Ph.D. (901-756-8398)

Amy Beebe, Ph.D. (901-301-8149)

Scott Beebe, Ph.D. (901-301-8149)

Fred A. Steinberg, Ph.D. (901-527-3737)

John V. Ciocca, Ph.D. (901-757-1468)

Lisa Craig Winborn, Ph.D. (901-388-1893)

Russell D. Crouse, Ph.D. (901-755-5802)

M2009-1926

LINDA B. HALL
ATTORNEY AT LAW
9744 DAYTON PIKE
SODDY-DAISY, TN 37379
TELEPHONE: (423) 332-6280
FACSIMILE: (423) 332-7348

November 29, 2010

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
Supreme Court Building
401 7th Avenue N
Nashville, TN 37219-1407

RE: Comments to Supreme Court Provisional Rule 40A

Dear Mr. Catalano,

I am writing to comment on the Provision Rule 40A which governs the conduct of Guardian *ad litems* in custody litigation. I have served as a Guardian *ad litem* in the Juvenile Court, Circuit Court and Chancery Court. I have served when there were no rules governing the conduct of Guardian ad litems, after Supreme Court Rule 40 was adopted (which was briefly adopted to apply to custody litigation) and under the current provisional rule 40A.

I have found that the current provisional rule makes it impossible for a Guardian *ad litem* to represent the best interest of the minor children. Pursuant to Section 3 of the rule, a Guardian *ad litem* is to be appointed when the court finds that the child's best interest are not adequately protected by the parties and that separate representation of the child's best interest is necessary. However, the rule severely limits the ability of the Guardian *ad litem* to represent the child's best interest. The rule states under Section 6 that the role of the Guardian *ad litem* is to represent the child's best interest by gathering facts and presenting facts for the court's consideration. However, the guardian *ad litem* is prohibited from making opening and closing statements, examining witnesses in court, and engaging in formal discovery. How exactly is the Guardian *ad litem* to present facts for the court's consideration? The rule allows a written report to be presented to the Court only upon agreement of all the parties. The Guardian *ad litem* can testify, but is bound by the rules of evidence. A Guardian *ad litem's* information is gathered by talking to other people that have had contact with the child and/or the parents, talking to the child if appropriate and reviewing the records of the child, all of which is hearsay and precluded by the rules of evidence. If neither attorney agrees with the position of the Guardian *ad litem*, then neither attorney will call the Guardian *ad litem* as a witness and the Court will not even hear the testimony of the Guardian *ad litem*. Since *ex parte*

communication with the court is prohibited absent consent of all parties, then the Guardian *ad litem* cannot even bring matters to the court's attention in an informal way.

I have had three cases recently in which my ability to represent the best interest of the minor children was severely hampered by the new rule. In one case, the child told me that her mother was planning on taking her on a trip. The mother was abusing drugs and was a flight risk. Because of the rule which prohibited me from taking any action an attorney could take, I could not file the appropriate pleadings with the Court to bring the matter to the Court's attention. I had to seek out the counsel for the father and ask them to file the appropriate emergency pleadings. This put me, as the Guardian *ad litem*, in the uncomfortable position of choosing a side to protect the minor child. It makes it difficult for the parties to view the Guardian *ad litem* as being neutral. Further, if the attorney for one of the parents does not want to take the action the Guardian *ad litem* feels is necessary to protect the minor child, either because they are not being paid or they believe that it will compromise their client's position, then there is no other alternative for the Guardian *ad litem* to bring the issue to the court's attention.

In another case, I was appointed because it was alleged that the husband was not the father of the minor child. During my investigation it was alleged and my investigation seemed to substantiate that the mother was addicted to crack cocaine. After the allegations were made, the mother and husband reconciled. The husband had told me that he used crack when he resided with the mother. Neither one of the attorneys for the parents wanted to take any action because they were not being paid nor would it be favorable to bring drug use to the court's attention. As the Guardian *ad litem*, I have no way of bringing to the Court's attention the alleged drug use. The only information I have is hearsay and I cannot file a motion with the court to have the mother submit to a drug test. How can I protect the best interest of the child in this situation? The new rule has made it impossible for me to get any concrete evidence of drug use that could then be used by the juvenile court in a dependency and neglect action. This child will fall through the cracks because as the Guardian *ad litem* I have no ability to file anything with the court.

The third case was one in which there was extensive media coverage. All of the factors that the Supreme Court rule identifies for the court to consider when appointing a Guardian *ad litem* were present in the case. However, when the provisional rule became effective, I was precluded as the Guardian *ad litem* from advocating for the best interest of the minor children. In order to protect the children's psychological/medical records and prevent any subsequent harm to the children, I had to approach one of the attorneys for the parents to file a motion on behalf of the children. Again, this aligns the Guardian *ad litem* with one side or the other. At the trial, I could not file a motion to ask the Court to consider closing the court proceedings to the media in order to protect the children's privacy. At trial, I could not ask the treating Psychologist any questions that I felt were necessary for the court to consider and neither one of the parents attorneys asked some of the questions that needed to be asked. Neither parent's attorney was willing to call the professional that prepared the custodial evaluation because neither parent was thrilled

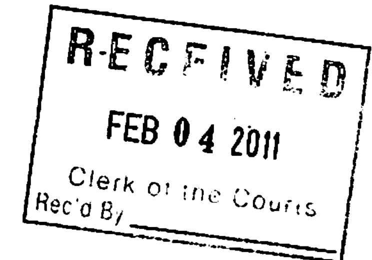
with the findings of the evaluation. As a result, the Court did not hear from that witness at trial.

The job of an attorney representing a parent in custody litigation is to present the evidence to the court that puts their client in the most favorable light and supports their client's position. In many cases, that conflicts directly with the evidence that would allow the court to determine what is in the best interest of the children. If the Guardian *ad litem* is not allowed to question witnesses, subpoena witnesses for trial or do anything that only an attorney can do, then how is the Guardian *ad litem* going to represent the best interest of the child? I do believe that there should be a rule governing the conduct of the Guardian *ad litem* in custody cases; however the provisional rule makes the Guardian *ad litem* completely useless in custody proceedings. The rule by its own language limits the appointment of a Guardian *ad litem* to those cases in which the child's interest are not adequately protected by the parents, but then relies upon the attorneys for those same parents to present the evidence that the court relies upon when making a best interest determination. A Guardian *ad litem* must have a way in which to present evidence to the court that directly affects the best interest of the minor children and allows the judge to make custody determinations in extremely difficult cases.

Sincerely,

Linda B. Hall

FAMILY LAW CENTER
1620 Westgate Circle Suite 150
Brentwood, Tennessee 37027
615-661-0122
Fax 615-661-0197
www.TennFamilyLaw.com



Tuesday, February 01, 2011

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comments on Guardian Ad Litem – Rule 40A

Dear Clerk,

Let me be blunt. Our Guardian ad Litem program is not working. GALs charge outrageous fees, they are accountable to no one, and unfortunately, in some cases, they become an extension of the Judge, the Department, or ONE of the attorneys in the case.

In 17 years, I have never had a GAL that did their job with care and concern for the best interest of the children. This problem which at first was general incompetence or lack of enthusiasm, has hastened to be a financial beast in the system.

Here are specifically some problems (all documented cases) of note:

1. GAL is appointed under Rule 13 of the Tenn. Rules of the Supreme Court which sets forth specifically the hourly rate they can charge. At the end of the case, they submit a fee affidavit billing their time at $200 per hour (instead of $40 or $50 per hour) and ask the Court to order the parents (or litigants) pay THOUSANDS of dollars. The Court does exactly what the GAL asked without regard for the fact that the order of appointment clearly sets forth the fee structure.

2. GAL is appointed as a Rule 40 GAL when she should have been appointed under Rule 40A. The Judge, *sua sponte*, changes the Mother's petition from a modification of custody to a dependant and neglect proceeding to give the Court the authority to use Rule 40. Then the judge and the GAL communicate ex parte and the Judge has the GAL prepare all of the orders, many which are NOT announced from the bench. Again, the GAL charges the litigants THOUSANDS of dollars and puts in the order that the GAL fees are necessary for the support of the child so they are not bankruptable. Further, the Court orders that the payment

for the fees be paid by a date certain which subjects the litigant to charges of contempt if they fail to comply.

3. GAL is appointed under Rule 40 and goes out and retains her own expert witness aligning with one side of the case. The litigant which she has aligned against now must hire a separate expert witness to rebut the GAL expert. Then the GAL charges the litigant whom she is aligned against THOUSANDS of dollars for her time in developing a case against the litigant.

4. GAL is appointed under Rule 40A and communicates voraciously with opposing counsel without copying the emails to the other attorneys. GAL aligns herself with opposing counsel and chats with him during the trial obviously siding with him. Then GAL charges the litigant whom she is aligned against THOUSANDS of dollars. When she is subpoenaed to produce copies of those emails, GAL refuses to do so, even though under Rule 40A, she is a WITNESS to the case and has NO communication privilege with either attorney.

5. GAL is appointed under Rule 40A and after the close of proof; GAL spends nearly 30 hours preparing the court's order. These billing hours include communications with opposing counsel, communications with the Court's expert, and ex parte communications with the Judge. GAL charges THOUSANDS of dollars.

6. Opposing counsel files a petition to change custody. As soon as the petition is filed, opposing counsel files a motion to appoint a GAL; opposing counsel selects the GAL and goes to GAL's office to "visit" with her before the order of appointment is signed. It is not disclosed until the final hearing that this meeting occurred.

7. GAL learns of disclosures of sex abuse and physical abuse when the child is interviewed. Instead of reporting the abuse to DCS, GAL solicits testimony from the Court's expert to claim that the Mother is PAS (parental alienation syndrome) a psychology theory that is NOT supported by professional psychologists at large and has not been reported in ANY peer review publications.

8. GAL is allowed by the Court to set up, control, schedule, and select supervisors for visitation with a parent with whom GAL has already exhibited favor.

9. AND THE WORST, GAL recommends the placement of children with perpetrators of physical, sexual, and emotional abuse upon the child.

ALL DONE WITH IMMUNITY, NO ACCOUTNABILITY, AND GUARANTEED PAYMENT WITHOUT REGARD TO THE QUALITY OF REPRESENTATION.

Sincerely,

Connie Reguli

110201-let clerk

FAMILY LAW CENTER
1620 Westgate Circle Suite 150
Brentwood, Tennessee 37027
615-661-0122
Fax 615-661-0197
www.TennFamilyLaw.com

RECEIVED
FEB 15 2011
Clerk of the Courts
Rec'd By

Tuesday, February 01, 2011

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comments on Guardian Ad Litem – Rule 40A

Dear Clerk,

This new rule will allow the "professional" Guardian ad Litems the RUN of the courthouse. What do I mean by that?

First we have a clique of the "professional" GALs. They get appointed to all the money cases and they run fees amuk. The judge count on them to run the case for them, have ex parte communication with the GALs and allow them to write the orders.

Second, the GAL will continue to run the courthouse. NOW, this rule will allow the Court to readjust the fee award to the GAL based on "how contentious" the case is. This will be used to punish the parent that confronts the GAL on their foul behavior, confronts the judge on the ex parte communication, and complains of bias on the part of the GAL. This is absurd and an unconstitutional deprivation of property without due process. The court can pick the attorney who will lobby against you and you have to pay double because you complain of bias.

Trust me, it happens every day. I have had calls and contacts from all ends of this state on the GAL abuse in the courthouse every day. The Supreme Court needs to reign them in.

> I currently have a case that the Judge intentionally converted the Mother's petition for custody to a dependant and neglect proceeding sua sponte just so she could appoint a GAL under Rule 40. The GAL then ran amuk and ran up thousands of dollars in fees. The GAL had multiple contacts with the Court and the Judge has even admitted that she believes that is OK.

On another case the GAL was appointed under Rule 40A and then ran up her bill with multiple emails to opposing counsel. Since she is a witness under Rule 40A, I subpoenaed her emails to him. She has refused and the Juvenile Court refused to make her produce them. She has hired an attorney to fight my request. She wanted my client to pay for those communications but not have access.

In both cases the GAL was obviously biased against the custodial parent. And although, the custodial parent had never been accused of harming the child, the GAL worked feverishly to remove the child from the custodial parent.

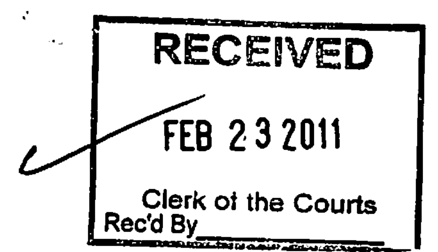
The Davidson County Juvenile Court tried to get the Supreme Court to order that Rule 40A did not apply to them. That should tell you something.

Do NOT approve this rule.

Sincerely,

Connie Reguli

February 17, 2011



Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Subject: Comments on Guardian Ad Litem – Davidson County Juvenile Court

Dear Mr. Catalano:

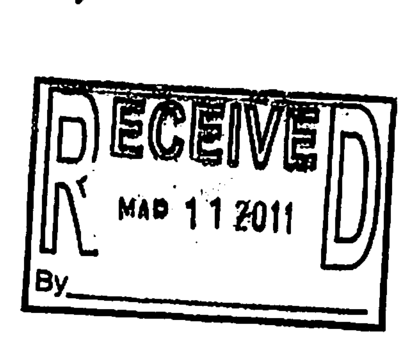
I have read Connie Reguli's letter dated February 01, 2011 and absolutely agree the GALs are out of control and unaccountable. We have been involved with a case in Davidson County Juvenile Court since November 2008 which has still not been concluded.

- GAL had minimal contact with the Father and considered a short interview in the court house sufficient.
- No home observation by GAL with the father and child. When the father asked for GAL to come and observe him with his child, in an email GAL commented that it was not needed, she had no concerns.
- GAL aligned herself with the mother early in the case and became involved in a way that suggested the GAL was Mother's attorney. The GAL sat at counsel table with Mother and her attorney during all of the hearings. GAL also huddled with Mother and her attorney in the hallway. The GAL went so far as to give nonverbal encouragement to the Mother during the course of the hearing by nodding her head and smirking when the Father testified.
- GAL, by her own admission: (1) recommended an attorney to the mother and (2) of her own accord retained an "expert" witness who was also aligned against the Father.
- Father was now required to hire his own expert witness, a child psychologist with 30 years experience who came to the home on four separate occasions for a four hour period per visit just to offer the Court expert testimony on the interaction between the Father and child. However, during this psychologist's testimony the GAL insulted her on the stand and tried to discredit her. The GAL had even objected to the involvement of the psychologist even though she took no interest, herself, in observing the Father and the child's interactions.
- When the GAL was asked for her **GA1** form after father received a court order to pay GAL thousands of dollars, GAL refused basically stating it was none of Father's business. The GAL took money from the State and when that dried up, she aggressively pursued to make the Father pay her.
- GAL did not make any attempt to find out anything about the child's relationship with her father it was her intent from early on to discredit the Father and align herself with the Mother (whose attorney was her personal friend).
- GAL is supposed to gather facts in the best interest of the child. Even when Father presented evidence in direct controversion to the Mother's statements regarding the child's temperament at exchanges, she continued to align with the Mother.
- GAL fee has charged exorbitant fees; has NO accountability; and has ignored evidence related to the child's best interest. She was simply an extension of Mother's counsel.

Jonathan M. Stone, Father
807 A. Knox Avenue
Nashville, TN 37204

Arlene A. Stone
Paternal Grandmother

Lee Hensley
4409 Walrock LN
Knoxville, Tennessee 37921



March 07, 20

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Sir:

I believe the appointment of a Guardian ad Litem currently permits too much flexibility and power to carry out the needs of the court. They do not abide by Supreme **Court Rule 40-A**, nor do local courts comply; in their decision to make the appointments in the first place.

In a recent personal case Sherry L. Mahar, the appointed Guardian ad Litem by Knox County Juvenile Court violated most or all the sections in **Rule 40-A**.

Sherry L Mahar investigated only the few parties that favored our own pre-conceived decision. She was appointed long before a notice or need had been determined. She took over all hearings and boastfully voiced the outcomes of the hearing long before they occurred.

She intentional solicited and coerced the two parties that I had determined **un-acceptable**; to petition for temporary custody of my two children. She then intimidated and guided the two parties by telling them that my children would be placed in foster care without their petitions.

Sherry Mahar ran about the court house discussing matters with the wrong parties, and making personal allegations against some of them. Some observers had noted that she was creating excessive drama and **causing mass confusion** between the family members. The Guardian ad Litem **represented** the Petitioners and announced the decisions of the court to them in advance. She appeared to be in direct violation of; **(b) section 6 of Rule 40-A.**

During the hearings and later at the trial, Sherry L. Mahar caused several un-reasonable delays in the proceedings by bouncing in and out of the court room attending to other matters. The Magistrate left her un-checked to do as she pleased and also met with her in private to discuss the case without notice to the other concerned parties on more than one occasion.

The Guardian ad Litem threatened and harassed me about her fees while being over concerned about my financial status. Demanded to visit my home to view a bank statement confirming the purchase of airline tickets that she had suggested I obtain. She made a statement by phone threaten me that she would show me how powerful she was about her assignment.

In my opinion this Guardian ad Litem extended and delayed the interviews, hearings, and the over-all process in my case by un-needed actions and conduct. She then reported to the court that she had 70+ hours of service and wanted me to pay her at a ridiculous rate of **$175.00** per hour. It should be **un-lawful** for a Guardian ad Litem to conduct an investigation in this manner.

Ms Mahar spent a good deal of her time working for and advising the Petitioners in my case while logging proposed hours against the court and I. She appeared only to represent her best interest and perform in a very authoritative fashion.

There was never a plan, assessment of hours, billing sheet, or debate about her duties and performance. Ms Mahar reported decisions outside the courtroom as if she already new the outcome. She mostly ran the proceedings during hearings and the trial and caused numerous delays and un-reasonable inconvenience to several parties.

Long after the trial she had her office harass me about various issues not pertaining to me, such as: do I know where this person lives, or that persons phone number, etc. She also continued to harass me about fees even though the court had put that decision on hold. She made senseless mailings to me about the girls and threats to me about filing contempt charges.

In my opinion there should be more care and caution administered before there is an appointment of a person that could ruin someone's life, the way this Guardian as Litem has. There should also be serious monitoring of that appointment to ensure the rules are being followed.

The most important element is that the Guardian ad Litem should only be allowed to perform one function, and not practice as an attorney on behave of the Parties making allegations; while assisting and encouraging them with their petitions to the court. I also believe these Appointees should be held accountable for their actions.

Yours Truly,

Lee Hensley

Lrhensley@gmail.com

865-300-1608 or 865-321-0428

M2009-01926-SC-RL2-RL

RECEIVED
MAR 17 2011
By________

LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
T. JOSHUA WOODS
JOSHUA A. WALLIS

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

KAREN SUGG, OFFICE MANAGER/PARALEGAL
CONNIE LUKE, PARALEGAL
TERRI JOHN, PARALEGAL

TELEPHONE
(901) 526-0206

FACSIMILE
(901) 525-1540

March 14, 2011

VIA U.S. MAIL
Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Re: Rule 40A

Dear Mr. Catalano:

I am sending this letter for the purpose of objecting to any changes to provisional Rule 40A which has been in effect since May 1, 2009. I have been given the Work Group's Report and Recommendations. My conclusion after working several years with Rule 40A is that it went a long way towards resolving most of the abuses in the Guardian *Ad Litem* system that existed prior to May 1, 2009. My comments are somewhat cutting but I can assure you that each and every one of them is backed up by a transcript. If the Court or any other body needs to have copies of these transcripts, other than those I am providing, please let me know.

The first and perhaps core issue is the deletion of Section 4, paragraph (d) which required Guardian *Ad Litems* to disclose conflicts. My reasoning for this is as follows.

About a year ago, a very prominent attorney in Memphis called and wanted me to represent him in a matter pertaining to a Guardian *Ad Litem* who was taking inane positions. He was so distressed he asked the Guardian *Ad Litem* if there was any relationship she had with the other side or other attorney that would cause a problem. The response was "No". This lawyer, operating on the proposition that occasionally "A blind hog will find an acorn," went to work on his own. Guess what he discovered? The Guardian *Ad Litem's* husband was being represented by the attorney whose client was benefiting from the Guardian *Ad Litem's* inane positions. The Guardian *Ad Litem* obtained an attorney and things spiraled out of control.

I told the attorney I would represent him on one condition, I was to be paid nothing as this was something that attacked the entire legal system which I have

cherished for the last forty-eight years. I filed a "complete" pleading which some might refer to as scurrilous but it was factually correct. When we went to hear the Petition, the Judge got everybody back in Chambers and was visibly distressed when he interrogated the attorney who was representing the Guardian *Ad Litem's* husband, the Guardian *Ad Litem* and her attorney. The Judge handled the matter in a very forceful way. The Judge in that case had not been happy with the adoption of Rule 40A and he and I had had numerous arguments, both in the Courtroom and in his Chambers about the proper role of a Guardian *Ad Litem*. After this incident and some others that had been brought to his attention, he relented and said he understood why I felt the way I did.

I know of no reason why the disclosure provision was deleted. Jurists and attorneys are required to disclose conflicts of interest. The rhetorical question is "Why are Guardian *Ad Litems* put on such an elevated plain they are not to be required to disclose conflicts?"

There is a perception among some of us who practice Domestic Relations Law in Shelby County that Guardian *Ad Litems* are not "Appointed", rather they are "Annointed". Let me explain to you why I make that statement.

I have a case which will eventually wind up in the Tennessee Supreme Court. I am going to go through a series of events that have taken place in that case. I represent the Mother of two minor children whose Father is an alcoholic and his visitation has been terminated. A Guardian *Ad Litem* was appointed to represent the two children. This matter has been going on for more than five years.

After several years, I had good reason not to trust the Guardian *Ad Litem*. The Guardian *Ad Litem* wanted to have a conference with the children. I insisted the conference take place at my office with the Mother present. The Guardian *Ad Litem* came to my office and a Court Reporter was present to take down what occurred. Nothing of any moment occurred and the Guardian *Ad Litem* suggested the children leave the room. After the children left the room, the Guardian *Ad Litem* made the following statement in the presence of the Court Reporter to my client.

> MS. HOLMES: I've thought about going to see your children at school, but I really don't want to do that. I've already said I taught school and you can say, and I've had this argument, if you will, with others who have played the role of guardian ad litem who have been assigned the role, who say that you can set it up so it's not disruptive. I don't believe that. I taught school for ten years and I don't believe it.

> So I'm telling you because I don't intend to go to – I want to assure you, in case you have heard of guardians doing that, I don't plan on doing that, Jenny.

Several months later, when the Guardian *Ad Litem* made statements in Court that were inconsistent with statements made in the meeting with the children, her response to my objection was as follows:

> MS. HOLMES: FIRST OF ALL, YOUR HONOR, I WAS NOT UNDER OATH IN THIS INTERVIEW.

The Guardian *Ad Litem* took the position that unless she was in Court and under oath, she could make whatever statements she wanted and could not be held accountable if she later changed her story.

As a result of that statement, I filed a Motion to Discharge the Guardian *Ad Litem*. Not only did the Trial Court not discharge the Guardian *Ad Litem*, but as obvious punishment for raising the issue, the Court granted sanctions against the Mother and awarded the Guardian *Ad Litem* and her attorney, attorney fees.

The Guardian *Ad Litem* then filed a Motion to Reduce Her Attorney Fees to Judgment and filed an Affidavit **under oath** this time, stating what her time entries had been. I then filed a Subpoena *Duces Tecum* for the Keeper of the Records for the Guardian *Ad Litem* to bring documents the Guardian *Ad Litem* claimed she had reviewed and which the Mother did not have copies of. The Guardian *Ad Litem* filed a Motion for Protective Order. My client had access to some of the documents and in filing my Response to the Guardian *Ad Litem's* Motion for Protective Order, I filed my client's Affidavit which is self-explanatory. The egregious overcharging by the Guardian *Ad Litem* is reflected in these documents. Exhibit "12" is about as bad as it gets.

The Court then heard the Motion for Protective Order and granted the Guardian *Ad Litem's* Motion and quashed the Subpoena *Duces Tecum*. The Court is going to allow me one hour to cross-examine the Guardian *Ad Litem* on the witness stand. At this time, the Court has no idea as to how much time will be needed to effectively cross-examine the Guardian *Ad Litem* nor do I. However, the Guardian *Ad Litem* is protected by the one hour time limit. In ruling, the Court held as follows:

> THE COURT: Well, this is an unusual situation in that it involves a Guardian Ad Litem, and we are – we're in this period now where we're dealing with the

> Rule 40(a.) I think prior to Rule 40(a) we would never have seen a subpoena like this or petition like this.
>
> And, frankly, I think 40(a) as it now exists is on it's last dying breath. I think the Supreme Court is going to modify Rule 40(a) and **I think we'll be back in the situation where we were prior to the time that this Rule was put into effect**. (Emphasis added.)
>
> I don't – I don't see the necessity of this. What we are talking about, and Mr. Caywood is very candid in his memorandum, it's not about – according to his memorandum, it's not about what the children said or didn't say, it's about the attorney fees issue.
>
> I think this attorney fees issue can be dealt with in the way we do with every attorney fee issue and that is, you know, I was allowed – I required the attorneys to submit a detailed statement and tell the attorneys if you want to interrogate the person on the witness stand, that you're welcome to do that.
>
> And so I am going to treat this the same way. If you all can't work it out, I would hope that you do, if you can't work it out, then we'll have a hearing and I'll – Mr. Caywood, I'll give you an hour to interrogate Ms. Holmes from the witness stand and ask her anything you want to ask her, but I'm not going to require her file to be produced; I'm not going to require any documents to be produced.
>
> * * *
>
> THE COURT: Well, I'm just saying its within the Court's **inherent power** to handle this matter and I'm going to give you an hour; I'm going to give you an hour to interrogate. (Emphasis added.)

This case is proceeding under the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence. I am not attempting to argue my case, but I know of nothing in the law that prevents a litigant from pursuing reasonable discovery

procedures. There is nothing unreasonable about questioning a fee bill in its entirety when one of the entries is for reading a two sentence letter and then looking at an attached picture of two children and charging thirty minutes for doing so.

In conclusion, in my opinion, Rule 40A should not be modified in any way whatsoever. Provisional Rule 40A was enacted during a period of time the Legislature was contemplating getting into the matter. I quite agree that should have been avoided if at all possible. A cynical person such as me who has been around the legal system for close to fifty years, could come to the conclusion Rule 40A was enacted to hold the Legislature at bay and now we are going back to what the situation was before Rule 40A was enacted. If that is the case, then perhaps the Legislature does need to become involved.

Sincerely,

David E. Caywood

DEC/bb
Cc: Honorable Janice M. Holder
Janet L. Richards, Professor, Cecil C. Humphries School of Law

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

FILED
SHELBY COUNTY CHANCERY COURT
FEB 23 2011
DEWUN R. SETTLE, C & M
TIME:________ BY:________

JENNIFER FURNAS COLEMAN, §
Petitioner/Counter-Respondent, §
§
VS. § No. CH-02-2091-1
§ Part II
MARTY ALAN COLEMAN, §
§
Respondent/Counter-Petitioner. §

AFFIDAVIT OF JENNIFER FURNAS COLEMAN HENSZEY

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Jennifer Furnas Coleman Henszey, hereby state under oath as follows:

1. I have read and approved the Response to Guardian *Ad Litem's* Motion to Quash Subpoena to Take Deposition *Duces Tecum* or In the Alternative Modify Subpoena and Motion For Protective Order and Memorandum in Opposition to Guardian *Ad Litem's* Motion to Quash Subpoena *Duces Tecum*; the facts contained therein are true to the best of my knowledge, information and belief.

2. On January 28, 2011, the Guardian *ad Litem* filed her Motion to Reduce Jennifer Furnas Coleman's Portion of Guardian *ad Litem* Fees as Ordered on June 30, 2010 to Judgment and Affidavit of Linda L. Holmes (Exhibit "1").

3. Attached to the Affidavit of Linda L. Holmes (GAL) was an itemized billing statement for the period of April 8, 2009 to June 24, 2010.

4. In reviewing the GAL's billing statement it appeared that she had billed excessively for some of the work shown.

5. I reviewed several letters generated in this matter. I selected 11 letters and

read each to myself while timing myself with a stopwatch.

6. For the time entry on the GAL's billing statement dated April 8, 2009 which reads "Read and review of letter from David Caywood", the GAL billed .25 hours. I read and reviewed the April 8, 2009 letter (Exhibit "2"). I timed myself. It took me 17 seconds to read and review this letter.

7. For the time entry on the GAL's billing statement dated April 14, 2009 which reads "Read and review of letter from Connie Luke", the GAL billed .25 hours. I read and reviewed the April 14, 2009 letter (Exhibit "3"). I timed myself. It took me 17 seconds to read and review this letter.

8. For the time entry on the GAL's billing statement dated April 14, 2009 which reads "Read and review of letter from Melissa Berry", the GAL billed .25 hours. I read and reviewed the April 14, 2009 letter (Exhibit "4"). I timed myself. It took me 34 seconds to read and review this letter.

9. For the time entry on the GAL's billing statement dated April 14, 2009 which reads "Read and review of letter from David Caywood", the GAL billed .25 hours. I read and reviewed the April 14, 2009 letter (Exhibit "5"). I timed myself. It took me 16 seconds to read and review this letter.

10. For the time entry on the GAL's billing statement dated May 15, 2009 which reads "Read and review of letter from Meredith Ally [sic]", the GAL billed .25 hours. I read and reviewed the May 15, 2009 letter (Exhibit "6"). I timed myself. It took me 33 seconds to read and review this letter and enclosure.

11. For the time entry on the GAL's billing statement dated June 10, 2009 which reads "Read and review of letter from David Caywood", the GAL billed .25 hours. I read

and reviewed the June 9, 2009 letter (Exhibit "7"). I timed myself. It took me 11 seconds to read and review this letter.

12. For the time entry on the GAL's billing statement dated June 10, 2009 which reads "Read and review of letter from Melissa Berry", the GAL billed .25 hours. I read and reviewed the June 10, 2009 letter (Exhibit "8"). I timed myself. It took me 54 seconds to read and review this letter and enclosure.

13. For the time entry on the GAL's billing statement dated July 16, 2009 which reads "Read and review of letter from Tonya Powers of Melissa Berry's office", the GAL billed .25 hours. I read and reviewed the July 16, 2009 letter (Exhibit "9"). I timed myself. It took me 18 seconds to read and review this letter.

14. For the time entry on the GAL's billing statement dated November 23, 2009 which reads "Read and review of letter from Dr. John McCoy", the GAL billed .25 hours. I read and reviewed the November 21, 2009 letter (Exhibit "10"). I timed myself. It took me 14 seconds to read and review this letter.

15. For the time entry on the GAL's billing statement dated December 15, 2009 which reads "Read and review of letter from Melissa Berry", the GAL billed .25 hours. I read and reviewed the December 15, 2009 letter (Exhibit "11"). I timed myself. It took me 30 seconds to read and review this letter.

16. For the time entry on the GAL's billing statement dated January 26, 2010 which reads "Read and review of letter and enclosure from David Caywood", the GAL billed .50 hours. I read and reviewed the January 25, 2010 letter and enclosure (Exhibit "12"). I timed myself. It took me 7 seconds to read and review this letter and enclsoure.

17. I assisted Mr. Caywood's office with preparing the attached summary entitled "Charges Billed by GAL for Reading and Reviewing Correspondence Versus Time Estimates by Ms. Henszey for Reading and Reviewing Same Correspondence" (Exhibit "13"). In order to give the GAL the benefit of the doubt, I doubled the time it took me to read and review the same correspondence which the GAL read and reviewed.

18. For each of the letters shown in Exhibit "13", the GAL should have billed no more than .05 hours or three (3) minutes for reading and reviewing each letter. Instead, the GAL billed .25 hours or 15 minutes for reading and reviewing each letter in Exhibits "2" through "11" and .5 hours or 30 minutes for reading and reviewing Exhibit "12".

19. As shown in Exhibit "13", for the letters in Exhibits "1" through "12", the GAL billed a total of $525.00 which is excessive. According to my calculations, the GAL should have billed a total of no more than $96.25. The GAL overbilled by $428.75 for just those few letters that were taken as examples and which do not come close to covering the entire billing statement.

20. The GAL included charges on her billing statements for work not related to either the Motions to Disqualify GAL or the Motions to Disqualify Dr. Fred Steinberg. I selected three (3) letters as examples of unrelated work. Again, these are only a few examples of the many improper charges.

21. On April 20, 2009, the GAL has an entry on her billing statement which reads "Read and review of letter and JHF's [sic] Motion to Strike Father's Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master." The April 20, 2009 letter and enclosures are attached as Exhibit "14". These documents have absolutely nothing to do with any of the Motions to Disqualify either the GAL or Dr.

documents have absolutely nothing to do with any of the Motions to Disqualify either the GAL or Dr. Fred Steinberg yet the GAL has included them on her billing statement. In this instance, the GAL billed $87.50 for .50 hours or 30 minutes for reading and reviewing documents unrelated to the Motions to Disqualify

22. On May 20, 2009, the GAL has an entry on her billing statement which reads "Dictate letter to Dr. Shaw". The May 20, 2009 letter is attached as Exhibit "15". This letter has absolutely nothing to do with any of the Motions to Disqualify either the GAL or Dr. Fred Steinberg yet the GAL has included it on her billing statement. In this instance, the GAL billed $43.75 for .25 hours or 15 minutes for dictating a letter unrelated to the Motions to Disqualify.

23. On June 8, 2010, the GAL has an entry on her billing statement which reads "Dictate letter to counsel". The June 8, 2010 letter is attached as Exhibit "16". This letter has absolutely nothing to do with any of the Motions to Disqualify either the GAL or Dr. Fred Steinberg yet the GAL has included it on her billing statement. In this instance the the GAL billed $43.75 for .25 hours or 15 minutes for dictating a letter unrelated to the Motions to Disqualify.

FURTHER AFFIANT SAITH NOT.

Jennifer Furnas Coleman Henszey

JENNIFER FURNAS COLEMAN HENSZEY

SWORN TO AND SUBSCRIBED before me this 22nd day of February, 2011.

STATE OF TENNESSEE NOTARY PUBLIC SHELBY COUNTY

MY COMMISSION EXPIRES: MAY 11, 2011

Notary Public

My Commission Expires:

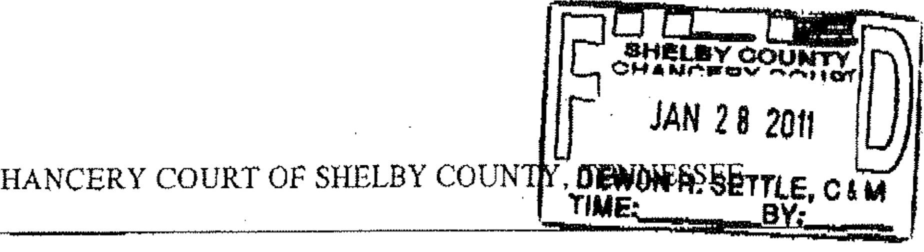
May 11, 2011

CERTIFICATE OF SERVICE

I, David E. Caywood, hereby certify that a copy of the foregoing Affidavit of Jennifer Furnas Coleman Henszey has been faxed and mailed to Mr. Bradley W. Eskins, Attorney at Law, 50 North Front Street, Suite 590, Memphis, Tennessee 38103; Melissa C. Berry, Attorney at Law, 1713 Kirby Parkway, Memphis, Tennessee 38120; Mr. Glen Reid, Attorney at Law, 1715 Aaron Brenner Dr., Suite 800, Memphis, Tennessee 38120; and Linda L. Holmes, Attorney at Law, 202 Adams Avenue, Memphis, Tennessee 38103 this 23rd day of February, 2011.

David E. Caywood

\\Cwserver\clientapps\Common Files\Connie\Coleman, Jennifer-5557\Pleadings\2.21.2011 Affidavit of Jennifer Furnas Coleman Henszey.doc



IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

JENNIFER FURNAS COLEMAN,

Plaintiff,

VS. DOCKET NO. CH-02-2091-I

MARTY ALAN COLEMAN,

Defendant.

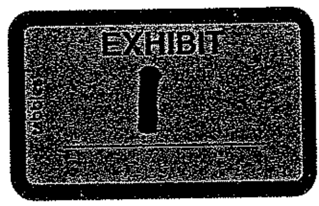
MOTION TO REDUCE JENNIFER FURNAS COLEMAN'S PORTION OF GUARDIAN AD LITEM FEES AS ORDERED ON JUNE 30, 2010 TO JUDGMENT

Comes now the Linda L. Holmes, Guardian Ad Litem, and moves this Honorable Court to reduce Jennifer Furnas Coleman's portion of Guardian Ad Litem Fees As Order On June 30, 2010 to Judgment and would state to the Court as follows:

1. That on June 30, 2010 an Order was entered in this cause assessing attorney fees and Guardian Ad Litem fees against Jennifer Furnas Coleman for any fees incurred by the opposing counsel and Guardian Ad Litem regarding her Motions to disqualify Linda L. Holmes as Guardian Ad Litem.

2. That as of this date Jennifer Furnas Coleman has a balance due and owing the Guardian Ad Litem for that time period in the amount of $10,281.25. See attached Affidavit and itemization of charges in bill dated January 28, 2011.

WHEREFORE, PREMISES CONSIDERED, your Guardian Ad Litem prays that this



Honorable Court reduce the portion of Guardian Ad Litem fees in the amount of $10,281.25 owed by Jennifer Furnas Coleman to judgement and for such other, further and general relief to which she may be entitled in this cause.

Respectfully submitted;

Linda Holmes

LINDA L. HOLMES #10664
Guardian Ad Litem
202 Adams Avenue
Memphis, Tennessee 38103
(901) 578-1234

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been furnished to the following on this 28 day of Jan, 2011 via-telefax and United States Postal Service, postage prepaid:

David Caywood
Attorney for Plaintiff
5100 Poplar Avenue, Suite 3125
Clark Tower Building
Memphis, Tennessee 38137

BY: L Holmes

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

JENNIFER FURNAS COLEMAN,

Plaintiff,

VS. DOCKET NO. CH-02-2091-I

MARTY ALAN COLEMAN,

Defendant.

AFFIDAVIT OF LINDA L. HOLMES

Comes now your affiant, Linda L. Holmes, after being duly sworn and makes oath as follows:

1. I was appointed to act as Guardian Ad Litem in this cause.

2. Pursuant to an Order dated June 30, 2010, the total amount Jennifer Furnas Coleman owes to me as Guardian Ad Litem fees for the time period of April 8, 2009 through June 24, 2010, is $10,281.25. See attached invoice.

FURTHER YOUR AFFIANT SAITH NOT.

Linda Holmes
LINDA L. HOLMES

SWORN TO AND SUBSCRIBED before me this 28 day of January 2011.

Marian H. Taylor
NOTARY PUBLIC

My Commission Expires:

10 July 2011

MARIAN H. TAYLOR STATE OF TENNESSEE NOTARY PUBLIC COUNTY OF SHELBY

Linda L. Holmes, Attorney at Law
202 Adams Avenue
Memphis, TN 38103

Ph:(901) 578-1234 Fax:(901) 525-1109

Jenny Coleman January 28,2011

Client number 1072
Inv #: 5185

Attention:

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Apr-08-09	Read and review of letter from David Caywood	0.25	43.75	LLH
	Dictate letter to all attorneys in resopnse to David's leter	0.25	43.75	LLH
Apr-09-09	Read and review of letter and documents received from Meredith Hamilton Alley	0.75	131.25	LLH
Apr-10-09	Read and review of letter and Motions received from Meredith Ally	0.50	87.50	LLH
	Review of Mortion to Disqualifiy GAL, research and writing response	4.00	700.00	LLH
Apr-11-09	Additional review of Response To Motion to Disqualifiy GAL; research and writing response	4.00	700.00	LLH
Apr-12-09	Additional review of Response to Motion to Disqualify GAL; research and writing response	2.00	350.00	LLH
Apr-14-09	Read and review of letter and Father's Motion received from Bradley eskins	0.50	87.50	LLH
	Read and review of letter from Connie Luke	0.25	43.75	LLH
	Read and review of letter from Melissa Berry	0.25	43.75	LLH
	Read and review of letter from David Caywood	0.25	43.75	LLH
	Telephone conversation with Dr. Kelley	0.50	87.50	LLH

Apr-16-09	Read and review of letter from David Caywood	0.00	0.00	LLH
	Responsive letter to David Caywood	0.25	43.75	LLH
	Read and review of letter and Motion to Join David Henszey received from Melissa Berry	.0.50	87.50	LLH
	Telephone conversation with Dr. Harris	0.50	87.50	LLH
	Telephone conversation with Dale Tuttle	0.25	43.75	LLH
Apr-17-09	Court appearance	2.50	437.50	LLH
Apr-20-09	Read and review of letter and JHF"s Motion to Strike Father's Supplement to Prposed Findings of Fact and Conclusions of Law Submitted to Special Master	0.50	87.50	LLH
	Email to Dr. Harris	0.25	43.75	LLH
	Email to Bradley Eskins and Melissa Berry	0.25	43.75	LLH
	Revisions to Response to Motion to Disqualify GAL and research	2.00	350.00	LLH
Apr-21-09	Additional research and additional revisions to Response to Motion to Disqualify GAL	2.00	350.00	LLH
	Read and review of copy of letter to David Caywood From Melissa Berry	0.25	43.75	LLH
Apr-22-09	Travel time to and from David Caywood's office to hand deliver Response to Motion to Disqualify	0.75	131.25	LLH
	Dictate letter to David Caywood	0.25	43.75	LLH
	Court Clerk's office to file GAL's response	0.50	87.50	LLH
	Read and review of Bradley Eskins' Response to Motion to Disqualify GAL	0.75	131.25	LLH
Apr-23-09	Court appearance and preparation of same	2.75	481.25	LLH
	Read and review of letter and Affidavits received from Meredith Hamilton Ally	0.50	87.50	LLH
Apr-27-09	Read and review of fax from David Caywood	0.25	43.75	LLH
	Dictate letter to David Caywood	0.25	43.75	LLH

May-04-09	Read and review of letter from Melissa Berry	0.25	43.75	LLH
	Read and review of letter from Connie Luke	0.25	43.75	LLH
	Read and review of copy of letter to David Caywood received from Melissa Berry	0.25	43.75	LLH
May-05-09	Read and review of fax from David Caywood	0.25	43.75	LLH
	Dictate letter to David Caywood	0.25	43.75	LLH
May-06-09	Read and review of letter from David Caywood	0.25	43.75	LLH
May-07-09	Read and review of emails from Marty Coleman, Dr. Harris and Dr. Beebe	0.25	43.75	LLH
	Court appearance to address Court regarding status conference	0.50	87.50	LLH
May-13-09	Read and review of letters from David Caywood	0.25	43.75	LLH
	Dictate letter to David Caywood	0.25	43.75	LLH
May-14-09	Telephone conversation with Bradley Eskins and review Dr. Shaw's records	0.50	87.50	LLH
May-15-09	Read and review of letter from Meredith Ally	0.25	43.75	LLH
May-20-09	Dictate letter to Dr. Shaw	0.25	43.75	LLH
May-21-09	Conference with Marty Coleman	0.50	87.50	LLH
May-22-09	Read and review of letter and Motion to Reassess GAL fees received from Melissa Berry	0.25	43.75	LLH
May-27-09	Read and review of letter and Ms. Henszey's memorandum pertaining to scheduling conference received from David Caywood	0.50	87.50	LLH
Jun-04-09	Read and review of letter of email from Marty Coleman	0.25	43.75	LLH
	Responsive email to Marty Coleman	0.25	43.75	LLH
Jun-10-09	Read and review of letter from David Caywood	0.25	43.75	LLH
	Read and review of letter from Melissa Berry	0.25	43.75	LLH

Jun-12-09	Dictate letter to Dr. Mary Hurley	0.25	43.75	LLH
Jun-16-09	Read and review of email from Dr. Harris	0.25	43.75	LLH
	Email to Marty Coleman and Bradley Eskins	0.25	43.75	LLH
Jul-01-09	Read and review of fax from Meredith Alley	0.50	87.50	LLH
Jul-06-09	Read and review of emails from Marty Coleman	0.25	43.75	LLH
Jul-09-09	Dictate letter to David Caywood, Melissa Berry and Bradley Eskins	0.25	43.75	LLH
Jul-15-09	Read and review of two emails	0.50	87.50	LLH
	Read and review of letter from David Caywood	0.25	43.75	LLH
Jul-16-09	Read and review of letter from Tonya Powers of Melissa Berry's office	0.25	43.75	LLH
Jul-28-09	Read and review of various emails regarding appearance in Court to reset Motions due to mediation being scheduled	0.25	43.75	LLH
Jul-29-09	Read and review of email from Marty Coleman	0.25	43.75	LLH
Sep-30-09	Read and review of email from Marty Coleman	0.25	43.75	LLH
	Read and review of additional emails from Marty Coleman	0.25	43.75	LLH
Oct-16-09	Read and review of email from Marty Coleman	0.25	43.75	LLH
Oct-20-09	Conference with Marty Coleman	0.25	43.75	LLH
Nov-02-09	Read and review of emails from Marty Coleman	0.25	43.75	LLH
Nov-18-09	Read and review of copy of letter to David Caywood received from Bradley Eskins	0.25	43.75	LLH
Nov-23-09	Read and review of letter from Dr. John McCoy	0.25	43.75	LLH
	Telephone conversation with Marty Coleman	0.25	43.75	LLH
	Conference with Marty Coleman and Bradley Eskins	1.00	175.00	LLH

Nov-24-09	Read and review of documents received from Bradley Eskins' office	0.50	87.50	LLH
Dec14-09	Dictate letter to attorneys enclosing Dr. Mccoy's letter	0.25	43.75	LLH
	Review correspondence and prepare for Court and Court appearance on David's Emergent Motion/Petition	2.00	350.00	LLH
Dec-15-09	Read and review of letter from Melisa Berry	0.25	43.75	LLH
Dec-16-09	Read and review emails between Marty Coleman and Drs. Harris and Bebee	0.50	87.50	LLH
Dec-21-09	Read and review of letter from David Caywood	0.50	87.50	LLH
Jan-26-10	Read and review of letter and enclosure from David Caywood	0.50	87.50	LLH
	Dictate letter to David Caywood	0.25	43.75	LLH
	Read and review of letter to David Caywood from Tonya Powers	0.25	43.75	LLH
	Responsive letter to David Caywood re: meeting	0.25	43.75	LLH
Feb-18-10	Read and review of letter from Melissa Berry	0.25	43.75	LLH
Feb-19-10	Read and review of Transcript of Proceedings from February 12, 2010	0.50	87.50	LLH
Feb-24-10	Read and review of letter from Bradley Eskins	0.25	43.75	LLH
Feb-25-10	Read and review of emal from Melissa Berry	0.25	43.75	LLH
	Read and review of copy of letter to David Caywood received from Glen Reid	0.25	43.75	LLH
Mar-01-10	Read and review of letter and proposed Order received from David Caywood	0.25	43.75	LLH
Mar-02-10	Read and review of email from Glen Reid	0.25	43.75	LLH
	Read and review of email from Dale Tuttle	0.25	43.75	LLH
	Read and review of email from Melissa Berry	0.25	43.75	LLH

Mar-10-10	Read and review of email from Dr. Harris	0.25	43.75	LLH
	Research case law termination of visitation	0.75	131.25	LLH
Mar-18-10	Dictate letter to David Caywood	0.25	43.75	LLH
	Read and review of letter from David Caywood	0.25	43.75	LLH
Mar-19-10	Conversation with Amy Beebe	0.25	43.75	LLH
Mar-23-10	Read and review of email from Glen Reid	0.25	43.75	LLH
Mar-29-10	Read and review of letter from David Caywood	0.25	43.75	LLH
Apr-07-10	Read and review of email from Marty Coleman	0.25	43.75	LLH
Apr-16-10	Read and review of emails from Marty Coleman	0.25	43.75	LLH
	Read and review of letter from David Caywood	0.25	43.75	LLH
	Read and review of letter from Melissa Berry	0.25	43.75	LLH
May-19-10	Read and review of letter from Bradley Eskins	0.25	43.75	LLH
May-21-10	Read and review of emails from Marty Coleman	0.25	43.75	LLH
May-25-10	Read and review of email from Marty Coleman and responsive email	0.25	43.75	LLH
Jun-08-10	Read and review of letter from Bradley Eskins	0.25	43.75	LLH
	Dictate letter to counsel	0.25	43.75	LLH
Jun-09-10	Preparation defense to Motion	1.00	175.00	LLH
Jun-10-10	Review file and work on Response to Mother's Amended Motion to Remove GAL	1.50	262.50	LLH
	Email to Melissa Berry	0.25	43.75	LLH
Jun-11-10	Dictate letter to David Caywood	0.25	43.75	LLH
	Email to James King	0.25	43.75	LLH

Jun-16-10	Read and review of letter from David Caywood	0.25	43.75	LLH
Jun-24-10	Court appearance re: Motion to Remove GAL	2.00	350.00	LLH
	Totals	58.75	$10,281.25	
	Total Fee & Disbursements			**$10,281.25**
	Balance Now Due			**$10,281.25**

TAX ID Number 621677524

LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

April 8, 2009

VIA FACSIMILE ONLY
Ms. Melissa C. Berry
Attorney at Law
1713 Kirby Parkway
Memphis, Tennessee 38120

VIA FACSIMILE ONLY
Bradley W. Eskins
Attorney at Law
50 North Front Street, Suite 590
Memphis, Tennessee 38103

Re: *Coleman, Jenny – Grandparents' Matter*
Our File: 5708

Dear Counsel:

I understand the two of you are agreeable to hearing this matter on Friday, April 24, 2009. As of the dictating of this letter, I have not heard from Ms. Holmes. If she is available Friday, April 24, 2009, then I am agreeable to passing the Motion one week. Unless and until I hear from her, we will have to hear this Motion Friday, April 17, 2009. I am doing the best I can to accommodate Mr. Eskins but we need Ms. Holmes' response one way or the other.

Sincerely,

David E. Caywood

DEC/bb
Cc: Linda Holmes, Attorney at Law
MHA/cc
CTC 2/only

LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

April 14, 2009

VIA TELECOPIER AND E- MAIL
Ms. Brenda Stallings
Clerk for Chancellor Walter L. Evans
Part I, Chancery Court
140 Adams Avenue, Room 308
Memphis, Tennessee 38103

RE: *Coleman v. Coleman*
Docket No. CH-02-2091-1
Our File No. 5708

Dear Ms. Stallings:

Pursuant to our telephone conversation yesterday afternoon, you are striking Jennifer Furnas Henszey's Motion to Disqualify Guardian *ad Litem*, Linda L. Holmes that is set for 9:00 a.m. Friday April 17, 2009.

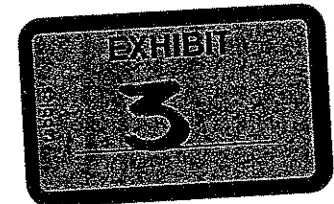
Also pursuant to our telephone conversation, Jennifer Furnas Henszey's Motion to Disqualify and Discharge Dr. Fred Steinberg and Prevent Dr. Steinberg from Testifying should remain on the docket as it will be heard at 9:00 a.m. Friday, April 17, 2009.

Very truly yours,

Connie S. Luke

/csl

cc: Bradley W. Eskins, Attorney at Law (via facsimile only)
Melissa C. Berry, Attorney at Law (via facsimile only)
Linda Holmes, Attorney at Law (via facsimile only)



ROGERS BERRY & CHESNEY, PLLC

LAURA D. ROGERS
MELISSA C. BERRY
MARGARET M. CHESNEY

ATTORNEYS AT LAW
1713 KIRBY PARKWAY • MEMPHIS • TENNESSEE 38120
Telephone 901.755.5994
Facsimile 901.755.8714

TANYA C. POWERS
Office Administrator

April 14, 2009

Via Fax with Mail Confirmation

David E. Caywood, Esq.
Clark Tower
5100 Poplar Avenue, Ste. 3125
Memphis, TN 38137

RE: Jennifer Furnas Coleman v. Marty Alan Coleman v. Larry & Anne Coleman
Shelby County Chancery Court Docket No. CH-02-2091 Part I

Dear David:

On April 1st, Dr. Steinberg forwarded a letter requesting that he be permitted to observe the children with my clients as part of his evaluation. On February 17th, you advised the Court that your client would cooperate "within a reasonable range" with Dr. Steinberg's evaluation. Since this is an evaluation for purposes of a grandparent visitation case, it would seem to me that Dr. Steinberg's request to meet jointly with Larry and Anne Coleman and the children is quite reasonable.

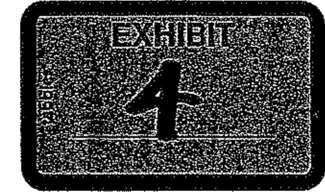
You have made it clear that no one involved in this litigation will have access to the children without the permission of your client. To date, Ms. Henzsey has not contacted Dr. Steinberg to coordinate scheduling this session for the children. My clients are ready, willing and able to comply with Dr. Steinberg's request and to meet with the children at Dr. Steinberg's office at Ms. Henzsey's convenience. Please advise.

Sincerely,

ROGERS BERRY & CHESNEY, PLLC

Melissa C. Berry

cc: Linda Holmes (via fax)
Bradley Eskins (via fax)
Dr. Fred Steinberg (via fax)
Larry & Anne Coleman



LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

April 14, 2009

VIA FACSIMILE AND U.S. MAIL

MHA | CL

FOR YOUR INFORMATION FROM DAVID E. CAYWOOD, ATTORNEY

Mr. Bradley W. Eskins
Attorney at Law
50 North Front Street, Suite 590
Memphis, Tennessee 38103

Re: ***Coleman v. Coleman***
Our File No. 5557 / 5708

Dear Brad:

I am in receipt of your letter of April 14, 2009. My Motion to disqualify Dr. Steinberg only relates to the grandparents' case. If and when the issue with the father becomes relevant, the Order relating to the grandparents' case will have no effect upon the father's case. That being the case, you have no interest in this Motion on Friday and therefore it will go forward on that date.

Sincerely,

David E. Caywood

DEC/mh
cc: Melissa C. Berry, Esq.
Linda Holmes, Esq.

c+c via email only

LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

May 15, 2009

Via Facsimile and U.S. Mail
Mr. Bradley W. Eskins
Attorney at Law
50 North Front Street, Suite 590
Memphis, Tennessee 38103

Via Facsimile and U.S. Mail
Ms. Linda Holmes
Attorney at Law
202 Adams Avenue
Memphis, Tennessee 38103

Via Facsimile and U.S. Mail
Ms. Melissa C. Berry
Attorney at Law
1713 Kirby Parkway
Memphis, Tennessee 38120

Re: Jennifer Furnas Coleman v. Marty Alan Coleman
(Grandparents matter)
Our File: 5708

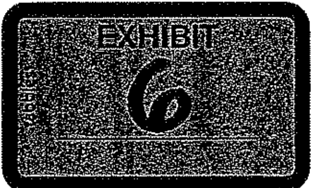
Dear Counsel:

Enclosed is an attested copy of Order Granting Motion for Chancellor to Recuse Himself that was entered with the Court.

Sincerely,

Meredith Hamilton Alley

MHA/ss
Enclosures



IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

JENNIFER FURNAS HENSZEY,	§	
	§	
Plaintiff/Counter-Defendant,	§	
	§	
VS.	§	No. CH-02-2091-1
	§	Part I (II)
MARTY ALAN COLEMAN,	§	
	§	
Defendant/Counter-Plaintiff.	§	
	§	
VS.	§	
	§	
LAWRENCE COLEMAN and	§	
SHIRLEY ANNE COLEMAN	§	
	§	
Intervening Petitioners	§	

ORDER GRANTING MOTION FOR CHANCELLOR TO RECUSE HIMSELF

This cause came on to be heard on Thursday, April 23, 2009, before Walter L. Evans, Chancellor of Part I of the Shelby County Chancery Court, upon Jennifer Furnas Henszey's Motion for Chancellor to Recuse Himself from this cause, Affidavits filed in support of the Motion, statement of counsel for all of the parties, statement of counsel for Dr. Fred Steinberg, who is not a party, statements of Charles W. McGhee, withdrawing attorney for David Henzsey, statements of Zachary M. Moore, attorney for Tammy Milligan, and the entire record, after all of which the Court finds the Motion should be granted and the case assigned to another Jurist.

The Court further finds that the transcript of the hearing held April 23, 2009 shall be filed in this cause and incorporated herein by reference.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED and DECREED.

WALTER L. EVANS

CHANCELLOR

DATED: 05/15/09

APPROVED FOR ENTRY:

David E. Caywood, #7827
Attorney for Jennifer Furnas Henszey
5100 Poplar Avenue, Suite 3125
Memphis, Tennessee 38137
(901) 526-0206

A TRUE COPY-ATTEST
Dewun R. Settle, Clerk & Master
By __________ D.C. & M.

Melissa C. Berry, #19967
Attorney for Intervening Petitioners
1713 Kirby Parkway
Memphis, Tennessee 38120
(901) 755-5994

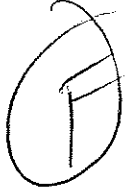
Linda L. Holmes, #010664
Guardian *Ad Litem*
202 Adams Avenue
Memphis, Tennessee 38103
(901) 578-1234

CERTIFICATE OF SERVICE

I, David E. Caywood, hereby certify that a copy of the foregoing Order Granting Motion for Chancellor to Recuse Himself has been faxed and mailed to Bradley Eskins, Attorney for Marty Alan Coleman, 50 North Front Street, Suite 770, Memphis, Tennessee 38103, this 15th day of May, 2009.

David E. Caywood

S:\Barbara\wpfiles\Coleman, Jennifer - Grandparents matter 5708\Order Granting Motion to Recuse 4.24.09 (2).doc



LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

June 9, 2009

VIA FACSIMILE
Ms. Melissa C. Berry
Attorney at Law
1713 Kirby Parkway
Memphis, Tennessee 38120

Re: *Coleman, Jenny – Grandparents' Matter*
Our File: 5708

Dear Melissa:

I am not available June 18, 2009. However, I am available June 25, 2009 at 4:00 p.m. which is one of the dates your office gave us. I am going to put it down for that date. I would appreciate your sending me a Notice.

With very best wishes I remain,

Sincerely,

David E. Caywood

DEC/bb
Cc: Bradley W. Eskins, Esq.
Linda Holmes, Attorney at Law

MHA/ec
CTC a/only

ROGERS BERRY & CHESNEY, PLLC

LAURA D. ROGERS
MELISSA C. BERRY
MARGARET M. CHESNEY

ATTORNEYS AT LAW
1713 KIRBY PARKWAY · MEMPHIS · TENNESSEE 38120
Telephone 901.755.5994
Facsimile 901.755.8714

TANYA C. POWERS
Office Administrator

June 10, 2009

David E. Caywood, Esq. MAICL
Clark Tower
5100 Poplar Avenue, Ste. 3125
Memphis, TN 38137

Bradley W. Eskins, Esq.
50 North Front Street, Ste. 590
Memphis, TN 38103

Linda L. Holmes, Esq.
202 Adams Avenue
Memphis, TN 38103

RE: Jennifer Furnas Coleman v. Marty Alan Coleman v. Larry & Anne Coleman
Shelby County Chancery Court Docket No. CH-02-2091 Part I (II)

Dear Counsel:

Enclosed please find a Notice to Take Deposition of Dr. Jonathan Shaw and accompanying Subpoena. As agreed, the deposition is scheduled for June 25, 2009 and will begin at 4:00 p.m.

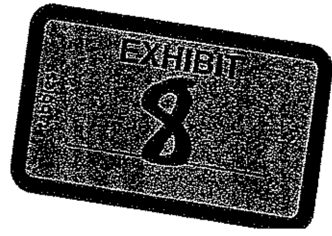
Sincerely,

ROGERS BERRY & CHESNEY, PLLC

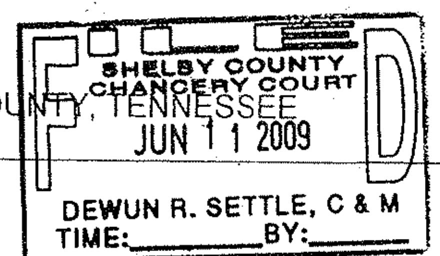
Melissa C. Berry

Enclosures
cc Larry & Anne Coleman (w/encl.)

ctc/email 6/12/09



IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE



JENNIFER FURNAS COLEMAN,

Plaintiff/Counter-Defendant,

vs.

No. CH-02-2091
Part I (II)

MARTY ALAN COLEMAN,

Defendant/Counter-Plaintiff,

vs.

LAWRENCE COLEMAN, and
SHIRLEY ANNE COLEMAN,

Intervening Petitioners.

NOTICE TO TAKE EVIDENTIARY DEPOSITION DUCES TECUM
OF DR. JONATHAN SHAW, M.D.

TO: Jennifer Furnas Coleman
c/o David E. Caywood, Esq.
5100 Poplar Ave., Suite 3125
Memphis, TN 38137

Marty Alan Coleman
c/o Bradley Eskins
50 N. Front St., Suite 770
Memphis, TN 38103

PLEASE TAKE NOTICE that the evidentiary deposition of Dr. Jonathan Shaw, M.D. will be taken upon oral examination before a certified court reporter and/or other officer authorized by law to take depositions, at the offices of Dr. Jonathan Shaw, M.D., 1384 Cordova Cove, Germantown, Tennessee, 38138, on Thursday, June 25, 2009, commencing at 4:00 p.m., regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

The deponent is to bring the following items to the deposition:

Any and all documents, medical charts, memoranda, testing, evaluations, notes, prescription records, etc., regarding Kyler Alan Coleman, DOB 3/18/00.

The oral examination will continue from day to day until completed. You are invited to attend and examine.

Respectfully Submitted,

Melissa C. Berry, #19967
ROGERS BERRY & CHESNEY, PLLC
Attorney for Larry & Anne Coleman
1713 Kirby Parkway
Memphis, TN 38120
(901) 755-5994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via U.S. Mail, postage prepaid, to David Caywood, Attorney for Plaintiff, at 5100 Poplar Avenue, Ste. 3125, Memphis, TN 38137, to Bradley Eskins, Attorney for Defendant, at 50 North Front Street, Ste. 770, Memphis, TN 38103, and to Linda Holmes, Guardian ad Litem, 202 Adams Avenue, Memphis, TN 38103, this the 11th day of June, 2009.

Melissa C. Berry

STATE OF TENNESSEE SHELBY COUNTY CHANCERY COURT	SUBPOENA* ____ to testify X duces tecum X to take deposition	DOCKET NUMBER CH- 02-2091 Part I (II)

PLAINTIFF	DEFENDANT
Jennifer Furnas Coleman	v. Marty Alan Coleman v. Lawrence Coleman and Shirley Anne Coleman

TO: (Name, Address & Telephone Number of Witness)

Dr. Jonathan Shaw, M.D.
1384 Cordova Cove
Germantown, TN 38138

Method of Service:

____ Shelby County Sheriff
____ Out of County Sheriff
X Private Process Server

*You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in punishment by fine and/or imprisonment as provided by law.

TIME TO APPEAR	DATE TO APPEAR
4:00 p.m.	Thursday, June 25, 2009

PLACE TO APPEAR: Chancery Court, Part ________
140 Adams Ave.
Third Floor
Memphis, Tennessee 38103
-OR-

1384 Cordova Cove
Germantown, TN 38138

ITEMS TO BRING:

Any and all documents, medical charts, memoranda, testing, evaluations, notes, prescription records, etc., regarding Kyler Alan Coleman, DOB 3/18/00.

___ Additional List Attached

This subpoena is being issued on behalf of
____ Plaintiff ____ Defendant X Intervening Petitioners

Attorney: (Name, Address & Telephone Number)
Melissa C. Berry
1713 Kirby Parkway
Memphis, TN 38120 (901/755-5994)

ATTORNEY'S SIGNATURE: [signature]

Private Process Server's Name, Address and Phone No.

DATE ISSUED

Dewun R. Settle, Clerk and Master

By: ______________________
Deputy Clerk and Master

CHANCERY COURT
JUN 11 2009
NOT FOR SERVICE OR RETURN USE

RETURN ON SERVICE

Check one: Note: A Private Process Server's or an Attorney's return must be sworn to below.

1. ___ I certify that on ______________________ I served a copy of this subpoena on the witness stated above by ______________________

2. ___ I certify that on ______________________ I failed to serve a copy of this subpoena on the witness because ______________________

Sworn to and subscribed before me on this _______

day of ______________________, 20 _____.

____
Notary Public / Deputy Court Clerk

My Commission Expires: ______________________

Notes or Signature of recipient (Optional):

____
Signature of Sheriff, Attorney or Attorney's Agent

ROGERS BERRY & CHESNEY, PLLC

LAURA D. ROGERS
MELISSA C. BERRY
MARGARET M. CHESNEY

ATTORNEYS AT LAW
1713 KIRBY PARKWAY • MEMPHIS • TENNESSEE 38120
Telephone 901.755.5994
Facsimile 901.755.8714

TANYA C. POWERS
Office Administrator

July 16, 2009

MHA
CL

Via Fax Only

David E. Caywood, Esq.
Clark Tower
5100 Poplar Avenue, Ste. 3125
Memphis, TN 38137

RE: Jennifer Furnas Coleman v. Marty Alan Coleman v. Larry & Anne Coleman
Shelby County Chancery Court Docket No. CH-02-2091 Part I (II)

Dear Mr. Caywood:

Your faxed correspondence of today's date regarding your proposed Order Referring Matter to Mediation was received after Ms. Berry left the office. Ms. Berry will not be back in the office until July 27th, and she will respond to your correspondence upon her return.

Sincerely,

ROGERS BERRY & CHESNEY, PLLC

Tanya Powers

Tanya C. Powers
Paralegal to Melissa C. Berry

cc Bradley Eskins (via fax)
Linda Holmes (via fax)
Larry & Anne Coleman

RECEIVED
7/16/09
3:35 pm

EXHIBIT
9

JOHN W. MCCOY, PHD
Clinical Psychologist

4 5?5 Poplar Avenue, Suite 404
Memphis, Tennessee 38117-7508

Office: (901) 7565583
Fax: (901) 405-2014

November 21, 2009

Linda Holmes, Esq.
Guardian ad Litem
202 Adams Avenue
Memphis, TN 38103

Re: Marty Coleman
DOB: 4-7-69

Dear Ms. Holmes:

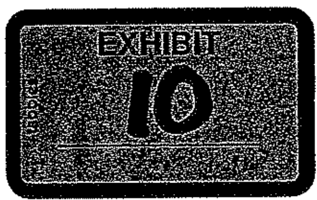
I met with Mr. Coleman yesterday. I am unable to find any reason why Mr. Coleman should not have supervised visitation with his children.

It is most likely in the best interest of the children, as well as Mr. Coleman that he reestablishes a relationship with them soon.

Sincerely,

John McCoy, PhD
Clinical and Forensic Psychologist
APA Certified Proficient in the Treatment of Substance Use Disorders

pc: Mr. Coleman, Ms. Stephens



ROGERS BERRY & CHESNEY, PLLC

LAURA D. ROGERS*
MELISSA C. BERRY
MARGARET M. CHESNEY
*Rule 31 Mediator

ATTORNEYS AT LAW
1713 KIRBY PARKWAY • MEMPHIS • TENNESSEE 38120
Telephone 901.755.5994
Facsimile 901.755.8714

TANYA C. POWERS
Office Administrator

December 15, 2009

Via Fax with Mail Confirmation

David E. Caywood, Esq.
Clark Tower
5100 Poplar Avenue, Ste. 3125
Memphis, TN 38137

RE: <u>Jennifer Furnas Coleman v. Marty Alan Coleman v. Larry & Anne Coleman</u>
Shelby County Chancery Court Docket No. CH-02-2091 Part I (II)

Dear David:

My clients and I are in receipt of your hand-delivery of yesterday's date and Ms. Henszey's settlement offer on the grandparent issues as set forth in the proposed Consent Order Pertaining to Grandparent Issues. As I suspected would be the case, this <u>is</u> a different offer than the one your client extended at the end of mediation with Judge Riley and includes terms that were neither discussed nor negotiated.

Your client's conduct in filing the Emergency Petition for Injunctive Relief during the middle of settlement negotiations, combined with your statement accompanying the new offer that "Ms. Henszey will entertain no modifications to the proposed consent order", have sent a clear message to my clients that Ms. Henszey is neither interested in settling this case in good faith nor concerned about the benefit to her children of a relationship with my clients. Her offer is rejected.

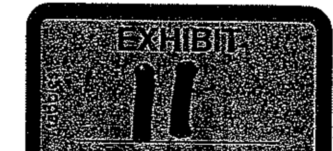
I will notify Natasha Langston that we need to obtain a setting on the pending motions.

Sincerely,

ROGERS BERRY & CHESNEY, PLLC

Melissa C. Berry

RECEIVED
15 2009
3:03
CTC 12/16/09



LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

KAREN SUGG, OFFICE MANAGER/PARALEGAL
CONNIE LUKE, PARALEGAL
TERRI JOHN, PARALEGAL

TELEPHONE (901) 526-0206
FACSIMILE (901) 525-1540

January 25, 2010

VIA U.S. MAIL ONLY
Ms. Linda Holmes
Attorney at Law
202 Adams Avenue
Memphis, Tennessee 38103

Re: *Coleman, Jenny – Grandparents' Matter*
Our File: 5708

Dear Linda:

I am sending you a recent color photograph of the Coleman children.

Sincerely,

David E. Caywood

DEC/bb
Encl.
Cc: Melissa C. Berry (w/encl.)
Bradley W. Eskins (w/encl.)

CL
CJC e/only

CHARGES BILLED BY GAL FOR READING AND REVIEWING CORRESPONDENCE VERSUS TIME ESTIMATES BY MS. HENSZEY FOR READING AND REVIEWING SAME CORRESPONDENCE

	A	B	C	D	E	F	G
1	Date	Description	GAL's Time	GAL's charge	Ms. Henszey's Estimated Time X 2	Ms. Henszey's Charge (.05 minimum)	Difference
2	4/8/2009	Read and review of letter from David Caywood	0.25	$43.75	34 seconds	$8.75	$35.00
3	4/14/2009	Read and review of letter from Connie Luke	0.25	$43.75	34 seconds	$8.75	$35.00
4	4/14/2009	Read and review of letter from Melissa Berry	0.25	$43.75	62 seconds	$8.75	$35.00
5	4/14/2009	Read and review of letter from David Caywood	0.25	$43.75	32 seconds	$8.75	$35.00
6	5/15/2009	Read and review of letter from Meredith Ally	0.25	$43.75	1 minute 6 seconds	$8.75	$35.00
7	6/10/2009	Read and review of letter from David Caywood	0.25	$43.75	22 seconds	$8.75	$35.00
8	6/10/2009	Read and review of letter from Melissa Berry	0.25	$43.75	1 minute 48 seconds	$8.75	$35.00
9	7/16/2009	Read and review of letter from Tonya Powers of Melissa Berry's office	0.25	$43.75	36 seconds	$8.75	$35.00
10	11/23/2009	Read and review of letter from Dr. John McCoy	0.25	$43.75	28 seconds	$8.75	$35.00
11	12/5/2009	Read and review of letter from Melissa Berry	0.25	$43.75	1 minute	$8.75	$35.00
12	1/26/2010	Read and review of letter and enclosure from David Caywood	0.50	$87.50	14 seconds	$8.75	$78.75
13		**TOTALS**		**$525.00**		**$96.25**	**$428.75**

LAW OFFICES
OF
DAVID E. CAYWOOD
ATTORNEYS AT LAW

DAVID E. CAYWOOD
MEREDITH HAMILTON ALLEY*
TRENTON W. PITTS
AMELIA KENDRICK THOMPSON

*Fluent in Spanish

5100 POPLAR AVENUE, SUITE 3125
MEMPHIS, TENNESSEE 38137

TELEPHONE
(901) 526-0206

FACSIMILE
(901) 525-1540

KAREN SUGG, PARALEGAL
CONNIE LUKE, PARALEGAL

April 20, 2009

VIA FACSIMILE
AND U.S. MAIL
James S. Strickland, Jr.
Attorney at Law
44 North Second Street, Suite 502
Memphis, Tennessee 38103

VIA FACSIMILE
AND U.S. MAIL
Bradley W. Eskins
Attorney at Law
50 North Front Street, Suite 590
Memphis, Tennessee 38103

Re: ***Coleman, Jenny – ~~Grandparents' Matter~~*** Pre matter
Our File: ~~5708~~ 5557

Dear Special Master Strickland and Mr. Eskins:

Enclosed please find filed stamped copies of the following documents:

1. Jenny Henszey's Motion to Strike Father's Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master;

2 Affidavit of Meredith Hamilton Alley.

Sincerely,

Karen Sugg

Karen D. Sugg
Paralegal to David E. Caywood

/ks
cc: Ms. Linda Holmes, Guardian Ad Litem
Ms. Melissa Berry, Attorney at Law

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

FILED
SHELBY COUNTY CHANCERY COURT
APR 20 2009
DEWUN R. SETTLE, C & M
TIME:______ BY:______

JENNIFER FURNAS COLEMAN,	§	
Plaintiff,	§	
	§	
VS.	§	No. CH-02-2091-1
	§	Part I
MARTY ALAN COLEMAN,	§	
	§	
Defendant.	§	

JENNY HENSZEY'S MOTION TO STRIKE FATHER'S SUPPLEMENT TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED TO SPECIAL MASTER

TO SPECIAL MASTER JAMES STRICKLAND:

Comes now the Plaintiff, Jennifer Furnas Henszey, and respectfully alleges that there is no authority for Marty Coleman to file his Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master, and as such, the Supplement should be stricken from the record.

Respectfully submitted,

David E. Caywood (#7827)
Meredith Hamilton Alley (#024981)
Attorneys for Plaintiff
Jennifer Furnas Henszey
5100 Poplar Avenue, Suite 3125
Memphis, Tennessee 38137
901-526-0206

CERTIFICATE OF SERVICE

I, Meredith Hamilton Alley, hereby certify that a copy of the foregoing Jenny Henszey's Motion to Strike Father's Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master has been faxed and mailed to Mr. Bradley W. Eskins, 50 North Front Street, Suite 590, Memphis, Tennessee 38103, Ms. Melissa C. Berry, Attorney at Law, 1713 Kirby Parkway, Memphis, Tennessee 38120, and Ms. Linda Holmes, Guardian *ad Litem*, 202 Adams Avenue, Memphis, Tennessee 38103, this 20th day of April, 2009.

Meredith Hamilton Alley

S:\Susie\wpfiles\COLEMAN_JENNIFER 5557\Motion to Strike Father's Supplement 4.17.09.doc

FILED
SHELBY COUNTY
CHANCERY COURT
APR 20 2009
DEWUN R. SETTLE, C & M
TIME:_______ BY:_______

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

JENNIFER FURNAS COLEMAN,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	No. CH-02-2091-1
	§	Part I
MARTY ALAN COLEMAN,	§	
	§	
Defendant.	§	

AFFIDAVIT OF MEREDITH HAMILTON ALLEY

STATE OF TENNESSEE)
COUNTY OF SHELBY)

I, MEREDITH HAMILTON ALLEY, being duly sworn, hereby state that the facts contained in the foregoing Jenny Henszey's Motion to Strike Father's Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master are true to the best of my knowledge, information and belief, and for the causes mentioned therein.

Meredith H Alley
Meredith Hamilton Alley

SWORN TO AND SUBSCRIBED before me this 17th day of April, 2009.

Eugenia C. Tanner
NOTARY PUBLIC

My Commission Expires:
3-16-2011

CERTIFICATE OF SERVICE

I, Meredith Hamilton Alley, hereby certify that a copy of the foregoing Jenny Henszey's Motion to Strike Father's Supplement to Proposed Findings of Fact and Conclusions of Law Submitted to Special Master has been faxed and mailed to Mr. Bradley W. Eskins, 50 North Front Street, Suite 590, Memphis, Tennessee 38103, Ms. Melissa C. Berry, Attorney at Law, 1713 Kirby Parkway, Memphis, Tennessee 38120, and Ms. Linda Holmes, Guardian *ad Litem*, 202 Adams Avenue, Memphis, Tennessee 38103, this 20th day of April, 2009.

Meredith Hamilton Alley

S:\Susie\wpfiles\COLEMAN_JENNIFER 5557\Affidavit of MHA 4.17.09.doc

Linda L. Holmes
Attorney At Law
202 Adams Avenue
Memphis, Tennessee 38103

Phone
(901) 578-1234

Fax
(901) 525-1109

May 20, 2009

Dr. Jonathan Shaw
1384 Cordova Cove
Germantown, Tennessee 38138

RE: My Client: Kyler Coleman

Dear Dr. Shaw:

As you know, I am the Court appointed Guardian Ad Litem of Kyler Coleman. I previously provided you a copy of the Order Appointing Guardian Ad Litem dated January 30, 2007 and the Order Granting Intervention By Paternal Grandparents As Parties And Order Extending Scope Of Guardian Ad Litem Investigation dated November 21, 2008.

Dr. Shaw, I am requesting that you provide me with an update of Kyler's medical records. You previously provided records through February, 2009. I need any additional records.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you should have any questions or problems in this matter.

Sincerely,

Linda L. Holmes

LLH:kw

cc: Mr. David Caywood
Ms. Melissa Berry
Mr. Bradley Eskins

Linda L. Holmes
Attorney At Law
202 Adams Avenue
Memphis, Tennessee 38103

Phone
(901) 578-1234

Fax
(901) 525-1109

June 8, 2010

VIA-TELEFAX

Mr. David Caywood
Attorney at Law
5100 Poplar Avenue, Suite 3125
Clark Tower Building
Memphis, Tennessee 38137

RE: Coleman vs. Coleman

Dear David:

Pursuant to Dr. Beebe's and Dr. Harris' recommendation of supervised visitation beginning now, I would recommend one of the following to supervise the visitation:

Jolen Bailey; Catherine Collins; John Ciocca; or Russell Krause.

If you prefer some other neutral party please let me know.

I look forward to hearing from you soon.

Sincerely,

Linda Holmes

Linda L. Holmes

LLH:kw

cc: Ms. Melissa Berry
Mr. Bradley Eskins