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Guardian ad Litem Practice in Dissolution, Grandparent Visitation, Paternity, Adoption, and Guardianship Cases[1]

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I. The Guardian ad Litem Appointment

Judges may use their discretion in deciding to appoint a Guardian ad Litem (GAL) for a child in a dissolution of marriage, grandparent visitation, paternity, adoption, or guardianship proceeding. Common reasons for a GAL appointment include: (1) allegations of child abuse, neglect, or endangerment have been pled or otherwise arisen in the case; (2) the request of one or both parties; (3) the request of a child; (4) a mental health professional, custody evaluator, parenting coordinator, or other professional recommended the appointment of a GAL; and (5) the child's interests are not be adequately represent by either parent or party on one or more issues.

There is a statewide shortage of qualified GALs, especially those who are able to serve pro bono. Most Indiana county courts do not have the option of appointing a GAL every time a request for a GAL appointment is made.

A. Mandatory GAL Appointments

Indiana case law and statutes mandate the appointment of a GAL in some specific situations. In Matter of Paternity of H.J.F., 634 N.E.2d 551, 555 (Ind. Ct. App. 1994), the Court of Appeals opined that a GAL appointment is not warranted in all paternity cases, but a "guardian ad litem must be appointed to protect the child's interests in all cases where a party seeks to overcome the presumption that a child born in wedlock is legitimate." In Pinter v. Pinter, 641 N.E.2d 101 (Ind. Ct. App. 1994), the Court of Appeals noted that the dissolution court erred in failing to appoint a GAL for the child because an appointment is required when a party seeks to overcome the presumption that a child born in wedlock is legitimate. In In Re Paternity of V.M.E., 668 N.E.2d 715,717 (Ind. Ct. App. 1996), the Court remanded the case and ordered the trial court to appoint a GAL to represent the children. The Court stated that "in narrow circumstances, such as when

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the children are not adequately represented, an appointment is required." The Court opined that the enmity between the parents with a real possibility of a custody award to the father made it unlikely that the children's rights would be adequately represented by the mother.

Two guardianship statutes require the appointment of a GAL. In guardianship cases, IC 29-3-2-3(a) requires the court to appoint a GAL to represent the minor, unless the court makes the written findings outlined at IC 29-3-2-3(b) which waive the GAL appointment. The reasons for waiver of the GAL appointment by the court are:

- The proposed guardian is capable of representing and managing the minor's property;
- No other petition for the appointment of a guardian has been filed; and
- The petition for appointment of a guardian is uncontested.

There is an overlap between the dissolution of marriage code and the guardianship code pertaining to the appointment of a GAL in the context of a conditional temporary custodian. A dissolution of marriage statute, IC 31-17-2-11, requires the dissolution court to appoint a conditional temporary custodian for the child upon the custodial parent's death when the court requires supervision during the noncustodial parent's parenting time or suspends the noncustodial parent's parenting time. IC 29-3-3-6(c) requires the guardianship court to appoint a GAL or Court Appointed Special Advocate for the minor when a guardianship petition is filed by the temporary custodian whom the dissolution court appointed. The GAL or Court Appointed Special Advocate appointed by the guardianship court serves until removed by the court. IC 29-3-3-6(c).

B. Discretionary Guardian ad Litem Appointments

In dissolution and paternity cases, Indiana law states that the court may appoint a GAL, a Court Appointed Special Advocate, or both, for the child at any time. IC 31-15-6-1 (dissolution), IC 31-17-6-1 (custody actions); IC 31-32-3-1 (paternity). In Schenk v. Schenk, 564 N.E.2d 973 (Ind. Ct. App. 1991), a dissolution custody case, the Court noted that the statute does not mandate appointment of a GAL in a dissolution case, and the Court found that it was not an abuse of discretion to fail to appoint a GAL in that particular case. Id. at 979.

The law regarding the appointment of a GAL in a grandparent visitation case is somewhat unsteady. No statute requires the appointment of a GAL in a grandparent visitation case. See In Re Walker, 665 N.E.2d 586 (Ind. 1996) (Court noted that trial court appointed a GAL in a contested grandparent visitation case) and McCune v. Frey, 783 N.E.2d 752 (Ind. Ct. App. 2003) (a court appointed special advocate report, which included recommendations on the grandparent visitation petition, was admitted into evidence). Additionally, there is case law indicating that there may not be statutory authority to appoint a GAL in a grandparent visitation case, although the practice is common. See In Re Guardianship of C.R. and A.R., 22 N.E.3d 657, 662 (Ind. Ct. App. 2014), in which the Court opined that the trial court did not have the authority to order a forensic visitation evaluation in a grandparent visitation case. Although the appointment of a GAL was not on issue in this case, the Court observed in its opinion that IC 31-17-6-1, the authorizing statute for court appointment of GALs, does not include the appointment of a GAL in a grandparent visitation case, "presumably because the legislature did not think it appropriate

for courts to have such a potentially burdensome appointment power in cases of grandparent visitation." In light of the C.R. opinion, it is strongly recommended that trial courts appoint GALs in grandparent visitation cases only if all parties agree to the appointment.

Guardianship courts may appoint a GAL at their own discretion as well. In appointing a GAL, the court must set out its reasons for the appointment. IC 29-3-2-3(a). A GAL may be appointed to represent several persons or interests if not precluded by a conflict of interest. IC 29-3-2-3(a).

No statute or case law requires the appointment of a GAL or Court Appointed Special Advocate for a child in an adoption case. Courts frequently appoint a GAL or Court Appointed Special Advocate to represent the child's best interests in an adoption proceeding when birth parents are not consenting to the adoption or when two competing petitions for adoption have been filed.

Case law addressing the appointment of a GAL in an adoption case includes:

In Matter of Adoption of L.C., 650 N.E.2d 726, 732-33 (Ind. Ct. App. 1995), the Court looked to guardianship law at IC 29-3-2-3 and Ind. Trial Rule 17(c) to ascertain whether the trial court had erred in failing to appoint a GAL for a child in a contested adoption proceeding. The Court opined that a trial judge needs to appoint a GAL only if the judge believes the minor is not otherwise adequately represented. The L.C. Court found no apparent necessity for such an appointment and held that the trial court had not abused its discretion by not appointing a GAL for the child.

In In Re Adoption of B.C.S., 793 N.E.2d 1054, 1060 (Ind. Ct. App. 2003), the Court affirmed the trial court's order granting the adoption petition filed by the deceased mother's former companion and denying the adoption petition filed by the maternal great-aunt and great-uncle. The Court was not persuaded by the maternal great-aunt and great-uncle's argument that the trial court was required to appoint a GAL in the adoption case. The Court opined that the trial court had discretion to determine whether a minor was adequately represented in the proceedings such that no GAL was necessary.

See also In Re Paternity of Baby W., 774 N.E.2d 570, 579 n.6 (Ind. Ct. App. 2002) and In Re Paternity of M.G.S., 756 N.E.2d 990, 1007 (Ind. Ct. App. 2001), *trans. denied*, in which the Court opined that the appointment of a GAL for the children in these contested adoption cases would have been both highly desirable and appropriate. In both cases the putative fathers had received pre-birth notice of the adoption but had failed to file paternity petitions within 30 days so their consents to adoption were irrevocably implied by statute. The Court noted that a GAL could file a paternity petition for the child which would not be similarly time barred. The Court observed that a GAL could assess the situation and proceed in the child's best interests since she was incompetent by reason of her age to do it for herself. Baby W., 774 N.E.2d 579, n.4.

The postadoption visitation privileges statute states that the adoption court may appoint a GAL or Court Appointed Special Advocate for the child before the court voids or modifies a postadoption contact agreement or before the court hears a motion to compel compliance with an agreement approved by the court. IC 31-19-16-6. The GAL or Court Appointed Special Advocate shall "represent and protect the best interests of the child." The postadoption sibling

contact statute states that the adoption court may appoint a GAL or Court Appointed Special Advocate "to represent and protect the best interests of the adopted child" before hearing a petition to vacate, modify, or compel compliance with the postadoption sibling contact order. IC 31-19-16.5-5. The court may appoint a GAL or Court Appointed Special Advocate for the adopted child only "if the interests of an adoptive parent differ from the child's interests to the extent that the court determines that the appointment is necessary to protect the best interests of the child." IC 31-19-16.5-5.

C. Appointment Practice Tips

The GAL appointment order should include the full name and birth date of each child for whom the GAL is appointed, as this helps the GAL more rapidly obtain records from the Department of Child Services, schools, day care centers, and others. GAL appointment orders are often general in nature and direct a GAL to conduct an investigation and make a report to the Court regarding the best interests of the child. Courts may specifically delineate activities they wish the GAL to perform; items may include things such as: (1) making unannounced visits; (2) specific attention to particular issue, such as medical care or school choice; (3) obtaining specific information, such as information from DCS or from a child's counselor; and (4) ascertaining a child's wishes if possible.

Courts may also limit the scope of a GAL investigation. A limited GAL appointment order with specific tasks may be a better use of the resources of the GAL and parties. Use of a limited GAL appointment can supplement information which the court has already received from other independent sources such as schools or mental health providers. Sometimes the court will need a complete GAL investigation which will require a greater expenditure of GAL time and resources. The court and parties should expect that the GAL will need a minimum of 75 days to conduct a complete GAL investigation and prepare a report, though communication on this topic may be helpful if there are shorter deadlines required.

It is very helpful to include the following in the GAL appointment order:

- The name, address, telephone, and facsimile number of the GAL
- Whether a report is requested
- Whether recommendations from the GAL are requested
- The names, addresses, and telephone numbers of all parties
- The names, addresses, telephone numbers, facsimile numbers, and email addresses of all the attorneys
- The date by which the GAL report should be filed
- The amount of the GAL fee (if known) and how it should be divided between the parties

The GAL appointment order should be signed by the court and distributed to each attorney and unrepresented party as well as to the GAL. Including the GAL on the distribution list of the GAL appointment order is very important. Attorneys for the parties should contact the GAL to be sure the appointment order has been received.

When a GAL has been appointed, attorneys for the parties should communicate promptly with the GAL. This communication should include:

- The client's home address, work and home telephone numbers, and work hours
- The issues pending before the Court and scheduled hearing dates
- Copies of pending motions, substantive court orders, and exhibits that are relevant to current issues
- The client's preferred outcome from the pending case
- The dates, times, and locations of any scheduled depositions or mediation sessions in case the GAL wishes to attend and participate in them

II. Guardian ad Litem Fees

IC 31-15-6-10 through 12 (dissolution) and IC 31-17-6-9 (custody actions) allow the dissolution court to assess a Guardian ad Litem (GAL) user fee against either or both of the parents of a child for whom a GAL is appointed. The court may order the parties to pay the GAL user fee directly to the attorney appointed to serve as GAL. If direct payment of the GAL user fee is made to the attorney who provides GAL services, the attorney receiving the GAL fee shall report the receipt of payment to the court within thirty days. See also Danner v. Danner, 573 N.E.2d 934, 938 (Ind. Ct. App. 1991), in which the Court of Appeals ruled that the dissolution court can assess a fee for GAL services against a parent.

The GAL user fee in a paternity case is addressed at IC 31-32-3-9, which states that, if any fees arise, payment shall be made under IC 31-40. IC 31-40-3-1 states that the juvenile court may order the parent or guardian of the child's estate to pay a $100 GAL or Court Appointed Special Advocate fee to the probation department for deposit by the probation department in the GAL or Court Appointed Special Advocate fund. This statute does not address GAL fees by a private agency, attorney, or individual.

In In Re Paternity of N.L.P., 926 N.E.2d 20, 23-25 (Ind. 2010), the child's parents entered into an agreement in a paternity case with an attorney to provide GAL services for an hourly fee. The attorney provided GAL services for over four years, resulting in fees and expenses which totaled $34,800. Neither parent disputed the GAL fees, but the trial court determined that, although the GAL conducted a thorough investigation, the GAL's fees were not reasonable. The Indiana Supreme Court reversed the trial court's order, holding that, because there was no evidence that the parties' agreements were void as against public policy, and the trial court made no findings as such, the trial court was bound to enforce the terms and conditions of the agreements. The Court noted that in a paternity custody dispute, the attorneys representing the competing adults must effectively represent the interests of their clients, but the interests of the adults are not always consistent with the best interests of the child. The Court cited IC 31-32-3-1, stating that the trial court is empowered to appoint a representative for the child in the form of a GAL or Court Appointed Special Advocate, or both. The Court further quoted IC 31-14-18-2(a), which states the trial court may order a party to an action to pay: "(1) a reasonable amount for the cost to the other party of maintaining an action under this article; and (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred, before the commencement of the proceedings or after entry of judgment." The Court said, "It is not unusual in litigation that the same or similar services are duplicated for different parties and the

court." The Court said that the services performed by the custody evaluator were performed for the benefit of the court; and those performed by the GAL were for the benefit of the child.

No specific statute or case law supports a court ordered GAL or Court Appointed Special Advocate fee in an adoption proceeding. A legal argument could be made that GAL fees in an adoption case may be court ordered similarly to GAL fees in guardianship cases, since both adoptions and guardianships are heard by courts with probate jurisdiction.

Indiana case law supports a court order for a GAL fee in a guardianship proceeding.

In Whinery v. Hammond Trust and Savings Bank, 80 Ind. App. 282, 140 N.E. 451 (1923), the Court opined that an officer of the court, selected by the court to protect the interests of minors, should not be expected to perform his duties without compensation, and that it is incidental to the court's appointment power to allow the GAL suitable compensation to be paid as the equity of the case shall require.

In State Ex Rel. Keating v. Bingham, 121 N.E.2d 727, 730 (1954), the Indiana Supreme Court opined that the compensation of a GAL for services rendered may be allowed as an expense of administration or out of the ward's interest in the proceedings in an amount determined by the court in its discretion. The Bingham decision further provided that the court may hear evidence to assist in determining the amount of compensation to be paid or the court may summarily fix the amount of compensation upon the knowledge of the judge as to the work done by the GAL.

In United Farm Bureau Family Life Ins. v. Fultz, 375 N.E.2d 601, 613 (1978), the Court stated that the probate laws empower the trial court to compensate a GAL for his services either from the ward's interest in the estate, or from the body of the estate. The Court stated that the policy reason behind such is to ensure that an officer of the court, who has been appointed by the court, will not have to render services without compensation. Where the ward recovers nothing, the GAL fee shall be taken from the core of the litigation, such as the insurance policy proceeds.

III. Role of the Guardian ad Litem

A. Definitions

For purposes of dissolution (IC 31-15), custody actions (IC 31-17), adoptions (IC 31-19-16 and IC 31-19-16.5), and juvenile law (paternity), a Guardian ad Litem is defined at IC 31-9-2-50(a) as "an attorney, a volunteer, or an employee of a county program" who is appointed by the court to:

(1) represent and protect the best interests of a child; and
(2) provide the child with services requested by the court, including:
    (A) researching;
    (B) examining;
    (C) advocating;
    (D) facilitating; and
    (E) monitoring;
the child's situation.

The definition statute further provides that a guardian ad litem who is not an attorney must complete the same training outlined at IC 31-9-2-28(a).

The statutory role of a Court Appointed Special Advocate in a dissolution of marriage (IC 31-19-15), custody action (IC 31-17), adoption (IC 31-19-16 and IC 31-19-16.5), and juvenile law (paternity case) is defined at IC 31-9-2-28(a) as: a community volunteer who (1) completes a training program approved by the court; (2) has been appointed by a court to represent and protect the best interests of a child; and (3) may research, examine, advocate, facilitate, and monitor a child's situation.

The GAL does not have a legally privileged relationship with the child or any party. See **Deasy-Leas v. Leas**, 693 N.E.2d 90, 97-99 (Ind. Ct. App. 1998).

B. Statutory Role in Dissolution Cases

The dissolution court may appoint a guardian ad litem/court appointed special advocate at any point in a dissolution proceeding to represent and protect the best interests of the child. IC 31-15-6-1; IC 31-17-6-1. In **Schenk v. Schenk**, 564 N.E.2d 973, 979 (Ind. Ct. App. 1991), a custody case, the Court noted that the statute does not mandate appointment of guardians ad litem in dissolution cases, and the Court found that it was not an abuse of discretion to fail to appoint a guardian ad litem in that particular case.

A person appointed to be a guardian ad litem (or a court appointed special advocate) cannot be: (1) an already existing party to the proceedings; (2) a party's employee; or (3) a party's representative. IC 31-15-6-2; IC 31-17-6-2.

Although not addressed by statute, the Court noted in the dissolution custody case **Deasy-Leas v. Leas**, 693 N.E.2d 90, 97 (Ind. Ct. App. 1998), that the guardian ad litem "is a party to the proceedings and is subject to examination and cross-examination." In dissolution proceedings, the guardian ad litem and court appointed special advocate "shall represent and protect the best interests of the child," and are considered "officers of the court for the purpose of representing the child's interests." IC 31-15-6-3 and -5; IC 31-17-6-3 and -4.

The guardian ad litem/court appointed special advocate may be appointed to investigate and report on the custodial arrangements for the child and may submit a written report containing hearsay which may be received in evidence and may not be excluded on the grounds that the report is hearsay or otherwise incompetent, if all statutory requirements are satisfied. IC 31-17-2-12. In preparing a report, the GAL or Court Appointed Special Advocate (or another court appointed investigator) may: (1) consult any person who may have information about the child and the child's potential custodial arrangements; (2) upon order of the court, refer the child to professional personnel for diagnosis; (3) consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian. IC 31-17-2-12(b). The child's consent must be obtained if the child is of sufficient age and capable of forming rational and independent judgments. IC 31-17-2-12(b).

If the following requirements are fulfilled, the GAL or court appointed special advocate's report is admissible into evidence and cannot be excluded on the grounds that the report is hearsay or otherwise incompetent. IC 31-17-2-12(c). The requirements are:

> (c) the court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten (10) days before the hearing. The investigator shall make the following available to counsel and to any party not represented by counsel:
> (1) The investigator's file of underlying data and reports.
> (2) Complete texts of diagnostic reports made to the investigator under subsection (b).
> (3) The names and addresses of all persons whom the investigator has consulted.

Any party to the proceeding can call the GAL/court appointed special advocate and any person whom they have consulted for cross-examination. IC 31-17-2-12(d). A party to the proceeding may not waive the party's right of cross-examination before the hearing.

A child's GAL or court appointed special advocate can make a motion for counseling for the child. IC 31-17-2-16. The court may require counseling for the child "under such terms and conditions that the court considers appropriate."

A guardian ad litem/court appointed special advocate may be ordered by the dissolution court to exercise continuing supervision over a child and "to assure that the custodial or visitation terms of an order entered by the court" are followed. IC 31-15-6-8; IC 31-17-6-7.

The guardian ad litem/court appointed special advocate may subpoena witnesses and present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem/court appointed special advocate. IC 31-15-6-7; IC 31-17-6-6. The guardian ad litem/court appointed special advocate may be represented by counsel, or may request court appointment of counsel if necessary to protect the child's best interests. IC 31-15-6-6; IC 31-17-6-5.

The court may assess a user fee against either or both parents. The court may order that the fee may be paid to the clerk to be maintained as a guardian ad litem/court appointed special advocate appointment fund, or to the county guardian ad litem/court appointed special advocate program, or to the individual or attorney who provided the guardian ad litem service. IC 31-15-6-10; IC 31-17-6-9.

The guardian ad litem/court appointed special advocate serves until the court enters an order for removal. IC 31-15-6-4; IC 31-17-6-3. A guardian ad litem/ court appointed special advocate who performs their duties in good faith is immune from any civil liability, except for gross misconduct. IC 31-15-6-9; IC 31-17-6-8.

C. Statutory Role in Paternity Cases

The paternity code, IC 31-14, makes no reference to the appointment of a guardian ad litem or court appointed special advocate for a child, and does not provide for a custody or visitation investigation by a guardian ad litem or court appointed special advocate. However, since paternity actions are within juvenile court jurisdiction, the juvenile court procedural law authorizes and controls the appointment of a guardian ad litem or court appointed special advocate in paternity proceedings.

IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or court appointed special advocate for a child "at any time." When a child's interests are not being adequately presented in a paternity proceeding, a guardian ad litem or court appointed special advocate appointment may be necessary. See **In Re Paternity of V.M.E.**, 668 N.E.2d 715, 717 (Ind. Ct. App. 1996) ("in narrow circumstances, such as when the children are not adequately represented, an appointment is required"; the enmity between the parents with a real possibility of a custody award to Father made it unlikely that the children's rights would be adequately represented by Mother).

The Court may not appoint a party to the proceedings or a party's employee or representative as the GAL or court appointed special advocate for the child. IC 31-32-3-2. The GAL/court appointed special advocate shall represent and protect the best interests of the child. IC 31-32-3-6. The GAL/court appointed special advocate is considered an officer of the court for the purpose of representing the child's interests. IC 31-32-3-7.

The GAL/court appointed special advocate may be represented by an attorney. IC 31-32-3-4. If necessary to protect the child's interests, the Court may appoint an attorney to represent them. IC 31-32-3-5. IC 31-32-3-3 states that a GAL/court appointed special advocate need not be an attorney, but the attorney representing the child may be appointed the child's GAL/court appointed special advocate.

Except for gross misconduct: (1) a GAL; (2) a Court Appointed Special Advocate; (3) an employee of a county GAL/court appointed special advocate program; or (4) a volunteer for a GAL/court appointed special advocate program who performs duties in good faith is immune from any civil liability that may occur as a result of the person's performance. IC 31-32-3-10.

There is no provision in the paternity law for admissibility of a written report into evidence; however, analogy may be made to the divorce custody law on this procedural issue. To make the argument that dissolution of marriage statutes apply to paternity cases, see **Sills v. Irelan**, 633 N.E.2d 1210, 1214 (Ind. Ct. App. 1996) (paternity and dissolution child custody and visitation statutes are "in pari materia and are appropriately construed together").

D. Case Law on Roles and Responsibilities in Dissolution and Paternity Cases

In **Montgomery v. Montgomery**, 59 N.E.3d 343, 353-55 (Ind. Ct. App. 2016), the Court reversed the trial court's order modifying custody of the child from Father to Mother as there was insufficient evidence of a substantial change in circumstances justifying modification or that

modification was in the child's best interests. The facts of the case indicate that the trial court appointed a guardian ad litem for the child, the guardian ad litem testified at the hearing, and her report was entered into evidence. In explaining its opinion, the Court found it important that the guardian ad litem recommended the child continue in the custody of Father. Mother noted that the guardian ad litem's report was filed over a year before the hearing and the guardian ad litem could not testify with certainty that her recommendation would be the same because she had not interacted with the parties and the child since that time, but the Court said that since Mother was seeking to modify custody, it was Mother's burden to demonstrate that something happened in the year since the report was filed that could or would have changed the guardian ad litem's recommendation.

In **In Re Paternity of P.S.S.**, 913 N.E.2d 765, 796 (Ind. Ct. App. 2009), the Court affirmed the juvenile court's dismissal of the child's petition to establish paternity filed against Mother and Putative Father after the dissolution of the marriage of the child's parents. The Court observed that a guardian ad litem had been appointed for the child during her parents' dissolution case, so that the child's interests were represented during mediation. The Court concluded that the child had a full and fair opportunity to take part in the resolution of the paternity issue during mediation, and that it would be unfair to give her "a second bite at the apple."

In **Swadner v. Swadner**, 897 N.E.2d 966, 976-77 (Ind. Ct. App. 2008), a dissolution of marriage case, the Court (1) held that the trial court had the authority to appoint a guardian ad litem to represent and protect the best interest of the child; (2) stated that it could not conclude that the guardian ad litem exceeded her authority when, in her preliminary recommendations, she recommended that if the unborn child was a boy, the child's middle name should be Wakefield, a traditional middle name in the Father's family; and (3) did not conclude that Mother was permanently bound by the guardian ad litem's recommendation concerning the middle name, where the parties had agreed to adopt the preliminary recommendations, but each had reserved the right to argue against them at the final hearing. The Court concluded that the trial court had not abused its discretion in determining that joint custody was appropriate and noted that the guardian ad litem had recommended joint legal custody and parenting time in excess of the minimum established by the Parenting Time Guidelines for Father. The Court affirmed the trial court's determination that Mother's request to relocate with the children was not in the children's best interests, citing the guardian ad litem's evidence and recommendation against granting Mother's request.

In **J.M. v. N.M.**, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied*, a dissolution of marriage case, Father appealed the trial court's order restricting his parenting time to supervised parenting time by a counseling service. The parties had agreed to the appointment of a guardian ad litem in a provisional order. The parties also agreed to binding arbitration pursuant to the Family Law Arbitration Statute, IC 34-57-4-1 et seq. The guardian ad litem testified, introduced her report as a exhibit, and cross-examined witnesses at the two day binding arbitration hearing. Before the hearing, Father objected to the participation by the guardian ad litem in the proceedings, which objection was overruled. The guardian ad litem's report, which was submitted at the hearing, recommended that Father have therapeutically supervised parenting time and that he undergo a psychological evaluation, including a drug and alcohol assessment. In his appellate claim that the decree regarding parenting time must be reversed, Father argued that the guardian ad litem was

erroneously allowed to examine and cross-examine witnesses and that there was a lack of statutory authority for this role. The Court disagreed, citing the guardian ad litem's statutory role (IC 31-9-2-50), the appointment statute (IC 31-15-6-1), the requirement to represent and protect the best interests of the child (IC 31-15-16-3), the guardian ad litem's role as officer of the court (IC 31-15-6-7), and the ability of the guardian ad litem to subpoena witnesses and present evidence (IC 31-15-6-7) and be represented by counsel (IC 31-15-6-6). The Court also cited Carrasco v. Grubb, 824 N.E.2d 705, 710 (Ind. Ct. App. 2005), *trans. denied*, and Deasy Leas v. Leas, 693 N.E. 2d 90, 93 (Ind. Ct. App 1998), *trans. denied*, which state that the guardian ad litem is a party to the proceedings. The Court concluded that the guardian ad litem's participation in the arbitration hearing was within statutory authority and there had been no abuse of discretion. The Court found no merit in Father's argument that the guardian ad litem's presence during the hearing was barred by the separation of witnesses order. The Court also rejected Father's contention that the guardian ad litem's alleged post-arbitration questioning of father's witness rendered the guardian ad litem's participation in the arbitration hearing improper because Father failed to show any prejudice he had suffered. The Court also disagreed with Father's argument that his objections to the admission of the guardian ad litem's report based upon Indiana Rules of Evidence 602, 701, 702 and 702(b) had been erroneously overruled. The Court found that Father had posed no such objections at the pre- arbitration meeting at which time the admission of the report had been discussed and that Father had the opportunity to question the guardian ad litem extensively about the contents of her report, and to use statements therein in his questioning of other witnesses. The Court also opined that, even if the guardian ad litem's report and testimony were erroneously admitted, sufficient evidence from other sources supported the trial court's parenting time determination.

In **Carrasco v. Grubb**, 824 N.E.2d 705, 710-11 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's order modifying custody of one of the children to Father where the guardian ad litem who had been appointed for the original dissolution had filed a report and recommended such a change. One of the issues raised by Mother on appeal was that the guardian ad litem's participation in the post-dissolution proceedings was not authorized by law. The Court concluded that a guardian ad litem's responsibilities are not dependent upon the stage of the proceedings, and, in seeking a change of custody of one of the children, the guardian ad litem properly participated in the proceedings and was acting in the child's best interests. The Court noted that IC 31-15-6-4 provides that a guardian ad litem is required to serve until excused by the trial court. The Court further noted that in Deasy-Leas it had determined that the "guardian is a party to the proceedings and is subject to examination and cross examination" and accordingly the guardian ad litem is permitted "to present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem or court appointed special advocate." IC 31-15-6-7. Additionally, the Court held that, when Mother refused to sign the change of custody agreement to which she had previously agreed, the guardian ad litem had the authority to request a hearing in light of IC 31-15-6-8 which provides that a guardian ad litem shall continue to supervise the situation "to assure that the custodial or visitation terms of an order...are carried out..." The Court rejected Mother's argument that the guardian ad litem was simply attempting to relitigate the trial court's award of custody. The Court noted that IC 31-17-2-21 permits a trial court to modify a child custody order if modification is in the best interest of the child and there has been a substantial change in one or more of the factors listed in IC 31-17-2-8, and that IC 31-17-4-2 authorizes the trial court to modify parenting time if the best interests of the child are served.

In **Deasy-Leas v. Leas**, 693 N.E.2d 90, 97-99 (Ind. Ct. App. 1998), the guardian ad litem, who was appointed in two dissolution custody proceedings, brought an interlocutory appeal of the trial court's denials of her motions to quash discovery requests and requests for protective orders. The Court noted that Indiana has not enacted a statutory privilege for communications between guardians ad litem and their charges. The Court opined that a trial court may rely on the protective powers of Ind. Trial Rule 26(c) when a guardian ad litem or any other party requests confidentiality in custody proceedings. The Court said that the other parties' rights to discovery are then safeguarded by the information. The Court held that, if the guardian ad litem is in possession of records to which the parties are entitled, the parties can use the avenues open to them to discover those items from the primary sources. The Court said that the appointment of a guardian ad litem: (1) should not be a discovery tool to be used by a party after waiting a sufficient amount of time for disclosures to be made; and (2) should not be a short cut to privileged information. The Court also observed that the guardian ad litem is a party to the proceedings and is subject to examination and cross-examination. The Court explained that a trial court may, especially when requested by a party acting with the mission to guard the children's best interest, rely on T. R. 26(c) and the general confidentiality provisions to protect certain documents and communications.

E. Case Law on Report Admissibility and Testimony in Dissolution and Paternity Cases

In u, 19 N.E.3d 278, 283 (Ind. Ct. App. 2014), the trial court appointed a guardian ad litem for the child on Father's motion to modify the child's custody from Mother. The court held an evidentiary hearing, at which the guardian ad litem testified. The guardian ad litem prepared a report, but it was never offered or admitted into evidence as an exhibit. The trial court modified custody of the child to Father, and the Court affirmed the trial court's judgment. The Court found the evidence supported the trial court's conclusions that modification of custody was in the child's best interests and that there had been a substantial change in one or more of the custody factors at IC 31-14-13-6. Among other evidence, the Court noted the guardian ad litem's testimony that: (1) the child was very happy at the school where Father had enrolled her, she achieved good grades, and had no trouble at school; (2) the child was "really close" to Father and Stepmother; (3) Father's home was appropriate and the child had her own bedroom; (4) the child had appropriate clothing and maintained good hygiene in Father's care; and (5) the stability offered by Father was preferable to the instability offered by Mother. In response to Mother's argument that the guardian ad litem's report was inadmissible hearsay, the Court noted that: (1)) at points during the guardian ad litem's testimony, Mother objected based on hearsay, and the trial court sustained those objections; and (2) the report was never admitted into evidence as an exhibit, so the Court did not need to consider whether the report itself was hearsay.

In **J.M. v. N.M.**, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), trans. denied, a dissolution of marriage case, Father appealed the trial court's order restricting his parenting time to supervised parenting time by a counseling service. The parties had agreed to the appointment of a guardian ad litem in a provisional order. The parties also agreed to binding arbitration pursuant to the Family Law Arbitration Statute, IC 34-57-4-1 et seq. The guardian ad litem testified, introduced her report as a exhibit, and cross-examined witnesses at the two day binding arbitration hearing.

Before the hearing, Father objected to the participation by the guardian ad litem in the proceedings, which objection was overruled. The guardian ad litem's report, which was submitted at the hearing, recommended that Father have therapeutically supervised parenting time and that he undergo a psychological evaluation, including a drug and alcohol assessment. In his appellate claim that the decree regarding parenting time must be reversed, Father argued that the guardian ad litem was erroneously allowed to examine and cross-examine witnesses and that there was a lack of statutory authority for this role. The Court disagreed, citing the guardian ad litem's statutory role (IC 31-9-2-50), the appointment statute (IC 31-15-6-1), the requirement to represent and protect the best interests of the child (IC 31-15-16-3), the guardian ad litem's role as officer of the court (IC 31-15-6-7), and the ability of the guardian ad litem to subpoena witnesses and present evidence (IC 31-15-6-7) and be represented by counsel (IC 31-15-6-6). The Court concluded that the guardian ad litem's participation in the arbitration hearing was within statutory authority and there had been no abuse of discretion. The Court found no merit in Father's argument that the guardian ad litem's presence during the hearing was barred by the separation of witnesses order. The Court also rejected Father's contention that the guardian ad litem's alleged post-arbitration questioning of father's witness rendered the guardian ad litem's participation in the arbitration hearing improper because Father failed to show any prejudice he had suffered. The Court also disagreed with Father's argument that his objections to the admission of the guardian ad litem's report based upon Indiana Rules of Evidence 602, 701, 702 and 702(b) had been erroneously overruled. The Court found that Father had posed no such objections at the pre- arbitration meeting at which time the admission of the report had been discussed and that Father had the opportunity to question the guardian ad litem extensively about the contents of her report, and to use statements therein in his questioning of other witnesses. The Court also opined that, even if the guardian ad litem's report and testimony were erroneously admitted, sufficient evidence from other sources supported the trial court's parenting time determination.

F. Case Law on Evidence Provided by a Guardian ad Litem in Dissolution and Paternity Cases

In **Rasheed v. Rasheed**, 142 N.E.3d 1017 (Ind. Ct. App. 2020), the Court held that the trial court erred in awarding joint legal custody and reversed and remanded the trial court's decision. Information pertaining to GAL/CASA includes: (1) the GAL filed a motion requesting the appointment of a PC, as the parties were unable to make joint decision; (2) the GAL's reports relayed much of the information contained in the record; (3) the GAL recommended that Mother have sole legal custody because the parties had not demonstrated any ability to co-parent, and that from the beginning, the parties would bicker over the smallest of things; (3) the GAL noticed significant concerns about the children's anxiety and trauma over parenting time with Father; (4) Father reported to the GAL he believed the children were coached, but after extensive contact with the children and witnessing their reactions to parenting time, the GAL did not believe the children were coached; (5) the GAL was extremely concerned about the welfare and in particular, mental health of one child in particular; (6) Mother appeared to the GAL to be genuinely fearful of Father; (4) there were allegations of Father threatening harm to the maternal family members, and of taking the children out of the country; and (7) the Court noted that the GAL's testimony and reports were evidence that the parties were utterly unable to cooperate.

In **Anselm v. Anselm**, 146 N.E.3d 1042 (Ind. Ct. App. 2020) *trans. denied*, the Court held that the trial court entered sufficient findings and did not abuse its discretion in awarding Mother primary physical custody of the children; the Court also made other orders regarding child support and medical expenses. Information pertaining to GAL/CASA includes: (1) a GAL was appointed and wrote a report; (2) the GAL recommended that Mother have primary physical custody because she was the primary caregiver; (3) the GAL testified that it was in the children's best interests for Mother to have primary physical custody; (4) the GAL's testimony and report provided ample evidence on the children's best interests.

In **In Re the Paternity Of C.B. and S.B.**, 112 N.E.3d 746 (Ind. Ct. App. 2018), the Court affirmed most of the trial court's findings, which were appealed by both parties on a variety of grounds, but reversed and remanded to the trial court to revisit its order of child support. Information pertaining to GAL/CASA includes: (1) the GAL believed Father loved his children; (2) the GAL noted Father showed great hostility towards Mother and her family; (3) the GAL noted various instances where Father's behavior was excessively hostile; (4) the GAL believed Father did not at all consider how his actions would impact the children and would not admit any wrongdoing; and (5) the GAL believed that Father's actions only created more conflict.

In **Goodman v. Goodman**, 94 N.E.3d 733 (Ind. Ct. App. 2018), the Court affirmed the trial court's order awarding custody of the parties' adopted child to Wife. Information pertaining to GAL/CASA includes: (1) the GAL was appointed and wrote a report; (2) the GAL noted the parties did things together as a family; (3) the trial court ordered the parties to follow certain GAL recommendations.

In **Milcherska v. Hoerstman**, 56 N.E.3d 634, 636, 640 (Ind. Ct. App. 2016), the Court affirmed the probate court's denial of Mother's request to relocate with the parties' eleven-year-old child from Mishawaka, Indiana to Texas. The facts of the case indicate that the probate court appointed a guardian ad litem, who filed a motion for a temporary restraining order requesting that the child remain in Indiana with Father until after the hearing. The guardian ad litem also testified at the final hearing. On the issues of the child's wishes and best interests, the Court noted the guardian ad litem's testimony that the child was very intelligent and mature, the child received her emotional stability from Father, her home life in Texas had caused anxiety, she had many friends and family in Mishawaka, and it was in her best interest to remain with Father in Indiana.

In **Steele-Giri v. Steele**, 51 N.E.3d 119, 125-28 (Ind. 2016), a dissolution custody modification case, the Indiana Supreme Court affirmed the trial court's denial of Mother's motion for custody modification. The facts of the case note that the guardian ad litem filed a report, which the trial court reviewed. In its discussion of the custody modification factors, the Court noted evidence in support of its opinion from the guardian ad litem's report on: (1) the child's relationship with Father and her paternal grandparents; (2) the child's relationship with the daughter of Father's live-in girlfriend; and (3) information from the teacher on the child's adjustment to school.

In **Montgomery v. Montgomery**, 59 N.E.3d 343, 353-55 (Ind. Ct. App. 2016), the Court reversed the trial court's order modifying custody of the child from Father to Mother as there was insufficient evidence of a substantial change in circumstances justifying modification or that

modification was in the child's best interests. The facts of the case indicate that the trial court appointed a guardian ad litem for the child, the guardian ad litem testified at the hearing, and her report was entered into evidence. In explaining its opinion, the Court found it important that the guardian ad litem recommended the child continue in the custody of Father. Mother noted that the guardian ad litem's report was filed over a year before the hearing and the guardian ad litem could not testify with certainty that her recommendation would be the same because she had not interacted with the parties and the child since that time, but the Court said that since Mother was seeking to modify custody, it was Mother's burden to demonstrate that something happened in the year since the report was filed that could or would have changed the guardian ad litem's recommendation.

In **In Re Paternity of J.G.**, 19 N.E.3d 278, 283 (Ind. Ct. App. 2014), the trial court appointed a guardian ad litem for the child on Father's motion to modify the child's custody from Mother. The court held an evidentiary hearing, at which the guardian ad litem testified. The guardian ad litem prepared a report, but it was never offered or admitted into evidence as an exhibit. The trial court modified custody of the child to Father, and the Court affirmed the trial court's judgment. The Court found the evidence supported the trial court's conclusions that modification of custody was in the child's best interests and that there had been a substantial change in one or more of the custody factors at IC 31-14-13-6. Among other evidence, the Court noted the guardian ad litem's testimony that: (1) the child was very happy at the school where Father had enrolled her, she achieved good grades, and had no trouble at school; (2) the child was "really close" to Father and Stepmother; (3) Father's home was appropriate and the child had her own bedroom; (4) the child had appropriate clothing and maintained good hygiene in Father's care; and (5) the stability offered by Father was preferable to the instability offered by Mother. In response to Mother's argument that the guardian ad litem's report was inadmissible hearsay, the Court noted that: (1)) at points during the guardian ad litem's testimony, Mother objected based on hearsay, and the trial court sustained those objections; and (2) the report was never admitted into evidence as an exhibit, so the Court did not need to consider whether the report itself was hearsay.

In **L.C. v. T.M.**, 996 N.E.2d 403, 410 (Ind. Ct. App. 2013), the Court reversed the trial court's denial of Mother's petition to modify custody of the two children, ages eleven and thirteen, from shared physical custody with Father and Mother to sole physical custody with Mother. The Court opined that the evidence presented at the hearing clearly established that a modification of custody would be in the children's best interest, and that Mother established that a substantial change had occurred in at least one of the custody factors. The Court specifically noted evidence from the guardian ad litem's report and testimony, which included: (1) the children's wishes had changed and they had become distressed at the negative, disparate treatment they were receiving when compared to the better treatment that their step-siblings were receiving at Father's home; (2) the children were "adamant" that the custody and parenting time arrangement should change and they felt that the environment at Father's home was "hostile"; (3) the children had good reasons for desiring the change in custody; (4) if Father held firm to his current position, the children would be so angry and disenfranchised that it would irreparably harm their relationship with him.

In **Swadner v. Swadner**, 897 N.E.2d 966, 976-77 (Ind. Ct. App. 2008), a dissolution of marriage case, the Court (1) held that the trial court had the authority to appoint a guardian ad litem to represent and protect the best interest of the child; (2) stated that it could not conclude that the guardian ad litem exceeded her authority when, in her preliminary recommendations, she recommended that if the unborn child was a boy, the child's middle name should be Wakefield, a traditional middle name in the Father's family; and (3) did not conclude that Mother was permanently bound by the guardian ad litem's recommendation concerning the middle name, where the parties had agreed to adopt the preliminary recommendations, but each had reserved the right to argue against them at the final hearing. The Court concluded that the trial court had not abused its discretion in determining that joint custody was appropriate and noted that the guardian ad litem had recommended joint legal custody and parenting time in excess of the minimum established by the Parenting Time Guidelines for Father. The Court affirmed the trial court's determination that Mother's request to relocate with the children was not in the children's best interests, citing the guardian ad litem's evidence and recommendation against granting Mother's request.

The Court affirmed the trial court's orders regarding communication between the parents and parenting time in **In Re Paternity of G.R.G.**, 829 N.E.2d 114, 121-23(Ind. Ct. App. 2005), a paternity parenting time and child support modification case. A guardian ad litem was appointed to represent the child. The guardian ad litem issued a report and recommendations and also testified. The father appealed the trial court's order that the parties communicate only in writing absent an emergency, alleging that the order was against the evidence presented at trial and was an abuse of discretion. The Court quoted the guardian ad litem's testimony and held that the evidence was sufficient to support the trial court's findings that the parents were unable to effectively communicate with each other, which supported the court's order that they communicate only in writing. On appeal Father also argued that the trial court abused its discretion by not awarding him parenting time on midweek evenings. The Court noted that the trial court's order stated, "Visitation is ordered pursuant to the Guardian Ad Litem's report, because it is the alternative to continued conflict of the parents." The Court opined that the trial court had not erred in entering the parenting time order in accordance with the guardian ad litem report because the order took into account the child's best interests.

In **Cunningham v. Cunningham**, 787 N.E.2d 930, 936 (Ind. Ct. App. 2003), a dissolution custody modification case, the Court held that, despite the opinions of the court appointed family therapist custody evaluator and the guardian ad litem, the trial court's decision to deny Father's petition for modification was supported by the evidence. The Court noted that, although the guardian ad litem spoke with all family members concerned in the custody evaluation, he did not speak with any of the children's teachers or school counselors, despite the fact that the decline in the older child's school performance was a primary issue in the case. The Court also noted that neither the custody evaluator nor the guardian ad litem addressed the fact that Father's fiancée and her thirteen-year-old son had begun residing with Father.

In **Haley v. Haley**, 771 N.E.2d 743, 748 (Ind. Ct. App. 2002), a dissolution custody modification case, Mother challenged the court appointed special advocate's testimony as being "odd and unsubstantiated." The Court declined to make a determination concerning the court appointed special advocate's credibility but noted that it was highly important to point out that the trial

court found apparent bias in the court appointed special advocate's report and yet still ruled in favor of Father's custody modification petition.

G. Guardian ad Litem Role in Adoption Cases

Indiana case law discusses the GAL's role and duties in adoption cases. For example, in In Re Adoption of J.L.S., 908 N.E.2d 1245 (Ind. Ct. App. 2009), the trial court appointed a GAL for the child in an adoption case when the court learned that one of the adoption petitioners had been found guilty of aggravated battery and attempted murder. The facts of the case include: (1) the GAL prepared a report for the adoption hearing; (2) the trial court and the attorney for the adoption petitioners read the report; (3) the GAL testified at the adoption hearing; (4) the GAL appealed the trial court's denial of the adoption petition, which was based on the trial court's interpretation that the adoption was precluded due to the petitioner's criminal convictions; (5) the GAL argued that the statute in question **(IC 31-19-11-1(c))** violates the child's substantive due process right to familial integrity by robbing him of an individualized determination of his best interests; (6) the Court reversed the trial court's decision and remanded the case for further proceedings.

In In Re Adoption of E.L., 913 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2009), the trial court had appointed a GAL for the child when the putative father objected to the stepfather's adoption of the child. The GAL recommended that the stepfather's adoption petition be denied and that the putative father's paternity should be established. In its decision, the Court reminded the parties that the trial court could not approve the proposed adoption unless it first found the adoption was in the child's best interest, and stated:

> The GAL appointed to represent [the child's] interests has objected to such a finding, meaning the adoption is by no means a foregone conclusion, and whether paternity can be established in [the putative father] is a live controversy between the parties. We emphasize that the GAL has a continuing responsibility, on remand, to advocate [the child's] best interest and to continue to object to any proposed adoption that the GAL finds to be not in [the child's] best interest.
> E.L. at 1281 n.5.

See also In Re Adoption of Infants H., 904 N.E.2d 203, 208 (Ind. 2009), in which the Court noted that the trial court appointed a GAL who supplied a home study of the adoption petitioner's home in New Jersey which had been prepared by a person in New Jersey. The Court commented that the GAL never expressed an opinion on whether the adoption was in the children's best interests but did testify that she saw no reason the court should not grant the adoption.

IC 31-19-16-7, an Indiana postadoption visitation privileges statute, states that the provisions of IC 31-32-3 [juvenile law] concerning the representation, duties, liability, and appointment of a GAL or Court Appointed Special Advocate apply to proceedings under the postadoption visitation privileges chapter (IC 31-19-16). A GAL or Court Appointed Special Advocate may recommend a postadoption contact privileges agreement for the adoption court's approval.

IC 31-19-16-2. IC 31-19-16.5-6, an Indiana postadoption sibling contact statute, states, "[t]he provisions regarding the representation, duties, and appointment of a guardian ad litem or court appointed special advocate by a juvenile court described under IC 31-32-3 apply to postadoption contact proceedings under this chapter." In In Re Adoption of T.J.F., 798 N.E.2d 867 (Ind. Ct. App. 2003), the Court found that the trial court improperly denied the adoptive parents' motion to dismiss the GAL's and Office of Family and Children's Motion to Permit Biological Sibling Visitation.

H. Guardian ad Litem Role in Guardianship Cases

No guardianship statute delineates the GAL's duties in a guardianship proceeding. It is reasonable that practitioners look to the juvenile law and dissolution statutes concerning GALs for guidance. See IC 31-9-2-50; IC 31-33-15-1 through 3; IC 31-17-6-1 through 9.

In State Ex. Rel. Keating v. Bingham, 121 N.E.2d 727 729-30 (1954), the Indiana Supreme Court distinguished a GAL from the attorney for the guardian, stating that a GAL is appointed to represent the ward in some particular litigation and further that the GAL is not a party to the main action but is an officer of the court brought into the case by the appointment and order of the court to render services pursuant to the duty imposed on him by the court.

See also Carr v. Carr, 685 N.E.2d 92, 94-95 (Ind. Ct. App. 1997), in which the facts disclose that the GAL appointed for an incapacitated adult nursing home patient made observations and gave recommendations to the court. Practitioners are cautioned that, unlike custody proceedings, no guardianship statute allows a GAL report which contains hearsay to be admitted into evidence when a party objects. Practitioners should ascertain the individual court's policy on this issue. Some courts allow the Guardian ad Litem's report in a guardianship case to come into evidence if the dissolution statutory requirements for Guardian ad Litem reports, outlined at IC 31-17-2-12(c), are met.

There are several examples of cases in which the facts note that a GAL or Court Appointed Special Advocate served in a guardianship case. In In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002), in which the Indiana Supreme Court cited recommendations in the Court Appointed Special Advocate's report as providing ample support for the trial court's judgment granting the stepfather's guardianship petition despite the father's objection to the guardianship. See also Hinkley v. Chapman, 817 N.E.2d 1288 (Ind. Ct. App. 2004), in which the Court of Appeals included in the facts of the case that the GAL, who had reviewed the child's psychological evaluation and other information, testified that it was in the child's best interests to appoint the child's adult sister and her husband as the child's guardians due to the child's educational deficits while in the mother's custody.

In In Re Guardianship of Hickman, 805 N.E.2d 808, 821-24 (Ind. Ct. App. 2004), *trans. denied*, the Court affirmed the trial court's judgment appointing permanent guardians of the person and the property of Josephine Hickman, an incapacitated adult. On appeal, the Court addressed three issues, including whether the trial court abused its discretion by admitting certain testimony of the GAL. The Court found that the appellant had waived the arguments raised on appeal of this issue by failing to make a contemporaneous objection to the admission of the evidence at trial on

those grounds. Notwithstanding waiver, however, the Court noted that Indiana courts had not addressed the admissibility of a GAL's opinion in a guardianship case. After discussing statutory provisions regarding GALs in child custody matters and the guardianship statutes' lack of provisions regarding the admissibility of the GAL's recommendations, the Court found that it did not need to decide the admissibility of a GAL's opinion in this case. The Court stated that, even assuming the trial court abused its discretion by admitting the evidence, any error caused by the GAL's testimony before the court and the advisory jury was harmless. The Court commented that, when a case is tried to the bench, it is presumed on appeal that the trial court ignored inadmissible evidence in reaching its judgment. The Court noted, however, that it did not mean to suggest that statements and other submissions from a GAL made before a nonadvisory jury were not completely subject to the rules of evidence for their admissibility.

I. GAL Role Practice Tips

It is important to remember that, in all family law cases, the GAL's role differs from the roles of a custody evaluator, parenting time supervisor, mediator, or parenting coordinator.

The GAL will frequently do some or all of the following activities in investigating the child's situation for the purpose of representing and protecting the child's best interests:

- Review the court's legal file, confidential file, and exhibits
- Listen to the court recording of the most recent hearing
- Conduct visits to the homes of each party, including checking for cleanliness, safety, functioning utilities and appliances, and food supply
- Interview the child (if age appropriate)
- Interview the parties to the case and significant other persons who live in the parties' households
- Conduct criminal history checks in the city or county where the parties live (Note that GALs do not have access to Indiana State Police records or F.B.I. records)
- Obtain and review DCS reports which have been substantiated regarding the child, as authorized by IC 31-33-18-2, and obtain and review DCS reports for other children in the parties' households if the children's parents or guardians consent
- Interview the child's school teacher and/or school staff members and review school records
- Interview the child's counselor (and parties' counselors if parties consent) and obtain and review counseling records or reports from counselors
- Review available custody evaluation reports
- Observe the child in the presence of both parties if distance and court orders so permit
- Observe the child at school and/or day care
- Interview the day care provider and one to three personal references for each party
- Confirm parties' employment and leases for the parties' houses or apartments
- Review medical records and/or interview medical providers for the child (and parties if parties consent), especially when health issues are a factor in the case
- Note and research the child's regular prescription medications (and parties' medications if parties consent)

- Provide referrals for social, educational, and other services for the child and parties
- Give on the spot advice to parties to remedy unsafe home situations and rectify problems during parenting time exchanges
- Prepare a report, file it with the court and distribute it to attorneys and unrepresented parties if authorized to do so by the court
- Prepare and file needed motions to facilitate GAL representation and address or respond to legal issues involving the child
- Attend depositions, mediations, and negotiations to obtain information and provide input on the child's best interests
- Help to negotiate and sign agreements
- Testify in court, subpoena and question witnesses for the GAL, offer exhibits, cross-examine witnesses, make legal arguments, file trial briefs and memoranda of law, and submit proposed findings of fact and conclusions of law

The GAL's role in a settlement agreement is not specifically addressed by Indiana statutes or case law; their role likely varies from court to court and county to county. Factors which influence the GAL's role in a settlement agreement include:

- The court's view of the GAL's role;
- The GAL's own view of his or her role;
- Whether the GAL is an attorney or a community volunteer;
- The type of legal proceeding (dissolution, grandparent visitation, paternity, adoption, or guardianship case);
- The issues covered by the agreement (custody, parenting time, child support, property division).

Case law clearly states that the GAL is a party to a divorce case (Deasy-Leas v. Leas, 693 N.E.2d 90 (Ind. Ct. App. 1998); Carrasco v. Grubb, 824 N.E.2d 705 (Ind. Ct. App. 2005), *trans. denied*; J.M. v. N.M., 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*.) It therefore seems very appropriate for the GAL to participate fully in divorce settlement agreements on issues affecting the child's custody, parenting time, and services needed for the child and parents. Sometimes the GAL is an effective person to suggest and convene a settlement negotiation conference because the GAL is likely well informed about each party's strengths and weaknesses. The GAL may be the only person at the settlement conference who has a good relationship with all parties. Attorneys for the parties may choose to involve the GAL in settlement negotiations or, at least, provide a copy of the parties' proposed agreement to the GAL for review and comment before submitting the agreement to the Court. Frequently, the GAL will be able to support the parties' settlement agreement, either by signing the agreement as a party or signifying the GAL's approval of the agreement "as to form." If the GAL does not support the parties' settlement agreement, the GAL should inform the Court by filing a notice specifying the reasons why the GAL does not believe the agreement is in the child's best interests.

Although Indiana paternity case law does not provide that the GAL is a party to a paternity case, case law states that the child is a necessary party to a paternity proceeding, and the child's interests may differ from those of the parents. See Marsh v. Paternity of Rodgers by Rodgers,

659 N.E.2d 171 (Ind. Ct. App. 1995) and Clark v. Kenley, 646 N.E.2d 76 (Ind. Ct. App. 1995). It could be argued that, because the GAL represents the best interests of a party to the case, the GAL should be included in paternity settlement conferences.

In adoption cases, there is no formal recognition of the GAL as a party to the case other than IC 31-19-16-2(5), which states that the GAL's recommendation should be included in a postadoption contact agreement that is submitted for the Court's approval. The GAL may be helpful in negotiating a settlement agreement in an adoption case because the GAL may be the only person who has knowledge of the strengths and weaknesses of each party. Some Judges extend dissolution case law, which states that the GAL is a party to the case, to all types of legal proceedings, including grandparent visitation, paternity, adoption, and guardianship cases. These Judges expect that the GAL will be a party to negotiating all settlement agreements on all cases and that the GAL will sign settlement agreements.

J. Practice Tips for the Guardian ad Litem Report

The Guardian ad Litem (GAL) report format will vary, depending on the individual GAL appointed to serve on the child's case. Practitioners should also be aware of or inquire as to what the parties and the Court expects.

The GAL report will probably include the following information:

- The names of the persons interviewed or observed (observation usually refers to young children who are not formally interviewed)
- The relationship of the persons interviewed to the child (for example, maternal grandmother, neighbor, teacher)
- The date of the last contact the GAL had with each person
- A list of the records reviewed by the GAL
- A summary of the GAL's activities on the case (for example, making home and school visits, listening to a recording of a hearing, making telephone calls to relatives)
- A summary of the most relevant information about the child(ren) and parties
- A summary of the most relevant information received from collateral sources such as medical and school records, interviews with teachers, counselors, and non-party relatives
- A summary of the observations made of the facilities and condition of each party's home
- A summary of the GAL's viewpoint of the child's best interests
- Recommendations (if requested by the Court) regarding the legal issues before the Court (for example, custody, parenting time, whether a guardianship petition or adoption petition should be granted)
- Recommendations of social services and other services that are in the child's best interests
- Attachments of the most relevant documents gathered by the GAL

The GAL's report is usually a summary, not a date-by-date contact log, so some information the GAL received will probably not be included in the report. The focus of the GAL report is to represent the child's best interests, so the report may not include all of the concerns expressed by the parties.

Most often, the GAL will mail the completed report directly to the attorneys for parties and unrepresented parties. The GAL usually also files the report with the court. Some courts prefer that attorneys and unrepresented parties review the GAL report at the court office and file a motion to receive a copy of the report.

The Indiana Rules on Access to Court Records, effective January 2021, provide for certain rules regarding confidentiality about GAL and CASA reports. Rule 5(b) provides that guardian ad litem/court appointed special advocate reports, Parenting Coordinator reports, and custody evaluation reports may be excluded from public access. GAL Reports should be filed confidentially under this Rule.

K. Practice Tips for the Guardian ad Litem in Court

Separation of witnesses. The purpose of separation of witnesses is to promote truthful testimony by preventing witnesses from hearing or discussing the testimony of other witnesses. One of the first issues on the role of the Guardian ad Litem (GAL) at trial is whether the GAL is subject to a separation of witnesses. The answer to this question may turn on whether Indiana law states or the Judge views the GAL as a legal party to the case. Ind. Evidence Rule 615 requires the Court to order witnesses excluded and separated at the request of a party or on the Court's own motion. Evid. R. 615 states that this rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. See J.M. v. N.M., 844 N.E.2d 590, 601 (Ind. Ct. App. 2006), *trans. denied*, a dissolution case where the Court found no merit in the father's argument that the GAL's presence at the hearing was barred by the separation of witnesses order.

Even if the GAL is not a legal party to the case (as in a paternity, adoption, or guardianship case), the GAL could be shown to be essential to the presentation of a party's cause. A party seeking to prevent a witness from exclusion as "essential to the presentation of the party's cause" must convince the trial court that the "witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney would not effectively function without the presence and aid of the witness." Hernandez v. State, 716 N.E.2d 948, 950 (Ind. 1999). The determination of whether a witness qualifies for exception from a separation of witnesses order due to being essential to a party's cause is within the trial court's discretion and is subject to review for an abuse of discretion. Fourthman v. State, 658 N.E.2d 253, 257 (Ind. Ct. App. 1995), cited in Long v. State, 743 N.E.2d 253, 257 (Ind. 2001). Other arguments which support a decision to allow the GAL to be present for the entire hearing are: (1) the GAL is an officer of the Court; (2) the GAL's prior submission of a report lessens the likelihood that the GAL will substantially change his or her testimony due to hearing the testimony of others; (3) the Judge may ask the GAL to continue representing the child's best interests after the hearing so excluding the GAL could impede the GAL's access to relevant information.

GAL court testimony. The GAL's role at the Court hearing will likely depend on whether the GAL is represented by an attorney. Dissolution, custody, and paternity statutes provide for the GAL to be represented by an attorney. IC 31-15-6-6 (dissolution); IC 31-17-6-5 (custody

action); IC 31-32-3-4 (paternity). If the GAL is represented by an attorney, the GAL's attorney will usually call the GAL as a witness, ask direct examination questions and offer the GAL report into evidence. Then, attorneys for the parties and the Judge will have the opportunity to cross-examine the GAL.

If the GAL is not represented by an attorney, an attorney for a party will usually call the GAL as a witness. The court could possibly call the GAL as a witness if no attorney does so (or if none of the parties is represented), but courts should not call witnesses except in extraordinary circumstances. See Isaac v. State, 590 N.E.2d 606 (Ind. Ct. App. 1992) (Judge called witness against defendant; Court reversed because Judge took sides.) A Judge's discretion to question witnesses is greater in bench trials than in jury trials. Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006) *trans. denied*. See also Rosendaul v. State, 864 N.E.2d 1110 (Ind. Ct. App. 1997), in which the defendant's conviction was affirmed because the Judge's questioning of the defendant in a bench trial aided fact-finding responsibilities and was done in an impartial manner. The GAL, if unrepresented, should ask to take the witness stand, be sworn, make a statement, offer exhibits, and answer cross-examination questions from attorneys for the parties and the Judge. The GAL may request to be excused from the hearing after testifying or may remain at Court to obtain additional information for ongoing best interests representation of the child.

IV. Release of the Guardian ad Litem

In dissolution cases and custody actions, the Guardian ad Litem (GAL) serves on the case until removed by Court order. IC 31-15-6-4 (dissolution); IC 31-17-6-3 (custody action).

The timing of the GAL's removal from a case varies according to the child's needs in the individual case. Some GALs request to be removed from the case as soon as the GAL report has been filed with the Court. Other GALs continue to serve on the case until after the court hearings have been concluded, the court has issued its judgment, and monitoring of the court's orders has been completed. Usually, the GAL will request to be removed from the case when the GAL believes that the legal issues pertaining to the child's custody and parenting time have been resolved.

If the court has appointed the GAL on a guardianship case, and the guardianship has been terminated, the GAL's role on the case ends due to the termination order. The Court lacks authority to issue ongoing orders after the guardianship has been terminated. See **In Re Guardianship of K.T.**, 743 N.E.2d 348, 351 (Ind. Ct. Ap. 2001), in which the Court said that the trial court lost jurisdiction over the case when it closed the guardianship. There is no provision in the guardianship statute for the trial court's continuing jurisdiction over a closed guardianship case.

Persons serving as GALs should only remain on cases that require active investigation or monitoring. Once these roles are completed, GALs should seek to be released; courts should grant the release of GALs as soon as is practicable, as the continued use of a GAL for light monitoring of a case expends GAL resources which Indiana does not possess in abundance.

GALs may seek clarification of their role or continued scope of duties after their investigation is complete by filing a motion for clarification with the appointing court.

GALs should always seek a formal order releasing them from any further duties.