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STUDENT ESSAY

NO CHAMPION FOR CHILDREN: TENNESSEE'S RULE 40A AND THE APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY PROCEEDINGS

Austin Elizabeth Kupke

I. Introduction

On February 17, 2009, the Tennessee Supreme Court adopted a provisional rule to be used in child custody cases in all courts in the State of Tennessee.¹ The rule, Rule 40A, concerns the “Appointment of Guardians Ad Litem in Custody Proceedings” and dictates the appointment, role, powers, duties, rights, limitations, and costs of guardians ad litem in limited types of cases “including but not limited to divorce, paternity, domestic violence, contested adoptions, and contested private guardianship cases.”² Rule 40A is provisional in that it was passed with the intention of it lasting only a limited time while the mechanics of the rule were evaluated and commented on by the general public and members of the bench and private bars.³

Guardians ad litem are individuals, frequently lawyers, whose “role generally is to assist the court in protecting [a] child’s best interests rather than to advocate

¹ Press Release, Administrative Office of the Courts, Supreme Court Adopts Provisional Rule for *Guardians Ad Litem* in Parenting Cases (Feb. 17, 2009), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/GAL%20Provisions.pdf> (on file with author).

² TENN. SUP. CT. R. 40A.

³ In Re: Tennessee Supreme Court Rule 40A (Apr. 30, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2009/Order%20Extending%20Comment%20Period%20and%20Exp%20Date%20of%20Rule40A.pdf> (on file with author).

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the child's wishes."⁴ In Tennessee, guardians ad litem are appointed by the court in situations where the rights of the child cannot be fairly represented by the legal counsel of her parent(s) or the State (in dependency, neglect or child abuse cases).⁵ Before Rule 40A was provisionally enacted, other statutory provisions guided and managed the appointment of guardians ad litem in child custody cases.⁶ Supreme Court Rule 40 controlled child dependency, neglect, or abuse cases, and continues to control these types of cases today.⁷

Rule 40A was passed with the intention of reducing the number of guardians ad litem appointed by the courts and to more clearly delineate the duties of a guardian ad litem once appointed.⁸ Additionally, the Supreme Court passed Rule 40A in an effort to control the actions of guardians ad litem and subsequently "reduce the overall costs to the parties" when a guardian ad litem becomes involved in a child custody case.⁹ The actions taken by the Supreme Court, however, destroy the very important role of a guardian ad litem in a custody proceeding.

⁴ Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL L. 183, 196-97 (2005) (citing ABA Child Custody Pro Bono Project, Appointment Laws in Divorce Cases (Aug. 2003)).

⁵ *Higgins v. Higgins*, 629 S.W.2d 20, 22 (Tenn. Ct. App. 1981); TENN. SUP. CT. R. 40. See generally Walton Garrett, *When Should a Guardian ad Litem be Appointed in a Custody Case?*, TENNESSEE FAMILY LAW LETTER, Nov. 1992, Vol. 7 No. 1, at 14 (hereinafter "Garrett, *When Should Guardian Ad Litem Be Appointed?*").

⁶ See TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. SUP. CT. R. 13.

⁷ TENN. SUP. CT. R. 40; see also Leslie Kinkead, *Supreme Court Rule 40A-Not to be Confused with Rule 40*, TBA FAMILY SECTION NEWSLETTER (Mar. 2009), http://www.tba.org/sections/JuvenileLaw/newsletters/juvenilelaw_e-news_032009.htm#Anchor-Fourth-11481.

⁸ Press Release, *supra* note 1.

⁹ *Id.*

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This note will show that the provisional passage of Supreme Court Rule 40A was a reactionary move to limit guardians ad litem in response to a rising distrust of them in custody proceedings. The result is a rule that weakens the role of guardians ad litem and vitiates their ability to advocate for children to the extent that the position is almost moot. While the role of guardian ad litem is inherently fraught with challenging issues of definition and delegation of responsibility,¹⁰ it is an essential function of the legal system and of child advocacy. Rule 40A, in all practical application, “takes the teeth” out of the guardian ad litem appointment and frustrates the representation of the party that has the most to gain or lose in custody cases: the child. If children are to have adequate protection during the trials of custody proceedings, guardians ad litem must be left with the tools necessary to advocate for them as their attorneys.

II. Development of the Law

While children in delinquency proceedings have a due process right to legal representation in court, “the [Supreme] Court has not recognized a comparable right to counsel for children in other civil contexts.”¹¹ Many states have laws that ensure representation for children in abuse and neglect proceedings, due to the passage of federal legislation aimed at protecting children in those situations.¹² For child custody cases, however, the question

¹⁰ Atwood, *supra* note 4, at 183-86.

¹¹ *Id.* at 187 (referencing *In re Gault*, 387 U.S. 1 (1967)). In *In re Gault*, a juvenile was arrested and adjudicated delinquent in juvenile court without, amongst other things, counsel. The Supreme Court held that the child’s 14th Amendment rights had been violated as a result. *In re Gault*, 387 U.S. 1 (1967).

¹² See generally Atwood, *supra* note 4, at 188-89; Tara Lea Muhlhauser, *From “Best” to “Better”: The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 633-36 (1990).

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of when children need or should have legal representation is left to the discretion of the judges who oversee their cases.¹³ Supreme Court Rule 40A is the rule that now controls this function of the legal system in Tennessee.

Before Rule 40A was passed, the Tennessee Code as well as the Tennessee Rules of Civil Procedure controlled the appointment of guardians ad litem in child custody cases.¹⁴ In relevant part, Rule 17.03 of the Tennessee Rules of Civil Procedure states

[t]he court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.¹⁵

Additionally, the Tennessee Code provides that “in an action for dissolution of marriage involving minor children, upon its own motion or upon the motion of either party, the court may appoint a guardian ad litem for any minor child of the marriage.”¹⁶

The appointment of a guardian ad litem in child custody cases arises out of the duty of a judge to rule in the best interests of a child.¹⁷ Generally, because children are

¹³ Walton Garrett, *Representation of Children in Custody Cases*, 7 TENNESSEE FAMILY LAW LETTER, Apr. 1987, Vol. 1 No. 6, at 9 (hereinafter “Garrett, *Representation of Children*”); see Atwood, *supra* note 4, at 193.

¹⁴ TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

¹⁵ TENN. R. CIV. P. 17.03.

¹⁶ §36-4-132.

¹⁷ See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1788-89 (1996) (citing *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993)).

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not parties in custody litigation, they do not require legal representation; the presumption is that the parents are in the best position to advocate for their own child and see that his or her best interests are protected.¹⁸ For this reason, Tennessee case law dating back to 1918 rejects the necessity of guardians ad litem where a parent of a child can adequately speak for the child's interests.¹⁹ Without an agent like the guardian ad litem, however, the court may not always know whether it has all of the requisite information to determine which parent will provide the best care for the child, even if his or her parents are advocating for him or her.²⁰ While the parents are party to these procedures, there is a legitimate concern that the necessary information must be "untainted by the parochial interests of the parents."²¹ Traditionally in Tennessee, in order to ensure that the proper information is garnered, the judge may in her discretion appoint a guardian ad litem.²²

Case law in the state of Tennessee indicates the importance of judges utilizing their ability to appoint guardians ad litem when appropriate. In the 1981 case *Higgins v. Higgins*, the Court of Appeals of Tennessee recognized that the trial court judge had not relied upon the system of using a guardian ad litem at the trial level of a custody case.²³ The trial judge had refused to hear testimony from three minor children whose parents were getting divorced and arguing over their custody.²⁴ This judge awarded full custody of the children to their father, with whom the two daughters had considerable trouble

¹⁸ Garrett, *Representation of Children*, *supra* note 13, at 9.

¹⁹ Kenner v. Kenner, 201 S.W. 779, 783 (Tenn. 1918).

²⁰ Stuckey, *supra* note 17, at 1788-89.

²¹ *Id.*

²² See Garrett, *When Should Guardian Ad Litem Be Appointed?*, *supra* at 14; see also TENN. CODE ANN. §37-1-149 (2010); TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

²³ *Higgins*, 629 S.W.2d at 22.

²⁴ *Id.*

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living.²⁵ On appeal, the custody decision was reversed. The appellate opinion acknowledged the trial judge's "commendable desire to protect [the children]" from testifying on their behalves but nonetheless found that "the rights of the children were not properly represented" by their parents whose "intensely hostile attitudes" prevented them from being sufficient advocates.²⁶ The appellate court called for a complete evidentiary retrial with instruction to appoint a guardian ad litem for the children so that their best interests would be protected.²⁷ Such precedent makes clear the importance of children having a voice in the legal arena of custody battles.

When a guardian ad litem is appointed, the costs incurred are generally to be billed as court costs to the parties to the legal suit.²⁸ Rule 17.03 of the Tennessee Rules of Civil Procedure dictates that the fee for guardians ad litem should be "reasonable."²⁹ In Tennessee, courts have often looked to Tennessee Supreme Court Rule 8, Rule of Professional Conduct Rule 1.5 for determining what constitutes a "reasonable" fee for a guardian ad litem, directing the court to consider such factors as "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," as well as "the fee customarily charged in the locality for similar services."³⁰

In *Keisling v. Keisling*, which was decided in 2005, the court turned to another Tennessee case from 1980, *Connors v. Connors*, to determine a reasonable fee for a

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ JANET LEACH RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW §8-7 (Matthew Bender 3d ed. 2008) (1997). In some counties, however retainers are paid up front.

²⁹ TENN. R. CIV. P. 17.03.

³⁰ TENN. SUP. CT. R. 8, RPC 1.5.

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guardian ad litem.³¹ There, trial judge appointed the guardian ad litem in the Keislings' case due to the "animosity" between the parents; this judge recused herself during the trial, however, and was replaced by a judge who immediately indicated skepticism towards the need for the guardian ad litem's appointment.³² This judge held that the guardian ad litem would only receive the \$1,500 as compensation even though her billed amount was \$15,825.³³ This was in part due to accusations that the guardian ad litem had "charged an excessive rate" and had not conducted the duties the family or the court expected of a guardian ad litem.³⁴

The appellate court remanded the issue of the guardian ad litem's compensation to the trial court with instructions to follow *Connors* and Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5.³⁵ The judge explained that serving as a guardian ad litem "is often a difficult and delicate task" and that the guardian ad litem must be "afford[ed] ... leeway to investigate" what the best interests of a child might be.³⁶ Still, the judge cautioned, the potential for abuse of discretion, "as where the guardian ad litem undertakes tasks or assumes a role that is overly-expansive"³⁷ is considerable, and that discretion must be kept in check.

³¹ *Keisling v. Keisling*, 196 S.W.3d 703, 729-30 (Tenn. Ct. App. 2005) (citing *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980)).

³² *Id.* at 726-27. "The Court is going to treat you as counsel for the children.... There's a vast difference between a guardian ad litem on the one hand and counsel for the children on the other hand . . . I have no interest in your duties as guardian ad litem, not at all, but I do have some interest in your duty as counsel for the children." *Id.* (quoting J. Inman).

³³ *Id.* at 727-28.

³⁴ *Id.* at 728.

³⁵ *Id.* at 731.

³⁶ *Id.* at 730.

³⁷ *Keisling*, 196 S.W.3d at 730.

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The *Keisling* case illustrates two important issues in the appointment of guardians ad litem in child custody cases: defining reasonable compensation and establishing what the appropriate boundaries are for guardians ad litem. Supreme Court Rule 40A was developed with these two concerns in mind.

Before Rule 40A, Rule 40 was the only Supreme Court Rule managing the appointment of guardians ad litem, but the rule was explicitly limited to juvenile court neglect, abuse, and dependency proceedings.³⁸ Rule 40A was passed under the authority of Tennessee Rules of Appellate Procedure Rule 1, which defines the scope of the Rules of Appellate Procedure.³⁹ The Advisory Comment to Rule 1 explains that under the Tennessee Code §16-3-402—§16-3-407, and §16-3-601, the Supreme Court of Tennessee is empowered to establish “rules of practice and procedure in all courts” of Tennessee.⁴⁰ The Tennessee Supreme Court may maintain control over procedure in the court system as a part of the separation of powers doctrine, which is included in the Tennessee Constitution.⁴¹ According to Buck Lewis, the President of the Tennessee Bar Association, Rule 40A was enacted by the Tennessee Supreme Court because “using guardian ad litem[s] [sic] in litigation is really more of a court (or) judicial function...the court wanted to have an opportunity to express itself on the issue.”⁴²

Rule 40A was adopted as a provisional rule with original effective dates of May 1, 2009 through April 30,

³⁸ TENN. SUP. CT. R. 40.

³⁹ TENN. R. APP. P. 1.

⁴⁰ *Id.* at Advisory Comment (referencing TENN. CODE ANN. §16-3-402—§16-3-407 (2009), and TENN. CODE ANN. §16-3-601 (2009)).

⁴¹ TENN. CONST. art. II, §1.

⁴² Bill Dries, *High Court Takes a Conservative Stance on GALs*, MEMPHIS DAILY NEWS, Feb. 26, 2009, <http://www.memphisdailynews.com/editorial/Article.aspx?id=41081> (quoting Buck Lewis, President of the Tennessee Bar Association).

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2010, which was intended as a time to solicit comments “regarding the operation, effect, and efficacy of this rule.”⁴³ On April 30, 2010, the date the rule was set to expire, the court issued an order extending the effective date of the rule until December 31, 2010 and asking “the bench, the bar, and the public” to submit written comments regarding Rule 40A to a clerk of the Tennessee Appellate courts.⁴⁴ In August of 2010, the Tennessee Supreme Court established a Rule 40A Work Group to parse the provisional rule and consider the written comments that were received in response to the court’s solicitation for comment.⁴⁵ The Work Group submitted a report of their findings on December 15, 2010, as a new proposed Rule 40A that addressed some of the group’s concerns.⁴⁶ On December 21, 2010 the Tennessee Supreme Court again extended the effective date of Rule 40A.⁴⁷ Finally, the court filed another order explaining the progress of the rule and again extending the deadline for the rule “until further notice of the Court” on January 21, 2011.⁴⁸ The court, in conjunction with the order, posted the Work Group’s proposed revision of 40A.⁴⁹ The purpose of this order was to extend the period for public comment until March 14, 2011 so that the

⁴³ TENN. SUP. CT. R. 40A §12.

⁴⁴ In Re: Tennessee Supreme Court Rule 40A (Apr. 30, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/proposals/2009/Order%20Extending%20Comment%20Period%20and%20Exp%20Date%20of%20Rule40A.pdf> (on file with author).

⁴⁵ Press Release, *supra* note 1.

⁴⁶ *Id.*

⁴⁷ In Re: Tennessee Supreme Court Rule 40A (Dec. 21, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Order%20Extending%20Eff%20Date%20Rule%2040A.pdf> (on file with author).

⁴⁸ In Re: Tennessee Supreme Court Rule 40A (Jan. 21, 2011), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Rule%2040A.%20Final%20Comment%20and%20Extension%20Order.1.21.11.pdf> (on file with author).

⁴⁹ *Id.*

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bench, bar, and public could respond to the Work Group's proposed rule.⁵⁰

The response to Rule 40A in the past few years is reflected in the comments received by the court since the original rule was passed in February of 2009. These comments, which are on the Tennessee Supreme Court's website, indicate what the future of Rule 40A might look like.

III. Current Policy

Keisling, discussed above, is one of many cases in Tennessee that indicate the tension that can arise when the duties of a guardian ad litem are not elucidated. The language of the release by the Administrative Office of the Courts dated February 17, 2009 that accompanied the adoption of Rule 40A makes clear that 40A was passed in an effort to gain control of certain by-products of guardian ad litem appointments. The release quotes Tennessee Supreme Court Justice Janice Holder as saying "[t]he guidelines outlined in Rule 40A should result in a reduction of the frequency of appointments of guardians ad litem...[and] give those appointed as GALs clearer direction about the duties a GAL must perform as well as limitations on a GAL's involvement in a case."⁵¹ Justice Holder also states that Rule 40A "should reduce the overall costs to the parties of a GAL's involvement in their case."⁵²

To these ends, Rule 40A contains language that restricts the appointments of guardians ad litem in custody proceedings. Section 3 of Rule 40A urges that "[c]ourts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint

⁵⁰ *Id.*

⁵¹ Press Release, *supra* note 1.

⁵² *Id.*

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guardians ad litem shall be exercised sparingly.”⁵³ Some have conjectured that this provision was a response to a contention that guardians ad litem “were being used excessively” and that “there was an appearance the Judges were simply rubber stamping the Guardians Ad Litem opinions.”⁵⁴ One response⁵⁵ to the limitations of Section 3, which guides guardian ad litem appointments, is that it conflicts directly with the discretion of the judge as outlined in the Supreme Court’s very own Rule 13, which dictates that the court “*shall*” appoint a guardian ad litem in proceedings to terminate parental rights.⁵⁶

In addition to limitations on the appointment of guardians ad litem, there is the most drastic, and most criticized, alteration to the traditional role of guardians ad litem: Section 9. Section 9 controls “Participation in Proceeding” and radically changes the abilities of guardians ad litem in practice.⁵⁷ Traditionally “[a]t trial the guardian ad litem functions as if the child had party status ... [h]e or she may make opening and closing statements, call, examine, and cross-examine witnesses and make motions.”⁵⁸ Under the proposed Rule 40A, however, Section 9(a)(4) provides that “a guardian ad litem may not

⁵³ TENN. SUP. CT. R. 40A §3(b).

⁵⁴ David E. Caywood, TBA Family Section Newsletter, New Guardian Ad Litem Rule 40A (Mar. 2010), http://www.tba.org/Sections/FamilyLaw/newsletters/Family_032010.htm.

⁵⁵ Comment from Williamson County Bar Association, Inc. in response to call for comment on Rule 40A (Feb. 24, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁵⁶ TENN. SUP. CT. R. 13 §1(d)(2)(D) (mistakenly cited in comment as Supreme Court Rule 17(d)(2)(D)) (emphasis added). This provision also violates judicial discretion per the Tennessee Code and the Tennessee Rules of Appellate Procedure. TENN. CODE ANN. §36-4-132 (2010); TENN. R. CIV. P. 17.03.

⁵⁷ Caywood, *supra* note 54.

⁵⁸ Garrett, *Representation of Children*, *supra* note 13, at 10.

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take any action that may be taken only by an attorney representing a party[;]" this includes "making opening and closing statements, examining witnesses in court, and engaging in formal discovery."⁵⁹

Many of the comments received in response to Rule 40A express concern about the tension the rule creates between a lawyer's ethical duty to represent his or her client adequately and the parameters of the guardian ad litem created by Rule 40A. The Williamson Bar Association reacted to Rule 40A with concern, stating "[a]n attorney appointed as a guardian ad litem can only carry out their [sic] duty if sufficiently empowered to protect a child's best interest."⁶⁰ Yet others reacted to the provisional rule with appreciation for tighter restrictions on the role of guardians ad litem. In the words of one private investigator who specializes in domestic cases and child custody, guardians ad litem pre-Rule 40A would "abuse" their positions, which in his opinion they frequently did not understand or fulfill.⁶¹ Rule 40A, according to him and another handful of commenters, appropriately limits the guardian ad litem's ability to frustrate child custody proceedings.⁶²

IV. Analysis

⁵⁹ TENN. SUP. CT. R. 40A §9(a)(4).

⁶⁰ Comment from Williamson County Bar Association, Inc. in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁶¹ Comment from Mitchell E. Davis in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁶² *Id.*

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There is some support to indicate that the creation of Rule 40A was a “push back” of sorts against guardians ad litem following certain legislative and judicial events. One highly publicized Tennessee case in 2007, *In re Adoption of A.M.H.*, involved a young Chinese-American girl whose foster parents sought to terminate her biological parents’ parental rights and adopt her.⁶³ The case went to the Tennessee Supreme Court, where Justice Barker’s opinion openly criticized the guardian ad litem in the case, casting doubt on her basis for decisions concerning the child and her handling of the relationship between the biological parents and their daughter.⁶⁴

Another case decided at the trial court level before the passage of Rule 40A was *Andrews v. Andrews*, in which a couple engaged in a bitter divorce suit had a guardian ad litem appointed whose costs over the course of her representation of the child added up to over \$160,000.⁶⁵ The case was decided at the trial level in December 2008, and the opinion of the judge decries the “weighty” part that the guardian ad litem played throughout the divorce proceedings.⁶⁶ In the appellate opinion, decided after the

⁶³ *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007); *see also* Dries, *supra* note 42.

⁶⁴ *In re A.M.H.* at 803-804. The Court here rejected the foster parents’ argument that irreparable damage to the child’s relationship to her biological parents had occurred due to the length of time since she had seen them, lamenting “the only evidence of substantial harm arises from the delay caused by protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings.” *Id.* at 812. *See also* Bad Cop News, The Supreme Court Scolds Judge Robert L. Childers Instead of Removing Him from the Bench (Jan. 28, 2007),

<http://badcopnews.wordpress.com/2007/01/28/tennessee-supreme-court-scolds-judge-robert-l-childers-instead-of-removing-him-from-the-bench/>.

⁶⁵ *Andrews v. Andrews*, No. W2009-00161-COA-R3-CV, 2010 Tenn. App. LEXIS 553, *35 (Tenn. Ct. App. Aug. 31, 2010).

⁶⁶ *Id.* at *67.

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adoption of Rule 40A, the court affirmed the trial court's ruling awarding the guardian ad litem only \$7,500, a fraction of what she charged and, having the benefit of Rule 40A, makes a point to reference Rule 40A in so ruling.⁶⁷

In addition to these two cases heard directly before the passage of Rule 40A and regarding the over-involvement and costly services of guardians ad litem, the House of Representatives in Tennessee was also busy with the roles of guardians ad litem.⁶⁸ In 2007 and 2008, Tennessee's General Assembly introduced two bills that automatically appointed guardians ad litem for children in custody proceedings, and two bills were introduced that aimed at delineating the roles and costs of guardians ad litem.⁶⁹ Rule 40A was therefore introduced at a time when the Tennessee legislature was already taking action to address some of the complicated nuances of the role of guardians ad litem.

There is no doubt that the role of the guardian ad litem is difficult to navigate. At the most basic level a guardian ad litem can be described as an "investigator, champion, and monitor."⁷⁰ While the fluidity of the guardian ad litem role makes it difficult to define and has led to some unfortunate results, there is no reason to, as one

⁶⁷ *Id.* at n.31.

⁶⁸ Dries, *supra* note 42.

⁶⁹ H.B. 319, 105th Gen. Assem., Reg. Sess. (Tenn. 2007), 2007 Bill Text TN H.B. 319 (LEXIS); H.B. 2820, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text TN H.B. 2820 (LEXIS); H.B. 3284, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text H.B. 3284 (LEXIS); H.B. 2904, 105th Gen. Assem., 2d Sess. (Tenn. 2008), 2007 Bill Text H.B. 2904 (LEXIS).

⁷⁰ Muhlhauser, *supra* note 12, at 638 (citing Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 28-30 (1976); Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100 (1984) (citation errors are the author's)).

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commenter on Rule 40A says, “thr[o]w the baby out with the bathwater.”⁷¹ While the Supreme Court has a vested interest in seeing that all functions of the court operate justly and efficiently, and Rule 40A was an attempt to remedy some of the problems that had been brought to the Court’s attention, the effect of Rule 40A is that children have no advocate to speak for their interests in those instances where parents are too embroiled in their own disagreements to know what is best for the child.

Rule 40A, Section 3 weakens the power and responsibility of judges in custody cases, where traditionally it has been solely within their discretion to recognize the situations where the child needs representation. Rule 40A, Section 4, which concerns how guardians ad litem are appointed, gives parties to the suit the power to appeal the appointment of a guardian ad litem.⁷² This provision frustrates the discretion of the court by allowing parties who the judge may feel cannot represent the interests of the child to challenge that judge’s appointment. If efficiency is truly a goal of Rule 40A, this section also allows for a process that can take days as parties file motions to have the appointment of a guardian ad litem struck down.⁷³ Finally, the language of Rule 40A, Section 3 does not leave enough to the discretion of the judge. The rule provides sixteen suggested conditions for when a guardian ad litem may be considered,⁷⁴ with no language giving the judge the discretion to find

⁷¹ Comment from Andrew Cate et al. in response to call for comment on Rule 40A (Nov. 18, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁷² TENN. SUP. CT. R. 40A §4(e).

⁷³ Comment from Hickman County Bar in response to call for comment on Rule 40A (Feb. 24, 2010), <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁷⁴ TENN. SUP. CT. R. 40A §3(c).

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appointment otherwise appropriate. In giving such specific instances, the challenge to the appointment of a guardian ad litem is too easily made.

Most harmful to children, however, is Section 9 of Rule 40A. Not only is the guardian ad litem prevented from calling witnesses or filing motions, but the report of the guardian ad litem, which traditionally has been provided to the court after the guardian ad litem has done an investigation into the best interests of the child, “shall not be provided to the court” unless the parents to the suit consent.⁷⁵ It is easy to envision the situation where both parents see unfavorable or embarrassing information in the guardian ad litem’s report, perhaps particularly in the circumstances where the report and representation for the child is most needed, and thus refuse to consent to the report being submitted to the court. Without this report, the guardian ad litem has absolutely no means of presenting the child’s best interest to the court.

The guardian cannot call witnesses such a psychologist or teacher, and cannot speak in court unless called as a witness by one of the parties,⁷⁶ who again, may wish to limit the voice of this neutral third party who has had access to their child. Even if the guardian ad litem is called as a witness, he or she is still prohibited from relaying information obtained from third parties due to inadmissibility of hearsay evidence.⁷⁷ Without the ability to file motions on behalf of children in custody settings, even when the guardian ad litem is aware of something that must be done for his or her client, he or she must appeal to one party’s attorney or the other, nullifying the neutrality that a guardian ad litem should have in custody proceedings.⁷⁸

⁷⁵ TENN. SUP. CT. R. 40A §9(d).

⁷⁶ TENN. SUP. CT. R. 40A §9(f).

⁷⁷ *Id.*; *Toms v. Toms*, 98 S.W.3d 140, 144 (Tenn. 2003).

⁷⁸ Comment from Linda B. Hall in response to call for comment on Rule 40A (Nov. 29, 2010),

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The revisions proposed by the Rule 40A Work Group cut back some of the restrictions that Rule 40A placed on the role of the guardian ad litem. Most importantly, the proposed alterations insist on viewing a guardian ad litem as an *attorney* and not a “special master” or “witness.”⁷⁹ The Work Group’s directive that a guardian ad litem be a lawyer for the child ensures that the guardian ad litem can act in the child’s best interest and assuage the concerns that a child’s voice is not being heard in proceedings that drastically affect the child’s life. During a time when a child is likely be upset, nervous, and torn between the interests of his parents and his own interests, it is vital that the child have a separate entity who can advocate on the child’s behalf beyond submitting a one-dimensional report and without needing to be called as a witness whose testimony may be barred by the rules of evidence.

V. Conclusion

In conclusion, although Rule 40A attempted to step in and control a very important function in child custody cases, the appointment of guardians ad litem, the Court took the concerns and criticisms of the position too far. The problems with Rule 40A stem from reacting too much to the “few spoiled apples” in guardian ad litem appointments, and does not consider the sensitive nature of the guardian ad litem position. While the role of guardians ad litem may need a more clearly defined position, that position must be some form of an attorney for the child, with no less than full array of powers and abilities that any attorney would have to represent his or her client. Hopefully, with further comment from the legal community, the Supreme Court

<http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Comments-SC%20Rule40A.pdf> (on file with author).

⁷⁹ In Re: Tennessee Supreme Court Rule 40A, *supra* note 48, at page 9.

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will amend Rule 40A to better serve the most vulnerable party in child custody cases: the child.