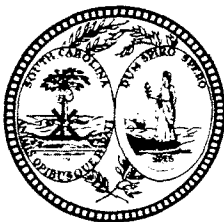


Reg. 5043



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 17, 1995

Ms. Sylvia Lynn Gillotte, Esquire
Division of Guardian ad Litem Programs
Office of the Governor
103 South Pine Street, Suite 204
Spartanburg, South Carolina 29302

RE: Informal Opinion

Dear Ms. Gillotte:

As legal counsel for the South Carolina Guardian ad Litem Program, you have requested the opinion of this Office regarding the authority of a court-appointed Guardian ad Litem to seek the assistance of a private investigator in an abuse or neglect proceeding initiated by the South Carolina Department of Social Services ("DSS"). The issue has arisen in several contexts, each of which will be described below.

1. During the course of a DSS court action involving the sexual abuse of a minor child, the Family Court issues a restraining order prohibiting a Party Defendant (e.g., the child's stepfather) from having unsupervised visits with the minor, who is in the physical custody of another Party Defendant (e.g., the natural mother). Following the issuance of the Court's Order, and while the Guardian ad Litem and DSS are still actively involved in the case, the Guardian receives information indicating that the "mother" is allowing the "stepfather" to have unsupervised access to the child.

Question: It appears that this contact generally occurs late at night, while the mother is working third shift. Can the Guardian ad Litem seek the services of a private investigator to gather evidence to document the violation of the Restraining Order? If so, how much information concerning the case can the Guardian ad Litem share with the investigator?

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2. DSS is considering recommending placement of several children with relatives and closing its case. Prior to the determination hearing regarding this matter, the Guardian ad Litem receives information that indicates that the relatives have serious substance abuse problems and are involved in criminal activity which is ongoing. DSS is unable or unwilling to verify this information and is most interested in closing its case.

Question: Can the Guardian ad Litem use a private investigator to assist in the investigation of these issues? Does it make a difference if the relatives live in or out of state?

3. A Guardian ad Litem is court-appointed to represent two minor children in a DSS action. The older child is placed in foster care, while the younger child is placed in a group home in another county. The older sibling confides to the Guardian ad Litem that she has received a letter from her younger sibling detailing his forced involvement in "ritualistic" activity with adults and other children at the group home.

Question: Can the Guardian ad Litem use a private investigator to conduct an initial investigation into the younger sibling's allegations, with the intention of turning this information over to law enforcement if verified? If not, are there other alternatives which might be viable?

Following a discussion of the statutes and legal principles applicable to the issues, each of your questions will be addressed.

Discussion

In each scenario, jurisdiction of Family Court has been obtained pursuant to S. C. Code Ann. §20-7-736(A) (1976, as revised 1985), which statute grants Family Court exclusive jurisdiction over actions involving children who are alleged to have been injured or endangered by a parent or guardian. Jurisdiction begins when a Petition for Removal is filed with the Court by the local child protective service agency (DSS). §20-7-736. In such cases, §20-7-110(A) requires that

[i]n all child abuse and neglect proceedings:

(A) Children shall be appointed legal counsel and a guardian ad litem by the Family Court. Counsel for the child shall in no case be the same as counsel for the parent, guardian or other person subject to the proceeding or any governmental or social agency involved in the proceeding.

To assist in implementing this very important statutory mandate, the General Assembly created a statewide Guardian ad Litem Program "to provide training and

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supervision to volunteers who serve as court appointed special advocates for children in abuse and neglect proceedings within the Family Court, pursuant to Section 20-7-110." S. C. Code Ann. §20-7-121 (1993 Cum. Supp.). The program is administered by the Office of the Governor. Section 20-7-122 enumerates the responsibilities and duties of the guardian ad litem:

The responsibilities and duties of the guardian ad litem are:

- (1) to represent the best interests of the child;
- (2) to advocate for the welfare and rights of a child involved in an abuse or neglect proceeding;
- (3) to conduct an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs;
-
- (5) to provide the family court with a written report, consistent with the rules of evidence and the rules of the court, which includes without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case;
- (6) to monitor compliance with the orders of the family court and to make the motions necessary to enforce the orders of the court or seek judicial review;
- (7) to protect and promote the best interests of the child until formally relieved of the responsibility by the family court.

Section 20-7-124 provides that the guardian ad litem is to represent the best interests of the child and provides authorization for the guardian ad litem to undertake various tasks; among others, these include:

(A) The guardian ad litem is charged in general with the duty of representation of the child's best interests. ... The obligation of the guardian ad litem to the court is a continuing one and continues until formally relieved by the court.

(B) The guardian ad litem is authorized to:

- (1) conduct an independent assessment of the facts;
- (2) confer with and observe the child involved;
- (3) interview persons involved in the case;
-
- (5) make recommendations to the court concerning the child's welfare:

(6) make motions necessary to enforce the orders of the court, seek judicial review, or petition the court for relief on behalf of the child.

(C) The guardian ad litem is authorized through counsel to introduce, examine, and cross-examine witnesses in any proceeding involving the child and participate in the proceedings to any degree necessary to represent the child adequately.

As stated in Cumbie v. Cumbie, 245 S.C. 107, 139 S.E.2d 477 (1964), "[i]t is the duty of the court, as well as that of the guardian ad litem and his attorney, to see that the rights of minor [sic] and incompetents are protected." 245 S.C. at 112. Put another way, "[a] guardian ad litem is a representative of the court appointed to assist it is properly protecting the interests of an incompetent person." Shainwald v. Shainwald, 302 S.C. 453, 457, 395 S.E.2d 441 (1990). In Shainwald, the court found the following from Bahr v. Golanski, 80 Wis.2d 72, 83, 257 N.W.2d 869, 874 (1977) to be instructive:

The requirement that the children have independent legal representation does not in any way suggest that the parents or the trial court were unmindful of the children's welfare. Rather, it reflects the conviction that the children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. **Properly understood, therefore, the guardian ad litem does not usurp the judge's function; he aids it.** (Emphasis added by South Carolina Supreme Court.)

Shainwald, 302 S.C. at 457. Shainwald was a child custody case; the court held that "the extent to which a guardian ad litem is permitted to testify and give an opinion or recommendation in a child custody case is left to the sound discretion of the trial judge." 302 S.C. at 457. The court then warned:

However, judges should be mindful of the duty of the guardian ad litem to advocate and fully protect the interests of his ward. Any exercise of discretion by the court which unreasonably interferes with the performance of that duty amounts to an abuse of discretion. Judges should also be mindful of the fact that a guardian ad litem is not in the true sense an adversary party and the court has a duty to insure that guardians ad litem perform their duties properly and in the best interest of their wards.

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This dicta is but a continuation of the Supreme Court's long-standing view of the law respecting the duty of a guardian ad litem. In Cagle v. Schaefer, 115 S.C. 35, 104 S.E. 321 (1920), the Court quoted from 22 Cyc. 662:

The duty of a guardian ad litem or next friend is to look after the infant's interest and to act for him in all matters relating to the suit as he might act for himself if he were of capacity to do. The guardian ad litem should make a defense of the interests of the infant as vigorous as the nature of the case will admit. His duty requires him to acquaint himself with the rights, both legal and equitable, of his wards and take all necessary steps to defend and protect them, and to submit to the Court for its consideration and decision every question involving the rights of the infant affected by the suit. If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect, as well as made to respond to the infant for the damage sustained.

Cagle v. Schaefer, 115 S.C. at 39-40. See also McIver v. Thompson, 117 S.C. 175, 108 S.E. 411 (1921) and Simpson v. Doggett, 159 S.C. 294, 156 S.E. 771 (1930).

The emerging view as to the role of the guardian ad litem is summarized in 21 S.C. Juris. Children and Families §123:

[T]he guardian ad litem for a child is to act on behalf of the ward to the same extent as an attorney representing a client. This would include adequately investigating the ward's circumstances, consulting with the ward as to the nature of the proceedings and the outcome, gathering evidence to support the ward's claim, presenting the evidence and witnesses in court, and engaging in vigorous advocacy.

That section continues, adding that "[t]he guardian ad litem also has the responsibility to monitor compliance with court orders, namely the child's status before the court, and to intervene if necessary."

In many instances, a guardian ad litem for an allegedly abused or neglected child will be an attorney and will thus be guided by the Rules of Professional Conduct, S.C.A.C.R. 407; because the guardian ad litem in any event should be acting on behalf

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of the child as an attorney would in representing a client,¹ reference to the Rules of Professional Conduct will be instructive.² Rule 1.1 requires that a lawyer "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comments following the text of the rule indicate that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem," Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." The comments following the text indicate that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Certainly these two rules would be persuasive in arguing that a guardian ad litem faced with information as indicated in your three scenarios should investigate the allegations, either personally or by some other means, which could conceivably include employment of a private investigator.

The above-cited statutes relative to the responsibilities and duties of the guardian ad litem call for the guardian ad litem to "conduct an independent assessment of the facts...." §§20-7-122 (3) and 20-7-124 (B)(1). The verb "conduct" has been defined variously as "to introduce, to manage, to command" or "to manage, carry on, control, direct." People v. Hill, 18 Misc.2d 352, 192 N.Y.S.2d 342, 344 (Ct. of Special Sessions, New York City 1959). In State v. Mahfouz, 181 La. 23, 158 So. 609 (1935), the court stated: "The transitive verb 'conduct,' says Webster, 'stresses the idea of immediate supervision or personal leadership.' It means to lead, to have direction of, to manage, to direct, to carry on." 158 So. at 609. To conduct an assessment of the facts, given the definitions employed in these judicial decisions, could well mean to direct, in part, the investigation undertaken by personnel such as private investigators (and quite possibly other professionals better equipped than the guardian ad litem to assess some aspect of the situation relevant to a particular child). While these statutes define the role of the guardian ad litem, the statutes "do not specify the precise method that should be utilized in performing this role." People in Interest of J.E.B., 854 P.2d 1372, 1374 (Colo. Ct.

¹See Matter of Scottie D., 406 S.E.2d 214 (W.Va. 1991) ("a guardian ad litem has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian ad litem were in a normal lawyer-client relationship." 406 S.E.2d at 221.).

²This Office ordinarily defers to the Ethics Advisory Committee of the South Carolina Bar in the interpretation of Rules of Professional Conduct. It might be advisable for additional input to be sought from that Committee as to certain of your questions.

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App. 1993) (termination of parental rights case). Judicial decisions from other jurisdictions are helpful.

The Supreme Court of Wisconsin in In Interest of Brandon S.S., 179 Wis.2d 114, 507 N.W.2d 94 (1993), reiterated the principle that a guardian ad litem is to function as an attorney would and is to advocate for the child's best interests. The court detailed the guardian ad litem's responsibility as doing "whatever a prudent attorney 'would recommend to a competent adult client in the same situation.' The difference between a competent adult's attorney and a guardian ad litem is that the role of the guardian ad litem extends beyond making recommendations to implementing the recommendations." 507 N.W.2d at 99.

The Alaska Supreme Court in Veazey v. Veazey, 560 P.2d 382 (Alaska 1977) was more specific. In this child custody decision, the court stated as to the guardian ad litem:

[A] guardian ad litem appointed pursuant to [statute] is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability. [Cites omitted.] Like any other attorney he should, upon appointment, investigate the facts thoroughly, a responsibility which ordinarily should include home visits and a private interview with the child with no one else present. When he feels it necessary, he should consult with non-legal experts--psychologists, social workers, physicians, school officials, and others. He should exercise his best professional judgment on what disposition would further the best interests of the child, his client, and at the hearing vigorously advocate that position before the court. With this responsibility necessarily goes the power to conduct discovery, to subpoena witnesses and present their testimony, to cross-examine witnesses called by other parties, and to argue his position to the court.

560 P.2d at 387.

Having established the statutory and legal principles by which guardians ad litem may be guided, each of your specific questions will now be addressed.

Question 1

Based on the statutory requirements that a guardian ad litem conduct an assessment of the facts relative to the child(ren) for whom he has been appointed, and in consideration of the judicial decisions which have considered the scope of activities appropriate for the guardian ad litem to conduct his assessment, I am of the opinion that a guardian

ad litem could employ a private investigator if, in his judgment, such employment is necessary to determine facts or circumstances which the guardian ad litem could not obtain himself, due to whatever limitations may be present. If such employment is the only means by which the necessary facts may be gathered, the guardian ad litem might be remiss in carrying out his duties and responsibilities to the child(ren) and to the court if he does not employ a private investigator (or other professional, as the facts may dictate) and conduct a complete and thorough assessment of the facts.

Having determined generally that a private investigator could be employed in appropriate circumstances, the next issue is how much information the guardian ad litem could share with that individual. Rule 1.6 of the Rules of Professional Conduct, as to confidentiality of information, is helpful in this regard.³ Paragraph (a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Paragraph (b) is not relevant here. Clearly, while Rule 1.6 requires confidentiality of information, there are strictly limited instances when some information must be shared. In that regard, Rule 5.3, relative to the responsibilities regarding nonlawyer assistants, is helpful:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) The lawyer is a partner if the law firm in which the person is employed, or has direct supervisory authority over the

³See footnote 2.

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person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The comments to the Rule are instructive:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

While this Office would certainly defer to the advice of the Ethics Advisory Committee in interpreting these Rules of Professional Conduct, it does seem clear that a certain sharing of confidential information with assistants employed in the course of representation will necessarily occur. Most probably, no more information than is absolutely necessary for the assistant (private investigator or other professional) to be able to carry out assigned tasks should be shared; clearly, enough information should be shared so that the private investigator or other professional can competently assess the situation, given the use to which the acquired information will be put.

Question 2

In addition to the foregoing and the obvious need for the guardian ad litem to protect the interests of the children in placement decisions, I would advise that the guardian ad litem could most probably employ a private detective under the circumstances outlined in your second question. I do not see that as an exclusive means of obtaining information about the potential placement, however. At the request of the guardian ad litem, perhaps the court or the local law enforcement agency could make an official inquiry of the law enforcement agency in the jurisdiction to which the child(ren) would be moving, to inquire as to the situation existing in the household there. Depending on the circumstances of placement, perhaps some provisions of the Interstate Compact on the Placement of Children, S.C. Code Ann. §20-7-1980 (1976, revised 1985) would provide a means of obtaining more information about the potential placement.

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Another possible resource would be the Uniform Child Custody Jurisdiction Act, S.C. Code Ann. §20-7-782 et seq. (1976, revised 1985). One of the stated purposes of that act, according to §20-7-784 (8), is to "promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other states concerned with the same child[.]" One possible means of assistance is found in §20-7-818:

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

In addition, §20-7-820 provides:

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The court in its discretion may order that the cost of these services be assessed against particular parties to the action.

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party to the action.

One final, and drastic, possibility would be for the guardian ad litem to request an ex parte proceeding, under seal, with the court to obtain whatever authorization the guardian ad litem might need to obtain or verify information about the relatives which the Department of Social Services is unwilling or unable to verify.

As to your question about whether it makes any difference that the relatives with whom placement is being considered live in or out of this state, certain of the remedies

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just discussed may not be available unless the relatives live out of state. If the employment of a private investigator out of state is considered, consideration should be given to the laws of the foreign jurisdiction as to the employment of a private investigator; for example, a private investigator licensed in this State might not have the necessary jurisdiction or legal capacity to conduct similar inquiries in a foreign state. It might be advisable for the guardian ad litem to involve the court of this state in the process, as an inquiry from a court might carry more weight than a similar inquiry made by a guardian ad litem in the eyes of law enforcement officials in a foreign jurisdiction.

Question 3

As to your question about a guardian ad litem investigating the possibility of ritual abuse occurring with respect to a ward of the guardian ad litem, there appears to be no reason why such could not be treated as any other situation such as those discussed above. Certainly the guardian ad litem himself or herself would have an absolute right to visit the ward and to observe the circumstances existing as to that ward and to take steps to ensure that the best interests of the ward are protected, as discussed above.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that the foregoing has responded to your inquiry as satisfactorily as is possible under the circumstances.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General