2020 WI 72

SUPREME COURT OF WISCONSIN

No. 19-13

In the Matter of the Petition to Amend Supreme Court Rule 35.015 (intro.) and (1), Relating to Qualifications for Appointment as a Guardian ad Litem in an Action Affecting the Family (GAL Qualifications)

FILED

JUL 20, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On April 9, 2019, Senator Roger Roth and Representative Robert Brooks, on behalf of the Joint Legislative Council Study Committee on Child Placement and Support ("Study Committee"), filed a rule petition asking this court to amend Supreme Court Rule (SCR) 35.015 pertaining to the educational requirements for guardian ad litem appointments under ch. 767. The petition asks the court to require all guardians ad litem appointed in family court cases to receive education on the dynamics and impact of family violence.

At a closed administrative rules conference on June 6, 2019, the court voted to solicit written comments and schedule a public hearing. On August 14, 2019, a letter was sent to the standard interested persons list and to the Wisconsin Family Court Commissioners Association, inviting comment on the proposed changes. The court received written comments in support of the petition from: Korey C. Lundin, Family Law Priority Coordinator, and Deedee D. Peterson, Executive Director, Legal

Action of Wisconsin; Delores Bomrad, Judicial Court Commissioner, Washington County Circuit Court; and Mark Fremgen, Circuit Court Commissioner, Dane County Circuit Court. The court received comments opposing the petition from: Tony Bickel, President, Wisconsin Fathers for Children and Families; Kay A. Johnson, Executive Director, the National Alliance for Targeted Parents; and Professor Gretchen G. Viney, University of Wisconsin Law School, together with Attorney Tiffany L. Highstrom, Stafford Rosenbaum, LLP.

The court conducted a public hearing on October 22, 2019. Representative Robert Brooks, Chair of the Study Committee, presented the petition to the court along with Attorney Maureen Atwell, a member of the Study Committee. Professor Gretchen G. Viney, University of Wisconsin Law School, and Kay A. Johnson, Executive Director, the National Alliance for Targeted Parents, spoke in opposition to the petition. Several citizens appeared in support of the petition, sharing personal testimony about challenges they faced navigating the family court system as survivors of domestic violence: Ms. Amy Berens; Ms. Jennifer Mauston; Ms. Megan Paulson; and Ms. Carrie Patzer. Korey C. Lundin, Legal Action of Wisconsin, Inc., Jenna Gormal, Public Policy Coordinator, End Domestic Abuse Wisconsin; and Sue Moen, Safe Harbor of Sheboygan County; also spoke in support of the petition.

The court discussed the petition in a closed administrative conference following the public hearing and again on May 14, 2020, and voted to grant the petition, with the modifications described herein.

A guardian ad litem may be appointed in family court proceedings to serve as an advocate for the best interests of a minor child. Wis. Stat. § 767.407(4). To fulfill this critically important role, the

guardian ad litem must be informed on a myriad of important issues that may affect a family. See Wis. Stat. § 767.407(4) (outlining the responsibilities of a guardian ad litem for minor children in ch. 767 cases). Indeed, a family court guardian ad litem must consider numerous factors that will bear on the court's determination of custody and placement for the minor children. See Wis. Stat. § 767.41(5)(am).

The array of issues arising in family court cases is reflected in our current educational requirements for guardians ad litem under ch. 767. Our current rule requires completion of six "guardian ad litem" education credits, approved by the Board of Bar Examiners (BBE). At least three of those six hours must be approved "family court guardian ad litem education" on any of the following subjects: 1. Proceedings under chapter 767 of the statutes; 2. Child development and the effects of conflict and divorce on children; 3. Mental health issues in divorcing families; 4. The dynamics and impact of family violence; and 5. Sensitivity to various religious backgrounds, racial and ethnic heritages, and issues of cultural and socioeconomic diversity. SCR 35.03(1m)(a).

At the public hearing, Professor Viney favored continuing to give guardians ad litem discretion to select the educational opportunities best suited for their practice. The petitioners acknowledged that a guardian ad litem should be informed on a myriad of issues. Informed by the recommendations of the Study Committee, however, the petitioners maintain that all guardians ad litem in family cases should be required to have some training and education pertaining to family violence. They emphasized that when family violence exists, the

consequences pervade many aspects of a family court proceeding. For example, a finding of interspousal battery as defined in Wis. Stat. § 940.19 or Wis. Stat. § 940.20(1m), or domestic abuse as defined in Wis. Stat. § 813.12(1)(am), is highly relevant to the legal standards applicable to a court's determination of appropriate custody, placement, and visitation. See, e.g., Wis. Stat. § 767.41(2).

The petition proposes that for a lawyer to be eligible to accept an appointment as a guardian ad litem for a minor in a family law action, the lawyer must have taken at least three hours of education specifically addressing the dynamics and impact of family violence. For subsequent appointments, at least one of six required education hours should be on the topic of the dynamics and impact of family violence.

We are persuaded that additional education on the topic of family violence is appropriate to better ensure that guardians ad litem appointed in family law cases are prepared to advocate for the best interests of the child. We opt to increase, by three credit hours, the requirements for accepting an initial appointment as a guardian ad litem under ch. 767, and to require that these three additional credit hours address the topic of family violence. SCR 35.03(1m)(a)4. Therefore, for guardian ad litem appointment orders issued after January 1, 2021, before the lawyer accepts the appointment the lawyer must have completed at least nine "guardian ad litem" education credits, approved by the BBE. Of these nine credit hours three must be approved education on the topic of family violence, and three more of these credit hours must be approved "family court guardian ad litem education" on any of the topics in SCR 35.03(1m)(a). The final three credit hours can be any

type of approved "guardian ad litem" or "family court guardian ad litem" education.

After the lawyer has met this nine credit threshold educational requirement, thereafter, on the date a lawyer accepts a subsequent family court guardian ad litem appointment the lawyer must have completed at least six approved hours of guardian ad litem education during the applicable reporting period. Of these, at least one credit must be approved education on the topic of family violence, and at least two additional credits must be approved family court guardian ad litem education on any of the subjects identified in SCR 35.03(1m). The remaining hours can be any approved "guardian ad litem" or "family court guardian ad litem" education.

The existing provisions in SCRs 35.01(3) and 35.015(2), permitting an appointing court to deem a lawyer "otherwise qualified by experience or expertise" to represent the best interests of a minor, remain unchanged. Therefore,

IT IS ORDERED that, effective January 1, 2021:

SECTION 1. Supreme Court Rule 35.01 (title) and (intro.) is amended to read:

SCR 35.01 Eligibility to accept an appointment under chapter 48 or 938. ~~Commencing on July 1, 1999, a~~ A lawyer may not accept an appointment by a court as a guardian ad litem for a minor in an action or proceeding under chapter 48 or 938 of the statutes unless one of the following conditions has been met:

SECTION 2. A Comment to SCR 35.01 is created to read:

Continuing legal education approved under SCR 35.03(1m) may be used to satisfy the educational requirements of SCR 35.01.

SECTION 3. Supreme Court Rule 35.015 (title) and (intro.) is amended to read:

SCR 35.015 Eligibility to accept an appointment under chapter 767. ~~Commencing on July 1, 2003~~ For guardian ad litem appointment orders issued after January 1, 2021, a lawyer may not accept an appointment by a court as a guardian ad litem for a minor in an action or proceeding under chapter 767 of the statutes unless one or more of the following conditions has been met:

SECTION 4. Supreme Court Rule 35.015(1) is amended to read:

(1) For a lawyer's first appointment commencing on or after January 1, 2021, ~~The~~ the lawyer has attended at least ~~6~~ 9 hours of guardian ad litem education approved under SCR 35.03 during the combined current reporting period specified in SCR 31.01(7) ~~at the time he or she accepts an appointment~~ and the immediately preceding reporting period. ~~At least 3 of the 6 hours shall be family court guardian ad litem education approved under SCR 35.03(1m).~~ The 9 hours shall be allocated as follows:

(a) At least 3 of the 9 hours shall be approved education addressing the topic of family violence.

(b) In addition to the requirement of (1)(a), at least 3 of the 9 hours shall be approved education on any topic identified in SCR 35.03(1m)(a).

(c) The remaining 3 hours may be any type of approved "guardian ad litem" or "family court guardian ad litem" education.

SECTION 5. Supreme Court Rule 35.015(1m) is created to read:

(1m) After a lawyer has satisfied the initial 9 credit threshold in 35.015(1) and for any subsequent appointments, the lawyer has

attended at least 6 hours of guardian ad litem education approved under SCR 35.03 during the combined current reporting period specified in SCR 31.01(7) and the immediately preceding reporting period. The 6 hours shall be allocated as follows:

(a) At least one of the 6 hours shall be approved education on the topic of family violence.

(b) In addition to the requirement of SCR 35.015(1m)(a), at least 2 more of the required 6 hours shall be approved education on any of the topics identified in SCR 35.03(1m)(a).

(c) The remaining hours can be any type of approved "guardian ad litem" or "family court guardian ad litem" education.

SECTION 6. Supreme Court Rule 35.02 is amended to read:

A lawyer's acceptance of appointment as a guardian ad litem for a minor in an action or proceeding under chapter 48, 767, or 938 of the statutes constitutes the lawyer's representation to the appointing court that the lawyer is eligible to accept the appointment under SCR 35.01 or ~~25.015~~ 35.015, whichever is applicable, and is governed by SCR 20:3.3.

SECTION 7. Supreme Court Rule 35.03(1m)(a)2. is amended to read:

Child development~~ and the effects of conflict and divorce on children~~.

SECTION 8. Supreme Court Rule 35.03(1m)(a)2m. is created to read:

The effects of conflict and divorce on children.

SECTION 9. Supreme Court Rule 35.03(2) is amended to read:

The board of bar examiners shall designate, under SCR 31.05(3) and 31.07 the number of hours applicable to SCR 35.01(1) and (2) and

35.015(1) and (1m) for each approved course of instruction and continuing legal education activity.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 20th day of July, 2020.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 REBECCA GRASSL BRADLEY, J. *(dissenting).* In many actions affecting the family, the court must appoint a guardian ad litem (GAL) to represent the best interests of a minor child. The law requires the GAL to consider 17 statutory factors in advocating for the child's best interests. Wis. Stat. § 767.407(4). Those 17 factors are:

> 1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
>
> 2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> 3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> 4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
>
> 5. The child's adjustment to the home, school, religion and community.
>
> 6. The age of the child and the child's developmental and educational needs at different ages.
>
> 7. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
>
> 8. The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

9. The availability of public or private child care services.

10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

11. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

12. Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b).

12m. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child or any other child or neglected the child or any other child:

a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

13. Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

14. Whether either party has or had a significant problem with alcohol or drug abuse.

15. The reports of appropriate professionals if admitted into evidence.

16. Such other factors as the court may in each individual case determine to be relevant.

Wis. Stat. § 767.41(5)(am). As this comprehensive list illustrates, a GAL undertakes a heavy responsibility to explore the complexities of a child's family relationships and every facet of a child's life and circumstances impacting the child's well-being, and after investigating all of that, to synthesize, digest and draw conclusions from innumerable details in order to construct a recommendation for the court regarding the best interests of the child.

¶2 As a prerequisite for a GAL to serve in this consequential capacity, this court wisely requires a minimum amount of education in topics pertinent to the GAL's responsibilities. Until now, each GAL retained the discretion to select from a number of relevant subject matters. While I support the majority's decision to increase the mandatory minimum number of education credits from six to nine (it should be even higher), the court errs in now requiring GALs to devote one-third of those hours to "family violence." Doing so places a disproportionate emphasis on one factor that certainly impacts some cases, at the expense of the GAL's instruction on a myriad of other considerations the GAL is statutorily required to investigate and weigh in advocating for children's best interests.

¶3 The law recognizes the seriousness of family violence issues in chapter 767 cases. As a former Milwaukee circuit court judge presiding in children's court, I too recognize that family violence is a significant problem for some families in Wisconsin. I appreciate the concerns motivating the recommendation of the

Study Committee on Child Placement and Support, which prompted the filing of this rule petition by the Joint Legislative Council. Requiring more education for Wisconsin GALs is a sensible idea given the monumentally important responsibility these attorneys undertake to advocate for the best interests of children who must adjust to the dissolution of their families. With respect to GALs who encounter family violence as an issue in their caseloads, I trust those attorneys will pursue education designed to assist them in meeting their obligations to the children whose interests they represent. Forcing every Wisconsin GAL to take initial and continuing courses on "family violence," however, will not produce the beneficial change Rule 19-13's proponents desire. Instead, it will hinder the ability of GALs to obtain the education necessary to meet all of their statutory obligations. The law requires GALs to be well-versed in a multitude of complex areas in order to act as effective advocates for the best interests of children. Because I would continue to afford these professionals the discretion to select those courses most pertinent to their practices, I respectfully dissent.

¶4 Wisconsin Stat. § 767.407(4) describes the responsibilities of a GAL as follows:

> The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. The guardian ad litem shall consider the factors under s. 767.41 (5) (am),

> subject to s. 767.41 (5) (bm), and custody studies under s. 767.405 (14). The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.405 (12) and on any parenting plan filed under s. 767.41 (1m). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.41 (5) (am) 2. The guardian ad litem has none of the rights or duties of a general guardian.

Under the previous GAL educational rule,[1] an attorney was eligible to accept a court appointment to serve "as a guardian ad litem for a minor in an action or proceeding under chapter 767" if one of the following two conditions were met:

> (1) The lawyer has attended 6 hours of guardian ad litem education approved under SCR 35.03 during the combined current reporting period specified in SCR 31.01(7) at the time he or she accepts an appointment and the immediately preceding reporting period. At least 3 of the 6 hours shall be family court guardian ad litem education approved under SCR 35.03(1m).
>
> (2) The appointing court has made a finding in writing or on the record that the action or proceeding presents exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise to represent the best interests of the minor.

SCR 35.015 (emphasis added). Wisconsin Supreme Court Rule 35.03(1m)(a) directs the Board of Bar examiners to "approve, as

[1] This matter addresses only GAL appointments in ch. 767 cases. SCR 35.01 covers GAL appointments in chs. 48 and 938 cases. See SCR 35.01.

family court guardian ad litem education, courses of instruction . . . on any of the following subject matters:"

- "Proceedings under chapter 767";
- "Child development and the effects of conflict and divorce on children";
- "Mental health issues in divorcing families";
- "The dynamics and impact of family violence";
- "Sensitivity to various religious backgrounds";
- "Racial and ethnic heritages"; and
- "[I]ssues of cultural and socioeconomic diversity."

SCR 35.03(1m)(a). Until the court granted this rule petition, the court's GAL education requirement afforded GALs the discretion to choose training on whichever topics the GAL perceived to be particularly relevant to the GAL's practice and cases.

¶5 Under Rule 19-13, the court substantially alters the requirements. Instead of six hours of GAL education with at least three of the six hours falling under any of the "family court" topics listed in SCR 35.03(1m), a GAL taking chapter 767 appointments must now complete a total of nine hours with: (1) at least three hours on "family violence," (2) at least three hours on "family court" approved topics listed in SCR 35.03(1m), and (3) the remaining three hours covering any court-approved education. This increases the initial GAL-required education hourly credits by 33 percent, with 100 percent of the increase dedicated to "family violence education." Rule 19-13's requirements continue in perpetuity, with one of the six maintenance credits for every

succeeding reporting period committed to the topic of family violence.

¶6 The court received three letters objecting to this educational rule change. One letter was jointly submitted by two lawyers: Tiffany L. Highstrom, a practitioner and member of the 2018 Legislative Council Study Committee on Child Placement and Support; and Gretchen Viney, a professor at the University of Wisconsin Law School who teaches a course on "Guardian ad Litem Practice in Wisconsin." Attorney Highstrom and Professor Viney strongly opposed the imposition of additional course-specific requirements, pointing out that doing so would eliminate a GAL's ability to "choose the topics of greatest interest or need" from the many listed in Wis. Stat. § 767.407(4) and SCR 35.03(1m)(a). Attorney Highstrom and Professor Viney identified other problems with imposing additional mandatory family violence credits, including the difficulties GALs will have in finding topic-specific seminars to satisfy the new training requirements. Attorney Highstrom and Professor Viney expressed further concerns about mandating family violence education because this directive reduces a GAL's opportunity to become educated on the many other topics a GAL needs to learn.

¶7 Importantly, Attorney Highstrom and Professor Viney explain that the new mandatory training in family violence is not tied to the statutory provisions for "interspousal battery" or "domestic abuse" found in one of the 17 factors, each of which are narrowly defined compared to the much broader concept of "family

violence"——a term the court elects to leave undefined. It is, after all, the obligation of the GAL to address the factors set forth in the statute, as defined by the law. Finally, these objectors remind us that a GAL is an attorney, "not a social worker, private investigator, or law enforcement officer" and "certainly, the [GAL] is not an expert witness." I agree with Attorney Highstrom and Professor Viney that "[w]e may make better use of training time to teach guardians ad litem how to be litigators, not witnesses." The legally prescribed role of the GAL is to be an advocate for the best interests of a child, not an expert on family violence.

¶8 Tony Bickel, the President of Wisconsin Fathers for Children and Families (WFCF) and a member of the Legislative Study Committee, also opposed the GAL educational rule change. He asserted that requiring three hours of family violence training is disproportionate to the overall training GALs must undergo in order to perform their roles effectively, and would detract from a GAL's ability to receive education on the many other factors used in determining the best interest of a child. While noting that domestic violence "is a significant factor in a relatively small percentage of family courts decisions," WFCF is "very much in favor of providing WI GALs with additional training in all of the factors that define a child's best interests." I agree, but imposing too many educational requirements on GALs "could have the unintended effect of dissuading guardians ad litem from taking appointments" given the costs associated with continuing legal education and in

light of the relatively low county pay rates, as Attorney Highstrom and Professor Viney mentioned.

¶9 Kay Johnson submitted the third letter opposing the petition. She commented on her own experience as well as the experiences of five other parents who went through "high-conflict" divorces with a GAL. Ms. Johnson asserted that three hours of additional family violence training will not improve GAL performance because the statutes already reflect the importance of family violence, most GALs already have attended three or more hours of training in family violence, and the issues in these cases are much broader than what can be taught in a three-hour class. Johnson advocates that the solution is not more mandatory training for GALs but instead the involvement of advocates "whose primary profession already includes education in child development and trauma on children who are exposed to the common adversities seen in family court such as parental conflict, parental mental health, loyalty binds, dysfunctional family dynamics and family violence." Emphasizing the importance of the GAL as "the one person who can alert the court to concerns that impact the mental and physical well-being of the child," Ms. Johnson notes that the GAL's role "absolutely includes domestic violence, but it includes much more."

¶10 I agree with the objectors. Requiring three family violence credits as a prerequisite for appointment as a GAL and then requiring one family violence credit every reporting period thereafter may be detrimental to children in many cases. Requiring

a significant portion of initial and maintenance credits on a single topic will prevent GALs from securing education in the other topic areas they must master, which may be more prevalent in their practices and in which they may need more training. Mandating family violence education representing one-third of all education requirements removes the discretion GALs need to properly educate themselves with classes relevant to their caseload, thereby impeding their ability to effectively advocate for the best interests of the children they are appointed to serve. While family violence is undoubtedly a serious problem in some chapter 767 cases, requiring every GAL to obtain these additional hours will hinder a GAL's ability to obtain education on the many other topics necessary to advocate for the best interests of the child. As Attorney Highstrom and Professor Viney put it, "[m]andatory domestic abuse training, while important, should not be required at the expense of a guardian ad litem's training in other areas, such as child development, mental health, and other legal skills such as negotiation and rules of evidence."

¶11 The proposal and the resultant rule are undoubtedly well-intentioned. Family violence is a serious societal problem warranting attention in family court proceedings. Nonetheless, the additional mandatory family violence credits imposed by Rule 19-13 will not solve issues with family violence in chapter 767 matters. The rule change will weaken the overall legal proficiency of GALs in Wisconsin by preventing them from broadening and expanding the knowledge they need to competently serve the children

whose best interests they are appointed to represent. Because I would deny the Joint Legislative Council's petition to amend SCR 35.015, I respectfully dissent.

¶12 I am authorized to state that Justices DANIEL KELLY and BRIAN HAGEDORN join this dissent.