Parenting Evaluators and GALs:
Caselaw Tactics and Strategies
(A presentation for the
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Family Law Section)
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Materials Presented By:
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This course provides caselaw, tactics
and strategies for defending your client
against a GAL or parenting evaluator.
The materials are presented
with an eye towards appeal.

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Ms. Dore's published articles include: *Court-Appointed Parenting Evaluators and Guardians ad Litem: Practical Realities and an Argument for Abolition*, Divorce Litigation, Vol. 18, No. 4, (April 2006); *The Stamm Case and Guardians ad Litem,* King County Bar Association Bar Bulletin, (June 2005); *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 Loyola Journal of Public Interest 41 (2004); *The "Friendly Parent" Concept: Anything But Friendly*, Washington State Bar Association Family Law Section Newsletter, (Fall 2001); and *Parenting Evaluators and GALs: Practical Realities*, King County Bar Association, Bar Bulletin, (December 1999).

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COURSE OUTLINE

A. Introduction

This course provides caselaw, tactics and strategies for defending your client against a guardian ad litem or parenting evaluator. The materials also question the practice of custody evaluations in general. The course is presented with an eye towards appeal.

B. The Evaluation Process

Parenting evaluators and guardians ad litem investigate parenting arrangements and report back to the court with their recommendations.[1] Evaluators are usually psychologists or social workers in private practice; guardians ad litem are often lawyers. Sometimes guardians ad litem are lay persons, for example, with the CASA program.[2] Many, if not most of these persons are hardworking and conscientious.

1. Appointment

It is not uncommon for an evaluator/guardian ad litem to be appointed via nomination or suggestion.[3] With this situation, attorneys can and do advocate for the appointment of evaluators/guardians ad litem whose views are compatible to their cases. For example, if a father claims that the mother is alienating him from the child, the father's attorney might suggest evaluators known to find alienation dispositive.

It is also permissible for attorneys to contact evaluators/guardians ad litem prior to appointment. Such contact is ostensibly to verify availability. Its real purpose can be to "test the waters" regarding one's case. If the reaction is favorable, the attorney will move forward to advocate appointment. If the reaction is unfavorable, the attorney may look elsewhere. Certain attorneys also tend to work with certain evaluators/guardians ad litem. In other words, they develop business relationships. With these circumstances, the person appointed can be pre-aligned to one side.

2. Investigation

Once appointment is made, the lobbying campaign continues. Each side provides the evaluator/guardian ad litem further information, often without informing the other side. This information can include hearsay and other inadmissible materials. The evaluator/guardian ad

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[1] Cf. RCW 26.09.220, RCW 26.10.130 and RCW 26.12.175(1)(b).

[2] The Court Appointed Special Advocate Program (CASA) was founded by a Seattle judge. See: www.nationalcasa.org/htm/about.htm. There are more than 900 CASA programs in operation throughout the country, which are also known as Volunteer Guardian ad Litem Programs. Id.

[3] Evaluator/guardians ad litem are also are appointed via a guardian ad litem list and the court's *sua sponte* ruling.

litem's opinion is thus formed unfettered by the rules of evidence.

Evaluators/guardians ad litem also meet with the parents and their children. Evaluators/guardians ad litem may also conduct or commission psychological (profile) testing for the parents or the children.[4]

3. Report

The results of the investigation, any psychological testing and recommendations of the evaluator/guardian ad litem are summarized in a report filed with the court. In these reports, the evaluator/guardian ad litem may or may not rely on applicable law. This phenomena has been documented in at least one reported decision. See: Gilbert v. Gilbert, 664 A.2d 239, 242 at fn.2 (Vt 1995) (describing survey results). Evaluators/guardians ad litem may also rely on their own personal, social or cultural values. Paul S. Appelbaum, M.D. states:

> When an evaluator recommends [a child's placement] we are learning not about the relative capacities of the parties but, instead, about the relative values of the evaluators.[5]

4. Trial

By the time of trial, the evaluator/guardian ad litem is in the position of defending his report and recommendations. Factors encouraging this phenomenon include the evaluator/guardian ad litem's need to maintain his reputation so as to be able to obtain future appointments.[6] He may also be concerned that the judge will reduce his fees if the recommendation is not accepted. With these concerns, he may have a "hardening" of his opinion, i.e., make it more "black and white." The recommended parent may be portrayed as clearly "good," while the non-recommended parent is portrayed as clearly "bad." Meanwhile, the reality may be in the middle, for example, that each parent is reasonably competent.

At trial, the evaluator's/guardian ad litem's testimony typically includes hearsay provided by the parties.[7] Repeated yet again, it can become distorted; much like the story repeated as part

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[4] See: Margaret A. Hagen, PhD, Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice, Regan Books, Chapter 8 (1997); and Higginbotham v. Higginbotham, 857 S.2d 341, 342 (Fla. App. 2003)(fourteen psychological tests performed on parents, seven psychological tests performed on children).

[5] Paul S. Abbelbaum, M.D., "*The Medicalization of Judicial Decision-Making*", The Elder Law Report, Vol. X, No. 7, February 1999, p. 3, ¶1, last line.

[6] Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case of Abolition*," Loyola Journal of Public Interest, Vol. 3, Spring 2002, p. 146. (www.thelizlibrary.org/liz/ducotearticlejuly2002.pdf).

[7] Cf. Raven Lidman and Betsy Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 George Mason Law Review 255, 279 (1998).

of a children's "telephone game."

Evaluator/guardian ad litem testimony can also include opinions on credibility.[8] The author has seen as a basis for such opinions, a parent's psychological profile, for example, that a parent has an "elevated lie scale." Such testimony can be extremely prejudicial.[9]

The above situation is different from the admission of an investigator's testimony in other contexts. For example, an investigator in a criminal trial would not be allowed to testify as to his or her recommendations regarding conviction, as to hearsay, or as to his or her opinion on witness credibility.[10]

C. Judicial Reliance on Evaluators/Guardians Ad litem

Most judges perceive evaluators/guardians ad litem as neutral investigators or advisors.[11] Evaluator-psychologists can be held in especially high esteem.

With this status, the reports, testimony and recommendations of an evaluator/guardian ad litem can become the factual standard for trial. The burden of the non-recommended party is to disprove a factual standard; the burden of the recommended party is merely to provide corroboration. In Gilbert, supra, the Supreme Court of Vermont found this situation so unfair as to require reversal. Gilbert, 664 A.2d at 242 §C, 243.

A related problem is the legitimization of improper evidence through the evaluator/guardian ad litem. In one record reviewed by this author, the evaluator testified that the mother's family was "manipulative" and dishonest. On cross examination, the evaluator conceded that as a basis for her opinion, she was relying on unsigned written statements provided by the father. Had the father sought to admit these statements through himself, they would have been viewed as hearsay, lacking authenticity and self-serving. But admitted as they were through the evaluator, their thrust (manipulative/dishonest) was instead perceived as fact. Such "fact" was then incorporated into the court's decision; the child was removed from the mother's primary

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8 Id.

9 Cf. Marriage of Luckey, 73 Wn. App. 201, 208, 868 P.2d 189 (1994) ("the use of profile testimony is unfairly prejudicial"); and State v. Carlson, 80 Wn. App. 116, 123 at ¶2, 906 P.2d 999 (1995):

> [No] witness may give an opinion on another witness' credibility . . . An expert opinion [on credibility] will not "assist the trier of fact" . . . because there is no scientific basis for such an opinion save the polygraph, and the polygraph is not generally accepted as a scientifically reliable technique. (footnotes omitted).

10 Lidman and Hollingsworth, *supra*, p. 279, ¶ 2.

11 Cf. Stamm, 121 Wn. App. at 837, quoting Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997) (the guardian ad litem acts as a "neutral advisor to the court").

care.

With the perceived neutrality of evaluators/guardians ad litem, their recommendations are often determinative.[12] But as described above, evaluators/guardians ad litem are not neutral. Once they make their recommendations, they are in the position of defending them; they have conflicts of interest including concerns about their future appointments and fees. The "evidence" they rely on is also inherently unreliable, the result of an off-the-record lobbying campaign. The generally poor quality of custody evaluations has been acknowledged in the literature.[13]

D. The Law in Washington State

The admissibility of evaluator/guardian ad litem testimony is most likely governed by Guardianship of Stamm, 121 Wn. App. 830, 91 P.3d 126 (2004). Other authority includes: Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005); Custody of Brown; caselaw from other states; and recent articles arguing for reform. See: below.

1. Stamm limits admissibility

With Stamm, the Washington State Court of Appeals limited its prior guardian ad litem case, Fernando v. Nieswandt, 87 Wn. App. 103, 940 P.2d 1380 (1997). Fernando had seemed to state that a guardian ad litem's recommendations and testimony are always admissible. 87 Wn. App. at 107-08. Stamm, by contrast, limits admissibility to testimony helpful to the trier of fact under ER 702. A guardian ad litem is not to be a mere vehicle for hearsay. Stamm states:

> We . . . hold that the trial court has discretion under ER 702 to permit a [guardian ad litem] to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may permit the [guardian ad litem] to state the basis for those opinions, including hearsay.
>
> This is not to suggest, however, that all information relied upon by a [guardian ad litem] should automatically be recounted at trial.

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[12] See: Lidman and Hollingsworth, *supra*, p. 297 at ¶2; ("[m]ore often, . . . [t]he judge merely confirms the guardian ad litem's decision").

[13] See: Dana Royce Baerger, et al, *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 Journal of the American Academy of Matrimonial Lawyers, 35, p. 36 ("Concern regarding the generally poor qualify of [child custody evaluations] has prompted some commentators to suggest an end to the use of [evaluations] in divorce proceedings"); Timothy M. Tippins, *Custody Evaluations-Part I: Expertise by Default?,* New York Law Journal, 7/15/03, p. 3, col. 1, Conclusion ("If the custody recommendation is little more than a personal value, judgment, intuition, or an educated guess, rather than a conclusion compelled by reliable and valid scientific research, it should not be received"); and Lidman and Hollingsworth, supra, p. 301 ("Soon thereafter . . . [the parents] learn that this *guardian ad litem* is a mere mortal getting information from here and there, frequently not verifying anything . . .").

> The [guardian ad litem's] testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay. . . .
>
> The testimony of a [guardian ad litem] must be carefully evaluated to ensure it is indeed helpful to the fact finder. An opinion formed on inadequate or unreliable grounds cannot be helpful. (Footnotes omitted).

Stamm, 121 Wn. App. at 837-38.

Stamm also limits admissibility by providing that a guardian ad litem is not to testify as to his or her assessments of credibility. Stamm states:

> [A guardian ad litem's] subjective assessments of credibility are irrelevant. Questions of credibility and the weight to be given to evidence are matters solely within the province of the fact finder. (footnote omitted).

Stamm, 121 Wn. App. at 839.

2. Reversible error

In Stamm, the guardian ad litem testified that her recommendations "depended upon her assessment of credibility" and that her role was to act as the "eyes and ears" of the court. Id. at 840. The jury followed her recommendations "almost to the letter" so that a guardianship was imposed. Id. at 843. Stamm reversed due to the "substantial likelihood" that her testimony had encroached on the jury as fact finder. Stamm states:

> [W]e must conclude the [guardian ad litem's] improper description of her role was prejudicial and there is a substantial likelihood that [her] improper testimony [on credibility] affected the jury's verdicts.

Id. at 844.

3. Stamm's limitations apply to child custody cases, but with less significance

By its terms, Stamm, an adult guardianship case, applies to child custody cases. Stamm states: "In both guardianship and child custody cases, the role of the [guardian ad litem] is the same . . ." Stamm, 121 Wn. App. at 837. Stamm, however, limits the significance of its holdings in the context of a bench trial, which is the forum for a child custody case. Stamm states:

> [W]hat might be appropriate in a written report and testimony to the court is not necessarily appropriate in testimony before a jury ...
>
> [T]he judge can cast a skeptical eye when called for. But a jury has no basis for such discernment. (Spacing changed).

Stamm, 121 Wn. App. at 838-9, and 841.

Stamm's lesser significance for bench trials is, however, *dicta* as Stamm itself was a jury trial.

4. Welfare of J.M.

In re Welfare of J.M., 130 Wn. App. 912, 125 P.3d 245 (2005) is a parental termination case in which the State was seeking to terminate the mother's rights. The mother's attorney offered no defense to the guardian ad litem and a social worker. Based on their testimony, the trial court terminated the mother's rights. J.M. reversed, holding that the attorney's failure to defend was ineffective assistance of counsel. J. M. also held that reports of non-testifying experts were not admissible as substantive evidence. J.M. states:

> ER 705 provides that material relied on by a testifying expert in reaching an opinion may be discussed. ER 703 provides that facts and data upon which a testifying expert bases an opinion, if of a type reasonably relied upon by experts in the particular field in forming opinions, need not be admissible in evidence. ER 705 says the expert may disclose the facts he or she relied on. But ER 705 is not a mechanism for admitting otherwise inadmissible evidence. An expert's use of the written reports of absent witnesses is not substantive evidence; they are admissible solely to show the grounds upon which the testifying expert's opinion is based. (Citations omitted).

J.M., 130 Wn. App. at 924-25.

4. Custody of Brown

In Custody of Brown, 153 Wn.2d 646, 105 P.3d 991 (2005), the petitioner had failed to object to the recommendations of a parenting evaluator and a guardian ad litem at trial. Brown, 153 Wn.2d at 650 and 655. With this and other circumstances, Brown held that the petitioner's due process rights were not violated "[in] this case." Id. at 655-6.

E. Other States

Caselaw from other states includes the following: Toms v. Toms, 98 S.W.3d 140, 144 (Tenn. 2003) (guardian ad litem reports were hearsay; trial court erred to rely upon the reports); C.W. v. K.A.W., 774 A.2d 745, 749 (Pa. Super. 2001) (the trial court's reliance on the guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a nonjudicial officer"); Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001) (the guardian ad litem so tainted the family court decision, the wife was denied due process of law); S v. S, 571 N.W.2d 801, 809 (Neb. App. 1997), overruled on other grounds (no merit in giving credence to guardian ad litem opinion based on hearsay); In Re B.S. and J.S., 829 P.2d 939, 940 (Mont. 1992) (hearsay elicited from the guardian ad litem should not have been considered); Gilbert v. Gilbert, 664 A.2d 239, 243 (Vt. 1995) (error to rely on guardian ad litem report based on hearsay); Pirayesh v. Pirayesh, 359 S.C. 284, 596 S.E.2d 205 (2004) (reversing because the guardian ad litem's recommendation was not the product of an independent, balanced and impartial investigation); Hastings v. Rigsbee, 875 So.2d 772, 777 (Fla.2d DCA 2004) (reversing because the trial court delegated its authority to the "parenting coordinator" who improperly acted as finder of fact); In Re Schiavo, 780 S.2d 176, 179 (F1. App. 2001)(affirming decision to proceed without a guardian ad litem because "a guardian ad litem . . . might cause the process to be influenced by hearsay"); Heistand v. Heistand, 673 NW.2d 541, 550 (Neb. 2004) (error to admit guardian ad litem's opinion testimony and related hearsay where guardian ad litem had not qualified as an expert); John A. v. Bridget M., 79 N.Y.S.2d 421, 427 (2005) (noting "ongoing debate" as to the proper role of expert psychological opinions in custody litigation) and Higgenbotham v. Higgenbotham, 857 So.2d 341, 342 (Fla. App. 2003) ("it is difficult to grasp how it is in the best interest of the child to deplete the resources of the family [with a $20,000.00 parenting assessment]").

F. Reforms

Proposed reforms have ranged from eliminating evaluators/guardians ad litem altogether to instituting changes to insure the quality and proper use of the reports. Matrimonial Commission Report to the Chief Judge of New York, February 2006, p. 46 (www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf); and Ducote, supra

Perhaps the most common reform has been to establish evaluation standards, for example, the GALR's. Another approach has been to redefine the role of guardian ad litem as a lawyer for the child. This approach is used in some states and is also advocated by the American Bar Association[14]

My personal view is that evaluators and guardians ad litem should be eliminated from child

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[14] Margaret K. Dore, *Court-Appointed Parenting Evaluations and Guardians and Litem: Practical Realities and an Argument for Abolition*, Divorce Litigation, Vol. 18, No. 4 (April 2006), pp. 55-56.

custody practice.[15] This is the only reform that will actually eliminate the problems.[16]

G. Articles

Tana Dineen, Ph.D., *Psychologists and Family Law: What if the Clothes have no Emperor*?, June 3, 1999 (www.tanadineen.com/COLUMNIST/Writings/FamilyLaw.html).

Margaret K. Dore, *Court-Appointed Parenting Evaluators and Guardians ad Litem: Practical Realities and an Argument for Abolition*, Divorce Litigation, Vol. 18, No. 4 (2006) (www.margaretdore.com/docs/Dore_Div_Lit_Article_4-06.pdf).

Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, Loyola Journal of Public Interest, 2002. (http://www.thelizlibrary.org/liz/DucotearticleJuly2002.pdf#search=%22Ducote%20%26%20%22guardian%20ad%20litem%22%22).

Robert E. Emery, Randy K. Otto, William T. O'Donohue, *A Critical Assessment of Custody Evaluations: Limited Science and a Flawed System*, Psychological Science in the Public Interest, Vol. 6, No. 1 (2005) (www.psychologicalscience.org/pdf/pspi/pspi6_1.pdf at page 3).

H. Suggested Objections

The following are suggested objections against parenting evaluators and guardians ad litem.

1. The opinion is "not helpful" under ER 702. See: Stamm, 121 Wn. App. at 838:

> The testimony of a [guardian ad litem] must be carefully evaluated to ensure it is indeed helpful to the fact finder. An opinion formed on inadequate or unreliable grounds cannot be helpful

2. Hearsay. See: ER 802, Stamm, Toms v. Toms, supra.

3. The evaluator/guardian ad litem has not qualified as an expert. See: Heistand v. Heistand, 673 NW.2d 541, 550 (Neb. 2004), but see: Stamm, 121 Wn. App. at 837 (approving guardians ad litem as nontraditional experts).

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15 Id.

16 Id.

4. MMPI/Psychological (profile) testing is unfairly prejudicial. See: Marriage of Luckey, 73 Wn. App. 201, 208, 868 P.2d 189 (1994) ("the use of profile testimony is unfairly prejudicial").

5. Opinions on credibility are inadmissable. See: Stamm, 121 Wn. App. at 839 ("a [guardian ad litem's] subjective assessments of credibility are irrelevant"); and State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995):

> [N]o witness may give an opinion on another witness' credibility. . . . An expert opinion [on credibility] will not "assist the trier of fact" . . . because there is no scientific basis for such an opinion save the polygraph, and the polygraph is not generally accepted as a scientifically reliable technique. (Emphasis added; footnotes omitted).

6. No substantial evidence. Cf. J.M., 130 Wn. App. at 924-25 (where GAL relied on reports of absent expert witnesses).

7. Speculation. Some reports contain a recital that test results are "only hypotheses," i.e., an admission that the results are speculative and therefore inadmissible. Cf. Roccobono v. Pierce County, 92 Wn. App. 254, 268, 966 P.2d 327 (1998) (expert opinion disallowed where based on assumptions for which there were no factual basis).

8. Relevance and ER 403. An evaluator may concede that a personality diagnosis has little correlation to parenting. If so, admissibility may possibly be blocked due to lack of relevance or ER 403 ("[a]lthough relevant, evidence may be excluded it its probative value is substantially outweighed by the danger of unfair prejudice . . .").

9. Bias. Bias may be a possible objection where the evaluator/guardian ad litem did not engage in a "balanced and impartial investigation." Pirayesh v. Pirayesh, 359 S.C. 284, 596 S.E.2d 205 (2004)

10. Improper delegation of judicial function. See: Hastings v. Rigsbee, 875 So.2d 772, 777 (Fla.2d DCA 2004) (reversing because the trial court delegated its authority to the "parenting coordinator" who improperly acted as finder of fact).

11. Noncompliance with the GALR's. But see: Esser v. Bobbitt, 139 P.3d 406, unpublished text (7/25/06) (affirmed despite GAL's GALR violations).

I. Available Resources

1. The Rules of Evidence (ER's).

2. Karl B. Tegland, Courtroom Handbook on Washington Evidence, Thompson West 2005 (can be ordered through West at 1-800-344-5009).

3. Online databases. Washington state cases and statutes can be viewed without charge at www.courts.wa.gov/opinions, www.legalwa.org and http://pro.wsba.org/casemaker. Casemaker also gives free access to some state and federal databases.

   Other states have similar online materials. Free copies of United States Supreme Court cases are available at www.findlaw.casecode/supreme.html.

J. Prepare for the Appeal at Trial

During trial, the most important thing you can do to prepare for appeal is to be conscious of the record:

1. Make your objections to the evaluator/guardian ad litem as soon as possible, for example, at the time of appointment.

2. Make an offer of proof when your evidence is excluded.

3. Avoid invited error. If you ask the evaluator/guardian ad litem to testify, it may be difficult to later object to admissibility.

4. State your name when you speak, so the person reading the record knows it's you when you're talking.

5. Identify exhibits by name and number. Reading three pages of transcript about exhibits 1, 2, and 3 is extremely hard to follow. A better way to do it would be: "I am now looking at Exhibit #1, the photograph of the red hat."

6. Describe diagrams, scenes, gestures, non-verbal communication, anything that would not be readily apparent from a transcript, e.g., "may the record show that the witness is talking to her counsel/reading her notes."

7. Be respectful to opposing counsel and witnesses. Otherwise, it looks really bad. Jokes may or may not work, especially from your client.

8. Make your objections as fully as possible, e.g., with the rule number and stated reason for your objection.

9. If the trial judge is hostile, consider asking to make the objection or offer of proof in writing.

10. If appropriate, make a continuing or standing objection.

11. If there have been communications with the court via e-mail, file copies of the e-mails in the court file with proof of service on all parties.

12. Make sure that any recording device is on and working, or bring your own court reporter. Be sure that your court reporter is competent.

13. Draft your findings as ultimate findings and not as evidentiary findings. By this, I mean that you should make a finding as to an "ultimate fact." For example, an ultimate finding would be that "the light was green," whereas an evidentiary finding would be that "the police officer testified that the light was green." This is important because ultimate findings are easier to defend on appeal.

14. If you have lost a motion for summary judgment, make sure that the judge's order complies with RAP 9.12 (the order must list every document considered).

15. Consider moving for reconsideration. If you haven't briefed a theory that you would like to raise on appeal, you can still raise it on reconsideration. You can also offer new evidence if it seems appropriate to do so. The downside is that the trial court may issue a decision even more adverse to your client.

16. Consider moving for relief under CR 60. This is kind of a last resort, but sometimes this is all you have. CR 60 motions require a show cause order. See: CR 60(e)(2); and Washington Practice, Vol. 4.