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# Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes

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# Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes

## I. INTRODUCTION

As the divorce rate has continued to increase over recent decades, more and more children are affected by their parents' divorce. Divorce is a devastating time for children.<sup>1</sup> It is overwhelmingly recognized that children, often torn between parents during the divorce, face many emotional, psychological, and even financial harms due to their parents' decision to end the marriage.<sup>2</sup> Many parents do not discuss with their children the changes that will occur in each child's life.<sup>3</sup> Children's quiet voices are often lost amidst the bickering and sorrow of the parents, preoccupied with their own divorce-related problems.<sup>4</sup> Due to their feelings of powerlessness throughout the entire divorce, years after the divorce and custody disputes are settled, many children remain angry and frustrated.<sup>5</sup> While it is ultimately the parents' decision to divorce, children are inevitably affected by this decision,<sup>6</sup> and are nevertheless disregarded when the time comes to make the custody determination that will affect the remainder of their minor years.<sup>7</sup>

While it is apparent that children who lack discretion should not make the decisions that will impact the remainder of their minority, older children may have logical and justifiable reasons in preferring a particular custody arrangement. In studies in which children have been given the opportunity to voluntarily participate in the custody

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1. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 Va. J. Soc. Pol'y & L. 129, 147 (2002).

2. Anita R. White, Comment, *Mediation in Child Custody Disputes and a Look at Louisiana*, 50 La. L. Rev. 1111, 1112 (1990); Candice M. Murphy-Farmer, Comment, *Mandatory Appointment of Guardians Ad Litem for Children in Dissolution Proceedings: An Important Step Towards Low-Impact Divorce*, 30 Ind. L. Rev. 551, 556 (1997); John David Meyer, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 Brandeis J. Fam. L. 445 (1998).

3. Kelly, *supra* note 1, at 148.

4. Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 87 (1980).

5. *Id.* at 233.

6. The majority of the children, when asked about their parents' divorce, stated their desire that the family remain intact. *Id.*

7. *Id.* at 40; Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1129 (1977).

decision, many children have been eager to discuss their viewpoints on the events occurring in their lives.<sup>8</sup> Moreover, exclusion from participation often increases children's already present feelings of isolation and frustration.<sup>9</sup>

Unlike juvenile delinquency and child abuse proceedings, children involved in contested custody disputes do not have an unconditional right to representation created either by the federal government or the Louisiana Legislature. Many legal scholars believe that children deserve a right to appointed counsel in divorce proceedings, as the juveniles in other child-centered proceedings possess.<sup>10</sup> Appointed guardians ad litem, however, will not ensure that the child's voice will be expressed. This lack of expression is the aspect of divorce that results in the greatest amount of psychological problems and frustrations in children years after the proceedings have ended.<sup>11</sup> Additionally, with more divorcing couples resorting to alternative forms of dispute resolution such as mediation, the Louisiana Legislature likewise does not provide children with a means to participate in mediation sessions.

Many states are beginning to recognize the harm that adversarial proceedings can have on families and are now providing more "party-friendly" procedures to resolve their custody disputes outside of the courtroom. Some jurisdictions require parents to first attempt mediation;<sup>12</sup> other jurisdictions give courts discretion to mandate parents' attendance in divorce education classes. Such classes are designed to help parents agreeably resolve their problems and better protect their children during the custody dispute.<sup>13</sup> While the various state legislative changes have attempted to shelter children during custody proceedings, many of these new laws continue to fail in recognizing the child's potential role in contributing to their future custody arrangement by neglecting to provide for child participation in the custody decision. Louisiana is one such state that fails to recognize both the psychological and emotional benefits which can result from child participation.

This article examines whether children should have a right to be heard in contested custody disputes and the risks that children,

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8. Landsman, *supra* note 7, at 1129.

9. Wallerstein, *supra* note 4, at 149.

10. Alison Beyea & Frank D'Alesandro, *Guardians Ad Litem in Divorce and Parental Rights and Responsibilities Cases Involving Low-Income Children*, 17 Me. B.J. 90, 92 (2002); Meyer, *supra* note 2, at 446; Murphy-Farmer, *supra* note 2.

11. In Louisiana, appointed representatives have the duty of ensuring that the child's "best interest" is protected, not of advocating the child's wishes. *See also*, La. R.S. 9:345 (2004).

12. Kelly, *supra* note 1, at 137-38.

13. *Id.* at 133.

parents, and society as a whole encounter by the exclusion of children from these proceedings. First, Section II provides an examination of the origin of child representation by examining *In Re Gault* and the Child Abuse Prevention and Treatment Act (CAPTA), and concludes by discussing the lack of federal guidelines for juvenile representation in custody proceedings. Next, Section III discusses the harm that can result to children by settling custody disputes in an adversarial setting. Thereafter, Section IV provides an overview of potential reforms the Louisiana Legislature could study to allow children the opportunity to participate in settling the custody dispute by first analyzing who presently represents Louisiana children and the alternative methods states are employing to resolve custody issues. Next, Section V discusses what is meant by the child's "voice." Finally, Section VI addresses the current Louisiana approach to resolving child custody disputes. Section VI thereafter reiterates reform suggestions and provides ways in which the child's voice can be heard more clearly in Louisiana. This paper will urge the Louisiana Legislature to recognize the harm that children face in the current adversarial setting of custody proceedings and request that the legislature evaluate these suggested alternatives which allow children the voluntary opportunity for involvement in the custodial decisions that will affect their minority years.

## II. CATEGORICAL HISTORY OF PROCEEDINGS CONCERNING CHILDREN

The latter half of the twentieth century was a time in which courts and legislatures were concerned with increasing rights and protections for children involved in court proceedings. The impetus for child representation quickly spread from the criminal forum to the civil setting relating to child protection cases. Representation for children in contested custody disputes, however, has been slow to provide for independent child representation in every case.

### A. Juvenile Delinquency Proceedings: *In Re Gault*

In 1967, the United States Supreme Court acknowledged in the case *In Re Gault*<sup>14</sup> that juveniles involved in delinquency proceedings have a constitutional right to counsel.<sup>15</sup> This landmark case was

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14. 387 U.S. 1, 87 S. Ct. 1428 (1967).

15. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy. J. Pub. Int. L. 106, 110 (2002); Mary E. Hazlewood, Comment, *The New Texas Ad Litem Statute: Is It Really Protecting the Best Interests of Minor Children?*, 35 St. Mary's L.J. 1035, 1042 (2004); Karen A.

significant in the realm of child representation because "it was the first time the United States Supreme Court mandated the appointment of attorneys for children."<sup>16</sup> In addition to granting children the right to counsel, the Supreme Court further expanded the rights of children by giving them other adult-type rights such as, "the right to remain silent, to confront and cross-examine witnesses."<sup>17</sup> Allowing juveniles these additional rights affected the role of their appointed counsel by generally requiring counsel to represent delinquent children as if they were adults.<sup>18</sup>

### *B. Child Abuse and Neglect Proceedings: CAPTA*

In the 1960s and 1970s following *In Re Gault*, the concept of using guardians ad litem to represent children spread from the criminal arena to the civil setting of child protection cases.<sup>19</sup> With the passage of the Child Abuse Prevention Treatment Act of 1974 (CAPTA), the Federal government mandated that states provide attorneys to serve as guardians ad litem for children in every child abuse and neglect proceeding, and thereafter enforced this requirement by threatening to terminate federal funding for states that did not comply.<sup>20</sup> CAPTA required states to appoint guardians ad litem for children to "represent the rights, interests, welfare and well-being of all children in abuse and neglect cases."<sup>21</sup>

Originally, CAPTA mandated the appointment of an attorney to represent the child; however, revisions to CAPTA clarified that a guardian ad litem may be an attorney or a court-appointed special advocate (CASA), or both.<sup>22</sup> The allowance for the use of CASAs as well as attorneys in child abuse cases was a reaction to the CASA movement<sup>23</sup> spreading throughout many states.<sup>24</sup> Revisions to

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Hallstrom, *The Ethical Challenges of Representing Children*, 46 La. B.J. 488 (1999).

16. Hazlewood, *supra* note 15, at 1042.

17. Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. Rev. 76, 86 (1984).

18. Hallstrom, *supra* note 15, at 490.

19. *Id.*

20. Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C. §§ 5105-5107 (2004).

21. Hallstrom, *supra* note 15, at 488.

22. *Id.*; Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* 35 (2nd ed. 2001).

23. "Court Appointed Special Advocates (CASA) originated in King County, Seattle, Washington, in January 1977. Based on an idea originated by Superior Court Judge David Soukup, this pilot program in 1977 trained 10 volunteers from the community to appear on behalf of 498 children and 376 dependency cases in

CAPTA further clarified the guardian ad litem's role as investigator of the child's harmful family environment and protector of the child's best interest before the court.<sup>25</sup>

Unlike juvenile delinquency proceedings in which appointed counsel generally represent the child as if she were an adult, in child abuse and neglect cases a guardian ad litem is appointed to provide the child with further protection.<sup>26</sup> Further protection is needed for an abused child because, sadly, the parent is often perpetrating the abuse and the guardian ad litem must become both the child's representative and protector. The guardian ad litem's representation of the child's best interest in protective services proceedings generally requires a determination of "the best alternative plan for the abused and neglected child."<sup>27</sup> Ideally, courts prefer for the child to be able to return to his parents; however, when the child's life is at risk, the court must determine the placement of the child through the best interest standard.<sup>28</sup>

### C. Contested Child Custody Proceedings

The contested custody proceeding is an area in which the federal government and many states have chosen not to provide for independent child representation which children receive in the types of proceedings discussed above. The risks children encounter, inherent in a contested custody dispute, nevertheless, suggests that the individual states or the federal government should evaluate the possibility of providing for mandatory appointment of representatives for children in these proceedings.

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Seattle. Within the year, the program was recognized by the National Center for State Courts as the best national example of citizen participation in the juvenile justice system." Peters, *supra* note 22, at 35-36.

24. In order to comply with the requirements of CAPTA, several states created a program of lay volunteers to assist children in child abuse cases. Upon witnessing the benefits of this program, in 1982 a national CASA program was developed which received federal funding. In 1989, the American Bar Association officially approved of the use of CASAs to assist attorneys in their representation of abused or neglected children. In 1992, Congress desired to further expand the benefits of the CASA program by establishing a grant program to allow for additional representation of children. By 1996, the CASA initiative had established over 600 programs throughout the country. *Id.*

25. Hallstrom, *supra* note 15, at 489.

26. *Id.*

27. Jennifer Wayne Bolden, Comment, *In Re: The Court-Approved Special Advocate (CASA) Volunteers Providing the Missing Link in "The Best Interests of the Child"*, 19 S.U. L. Rev. 421, 425 (1992).

28. *Id.*

### 1. *Lack of Federal Rules Governing Child Custody Proceedings*

While the United States Supreme Court and the federal government respectively mandate the appointment of counsel for children in juvenile delinquency proceedings and child abuse and neglect cases, there is no overriding federal mandate for appointed counsel in contested custody disputes.<sup>29</sup> The Supreme Court and the federal government have given discretion to the states to develop their own statutes regarding child protection. Dutifully, all fifty states currently have their own laws in place to allow for the appointment of guardians ad litem under specified circumstances in the contested custody forum.<sup>30</sup>

Most states appoint counsel on a discretionary basis when the judge determines that it is in the child's best interests.<sup>31</sup> While the "best interest" standard is employed by the majority of states,<sup>32</sup> many of these states give little guidance as to the definition of "best interest."<sup>33</sup> Furthermore, various state statutes have differing and varied requirements in determining who may serve as guardian ad litem, under what circumstances guardians should be appointed to

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29. Presently, the inaction of federal and state governments indicates that the governments do not identify divorce as a cause of vulnerability for the children involved.

30. Cynthia Grover Hastings, Note, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. Third World L.J. 283, 292 (2004).

31. Wisconsin is presently the only state to mandate the use of guardians ad litem for minor children in every child custody dispute. Wisconsin also was the first state to initiate appointing guardians ad litem for custody disputes in its Supreme Court case of *Edwards v. Edwards*. The *Edwards* case was decided in 1955 before any federal guidelines for other child-related proceedings were developed. The language in the *Edwards* decision did not command the lower courts to appoint guardians ad litem in contested custody cases; however, in later cases the Wisconsin Supreme Court used "increasingly authoritative language to require the appointment of GALs in this context." Despite the Wisconsin Supreme Court's nudgings, the Wisconsin Legislature continued to defeat bills mandating the appointment of guardians ad litem in all divorce-related disputes. Tired of waiting on the legislature, in 1971 the Wisconsin Supreme Court used its rule-making power to mandate the use of guardians ad litem when the trial court found the welfare of minor children at risk. In 1975, the Wisconsin Legislature ceded to its Supreme Court and codified the Court's ruling, thereby making Wisconsin the first and only state thus far to mandate the appointment of guardians ad litem when minor children are involved in divorce-related custody disputes. See *Edwards v. Edwards*, 71 N.W.2d 366 (Wis. 1955); Hastings, *supra* note 30, at 291.

32. As of 1996, thirty-eight states had statutes mandating that the appointment of representation and the role of representatives must be in the child's best interest. Peters, *supra* note 22, at 38.

33. *Id.* at 40.

represent children, and what factors may be used in determining the best interest of the child.<sup>34</sup>

## 2. *Risks Children Encounter in Contested Custody Proceedings*

While the risks that children are exposed to in contested custody disputes are not believed to be as great as the risks faced in juvenile delinquency proceedings<sup>35</sup> and child abuse and neglect cases,<sup>36</sup> the psychological,<sup>37</sup> emotional, and financial<sup>38</sup> risks involved in custody cases should not be overlooked. Permanency in the family environment is an emotional necessity in the developmental years of a child.<sup>39</sup> Upon disruption of the family home, that much-needed permanency is disturbed, thereby causing significant psychological impacts on children.<sup>40</sup> Dr. Joan B. Kelly clearly indicates the increased risks children encounter in divorce:

Large numbers of studies have shown . . . that groups of children whose parents are divorced have more adjustment, academic, conduct, and relationship problems as compared to children whose parents have remained married. Diminished parental support and contact, continued high interparental hostility, loss of economic and psychological resources, disruptive life changes, and the remarriages and re-divorces of residential parents all increase risk for many children.<sup>41</sup>

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34. Hastings, *supra* note 30, at 293.

35. In juvenile delinquency proceedings, children potentially face the high risk of losing their personal freedom.

36. In child abuse and neglect proceedings, children face the dangers of physical and emotional abuse.

37. "The list of problems children encounter after separation of their parents reads like a general catalog of psychological maladjustments: denial of separation, grief, sadness and depression, fear of abandonment, actual abandonment, running away from home, immaturity (regression), hypermaturity, blame, guilt, reconciliation preoccupations, sexual and identification problems, insecurity and low self-esteem, and anger." White, *supra* note 2, at 1112.

38. The financial effects of divorce can have serious damaging effects on children. Divorce often results in children living with a reduced standard of living than they enjoyed prior to their parents' separation. Furthermore, a single parent's income and mounting legal bills could result in the need for a custodial parent to work longer hours, thereby reducing the amount of quality time the child is able to enjoy with that parent. Murphy-Farmer, *supra* note 2, at 556; Meyer, *supra* note 2, at 445.

39. Wallerstein, *supra* note 4, at 35.

40. Murphy-Farmer, *supra* note 2, at 557.

41. Kelly, *supra* note 1, at 130.

With children exposed to such serious risks, it is apparent that children need to be protected and their concerns need to be addressed throughout the divorce and custody proceedings.

Children will encounter many psychological risks regardless of whether the court intervenes and provides children the opportunity to participate in the custody decision.<sup>42</sup> Divorce is a painful process for children and the dramatic life changes that the child experiences will certainly have a drastic impact on the child. Courts can, however, mitigate the risks a child may encounter in a child custody dispute by allowing children to express their views and offer input so that children do not feel unimportant and lost throughout the process.

From 1971 to 1977, Dr. Judith S. Wallerstein and Dr. Joan B. Kelly conducted a study (the Wallerstein study) of sixty divorcing California families and their children to assess the various effects of divorce.<sup>43</sup> The study found many parents apprehensive of informing their children of their decision to divorce for fear of how their children would react.<sup>44</sup> In the families who chose to overcome their apprehension and discuss their decision to divorce, the discussions were often awkward and parents failed to tell their children how the divorce would affect them in the months ahead.<sup>45</sup> In the conversations that did occur, out of the sixty families studied, not one family "was able to provide the children with an adequate opportunity to express their concerns."<sup>46</sup> Of the children interviewed five years after their parents' divorce, twenty-three percent of the children remained angry.<sup>47</sup> The overriding source of their anger stemmed from their feelings of anxiety and powerlessness throughout their parents' divorce.<sup>48</sup>

Courts and state legislatures can ensure that children are protected and remain the primary focus of a custody case by providing children a voluntary opportunity to participate in the decision. Whether that opportunity is provided by an appointed attorney supplying the court with an explanation of the child's wishes, through permitting children

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42. "The law cannot prevent all damage to the child's interests caused by divorce, since it cannot compel harmonious relationships. It can, however, provide a means for reducing the damage by ensuring that the child's interests are not neglected in divorce custody proceedings." Landsman, *supra* note 7, at 1137.

43. Wallerstein, *supra* note 4, at 4.

44. "In the main, these parents are apprehensive that their children may be unhappy, frightened, or angered by their decision and, feeling somewhat battered and depleted by their own ordeal [the impending divorce], they are reluctant to take this on." *Id.* at 39.

45. *Id.*

46. *Id.* at 40.

47. The majority of the children openly expressing their anger were within the nine to twelve-year-old age range. *Id.* at 232-33.

48. *Id.* at 233.

limited participation in mediation between the parents, or by allowing children to review an agreement reached by parents through a parenting plan, giving the child a chance to feel like an important individual in the proceedings can reduce the harms that children now encounter years after the divorce and custody disputes are final.

### III. ADVERSARIAL PROCEEDINGS AND HARM TO CHILDREN

In a divorce case, unlike many civil proceedings, the courts are dealing with intimate, personal relationships. The court has the dual task of severing the relationship of the parents, while at the same time attempting to secure the relationship between the individual parents and their child when determining custody issues. The adversarial system, whereby one party is pitted against the other in a win-lose competition, is harmful to children.<sup>49</sup> Children often end up caught in the middle,<sup>50</sup> sometimes exposed to “manipulation, anger, or rejection by one or both parents.”<sup>51</sup>

The nature of adversarial proceedings has the potential to increase the risks that children are exposed to in the custody determination.<sup>52</sup> The adversarial process is generally not protective of children in that the nature of the proceedings tends to “escalate conflict, diminish the possibility of civility between parents, exacerbate the win-lose atmosphere that encourages bitterness and parental irresponsibility, and weaken important parent-child relationships.”<sup>53</sup> Parents are often encouraged not to speak to each other during the dispute. Attorneys also push the parents to remember information, sometimes even false information, damaging to the other spouse so that their client may prevail.<sup>54</sup> Hostilities that develop between the parents during the adversarial process will inevitably impact the child for at least the remainder of her minor years.<sup>55</sup> Additionally, the adversarial setting often causes the child to lose his position as the primary concern in the custody dispute.<sup>56</sup> While only five percent of contested custody disputes actually reach an adversarial forum, when parents exercise

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49. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 85–87 (1997).

50. *Id.* at 85.

51. Landsman, *supra* note 7, at 1131.

52. Kelly, *supra* note 1, at 131.

53. *Id.*

54. *Id.*

55. After the custody decision is made, the parents must still interact with each other in exchanging visitation of the child, attending important events in the child's life, etc. When the custody dispute becomes hostile between the parents, it is highly unlikely that the hostilities will abruptly end solely because the court has rendered the custody determination. See also Weinstein, *supra* note 49, at 122.

56. *Id.*

legal strategies that are focused on “winning” the child from the outset of the adversarial process, the child is the one who suffers.<sup>57</sup>

Children also face further harm when custody disputes result in lengthy adjudications.<sup>58</sup> Children need both stability and security<sup>59</sup> in their home life. When the parents’ lawyers exercise strategic maneuvers to prolong and frustrate the adversarial process, children suffer from the instability of not knowing with which parent they will live until the dispute is eventually decided. Even when the court determines the custodial parent, children may still live in an uncertain environment due to the parents’ rights to later bring suit to change or modify the custody arrangement.<sup>60</sup>

To counteract against the harm that children face in the adversarial arena, chamber interviews were initiated in a movement away from placing children in the midst of the adversarial process. In chamber interviews, the judge of the child custody dispute speaks with the child, allowing her an opportunity to be heard. A drawback to chamber interviews, however, is that such interviews could be traumatic and intimidating for young children<sup>61</sup> or children who do not wish to be involved.<sup>62</sup> Nevertheless, when the child is of an appropriate age and desires to express their logical, reasoned viewpoints to the judge, chamber interviews can be quite effective.<sup>63</sup>

Just as attorneys who are appointed to represent children should have special skills to be able to relate to children, judges in child custody disputes likewise need to have special communication skills that enable the child to feel at ease and help the child understand the custody process.<sup>64</sup> Also, children need reassurance that their communications with judges are confidential in order for children to feel that they can fully divulge their experiences and ideas.<sup>65</sup> Furthermore, chamber interviews provide a cost efficient alternative to allow children to be heard without adding the cost of a child’s attorney to the custody dispute expenses. Due to the staggering number of divorces<sup>66</sup> occurring today, however, many courts do not

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57. Kelly, *supra* note 1, at 131.

58. Landsman, *supra* note 7, at 1132.

59. Weinstein, *supra* note 49, at 149.

60. *Id.* at 1133.

61. Kelly, *supra* note 1, at 154.

62. *Id.* at 153.

63. “[I]nvolving young children under six years of age is generally not appropriate, as they have neither the emotional and cognitive maturity, nor the capacity for moral reasoning, that is essential to participation in meaningful dialogue regarding their perspectives on divorce outcomes and parent behaviors.” *Id.* at 151.

64. *Id.* at 154.

65. *Id.*

66. While the sheer number of divorces would make it difficult for judges to

utilize chamber interviews because of the problem of finding sufficient time to schedule these sessions and the unwillingness and inability of judges to participate.

#### IV. REFORM POSSIBILITIES

This Section will first examine the current forms of representation children presently have available in Louisiana. Next, this Section gives an overview of reformation possibilities that other states have adopted, which the Louisiana Legislature could examine for guidance as a means to better protect Louisiana children in contested custody disputes.

##### *A. Current System of Representation for Louisiana Children*

Parents are currently children's primary form of representation in custody proceedings. While parents are the individuals who know their children the best, they may not be the best protector of their children's best interests in an emotional custody dispute. Even when the court delegates the duty of protecting the child's best interests to a judge or guardian ad litem, the current Louisiana system does not ensure that children will be adequately represented and sheltered.

##### *1. The Parents*

At any other time in the child's life, it would almost seem unassailable that the parents have the best interest of their children in mind when making any decisions concerning them. In custody disputes, however, this may not be the case. Opponents of appointing guardians ad litem for children believe that parents will truly try to do what is best for their child despite the adversarial nature of contested custody proceedings.<sup>67</sup> Nevertheless, the reality of the nature of custody disputes and the elevated emotions involved may interfere with the parents' typical role of protecting their children above all else.

Generally, it is more beneficial to children if their parents are able to work through their differences to reach a decision of what is best for their children rather than delegating that decision-making

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schedule chamber interviews with each child involved, it is noted that not all divorces result in contested custody disputes.

67. Ducote, *supra* note 15, at 117; Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 Ind. L.J. 605, 613 (1998).

authority to outside parties such as the court or guardians ad litem.<sup>68</sup> If parents are unable to make such decisions together, however, then children could be better served if courts instead provided services to parents to aid them in compromise and decision-making<sup>69</sup> instead of making the decision for the parents.<sup>70</sup> There are some situations, though, when parents are unwilling to cooperate in making custody decisions, making court intervention necessary.

In a high conflict custody case,<sup>71</sup> parents cannot reasonably be expected to “objectively and clearly assess the needs of their children.”<sup>72</sup> In an unresolved custody dispute where parents are pitted against each other, neither parent has the established right to be the sole representative for the child.<sup>73</sup> Each parent’s viewpoint of what is in the child’s best interest will be skewed to their vantage and will generally differ from the viewpoint of the other parent.<sup>74</sup> Furthermore, with parents embroiled in their own emotional battles against the other spouse in the divorce, oftentimes the child’s best interest is not the primary focus of the custody proceeding as it should be.<sup>75</sup> Custody proceedings often focus on the parents’ marital faults and accusations against each other as to why the other spouse should not have custody of the children.<sup>76</sup> Some parents may even use the threat of seeking child custody in order to obtain concessions from the other spouse in other divorce matters, such as securing more marital property or obtaining greater spousal support.<sup>77</sup>

Regardless of whether the parents have ulterior motives in seeking custody of their children, in a contested custody dispute the parents do not agree as to what is best for their child. To counteract against the potential for a parent’s “coloring” or hiding facts unfavorable to that parent’s best interest, courts have taken the approach of appointing guardians ad litem to represent the child and

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68. Lenard Marlow, *Divorce and the Myth of Lawyers*, 120 (1992).

69. Mediation tends to be the preferred form of alternative dispute resolution. White, *supra* note 2.

70. Marlow, *supra* note 68, at 120.

71. “High conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation.” Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495, 500 (2001).

72. Weinstein, *supra* note 49, at 132.

73. Landsman, *supra* note 7, at 1134.

74. *Id.*

75. Meyer, *supra* note 2, at 449.

76. *Id.*; Weinstein, *supra* note 49, at 133.

77. Meyer, *supra* note 2, at 450.

present facts to the court that both parents may fail or choose not to disclose.<sup>78</sup>

## 2. Judge or Guardian Ad Litem

Louisiana legislation delegates court officials the duty of assuring that the child's best interest is protected in child custody disputes.<sup>79</sup> In protecting the child's best interests, this still does not ensure that the child's voice will be heard. While the court may assess the preference of the child as one of the factors in determining the child's best interest,<sup>80</sup> there is no requirement that the court inquire as to the child's wishes in regards to the custody decision.

The court's decision between parents is often made difficult by the fact that, in the majority of cases, both parents are equally competent to care for their children.<sup>81</sup> By submitting their custody dispute to state courts, however, the court must step into the shoes of the parent and decide what custody arrangement is best for the child.<sup>82</sup> While the Louisiana Legislature sends a strong message in ensuring that the state will protect children involved in these disputes, the reality is that neither a judge nor a guardian ad litem is likely to be capable of fully determining what is in the child's best interest through the adversarial process.<sup>83</sup> Oftentimes, judges<sup>84</sup> and guardians ad litem lack the necessary training and knowledge to fully understand the complexities of determining what is best for the child when faced with the psychological and emotional nature of divorce.<sup>85</sup>

### B. Mandatory Appointment of Guardians ad Litem

While parents generally bear the responsibility to protect their children, in a custody proceeding the parents' interests may conflict with the best interest of their child.<sup>86</sup> Furthermore, while the court

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78. Hill, *supra* note 67, at 613; Weinstein, *supra* note 49, at 90.

79. La. Civ. Code art. 134; La. R.S. 9:335 (2004); La. R.S. 9:345 (2004).

80. La. Civ. Code art. 134.

81. Guggenheim, *supra* note 17, at 122.

82. *Id.* at 120; Murphy-Farmer, *supra* note 2, at 561.

83. Marlow, *supra* note 68, at 116–17.

84. *Id.*

85. Weinstein, *supra* note 49, at 104. “[I]t asks too much of judges: that somehow they can assess the abilities of the parents at a time of significant stress and reach a conclusion about who will better serve the child's interests is little more than a ‘fantasy.’ Furthermore, the [best interest] rule does not discourage custody disputes because its vagueness creates an incentive to litigate.” Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 Cardozo L. Rev. 1523, 1541 (1994).

86. Meyer, *supra* note 2, at 446.

has the statutory duty to protect the child's best interest, a parent has no such express duty to represent the best interests of their child.<sup>87</sup> Because neither parent, in opposition to the other parent, can conclusively represent what is best for the child, many scholars believe that an attorney should be appointed to represent children in custody proceedings.<sup>88</sup>

Many legal scholars believe that children will be better protected in custody proceedings if the legislature provides for guardians ad litem in *all* child custody disputes.<sup>89</sup> Mandatory appointment of guardians ad litem would, at a minimum, provide uniformity to contested custody cases. Because the decisions made in a disputed custody case will have an extensive impact on the child's life, the child clearly has an interest in the proceedings, thereby increasing the need for individual representation.<sup>90</sup>

Louisiana currently allows courts the discretion to appoint guardians ad litem upon determination that the appointment is in the child's best interest.<sup>91</sup> Even if the appointment of guardians ad litem was mandatory, because of the consensus that the guardian's role is to represent the child's best interest and not the child's wishes, the child still is not guaranteed a voice in the proceeding. The child's wishes may differ from what the guardian determines to be in the child's best interest.<sup>92</sup> While the child's wishes may not always be what is best for the child, there is value in allowing the child to express her views and experiences. Additionally, guardians ad litem may choose not to develop the requisite relationship with the child that would enhance the child's willingness to candidly express her wishes to her guardian.

### C. *Mediation as an Alternative to Adversarial Proceedings*

Louisiana Revised Statutes 9:332 provides courts the power and discretion to order parents in a child custody dispute to mediate their differing viewpoints.<sup>93</sup> While this mediation statute is beneficial in removing parents from an adversarial setting, this statute does not

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87. *Id.* at 444.

88. *Id.* at 446.

89. Meyer, *supra* note 2, at 446; Murphy-Farmer, *supra* note 2, at 554; Beyea, *supra* note 10, at 92.

90. Murphy-Farmer, *supra* note 2, at 554.

91. La. R.S. 9:345 (2004).

92. For example, a child may "wish" to live with a parent who is more lenient, however, living with the less restrictive parent might not be in the child's "best interest." But sometimes, just being consulted about his wishes can make a child feel involved in deciding his future, and thereby potentially eliminate frustration and anger.

93. La. R.S. 9:332 (2004).

require, nor expressly allow, children to participate in the mediation process in regards to the custody determination.

The purpose of mediation is “to reduce the acrimony which may exist between the parties, [and, second], to develop an agreement assuring the child or children’s close continuing contact with both parents after the marriage is dissolved.”<sup>94</sup> Mediation has gained increasing approval throughout the nation with some states even *mandating* mediation in the child custody field.<sup>95</sup> Many courts in jurisdictions across Louisiana have exercised their discretion to require mediation.<sup>96</sup> That being so, the Louisiana mediation statutes could better protect the child’s best interest by expressly providing for voluntary child participation.

#### *D. Divorce Education Programs*

Many jurisdictions are beginning to require or suggest that divorcing parents attend divorce education classes. In general, these classes are directed toward parents with the goal of informing them of ways to help their children cope with their impending divorce.<sup>97</sup> The majority of jurisdictions only offer such divorce education programs for parents; however, divorce education programs are slowly being implemented for children.<sup>98</sup> Child-oriented programs are structured in a manner to help children understand and cope with their parents’ divorce and the changes that will occur in their lives.<sup>99</sup>

The primary benefit of divorce education programs is that these courses bring the needs of children into the forefront of parents’ minds.<sup>100</sup> When classes are provided for children, children are encouraged to express their feelings and concerns about being torn between two parents. Such classes also counsel children on how to deal with conflicts at home. When jurisdictions combine the use of parent and child education courses, children may be more inclined to discuss with their parents their views and the impact the divorce is having on their daily lives.<sup>101</sup>

Louisiana Revised Statutes 9:306 provides family courts the discretion to mandate parents’ attendance in divorce education

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94. White, *supra* note 2, at 1116.

95. Kelly, *supra* note 1, at 137–38.

96. Honorable D. Milton Moore III, Judge, 4th Judicial District, *ADR: The Future is Now*, 43 La. B.J. 148 (1995).

97. Kelly, *supra* note 1, at 134.

98. *Id.* at 136.

99. *Id.*

100. *Id.* at 137.

101. *Id.* at 155.

classes;<sup>102</sup> however, the legislature does not provide a similar provision for child education courses. Mandating that parents attend divorce education classes and providing for child education classes could prove more beneficial to the individuals involved in the contested custody dispute.

### E. Parenting Plans

Recently there has been a shift in state legislatures whereby many states are requiring divorcing parents to draft a parenting plan before their divorce is granted.<sup>103</sup> Some states require that parents present the court with a joint plan. Other states only require that each parent submit his or her own parenting plan.<sup>104</sup> While the states differ in their requirements, most parenting plans require a residential schedule, a description of the time children will spend with the non-domiciliary parent, and also a system for the parents to make important decisions regarding their children.<sup>105</sup> States initiating parenting plans intend to prevent the harms that the adversarial process may inflict on children; however, many parenting plan statutes fail to recognize the benefit that can be achieved by allowing children to participate in the development of a parenting plan satisfactory to all parties involved in the custody dispute.

## V. THE CHILD'S VOICE

Children should be given the opportunity to participate in custody proceedings when they are of competent age and capable of reasoned thoughts.<sup>106</sup> In defining the child's participation, it is generally accepted that children should be given the opportunity to give their relevant input concerning the custody issue, but not ultimately dictate with which parent they should live.<sup>107</sup> Professor Katherine Hunt Federle, however, goes further in giving children rights. She believes that the child must be an "empowered participant"<sup>108</sup> in the custody proceedings regardless of the child's capacity.<sup>109</sup> Federle advises

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102. La. R.S. 9:306 (2004).

103. Elrod, *supra* note 71, at 529.

104. *Id.*

105. *Id.*

106. Kelly, *supra* note 1, at 151.

107. *Id.*

108. Viewing the child as an "empowered participant" means that the child should have the *sole* authority to choose which parent should be the custodial parent. Weinstein, *supra* note 49, at 135.

109. *Id.*; Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *Fordham L.*

guardians ad litem to counsel children in such a manner as to allow children to reach their own decisions without outside influence.<sup>110</sup> While Federle recognizes that some children may make bad choices, she posits that even adult clients have the capability to make bad decisions.<sup>111</sup> The essence of Professor Federle's the empowerment theory is that "there is value in allowing a client to speak her own voice and to determine her own goals."<sup>112</sup>

Many scholars believe the risk of the empowerment theory may be too high in the child custody arena where the child's bad decisions could result in his injury or death should the child choose to live with an abusive or neglectful parent.<sup>113</sup> The overwhelming viewpoint is that, while children should be allowed to voice their concerns and have the right to participate in custody disputes, their voice and rights must be administered with the child's safety and well-being in mind.<sup>114</sup> The child's voice can include the right of the child to submit evidence, the right to render his opinion regarding preference of custodial parent, offering opinions as to suggested parenting plans, or simply discussing his feelings and grievances resulting from his parents' divorce.

Empirical research indicates that there is value in allowing children to voice their concerns and participate in the custody decision.<sup>115</sup> For instance, several studies have shown that, when given the opportunity to participate in mediation, children enthusiastically welcomed the chance to interview with the mediator.<sup>116</sup> In the Wallerstein study, many of the children likewise embraced the occasion to discuss their views and problems concerning the divorce and custody situation with which they were coping.<sup>117</sup> Children's eagerness to participate in these research sessions illustrates the value in giving children an opportunity to be heard.

In reality, because children lack many of the rights that adults possess in adversarial proceedings, the child's voice is rarely heard in custody disputes.<sup>118</sup> Arguably though, children's involvement in the adversarial process should be limited due to the harm that such

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Rev. 1655 (1996).

110. Federle, *supra* note 109, at 1691-92.

111. Weinstein, *supra* note 49, at 135.

112. *Id.*

113. *Id.* at 138.

114. *Id.*

115. Kelly, *supra* note 1, at 150.

116. *Id.* at 151.

117. Wallerstein, *supra* note 4, at 72.

118. In the child custody forum, neither the federal nor state government has explicitly provided children a right to be heard. Weinstein, *supra* note 49, at 116.

involvement could bring.<sup>119</sup> Often, guardians ad litem are counseled not to ask children with which parent they would choose to live for fear of the psychological effects<sup>120</sup> choosing between the parents could have on a child.<sup>121</sup> Due to this advice, attorneys often ask hypothetical questions concerning the type of environment in which the child would like to live; however, answers to these hypothetical questions rarely aid the decision-maker in determining the child's wishes.<sup>122</sup> Furthermore, due to their inability to comfortably interact with children, some guardians choose not to consult children for any information.<sup>123</sup> Likewise, judges often find interviewing children difficult and therefore avoid consulting them.<sup>124</sup> Even when children are given the opportunity to express their wishes, whether in court or to their appointed counsel, their voices are often "muffled" or "unheard because the system does not understand their significance."<sup>125</sup>

One important element of granting children the opportunity to be heard is making this opportunity voluntary; children who wish to express their concerns should be permitted and encouraged to do so.<sup>126</sup> However, the child's age at the time of the proceedings is an important factor in determining whether the child should be allowed to participate.<sup>127</sup> Additionally, children need to be assured that their voices will be listened to by both their parents and the various court participants.<sup>128</sup> If children are given the chance to voice their wishes and their wishes are not given appropriate value, children will likely feel just as angry and frustrated as those children not given such an opportunity to speak at all.<sup>129</sup>

## VI. SUGGESTED REFORMS TO ALLOW FOR CHILD PARTICIPATION

Before examining the various alternatives that the Louisiana Legislature should incorporate into the Civil Code to allow for greater child participation in contested custody proceedings, it is necessary to first evaluate the current system Louisiana has in place to settle these disputes.

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119. *Id.*; Landsman, *supra* note 7, at 1131.

120. Such effects include "anxiety, loyalty conflicts, and fears of punitive retribution." Kelly, *supra* note 1, at 148.

121. Weinstein, *supra* note 49, at 116; Kelly, *supra* note 1, at 148.

122. Kelly, *supra* note 1, at 148.

123. *Id.*

124. Weinstein, *supra* note 49, at 116.

125. *Id.* at 116-17.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

### *A. Current Louisiana Approach*

The laws presently in place in Louisiana clearly demonstrate the legislature's desire to protect children in disputed custody proceedings. Like many other states, Louisiana law applies the "best interest" standard in child custody cases and allows for the discretionary appointment of guardians ad litem for children when courts believe the need for independent counsel exists. Furthermore, the Louisiana Legislature has attempted to adapt to the trend of moving family-related cases away from the adversarial courtroom setting by providing mediation and divorce education classes for the parents involved in the divorce. Louisiana law could, nevertheless, go much further by allowing for child participation in the custody decision.

#### *1. Best Interest Standard*

Like many states, Louisiana utilizes the "best interest" standard in resolving child custody disputes as provided by Louisiana Civil Code article 131.<sup>130</sup> In using this standard, the court must consider factors, such as the twelve factors listed in Civil Code article 134,<sup>131</sup> as well as other factors the court deems important on a case-by-case basis. While the Louisiana Civil Code requires the court to consider the various enumerated factors, the Code does not give guidance as to how the court is to gather the required information for evaluation or as to how each factor is weighted. Often, the court believes that evidence concerning the best interest of the child will be discovered through the argument of the parents' cases in the custody proceeding.<sup>132</sup> Some courts, however, believe that the parents may

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130. La. Civ. Code art. 131.

131. The factors listed in La. Civ. Code art. 134 include: (1) the emotional bonds between each parent and the child, (2) each parent's ability to give the child emotional and spiritual guidance, as well as to provide for the education of the child, (3) the ability of each parent to provide for the child's necessities such as food, shelter, and clothing, (4) the time that the child has lived in a stable environment and whether that environment will continue, (5) the stability of the family environment in which the child currently resides, (6) each parent's moral fitness and the effects it may have on the child, (7) each parent's mental and physical health, (8) "the home, school, and community history of the child," (9) the child's preference, if the child is of an appropriate age, (10) the desire and ability of each parent for the child to continue a close relationship with the other parent, (11) the physical distance between the two parents, and (12) which parent previously bore the primary responsibility of caring for and raising the child. La. Civ. Code art. 134.

132. One Louisiana attorney believes that parents will represent the child's best interests despite their marital difficulties because the parents "have more invested

choose to hide some information, or fail to present information unfavorable to their case. For this reason, the court may ensure that the necessary information regarding the child's best interest will be discovered through the appointment of a guardian ad litem for the child.<sup>133</sup> When the appointment of counsel to represent a child is discretionary as opposed to mandatory, as is the case in Louisiana, potential problems can arise in determining whether the court has all of the relevant and important information to fully determine the child's best interest.

While the best interest standard employed in Louisiana takes into account the child's preference as one of the delineated factors,<sup>134</sup> this does not ensure that the child's wishes will even be addressed or determined by the court or the child's guardian ad litem. Louisiana's statutes regarding child custody seem to have the best intentions of ensuring that the child's best interests are protected; however, these statutes and Code articles continually disregard child participation and the child's potential to play a valuable and necessary role in custody proceedings.

## 2. Appointment of Guardians ad Litem as Part of the Best Interest Standard

Louisiana Revised Statutes 9:345 provides for the appointment of a guardian ad litem in a child custody or visitation proceeding.<sup>135</sup> This statute provides that the appointment is a discretionary decision for the judge to make on his own motion, or on the motion of the parents or children involved in the dispute.<sup>136</sup> In determining whether counsel should be appointed to represent the child, the judge considers the best interest of the child by examining such factors as whether the case is a high-conflict custody dispute, whether the appointed counsel could provide different information than that of the parents' counsel, and whether the individual parent's and child's interests conflict.<sup>137</sup>

It seems evident that a factor the judge must consider is whether the interests of the individual parents conflict. In a contested custody dispute, it is apparent that the parents cannot agree on who should care for the child because if the parties could agree they would not have a dispute to contest in a court proceeding. Another potential

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in the child's welfare than the guardian ad litem du jour." Ducote, *supra* note 15, at 117.

133. La. R.S. 9:345 (2004).

134. La. Civ. Code art. 134.

135. *Id.*

136. *Id.*

137. *Id.*

problem with the appointment of guardians ad litem for Louisiana children is that the judge needs to make the decision of whether a guardian will be appointed for the child at the beginning of the proceedings so that the child is protected from the beginning; however, during the initial stages of the proceeding, it is unlikely that the judge will be aware of all potential conflicts that may arise in the course of the trial thereby necessitating the appointment of counsel for the child.

*a. Guardian ad Litem's Role*

While many scholars encourage the use of guardians ad litem to represent children in contested custody disputes, other legal scholars criticize their use due to the conflicting viewpoints as to what role a guardian ad litem is intended to fulfill.

*i) Best Interest versus Child's Wishes*

Throughout the United States, there has been much debate as to whether the role of the guardian ad litem is to be an advocate for the child's best interests, or to present the child's wishes to the court. The overwhelming consensus indicates that most jurisdictions believe that it is the role of appointed counsel to advocate the child's best interest.<sup>138</sup> Louisiana Revised Statutes 9:345 does not dictate the role that a guardian ad litem assumes when appointed.<sup>139</sup> The statute provides that the court may appoint an attorney for the child when the court deems it to be in the child's best interest and thereafter lists factors for the court to consider.<sup>140</sup> Additionally, the statute gives guidance as to tasks the attorney must perform, such as interviewing the child, reviewing the child's records, and conducting discovery; however, the statute does not explicitly state whether the attorney must represent the child's best interest or the child's wishes.<sup>141</sup>

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138. Hill, *supra* note 67, at 616; Hastings, *supra* note 30, at 293; Meyer, *supra* note 2, at 447; Beyea, *supra* note 10, at 91.

139. La. R.S. 9:345 (2004).

140. Factors the court must consider in determining the child's best interest in having appointed representation include: "(1) Whether the child custody or visitation proceeding is exceptionally intense or protracted. (2) Whether an attorney representing the child could provide the court with significant information not otherwise readily available or likely to be presented to the court. (3) Whether there exists a possibility that neither parent is capable of providing an adequate and stable environment for the child. (4) Whether the interests of the child and those of either parent, or of another party to the proceeding, conflict. (5) Any other factor relevant in determining the best interest of the child." La. R.S. 9:345A (2004).

141. *Id.*

*ii) Informing the Child*

Whether scholars believe that the guardian ad litem should represent the child's best interest or the child's wishes, it is their predominant viewpoint that the guardian should interact with the child she represents to help the child understand what is occurring throughout the custody dispute.<sup>142</sup> Louisiana Revised Statutes 9:345 requires appointed counsel to interview the child; however, this does not ensure that the child will be informed about the process the court is undertaking to reach an appropriate decision.<sup>143</sup> With the child's custody at issue, the child clearly has an interest in the proceedings as "[t]he choice of custodial parent will influence the child's personality and personal attachments, and the process of litigation may itself put the child's well-being in jeopardy."<sup>144</sup>

Ideally, the child's guardian ad litem would not have the duty of informing the child about the pending legal situation between his parents.<sup>145</sup> Parents, as the child's caregivers, should talk with their child to explain the upcoming changes occurring in the child's life. In reality though, few parents have such conversations with their children concerning the custody process.<sup>146</sup> One study which focused on parent-child communications throughout the divorce discovered that:

23% of children said that no one talked to them about the divorce. For 44% of children, only the mothers explained, and for 17%, mothers and fathers together discussed the divorce with their children. As to the extent of the communication, only 5% of the children said they have been fully informed and encouraged to ask questions.<sup>147</sup>

Because many parents fail to have conversations with their child concerning what can be expected during the child custody proceeding, a guardian ad litem is often required to accept that role and explain the legal process and her role in representing and protecting the child.<sup>148</sup>

*iii) Usurpation of Judge's Power*

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142. Landsman, *supra* note 7, at 1165; Bruce A. Green & Bernardine Dohrn, *Foreward: Children and the Ethical Practice of Law*, 64 *Fordham L. Rev.* 1281, 1295 (1996); Federle, *supra* note 109, at 1689.

143. La. R.S. 9:345 (2004).

144. Landsman, *supra* note 7, at 1129.

145. *Id.* at 1165.

146. Kelly, *supra* note 1, at 149.

147. *Id.* at 149–50.

148. Green, *supra* note 142, at 1295.

In Louisiana, it is the court's duty to determine the child's best interests.<sup>149</sup> Because it is ultimately the judge's duty to make determinations regarding the child, many scholars argue that the guardian ad litem is assuming the power and functions of the judge by representing the child's best interest.<sup>150</sup> A circular argument results, however, because other scholars posit that the guardian ad litem is only assisting the judge in making his decision regarding the child's best interest by ensuring that all relevant facts are presented.<sup>151</sup> Proponents of guardians ad litem argue that "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."<sup>152</sup> The judge cannot perform these activities, therefore the guardian ad litem acts as his assistant in obtaining this necessary information.<sup>153</sup>

One problem with guardians ad litem determining the best interest of the child is that, if each individual guardian ad litem is authorized to make such assessments, child custody decisions will lack uniformity.<sup>154</sup> To ensure more effective child advocacy, uniformity is necessary so that guardians ad litem will know their requisite duties, each child will receive similar representation, and courts will receive equitable benefits from each guardian.<sup>155</sup>

#### *b. Costs Associated with Guardians ad Litem*

Louisiana Revised Statutes 9:345 provides that the costs of appointed counsel for the child will be apportioned between the parents, taking into account each parent's ability to pay.<sup>156</sup> It is undisputed that the cost of legal counsel is not inexpensive. According to practicing New Orleans attorney Richard Ducote, "Fees for guardians ad litem in contested custody cases can amount to many thousands of dollars . . . . Fees exceeding \$20,000 are not rare."<sup>157</sup> Ducote believes that adding a third attorney produces a significant economic problem because oftentimes parents are

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149. La. Civ. Code art. 134; La. R.S. 9:345 (2004).

150. Landsman, *supra* note 7, at 1183; Hill, *supra* note 67, at 621; Ducote, *supra* note 15, at 115; Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *Fordham L. Rev.* 1399, 1414 (1996).

151. Landsman, *supra* note 7, at 1172.

152. Ducote, *supra* note 15, at 131. When the parties are indigent, the court must absorb the costs of guardians ad litem.

153. *Id.*

154. *Id.*; Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *Fordham L. Rev.* 1399, 1414 (1996).

155. Guggenheim, *supra* note 154, at 1414.

156. La. R.S. 9:345 (2004).

157. Ducote, *supra* note 15, at 149.

already struggling to pay for their own counsel.<sup>158</sup> Proponents of guardians ad litem, however, believe that the added cost is worthwhile in that the child's counsel can help shorten trial time and ensure that the child's best interests are protected through his own personal representation.<sup>159</sup>

The added costs can be detrimental, nevertheless, because the parents' financial constraints can negatively affect children by necessitating the parents' having to work more to pay the mounting legal bills and also reducing the children's standard of living.<sup>160</sup> Some parents may be forced to choose between funding appointed counsel for their child or paying for other beneficial services for their child such as counseling.<sup>161</sup> Furthermore, unlike child protection proceedings, states generally do not have funds set aside to pay for guardians ad litem in contested custody disputes where the court does not find the appointment necessary to protect the child's best interest.<sup>162</sup> Due to the high costs of a third attorney, some courts are hesitant in appointing guardians ad litem for children.<sup>163</sup>

### *c. Benefits Associated with Guardians Ad Litem*

The guardian ad litem is in a unique position allowing him to undertake the duty of ensuring that parent-child relationships remain strong when the proceedings are finalized; "[t]he child's attorney should remember that when the dust settles in and out of the courtroom, the child will continue his intimate emotional attachment to one or both parents."<sup>164</sup> This added responsibility should encourage the guardian ad litem to treat both parents cordially in an attempt to alleviate resentment and frustration between all of the parties involved.<sup>165</sup>

### *3. Discretionary Mediation in Louisiana*

As an alternative to resolving disputes in the adversarial arena, Louisiana has recognized the need to provide alternative forms of dispute resolution, such as mediation, to mitigate some of the harms

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158. *Id.*

159. Meyer, *supra* note 2, at 456.

160. *Id.* at 445.

161. Weinstein, *supra* note 49, at 118.

162. Beyea, *supra* note 10, at 92.

163. Murphy-Farmer, *supra* note 2, at 570.

164. Landsman, *supra* note 7, at 1172.

165. *Id.*

that result from the divorce and custody process. Louisiana Revised Statutes 9:332 provides courts the power and discretion to order parents in a child custody dispute to mediate their differing views.<sup>166</sup> The statute further provides how a mediator may be appointed and how costs should be apportioned among the parties. Louisiana Revised Statutes 9:333 sets forth the duties of the mediator<sup>167</sup> and Louisiana Revised Statutes 9:334 lists mediator qualifications.<sup>168</sup> Even in these statutes, nothing is provided for child involvement in the custody determination. Ordering the parents to attend mediation instead of litigation is discretionary and the order can be made at any time before the proceedings or once the proceedings have begun.<sup>169</sup> Once an agreement is reached in mediation, the attorneys for both parents are allowed to review the agreement before submitting the agreement before the court.<sup>170</sup>

Mediation can offer such advantages as limiting the impact of the custody dispute on the child by removing the parents from an adversarial setting, ensuring family privacy, lessening the costs involved in the custody dispute, establishing adjusted relationships between the parents that will be beneficial for their children, and encouraging the parents to reach a mutually beneficial agreement.<sup>171</sup> With the numerous advantages that mediation can bring to the parties, the Louisiana Legislature should make custody mediation mandatory and also provide for voluntary child participation in mediation proceedings.

#### 4. Divorce Education Classes in Louisiana

Louisiana has followed the trend of many other states and provides for divorce education classes for parents. Louisiana Revised Statutes 9:306 provides that family courts have the discretion to require parents to “attend and complete a court-approved seminar designed to educate and inform the parties of the needs of the

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166. La. R.S. 9:332 (2004).

167. Some of these duties include “[assisting] the parties in formulating a written, signed, and dated agreement,” advising the parties seeking mediation to obtain independent counsel to review the agreement reached in mediation before signing the agreement, and the mediator must remain impartial to both parties and cannot force the parties to reach a solution. La. R.S. 9:333 (2004).

168. A mediator must have a college degree and complete the required hours of training, or may “[h]old a license or certification as an attorney, psychiatrist, psychologist, social worker, marriage and family counselor, professional counselor, or clergyman” and complete additional hours of general and specialized mediation training. La. R.S. 9:334 (2004).

169. White, *supra* note 2, at 1116.

170. *Id.* at 1117.

171. *Id.* at 1125.

children."<sup>172</sup> Within this statute, if the court chooses to send parents to such seminars, the judge must adopt criteria to evaluate the courses, the costs of the classes, and the time a parent must spend to complete such a program.<sup>173</sup> Additionally, the instructors of parenting classes must meet certain state-approved classifications and training requirements.<sup>174</sup> Louisiana Revised Statutes 9:306 dictates the purpose of parenting classes in that they must focus "on the developmental needs of children, with emphasis on fostering the child's emotional health."<sup>175</sup> The content of parenting classes must include discussions as to child development, information on detecting stress in children, the emotional impacts divorce may have on children, the evolving roles of the parents after divorce, visitation recommendations, the expenses involved in raising their children, and advice as to "conflict management and dispute resolution."<sup>176</sup> With such strong emphasis placed on the child's needs throughout Louisiana Revised Statutes 9:306, the Louisiana Legislature could better protect children by providing for divorce education classes specifically designed for children.

Under the current Louisiana laws, if guardians ad litem are to remain the primary means of protecting children, then their appointment needs to be mandatory to provide uniform representation for all children in child custody disputes. Nevertheless, due to the extensive harms that result from the adversarial setting of family disputes, non-adversarial proceedings appear to be the better forum for resolving child custody disputes. There are many ways in which the Louisiana Legislature can amend the present laws to provide for greater child protection. Furthermore, the current laws need to be adapted to recognize the value and necessity of providing children a role in the custody determination if the child desires to participate.

### *B. Non-Adversarial Proceedings*

The Louisiana Legislature should evaluate the benefits associated with non-adversarial proceedings such as mediation, divorce education classes, and parenting plans, and consider the

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172. La. R.S. 9:306A (1995).

173. La. R.S. 9:306B (1995).

174. The instructor may be a "psychiatrist, psychologist, professional counselor, social worker licensed under state law, . . . a person working with a court-approved, nonprofit program of an accredited university created for educating divorced parents with children. All instructors must have received advanced training in instructing co-parenting or similar seminars." La. R.S. 9:306C (1995).

175. La. R.S. 9:306D (1995).

176. *Id.*

ways in which children could participate in these forums. By making these non-adversarial proceedings mandatory as a first step toward setting the child custody dispute, both parents and children can profit through working together to ensure that the childrens' best interests are protected.

### 1. *Mandatory Mediation*

Since judges have been given the discretion to require parties' attendance in mediation, many judges throughout the state have utilized their discretion to make mediation mandatory in their jurisdiction.<sup>177</sup> Louisiana should formally follow the lead of these Louisiana judges and other states<sup>178</sup> and implement mandatory mediation in child custody disputes.<sup>179</sup> Participants in custody mediation have reported their satisfaction with the process when compared with parents who chose to take their dispute to the adversarial arena.<sup>180</sup> With the benefits and satisfaction that mediation can bring to the parties, the legislature should consider following the example of these thirteen states<sup>181</sup> which make custody mediation mandatory.

In addition to making mediation mandatory, the Louisiana Legislature should also consider including a provision to allow children limited participation in the mediation process. Studies of families who have attended mediation indicate that children are eager to participate in mediation sessions.<sup>182</sup> The child's wish to participate in the process of resolving their custody generally centers around their need to be heard, but not a desire to ultimately make the custody decision.<sup>183</sup> Child participation in a less-formal mediation forum can include interviews with the mediator alone or

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177. Moore, *supra* note 96, at 148.

178. California was the first state to initiate mandatory mediation. By 2001, thirteen states had mandatory mediation in custody disputes, with an opt-out provision in cases involving domestic violence. As for as the other thirty-seven states, thirteen states, in 2001, had no statute regarding mediation, and the remaining twenty-four states had statutes providing that mediation was discretionary for the courts to determine. Kelly, *supra* note 1, at 137-38.

179. White, *supra* note 2, at 1116.

180. Kelly, *supra* note 1, at 138.

181. *Id.*

182. "[A]mong 150 families attending mediation whose children were invited to an interview with the parents' mediator, only two children refused to participate. In another group of more than 200 children, ranging in age from six to seventeen, asked by their parents to talk with their mediator in a separate interview session, none refused to go, and most were quite open and talkative." *Id.* at 151.

183. *Id.* at 152.

with the parents, or even involvement through discussion when an agreement is reached between the parents.<sup>184</sup>

Through child participation in mediation, the parents are forced to recognize their child's feelings and focus on their child in a way that might not be possible in an adversarial setting.<sup>185</sup> Dr. Joan B. Kelly explains that by participating in mediation, children are given a clear opportunity to be heard, "children are given the opportunity to talk about how they are dealing with the divorce, what the situation is like for them, how much conflict they are experiencing, what advice they would like to give their parents, and any ideas they have regarding . . . access that would work for them."<sup>186</sup> Hearing this information straight from the child forces the parents to realize that the outcome of the custody dispute should achieve a situation in the best interest of the child and not the parent's own selfish desires.

While mediation has its benefits, in some contested child custody disputes, there may be some aspects of the dispute that mediation will be unable to mitigate. In some cases, if mediation were mandatory, parents would still refuse to cooperate and would ultimately resort to litigation to resolve the matter. In such a case, the costs of mediation would be an additional expense further increasing the costs involved in the custody dispute.<sup>187</sup> Although mediation may not work with every family, the satisfaction and success that have been achieved in many mediation studies indicate that mediation is a preferable alternative to the predominantly adversarial setting of child custody disputes. The Louisiana Legislature should make mediation the first resort for divorcing parents attempting to settle their custody battle; additionally, the legislature should allow for voluntary child participation in mediation sessions.

## 2. *Divorce Education Classes for Parents and Children*

In recent years, courts have seen the need to provide divorcing parents with information concerning how the divorce process works and the effects divorce will have on their children.<sup>188</sup> Some of this information can be distributed through literature when the parents initially file for divorce. Other information, however, requires more

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184. *Id.* at 157-58.

185. *Id.*; Weinstein, *supra* note 49, at 149.

186. Kelly, *supra* note 1, at 158.

187. White, *supra* note 2, at 1120.

188. Elrod, *supra* note 71, at 531; Kelly, *supra* note 1, at 133.

interaction in order for parents to be fully informed and prepared to address the needs of their children throughout the custody proceeding.

Parent education classes were developed in 1978, and currently these programs exist in every state, including Louisiana.<sup>189</sup> These courses may be either mandatory or optional, depending on the jurisdiction; however, more states are beginning to mandate attendance in these classes due to their benefits and low participation rates when attendance is voluntary.<sup>190</sup> These classes can range from a half-day to a whole-day and “provide general information on the psychological process of divorce; legal procedures and custody options; needs of [children] during and after divorce; co-parenting; child’s need for access to both parents; and services available to the community.”<sup>191</sup> Overall, parents tend to be satisfied with parenting education programs and feel that these classes better prepare them to address their children’s needs.<sup>192</sup>

While most states only provide classes for parents, some states are beginning to provide similar courses for children involved in custody disputes.<sup>193</sup> The goal of the children’s programs is to help children cope with their parents’ divorce; for example, “[s]uch programs for children are not regarded as counseling, but instead provide cognitive emotional support in school and community based group settings.”<sup>194</sup> These classes could be extremely beneficial to children. More importantly, these classes could be the best opportunity to allow children’s voices to be heard and ensure that children feel that they are acknowledged and involved in the entire custody process. According to Dr. Joan B. Kelly, child education courses provide substantial benefits in that “[t]hese programs bring children’s needs and voices sharply into focus for parents in a completely nonadversarial manner, and at relatively low cost.”<sup>195</sup>

While Louisiana presently permits sending parents to parenting education classes,<sup>196</sup> courts have the discretion of determining whether parents should attend such classes. Parenting education programs are only available currently in scattered communities across the state. Additionally, the Louisiana statute does not give any clear guidance as to what factors determine whether parents should attend such classes.<sup>197</sup> The benefits and satisfaction that such parenting

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189. Elrod, *supra* note 71, at 531.

190. Kelly, *supra* note 1, at 134.

191. Elrod, *supra* note 71, at 531.

192. *Id.*

193. Kelly, *supra* note 1, at 155.

194. *Id.* at 136.

195. *Id.*

196. La. R.S. 9:306 (2004).

197. “Upon an affirmative showing that the facts and circumstances of the

classes can bring indicate that these classes could better aid divorcing parents if they were mandatory.<sup>198</sup> Furthermore, the legislature should provide for child education courses to allow children's voices to be heard if the child desires to attend such a program.

### 3. *Parenting Plans and the Tennessee Approach*

Louisiana's child custody laws could benefit from adopting Tennessee's parenting plan statutes and adapting these statutes to provide for child and parent interaction in developing an appropriate parenting plan. In 2001, the Tennessee Legislature enacted a statute requiring parents with minor children to submit a parenting plan to the court before receiving court approval for their divorce.<sup>199</sup> If parents fail to agree on a plan that the court determines to be in the child's best interests, parents must next attend mediation or another form of Alternative Dispute Resolution to develop a plan together.<sup>200</sup> Tennessee's parenting plan is designed to be adaptive to allow for changes as the child grows older, and the plan must provide for an alternative dispute resolution mechanism for problems that develop between parents in the future before the parents may resort to the adversarial forum.<sup>201</sup>

The Tennessee statute contains the same "best interest" language as Louisiana's child custody statutes, but there is still no mechanism for allowing child participation.<sup>202</sup> Nevertheless, Tennessee's parenting plan is beneficial to children by removing the dispute from the adversarial arena and encouraging the parents to work through their disputes personally or through mediation. The non-adversarial aspect of parenting plans can prevent the harm to children discussed above in Section III; however, parenting plan laws could be enhanced by statutorily providing children the opportunity to work together with their parents in developing a parenting plan.

While parenting plans such as Tennessee's force parents to focus on what is best for their children throughout the custody determination, parenting plans can be further strengthened by

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particular case before the court warrant such an order. . . ." La. R.S. 9:306A (2004).

198. "Empirical research on parent education programs, and parental response to these programs, suggests that well-designed divorce education programs should be mandatory and early in the divorce process for all parents disputing custody or access issues." Kelly, *supra* note 1, at 137.

199. Tenn. Code Ann. § 36-6-404 (2001).

200. Wesley Mack Bryant, Comment, *Solomon's New Sword: Tennessee's Parenting Plan, The Roles of Attorneys, and the Care Perspective*, 70 Tenn. L. Rev. 221, 224 (2002).

201. Tenn. Code Ann. § 36-6-404 (2001).

202. Bryant, *supra* note 200, at 228.

providing children a voice in developing an acceptable custody arrangement.<sup>203</sup> There are various ways in which children may participate in the development of a suitable plan. Parenting plan statutes could be reformed to require parents to discuss their potential plan with children and ascertain their child's wishes and preference in scheduling time with each parent. If nothing else, children could be given the opportunity to approve of their parents' plan before the court finalizes the parents' divorce. As in the above-mentioned reform possibilities, allowing children a right to express their voice is beneficial not only to the child in making them feel valuable in the custody decision, but also to the parents by requiring their focus to remain where it should throughout the custody determination—on the needs of their child.

## VII. CONCLUSION

Louisiana, like many other states, has the best intentions of protecting the child's "best interest" in child custody disputes. In practice, however, the current laws are not as effective as they could be in protecting children in disputed child custody cases. The Louisiana Legislature has many alternatives to consider in determining what method(s) could better protect Louisiana children. Additionally, Louisiana has the benefit of looking to other state legislatures which have experimented in the child custody area to evaluate what changes have been effective and ways that other states' laws may be adapted, enhanced, and adopted to better serve Louisiana residents. The Louisiana Legislature needs to provide children a voluntary right to participate and express their "voice" in the custody determination. In regards to settling the child custody dispute, due to the harm inherent in the adversarial setting, child custody disputes appear to be better addressed in a non-adversarial setting, such as mediation. The Louisiana Legislature should consider following the lead of other states which have made mediation the mandatory initial process in settling a child custody dispute as opposed to taking their argument into the confrontational battleground of the courtroom. Furthermore, children should be allowed to participate in mediation sessions through discussions with the mediator and their parents.

Additionally, the legislature should evaluate the benefit and place for divorce education classes for parents. Due to the benefits that such classes can provide parents in helping their children cope, the legislature may find it necessary to make these programs mandatory. Furthermore, the Louisiana Legislature should look to other states and implement complimentary child education classes which provide

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203. *Id.*

children with direction, advice, and a means of expressing their views and needs during the divorce process.

Finally, the Louisiana Legislature should consider implementing a plan like Tennessee's parenting plan for parents to develop before the court will finalize their divorce. Such a plan would force parents to work together and focus on what is best for their child; nevertheless, children should also be provided a voice in this procedure as well. If parenting plans are adopted, the legislature should likewise provide for child participation whether by allowing a child to approve the final plan, or physically working together with the parents to develop a plan suitable for both parents and child.

While it is impossible for laws to prevent all of the harm and emotional troubles that children will encounter in divorce, the Louisiana Legislature can provide alternatives to make the transition easier and less detrimental to children. Primarily, by removing ailing families from the treacherous adversarial setting, the custody conflict can be mitigated by not placing parents in the role of opponents. Moreover, by providing children a voice in the custody determination, children will realize their importance to the decision and parents will be reminded of their responsibilities to protect their children's best interest.

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