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THE *GUARDIAN AD LITEM* IN CHILD CUSTODY CASES:  
THE CONTOURS OF OUR JUDICIAL SYSTEM STRETCHED  
BEYOND RECOGNITION

Raven C. Lidman  
Betsy R. Hollingsworth\*

[There is a] marvelous capacity of a Latin phrase to serve as a substitute for  
reasoning . . . ."

INTRODUCTION

A lawyer<sup>1</sup> has just returned to the office from the Family Law motion docket with a client. The judge has appointed a *guardian ad litem*<sup>2</sup> in the

\* The authors are Clinical Professors of Law at Seattle University School of Law. We would like to thank our research assistants, Curt Cutting and Laura Bradley, and our many clinic students for teaching us so much.

In our Law Practice Clinic students represent both criminal misdemeanor defendants and low-income parents in dissolution actions. We ask our students to reflect on the role of lawyer as they perform it and see others do so. We also ask them to examine the roles of judge, client, witness, etc. But when we would meet with a team of students to discuss a *guardian ad litem*, none of the evidentiary, procedural or substantive guideposts were available. We could not answer, for ourselves or our clients, the question posed at the outset of this Article.

\*\* Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L. J. 229, 229 (1922). Morgan's article is credited with successfully discouraging the legal community from using the term, *res gestae*, such that by 1988 a court would declare: "Whatever could be analyzed under one or another of the forms of *res gestae* can now be analyzed more cleanly in a water-tight compartment of its own." *Cassidy v. State*, 536 A.2d 666, 673 (Md. Ct. Spec. App. 1988). The authors of this Article would be pleased to instigate a similar reexamination of the phrase *guardian ad litem*.

<sup>1</sup> By *lawyer*, this Article means someone licensed to practice law. As will appear clear from this Article, the concept of lawyer takes on an elastic character when people write of *guardians ad litem*. This Article also uses the terms *witness*, *party*, *expert* and *judge* in their traditional senses, although with reference to *guardians ad litem* these concepts also slide into one another. See *infra* Part I.A.

<sup>2</sup> This Article explores the roles and functions which have been assigned to a *guardian ad litem*. Some jurisdictions use different terms, such as Court Appointed Special Advocate (CASA) (originally, Seattle, Washington, and now multiple jurisdictions), Law Guardian (New York), Mediator (California), and Investigator (Uniform Marriage and Divorce Act) to refer to a *guardian ad litem* or to fulfill *guardian ad litem*-type roles. Often a statute will allow appointment of several different figures such as a *guardian ad litem*, lawyer for the child, or an investigator, but the courts and participants often use the terms interchangeably. For a recent listing of various state statutes, see REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 14 nn. 7-10 (American Academy of Matrimonial Lawyers 1995) [hereinafter REPRESENTING CHILDREN].

BLACK'S LAW DICTIONARY 488 (6th ab. ed. 1991) defines a *general guardian* as "one who has the general care and control of the person and the estate of his ward," and a *guardian ad litem* as "a guardian appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party."

marriage dissolution<sup>3</sup> case because of a dispute involving the custody of minor children. The client asks, "What is a *guardian ad litem* and what will that person do?"

This scene plays out in hundreds, if not thousands,<sup>4</sup> of cases each week across the United States. The answers given are as varied as the multitude of local experiences in each jurisdiction of each attorney. Most lawyers, judges and *guardians ad litem* would acknowledge (at least privately, if not to the parent) that they are not really sure how to explain what *guardian ad litem*s do. The *guardian ad litem* has been defined as (1) the person appointed by the court to serve as an investigator to gather information about the parents and the children and report back to the court recommending which parent should have custody;<sup>5</sup> (2) the lawyer appointed to represent the children;<sup>6</sup> (3) an advocate for the "best interests" of the children;<sup>7</sup> (4) a facilitator/mediator;<sup>8</sup> and (5) some combination of the

<sup>3</sup> *Dissolution and divorce* both refer to the cause of action filed by a husband or wife to terminate their marital status. The Uniform Marriage and Divorce Act (despite its title) utilizes the term *dissolution*. See UNIFORM MARRIAGE AND DIVORCE ACT, pt. 3, § 301 (amended 1973), 9A U.L.A. 179 (1987).

<sup>4</sup> No data indicates the number of dissolution cases in which a *guardian ad litem* or equivalent is appointed. A very conservative estimate is that only five percent of the 1.2 million dissolution cases annually (see below) have a *guardian ad litem* figure appointed, resulting in more than 1100 per week. This does not include third-party, modification and paternity cases where custody is at issue.

In 1992, 1.215 million divorces occurred, with a slight drop to 1.187 million in 1993. See MONTHLY VITAL STATISTICS REPORT (Nat'l Center for Health Statistics Vol. 42, No. 13, 1994). One researcher estimated that one-half of all divorces involve children. See John Goerdts, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation*, in URBAN JURISDICTIONS 16 (Nat'l Center for State Courts 1992); see also BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 29-31 (Nat'l Center for State Courts 1993).

<sup>5</sup> This is a common role assigned to the *guardian ad litem*. See MINNESOTA SUPREME COURT PERMANENT FAMILIES TASK FORCE, THE COMPREHENSIVE TRAINING PROGRAM FOR THE CASA/GAL (1989); Carol Higley Lane, *The Guardian ad Litem in Divorce Cases*, in DONALD C. BROSS & LAURA FREEMAN MICHAELS, FOUNDATIONS OF CHILD ADVOCACY 161, 169 (Nat'l Ass'n of Counsel Children 1987); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q., 53, 56, 61 (1992); Monroe L. Inker & Charlotte Anne Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 111 (1971); 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, 1140 (1978). In many jurisdictions there is also an agency of the court which employs social workers to do investigations. See *infra* Part I.C., for a fuller exploration of the role of investigator.

<sup>6</sup> Lawyers frequently serve as *guardians ad litem*. See N.Y. FAM. CT. ACT LAW § 242 (McKinney 1997); WIS. STAT. §§ 767.045(1), (3) (1990); see also *infra* Parts I.A., II.C. Ohio insists that a *guardian ad litem* is not a lawyer. *Bawidamann v. Bawidamann*, 580 N.E.2d 15 (Ohio Ct. App. 1989) (distinguishing lawyer's role (i.e., represent the child's wishes only) versus the *guardian ad litem*'s role (i.e., represent the best interest of the child)). Much of the literature in this area addresses the special concerns that arise when a lawyer is appointed as a child's *guardian ad litem*. See generally *Special Issue: Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1281 (1996) (containing the recommendations of the Conference on Ethical Issues in the Legal Representation of Children, the report of the conference's working groups, and twenty-five articles exploring lawyers' roles and responsibilities when they are appointed for children).

<sup>7</sup> Many consider the *guardian ad litem* to be the representative of the child's best interest,

above and more.<sup>9</sup>

As part of their responses to the inquiring parent, many attorneys will assert some variation of this statement: “[T]he *guardian ad litem* is supposed to be neutral and objective, has had some training or experience with custody issues, and will report back to the court, usually providing the judge with information and a recommendation.” Some people describe the *guardian ad litem* as serving as the “eyes and ears of the court,”<sup>10</sup> performing a quasi-judicial role and often cloaked in judicial immunity.<sup>11</sup> All

regardless of whether the *guardian ad litem* is a lawyer or lay person. See generally Emile Kruzick & David Zemans, *In the Best Interest of the Child: Mandatory Independent Representation*, 69 DEN. U. L. R. 605 (1992); Tara Lea Mulhauser, *From ‘Best’ to ‘Better’: The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633 (1990).

Presumably all lawyers attempt to represent their clients’ best interests. See generally Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996). But when juxtaposed with the lawyers’ responsibilities to children, it is often used as a counterpoint to the child’s wishes. Additionally, ‘best interests’ is the nationwide statutory standard to be applied by the judge in making decisions regarding children. See *infra* notes 168-169 and accompanying text.

<sup>8</sup> See Richard Schwartz, *A New Role for the Guardian Ad Litem*, 3 J. DISP. RESOL. 117, 119 (1987). Under the California statutes, the court can appoint a lawyer, *guardian ad litem*, evaluator, or mediator. See CAL. CIV. PROC. CODE § 372 (West 1997). If the mediation fails, the appointed mediator, however, is also permitted to investigate, evaluate, report and recommend to the court. See CAL. FAM. CODE § 3183 (West 1997).

<sup>9</sup> See Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The GAL*, 13 CAL. W. L. REV. 16 (1976). Fraser’s article, although focused on representation in abuse contexts, is often cited in other contexts for four roles: investigator; advocate; counsel; and guardian. See, e.g., Donald Bross, *An Introduction to Child Representation*, in BROSS, *supra* note 5, at 85; MANUAL FOR PARENTING INVESTIGATORS OF THE TACOMA-PIERCE COUNTY BAR ASSOCIATION 7-8 (Sept. 1991) (“There is no consistent definition of parenting investigator. . . . The multifaceted role of the parenting investigator can include serving as an investigator, mediator, advocate, counselor, guardian and monitor.”); Mulhauser, *supra* note 7, at 638 (“It is imperative that these roles [investigator, champion and monitor] be joined.”); Landsman & Minow, *supra* note 5, at 1185 (“Lawyers are competent to represent children but as a new role may have to simultaneously act as fact-finders, advocates, mediators, arbitrators, and counselors.”); see also Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1800 (1996) (proposing that *guardian ad litem* serve in role of surrogate parent with the authority to act *in loco parentis*).

<sup>10</sup> This is a very common refrain used in connection with the *guardian ad litem*. See, e.g., French v. French, 452 So. 2d 647, 651 (Fla. Dist. Ct. App. 1984) (citing NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASS’N., COURT APPOINTED SPECIAL ADVOCATE: A GUIDE FOR YOUR COURT 13-14 (1984)); *In re Marriage of Wycoff*, 639 N.E.2d 897, 904 (Ill. App. Ct. 1994). Note that this expression seems to assume that justice (and the judge) are both blind and deaf.

The case law has a penchant for anatomical analogies. Another common refrain is that the *guardian ad litem* is an “arm of the court.” *Collins v. Tabet*, 806 P.2d 40, 42 (N.M. 1991). This is consistent with our experience that judges may, on occasion, be disarming.

<sup>11</sup> See *Cok v. Costantino*, 876 F.2d 1, 3 (1st Cir. 1989):

[T]he guardian ad litem[s] are non-judicial persons fulfilling quasi-judicial functions. A guardian ad litem typically gathers information, prepares a report and makes a recommendation to the court regarding a custody disposition. . . . [T]he guardian ad litem [was] involved in the adjudicative process and shared in the family court judge’s absolute immunity. . . . [S]uch delegated function is intimately related to the judicial process.

attorneys will caution their clients to give *guardians ad litem* the utmost cooperation because this person's recommendation carries much weight with the court.<sup>12</sup>

The definitions of the term *guardian ad litem* do not clearly distinguish between functions (investigating, fact finding, representing, testifying, arguing, reporting) and roles (judge, party, lawyer, witness).<sup>13</sup> Traditional role definition is ignored, thus permitting the performance of a function not appropriate to the role. For example: a *guardian ad litem*-lawyer may offer to the court her own observations and personal opinions as evidence via a report and recommendation, in effect performing the testimonial function of a witness; a lay *guardian ad litem*-investigator may express an opinion on who should get custody as if he were an expert witness, or may make an argument at a motion hearing, performing a function reserved to a lawyer or *pro se* party;<sup>14</sup> and a lay *guardian ad litem* may tell the children their conversations will be confidential, thereby asserting a privilege limited to attorney-client relationships.<sup>15</sup>

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*See generally* Missouri *ex rel.* Bird v. Weinstock, 864 S.W.2d 376 (Mo. App. 1993) (recognizing absolute quasi-judicial immunity); Penn v. McMonagle, 573 N.E.2d 1234 (Ohio Ct. App. 1990) (same). *But see* Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994) (holding paid *guardian ad litem* liable for negligent acts); Bullock *ex rel.* Bullock v. Huster, 554 N.W.2d 47 (Mich. Ct. App. 1996) (on remand from State Supreme Court's ruling that legislature included *guardians ad litem* within immunity shield if acts within the scope of authority).

<sup>12</sup> Judges frequently follow the recommendations of *guardians ad litem*. *See* Elrod, *supra* note 5, at 62; *see generally* Patricia S. Curley & Gregg Herman, *Representing the Best Interests of Children: The Wisconsin Experience*, 13 J. AM. ACAD. MATRIMONIAL L. 123 (1995); Judy Antell Fuller, *Guardians Ad Litem in Custody Dispute Resolutions: Representation of the Child's Best Interest*, FLA. BAR J., July/Aug. 1988, at 27; Jonathan Hafen, *Children's Rights and Legal Representation—The Proper Roles of the Children, Parents and Attorney*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423 (1993).

<sup>13</sup> In dicta, one state appellate opinion seems to imply that it might be inappropriate for the trial court to restrict the functions of *guardian ad litem*. *See* Vande Hoven v. Vande Hoven, 336 N.W.2d 366, 368 (N.D. 1983):

[The contemplated guardian ad litem] asserts that case law in Wisconsin and Alaska supports the view that a court should not place limitations on a court-appointed guardian ad litem. . . . Because this case is improvidently before us from a procedural standpoint, we do not decide this issue. Nevertheless, we note that, in light of the very serious allegations made in this case . . . it appears to be in the best interests of the children to have their guardian ad litem bestowed with full advocacy authority under Section 14-09-06.4 N.D. CENT. CODE.

<sup>14</sup> The literature has little to say regarding the *guardian ad litem*'s posture and influence at pretrial motion hearings, at which temporary custody decisions are made (and are often outcome determinative). It has been our experience that the *guardian ad litem* is rarely sworn in as a witness, and instead is permitted to address the court making both representation of facts and arguments as to their weight and significance. When we have asked the judge to swear in the *guardian ad litem*, the response has been something like, "I always hear from the *guardian ad litem*. This is not a calendar for the taking of testimony."

<sup>15</sup> *See generally* Emily Buss, "You're My What?" *The Problems of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV 1699 (1996) (exploring the use and misuse of confidentiality by children's lawyers and *guardians ad litem*).

Other examples of conflicting functions and roles are: John O. v. Jane O., 601 A.2d 149, 163-64 (Md. Ct. Spec. App. 1992) (holding that the lawyer need not even attend the trial and can submit

This confusion about *guardian ad litem* roles is startling. It arises in the legal forum where definitions are important, precision is a virtue, and role responsibilities are highly regulated. Such precision and regulation are essential to provide the parties due process,<sup>16</sup> and are particularly important where the state invades families' constitutional rights of privacy,<sup>17</sup> while addressing the needs of vulnerable minors. Yet when a judge inserts the figure of a *guardian ad litem* into the case, no consensus as to that figure's rights and responsibilities exists.

Many authors writing on the subject have called for clarity. They typically take one of two approaches: (1) narrow the focus to one role, such as that of lawyer, explore the lawyer's responsibilities to the child-client, and then suggest when the limits of those responsibilities have been reached that a *guardian ad litem* may be or should be appointed;<sup>18</sup> or (2) offer a list of functions that a *guardian ad litem* should perform, without close attention to role conflicts.<sup>19</sup> In both instances, the term *guardian ad litem* retains its elasticity and remains unclear.<sup>20</sup> As a last resort, these authors

recommendation via letter later); *Provencal v. Provencal*, 451 A.2d 374, 376-77 (N.H. 1982) (stating that an attorney could reveal the client confidences to the trial judge who would then decide if any of the confidential material would be released to the parties).

<sup>16</sup> For purposes of this Article, *due process* is that process by which a publicly accountable neutral judge decides cases in open court after hearing the evidence though witnesses of interested litigants who are represented by lawyers or appearing *pro se*. These are the basic components of the adversarial system. See V.S. MANI, *INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 25-36* (Martinus Nijhoff ed., 1980).

<sup>17</sup> The concept of *family privacy* expresses the core democratic value that individual autonomy and freedom from state intrusion and regulation also extend to persons related by blood and marriage at least in the areas of child rearing and education. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). But see *Provencal*, 451 A.2d at 377 (stating that parents' interest in the custody and rearing of their children is a fundamental right protected by the due process provisions of the state and federal constitutions, but also that "due process should be more flexible when the dispute is between persons such as the child's parents").

<sup>18</sup> Since the phenomenon arises in the courts, lawyers were originally appointed as *guardians ad litem*. Most of the literature has explored how the lawyer does, could or should act when serving as a *guardian ad litem*. See *infra* Parts I.A., II.C.

<sup>19</sup> For an example of this approach, see DONALD N. DUQUETTE & MARTHA W. STEKETEE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS 37* (1990). Roles and duties include fact finder; legal representative; case monitor; mediator; information-resource broker. Tasks include investigation; consultation; assessment; identifying the child's interests; permanency planning; client counseling; decision making; problem solving and mediation; identifying action steps; and following up on action steps. See *id.*

<sup>20</sup> Special masters in the federal courts have some similar role-blurring features. See Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2137 (1989):

To the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers. The danger of a new cottage industry, enhanced by large fees for special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of special masters presently in vogue.

suggest that at each appointment the court should clarify the role of the *guardian ad litem* for the appointee and the parties.<sup>21</sup>

This Article proposes that the Latin term *guardian ad litem* be discarded.<sup>22</sup> Also, terms such as advocate, evaluator, and fact-finder should not be employed for a court appointed individual because the first two are imprecise, and the third applies to a function reserved to the judge.<sup>23</sup> If the court wants to appoint someone, that person should fulfill a recognized role, such

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However, there is one major difference. Instead of being utilized in the most routine of cases (such as dissolutions), special masters are appointed in large, complex, multi-party, and/or multi-district litigation. Judge Posner seemingly dismisses Ms. Silberman's concerns by offering efficiency, flexibility, and looser ethical standards as rationale for the use of special masters. See Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2217-18 (1989). This type of rationale is commonly heard when the use of *guardians ad litem* is defended.

<sup>21</sup> Every case and article cited herein discussing *guardians ad litem* bemoans the lack of clarity and suggests at some point that the parties, appointee and judge at least get clarification in a particular case. This case by case approach may have the benefit of stimulating the participants to think carefully about the appointment. However, it has been our experience that this approach backfires. The judges feel uncomfortable since there are so few guidelines. The opposing attorneys likewise have not thought it through and see a motion for clarification as a strategic move in the case. Finally, the *guardians ad litem* take offense at having their authority circumscribed. This has been very prejudicial to our clients who are viewed as having something to hide or as being unnecessarily litigious.

Minnesota has conducted the most intensive study of *guardians ad litem* in custody-type cases. See generally MINNESOTA OFFICE OF THE LEGISLATIVE AUDITOR, PROGRAM EVALUATION DIV., GUARDIANS AD LITEM (1995) [hereinafter GUARDIANS (Minn.)]. One of the study's major conclusions was that "[t]here is not a universally understood or consistently applied definition of the appropriate roles and responsibilities for guardians in Minnesota, leading to a frequent confusion and differing expectations." *Id.* at xi.

<sup>22</sup> The Uniform Marriage and Divorce Act, adopted widely across the nation, never uses the term *guardian ad litem*. See UNIFORM MARRIAGE AND DIVORCE ACT, pt. 3, § 310 (amended 1973), 9A U.L.A. 443 (1987). The comments to this section specifically state that the attorney is not a *guardian ad litem*, but then go on to state that the attorney is "an advocate whose role is to represent the child's interests." *Id.* As discussed in Part I of this Article, some jurisdictions permit a *guardian ad litem*-lawyer to represent the child's interests even if they conflict with the child's wishes. Thus, it is a bit unclear what the Uniform Marriage and Divorce Act drafters understood to be permissible. Section 404 permits the court to interview the child and seek the services of professionals, *id.* § 404, 9A U.L.A. 600, and Section 405 permits the court to appoint an investigator to investigate and report to the court and the parties, *id.* § 405, 9A U.L.A. 603.

<sup>23</sup> The analogous role for an advocate would be lawyer. But the term *advocate* is so often used when referring to lay individuals that it does not correspond to a traditionally recognized role in the judicial system.

An *evaluator* is someone who decides what value to give to something. See WEBSTER'S NEW WORLD DICTIONARY 470 (3d coll. ed. 1988). Their function is to decide what issues, facts, and perspectives are relevant, and what weight should be given to each. Each participant in the system does this on a recurring basis. Thus the term is too diffuse to be meaningful. Compare this to the role of an Early Neutral Evaluator used by the parties as a form of alternate dispute resolution. See *infra* Part I.D.

The term *fact-finder* is frequently used to describe a function of a *guardian ad litem* which in most contexts refers to the investigative function (discovering evidence). See Landsman & Minow, *supra* note 5, at 1140-42. It is basic to due process that only a judge or jury can be the fact-finder (stating which facts the decision maker is persuaded are significant and substantiated). A court may delegate the fact-finding to a magistrate, commissioner or special master, but that requires a very special delegation of authority.

as lawyer, investigator or witness.<sup>24</sup>

The judicial system is the dispute resolution mechanism required by the state to resolve dissolutions.<sup>25</sup> It is the forum in which differing versions of perceived reality are presented for neutral judges to sift and weigh. Thus, one must assume that the parties, who in a custody case are the parents, are no more or less biased and intelligent than other parties.<sup>26</sup> The parents, through their lawyers, can marshal the facts,<sup>27</sup> present relevant witnesses, and engage in settlement opportunities. The child can participate as a witness to provide information or as a party who may be entitled to a lawyer.<sup>28</sup> And the judge performs her essential responsibilities by deciding which alleged facts have been proven, weighing those facts, drawing reasonable conclusions, and applying the law to reach a decision.

Throughout this Article, the discussion is limited to the situation created when two parents approach the court raising an issue about the custody of children. The Article distinguishes between the situation that occurs when the parents fail to parent (“dependency”)<sup>29</sup> and that which occurs when the parents fail to agree (“dissolution” and “contested custody”). This Article focuses on the latter. Most contested custody cases have no need for any court appointed individual. The Article submits that such an appointment more often undermines the normal functioning of the courts

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<sup>24</sup> No one has seriously proposed that a *guardian ad litem* should fulfill the judge's role, although it has been noted that the recommendation often is so decisive that the person in effect becomes the judge. See, e.g., Jonathan Hafen, *Children's Rights and Legal Representation—The Proper Roles of the Children, Parents and Attorney*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 425 (1993); Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1788 (1996).

<sup>25</sup> In every state, married people must use courts as the only method to obtain a legally recognized dissolution, resolving the attendant issues of custody, child support, alimony, property and debt division. See *infra* Part II.A.

<sup>26</sup> The courts' distrust of parents is deeply ingrained. In a rare family law decision by the U.S. Supreme Court (regarding a Full Faith and Credit Clause dispute), the Court in off-handed dicta mirrors this widespread distrust. “Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.” *Ford v. Ford*, 371 U.S. 187, 193 (1962); see also Kruzick & Zemans, *supra* note 7, at 610-12 (citing to both U.S. and Canadian assumptions that parents in a custody battle don't act in the best interest of their children).

In dissolutions, the parties' very identities as lovers, parents, friends, and providers are often being challenged. But long ago the American legal system rejected the common law position that parties are *per se* incompetent or presumptively less credible because of their stake in the outcome. See generally MCCORMICK ON EVIDENCE, Ch. 7, § 65 (John W. Strong ed., 4th ed. 1992).

<sup>27</sup> This same problem existed regarding financial issues, especially child support. Under the new federal child support guidelines applied to all states, a substantial amount of mandated information which must be, and is now being provided, to the court. See 45 C.F.R. § 302.56 (1997).

<sup>28</sup> No state makes the child a named party to a dissolution. See *infra* Part I.E. The child's preference as to custodian is one factor, but not dispositive, except in Georgia. See *infra* note 169.

<sup>29</sup> Child abuse and neglect proceedings are referred to by different names in different states. This Article uses the term *dependency* to designate such cases.



by entrusting to one person the roles of lawyer, witness, expert witness, party, *and*, often, decision maker.<sup>30</sup>

Part I dissects each of the five potential *guardian ad litem* roles: Lawyer, Expert Witness, Investigator/Lay Witness, Mediator/Facilitator, and Party. For each role, this section explores: how the well-known role is typically performed within the court system as a whole; how that role might be performed in a custody case, consistent with its occurrence elsewhere in the judicial system; and how that role, when held by a *guardian ad litem*, actually is performed in a custody context.

Part II endeavors to explain how the *guardian ad litem* figure has become so confusing by separately discussing five factors which have muddled the role of court-appointed officials in dissolution-custody cases. Section A briefly reviews the history of divorce law and reflects on the changing ways in which courts and legislatures have viewed the nature of the family and the rights of parents to the custody of their children. Section B then looks at the origins of the term *guardian ad litem* and its application in non-dissolution contexts. Section C discusses the little-used option of appointing lawyers for children. Part D focuses on the differing perspectives of the participants in a divorce proceeding. And finally, Section E examines the alleged efficiencies and real costs of using *guardians ad litem*.

The Conclusion offers the following recommendations: (1) the Latin term, *guardian ad litem*, should be eliminated entirely; (2) court appointment of an individual should be limited to clearly articulated functions consistent with a known role; and (3) courts should make such appointments sparingly in custody cases arising from a dissolution.

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<sup>30</sup> In one of the earliest critiques of the combined powers of the *guardian ad litem* or child advocate, one author states:

Undoubtedly, a person doing all these things might render assistance to the court in making a best interest decision. However, an advocate having the power to do all of these things possesses authority greater than that traditionally accorded to either an attorney or a guardian ad litem. The advocate seemingly makes the ultimate decisions regarding what is in the child's best interest, testifies (although perhaps not under oath) in conclusory terms regarding the child's best interest, and performs the duties of an attorney by advocating his position before the court in the adversary process. Indeed, the power is so great that a stated interest of the child may be ignored while the interest perceived by the guardian is espoused.

Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1, 9-10 (1977-78).

## I. THE MULTIPLE AND CONFLICTING ROLES OF THE *GUARDIAN AD LITEM* IN CUSTODY PROCEEDINGS

### A. *Lawyer for the Child*

All states permit appointment of a lawyer for the child in a marriage dissolution action.<sup>31</sup> However, rather than appoint lawyers for children, courts tend to rely on different statutory authority to appoint *guardians ad litem*.<sup>32</sup> Very few jurisdictions require that the *guardian ad litem* be a lawyer,<sup>33</sup> but lawyers frequently serve as *guardians ad litem*.

#### 1. What are lawyers?

Lawyers are agents for their clients.<sup>34</sup> Lawyers act on behalf of clients in certain recognizable ways, guided by standards of professional conduct.<sup>35</sup> The core function of a lawyer is zealous advocacy for the client,<sup>36</sup> once the client's desires are ascertained. The lawyer listens to the client and advises the client about the legal process, the possible causes of action, other dispute resolution options, and the range of likely outcomes.<sup>37</sup>

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<sup>31</sup> See, e.g., WASH. REV. CODE ANN. § 26.09.110 (West 1997) (modeled on the Uniform Marriage and Divorce Act § 310).

<sup>32</sup> Recently Washington added *guardian ad litem* as an option under the section that formerly was based on the Uniform Marriage and Divorce Act § 405, providing for investigator. See WASH. REV. CODE ANN. § 26.09.220 (West 1997). Some states rely on a specific statutory provision, see, e.g., *supra* note 2, or their version of Fed. R. Civ. P. 17(c). See, e.g., WYO. R. CIV. P. 17(c) (West 1996).

<sup>33</sup> See, e.g., WIS. STAT. ANN. §§ 767.045(1), (3) (West 1997).

<sup>34</sup> The preamble to the ABA Model Rules of Professional Conduct provides that: "[1] A lawyer is a representative of clients . . ." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1995).

<sup>35</sup> Most lawyers are regulated by state-adopted variants of the MODEL RULES OF PROFESSIONAL CONDUCT or the MODEL CODE OF PROFESSIONAL RESPONSIBILITY. Lawyers may also be guided by standards developed by professional organizations. See, e.g., JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979) [hereinafter COUNSEL FOR PRIVATE PARTIES]; REPRESENTING CHILDREN, *supra* note 2; STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (Proposed Official Draft 1995) [hereinafter ABUSE AND NEGLECT CASES]; see also *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Conference Recommendations*].

<sup>36</sup> Canon 7 of the MODEL CODE provides: "A lawyer should represent a client zealously within the bounds of the law." MODEL CODE Canon 7. The Preamble of the MODEL RULES provides: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES Preamble.

<sup>37</sup> "As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . . A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or others." MODEL RULES Preamble.

Counseling is an interactive process. The lawyer researches the law, investigates the facts and evaluates the evidence. The lawyer is expected to discuss legal as well as non-legal strategies, and help the client develop and prioritize a range of possible and desirable outcomes. The client gives the lawyer feedback on what the client wants and how the client would like the lawyer to proceed. Once the client has directed the lawyer, the lawyer must act independently on behalf of the client and represent the best interest of the client *as perceived by the client*.<sup>38</sup>

The process of counsel and advice is confidential.<sup>39</sup> Unless the lawyer has the client's permission, the lawyer does not reveal discussions with the client nor the client's vacillating or firmly held motivations to the court or anyone else.

The lawyer is not neutral. The lawyer is not counsel to the court. The lawyer is neither the party nor a witness.<sup>40</sup> One would not expect the lawyer to give to the court a report in which the lawyer expresses a personal evaluation or opinion as to the weight to be given the evidence, the credibility of the witnesses, or the ultimate outcome.<sup>41</sup> The lawyer researches and briefs the law; calls or cross-examines witnesses to elicit evidence on the substantive issues and the credibility of witnesses; and makes arguments to the court as to how the law and the facts support the client's position.

## 2. How might children's lawyers function regarding custody in a dissolution?

Based on this common understanding of a lawyer's role and functions, one might imagine how a child's lawyer would execute his duties in a custody proceeding. The lawyer would go to the child. If the child can speak and understand language, then the lawyer would explain that a

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<sup>38</sup> Rule 1.2 of the MODEL RULES provides that: "(a) A lawyer shall abide by the client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES Rule 1.2; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 31-33 (Proposed Final Draft No. 1, 1996).

<sup>39</sup> The requirement of client confidentiality is at the heart of the attorney-client relationship. *See* MODEL RULES Rule 1.6; MODEL CODE Canon 4, DR 4-10; *see generally* Buss, *supra* note 15.

<sup>40</sup> *See* MODEL RULES Rule 3.7(a) ("A lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness . . ."); MODEL CODE Canon 9 ("Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.").

<sup>41</sup> *See* MODEL RULES Rule 3.4 (A lawyer shall not: "(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."); *see also* MODEL CODE DR 7-106(c)(3), (4).

dissolution had been filed and that the lawyer had been appointed to represent the child. Then the lawyer would try to ascertain if the child had a position or information that the child wanted to communicate to the court. The child might have a position or opinion that the lawyer felt would not prevail. The lawyer might investigate, give the child the information gained by the lawyer, and advise the child regarding likely outcomes. If the child did not accept that advice, the lawyer would be ethically bound to advocate for the client's position or withdraw.<sup>42</sup>

This situation does not differ from a lawyer-client relationship in any other setting. First, lawyers frequently find themselves in positions in which their clients' wishes are not in accord with their evaluation of the case. A criminal defendant may insist on going to trial while his attorney may believe that the client should accept the government's plea offer. A client may wish to accept an offer that the lawyer does not feel is a fair settlement. Nonetheless, the lawyer must "abide by a client's decision."<sup>43</sup> Normally, when a client disagrees with the attorney's advice, a presumption of incompetency does not automatically follow. The lawyer must not substitute his judgment for that of the client.

The problem, of course, is that minors historically have been treated as incompetents by the law, lacking the legal or actual capacity to make decisions for themselves. In a post-*Gault*<sup>44</sup> world, this absolutist position is rejected, and children have been granted some rights formerly held only by adults.<sup>45</sup> Also, in current thinking, children are viewed as having a wide range of abilities depending on their experience, developmental stage, and the context in which their abilities are to be applied.<sup>46</sup>

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<sup>42</sup> Guggenheim has developed the theory that the lawyer for the child represents the child's "legal rights." Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1420 (1996). In some matters, e.g., custody, an impaired child's opinion is of small consequence to the outcome. Thus, the lawyer presents that opinion, but more significantly ensures that the process is fair and that the court has full information (via witnesses). *See id.*

<sup>43</sup> MODEL RULES Rule 1.2(a).

<sup>44</sup> *See In re Gault*, 387 U.S. 1 (1967). This landmark opinion determined that as a matter of due process a child charged with an offense punishable by incarceration has the right to an attorney whom the client directs. *See infra* notes 188-97 and accompanying text (illustrating the importance of *In re Gault* in the development of arguments in favor of children having a right to a lawyer whenever important interests of theirs are adjudicated).

<sup>45</sup> Subsequent to *In re Gault*, children have been granted some greater legal rights. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding pregnant minors have same rights as adult women to decide whether or not to bear a child); *Tinker v. Des Moines*, 393 U.S. 503 (1969) (holding children have First Amendment rights of free speech in school). This increase in legal rights has coincided with a recognition that children have varied abilities to make decisions and express preferences on their behalf. *But see Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (children's rights are not the same as adult rights because of "the peculiar vulnerability of children").

<sup>46</sup> *See generally* Janet Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 *N.C. L. REV.* 1083 (1991) (arguing that childhood is as much a social as biological construct); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a*

The codes, rules, and standards for lawyers do not provide definitive answers concerning when minors are competent to understand and make decisions. However, all give some guidance. By and large, they encourage maintaining a traditional lawyer-client role to the degree possible given the context of the case and the nature of the impairment. For instance, the Model Rules of Professional Conduct ("Model Rules") provide that:

When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.<sup>47</sup>

The same approach is recommended by the American Bar Association's Institute for Juvenile Administration (IJA-ABA).<sup>48</sup> Their standards caution the attorney against presuming that a child is by definition incompetent and remind attorneys that they are to make efforts to communicate with a client in a method that is client-centered and takes into account that client's perspective and limitations.<sup>49</sup> The American Academy of Matrimonial Lawyers (AAML) proposes the use of a rebuttable presumption that a child is impaired below age twelve.<sup>50</sup> Interestingly, the actual case law on custody barely mentions the age of the children as a constraint upon the lawyer or *guardian ad litem*.<sup>51</sup>

*Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996) (reviewing the literature on children's cognitive capacities regarding decision-making).

<sup>47</sup> MODEL RULES Rule 1.14(a). Further:

[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

*Id.* at Rule 1.14(a) cmt.

<sup>48</sup> See COUNSEL FOR PRIVATE PARTIES, *supra* note 35.

<sup>49</sup> See *id.* (*incompetence* is undefined); ABUSE AND NEGLECT CASES, *supra* note 35, at Part I, 1.1-1.7 (making no presumption as to incompetence, but rather assuming *disability* is contextual). If a child is preverbal or incapable of understanding the issues, then the lawyer should request the appointment of a separate *guardian ad litem*.

<sup>50</sup> See REPRESENTING CHILDREN, *supra* note 2, at Standard 2.2. This chronological demarcation is surprising as, in all other respects, these standards are very protective of child-client rights. However, these standards do not encourage routine appointment of anyone for the child in custody cases. See *id.* at Standard 1.1 cmt. ("In the absence of a particular reason for assigning representation for a child, the representative will merely duplicate the efforts of counsel already appearing in the case."). If a lawyer or guardian is appointed for an impaired child that person is not to advocate a position on the outcome. See *id.* at Standards 2.7, 3.2.

<sup>51</sup> See, e.g., *Wiederholt v. Fischer*, 485 N.W.2d 442, 446 (Wis. Ct. App. 1992) (side-stepping the issue of whether the children, age eleven, twelve and fifteen, are impaired by holding that the lawyer's client is the "concept" of the children's best interests, not the children *per se*); see *infra* notes 75-81 and accompanying text.

The next problem becomes: what is a lawyer to do when she determines that the client is impaired to such a degree that the client cannot make meaningful decisions? The emerging consensus amongst those who draft ethical rules or standards is that the lawyer should not act in the dual capacity as representative of and as substituted decision maker for the child or incompetent.<sup>52</sup> Lawyers are urged to stay within the role of lawyer. The consensus recommends that lawyers take instruction from the child's guardian, and if no one occupies that role, then lawyers should seek to have a guardian or *guardian ad litem* appointed.<sup>53</sup>

At this point, the problem has come full circle: what is a *guardian ad litem*? The Model Rules and Model Code of Professional Responsibility (Model Code) use only the term "guardian," which they do not define. The IJA-ABA standards do not define *guardian ad litem*. Thus the lawyer is regulated, but, like *Alice in Wonderland*, litigants slip through a loophole into a world where the guardian or *guardian ad litem* figure is not.

The AAML does not encourage the appointment of any representative of a child in most custody cases and does not call for a *guardian ad litem* if the child is impaired.<sup>54</sup> The AAML standards also do not define *guard-*

<sup>52</sup> See REPRESENTING CHILDREN, *supra* note 2, at Standard 2.7 cmt.:

The most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests. . . . When lawyers represent unimpaired clients, the individual lawyer's personal views are virtually irrelevant. Because lawyers must abide by their client's decisions (Model Rule 1.1) when representing ordinary clients, all are obliged to perform the same role. Once the unimpaired client has determined his or her goals counsel's conduct depends in no way upon his or her personal values. Similarly situated clients will be similarly represented. Although cases may be decided differently because of the quality of counsel's skill, such differences are unavoidable. Our legal system can do no more—but should do no less—than define an objective, uniform role for professionals.

When clients are impaired, it is equally important to develop standards that seek to achieve such uniformity. Accordingly, these Standards define a uniform role of counsel for lawyers representing impaired children that does not depend on the opinions and values of the lawyer.

<sup>53</sup> See MODEL RULES Rule 1.14(b) (stating that a lawyer believing the client is impaired should request appointment of guardian). However, the rule does *not* call for the appointment of a *guardian ad litem*. See COUNSEL FOR PRIVATE PARTIES, *supra* note 35, at Standard 3.1(b) cmt. (stating that if the child is incompetent, the lawyer should request appointment of a *guardian ad litem*; take a neutral posture; or, as a last resort, adopt a position requiring the least intrusive intervention).

<sup>54</sup> See REPRESENTING CHILDREN, *supra* note 2, at Standard 1.1 cmt.:

These standards reject the general call for children to be represented in matrimonial cases. . . . [C]hildren are not necessarily better served by being given a representative, and other parties to the action may be adversely affected by the appointment. In the absence of a particular reason for assigning representation for a child, the representative will merely duplicate the efforts of counsel already appearing in the case.

Matrimonial and related custody proceedings should continue to be viewed as private disputes brought to the court for resolution because the parties are unable to resolve the dispute by other means. The mere fact that parents have decided to resolve their dispute in a contested manner is insufficient reason to require a separate legal representative for children

*ian ad litem*. However, they do set forth some guidelines for *guardians ad litem*: ensure a fair process; protect the child from the delays and stresses of the proceeding; take no position on the outcome; and do not perform lawyering functions like filing briefs or examining witnesses.<sup>55</sup>

If the court does not appoint a *guardian ad litem*, then the lawyer for the child is in a bind because the rules and standards diverge. The Model Rules reluctantly allow the court to force the attorney to act as *de facto* guardian.<sup>56</sup> Likewise, the IJA-ABA standards say the lawyer “may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence, or, if necessary the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile’s circumstances.”<sup>57</sup> The AAML standards for lawyers of impaired children are much like those for *guardians ad litem*, except that the lawyer may argue, brief the law, and examine witnesses while still not taking a position on the outcome.<sup>58</sup>

If a person who happens to be a lawyer is appointed as a *guardian ad litem*, the more recent standards suggest that the appointee should not consider himself or encourage others to treat him as if he were the lawyer for the child.<sup>59</sup>

### 3. What do *guardian ad litem*-lawyers actually do?

In custody cases, most courts and legislatures neither protect child-client rights nor trust juvenile competence. Whatever the child’s age, it is almost universal that the *guardian ad litem*-lawyer’s charge is to advocate for what he perceives as the child’s best interests and not the child’s own wishes.<sup>60</sup>

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in most cases.

<sup>55</sup> See *id.* at Standards 3.1-3.7.

<sup>56</sup> See MODEL RULES Rule 1.14(b), Standard 2.3 cmt.; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983) (providing that the lawyer may be “compelled . . . to make decisions on behalf of the client”).

<sup>57</sup> COUNSEL FOR PRIVATE PARTIES, *supra* note 35, at Standard 3.1(b)(ii)(c)(3).

<sup>58</sup> Compare REPRESENTING CHILDREN, *supra* note 2, at Standards 2.7-2.13, with Standards 3.1-3.7.

<sup>59</sup> See *id.* at Standards 3.1-3.7; see also Buss, *supra* note 15, at 1732; *c.f.* Conference Recommendations, *supra* note 35, at 1301-02 (Part I.A.1.) (preferring the appointment of a lawyer for a child rather than a *guardian ad litem*); *id.* at 1302 (Part I.B.2.) (recommending against appointment in a dual capacity and suggesting that if given dual appointment, the lawyer elect to represent child as a lawyer); *id.* at 1315-16 (Parts VI.B.1.-3.) (suggesting any lawyer who is appointed as a *guardian ad litem* give full disclosure that he will do things that a lawyer can not do, such as advocating for what he believes is best for the child or revealing what would otherwise be confidential).

<sup>60</sup> See, e.g., *In re Marriage of Rolfe*, 699 P.2d 79, 85-86 (Mont. 1985) (“We recognize that in Montana the attorney for the child is not a *guardian ad litem*. Nevertheless his role in a custody dispute is to advocate the child’s best interest, not the child’s wishes.”); *J.W.F. v. Schoolcraft*, 763 P.2d 1217, 1220 (Utah Ct. App. 1988) (“[I]t is critically important for [the child] to have personal representation by

*Guardian ad litem*-lawyers make reports to the court revealing confidences of the child.<sup>61</sup> They are permitted and expected to meet with the parents without the parents' attorneys present as part of their investigation.<sup>62</sup> They can testify.<sup>63</sup> In Alaska, the *guardian ad litem* can be a lay person, even though such person is "in every sense the child's attorney,"<sup>64</sup> and several opinions speak of the *guardian ad litem*-lawyer as the representative of the court.<sup>65</sup>

A Connecticut study in which lawyers acting as *guardians ad litem* were interviewed documented the confusion these functions caused attorneys as long ago as 1977. The interviews exposed the genuine concerns and conflicts which arose when lawyers tried to ascertain the child's competence, determine the child's wishes, resolve in their own minds what would be best for the child, and then develop the position to advocate. Some lawyers described themselves as advocates of the child—yet advanced a position the child actually opposed, and some considered themselves to be fact-finders.<sup>66</sup>

In 1977 the Alaska Supreme Court captured this confusion in *Veazey*

counsel who has no other agenda than to determine what actually is in the best interests of that child."), *rev'd in part, State ex rel. J.W.F. v. Schoolcraft*, 799 P.2d 710 (Utah 1990); *see also In re Marriage of Barnhouse*, 765 P.2d 610, 612 (Colo. Ct. App. 1988) (a child should have a lawyer, but "when a statute gives a court the power to appoint an attorney for children in custody disputes, that advocate must represent the children's interests alone. . . . [and] should present *all* evidence available concerning the child's best interest.") (emphasis added).

<sup>61</sup> Some states require the *guardian ad litem* to be a party as well as a lawyer for the child (latter role retains the attorney-client privilege role); the *guardian ad litem* can file reports with and make recommendations to the court. *See, e.g., Provencal v. Provencal*, 451 A.2d 374, 376-77 (N.H. 1982); *Church v. Church-Corbett*, 625 N.Y.S.2d 367 (N.Y. App. Div. 1995). *But see* *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988) (overruling previous rule that the attorney-client privilege applied to guardian's role as a party to and expert witness in custody proceedings).

<sup>62</sup> In Missouri the *guardian ad litem* is a lawyer, yet by statute (reaffirmed by a 1995 appellate court opinion) the *guardian ad litem*-lawyer can directly interview a parent who is a party. *See* MO. REV. STAT. § 452.423.2 (1996); *see also K.S.H. v. D.J.H.*, 891 S.W.2d 144 (Mo. App. E.D. 1995). In contrast, the New York law guardian, who must be a lawyer, has a child-client who cannot be interviewed by the parents' lawyers. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Opinion No. 656, N.Y.L.J., Jan. 21, 1994, at 2 (parents cannot even consent to the interview).

<sup>63</sup> *See Richelson v. Richelson*, 536 A.2d 176, 180 (N.H. 1987).

<sup>64</sup> *Carter v. Broderick*, 816 P.2d 202, 206 (Alaska 1991) (quoting *Veazey v. Veazey*, 560 P.2d 382, 387 (Alaska 1977)); *see also ALASKA STAT.* § 25.24.310 (Michie 1997).

<sup>65</sup> *See Gerber v. Peters*, 584 A.2d 605, 607 (Me. 1990) ("The duty of a court appointed *guardian ad litem* of a minor child in a divorce case is to the court, and the scope of that duty lies within the parameters of the order of appointment."); *Shainwald v. Shainwald*, 395 S.E.2d 441, 444-45 (S.C. Ct. App. 1990) ("A *guardian ad litem* is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person . . . [yet] [p]roperly understood, therefore, the *guardian ad litem* does not usurp the judge's function; he aids it."); *Allen v. Allen*, 254 N.W.2d 244, 247 (Wis. 1977) (holding that the *guardian ad litem* also acts as a representative appointed to counsel and consult with the trial judge concerning the custody issue).

<sup>66</sup> *See Landsman & Minow, supra* note 5, at 1146-52.



v. *Veazey*,<sup>67</sup> and unfortunately perpetuated it since this case is one of the most commonly cited cases regarding the role of *guardians ad litem* where custody is an issue.<sup>68</sup> Alaska law permitted the appointment of a lawyer or *guardian ad litem*. The trial court appointed a lawyer to serve as a *guardian ad litem*. On appeal, the *guardian ad litem* argued that ethically, as a lawyer, he should zealously advocate his client's position. However, the father wanted the *guardian ad litem* to serve as "expert investigator and adviser to the court, . . . and make a recommendation to the court based on his view of the best interests of the child . . . and not take an active part in the hearing or cross examine witnesses."<sup>69</sup>

The court began its analysis by noting that under the "best interests" standards, a child's preference is relevant. From a brief survey of the literature on the effects of divorce, the court ascertained that children are affected by the break-up of the family and, even though they are not formal parties, that children have the greatest interest in the litigation. From that, the court concluded that the *guardian ad litem* was in "every sense the child's lawyer."<sup>70</sup> However, the opinion then jumped over any discussion of the child's competence. It asserted that the lawyer "should exercise his best professional judgment on what disposition would further the best interests of the child," and certainly need not follow the client's wishes.<sup>71</sup> Thus the *guardian ad litem*-lawyer could advocate a position that neither of the parents should be awarded custody of their child!<sup>72</sup>

Wisconsin is one of the jurisdictions that requires the *guardian ad litem* to be a lawyer. Since 1955,<sup>73</sup> Wisconsin appellate courts have decided at least fourteen cases in which they determined that it was mandatory

<sup>67</sup> 560 P.2d 382 (Alaska 1977).

<sup>68</sup> The exact issue before the court was whether the *guardian ad litem* had the right, as a party, to a peremptory challenge of the judge. *See id.* at 384. In holding that the *guardian ad litem* does have the right, the court accepted all parties' invitation to clarify the *guardian ad litem* role in general. *See id.* at 386. Thus, the opinion is well organized and fairly comprehensive. Many cases cite *Veazey* with favor. *See, e.g.,* Hartley v. Hartley, 886 P.2d 665, 673 (Colo. 1994); *In re* Marriage of Rolfe, 699 P.2d 79, 87 (Mont. 1985); Vande Hoven v. Vande Hoven, 336 N.W.2d 366, 368 (N.D. 1983); Provencal v. Provencal, 451 A.2d 374, 376 (N.H. 1982); Moore v. Moore, 809 P.2d 261, 264 (Wyo. 1991); J.W.F. v. Schoolcraft, 763 P.2d 1217, 1221 (Utah Ct. App. 1988), *rev'd in part*, *State ex rel. J.W.F. v. Schoolcraft*, 799 P.2d 710 (Utah 1990).

<sup>69</sup> *Veazey*, 560 P.2d at 386.

<sup>70</sup> In *Veazey*, the court states:

[W]e have concluded that a *guardian ad litem* appointed pursuant to AS 09.65.130 is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability . . . He should exercise his best professional judgment on what disposition would further the best interests of the child, his client.

*Id.* at 387.

<sup>71</sup> "But it is equally plain that the guardian is not required to advocate whatever placement might seem preferable to a client of tender years." *Id.* at 390.

<sup>72</sup> *Id.* at 389. This is extraordinary, given that a dissolution proceeding is not a dependency.

<sup>73</sup> *See* *Edwards v. Edwards*, 71 N.W.2d 366 (Wis. 1955).

to appoint such *guardian ad litem*-lawyers if there were special concerns. Since 1975,<sup>74</sup> by definition such "special concerns" included all contested custody cases. Although the opinions refer to the child as a party in interest and as the person represented by a lawyer, the courts hold, nonetheless, that the attorney is an advocate of the child's best interest. Moreover, a recent pronouncement from one panel of the Wisconsin Court of Appeals actually defines the client as a "concept," the concept of the best interest.<sup>75</sup>

The Wisconsin courts' opinions have an exasperated tone as they repeatedly reiterate that these *guardians ad litem* must perform lawyer-like functions: they can examine and cross-examine witnesses, and they can make arguments and file briefs, but they cannot testify themselves nor offer new factual material in reports. Trial courts, parents' attorneys, and *guardian ad litem*-lawyers have been chastised for "lapses" such as: the trial court talking to the *guardian ad litem* in chambers without recording the discussion;<sup>76</sup> permitting the *guardian ad litem* to file a "report" twenty days after the close of trial;<sup>77</sup> or allowing the *guardian ad litem* to file a preliminary report and make an oral report to the court after closing arguments.<sup>78</sup> But Wisconsin appellate courts do not reverse for these lapses. Instead the reviewing courts characterize preliminary reports as briefs and oral reports as arguments.<sup>79</sup>

It is no wonder that parents' lawyers dealing with *guardian ad litem*-lawyers in Wisconsin have not known how to treat them. This situation led to a bar complaint filed against the lawyer for a parent because he met with his client's child without the *guardian ad litem* present. The lawyer thought, and the bar association hearing officer agreed, that the client of the *guardian ad litem* was a concept, not the child.<sup>80</sup> Yet the Wisconsin Supreme Court reversed, holding that the client was the child, and thus a violation of

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<sup>74</sup> See *de Montigny v. de Montigny*, 233 N.W.2d 463 (Wis. 1975). This case is cited in *Veazey*, 560 P.2d at 388.

<sup>75</sup> The Wisconsin Court of Appeals stated:

The *guardian ad litem* described his duties as representing and advocating the children's wishes. . . . However, sec. 767.045(4), Stats., clearly states that the *guardian ad litem* shall be an advocate for the *best interests* of a minor child and that the *guardian ad litem* shall not be bound by the wishes of the minor child. This means that the *guardian ad litem* does not represent a child *per se*. Rather the *guardian ad litem*'s statutory duty is to represent the *concept* of the child's best interest. In advocating for this concept, the *guardian ad litem* acts in the "same manner as an attorney for a party to the action."

*Wiederholt v. Fischer* 485 N.W.2d 442, 446 (Wis. Ct. App. 1992) (emphasis in original).

<sup>76</sup> See *Haugen v. Haugen*, 262 N.W.2d 769, 773 (Wis. 1978).

<sup>77</sup> See *Allen v. Allen*, 254 N.W.2d 244, 248 (Wis. 1977).

<sup>78</sup> See *Hollister v. Hollister*, 496 N.W.2d 642, 645 (Wis. App. 1992).

<sup>79</sup> See *id.* at 645.

<sup>80</sup> See *In re Disciplinary Proceedings Against Kinast*, 530 N.W.2d 387, 390-91 (Wis. 1995) (apparently construing the *Wiederholt* opinion literally and holding that there was no violation since the client represented by the *guardian ad litem* was the "best interests," and thus the child was not a client).

professional ethics occurred when the parent's lawyer met with a represented client without that client's lawyer present.<sup>81</sup>

Other jurisdictions are no clearer in their guidance to *guardian ad litem*-lawyers. In some opinions, it is even difficult to tell whether the *guardian ad litem* is a lawyer or not. A South Carolina court permitted the *guardian ad litem* to give a report and testify; yet in the next paragraph of the same opinion wrote of the *guardian ad litem* as providing independent legal representation.<sup>82</sup> In Maryland, an appellate court did not find it unreasonable that the lawyer for the child did not attend the trial (thus did not listen to, call, or examine witnesses), and sent a letter to the judge after trial with the lawyer's recommendations.<sup>83</sup>

The Ohio Court of Appeals seems to be one of the few courts to hold the lawyer to normal professional standards.<sup>84</sup> The court considered the lawyer as the child's confidential advocate and saw the *guardian ad litem* as having a separate role to represent the child's best interest. The court did imply that one individual could fill both roles, but only so long as the individual's perception of the child's best interest is the same as that of the child.<sup>85</sup>

Given the ethical constraints on lawyers and their traditional role within the judicial system, the term "lawyer" simply should *not* be used with regard to "representation" of the child unless the lawyer is barred from substituting his own wishes and is authorized to act fully, but only, within the ethical rules governing lawyers. To do otherwise contaminates the role of the lawyer and confounds the person appointed to fill that role. And to blend the term lawyer with the term *guardian ad litem* makes that confusion all the greater.

## B. *Expert Witness*

Some states and commentators assume that a *guardian ad litem* is a type of expert in the area of child custody.<sup>86</sup> Typically, experts render

<sup>81</sup> See *id.* at 390-91 (quoting *de Montigny v. de Montigny*, 233 N.W.2d 463, 468 (Wisc. 1975) (stating that "children in a divorce proceeding are necessary, and indeed indispensable, parties to the proceeding and must be represented in their own capacity as parties")). Thus there had been a violation, but the court did not impose sanctions because of prevailing practice and the "uncertainty whether the rule applied to children in divorce proceedings." *Id.*

<sup>82</sup> See *Shainwald v. Shainwald*, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990).

<sup>83</sup> See *John O. v. Jane O.*, 601 A.2d 149, 163-64 (Md. Ct. Spec. App. 1992).

<sup>84</sup> See *Bawidamann v. Bawidamann*, 580 N.E.2d 15, 16 (Ohio Ct. App. 1989).

<sup>85</sup> See *id.* at 22.

<sup>86</sup> No court goes through any discernible process of qualifying a *guardian ad litem* as an expert. See, e.g., *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997):

The statutes which authorize the appointment of the *guardian ad litem* authorize the family courts to hear the opinions of a witness who would not be a traditional expert under ER 702.

opinions to the court. While few courts and cases refer to *guardians ad litem* as experts, almost all courts have discussed the *guardian ad litem*'s right and responsibility to express an opinion as to custody of the child.

### 1. What are expert witnesses?

Expert testimony is only admissible where helpful to assist the trier of fact in understanding information which would not ordinarily be within that person's common knowledge.<sup>87</sup> Generally a witness is not allowed to express an expert opinion unless a sufficient foundation has been laid to establish that the witness, through "knowledge, skill, experience, training, or education,"<sup>88</sup> is qualified to testify as an expert. A person is usually qualified as an expert in only a relatively narrow field or range of issues.<sup>89</sup>

To the extent that an expert would advance the position of one party or another, one would expect that party to have an interest in calling such an expert. This advocacy function also allows the parties to determine not only whether expert testimony might advance their position in the case, but also to assess whether they can afford to hire such an expert.

An expert is not allowed to express an opinion about the credibility of another witness.<sup>90</sup> Rather, expert testimony may provide the court with additional information by which the court itself is better able to assess another witness' credibility.

While an expert might express an opinion on the ultimate issue in the case,<sup>91</sup> the expert would not normally make a recommendation as to what action a court should take.<sup>92</sup> In a negligence case, for example, an expert

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A *guardian ad litem* is not appointed as an "expert." Rather, she is appointed to investigate the child and family situation for the court and make recommendations. In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a common sense impression to the court.

See also Carol Higley Lane, *The Guardian Ad Litem in Divorce Cases*, in BROSS & MICHAELS, *supra* note 5, at 169 (suggesting parties stipulate to admissibility of the report as that of an expert).

<sup>87</sup> See FED. RULE EVID. 701. Expert testimony may not be allowed where it covers a matter of common knowledge. See *State v. Fernald*, 397 A.2d 194, 197 (Me. 1979).

<sup>88</sup> FED. R. EVID. 702.

<sup>89</sup> See, e.g., *infra* note 103.

<sup>90</sup> To allow an expert (or any witness for that matter) to express an opinion about the credibility of other witnesses would "invade the province of the [fact-finder] to weigh the evidence and decide the credibility of witnesses." *State v. Jones*, 863 P.2d 85, 94-95 (Wash. Ct. App. 1993); see also *Ball v. State*, 651 So. 2d 1224, 1226 (Fla. Dist. Ct. App. 1995); *Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App. 1994). Experts may, however, provide testimony that may assist the judge in assessing witness credibility. See generally Michael Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53 (1991).

<sup>91</sup> See FED. R. EVID. 704(a).

<sup>92</sup> See *id.* at 704(b); see generally, Nicholas Bala, *Assessing the Assessor: Legal Issues*, 6 C.F.L.Q. 179 (1990) (critically reviewing of the role of the expert in family law cases in Canada); Jane Ellis, *Evaluating the Expert: Judicial Expectations of Expert Opinion Evidence in Child Placement Adjudica-*

on traffic reconstruction might testify that in her opinion the defendant was driving at one hundred miles per hour. However, the expert will not testify that the jury should find in favor of the plaintiff, although that may be the permissible and logical inference to be drawn from the testimony.

The expert might issue a report that would be provided to the parties, but this report would not be supplied to the judge or placed in the court file unless the parties stipulated to its admissibility, or the report was otherwise admissible under a rule of evidence or other local court rule.<sup>93</sup> Rather, the expert's opinion would be presented to the court in the form of direct testimony subject to cross examination.

These procedures hold true even when the court appoints the expert as set forth in Federal Rule of Evidence 706.<sup>94</sup> Thus, this analysis shows that (1) even a court-appointed expert participates in the litigation for a specific purpose outlined by the court; (2) the expert's findings and opinions would initially be provided to the parties and not to the court; and (3) the court would receive the expert's opinion only through testimony subject to cross-examination.

## 2. What could expert witnesses do regarding custody in dissolution cases?

Applying this analysis to a custody case, an expert witness would be utilized only where the court or the parties had previously identified the specific expertise needed by the court to assist it in understanding a particular issue. The court would only receive the expert's observations through direct testimony subject to cross-examination, and only after the witness had been qualified as an expert. Such qualification would involve the credentials of the individual in a recognized area of expertise. The expert's testimony would be constrained by both. The expert's opinion might embrace an

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*tions*, 5 CARDOZO L. REV. 587 (1984).

<sup>93</sup> In Washington State, for example, a test report by an expert is admissible in lieu of the witness' testimony where certain certification and notice requirements have been met and the opposing party has not objected. See WASH. SUPERIOR CT. CR. R. 6.13(b).

<sup>94</sup> Rule 706 states:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection . . . . A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross examination by each party, including the party calling a witness.

FED. R. EVID. 706(a).

ultimate issue in the case, but would not include an opinion on another's credibility or issues of law.

Qualification cannot occur in *guardian ad litem* situations because no recognized area of general expertise with regard to "custody" or "child placement" exists.<sup>95</sup> The legal standard for determining child placement is the best interests of the child. While there are many factors that may be considered in making that decision, no widespread scientific standard has evolved that can be applied in assessing all those factors.

Rather, courts may find expert testimony of assistance when evaluating or weighing specific factors. For instance, if one parent's mental stability has been questioned, the court might want expert testimony on that particular issue. Another example would be if a child is deaf and each parent has a different view as to how to raise the child (such as interacting through signing versus oral communications, or schooling at home versus at a school for the deaf), expertise might be appropriate.<sup>96</sup>

For some courts and commentators, a significant factor for evaluation is the psychological makeup of the parents and child. Here the court would appoint as an expert a psychologist or psychiatrist with specialized training and expertise in conducting psychological testing and evaluation.<sup>97</sup> The court would also specify the particular parameters of the evaluation.<sup>98</sup>

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<sup>95</sup> See generally PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS (Lois Weithorn ed., 1987) [hereinafter PSYCHOLOGY] (reviewing the social science literature, especially psychology, and how it is used and misused in custody cases).

[F]inal determinations as to which placements are in the children's 'best interests' necessarily become value laden and nonscientific. . . . Thus, in offering opinions on which of two or more adequate options is 'best' for a child, psychologists are performing not as 'experts' but as individuals with personal biases and lifestyle preferences.

*Id.* at 159-60. *But see* Beth K. Clark, *Acting in the Best Interest of the Child: Essential Components of a Child Custody Evaluation*, 29 FAM. L.Q. 19, 21 (1995) (arguing that there is a category of *expert*, the child custody evaluator, who should have completed a Ph.D. in psychology or a residency in psychiatry, and have specialized training in forensics and child development); *cf.* Linda Whobrey Rohman et al., *The Best Interest of the Child in Custody Disputes*, in PSYCHOLOGY, at 59 (indicating that in their review of the literature there is some basis for thinking psychology can contribute useful information in child custody disputes).

<sup>96</sup> In the Wisconsin scheme, even if the parents agree that signing is the best idea for the deaf child, the court might still seek a *guardian ad litem*-expert to second guess the adequacy of the parents' position.

<sup>97</sup> The *evaluator* in this instance means one who is competent to render an opinion by virtue of expertise. *Cf.* Early neutral evaluator discussion *infra* at note 123. In the case of assessing whether a mental health professional has the necessary forensic expertise to serve as an expert evaluator, one commentator suggests that the court should determine whether the individual has: "(1) a substantive background in children, adolescent, and family mental health issues and (2) relevant training and expertise in the forensic applications of child and family issues." Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L.Q. 63, 64 (1995); *see also* American Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 29 FAM. L.Q. 51, 52-53 (1994) [hereinafter *APA Guidelines*] (acknowledging that special competencies and knowledge are required for making such evaluations).

<sup>98</sup> *See APA Guidelines, supra* note 97, at 56 (contemplating that the "scope of the custody-related

While this expert might be called upon to render an opinion on the ultimate issue of what placement is in the best interest of the child, the expert would have to concede that no consensus exists within the psychological profession as to whether a person in this role should render such an opinion, or instead only address what is in the child's psychological best interests.<sup>99</sup>

### 3. How do *guardian ad litem*-experts function?

In the dissolution context, the court has a tendency to appoint just one person to be the source of all information for the court. Rarely is the person appointed subject to any limits defined by an area of expertise. Instead the appointee is often treated as if that person were an expert in all areas regarding custody.

In custody cases, courts often ask those performing the role of *guardian ad litem* to render expert opinions even though they do not have the requisite training to do so. It is assumed that they can make such a recommendation merely because they have done an investigation at the request of the court. In effect they are imbued with expertise, merely by virtue of having been placed in that role, irrespective of their actual background.<sup>100</sup> This fictional qualification as a child custody expert then becomes self-perpetuating. The more often a particular individual performs that role, the more likely that the trial court will rely on him as if he were an expert.

The judiciary and the general public assume lawyers are competent to render such an opinion in the role of a *guardian ad litem* simply because of their experience representing dissolution clients. This logic is akin to assuming that an attorney who has handled a number of soft tissue injury suits would be qualifiable as an expert on soft tissue injuries. Most courts and voluntary programs require some type of training in order to qualify for appointment as a *guardian ad litem*, but such training could be as little as seven hours.<sup>101</sup> Even if the training is for up to forty hours, some amount of this time is spent dealing with administrative matters such as how to write a report, and dealing with procedural matters such as how the courts function. Very little time is spent on child development, family dynamics during stress, and the other substantive knowledge that one would expect

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evaluation is determined by the nature of the question or issue raised by the referring person or the court . . .").

<sup>99</sup> See *id.* at 58; see generally GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS & LAWYERS* (1987); *PSYCHOLOGY*, *supra* note 95.

<sup>100</sup> See *Fernando v. Nieswandt*, 87 Wash. App. 103, 107, 940 P.2d 1380 (1997).

<sup>101</sup> See, e.g., KING COUNTY (WASH.) FAM. CT., COURT APPOINTED SPECIAL ADVOCATE PROGRAM VOLUNTEER MANUAL 32 (1990) ("All prospective CASAs are required to attend a minimum of 7 hours of training before receiving a case assignment.").

from an expert.<sup>102</sup>

Many reasons exist for judges, lawyers, counselors, and others who deal regularly with children to have some specialized training regarding issues like child development, parenting, and the effects of legal disputes on children. However, participation in such training does not make them experts. Those who are experts in the field of child psychology or child development generally limit their expertise to the specifics of their training and experience.<sup>103</sup> Rarely is someone competent to render an expert opinion on which parent's custody is in the best interest of the child.<sup>104</sup>

### C. Investigator

The most common role assigned to a *guardian ad litem* is that of an investigator.<sup>105</sup> Only one jurisdiction, Wisconsin, has rejected this role.<sup>106</sup>

#### 1. What are investigators?

An investigator is employed to discover and verify information.<sup>107</sup> This function might include obtaining and reviewing copies of relevant documents, interviewing witnesses, and performing site visits. The investigator usually acts as a resource for a party. The investigator reports the results of the investigation to the party and her lawyer who then evaluate it for strategic uses in negotiations or as evidence at trial. At trial, the lawyer

<sup>102</sup> For a general discussion of Court Appointed Special Advocate training in the state of Washington, see Nancy Neraas, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington Experience*, 58 WASH. L. REV. 853, 862-65 (1983).

<sup>103</sup> See Gary B. Melton & Susan Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise*, 44 AM. PSYCHOLOGIST 1225, 1225-33 (1989). For example, a psychologist who deals primarily with children who have been the victims of child abuse would normally not feel comfortable or competent to testify regarding childhood autism.

<sup>104</sup> See, e.g., *Baty v. Baty*, 403 N.E.2d 747, 749 (Ill. App. Ct. 1980) (holding that a witness who lacked specialized education in child psychology, elementary education, or day care could not qualify as an expert in a custody proceeding); see *supra* note 99.

<sup>105</sup> Actually the function predates the wide use of *guardians ad litem* and was (and still is) performed by social workers or other court-related personnel. See generally Robert Levy, *Custody Investigations in Divorce Cases*, 4 AM. B. FOUND. RES. J. 713 (1985) (offering a scathing commentary and history of such investigations). What is also surprising are the number of jurisdictions in which a case may have an investigator, a lawyer, and a *guardian ad litem*.

<sup>106</sup> See *Hollister v. Hollister*, 496 N.W.2d 642, 645 (Wis. Ct. App. 1992) (rejecting the notion that the *guardian ad litem* has a "fact finding mission" and instead viewing the role of the *guardian ad litem* as lawyer for the child, who, as such, cannot be a witness as an investigator is often envisioned as being). This assumes that the court was referring to a "fact finding mission" as that of a *fact gatherer*. See *supra* note 23 for a discussion of the common misapplication of the term "fact-finder" to children's lawyers or *guardians ad litem*.

<sup>107</sup> See BLACK'S LAW DICTIONARY 572 (6th ab. ed. 1991); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 636 (1983).



would present that information through witnesses with personal knowledge of the information.<sup>108</sup> Occasionally the investigator could be called to testify as a witness. However, the investigator could not relay hearsay, but only testify as to those matters about which she has first-hand knowledge.<sup>109</sup> Otherwise the investigator remains behind the scene.

## 2. What might an investigator do regarding custody in a dissolution?

In a custody case, one might employ an investigator to gather all of the possible evidence that either side might rely on. Because the best interests standard is extremely broad, the range of information or facts to be explored is nearly endless. The obvious include: interviewing all witnesses such as siblings, parents, relatives, teachers, doctors, neighbors, day care providers; collecting medical, police, court, financial, and school records; and observing the child, the home, and perhaps the interaction of the parents with the children.<sup>110</sup> The results of the custody investigation would be presented in the form of documents and detailed summaries of the interviews. They would be provided to the parties who would then decide how to proceed.

## 3. How are *guardian ad litem*-investigators used?

In the context of a custody dispute, the *guardian ad litem*-investigator not only collects information, but evaluates and packages it in a report filed with the court. The report usually concludes with a recommendation to the court as to which parent should get custody. Some statutes make these reports independently admissible.<sup>111</sup> The report is usually, although not always, provided to the parties and often not until very close to trial.<sup>112</sup>

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<sup>108</sup> See FED. R. EVID. 602 (providing that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). The only exception to this rule is for expert witnesses. See *id.* at 703.

<sup>109</sup> The investigator, like any other witness, would be prohibited from relating out-of-court statements by others if offered for the truth of the assertion, unless this testimony fell within a recognized exception to the hearsay rule. See *id.* at 801, 803-04. Thus, while the investigator likely gains information by interviewing a variety of persons, she generally cannot testify regarding those conversations. This information would be presented directly through the testimony of the interviewees, subject to cross-examination.

<sup>110</sup> Cf. Levy, *supra* note 105 for a discussion of the content of social worker custody investigations which the authors find consistent with their experience of *guardian ad litem* investigations, including their relative superficiality.

<sup>111</sup> See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT, pt. 4, § 405(b) (amended 1973), 9A U.L.A. 604 (1987) ("If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.").

<sup>112</sup> See *id.* § 405(c), 9A U.L.A. 604 (requiring the report be provided ten days before a hearing).

Investigators may or may not be called to testify at trial. If they do testify, litigators assume that they will testify to the entirety of their investigation (regardless of whether or not they have personal knowledge), provide their assessment of the credibility of the information, and make recommendations (regardless of expertise).

Compare this scenario to the role of a police investigator in a criminal case. Generally, the officer's report is not submitted to the court.<sup>113</sup> The officer can testify only to very limited matters. To the extent that an officer is an occurrence witness, because he actually saw some activity involving a crime scene, the officer can testify to the occurrence. Follow up interviews give the prosecutor information about other potential witnesses or leads. But at a court hearing, the other witnesses' testimony or declarations are all that are admissible, not the hearsay statements of these witnesses through the detective investigator. The detective investigator would not be allowed to express an opinion as to the credibility of the witnesses he has interviewed or as to whether the court or jury should find the defendant guilty or not.

Another way to look at the issue is to face the odd bias built into the concept of a lay witness appointed by the court. Such a person is most likely to enjoy the highest credibility rating by the court, whereas parties' witnesses will not have this advantage. Thus *guardians ad litem* typically will have greater credibility simply because the judge appointed them.

Often a judge appoints a *guardian ad litem*-investigator because the court believes he will provide a more objective and neutral rendering of the "facts."<sup>114</sup> Objectivity implies that the investigator collects information from the external world and does not impose his own selectivity and bias in the collection or transmission of the information. This is a phenomenological and practical impossibility.<sup>115</sup> Our jurisprudence assumes that there are multiple realities, some more or less subjective, which interact and are presented in the courtroom and from which the judge's job is to identify some relevant verities and then draw conclusions.

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<sup>113</sup> See MCCORMICK ON EVIDENCE, *supra* note 26, at Ch. 29, § 288 & Ch. 30, § 296.

<sup>114</sup> See Inker & Perretta, *supra* note 5, at 111 ("When the court seeks independent evidence, it releases itself from the shackles of partisan advocacy and opens the door to the introduction of objective evidence which may be detrimental to either or both parents but beneficial to the child.")

<sup>115</sup> See Martin Guggenheim, *The Right to Be Represented But Not Heard*, 59 N.Y.U. L. REV. 76, 108 (1984):

[T]he information will have been colored by the Investigator's values, by his sense of what is relevant and what is not, before it is ever heard in open court; to an undetectable degree, the evidence will already have been processed and evaluated before alternative assessments can be offered. To some extent, the decisionmaking process will have been closed before the parties have had an opportunity to present their arguments in court. Accordingly the opportunity to be heard, to have a day in court, becomes less meaningful.

*Id.* (citations omitted).

Neutrality, perhaps, seems the easiest to define, in that the person has no partiality for one or the other parent. Many *guardian ad litem*-investigators begin the investigation that way, but it is doubtful they continue throughout the process with such impartiality. And to the extent that they make a recommendation, they can no longer be perceived as neutral.

The court's reliance on the *guardian ad litem*-investigator to uncover the "facts" is based on its inherent distrust of the parents to provide the necessary evidence upon which to base a decision.<sup>116</sup> However, when one examines how the *guardian ad litem*-investigator goes about collecting the information for the court, two things become apparent. First, the primary source of facts and witnesses for the *guardian ad litem*-investigator is the parents. Rarely does the *guardian ad litem*-investigator seek out witnesses or information sources other than those identified for them by the parents.<sup>117</sup>

Second, most courts and statutes require the investigator to go beyond merely conveying the information gathered, to providing recommendations to the court.<sup>118</sup> Thus in reality, what the courts want is an *assessment* of the facts—the weight and credibility to be given to each piece of that information. In other words, the court wants a personal opinion regarding the evidence, an opinion that neither the parties nor their lawyers are allowed to express.<sup>119</sup> When this occurs, the individual is no longer a mere investigator but has risen to the rank of an expert or perhaps has taken on the vestments of the judge himself.<sup>120</sup>

The previous analogy with criminal investigators also illustrates

<sup>116</sup> See *supra* note 26.

<sup>117</sup> See *Cyr v. Cyr*, 432 A.2d 793, 798 (Me. 1980):

The trial judge acted within the permissible range of his discretion in denying Peter Cyr's motion for appointment of a *guardian ad litem*. . . . In the present case the Superior Court was deluged with testimony from lay and expert witnesses . . . . Neither party . . . had any incentive to minimize his own contributions to the children's welfare or to conceal any subversions of that welfare by the other spouse. An investigator from the Maine Department of Human Services offered a neutral opinion of the children's best interest. The trial judge could reasonably have predicted that a *guardian ad litem* for the children would provide little additional information while substantially increasing the contentiousness of the hearing.

*Id.* The comment to Standard 1.1 of the AAML Standards states: "In the absence of a particular reason for assigning representation for a child, the representative [either counsel or *guardian ad litem*] frequently will merely duplicate the efforts of counsel already appearing in the case." REPRESENTING CHILDREN, *supra* note 2, at Standard 1.1 cmt.

Perhaps the one piece of information the parents cannot provide accurately is the wishes of the child. In this area the child can be called as a witness or it may make sense to have a lawyer for the child to represent the child's wishes rather than a *guardian ad litem* whose role is far more sweeping.

<sup>118</sup> The authors have interviewed several *guardians ad litem* who have on one or another occasion declined to give the court a recommendation. Uniformly they report that the judge is displeased with their performance.

<sup>119</sup> See *supra* Parts I.A, I.B.

<sup>120</sup> See *supra* note 23 (discussing the usage of the term *fact-finder* when referring to a *guardian ad litem*.)

another problem with a *guardian ad litem*-investigator. The detective is a witness for a party rather than for the court, yet often, a *guardian ad litem*-investigator is seen as an agent for the court. The concept of the court engaging its own investigation, while foreign to our common law system of jurisprudence, is the model for the inquisitorial civil law systems of Europe and Latin America.<sup>121</sup>

#### D. Mediator

Courts, legislators, and lawyers (as well as parents) recognize that the process of litigation is costly and often exacerbates disputes. They are increasingly aware that private solutions are useful, and courts may wish to direct the parties to mediation.<sup>122</sup> This section focuses on mediators as a primary example of facilitators of negotiated settlements. Settlement conference judges and early neutral evaluators<sup>123</sup> also serve as facilitation mechanisms. The court sometimes assigns this role to a *guardian ad litem*.<sup>124</sup> Sometimes the person denominated as a *guardian ad litem* chooses or offers to function as a mediator with the court's blessing.<sup>125</sup>

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<sup>121</sup> It is beyond the scope of this Article to fully explore the civil law system of investigating judges; however, it is worth noting that no cases address this casual remaking of our judicial system.

<sup>122</sup> Some jurisdictions now mandate or permit counties to adopt a rule requiring parents who dispute custody to first attempt to mediate the dispute. *See, e.g.*, WASH. REV. CODE ANN. § 26.09.015 (West 1997).

<sup>123</sup> *Early neutral evaluator* is a recognized term in the field of dispute resolution. It refers to an individual hired by one or both of the parties to review and assess the evidence in a case in order to assist the parties in reaching a negotiated settlement. The assessment is provided only to the party or parties and not the court. *See* EDUCATION & MEDIATION COMMS., ALTERNATIVE DISPUTE RESOLUTION SECTION, WASH. STATE BAR ASS'N, MANUAL ON ALTERNATIVE DISPUTE RESOLUTION 7 (1993). Settlement judges perform a similar function in reviewing the evidence and providing the parties with some insight as to how a judge might view that evidence. The settlement judge would not be the judge presiding over the trial and would not communicate the contents of the settlement discussions to the trial court. *Id.* at 6.

<sup>124</sup> In California, the reverse has occurred. Under state law, counties can require that a mediator be allowed to "submit a recommendation to the court as to the custody or visitation with the child." CAL. [FAM.] CODE § 3183(a) (West 1994). Thirty-two counties have adopted such a local rule. California also entrusts this mediator to be the advocate of the best interests of the child. And, contrary to most mediation standards, confidentiality rights are held by the court not the parties. *See* Rosson v. Rosson, 224 Cal. Rptr. 250, 257-58 (1986); CAL. [FAM.] CODE § 3177 ("Mediation proceedings pursuant to this chapter shall be private and shall be confidential. All communications, verbal or written from the parties to the mediator in the proceeding are official information within the meaning of §1040 of the Evidence Code.").

<sup>125</sup> *See* Landsman & Minow, *supra* note 5, at 1185.

## 1. What are mediators?

There is substantial literature on mediation and the role of a mediator.<sup>126</sup> This literature reflects near unanimity that the process is a voluntary one in which a trained third person meets with the disputants and attempts to assist them to find common ground and their own solutions.<sup>127</sup> Within the range of mediation techniques, there exist a number of common features: no independent investigation of the facts; no final authority to impose a solution; some sense of neutrality<sup>128</sup> with respect to the parties and the solution or resolution they reach; and confidentiality.<sup>129</sup>

These features are essential for an effective mediation process. To reach a cooperative agreement, the parties must trust that the mediator is present to assist both sides, but not favor one over the other. In addition, the parties must feel free to express themselves openly without the fear that their statements will be turned against them through disclosure by the mediator.<sup>130</sup>

## 2. How might mediators function regarding custody in a dissolution?

In custody cases there is an increasing use of mediation.<sup>131</sup> Parties seek it voluntarily, and courts increasingly are mandating that the parties attempt mediation. In most instances, people designated as mediators function as described above.<sup>132</sup> They would usually meet with the parents, typically, but not necessarily, without lawyers present.<sup>133</sup> The mediator would ask each parent to explain the problem that brought them, letting each respond. Then the mediator would try to assist the parents in generat-

<sup>126</sup> For an excellent summary of the mediation process, see Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 5-8.

<sup>127</sup> See *id.* at 5-6.

<sup>128</sup> See MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 2 (1996) [hereinafter CONDUCT FOR MEDIATORS] (approved by the American Arbitration Ass'n, American Bar Ass'n, and Society of Prof'ls in Dispute Resolution). This standard requires the mediator to conduct the mediation in an impartial manner and avoid even the appearance of partiality.

<sup>129</sup> See *id.* § 5; Kirtley, *supra* note 126, at 9.

<sup>130</sup> See CONDUCT FOR MEDIATORS, *supra* note 128, § 5.

<sup>131</sup> See Elizabeth S. Scott & Robert Emery, *Child Custody Dispute Resolution: The Adversarial System and Divorce Mediation*, in PSYCHOLOGY, *supra* note 95, at 39-51.

<sup>132</sup> Except for California. See *supra* note 124.

<sup>133</sup> The parents usually meet together with the mediator although they may adjourn into separate caucuses or have some separate meetings. In most instances the lawyers are not present, primarily for cost savings, but there have been calls for lawyer participation to correct power imbalances between the parties or to facilitate obtaining a document memorializing the agreement. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1331 (1995).

ing solutions to the problem. It is less common that the mediator would meet with the children, although commentators have suggested this course of action.<sup>134</sup> If the parents can work out a custody plan, the mediator might assist either them or their lawyers in writing an agreement.

If the parents cannot arrive at an agreement, the mediation terminates. Mediators do not report to the court what the parties have told them in the mediation nor the mediator's perception of why the mediation was not successful. Likewise, if the mediation does not succeed, the mediator will not recommend an outcome to the court.

### 3. How do *guardian ad litem*-mediators function?

Within the context of a custody case, many individuals who are designated as *guardians ad litem* are asked or take it upon themselves to perform a mediator role in addition to one or more of the other roles discussed above.<sup>135</sup> Certainly their report may foster negotiations in which the *guardian ad litem* may or may not participate. Proponents of *guardians ad litem* see promoting settlements as one of their primary strengths.<sup>136</sup> But distinct from traditional mediation, the parties are aware of the *guardian ad litem*-mediator's relationship with the court and may choose to settle because they believe that the judge will automatically follow the *guardian ad litem*'s recommendation.<sup>137</sup>

Several authors have tried to deal with this dilemma by suggesting the mediator role be performed before making recommendations. They suggest, however, that if the mediation fails, then the *guardian ad litem* should proceed to prepare a report and recommendations.<sup>138</sup> It is difficult to imagine how one person can fulfill the responsibilities and ethical constraints of mediators and maintain the cooperation of the parties if they are then to make an independent investigation and recommendation to the court.

#### E. *Party to the Dissolution*

This role is discussed last as it best illustrates the deep confusion in

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<sup>134</sup> See Schwartz, *supra* note 8, at 140.

<sup>135</sup> See *id.* at 163.

<sup>136</sup> See *id.* at 151-52. Schwartz acknowledges that this practice may "compromise the confidentiality and privacy goals of the mediation" and "the mediation process itself may suffer from control of a mediator who may use the parents' words and actions against them at a later time." *Id.*

<sup>137</sup> The authors experienced a situation where a *guardian ad litem* offered to serve as a mediator after he had made his recommendation. Our client had no confidence that the *guardian ad litem* could be neutral after recommending against her.

<sup>138</sup> See *supra* note 123.

this area of the law. No jurisdiction requires the child to be a formally named party to a dissolution. Some appellate opinions state, however, that “the child is an unnamed party, who [has] the most interest in the litigation,”<sup>139</sup> or is a “necessary and indispensable party.”<sup>140</sup> A few judicial opinions presume that the *guardian ad litem* is an actual party,<sup>141</sup> even if the opinion explicitly declines to decide whether the child is a party.<sup>142</sup>

### 1. What are parties?

*Party status* refers to those who have a legally recognized stake in the outcome of the litigation. Parties are entitled to make requests of the court and utilize the court process to advance their position. Parties may testify, engage in and be subject to discovery, negotiate and settle the case, and must subject themselves to the decision of the judge. They may retain lawyers to represent them or they are entitled to proceed *pro se*. If they act without a lawyer, they can do all of the things that lawyers do, subject to the same constraints under which lawyers operate. In addition, they can instruct themselves since they are also the client. A party *cannot* be an arm of the court.<sup>143</sup>

Where one of the named parties is incompetent, his guardian stands in the shoes of the party and instructs the lawyer.<sup>144</sup> In the absence of a guardian, then a *guardian ad litem* may be appointed for the incompetent party for the litigation.<sup>145</sup> Both the guardian and *guardian ad litem* have the responsibility to try to ascertain what the incompetent party would have wanted if he was still capable of making decisions. This may be possible when the incompetent party is an adult, through investigation of that

<sup>139</sup> *Veazey v. Veazey*, 560 P.2d 382, 386-87 (Alaska 1977).

<sup>140</sup> *de Montigny v. de Montigny*, 233 N.W.2d 463, 468 (Wis. 1975); *see also* *J.W.F. v. Schoolcraft*, 763 P.2d 1217 (Utah Ct. App. 1988), *rev'd in part*, *State ex rel. J.W.F. v. Schoolcraft*, 799 P.2d 710 (Utah 1990). Though formally a paternity case, in discussing issues of parental custody the *Schoolcraft* court states, “When a court presumes to consider the best interests of a child, especially when custody is at issue, it is crucial for that child to have party status.” *Id.* at 1220.

<sup>141</sup> *See In re Marriage of Martins*, 645 N.E.2d 567, 574 (Ill. App. Ct. 1995) (“a neutral court-appointed party”). Yet an earlier Illinois court stated that the *guardian ad litem* was both party and representative. “Timothy was a witness in an in-chambers hearing before the trial court. The *guardian ad litem*, as Timothy’s representative, was a party to the action and thus, the one to present in the trial court a motion for reconsideration of the judgment.” *In re Marriage of Apperson*, 574 N.E.2d 1257, 1261 (Ill. 1991); *see also* *Provencal v. Provencal*, 451 A.2d 374, 376 (N.H. 1982) (relying on N.H. REV. STAT. ANN. § 17-a, and holding that the *guardian ad litem* represents the interests of the child and shall be a full party to the proceedings and shall have such rights as other parties).

<sup>142</sup> *See Apperson*, 574 N.E.2d at 1261.

<sup>143</sup> The judge cannot serve as a party in a case he is judging. *See* CODE OF JUDICIAL CONDUCT Canon 3E(2)(d) (1990).

<sup>144</sup> *See supra* Part I.A.; *infra* Part II.B.

<sup>145</sup> *See supra* Part I.A.2.

person's past actions, personality, and expressed wishes. But this is nearly impossible when the party is an infant or a very small child. Thus, asking the *guardian ad litem* to act in the best interests of the child often results in that person substituting his judgment for the child's.

2. How might party status for the child regarding custody be used in a dissolution?

In a custody case, a court could formally designate children as parties. Typically children, even as parties, do not need a *guardian ad litem* if they have a natural guardian who can advocate on their behalf.<sup>146</sup> In a custody case, there are the two natural guardians, the parents, both advocating what they believe to be in the child's interests. However, once a child attains party status, courts view her as having an interest adverse to her parents, who then cannot represent her. Thus the child-party will have a lawyer appointed to represent her. Usually, the lawyer-client relationship will dictate the lawyer's actions, unless the lawyer determines that the child is so impaired as to be unable to assist the lawyer at all. In such a case the lawyer might ask the court to appoint a *guardian ad litem*.<sup>147</sup> However, the reverse could also occur. A *guardian ad litem* can be appointed to ascertain if the child is competent. If so, then the child is appointed a lawyer. The first determination concerns competency. Only when a child is considered incompetent might a *guardian ad litem* step into the picture.<sup>148</sup>

Unless the child has a lawyer, the *guardian ad litem* is, in effect, a *pro se* party. Such parties are not formally accorded more rights than other parties or those parties' lawyers.<sup>149</sup> In their capacity as *guardian ad litem-pro se* parties, they would be held to the same basic standards as attorneys. They could call witnesses on their own behalf and cross-examine all other witnesses. They would not give recommendations to the court but could make arguments to the court. Like other lawyers, they could not express their personal opinion as to the veracity of witnesses nor the justness of a claim. They could conduct depositions, but would not have a right to interview other parties without those parties' lawyers present. They would be given notice of all proceedings and would have to sign all agreed orders.

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<sup>146</sup> See *infra* Part II.B.

<sup>147</sup> See *supra* Part I.A. (regarding lawyer's responsibilities when representing incompetents).

<sup>148</sup> See *infra* Part II.B.

<sup>149</sup> Although *pro se* parties may be provided some degree of latitude since they have no formal legal training, they must still remain within the common boundaries of court procedure. Typically such unrepresented litigants create significant problems for the court precisely because they act as party and as their own lawyer. Those states that appoint lawyers to serve as *guardians ad litem* are merging the two roles and may be providing evidence of the old adage, "he who is his own lawyer has a fool for a client." TWO THOUSAND FAMOUS LEGAL QUOTATIONS 42 (1992).



A party may also serve as a witness, testifying under oath subject to cross-examination. The testimony must comply with the rules of evidence, which means among other things that the witness would not be allowed to relate what others said,<sup>150</sup> unless those out-of-court statements fit under some recognized exception to the hearsay rule. The *guardian ad litem*-party would generally be restricted from testifying to his own personal opinion,<sup>151</sup> unless he were testifying as an expert.<sup>152</sup> Normally a party, as witness, would not serve as an expert for his own case. And the party would certainly be restricted from expressing a personal opinion as to the credibility of other witnesses.<sup>153</sup>

### 3. How do *guardian ad litem*-parties function?

In custody litigation, the courts rarely address the *guardian ad litem* as a party. Most jurisdictions treat the *guardian ad litem* as if the individual were a party, however, by permitting the *guardian ad litem* to state a position as to the outcome of the litigation as well as by extending them the right to participate in all stages of the proceeding. But rarely is a *guardian ad litem* limited to the normal attributes and limitation of the status of a party. As indicated throughout this Article,<sup>154</sup> they are permitted to render opinions on the credibility of the evidence and witnesses and on the ultimate outcome. They are permitted to interview all other parties, get access to confidential records, make recommendations, and even write reports to the court after a trial which they did not attend—thus making themselves unavailable for cross-examination.

The role of a party is a known quantity within our jurisprudence. Yet when combined with that of a *guardian ad litem*, it expands to consume the litigation. The figure becomes mythic in its capacity to be seen as neutral and objective at the same time it advocates a position, provides expert opinions on its own behalf, serves as a lay lawyer, and is accorded highest priority by the court—including being treated as an arm of the court.

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<sup>150</sup> See FED. R. EVID. 801(c), 802.

<sup>151</sup> See *id.* at 701.

<sup>152</sup> See *id.* at 702.

<sup>153</sup> In states that have adopted FED. R. EVID. 608, a party could, under certain circumstances, provide his personal opinion as to the reputation of a witness for veracity as it relates to that witness' general credibility. This could only be done, however, if the party-witness was personally familiar with the witness, which is not usually the case for a *guardian ad litem*-party. See MCCORMICK ON EVIDENCE, *supra* note 26, at Ch. 17, § 186.

<sup>154</sup> See *supra* Parts I.A.3, B.3, C.3, D.3, E.3.

## II. HOW DID THIS MUDDLING OF ROLES AND FUNCTIONS COME ABOUT? THE INTERPLAY OF FIVE FACTORS

The focus of this Article is the state of the law and current thinking regarding *guardians ad litem* in custody cases within the context of a dissolution. Part I deconstructed the tangled web of contradictory and inconsistent uses of these court-appointed figures, and explored the contours of recognized roles within the judicial system and to ascertain which functions are appropriate to which roles.

Part II of this Article proffers the interplay of five factors to explain how the functions and roles of court-appointed officials have become muddled: (1) the custody rules in the development of divorce law; (2) the evolution of the concept of *guardians ad litem*; (3) the rejected alternative: appointing a lawyer for the child; (4) the concerns and needs of the participants; and (5) the issues of alleged efficiencies and real costs. The first two sections of this Part explore the interrelationship of two historical trends, the rise of no-fault divorce with its child-focused custody rules, and the origins and uses of *guardians ad litem* in other types of cases. The third section looks at the alternative conception for advocating on behalf of the child—the appointment of a lawyer. The fourth section looks at the agendas and interests of participants in a dissolution case, and the final section considers the proffered efficiency arguments for having one person wear so many hats.

### A. Custody Rules in the Development of Divorce Law

It is beyond serious policy debate at this point in the history of North American and Western European law that people have a right to dissolve their marriages at will.<sup>155</sup> Whether in a civil or common law country, married couples must use the court system to obtain a divorce.<sup>156</sup> To the extent that couples agree as to the disposition of the incidents of marriage (division of property, debts, and residence of children), the court usually is not interested in scrutinizing nor disturbing their private arrangements.<sup>157</sup>

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<sup>155</sup> See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 149 (1989). Some recent discussion asserts that fault should be reintroduced as a standard for the proceeding. However, its reintroduction is not for the purpose of determining if the divorce may be had, but rather, *upon which terms*. See *infra* note 166.

<sup>156</sup> The state has asserted monopoly control over the final process. There is no such thing as "common law divorce," although societies where divorce was not legally permitted or affordable have always had some informal methods of ending the marriage. See *id.* at 148 n.2.

<sup>157</sup> See UNIFORM MARRIAGE AND DIVORCE ACT, pt. 3, § 306(b) (amended 1973), 9A U.L.A. 216 (1987). Parents may make separation agreements that will bind them and the court, absent a finding of overreaching, duress, fraud. One caveat is the subsection dealing with children and issues of custody.

Where the husband and wife disagree, the public court is the place to decide the dispute.

Despite mandatory reliance on the courts to resolve divorce disputes, there is an implicit mistrust of the adversarial system when it comes to family law cases. There is an almost knee-jerk reaction by the judges that parents cannot be trusted to provide the court with all the information necessary to reach the best resolution of disputes involving children.<sup>158</sup>

Our British heritage sheds some interesting light on the legal system's lack of familiarity with private family law matters. Until relatively recently, it was exceedingly difficult for anyone to obtain a divorce. Religious doctrine so controlled the cultural, social and political climate that it was the ecclesiastical courts that regulated and heard such matters. The Anglican church (despite its birth following the dispute over the divorce of Henry VIII), with its Catholic ancestry, discouraged breaking the bonds of matrimony; thus its courts did not grant such relief.<sup>159</sup> The King's courts did not deal with the matter<sup>160</sup> and only by act of Parliament were divorces occasionally granted.<sup>161</sup> This attitude was imported into the Western Hemisphere. The independent colonies, and subsequently the states, added divorce actions to the repertoire of the civil courts haphazardly. Thus there was not a rich statutory nor common law tradition devoted to placement of children in a situation where the court was choosing between two parents.

Even when divorce became permissible, the grounds for dissolution were based on the standard of "fault." Such a standard not only influenced the ability of a person to actually obtain a decree severing the legal status of husband and wife, but often shaped the other relief awarded. Innocence, blamelessness, and "clean hands" would lead to a form of "winner take all," that is, the victim would get the divorce, the children, the property, alimony, and the like.<sup>162</sup> Under these circumstances, appellate courts had little

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The court always retains the right to ascertain if the arrangement is in the child's best interest. In practice, few courts ever scrutinize a default or uncontested decree for substantive content, other than to assure that all issues have been addressed.

Some commentators have argued that it is precisely in the default or agreed setting that a *guardian ad litem* must be appointed as a check against the parents. See generally Maurice Wilcox, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

<sup>158</sup> See *supra* note 26. Many opinions openly state that parents cannot be trusted, without reference to any rule or reasoned analysis as to why the court is entitled to rely on a presumption that parents lack credibility. One explanation may be that half of all parties to such lawsuits are women. Recent studies of gender bias in the courts have disclosed a profound mistrust of women as witnesses. See FINAL REPORT OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS 9, 11 (1989); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 279, 281-83 (1987).

<sup>159</sup> See HOMER H. CLARK & CAROL GLOWINSKY, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 3 (4th ed. 1990).

<sup>160</sup> See *id.* at 3.

<sup>161</sup> See *id.* at 6.

<sup>162</sup> *Id.* at 739-40.

need to develop a body of law to deal with the placement of children independent of the scrutiny given to the parents' behavior in realms which frequently had no direct relationship to the care of the children.

When the courts or the legislature did independently assess the basis for placement of children, there were deeply embedded gender-based social norms reflected in the standards. Before the mid-1800s, there was a decided legal preference for the right of the father to have control of the children.<sup>163</sup> Later courts adopted the "tender years" doctrine which presumed that the mother, as the natural caretaker, would best provide for the rearing of the children, at least during their infancy.<sup>164</sup> At the present time no state articulates a gender preference.<sup>165</sup>

It was not until the rise of the no-fault divorce that the court or legislature was required to independently assess the other incidents of a fractured marital community.<sup>166</sup> Such issues as custody, alimony, and property disposition were decoupled from the standards for granting the decree itself and from widespread gender-based norms. One dissolution raises multiple causes of action. Most such causes of action result in the termination of a legal relationship between the parties. But issues of child custody and child support imply some ongoing contact between the former husband and wife as parents.<sup>167</sup>

The best interests standard, with its focus on the child, became the common theme when the court was dealing with issues of custody.<sup>168</sup> It was and still is a highly indeterminate test. It is often devoid of significant legislative guidelines<sup>169</sup> and instead invites the court to explore the fullest

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<sup>163</sup> See CLARK & GLOWINSKY, *supra* note 159, at 1075.

<sup>164</sup> See *id.*

<sup>165</sup> In the comments to the UMDA standards on custody, the drafters saw that section as "consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal . . . is simply a short hand method of expressing the best interest of children." UNIFORM MARRIAGE AND DIVORCE ACT, pt. 4, § 402 cmt. (amended 1973), 9A U.L.A. 561 (1987).

<sup>166</sup> Fault is still the basis for divorce in some states. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 773 (Table 4: Grounds for Divorce and Residency Requirements) (1996). And from determinations of fault flow certain other rights, such as alimony. But in most no-fault jurisdictions, the statutes are explicit in rejecting "marital misconduct" as a factor influencing the disposition of any of the incidents of the divorce.

<sup>167</sup> Maintenance and alimony also contemplate ongoing contacts; however, an analysis of this issue is beyond the scope of this Article.

<sup>168</sup> One author traces the origin of the best interest test in the United States to an 1840 New York case, where the standard is adopted, in contrast with the then prevailing fathers' rights norm, as a justification for the court putting a sick three-year-old child with its mother. See Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 900 (1975) (citing *Mercein v. People*, 35 Am. Dec. 635 (N.Y. 1840)).

<sup>169</sup> See UMDA § 402, 9A U.L.A. 561. There are five unranked factors for courts to consider: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to

range of the family's prior history and philosophy of child-rearing. The courts became embroiled in the sifting and winnowing of a multitude of factors and were called upon to exercise exceedingly broad discretion on a case-by-case basis.<sup>170</sup> At the same time this wide discretion has nearly exempted the trial court from appellate review.<sup>171</sup> Many authors have argued cogently that the best interest standard should be revised.<sup>172</sup>

While this Article does not take a position on the best interests standard, the authors believe that indeterminacy is problematic. However, courts have had equally ambiguous standards in other areas of law, such as due process, probable cause, and even nuisance.<sup>173</sup> Whatever the standard, courts have been able to resolve these issues through the traditional tools available to them. Since, at present, the mandatory dispute resolution mechanism for dissolution matters is the public courts, the focus of this Article is how such matters are and ought to be approached within the framework of our judicial system. Faced with the enormity of deciding the fate of children, the lack of viable precedent to do so, and the limitless discretionary standards, the courts and legislatures borrowed the elusive figure of the *guardian ad litem*. It had the dubious virtues of a Latin title

his home, school and community; and (5) the mental and physical health of all individuals involved. Some states like West Virginia and Minnesota have adopted a primary caretaker as part of the "best interest" test. See *Davis v. Davis*, 235 N.W.2d 836, 838 (Minn. 1975); *Blankenship v. Blankenship*, 489 S.E.2d 756, 761 (W. Va. 1997); *Garska v. McCoy*, 278 S.E.2d 357, 362-63 (W. Va. 1981); MINN. STAT. § 518.17(1)(a)(3) (1990). Washington has given primary caretakers a lead position although recent case law rejects it as a presumption. See *In re Marriage of Kovacs*, 854 P.2d 629 (Wash. 1993); WASH. REV. CODE § 26.09.187(3)(a)(1) (1989). Georgia gives priority to the child's wishes if the child is over 14. See GA. CODE ANN. § 19-1 9(a)(3) (1996). Recently states have added by statute or court decision requirements that the courts consider domestic violence. See *Elrod & Spector, supra* note 166, at 771 (Table 2).

<sup>170</sup> Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. No. 3, 226, 262 (1975) (expressing concern that the lack of predictability and accountability inherent in the best interests standard pose serious barriers to settlement). Note also that divorce law is highly parochial since it has been eschewed by the federal courts and instead left up to the states.

<sup>171</sup> See Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2291-96 (1991) (pointing to a long and respectable tradition of judicial discretion under the Common Law, but noting the responsibility this places on the trial judge to articulate specific findings of fact and legal conclusions, and on the appellate courts to reject a posture of extreme deference to the trial court). Mnookin, in a more recent article regarding indeterminacy, points out that "what" is decided is of perhaps secondary concern to "who" makes the decision. See John E. Coons et al., *Deciding What's Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 465, 489-90 (1993); see also *In re Marriage of Apperson*, 574 N.E.2d 1257, 1260-61 (Ill. 1991); See Ellis, *supra* note 92 at 615.

<sup>172</sup> See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 53-64 (2d ed. 1979) (psychological parent); David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 558-68 (1984) (primary caretaker or gender); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988) (primary caretaker).

<sup>173</sup> See Schneider, *supra* note 171, at 2240.

and a historical pedigree.

## B. *The Evolution of the Concept of Guardian Ad Litem*

The earliest concept of guardian in English law appeared around the fourteenth century as the testamentary guardian for the child of a deceased father.<sup>174</sup> The surviving wife and mother would have been deemed by law as unfit to manage the child's affairs. However, the purpose of this guardian was to protect the infant's interest in land and not to care for the child.<sup>175</sup> The guardian concept seeped into our jurisprudence slowly and became linked with the concept of *parens patriae*, which was the idea that the king had ultimate ownership of the land and control over and solicitude for infants, "idiots," and "lunatics."<sup>176</sup> The king delegated his *parens patriae* authority to a guardian through the mechanism of the court. Over time, the judiciary assumed the *parens patriae* mantle and when an issue arose that involved the need of judicial resolution involving an incompetent or a minor a *guardian ad litem* would get appointed for that person for the period of the litigation.<sup>177</sup>

Over time, courts began appointing *guardians ad litem* in situations where the incompetent or child was a named party *and* (a) the presumed legal guardian had an interest which was adverse; or (b) there was no presumed natural guardian.

### 1. Adversity between the child and parents (natural guardians)

Parents are normally the guardians of their children. Historically it was rare for the nuclear family unit (composed of parent(s) and children) to be breachable for purposes of intra-family lawsuits. Children could never sue their parents over the care the parents provided nor could either spouse in an intact family approach the court to resolve a dispute over child rearing.<sup>178</sup> However, when the guardians or parents and the child were parties,

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<sup>174</sup> See Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 148-50 (1970).

<sup>175</sup> See *id.*

<sup>176</sup> *Statute De Prerogativa Regis*, 1324, 17 Edw. 2, ch. 9 (Eng.). See generally Cogan, *supra* note 174.

<sup>177</sup> The idea that the court itself would be a protector of minors was discredited by the Supreme Court. See *In re Gault*, 387 U.S. 1, 34-35 (1967). However, the concept still persists as evidenced by a recent New Mexico case in which the supreme court states that minor children are represented not only by the *guardian ad litem*, but by the court itself. See *Collins ex rel. Collins v. Tabet*, 806 P.2d 40, 49 (N.M. 1991).

<sup>178</sup> See GLENDON, *supra* note 155, at 97-102. Glendon quotes the New York Court of Appeals: The court cannot regulate by its processes the internal affairs of the home. Dispute between

such as inheritors under a will or victims of a third party tort, and their interests were adverse, it was considered appropriate for each party to have her own representative.

In both the probate and tort examples above, the person to be appointed on behalf of the child was termed a *guardian ad litem* by statute or court rule. The term was most frequently interpreted in this context to mean a lawyer, since it is a lawyer who can assist the child to navigate through the litigation and thus be the protector of the child's-interests-as-party. This *guardian ad litem* has a fairly narrow responsibility since the issues typically involve fairness of a monetary award and do not require extensive involvement in the litigation nor investigation of family history. Even in these contexts there has been confusion about the roles and functions of the *guardian ad litem*, similar to the issues raised in this Article.<sup>179</sup>

## 2. Where there is no natural guardian

### a. Incompetency: no pre-existing guardian

Adults direct their own lives and do not have guardians. However, once an adult's capacities are severely impaired, the adult may not be able to care for himself. In guardianship proceedings, the petitioner, as proposed guardian, seeks to become the guardian of the party's-interests-as-person. The proposed ward<sup>180</sup> is a named party, who does not usually enter the lawsuit with prior knowledge of its existence, much less a lawyer to represent him or her.

These proceedings are essentially one-sided, in that the petitioner is the only person presenting information to the court. By presumption, the alleged incompetent may not be personally able to do so. Under these circumstances, the court does not have the benefit of an adversarial pro-

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parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.

*Id.* (quoting *People ex rel. Sisson v. Sisson*, 2 N.E.2d 660, 661 (N.Y. 1936)).

<sup>179</sup> Recently the Washington Supreme Court promulgated proposed new rules for minor torts settlements. Proposed Adoption of Superior Court Special Proceedings Rule, SPR 98.16W, 129 Wn.2d proposed-2 (1996). In the comments, the court noted that the term *guardian ad litem* was confusing, but chose to continue using it. *Id.* P-9. These rules were adopted as amended on March 6, 1997. See Wash. Prac. vol. 4A, Orland, SPR 98.16W (1997).

<sup>180</sup> Typically the proposed ward is an adult, but may also be a child. Children have their parents as natural guardians, but the parents may be dead or absent—necessitating the appointment of someone else to serve as their guardians.

ceeding by which it can get information from both sides. The court appoints someone to represent the prospective ward, the alleged incompetent. The responsibilities of this person, termed a *guardian ad litem*, last only for the period of the litigation until the guardian is appointed or is determined not to be needed.

This *guardian ad litem*'s primary duty is to make a preliminary assessment of whether the person understands that a proceeding has begun and has the competence to take a position regarding the proposed guardianship.<sup>181</sup> The *guardian ad litem*'s first responsibility is to confer with the proposed ward. If the ward understands the proceeding and wishes to object, the *guardian ad litem*, who need not be a lawyer, may recommend to the court that a lawyer be appointed. Conflicts and confusion over this *guardian ad litem*'s role have arisen regarding the permissibility of them rather than a judge making the initial determination of competency and regarding their later responsibilities once they decide the proposed ward is incompetent.<sup>182</sup>

b. Dependency: natural guardians have been displaced

State-initiated dependency cases are those in which the parents are accused of abusing or neglecting their children.<sup>183</sup> These proceedings are initiated with an accusation and preliminary determination of parental unfitness.<sup>184</sup> Once an initial determination of the need for a dependency is made, the court is permitted to assume that the parents do not have the best interests of their children at heart. The issue of both parents' rights to remain the legally recognized guardians of their children is precisely what is being disputed. The child might no longer even be in their care or custody, thus the parents would lack information about the present circumstances of their children.

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<sup>181</sup> See UNIFORM GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, §§ 1-403, 2-109, 2-209, 8A U.L.A. 439, 464 (1982). The role is not free of confusion. However, at minimum the duties are spelled out: to provide certain information to the alleged incompetent regarding that person's legal rights to have counsel; and to be present at the hearing and to have a jury trial. In addition, the *guardian ad litem* is to investigate the degree of incompetence and disability, evaluate the appropriateness of the proposed guardian, report the alleged incompetent's approval or disapproval of the proposed guardian, and recommend whether counsel should be appointed for the alleged incompetent.

<sup>182</sup> See generally James M. Peden, *The Guardian Ad Litem Under the Guardianship Reform Act: A Profusion of Duties, a Confusion of Role*, 68 U. DET. L. REV. 19, 29-30 (1990) (providing cogent exploration of the conflicts regarding representative, expert, investigator and master).

<sup>183</sup> American and English Law, dating back to the Elizabethan Poor Laws, permitted the state to remove children from "unfit" (at that time, synonymous with poor) parents. Neglect, generally due to poverty, was the primary basis. Not until 1860 did a New York court remove a child for abuse, because parental discipline was not only deemed the parental prerogative but actually encouraged as a proper child-rearing practice. See Areen, *supra* note 168, at 908-09.

<sup>184</sup> Unfitness presupposes that the parents have ignored the child's minimal needs.



In this setting, the natural guardians have been displaced. Decisions about the child's needs and care are being made by the state, the court, the foster parents, and sometimes also the natural parents. This scenario is almost the polar opposite of a guardianship where there is only one side of the issue being presented to the court until the proposed ward appears. In a dependency there are many people addressing the interests of the children, and there is a fear that the children get lost in the shuffle.

In 1974, Congress mandated the use of *guardians ad litem* in proceedings involving abuse or neglect of a child.<sup>185</sup> The responsibilities as outlined in the federal regulations were not particularly well-defined.<sup>186</sup> The *guardian ad litem* is not required to be a lawyer, but the person is asked to advocate on behalf of the child. It is not clear whether that means representing what the child says she wants or what the *guardian ad litem* believes to be in the best interest of the child. The person is to gather information for the court, monitor the progress of the parents and the situation of the child, report to the court, and make recommendations.

In a dependency, the child is at least a nominal party and the use of a *guardian ad litem* may imply a recognition that this party to the proceeding did not have her own representative. The role in this context continues to be much debated.<sup>187</sup>

### C. *The Rejected Alternative: A Lawyer for the Child*

Another justification for the appointment of a representative for the child in custody matters lies in the Supreme Court decision in *In re Gault*.<sup>188</sup> That landmark case determined that juvenile offender and delinquency proceedings are criminal in nature and that children, as parties, have a constitutional right to their own lawyer, among other rights under the Due Process Clause.<sup>189</sup>

In criminal proceedings surrogates may not be substituted for the defendant. The child's natural guardians, the parents, have no standing to speak for the child in these proceedings, although they may have a high

<sup>185</sup> See Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 5 (1974) (codified at 42 U.S.C. §§ 5101-5106 (1994)).

<sup>186</sup> See 45 C.F.R. § 1340.14(g) (1997):

In every case involving an abused or neglected child which results in a judicial proceeding, the State must insure the appointment of a *guardian ad litem* or other individual whom the State recognizes as fulfilling the same functions as a *guardian ad litem*, to represent and protect the rights and best interests of the child.

<sup>187</sup> See generally Robert E. Shepherd, Jr. & Sharon S. England, "I Know The Child Is My Client, But Who Am I?," 64 FORDHAM L. REV 1917 (1996) (reviewing studies and articles regarding *guardians ad litem* usage in dependency proceedings).

<sup>188</sup> 387 U.S. 1 (1967).

<sup>189</sup> See *id.*

degree of concern regarding the outcome. The state, despite its *parens patriae* solicitude for the child, cannot prosecute and represent the child defendant at the same time. Many had believed that the judge in these types of cases would be the protector of the child.<sup>190</sup> But the Supreme Court held in *Gault* that the judge could not step out of his role as neutral fact-finder and decision maker to represent the child.<sup>191</sup>

Justice Fortas, writing for the majority, discussed the term *parens patriae*. He found that its history and meaning were unclear.<sup>192</sup> And the opinion is replete with instances of how the paternalism of the juvenile system, cloaked in the guise of that Latin phrase, have led to numerous abuses of those very children it was intended to protect.<sup>193</sup>

Some authors have read *Gault* as requiring,<sup>194</sup> or at least implicitly supporting<sup>195</sup> that children in custody cases be given similar protections by having lawyers appointed for them. Yet some of these commentators use the terms lawyer and *guardian ad litem* interchangeably.<sup>196</sup> Few limit the responsibilities of the lawyer or *guardian ad litem* to the traditional role of representative of the child. Ironically, these calls for an extension of *Gault's* right to counsel often assume that the lawyer is necessary to assist the court in its *parens patriae* role.<sup>197</sup> This is the very role the Supreme Court

<sup>190</sup> See *id.* at 14-19.

<sup>191</sup> See *id.* at 36.

<sup>192</sup> See *id.* at 16 ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."). Indicative of our general confusion when dealing with children in a legal setting is the widespread use of imprecise Latin phrases such as *parens patriae*, *guardian ad litem*, and *in loco parentis*. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting); see generally Cogan, *supra* note 174.

<sup>193</sup> *Gault* is a strong tonic for any person who begins to feel they know what is best for another's child. This case involved a fifteen-year-old boy who was detained without notice to his parents and tried the next day by the judge without the complainant present. The sole witness was the unsworn police officer, who testified that the defendant had confessed. The interrogation lacked minimal constitutional protections. Neither the parents nor the defendant were given written notice of anything. The complaint lacked any factual support for the allegation that the defendant was a delinquent minor. The child was sentenced to six years in a public facility. The offense was a misdemeanor for which an adult would pay a fine of no more than \$50 and serve no more than two months. See *Gault*, 387 U.S. at 4-9. The boy and a friend allegedly made a prank phone call to a neighbor in which "the remarks . . . were of the irritatingly offensive adolescent sex variety." *Id.* at 4.

<sup>194</sup> See generally Kerin Bischoff, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse Is Alleged*, 138 U. PA. L. REV. 1383 (1990); Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 FAM. L.Q. 53 (1985); Henry Foster & Doris Freed, *A Bill Of Rights For Children*, 6 FAM. L.Q. 343 (1972); Inker & Perretta, *supra* note 5.

<sup>195</sup> See COUNSEL FOR PRIVATE PARTIES, *supra* note 35, at 3-7, 11.

<sup>196</sup> See Sahari Shink, *Reflections on Ethical Considerations*, in LAWYERS FOR CHILDREN 60 (ABA Center on Children and the Law ed., 1990); see also *supra* Part I.A.

<sup>197</sup> See *Veazey v. Veazey*, 560 P.2d 382, 387 n.4 (Alaska 1977):

In making his determination as to what conditions of a divorce judgment would best serve

denied courts in *Gault*.

It is a rare court that has required that children in custody cases be appointed a lawyer who acts only like a lawyer.<sup>198</sup> Moreover, those who adopted the *guardian ad litem* model or even those who call for a child's lawyer ignore two basic distinctions between a custody case on the one hand and minor tort settlements, guardianships, dependencies and juvenile offender cases on the other. Children are not named parties in custody cases. Fit guardians, the parents, exist and are caring for the child and presenting evidence on the child's best interest.

Yet in a custody case, the participants continue to cling to the need for an appointed figure for the child. Since at least 1967, the model of a lawyer for a child has existed, but most embrace the older model of a *guardian ad litem*, despite its lack of clarity. This may reveal that the participants' concerns are more directed at their own needs rather than those of the child.

#### D. *Concerns and Needs of the Participants*

There are at least five different groups of players in dissolution cases, each with different agendas and interests: (1) judges; (2) lawyers for the parents; (3) *guardians ad litem*; (4) children; and (5) parents. Following is a discussion of each group of players and their accompanying concerns and needs.

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the interests of the children involved, the trial court does not function solely as an arbiter between two private parties. Rather, in his role as a family court, the trial court represents the interests of society and best interests of the family.

(quoting *Kritzik v. Kritzik*, 124 N.W. 2d 581, 585 (Wisc. 1963)); see also *S.L.J. v. Kahn*, 778 S.W.2d 239, 243 n.1 (Mo. Ct. App. 1989):

[W]hen a child appears before a court for purposes of its own welfare, it becomes a ward of the court as to the issues in the case. . . . The court's duty to serve the child's best interest . . . would make the court the appropriate 'guardian' of the child's interest in having an effective *guardian ad litem* and thus the court's role supersedes that of the parent as natural guardian.

(citations omitted); *Wasson v. Wasson*, 584 P.2d 713, 714 (N.M. Ct. App. 1978) ("We note that an attorney is required for an infant not otherwise represented in an action . . . Minor children in court are represented not only by a *guardian ad litem*, but by the court itself."); compare Robyn-Marie Lyon, Note, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 685 (1987) ("Traditionally, the court has assumed the *parens patriae* role in adjudication concerning children. The judge was traditionally seen as a fatherly patriarch who protects the child, thereby alleviating the need for independent protection of the child's due process rights."), with Clara Johnson et al., *Implementing the Guardian Ad Litem Mandate: Toward the Development of a Feasible Model*, JUV. & FAM. CT. J., Nov. 1980, at 3-4 (recognizing the fact that the interest of all parties, namely the parents and the social agency, might be in conflict with the best interests of the child, and that the court, as *parens patriae*, cannot effect the dual roles of full advocate for the child and arbiter in performing the state's function of *parens patriae* which have aided in the metamorphosis of the court).

<sup>198</sup> See *supra* Part I.A.

## 1. Judges

Deciding custody disputes greatly troubles decision makers, and many seek ways to lighten that responsibility. Judges often articulate that custody determinations are the most difficult decisions to make.<sup>199</sup> When confronted with the issues of making future residency and custody decisions about children, judges hope for some outside, neutral, objective person who can provide more information and guidance to the court.<sup>200</sup>

By appointing such a person, judges delegate their awesome responsibility<sup>201</sup> to someone else. However, no appellate decisions authorize such delegation to a *guardian ad litem*.<sup>202</sup> Several opinions uphold the right of the judge to disregard the *guardian ad litem*'s recommendation.<sup>203</sup> Yet a recent statement by the Illinois Appellate Court is astounding in its view of the *guardian ad litem* as one who *confirms* the judge's decision.<sup>204</sup> More often, the process is seen as the reverse. The judge merely confirms the *guardian ad litem*'s decision.<sup>205</sup>

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<sup>199</sup> See generally Robert I. Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting From a Termination of The Marriage*, 50 CONN. BAR J. 150 (1976) (Berdon, a Superior Court Judge, echoing the common discomfort of many judges with custody issues). Exploring decision-making theory in the context of custody cases, one writer indicates that judges are often under intolerable "psychological tension" because such decisions have "momentous importance for the parties directly involved," yet the best interest test does not provide a standard enabling the judge to have a rational preference for one parent over the other if both are fit. Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 2 (1987). Another author points out that where both parents are fit "few other legal decisions are as certain to be decided with so small a risk of seriously damaging the child." Guggenheim, *Right to Be Represented*, *supra* note 115, at 122; see also Fineman, *supra* note 172, at 727.

<sup>200</sup> See *Rosson v. Rosson (In re Rosson)*, 224 Cal. Rptr. 250, 257 (Cal. Ct. App. 1986) ("As trial judges, each member of this division served in courts where mediators made recommendations to the court and we found this procedure to be invaluable in assisting parents to resolve difficult cases without contested hearings."); GUARDIANS (Minn.), *supra* note 21, at 18 ("Judges told us that they want guardians to give them an independent assessment of a case, from the perspective of an outsider who has nothing to gain, but always putting [sic] the needs of the child first.").

<sup>201</sup> The responsibility is awesome because in custody cases the decision maker has very wide discretion given the indeterminacy of the prevalent best interest standard. See *supra* notes 170-73 and accompanying text.

<sup>202</sup> However, several New York cases imply it is almost an abuse of discretion to ignore the *guardian ad litem*'s recommendation. See *Young v. Young*, 628 N.Y.S.2d 957 (N.Y. App. Div. 1995); *Clark v. Dunn*, 600 N.Y.S.2d 376 (N.Y. App. Div. 1993).

<sup>203</sup> See *Roth v. Roth*, 367 N.E.2d 442, 447-48 (Ill. App. Ct. 1977); *Richelson v. Richelson*, 536 A.2d 176, 180 (N.H. 1987); *Zelnik v. Zelnik*, 601 N.Y.S.2d 701, 702 (N.Y. App. Div. 1993).

<sup>204</sup> "It is manifest that the trial court sought the *guardian ad litem*'s personal opinion . . . The court apparently wanted confirmation that its choice was the proper one. There is nothing to indicate this was not accomplished by the *guardian ad litem*'s report." *In re Marriage of Russell*, 523 N.E.2d 193, 199 (Ill. App. Ct. 1988); see also *Wright v. Wright*, 627 N.Y.S.2d 819 (N.Y. App. Div. 1995).

<sup>205</sup> See *Elrod*, *supra* note 5, at 62. Most *guardians ad litem* agree that judges tend to accept their recommendation. If they don't give a recommendation as to custody, some have reported that they have been rebuked by the judge. One *guardian ad litem* felt uncomfortable giving a recommendation but said,

## 2. Lawyers for the parents

The use of the *guardian ad litem* by judges in this fashion has led to the perception by lawyers that in many cases the judge will defer to or “rubber stamp” the recommendations of the *guardian ad litem*. Such a belief, whether or not valid, tends to lead lawyers to encourage their clients to settle the case rather than take on the seemingly insurmountable task of challenging the *guardian ad litem*’s recommendation, and the *guardian ad litem* herself, at trial.<sup>206</sup> Since the *guardian ad litem* is seen as an “agent of the court,”<sup>207</sup> such a challenge could be seen as a challenge to the court itself.

Some lawyers use a *guardian ad litem* and her multifaceted role to avoid their own difficult responsibilities of honestly assessing their parent-clients’ chances of success in the custody litigation. No lawyer relishes the idea of telling a client that the client’s background, beliefs or conduct make it unlikely that a judge will grant custody to the client. The lawyer would rather leave this task to an outsider, leaving the lawyer free to be empathetic with the client’s anger or disappointment with the *guardian ad litem*’s assessment. The lawyer then need merely emphasize the futility of further litigation in the face of the *guardian ad litem*’s report.<sup>208</sup>

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“If I don’t make the decision, who will?” (interview notes on file with authors). One commentator recognized this perception when she said: “Legitimate questions have been raised about . . . whether the *guardian ad litem* is in reality a pretrial judge.” ANN HARALAMBIE, *THE CHILD’S ATTORNEY* 6 (1993). The Iowa Appellate Court had to remind the parties in one case that the “*guardian ad litem* is not designated to be the decision-maker . . .” *In re J.V.*, 464 N.W.2d 887, 893 (Iowa Ct. App. 1990).

<sup>206</sup> Legal challenges that would be routine in other litigation are often viewed with hostility when made regarding functions performed by a *guardian ad litem*. See *Metcalfe v. Metcalfe*, 655 So. 2d 1251 (Fla. Dist. Ct. App. 1995) (finding no violation of due process when the parent was denied discovery of the *guardian ad litem*’s records, because the statute provides that the records are confidential, even though the *guardian ad litem* uses them to make a report to the court); *Howard v. Howard*, 469 A.2d 1318, 1321, (N.H. 1983):

The plaintiff also contends that the report of the *guardian ad litem* should not have been admitted into evidence because it contained hearsay, was prejudicial, denied her the right to confront witnesses and denied her due process. . . . It is apparent that if the *guardian ad litem* is to perform these functions effectively, he or she will need a great deal of flexibility. To impose a set of rigid restrictions on *guardians ad litem* would defeat the purpose for which they are appointed . . .

See also *Shainwald v. Shainwald*, 395 S.E.2d 441, 443-45 (S.C. Ct. App. 1990) (“We reject the mother’s somewhat novel argument that guardians ad litem should be precluded altogether from giving opinions regarding custody . . .”).

<sup>207</sup> *Gerber v. Peters*, 584 A.2d 605, 606 (Me. 1990) (“The duty of a court appointed *guardian ad litem* of a minor child in a divorce case is to the court . . .”); *Shainwald*, 395 S.E.2d at 443-45 (“A *guardian ad litem* is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person.”).

<sup>208</sup> Other lawyers may have experienced difficulty in dealing with the client in the face of the lawyer’s candid, but unfavorable assessment and feel the need for some outside “neutral” validation to regain the client’s trust. Still others find that their assessment is not taken seriously by the opposing

### 3. *Guardians ad Litem*

*Guardians ad litem* often feel overwhelmed and under assault. Their responsibility is to discover what is best for children. They know that their recommendation is likely to be outcome determinative. They carry the judge's burden, yet they have no clear guidelines about their role. They also know that their recommendation will displease one parent, and they prepare for the inevitable attack.<sup>209</sup>

On the other hand, *guardians ad litem* often find their status a heady one. Many who serve in this capacity are newer lawyers.<sup>210</sup> Newer lawyers are often among the most enthusiastic about the role, perhaps because their appointment by the court is seen as an acknowledgment of their competence as family law attorneys. They may also relish the position of being imbued with special quasi-judicial powers and expect the parties to follow their "orders" directly without question.<sup>211</sup> To challenge a *guardian ad litem's* scope of authority or directives under these circumstances poses the risk that the *guardian ad litem* will look with disfavor upon the challenger.<sup>212</sup>

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counsel or party without the support of some outsider. These dilemmas for lawyers are not unique to family law, only perhaps more emotionally charged. In other arenas of law, an outside opinion can also assist negotiations and these same tools can be employed in the custody context as well. For example, many lawyers utilize a mutually agreed-upon early neutral evaluator to assist the parties in realistically assessing the strengths and weaknesses of their case. The evaluator presents his or her assessment only to the parties for purposes of their negotiations, and with the consent of the parties may also act as a facilitator for the purposes of negotiation discussions. If negotiations do not result in a settlement, however, the evaluator's opinions and participation in the negotiation are not revealed to the court. See Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 282 (1986).

<sup>209</sup> The authors' experience is that most people wishing to perform as *guardians ad litem* are well meaning and unselfish. We assume they have the highest integrity and motives. From that type of assumption, many leap to the conclusion that such a person does not bring any bias into the process. However, such objective, unbiased persons are rare, especially once they have decided in favor of one parent. See *supra* notes 114-15 and accompanying text.

<sup>210</sup> See Sahari Shink, *supra* note 196, at 60; see also Ellen Solender, *The Guardian Ad Litem, A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 642-43 (1976). Other lawyers, who have tired of making their living in the oft contentious arena of adversarial practice, see their frequent appointment as a means of supplementing their income in order to reduce their reliance on traditional lawyering work, which is similar to lawyers who have attempted to switch all or a portion of their work to a mediation practice.

<sup>211</sup> Furthermore, some individuals thrive on being in a position of power over others. A *guardian ad litem* can insert herself into a family to structure the interactions among the family members, without having any historic, emotional, financial, or physical commitments and responsibilities for the consequences. Without the controls and limits which are inherent in the judicial system and which constrain judges, the *guardian ad litem*, with or without admirable motives, is not accountable.

<sup>212</sup> Our experience in actual cases is that the appointee sees any attempt to clarify her role as an attempt to undermine her authority, although in interviews (on record with the authors), people who serve as *guardians ad litem* feel very uncomfortable with the lack of guidance they receive.

#### 4. Children

When custody issues arise, the children will be affected even though they are not parties. Traditionally non-parties do not help shape the outcome of the litigation. However, the children's wishes are relevant under most state's statutes regarding what is in their best interests.<sup>213</sup> During the same period that custody rules developed to include the children's wishes as one factor in the best interests analysis, the courts have been expanding the rights which are afforded children in general.<sup>214</sup> This expansion has led to a widespread belief that children should somehow participate in the custody process, that they should have a voice.<sup>215</sup>

Some children have a strong preference as to their custodial parent and want to participate. Indeed, in some recent cases children sought, mostly unsuccessfully, to intervene as parties,<sup>216</sup> to replace the *guardian ad litem* with their own lawyer,<sup>217</sup> or to "divorce" their parents.<sup>218</sup> Most children just wish the divorce would go away and that their parents would get back together.<sup>219</sup> Many do not want to be placed in a position in which they have to express a preference, let alone actively advocate for that preference.<sup>220</sup>

Ironically, if the children desire to have a voice they are given a *guardian ad litem*. These children's spokespersons can substitute their own voices and preferences and in effect silence the children. Furthermore, whereas the child's wishes are only one factor for the court to consider,<sup>221</sup> the *guardians ad litem*'s recommendations are often outcome determinative.

<sup>213</sup> See, e.g., *supra* note 169.

<sup>214</sup> Since the 1960s, a rise in the call for and the granting of greater rights for children has occurred, independent of the parents' rights and comparable to other rights held by adults. See *supra* notes 5, 45.

<sup>215</sup> This is another very common rhetorical position. See *John O. v. Jane O.*, 601 A.2d 149, 163-64 (Md. Ct. Spec. App. 1992) ("Counsel was appointed to represent the minor child's interests in the case . . . The purpose of sec. 1-202 is to afford the court an opportunity to hear from someone who will 'speak on behalf of the child' [even though counsel opposed the child's wishes]"); Bischoff, *supra* note 194, at 1383 ("When court proceedings will immutably alter children's lives, their interests must be voiced."); Mulhauser, *supra* note 7, at 635 ("[T]he appointment of guardians ad litem was a way to balance interests and to increase the volume of the child's voice in judicial proceedings.").

Yet the children's wishes as to their custodian is only one of many factors considered by the court. See generally Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873 (1996); Guggenheim, *Paradigm*, *supra* note 42, at 1424-28.

<sup>216</sup> See *In re Marriage of Apperson*, 574 N.E.2d 1257 (Ill. 1991).

<sup>217</sup> See *Hartley v. Hartley*, 886 P.2d 665 (Colo. 1994).

<sup>218</sup> See generally George H. Russ, *Through the Eyes of a Child, "Gregory K": A Child's Right To Be Heard*, 27 *FAM. L.Q.* 365 (1993).

<sup>219</sup> Much of the literature studying children of divorce indicate that it is a traumatic event for the children. See generally *PSYCHOLOGY*, *supra* note 95, at 72. Being asked to make a choice may cause the child to have feelings of guilt for having betrayed the other parent. See *id.* at 75-77.

<sup>220</sup> See *id.*

<sup>221</sup> See *supra* note 169.

## 5. Parents

The cases and literature discussing *guardians ad litem* rarely mention parents' interests. One of the two parents will be awarded residential custody of the children.<sup>222</sup> Prior to the commencement of the dissolution, their parenting is not scrutinized, absent abuse or neglect. They are the people with whom the children have lived and continue to live, and they have the day-to-day responsibility for care and nurture. Parents have the most information about the children. Yet once the dissolution is filed and some dispute arises regarding the care of the children, parents are presumed to be too combative to see the children's best interests.<sup>223</sup> A *guardian ad litem* is appointed, and the parents' every move is under a microscope.

Still, at the outset, when the lawyer gives the parent one of the standard definitions of a *guardian ad litem*,<sup>224</sup> most parents accept the notion that someone will independently investigate the case and protect the child. Soon thereafter, however, they learn that this *guardian ad litem* is a mere mortal getting information from here and there, frequently not verifying anything, often spending no more than a few minutes with the children.<sup>225</sup>

### E. *Issues of Alleged Efficiencies and Real Costs*

#### 1. The efficiency argument

Many people appreciate the problem of having one person playing so many roles. Their response is a practical one, but one within the dominant paradigm of continuing to rationalize the need for *guardians ad litem*. One person as *guardian ad litem* may be cost effective and efficient because neither the parties nor the court can pay for multiple appointees to perform each role separately. This perspective often underestimates the monetary costs of the present system, assumes that all the roles are necessary, and ignores the costs in fairness to our judicial system.

The cost and efficiency argument is straightforward. A single report is less time-consuming to read than several. One witness takes less time to

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<sup>222</sup> By virtue of a five day school week, joint custody decrees can rarely create a fifty-fifty split in residential care, unless the parents live very nearby. Instead, the parents are given joint decision making, but one parent is designated the residential parent.

<sup>223</sup> Courts instinctively feel that by separating, the parents have proven themselves less than fit. *See, e.g., supra* note 26. Yet all states allow parents to divorce.

<sup>224</sup> *See supra* notes 5-8 and accompanying text.

<sup>225</sup> The authors' experience with numerous parents is that they become disillusioned with the non-professional investigations of the *guardian ad litem*, whether or not the recommendation is in their favor.



examine than three or four. In addition, someone, either the court or the parties, has to pay for the person or persons in these roles, or multiple volunteers must be relied upon. When these roles are filled by more than one person, the costs, either in expenditure of funds or volunteer time, may increase dramatically.

## 2. Problems with the efficiency argument

The efficiency argument ignores the financial costs that an unrestricted *guardian ad litem* places upon the court or the parties. For example, in a Florida case, *guardian ad litem* fees were \$24,300.<sup>226</sup> Even substantially lower fees can impact poorer clients as we saw in one of our Clinic cases. Our client had very little income.<sup>227</sup> Nonetheless, she was required to pay \$2500, half of the *guardian ad litem*'s fees. In addition, the *guardian ad litem* required a psychological evaluation for which our client was billed \$800. The husband was also billed an equal sum. While he had a modest income, he had a child support obligation and attorney fees to pay. The husband moved for and was granted a temporary order allowing a reduction in his child support due to the need to pay the *guardian ad litem*! Thus the children, in whose interest the *guardian ad litem* ostensibly was appointed, suffered financially as a result of the appointment.<sup>228</sup>

To the extent that the court views a *guardian ad litem* as a party, the anomaly exists that a presumed stakeholder is being paid to participate in the litigation, thereby creating a significant agency cost. The *guardian ad litem*'s income is increased so long as the litigation is on-going. Yet, this "party" who represents the child is removed from that role as soon as the litigation is over. Thus she has no financial interest to preserve the corpus out of which child support is to be paid.

If the *guardian ad litem* is being paid by one party or can only reasonably expect payment from one party, her judgment and recommendation may be or may appear to be influenced by this consideration. The *guardian ad litem*'s recommendations may be subtly or even unconsciously swayed by the fear that it may be more difficult to collect fees if a party ordered to pay does not like the recommendation.

Many parents cannot afford an attorney and free legal services are

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<sup>226</sup> See *Metcalf v. Metcalf*, 655 So. 2d 1251, 1254 (Fla. Dist. Ct. App. 1995).

<sup>227</sup> She was the mother of three. She worked for minimum wage (net \$800 per month). When she was injured in a car accident, she went on public assistance (\$546 per month, plus food stamps).

<sup>228</sup> In addition, some very recent cases have held that *guardian ad litem* fees are in the nature of a family support obligation and, therefore, not dischargeable in bankruptcy. See *Miller v. Gentry (In re Miller)*, 55 F.3d 1487 (10th Cir. 1995); *Spear v. Constantine (In re Constantine)*, 183 B.R. 335 (Bankr. D. Mass. 1995).

limited.<sup>229</sup> The parents themselves are not entitled to court appointed counsel. Yet some courts have a limited fund from which to pay *guardians ad litem*. The general policy is to have the public pay for a *guardian ad litem* for the child who is not a party before providing basic legal services for the indigent parties themselves.

Still other courts have developed programs wherein a county funds and administers a program of volunteer *guardians ad litem*.<sup>230</sup> These programs solicit and train community volunteers to act as *guardians ad litem*. Most are non-lawyers. To the extent that these community volunteers act as legal advocates for the child, several issues seem apparent. To appoint or allow a lay advocate to represent someone in proceedings other than administrative hearings would raise questions concerning the unauthorized practice of law.<sup>231</sup> If the recommendation of the lay *guardian ad litem* is challenged, the *guardian ad litem* might get a program-funded lawyer even though neither of the parents, nor the child would be so entitled.

Some may say that the *guardian ad litem* appointment saves lawyer fees for the parents. To the extent that the *guardian ad litem* acts as an investigator, the lawyers need not each independently talk to the witnesses and investigate the case, thus saving each client attorney fees. But where the parties' lawyers do not independently prepare the case, they may not competently represent their clients. Thus a good lawyer will generally duplicate the *guardian ad litem*'s efforts. Should the lawyers wish to save money for their clients in this fashion, they could, independent of the court, jointly hire a mutually acceptable investigator.

In fact, the greatest cost saving of a *guardian ad litem* appointment may come from the perception that the court will accept the *guardian ad litem*'s recommendation, thus saving costly trial preparations and trial. Negotiating in the face of the *guardian ad litem*'s recommendation often leads to capitulation by the non-favored party in the recommendation.<sup>232</sup> Here one party settles not because he feels the result is reasonably fair under the circumstances or is necessarily in the children's best interest, but rather because he believes that he has already lost.

Because the role is unclear, a *guardian ad litem* can freely expend his time in whatever way he sees fit without being accountable to the court or the parties. After the fact, it is difficult for the court to reject fees as unnecessary when the court has not circumscribed the person's role and

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<sup>229</sup> Typically, free legal services are available only through law school clinics, state or local bar *pro bono* programs, or programs funded by Legal Services Corporation.

<sup>230</sup> See *supra* note 102.

<sup>231</sup> See ADMINISTRATOR FOR THE COURTS (WASH.), GUARDIAN AD LITEM PROJECT FINAL REPORT (August 1997) (proposed rule giving *guardians ad litem* power to act like lawyers, but asserts that for these purposes it should not be construed as unauthorized practice of law).

<sup>232</sup> See *supra* notes 24, 205-07 and accompanying text.

functions.

Appointing separate individuals for each of these roles—lawyer, expert witness, investigator, mediator, and party—would result in greater costs only if the court routinely felt it necessary to have each of these roles performed in each and every case. Separating the roles forces the court to evaluate which, if any, are necessary. Such a careful consideration of the necessity of any of these roles often would result in the appointment of none or only one with limited and specific responsibilities. Thus, costs would be saved rather than increased.

## CONCLUSION

This Article throughout has addressed how the use of *guardians ad litem* is inconsistent with the normal function of our judicial system. The alleged financial efficiencies pale in comparison to the price paid when undermining the notions of due process implicit in our court system. The concerns of the judges, lawyers, *guardians ad litem*, parents, and children in custody decisions are all valid. However, the very fact that these types of cases seem difficult is a reason to approach such easy solutions as the appointment of a *guardian ad litem* with caution.

This Article rejects the idea that there is such an entity as a generic *guardian ad litem*. *Guardian ad litem* is a Latin term with no clearly defined meaning. Individuals can play distinct roles in appropriate cases. Rarely can one individual play more than one role. This Article proposes that use of the term *guardian ad litem* in the context of custody cases be eliminated.<sup>233</sup>

Instead, in a particular case, a judge should appoint an individual to serve in a discrete, recognized role—lawyer, expert witness, investigator, mediator, or party. The judge, appointee, and parties should clarify: (1) the specific role of the appointed individual; (2) the functions that are consistent with the role; (3) the qualification that the potential appointee has to perform the role; and (4) the reasons why the parties could not provide this information to the court through the process of normal civil litigation without the need of an appointee.

A basis exists for the appointment of a lawyer for the child in some cases. If the court wants the child's opinion or participation, or the child wants to express an opinion, then it may be appropriate to appoint a lawyer

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<sup>233</sup> Eliminating the term *guardian ad litem* will have no salutary effect if that term is merely replaced by another single, elastic term such as *CASA*, *evaluator*, or *advocate*. We applaud the use of English, but suggest that in the court system we should stay within the boundaries of well accepted roles.

to represent the child.<sup>234</sup> The lawyer should be guided by the traditional legal and ethical constraints on his profession. The lawyer should never substitute his preferences regarding the outcome for those of the child. The lawyer-child relationship should be confidential. The lawyer may call and examine witnesses, and make arguments, but never testify, file reports, or make recommendations. The lawyer can negotiate with the other parties and their lawyers, but could never act as a mediator.

The lawyer would not be able to meet with the parents without the permission or the presence of the parents' lawyers. The parents' lawyers would be similarly constrained from meeting with the child. If the parents can resolve the matter of custody, the children's lawyer ideally should not be able to disturb that agreement. However, once the children have a lawyer, the lawyer has duties and responsibilities that may make a rule barring them from objecting to a parental settlement unethical.

If questions arise for which an expert is necessary, the court could appoint such an individual for that specific and limited purpose. Normally, the court should expect the parties to present expert testimony if they believe it would assist the court in understanding their theory of the case. The parties could agree on one expert to provide such testimony if they wish to save costs. For an appointed expert, the area of expertise sought and the qualification of the appointee should be very clearly delineated.<sup>235</sup> Such a person would never be a representative of the child.

It would be rare that the court should need to appoint an investigator if the parties are required to present all relevant information bearing on the issue of custody. An investigator, if called as a witness, would only be competent to testify to matters within his personal knowledge and would not render opinions or assessments of the other evidence. The investigator would not file a report with the court, and would not make recommendations to the court.

Courts encourage mediation, and some even require it. The parties should never confuse the mediator with formal roles inside of the litigation. The mediator should maintain confidentiality and should never be called as a witness at trial by either party or the court. The mediator should never devise a custody plan of their own making and should never make recommendations as to the outcome of the dispute.

The court may wish to consider the child as a party, but no other figure should be appointed as a substitute party for the child.

One function that is unacceptable under any of these roles is that of

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<sup>234</sup> This Article does not propose specific standards for when to appoint a lawyer. Rather, this Article tends to align with those who suggest that such appointments should be rarely made. See, e.g., REPRESENTING CHILDREN, *supra* note 2, at 9-10.

<sup>235</sup> On the whole, we are skeptical that there is such a thing as a *custody placement expert*. Experts are more likely to be psychologists or social workers.

making a recommendation to the court. So long as child custody matters continue to be resolved in our civil court system, the rules of evidence and civil procedure apply. Parties can make requests. Lay witnesses can testify from personal knowledge. Qualified expert witnesses can render opinions in the area of their expertise. Lawyers can examine the witnesses and make arguments as to the inferences the court should draw from the evidence. No role exists for someone to predigest and prejudge the case for the tribunal. Only the judge can act as a fact finder and decision maker.

The law of the family has emerged from the margins of jurisprudence. However, it still carries relics from its past. Elimination of the term and figure of the *guardian ad litem* will help move family law into the mainstream of legal thought and will permit better protection of the rights and interests of children and parents.