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FROM "BEST" TO "BETTER": THE INTERESTS OF CHILDREN AND THE ROLE OF A GUARDIAN AD LITEM

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The issues inherent in placing children in the courtroom and in judicial decision-making on behalf of children have received wide attention. Guardians ad litem as advocates for children have received similar attention for their role in representing the "best interest of children" in judicial proceedings. While it is clear that guardians ad litem are appointed to represent this interest, greater clarity and attention must follow their basis for recommendations and custodial determinations. A value-free and culturally-sensitive perspective must be nurtured in these officers of the court as guardians ad litem provide information and insight to the appointing judge. The use of guardians ad litem, however, remains an effective and efficient way to figuratively increase the volume of a child's voice in the court and the legal process. The recent appointment of guardians ad litem to criminal child sexual abuse cases and civil domestic violence protection order cases illustrates the guardian ad litem's additional roles of protecting the child, providing a recommendation to the court, and assisting counsel and the court with pre-trial preparation and child witness considerations in domestic violence and sexual exploitation cases. This article will discuss the role of the guardian ad litem in all of these courtroom proceedings.

I. LEGISLATIVE REACTION TO CHILD MALTREATMENT IN THE 1970s INSTITUTIONALIZED THE ROLE AND INVOLVEMENT OF GUARDIANS AD LITEM IN COURT PROCEEDINGS

The recognition of a distinct role for guardians ad litem to represent the best interests of a child and provide a voice for children in the legal system came on the heels of the movement to curb child abuse and neglect in this country.¹ The Child Abuse and

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1. The 1974 Child Abuse and Neglect Treatment Act became the model and impetus for the response to the growing recognition of child maltreatment among the medical and human service professions. See Child Abuse and Neglect Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 5 (codified as amended as Pub. L. 100-294 tit. 1, § 101

Neglect Prevention and Treatment Act encouraged the creation of child protective service units in child welfare agencies and provided a broad federal mandate to initiate laws and programs to address child abuse and neglect in every state.² In addition to the child abuse and neglect reporting laws that this legislation prompted,³ state recipients of federal block grant dollars were required to create a statutory scheme to ensure that an abused or neglected child would have access to a guardian ad litem in every judicial proceeding.⁴ This federal mandate carried a heavy-handed fiscal sanction and gave the guardian ad litem a new role in addition to that of representing the child in civil court actions that had previously achieved historic and legal precedent.⁵

The role of the guardian ad litem in child abuse and neglect proceedings was broadly stated in the early 1980s by a group of national child advocacy experts.⁶ This broad concept was later narrowed to focus on providing advocacy for a child in both the legal and child welfare systems.⁷ The most significant aspect of

(1988), 102 Stat. 102, 42 U.S.C. § 5101-05). The Act established a national center on child abuse and neglect and initiated a funding plan for states to obtain fiscal support for the purpose of offering child protective services. *Id.*

2. *Id.* Under the 1974 Child Abuse and Neglect Treatment Act, each state was required to establish a child abuse and neglect reporting law and a social service system to respond to those reports. *Id.*

3. See N.D. CENT. CODE § 50-25.1 (1989)(establishing the standard for nonaccidental harm to children; mandating the reporting of child abuse or neglect allegations by certain professionals; and defining the nature of child protection services).

4. See 42 U.S.C. § 5106a(6) (1989). This requirement was part of the federal scheme to build a protection network for abused and neglected children and each state was required to codify this assurance in order to receive federal funds. *Id.* See also N.D. CENT. CODE § 50-25.1-08 (1987 & Supp. 1989)(state equivalent of the federal requirement that each child receive a guardian ad litem when before the court on a matter of child abuse or neglect).

5. See, e.g., *Shuck v. Shuck*, 44 N.W.2d 767, 769 (N.D. 1950)(quiet title action where the court referred to the duties of a guardian ad litem and a general guardian); *Bartholomay v. St. Thomas Lumber Co.*, 148 N.W.2d 278, 287-88 (N.D. 1966)(wrongful death action where appointment of next friend was noted as error; guardian ad litem should have been appointed instead of next friend to protect rights of child, even though practical purpose of guardian ad litem and next friend was similar); *O'Neil v. Swan*, 218 N.W.2d 457, 457 (Minn. 1974)(negligence action against guardian ad litem by parent; court stated that guardian ad litem's role was to protect rights of infant).

6. H. DAVIDSON, *THE GUARDIAN AD LITEM: AN IMPORTANT APPROACH TO THE PROTECTION OF CHILDREN, PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM* 835-46 (1981)(reporting on the "Areas of Consensus" reached at a national conference in Virginia in November of 1980). Child advocates gathered at this conference to provide direction and national standards for the newly mandated guardian ad litem in child abuse and neglect proceedings. *Id.* at 839-42. The roles included investigator, facilitator, mediator, advocate, coordinator, witness, reformer, case plan developer, assessor, hand-holder, cross examiner, and many others. *Id.* at 842-45.

7. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 28-30 (1976). Fraser's article was one of the first published on this issue and is often cited for the quartet of roles the guardian ad litem assumes: investigator, advocate, counsel, and guardian. *Id.* at 33-34. Fraser analyzed these roles in the context of a child abuse case as the 1974 Act had recently mandated a guardian ad litem's involvement in these cases. *Id.*

the guardian ad litem's role was the attempt to strike a balance on behalf of a child between the state and the parent's interests.⁸ With issues of state intervention on the horizon⁹ and recognition of child maltreatment documented and reported, the appointment of guardians ad litem was a way to balance interests and to increase the volume of the child's voice in judicial proceedings.¹⁰

As the movement to prevent maltreatment of children grew, there was a renewed interest in emergency short-term and long-term placement of children in foster care and other settings outside the natural family home. Many experts examined the effects of non-parental custodial placements of children.¹¹ They found that, as the result of a renewed goal to protect children, many maltreated youth were placed in foster care and stayed in placements without the proper planning or necessary rehabilitative services to reunite them with their parent(s).¹²

The 1980 Adoption Assistance and Child Welfare Act¹³ expanded the role of the guardian ad litem as it addressed the issues of children lingering and "drifting" in foster care.¹⁴ Addi-

8. See D. DUQUETTE, *ADVOCATION FOR THE CHILD IN PROTECTION PROCEEDINGS* 1 (1990) (describing the sole interest or focus of an advocate for a child and the court's role in balancing interests of the state, parent(s), and child).

9. Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 628-29 (1976).

10. See Fraser, *supra* note 7, at 33.

11. See Mnookin, *Foster Care — In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973) (describing the consideration and states' interest in both protecting children and providing for the needs of children in out-of-home settings); Wald, *supra* note 9, at 667-69. The "psychological parent theory" was introduced in the early 1970s by Goldstein, Solnit, and Freud to assist legal and child welfare personnel with custodial determinations. 27 J. GOLDSTEIN, A. SOLNIT & A. FREUD, *FINDING THE LEAST DETRIMENTAL ALTERNATIVE: THE PROBLEM FOR THE LAW OF CHILD PLACEMENT, THE PSYCHOANALYTIC STUDY OF THE CHILD* 626-41 (Feb. 1973). Goldstein, Solnit, and Freud proposed the "psychological parent theory," or the theory that children should be placed with the parent who has the fullest psychological tie to that child, as a standard for custodial decisions. *Id.* This theory received much acclaim for its child-centered focus and also for the suggestion that the psychological parent be granted full custodial rights, sometimes to the exclusion of the non-psychological parent or the parent with more tenuous ties to the child. *Id.*

12. DODSON, *Reasonable Efforts to Prevent Foster Placement, A Guide to Implementing the "Reasonable Efforts" Requirements of Public Law 96-272 Through Judicial Determinations and State Policy*, AMERICAN BAR ASSOCIATION 2 (1985). This publication provides an approach to agencies and courts regarding the federal mandate to heed the "reasonable efforts" standard before removing children from their natural parent(s) or home. *Id.* at 5-35.

13. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 501 (1981).

14. DODSON, *supra* note 12, at 1-4. Prior to the 1980 Adoption Assistance and Child Welfare Act, children often drifted from foster home to foster home without a coordinated or implemented plan for their future or permanent status in one home or facility. This phenomenon was widely documented as "foster care drift." See T. NAZARIO, *IN DEFENSE OF CHILDREN: UNDERSTANDING THE RIGHTS, NEEDS, AND INTERESTS OF THE CHILD* 218 (1988); R. HOROWITZ & H. DAVIDSON, *LEGAL RIGHTS OF CHILDREN* 371, 372 (1984); *Making Reasonable Efforts: Steps for Keeping Families Together*, NATIONAL COUNCIL OF

tionally, the act mandated that the states initiate, for each child in foster care, a permanency plan requiring rehabilitation and social services intended to reunite the child with the family.¹⁵ The guardian ad litem subsequently assumed the very natural role of monitoring permanency plans for the courts that placed children in foster care for compliance with court orders and case plans.¹⁶

Thus, the use of guardians ad litem has been directly related to recognition of the state's duty to protect maltreated children. Moreover, guardians ad litem have been key actors in the response to rehabilitation and reunification needs of children and families. Furthermore, guardians ad litem have represented the court in attending to the aforementioned needs of children and families.

Also during the early 1980s, changes in statutory grounds for divorce and the increase in family dissolution proceedings were gaining the attention of judges and child development experts.¹⁷ The concept of involving a third-party, such as the guardian ad litem, who brings information, expertise, and a neutral role, has gained favor.¹⁸ The guardian ad litem's role, especially in divorce and custody cases, continues to be used with increasing frequency in many courts.¹⁹

JUVENILE AND FAMILY COURT JUDGES 7 (L. Lange ed.). These publications discuss the issue of "foster care drift" and the accompanying federal initiative written to address this problem — the Adoption Assistance and Child Welfare Act of 1980. This Act addressed the drift by requiring custodial agencies to provide written plans for a child when they enter out-of-home care and continuing during their stay in care. DODSON, *supra*.

15. DODSON, *supra* note 12, at 2. The written case plan must address child and family reunification. This process is often referred to as planning for the "permanency" of the child and is intended to reduce multiple placements and encourage rehabilitation, thus expediting reunification. *Id.*

16. See FOSTER CHILDREN IN THE COURTS 91-90 (M. Hardin ed. 1983)(a series of steps for monitoring a juvenile court case after disposition).

17. See J. KELLY & J. WALLERSTEIN, SURVIVING THE BREAKUP (1980); L. WEITZMAN, THE DIVORCE RESOLUTION 41, 49, 216 (1985). The authors address the effects of the no-fault divorce statutes on marital dissolution, economic and standing, and child custody.

18. See, e.g., WIS. STAT. § 767.045 (1981 & Supp. 1988)(guardians ad litem shall be appointed when court has special concerns about minor children in contested custody action); N.H. REV. STAT. ANN. § 458:17-a (1983 & Supp. 1988)(court may appoint guardian ad litem if parents seek joint legal custody and a fund is established to assist indigent parents with guardian ad litem fee); Note, *Balancing Children's Rights Into the Divorce Decision*, 13 VT. L. REV. 531, 543-81 (1989); Schwartz, *A New Role for the Guardian ad Litem*, 3 OH. ST. J. DIS. RES. 117, 135-42 (1987); Fuller, *Guardians ad Litem in Custody Dispute Resolutions: Representation of the Child's Best Interests*, 62 FLA. B.J. 27, 27-30 (1988); Johnson, *The Role of the Guardian ad Litem in Custody and Visitation Disputes*, 17 COLO. LAW. 1301, 1302-04 (1988); Comment, *A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determination Through the Use of a Legal Advocate*, 6 SETON HALL L. REV. 303, 304 (1975).

19. See N.D. CENT. CODE § 14-09-06.4 (1981 & Supp. 1989)(authorizes appointment of guardian ad litem to represent best interests of child); Healy v. Healy, 397 N.W.2d 71, 75 (N.D. 1986)(holding that it was not an abuse of discretion to appoint guardian ad litem to supervise visitation); M.M. v. R.R.M., 358 N.W.2d 86, 89 (Minn. 1984)(appointment of guardian ad litem was discretionary but strongly encouraged in divorce-custody cases); Maxfield v. Maxfield, 439 N.W.2d 411 (Minn. App. 1989)(judge appointed guardian ad litem

II. THE ROLE OF A GUARDIAN AD LITEM

The dichotomous role of the guardian ad litem as a champion both of the child's best interests and the child's wishes is widely recognized.²⁰ In part, the distinction between the two roles depends on the background skills and accompanying professional or ethical standards of the guardian.²¹ To characterize the guardian ad litem as necessarily an attorney or a lay person may artificially limit the range of representation of each.²² However, in a

to represent child's custodial preference in case where parties did not feel guardian ad litem appointment was necessary). In Minnesota, if a court has reason to believe a minor child is a victim of child abuse or neglect and is before the court in a divorce or custody matter, a guardian ad litem appointment is mandated. MINN. STAT. § 518.165(2) (1988). See also *In re J.E.P. v. J.C.P.*, 432 N.W.2d 483 (Minn. App. 1988)(when allegations of abuse are present in visitation disputes, court must appoint guardian ad litem to represent interests of child). See also *Leonard v. Leonard*, 583 S.W.2d 514, 516 (Mo. App. 1990)(the court held that it was an error not to appoint a guardian ad litem in a case where a custodial mother was attempting to terminate the visitation rights of a noncustodial father based on allegations of sexual abuse). Even though Missouri did not have a statute mandating such an appointment at the time and despite the fact that neither party requested a guardian ad litem, the court stated that the case must be remanded with a direction to appoint and involve a guardian ad litem. *Id.*

20. See J. GOLDSTEIN, A. FREUD, A. SOLNIT, S. GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD 122 (1986)(hereinafter GOLDSTEIN)("[a] lawyer for a child cannot advocate both the child's wishes and his own perception as a lawyer (with the advice of experts in child development and on the basis of statutory and case law) of the child's best interests"). Although guardians ad litem may not be able to advocate for both the child's wishes and best interests when those two positions differ, at least one court has held that an attorney could earn separate fees as both lawyer and guardian ad litem in a case. *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 925 (3rd Cir. 1985). See also DUQUETTE, *supra* note 8, at 29-33 (for a discussion of considerations an advocate must consider when a child's wishes can be articulated). The major consideration often turns on the age of the child related to their ability to cognitively form and articulate a wish or a position. *Id.*

21. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.3 (1989); CODE OF JUDICIAL CONDUCT (1989)(lawyer carries an ethical responsibility to be a zealous advocate for her client, which means abiding by the client's decisions or wishes). In some situations, an attorney's ethical responsibility prohibits her from taking a pure "best interests" of the child/client position. By virtue of their legal training, lawyers may bring a different style and range of abilities to the role of guardian ad litem than non-attorneys. Similarly, nonlaw-trained guardians, if they are members of another licensed or regulated profession such as social work or nursing, may have certain ethical limitations. They may also bring skills attributable to their profession that enhance their ability to fulfill the role of a guardian ad litem.

22. Three types of guardians ad litem have been used by the court and are characterized by their professional designation. A national study documented five major categories of guardian ad litem representation currently used around the country: the law school clinic model; staff attorney model; paid private attorney model; lay volunteer/paid attorney model; and the lay volunteer model. CONDELLI, NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS VOL. I: EXECUTIVE SUMMARY 1, 2 (1988). These five categories can be further distilled into three types of guardians ad litem: law-trained, professionally trained or expert guardians ad litem, and lay guardians ad litem. When attorneys are appointed in this capacity they are often referred to as an attorney ad litem. Psychologists and other potential experts may be appointed as a guardian ad litem and use their evaluative and psychometric skills as a foundation for their recommendation. Lay guardians ad litem have varying backgrounds and usually participate in training in preparation for their appointment. Case law does not dictate a preference for a law-trained guardian ad litem over a nonlaw-trained guardian ad litem in North Dakota. In *Asendorf v. M.S.S.*, the North Dakota Supreme Court ruled that

case where the child's best interests and the child's expressed wishes may differ, the guardian ad litem, be they professional or lay, must ask the court's advice by requesting a clarification of the scope of appointment and present a petition for a divisible role.²³

The most frequent characterizations of the role of a guardian ad litem are that of investigator,²⁴ champion,²⁵ and monitor.²⁶ It is imperative that these roles be joined; if they become mutually exclusive the champion's advocacy will be diluted by a lack of relevant information and the investigator will not be able to provide

the lower court did not err by appointing a non-attorney to act as guardian ad litem. 342 N.W.2d 203, 206 (N.D. 1983). The only limitations are that a party to the action cannot be a guardian ad litem. See *In re K.P.*, 267 N.W.2d 1, 7 (N.D. 1978)(party to termination of parental rights proceedings cannot be guardian ad litem); *In re R.H.*, 262 N.W.2d 719, 726 (N.D. 1978)(social service employee cannot be appointed as guardian ad litem in a termination of parental rights case when the agency is the petitioner).

Twenty-five counties, or four judicial districts in the state of North Dakota, currently appoint specially trained non-lawyer guardians ad litem in all types of cases before the court. Pilot projects began in 1986 with the assistance of State District Judges Norman J. Backes, Lee A. Christofferson, Robert L. Eckert, Gordon O. Hoberg, William A. Neumann, James H. O'Keefe, and John T. Paulson.

According to data compiled by the Guardian ad Litem Project at the Children and Family Services Training Center at the University of North Dakota, in a two district area between May 1987 and November 1989, guardians were appointed to serve in 26 divorce/custody cases, 87 deprivation cases, 27 cases involving unruly children, and totaling all case categories, the appointments reached 250 children. See *THE GUARDIAN AD LITEM HANDBOOK* 254 (1987). This handbook is published by the Children and Family Services Training Center and provided to all guardians ad litem and courts in North Dakota.

23. *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985). The opinion stated in pertinent part:

[W]e hold that when an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian.

Id. See also DUQUETTE, *supra* note 8, at 32.

24. Fraser, *supra* note 7, at 33. See also Comment, *The Non-Lawyer Guardian ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington Experience*, 58 WASH. L. REV. 853, 864-67 (1983)(describing the use of non-lawyer guardians ad litem and their coordination and consultation with lawyers to provide an effective and efficient model of representation for maltreated children). This King County model is often referred to as the Court Appointed Special Advocate (CASA) model which has received national prominence.

25. Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 100 (1984). Professor Guggenheim uses the word "champion" to recognize a role first addressed in *Parham v. J.R.*, 442 U.S. 584 (1979). *Id.* "Children incarcerated in public mental institutions are constitutionally entitled to a fair opportunity to contest the legitimacy of their confinement. They are entitled to some champion who can speak on their behalf and who stands ready to oppose a wrongful commitment." *Parham*, 442 U.S. at 638 (Brennan, J., concurring in part and dissenting in part).

26. The role of the guardian ad litem as a monitor is gaining recognition with the growth of the Court Appointed Special Advocate (CASA) program nationally. A national evaluative study found that the CASA model programs put strong emphasis on case monitoring. Overall, the study found that CASA representation as a guardian ad litem was superior to the use of attorneys in that role. CONDELLI, *supra* note 22, at 2. See also I. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 157 (1989).

facts, alternatives, and recommendations to the court. Without championship and investigation, the monitor role loses effectiveness because advocacy and information must be present for an effective check on the progress of the permanent reunification plan. The roles must be symbiotic in order for the child's interests or wishes to be fully represented.²⁷

The guardian ad litem may appear to be a conduit for the court at certain points of the appointment. The relative freedom a guardian ad litem has to explore options available to the child and family gives the court a wider view of the situation and provides tools to assist the judge in making a more informed decision without compromising the doctrine of judicial impartiality.

It is clear that a guardian ad litem is appointed as an officer of the court²⁸ and, as such, is accorded presence at the hearing and the opportunity to voice a recommendation.²⁹ In some jurisdictions, guardians ad litem call and question witnesses and respond as a full party to the proceeding.³⁰

The dispositional or custodial recommendation that the guardian ad litem prepares for the court is delivered in different ways, depending on local custom.³¹ A lay guardian ad litem is

27. DUQUETTE, *supra* note 8, at 35 (suggests two additional roles of mediator-conciliator and information and resource broker. These have often been formally introduced as tasks for the guardian ad litem and have now been expanded to define a role.).

28. *duPont v. Southern National Bank of Houston, Texas*, 771 F.2d 874, 882 (5th Cir. 1985)(citing *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982)). See also *McCurren v. S.T.*, 241 N.W.2d 690, 698 (N.D. 1976)(guardian ad litem's position is entitled to consideration). In *Tindell v. Rogosheske*, the Minnesota Supreme Court held that the guardian ad litem is a quasi-judicial officer of the court and, as such, is entitled to absolute immunity. 428 N.W.2d 387, 387 (Minn. 1988).

29. *In re Marriage of Barnhouse*, 765 P.2d 610 (1988)(the attorney for the child in a divorce proceeding is required to represent more than a position of parroting back the child's wishes to the court. The attorney is to use greater objectivity to investigate and arrive at a recommendation or conclusion regarding the best interest of the child). See also *Marotz v. Marotz*, 80 Wis. 2d 477, —, 259 N.W.2d 524, 530 (1977)(citing *Allen v. Allen*, 78 Wis. 2d 263, 267-68, 254 N.W.2d 244, 247 (1977))(guardian ad litem possesses all the rights, powers, and obligations accorded to a legal advocate, including right of appeal and right to continue in appointment throughout the appeal).

30. *In re D.C.*, 426 N.W.2d 541, 546 (Neb. 1988). The guardian ad litem called more witnesses than the state in this termination of parental rights proceeding. *Id.* The court held that even though these additional witnesses greatly assisted the state in proving its burden, the guardian ad litem did not impermissibly prosecute the state's case. *Id.* The North Dakota Supreme Court was presented with a similar issue in *Vande Hoven v. Vande Hoven*, 336 N.W.2d 366 (N.D. 1983). However, the action in *Vande Hoven* was before the court on a supervisory writ and the court ruled on the writ without reaching the question of whether the guardian ad litem should be bestowed with full advocacy authority. *Id.* at 368.

31. Each judicial district and court determines whether the guardian ad litem will be called as a witness to testify to their recommendation, or whether the judge will receive it as such and enter it into the record by judicial notice. The court may consider the guardian ad litem's background and experience, as well as the facts of the case in arriving at this decision. In North Dakota, most guardians ad litem are called to give testimony regarding

often called to testify and offer a recommendation and report on the record.³² In other instances, the recommendation and report is received by the judge and counsel before the proceeding and is accepted as an exhibit; the judge may refer to it as part of the record or it can be included as part of a stipulation. The parties may have an opportunity to respond either by cross examination or argument. In all cases, the weight given the recommendation is purely discretionary.

III. THE BEST INTEREST STANDARD

The best interest standard that guardians ad litem represent must focus on the custodial and rehabilitative questions in the cases guardians ad litem are appointed to oversee. Therefore, that standard must be resilient and encompass the needs of family members, and most importantly, the children.³³ While guardians ad litem are given statutory guidance in divorce and custody cases,³⁴ the best interest standard is largely undefined in other

their recommendation, and counsel are given an opportunity to examine the basis for their recommendation.

32. When the lay guardian ad litem testifies, the judge and counsel for the petitioner and respondent have the opportunity to question the guardian ad litem under oath as to the basis for their recommendation and the relevant facts the guardian ad litem collected and distilled into that recommendation. In preparation for the examination, counsel for the respondent may have a right to access information that forms a basis for the recommendation. See *Ross v. Gadwah*, 131 N.H. 391, ___, 554 A.2d 1284, 1285 (1988).

33. See, e.g., Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269-73 (1987) (an explanation of the best interest standard with an analysis of the areas of weakness of this standard; the author claims the standard is vague and may be subject to misuses by judges and parents); J. KELLY & J. WALLERSTEIN, *SURVIVING THE BREAKUP* (1980) (a study document that relates the short term effects of divorce on children and adults with considerations for custodians on joint custody arrangements); J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, & CHILDREN A DECADE AFTER DIVORCE 282-94* (1989) (longitudinal follow-up to the earlier documented study of the effects of divorce on children and adults). Wallerstein concludes that the effects of divorce are far reaching but adjustment may be enhanced by minimizing parental discord during visitation and voicing a verbal acceptance of a former spouse or non-custodial parent. *Id.*

34. See N.D. CENT. CODE § 14-09-06.4 (1981) (defining type of proceeding and role of guardian ad litem as representative of the child's best interests); N.D. CENT. CODE § 14-09-06.2 (1981 & Supp. 1989). Section 14-09-06.2 sets forth the following factors the court should consider in determining the best interests of the child:

- a. The love, affection, and other emotional ties existing between the parents and child.
- b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- c. The disposition of the parent to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- d. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- e. The permanence, as a family unit, of the existing or proposed custodial home.
- f. The moral fitness of the parents.

cases. As Robert Mnookin, Professor of Law, states:

Normally judges look to statutes, but custody statutes do not themselves give content or relative weight to the pertinent values. Moreover, if one looks to our society at large, one finds neither a clear consensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. The answer, in short, is indeterminate.³⁵

Similarly, guardians ad litem are subject to that same uncertainty. The need for more readily articulated standards based on parent-child rehabilitative needs and research³⁶ seem closely aligned with a recent emphasis on the holistic goals of reducing the trauma of separation and enhancing visitation and reunification for children.

The connotation of "best" interests also may deserve some reconsideration.³⁷ A guardian ad litem's role is to provide infor-

- g. The mental and physical health of the parents.
- h. The home, school, and community record of the child.
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- j. The existence of domestic violence. If the court finds that domestic violence has occurred, the court shall provide for a custody arrangement that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01.
- k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
- l. Any other factors considered by the court to be relevant to a particular child custody dispute.

N.D. CENT. CODE § 14-09-06.2 (Supp. 1989).

See also *Dinius v. Dinius*, 448 N.W.2d 210 (N.D. 1989) (court held that the trial court's award of custody to the husband which placed heavy emphasis on factors 4 and 5 of section 14-09-06.2); *Bashus v. Bashus*, 393 N.W.2d 748 (N.D. 1986) (upheld the trial court's award of custody to the husband where both parents were fit and able to care for children; the trial court relied on the father's extended family presence and the mother's prolonged absences from the home). The court held that these codified factors must dictate custodial determinations in divorce actions. *Bashus*, 393 N.W.2d, at 750.

35. R. MNOOKIN, IN THE INTEREST OF CHILDREN 18 (1985). See also Charlow, *supra* note 33, at 270. Charlow noted, "[j]udges cannot be certain that their decisions are best for the children involved; science has not yet provided a sound basis for such decisions. Nor can judges be certain that their decisions are legally correct, because the law remains undefined." *Id.* (citing Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975)).

36. See Charlow, *supra* note 33, at 273-75, 279-80 (examining basis for custodial theories and decision making and the attention to child development and adjustment concerns).

37. *Id.* at 268. Charlow stated:

[s]ome states provide a list of factors to be considered in determining the best interests of the child, while others leave the determination of which facts are material to the discretion of the court. In either case, courts make custody

mation to the court, explore options or alternatives, and to negotiate with and among the systems or institutions having an interest in the case. To state that guardians ad litem represent the "best" interests is to assume that their recommendation should have precedence over the state's recommendation or the parent's resolution.

The guardian ad litem's role is to engage in creative exploration to link resources, services, and the needs of the child and families. Guardians ad litem, therefore, examine the "better interests" of the child, as the balance shifts from parental decision making to judicial decision making when the state intervenes or in a custodial proceeding. The term "better" denotes that the status quo of the child has changed and that a range of options should be examined to assist parents in enhancing or maintaining their relationship with the child and ensure the most appropriate placement for the child.

Often the guardian ad litem is presented with two nurturing parents seeking custody or two parents who have extreme rehabilitative needs. If the role presented to the guardian ad litem is to examine the "best" interests, a qualitative standard that can be articulated in a recommendation that is value-free³⁸ may not be possible. If the guardian ad litem seeks to examine the "better" interests, a wider range of options may be available for recommendation to the court. This approach is analogous to the dilemma of choosing between two "psychological parents" in a custodial determination.³⁹

decisions on an individual basis. Statutes do not establish the weight to be accorded to any particular factor. Furthermore, it is not clear whether the 'best interests of the child' means a 'happy' childhood or a childhood that leads to a well-adjusted adult regardless of the happiness experienced during minority.

Id.

38. GOLDSTEIN, *supra* note 20, at 10-53. The authors examine the impact of professional and personal value systems on recommendations given by counsel and experts, as well as the foundations for judicial decision-making. *Id.*

39. *Id.* at 276. The theory of the psychological parent and the importance of determining which parent would be named as such, as well as the importance of this parent receiving primary custody, has been given prominence. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20 (1979); J. GOLDSTEIN, *BEFORE THE BEST INTERESTS OF THE CHILD* 45-48 (1979). See also GOLDSTEIN, *supra* note 20, at 67, 68. This trilogy introduces and supplies the psychological parent theory to issues of custodial determination, state intervention, and judicial decision making. See also *Daley v. Gunville*, 348 N.W.2d 441 (N.D. 1984) (the court applied the psychological parent theory and stated that while the establishment of such a relationship doesn't end the trial court's inquiry, it does furnish a justification for the award of custody to a party other than a natural parent); *Dinius*, 448 N.W.2d at 212, 217-18 (court stated that the "psychological parent" concept is inapplicable when a custodial determination must be made between two natural parents). Justice Levine's dissent in *Dinius* raised the issue of considering a primary caretaker as a custodial preference and argued that dismissing the "psychological parent" theory for interparent custodial disputes undermines this primary

The recommendations guardians ad litem make in divorce, custody, and juvenile court cases must be carefully examined by the court and the parties to the action.⁴⁰ The basis for the recommended decisions must be clear and based on an articulated set of standards or values.⁴¹ Scrutiny must be used to ensure that recommendations and decisions focus on the needs of the child and are free of personal and cultural bias.⁴²

IV. GUARDIANS AD LITEM IN CRIMINAL CASES AND DOMESTIC VIOLENCE CASES

Guardian ad litem appointments in juvenile court and for adoption and divorce/custody proceedings have received wide acceptance.⁴³ In addition, a recent study highly recommends the use of guardians ad litem in both criminal and juvenile cases involving a child sexual abuse allegation.⁴⁴ Guardian ad litem appointments are permitted in two additional proceedings in

caretaker preference or presumption). *Id.* (Levine, J., dissenting) (citing O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 484 (1987)). Justice Levine argued that this limitation or dismissal doesn't allow necessary significance for the factors of parent-child interaction that reveal the "intimate interaction" and "psychological bond." *Id.* Thus, if a guardian ad litem searches for the "better" interests for a child, the guardian ad litem [GAL] may be able to consider these factors in greater detail and these factors may be displayed more prominently in their recommendation.

40. See Charlow, *supra* note 33, at 268, 279 (challenges the statutory best interests concept).

41. *Id.* See also DUQUETTE, *supra* note 8, at 133-36 (discussing the impact of personal bias and values on decision-making). The author suggests that advocates must participate in a process that separates logical decision making from gut reactions. *Id.* at 135. The logical decision making component would seem to suggest reliance on accepted standards or theories supported by the facts/observances of a guardian ad litem. The judge and/or attorneys may then examine the basis of the recommendation to determine whether it is free of personal bias and value.

42. GOLDSTEIN, *supra* note 20, at 10-17. See also DUQUETTE, *supra* note 8, at 24-25 (emphasizing the importance of the guardian ad litem's role in recognizing ethnic diversity in forming recommendations and responding with a cross-cultural perspective).

43. See HOROWITZ, *supra* note 14, at 248-51 (a survey of guardian ad litem use and issues in divorce and custody cases). See also R. Podell, *The Role of the Guardian Ad Litem: Advocating the Best Interests of the Child*, 25 TRIAL 31 (1989); Fuller, *supra* note 18; Johnson, *supra* note 18.

44. King, *Going to Court: The Experience of Child Victims of Intrafamilial Sexual Abuse*, 13 J. OF HEALTH, POL., POL'Y & L. 716-18 (1988) (a study calling for the establishment in every state of guardian ad litem services for child victims of sexual assault). "We recommend that GALs be appointed for every child victim in the criminal justice process regardless of whether they [the child] have come into the jurisdiction of the juvenile court. We also recommend that GALs be better integrated into the pretrial process in criminal court. This could be accomplished by requiring concurrence of the GAL, in addition to concurrence of the prosecuting and defense attorneys, before a continuance is granted; ensuring GAL presence at pretrial conferences; and encouraging GAL involvement in plea bargain decisions." *Id.* at 718. See also CALIFORNIA CHILD VICTIM WITNESS JUDICIAL ADVISORY COMMITTEE FINAL REPORT 65 (1988) (Calif. Attorney General's Office) (Child Advocacy Recommendation 37 recommends a support person for a child witness to protect, guide, and assist the child).

North Dakota: criminal cases involving a child victim of sexual abuse and civil protection order proceedings.⁴⁵ The guardian ad litem's primary role in a criminal sex offense prosecution is to protect the child from the strain of the adversarial process, particularly when that process involves a family member or an adult close to the child.⁴⁶ The guardian ad litem should act to reduce or control multiple interviews and lengthy dispositions, provide assistance with specific child victim/witnesses issues such as courtroom support and physical adaptations, and the guardian ad litem should monitor the development of the case to reduce delays and encourage prompt disposition.⁴⁷

The court retains the discretion to appoint a guardian ad litem in criminal sex offense cases,⁴⁸ and either an attorney or lay guardian is permitted.⁴⁹ The advocacy role of the guardian presupposes

45. See generally D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, ESQ., *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* (Aug. 1985); D. WHITCOMB, *GUARDIANS AD LITEM IN CRIMINAL COURTS* (Feb. 1988). North Dakota took a progressive stance in the establishment of the guardian ad litem appointment provision, as few states had taken this step to provide assistance to child victims and witnesses. When this law took effect in 1987, a minority of states had made legislative accommodations for child witnesses in criminal cases. See CAL. PENAL CODE § 1348.5 (Supp. 1990); FLA. STAT. ANN. 415.503 (Supp. 1990); IOWA CODE ANN. § 910 (A.15)(Supp. 1990); OKLA. STAT. ANN. tit. 22, § 753 (Supp. 1989); PA. STAT., tit. 42, § 5983 (Supp. 1989); WIS. STAT. ANN. § 950.055 (Supp. 1989).

46. Hardin, *Guardians ad Litem for Child Victims in Criminal Proceedings*, 25 J. FAM. L. 687, 694 (1986-87)(citing RECOMMENDATION OF THE U.S. ATTORNEY GENERAL'S ADVISORY BOARD ON MISSING AND EXPLOITED CHILDREN: THEIR SAFETY AND THEIR FUTURE (1986)).

47. Hardin, *supra* note 46, at 691. Hardin stated that the effectiveness of the guardian ad litem in fulfilling these duties depends on how they are selected and what kind of training and programmatic support they have. *Id.* See also King, *supra* note 44, at 714-16. This study supports a strong and well defined role for a guardian ad litem in criminal child sexual abuse cases; a role encompassing, but greater than the traditional role of child victim support.

48. Even in states without a rule or statute authorizing such an appointment, a guardian ad litem could be appointed by the court. See *Stewart v. Superior Court*, 787 P.2d 126 (Ariz. 1989)(a trial court has inherent equitable powers to appoint a guardian ad litem for a child witness). While this appointment may be invasive of the parents' liberty interest, it can be exercised upon a showing sufficient to trigger the court's parents patriac concern because the parents may be unable or unwilling to perceive or advance the child's best interests. *Id.* at 127, 129, 130.

49. See N.D. CENT. CODE § 12.1-20-16 (Supp. 1989)(providing for discretionary appointment of guardian ad litem for child who is material witness in child sexual abuse case). Hardin argues that Section 50-25.1-08 of the North Dakota Century Code may make the appointment of a guardian ad litem in a criminal child sexual abuse case mandatory because the language, "[t]he court, in every case involving an abused or neglected child which results in a judicial proceeding shall appoint a guardian ad litem for the child in those proceedings," does not specifically define or limit "judicial proceedings." Hardin, *supra* note 46, at 712. See N.D. CENT. CODE § 50-25.1-08 (1989)(guardian ad litem appointment statute referring to abused or neglected children). At least one North Dakota district court (Northwest Judicial District) stated in 1986 that the language of Section 50-25.1-08 did not require or permit an appointment in a criminal case. In *State v. Allard* (County Court No. 31304) and *State v. Bolken* (County Court No. 34033), Kent Rierson and later David Nelson, attorneys at law, were appointed as guardians ad litem on behalf of the children in a case where the defendants were charged with gross sexual imposition. *Id.* While the

a willingness to seek innovative procedures to reduce courtroom-related trauma for a child witness.⁵⁰ The guardians are not permitted to introduce evidence or examine witnesses; they act as third-party assistants to the court to give the child information and to focus on the child's needs during the criminal prosecution.⁵¹ It is also anticipated that if a concurrent juvenile court action is brought, the guardian can be appointed to both proceedings to coordinate the interests of safety, protection, and well-being.⁵² A concurrent appointment is one way the judiciary can recognize the child witness' special and individual needs on a case-by-case basis without compromising the neutrality of the bench.⁵³

Protection orders⁵⁴ and accompanying litigation may place children and their interests in a tenuous position as parents or caretakers seek protection from abusive partners. While the protection order often provides a protective cloak for the children as well as the abuse victim, children may bear physical and psychological scars from the familial violence.⁵⁵ A discretionary guardian

appointments were made, the district and supreme courts would not authorize compensation for these attorneys in the guardian ad litem role because the appointment power in child sexual abuse cases was not recognized at the time. *Id.* The 1987 Legislature enacted Section 12.1-20-16 in response to this issue. See N.D. CENT. CODE § 12.1-20-16 (Supp. 1989).

50. Hardin, *supra* note 46, at 691. See J. MEYERS, CHILD WITNESS LAW AND PRACTICE §§ 7.3, 7.4 (1987)(discussing support persons location in courtroom and altering courtroom procedure or physical environment to assist a child witness). See also *State v. Walsh*, 495 A.2d 1256 (N.H. 1985)(guardian ad litem's participation at trial was not error given the child victim's age (15), and allowing the guardian ad litem to sit at the prosecutor's table was not an abuse of discretion).

51. N.D. CENT. CODE § 12.1-20-16 (Supp. 1989). "The role and purpose of the guardian ad litem during trial should be explicitly outlined and delineated by the trial judge prior to trial to avoid interference with the proper conduct of the trial so as to avoid a mistrial." *Walsh*, 495 A.2d at 1258.

52. Hardin, *supra* note 46, at 688. See also D. WHITCOMB, GUARDIANS AD LITEM IN THE CRIMINAL COURTS 40-45 (1988)(describing and defining successful and innovative preparations and accommodations to reduce the anxiety of child witnesses prior to and during the court hearing).

53. Hardin, *supra* note 46, at 696. See also Meyers, *supra* note 50, at 28 (one interviewer gathering information for all interested parties reduces the likelihood of multiple interviews for the child victim); WHITCOMB, WHEN THE VICTIM IS A CHILD, *supra* note 45, at 92 (a concurrent appointment provides a link between the two proceedings).

54. See N.D. CENT. CODE § 14-07.1-02 (1981 & Supp. 1989)(statutory process for obtaining domestic violence protection order). Protection orders, often mistakenly referred to as restraining orders, are adult abuse or domestic abuse protection orders. Unlike the civil remedy available for restraining orders, a violation of a protection order is a crime and can warrant an immediate arrest. N.D. CENT. CODE § 14-07.1-06 (1981 & Supp. 1989).

55. See, e.g., DOMESTIC VIOLENCE ON TRIAL 97-103, 110-13 (1987)(discussing the effects on children of witnessing violence in the home which creates an argument and analysis for the connection between domestic violence and the likelihood of child abuse or neglect in the family home); L. WALKER, THE BATTERED WOMAN SYNDROME 57-66 (1984); P. JAFFE, D. WOLFE & S. WILSON, CHILDREN OF BATTERED WOMEN 21, 39-40 (1990)(hereinafter JAFFE)(describing the overlap between wife assault and child abuse, documenting behavior problems of children witnessing violence).

ad litem appointment may be granted in these situations to provide the children with a "best interest" representative in the legal proceedings.⁵⁶

Because expedience is necessary in obtaining a protection order, the guardian ad litem's role is given a rigid time frame and statutory assignment.⁵⁷ As in other cases, the guardian ad litem conducts an investigation and provides a recommendation to the court; the recommendation may address the issues of custody, support, or visitation.⁵⁸

This protection order appointment provision enables the court to hear and respond to the child's needs at a time when the two petitioning parties are granted an opportunity to present facts supporting or challenging an order. This provision does not assume that parents would not instinctively seek to represent the best interests of their child in seeking protection.⁵⁹ Instead the judge and the attorneys in the case have an opportunity to seek assurance that the child's safety and well-being are addressed as a separate area of inquiry when determining whether to grant a temporary or permanent protection order.⁶⁰ As third-party victims to the abusive acts of adults in a home, the child's interests should receive equal consideration and, if required, adversarial equity.

V. CONCLUSION

"Deciding what is best for a child often poses a question no

56. See N.D. CENT. CODE § 14-07.1-05.1 (1981 & Supp. 1989) (allowing for a discretionary guardian ad litem appointment in a protection order case).

57. *Id.*

58. *Id.* The guardian ad litem must complete their tasks within the fourteen days prior to the full protection order hearing, and the appointment expires at the conclusion of that hearing unless the judge specifically seeks to continue the guardian ad litem's appointment to assist with visitation arrangements. *Id.* The judge may appoint the guardian ad litem to act in a continuing capacity to assist with visitation issues if there is a specific order to that effect, based on an articulated statement of need or fact during the proceedings. *Id.* Visitation is often a time of great stress for the custodial parent, and likely for the non-custodial parent; in domestic violence situations, the added element of physical fear aggravates this situation. See DOMESTIC VIOLENCE ON TRIAL, *supra* note 55, at 57-66 (discussing the risks inherent for children in custodial and visitation arrangements when one party or both has a history of violent behavior).

59. This provision instead gives independent recognition to the child's interests in this situations. As Jaffe, Wolfe, and Wilson report, many adolescents choose to seek relief from family distress and violence by running from the situation or, in the alternative, by trying to physically and emotionally protect the most vulnerable members of their family. JAFFE, *supra* note 55, at 28-29.

60. See DOMESTIC VIOLENCE ON TRIAL, *supra* note 55, at 127, 134, 149-50. See also JAFFE, *supra* note 55, at 84 (discussing the child's need for safety and protection in these cases and how the trauma of violence can be addressed if a parent(s) is not yet ready to receive assistance).

less ultimate than the purposes and value of life itself."⁶¹ Every judge, prosecutor, and attorney carries a great burden of responsibility to assist children, families, and the state in deciding questions of custody, rehabilitation, and reunification. A guardian ad litem can assist all the players with that burden and provide direction and focus to the court with the child as the polestar. We must have no greater societal goal than to direct every resource available toward meeting the needs of children and families in the courtroom and in our communities.

61. MNOOKIN, *supra* note 35, at 18.

