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The Curious Case of the Guardian Ad Litem

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THE CURIOUS CASE OF THE GUARDIAN AD LITEM

Katherine Hunt Federle¹ & Danielle Gadomski²

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I. INTRODUCTION

In 2006, Cameron Iacovelli, a veteran of foster care, was given the chance to speak to the Connecticut legislature about his experience with his guardian ad litem, the attorney appointed to represent his best interests in the abuse and neglect case about him.³ He told them:

I've been in DCF [Department of Children and Families] care since I was 12 years old but didn't know that I had a lawyer until I was 18 years old. That was when I found out that I no longer had a lawyer A lot of decisions were made for me, and this person went to court to affect those decisions without my knowledge or influence. I wonder how a lawyer represented me if he didn't know me. How can he represent me without knowing what I want? For all he knew, I could have been a girl. I believe that if they want to represent you, they have to know you and meet you.⁴

The concerns Cameron shared with the Connecticut legislature are echoed by thousands of children in the child welfare system every day.⁵ But even the child who has an opportunity to meet with his guardian ad litem may not have a legal voice in the proceedings because his guardian may

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³ *Testimony Regarding: Raised Bill No. 7077, An Act Concerning the State Budget for the Biennium Ending June 30, 2009, and Making Appropriations Therefor Before the Appropriations Comm.*, Bill No. 7077 (Conn. 2007) (statement of Cameron Iacovelli, Jim Casey Youth Opportunity Initiative participant), available at <http://www.ckidslink.org/testimony/022007appropsstbudget.pdf>.

⁴ *Id.*

⁵ See, e.g., Karen de Sá, *Part III: 'If it was about me, why didn't they ask me?'*, MERCURY NEWS, Feb. 12, 2008, http://www.mercurynews.com/dependency/ci_8237949?nclick_check=1.

advocate for the child's best interests rather than his expressed preferences.⁶

I have always been perplexed by the guardian ad litem in abuse and neglect cases. The role does not seem to fit neatly into our adversarial system. The guardian ad litem is not a lawyer, at least not the kind of lawyer who is bound by duties of loyalty and zealous advocacy to argue on behalf of her client's express preferences. The guardian ad litem is not a court-appointed expert—certainly she lacks the expertise to qualify as such, although she nevertheless may assist the court in resolving the dispute. Nor is the guardian ad litem the judge or the prosecutor, although one could argue plausibly that the court all too often defers to the guardian ad litem and the state may fail in its obligations to adequately prosecute the case, leaving it to the guardian ad litem to fill in the gaps.

This is even more curious given the significant rights at stake in an abuse and neglect proceeding. There can be no doubt that parents have a fundamental right to the care, custody, and control of their children.⁷ Although it is less clear that children have a right to maintain their relationships with their parents,⁸ we might all agree that children may have strong views and even stronger feelings about those relationships. Thus, abuse and neglect proceedings that seek to curtail or strip parents of custody directly implicate constitutional concerns. But the role of the guardian ad litem seems so discordant with our adversarial system that it is hard to understand how the guardian ad litem has become a fundamental feature of these proceedings.

If, all things being equal, the outcomes for children in the child welfare system were good, then perhaps my concerns about silencing children's voices in the child welfare system would not be such a problem. Of course, that would assume that rights themselves have little value, a position I have consistently eschewed.⁹ But we know that outcomes for

⁶ 2 U.S.C. § 5106a(b)(2)(A)(ix) (1994 & Supp. 1996) (current version at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006)). ASFA established the best interests standard for guardians ad litem on the national level but the initial advocates of guardians ad litem already envisioned them as best interests advocates. See Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 29 (1976).

⁷ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁸ *Troxel*, 530 U.S. at 88 (stating that it is "extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children") (Stevens, J., dissenting); *Yoder*, 406 U.S. at 243-44 (holding that children are persons within the meaning of the Bill of Rights and their views on education are entitled to be heard) (Douglas, J., dissenting).

⁹ See, e.g., Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103, 103 (2008); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 424 (2000); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996); Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995).

children in the child welfare system generally are not good.¹⁰ It also appears that the guardian ad litem model promotes racist, classist, and paternalistic approaches to the problems of the poor.

The guardian ad litem is “the man.” This article will explore the historical development of the guardian and examine the role that wealth, property, and status played in the recognition of rights. Tracing the roles that class and race played in the development of laws governing the family situates the guardian ad litem within an institutional framework that treats children of poor and minority families differently. Moreover, this contextualizes the debate about the proper role of the guardian ad litem and suggests that we should critically examine claims about the need for the child’s protection. This article concludes by arguing that the guardian ad litem is ill equipped to protect the rights a child possesses, and that an express-preferences lawyer is the better model.

II. HISTORICAL ANTECEDENTS

Guardianship itself is an ancient legal concept, tracing its Western roots to Roman law. There were two kinds of guardians at Roman law (at least as it was understood by medieval jurists in feudal England who drew upon the principles articulated in the Justinian Code): the tutor, who was appointed to care for the minor child’s person, and the curator, who was appointed to protect the property of a minor past puberty.¹¹ The curator also could be appointed to assist the minor in litigation.¹² This is significant, because as it was understood and practiced by medieval English jurists who drew upon these laws, the curator ad litem (ad litem meaning for the purposes of litigation) was appointed by the court to act only for the purposes of the litigation, and since the curator’s function was to participate in a lawsuit on behalf of the minor, his duty was to vindicate the child’s legal rights.¹³ In practice, however, some courts blurred the distinction between tutor and curator, consolidating the two offices.¹⁴ Despite the Church’s claimed responsibility for all children, the ecclesiastical courts regularly provided guardians only for minors with rights to part of a

¹⁰ See, e.g., MARTHA SHIRK & GARY STANGLER, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM (2004) (providing an account of the welfare system and recommendations on how to improve it); U.S. DEP’T OF HEALTH AND HUMAN SERV., A REPORT TO CONGRESS ON ADOPTION AND OTHER PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE: FOCUS ON OLDER CHILDREN 1-4 (2005), http://www.acf.hhs.gov/programs/cb/pubs/congress_adopt/congress_adopt.pdf.

¹¹ R.H. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 TUL. L. REV. 223, 229 (1978). At Roman law, puberty was set at age fourteen for boys and twelve for girls. *Id.* at 229 n.22. The curator’s appointment ended when the child reached twenty-five. *Id.* at 229. English courts in practice, however, never established age twenty-five as the endpoint of a wardship. See *id.* at 233-34.

¹² *Id.* at 250.

¹³ *Id.* at 247-48.

¹⁴ *Id.* at 231-32.

decedent's estate; they did not provide a guardian for all children,¹⁵ a practice which carried over to the courts of chancery.¹⁶ This can hardly be a surprise since the Middle Ages paid little attention to the special needs of children.¹⁷

To fully understand the history of guardianship law, one must appreciate legal concepts of parental custody. In the late sixteenth and early seventeenth centuries, parents did not have the sort of custodial rights and power we recognize today.¹⁸ The sense of ownership, belonging, and adult responsibility was very different and so, too, was the legal response to orphans. Parents could not determine the custody of their children,¹⁹ so it was left to the courts to appoint a guardian. Not every child who was orphaned had a guardian, however, for the courts appointed guardians only for heirs and, predominantly, the heirs of land.²⁰ The types of guardianships (and in sixteenth century England there were at least ten different types)²¹ were largely determined by the way in which the inherited land was held.²² For example, when a child inherited land held in knight's service, the monarch (or sometimes, a lesser lord) was appointed the guardian and was entitled to all the profits from the estate during the heir's minority, had authority to arrange the heir's marriage, and could even sell these rights separately.²³ The most common form of guardianship, the guardian in socage, envisioned guardianship of the body of the ward as well as guardianship of the land, but the duties of the guardian, who was by law a close relative, were more like those of a trustee, and the guardian was obligated to provide a strict accounting to the ward, who could terminate the

¹⁵ *Id.* at 255.

¹⁶ *Id.* at 256.

¹⁷ *Id.* at 255-56. Helmholtz notes that even in modern society, we "ha[ve] not taken the step of requiring the appointment of a guardian in all cases." *Id.* at 256.

¹⁸ HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 232 (2005). The law recognized guardianship by nurture, which stemmed from the relationship between parents and those children who did not stand to inherit, but even these were held to terminate on the child's fourteenth birthday, suggesting that parents had little or no obligations to their children beyond the age of fourteen. *Id.* at 235. The guardianship by nature, recognizing the relationship between the father and his heir, lasted until the heir turned twenty-one, perhaps to ensure the security of the land holdings. Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1366 n.120 (1999). Nevertheless, there is little legal commentary about the nature and obligations of these guardianships, suggesting that scant thought was given to the rights of parents as we think of them today.

¹⁹ BREWER, *supra* note 18, at 235.

²⁰ *Id.* at 233. Before 1540, land could not be devised; rather, it could only be inherited through common laws of succession. Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 LAW & HIST. REV. 247, 269 n.66 (1999).

²¹ BREWER, *supra* note 18, at 235.

²² Thus, children who inherited land held in "knight's service" (held in exchange for the promise to serve as a knight for the king) were appointed guardians in knight's service, who reclaimed the land (and all of its profits) for the king until the heir was able to serve. *Id.* at 233. Guardians in socage were appointed when the land was held freehold. *Id.* at 234.

²³ *Id.* at 233-34. Wardships proved a lucrative source of income for the king. *Id.* at 234. By 1540, the Court of Wards and Liveries was established to supervise the collection of fees. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 257 (4th ed. 2002).

guardianship at age fourteen.²⁴

For those children without land to inherit, the law said very little. If the family were well off, the children would be cared for by their mother or some other relative. But without land or other economic resources, the family could experience considerable financial distress upon the death of the father. Under those circumstances, the family might be forced into the poor laws system. The children might take to begging or could be placed out for work, thus splitting up the family unit. Those children placed for work would be subject to the rules of their new masters, as servants not as wards. But no guardian would be appointed to care for the children under these circumstances and the law did not provide them with any special protection.²⁵

In 1660, the law of guardianship changed dramatically with the passage of the Abolition of Military Tenures Act.²⁶ The Act abolished feudal tenures and its incidents, like guardianships in knight's service, as well as the Court of Wards and Liveries.²⁷ The Act explicitly gave fathers the power to appoint a guardian for an infant heir, who would act on behalf of the infant after the father's death or even during his lifetime if he so specified.²⁸ The age at which the guardianship terminated was extended to age twenty-one, and would supersede all other forms of guardianship, including that of the mother.²⁹ The Act did not abolish guardianships by socage, but in practice they may have become less common.³⁰ Although the Act placed certain limitations on who might be appointed guardian,³¹ it was now the father, and not the court, who had the freedom to select a guardian for his infant heir.

In early colonial America, land was held in socage before 1660, so the rules pertaining to guardianships in socage generally were applied; however, there was considerable variation among the colonies both prior to and after the passage of the Act.³² By 1641 in Massachusetts, for example, fathers had the authority to appoint guardians for their children under the

²⁴ BREWER, *supra* note 18, at 234.

²⁵ *Id.* at 237.

²⁶ Tenures Abolition Act, 1660, 12 Car. II, c. 24 (Eng.).

²⁷ Abramowicz, *supra* note 18, at 1369; Wright, *supra* note 20, at 270.

²⁸ 12 Car. II, c. 24, § 8.

²⁹ *Id.* Courts subsequently interpreted that statute to supplant the mother's guardianship by nurture. *Eyre v. Shaftesbury*, (1722) 24 Eng. Rep. 659, 667; 2 P. Wms. 103, 125 (guardian by will takes place of all other guardians).

³⁰ Abramowicz, *supra* note 18, at 1370. Some commentators suggested that guardians in socage had authority to act on behalf of their wards only until they turned fourteen, but under the 1660 Act, the father could appoint a guardian to act until the heir turned twenty-one. BREWER, *supra* note 18, at 251.

³¹ See 12 Car. 2, c. 24, § 8 (requiring the guardian be "in possession or remainder" and excluding "Popish Recusants"). There is evidence that while fathers could (and did) appoint mothers as guardians, they did so with less frequency than the courts. Wright, *supra* note 20, at 270.

³² BREWER, *supra* note 18, at 251.

age of twenty-one (although not all did so),³³ while in Virginia and Massachusetts after 1660, fathers designated a number of different ages when their heirs could inherit the land, an age often well below twenty-one.³⁴ Some colonies even recognized that the heir could choose a new guardian for himself at the age of fourteen who would serve as guardian until the ward turned twenty-one.³⁵ Nevertheless, by the mid-eighteenth century, it was common for fathers to appoint guardians until their heirs turned twenty-one.³⁶

The guardianship laws still applied only to heirs; thus, children who would not inherit could be treated very differently. In those families where the inheritance was not substantial enough to support the other siblings, or if there was no inheritance, binding out of children was not uncommon, although the approaches taken in the colonies varied.³⁷ There also was little evident commitment to keeping poor families intact; in some colonies, for example, children were placed in apprenticeships that separated them not only from their parents but from their siblings as well.³⁸ While other colonies supported poor families, there was an apparent limit to their generosity; some poor families were barred from moving into the community while others were auctioned off—albeit as a family unit.³⁹ Thus, keeping poor children with their families received variable support in the colonies, but the policies governing those decisions were embedded in the poor laws and not the rules pertaining to guardianship.

Sixteenth-century Elizabethan poor laws gave the state ultimate authority over the children of the poor. These laws provided support for the poor at the cost of significant state intervention and served as a mechanism of social control.⁴⁰ Thus, the 1562 Statute of Artificers “provided that poor children could be involuntarily taken from their parents and apprenticed.”⁴¹ The Poor Law Act of 1601 also authorized the “removal of poor children

³³ *Id.* at 251-52.

³⁴ *Id.* at 252.

³⁵ *Id.* at 254.

³⁶ *Id.*

³⁷ *Id.* at 255-56. Virginia, for example, bound out more children and at a younger age than did Massachusetts or Pennsylvania. *Id.* at 252.

³⁸ *Id.* at 257.

³⁹ *Id.* Brewer argues that in Massachusetts and Pennsylvania, more effort was made to keep children with their families while in Virginia, it was more common to apprentice even young children. *Id.*

⁴⁰ Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 20 (1998); see also Douglas R. Rendlemen, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 210 (1971). Mechanisms of social control included restricting the right of the poor to settle through laws which mandated a certain amount of acreage to build a cottage, limiting the ability of the poor to marry by requiring town approval of relationships and charging marriage license fees, and controlling the right of poor unmarried women to bear children through bastardy laws aimed at preventing the birth of illegitimate children for which the town would bear the burden of supporting. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 542-43 app. A (2d ed. 2001).

⁴¹ Ventrell, *supra* note 40, at 20.

from their parents at the discretion of overseer officials and the ‘bounding out’ of children to a local resident as an apprentice until the age of majority.”⁴² These apprenticeships were essentially forced labor and reduced the cost to the state of maintaining poor children while satisfying the state’s “parental duties” of support.⁴³

In the American colonies, intervention in the lives of the poor continued with what has been called the “poor plus” system.⁴⁴ Children were protected not only from poverty, but also from other dangerous environmental hazards.⁴⁵ In eighteenth-century Virginia, for example, poor children could be bound out as apprentices if their parents were “not providing ‘good breeding,’ neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or ‘uncapable.’”⁴⁶

Colonial government treated the children of slaves differently. Colonial law generally did not recognize the slave family as a protected institution.⁴⁷ Slave men and women were the property of their masters, and therefore, were never legally husband and wife.⁴⁸ All children born to the couple were considered illegitimate.⁴⁹ Even the de facto nature of slave family life was subject to disruption as members could be sold at the will and whim of the master.⁵⁰ After the Civil War, family vagrancy and apprenticeship laws were enforced disproportionately against African Americans and allowed judges to bind black orphans and poor children to white employers.⁵¹

By the early nineteenth century, the concept of paternal custody had become firmly embedded in post-Revolutionary America—at least for some families. Commentators argued that parental custody was grounded in natural law and extended to children until they reached the age of twenty-one.⁵² Parents were not only entitled to custody but also to the services and labor of their children.⁵³ Nevertheless, poor parents could—and did—continue to lose custody of their children, and while mothers were appointed guardians more often, the practice of apprenticing children continued.⁵⁴ For African American families, separation was even more frequent. In slave states, all children born into slavery were deemed to be in the custody of

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Rendlemen, *supra* note 40, at 212.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting MARCUS JERIGAN, *THE LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA* 104, 149, 151, 161 (1960)).

⁴⁷ PETERS, *supra* note 40, at 546 app. A.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 546-47 app. A.

⁵¹ *Id.*

⁵² BREWER, *supra* note 18, at 262.

⁵³ *Id.* at 263.

⁵⁴ *Id.*

slave owners while free black children were more likely to be bound out than white children.⁵⁵ Even in states sympathetic to abolition, there was a willingness to separate black children from their parents that was antithetical to the principle of paternal custody.⁵⁶

The nineteenth century saw the consolidation of judicial power over families. Although paternal power was important, there was a growing recognition of the important role that mothers played in the lives of their children, and many courts expanded the concept of guardianship to account for the role of women in family life.⁵⁷ Moreover, the judicial expansion of maternal power was tied to the recognition that children's best interests would be better served.⁵⁸ Nevertheless, the children of the poor were removed from their parents' custody with little regard for parental rights and prerogatives.⁵⁹ By the latter half of the nineteenth century, parental unfitness and neglect served as the basis for removal, although reformers of the era equated poverty with neglect, thus justifying further state intervention.⁶⁰

The construction of guardianships, then, took on two distinctly different forms. On the one hand, when the minor's financial interests were at stake, the guardian had clear obligations to vindicate the legal rights of his ward. He had to account for the profits of a ward's estate as if he were a trustee, for example, and he also could sue on behalf of the infant.⁶¹ A guardian ad litem (as distinguished from a guardian) would be assigned to defend the ward against a suit and it was error to enter a decree against a minor without such an appointment.⁶² Moreover, there was some recognition of the need for independence in performing the duties of a guardian ad litem, because while clerks and masters of the court could be appointed as guardians ad litem, at least one court refused to appoint court officers because it "produced an inconvenient mixture of duties."⁶³

⁵⁵ *Id.* at 263-64.

⁵⁶ *Id.* at 264. Brewer notes that in Pennsylvania, the plan for abolishing slavery permitted slaves to obtain their freedom at age twenty-eight, but if they had children during their enslavement, the children, too, would have to wait until they reached twenty-eight before securing their freedom. *Id.*

⁵⁷ MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 243 (1985).

⁵⁸ *Id.*

⁵⁹ Marsha Garrison, *Why Terminate Parental Rights?*, 35 *STAN. L. REV.* 423, 435 (1983).

⁶⁰ *Id.*

⁶¹ 2 HENRY BALLOW, *A TREATISE OF EQUITY* 509-10 (John Fonblanque & Antony Laussat eds., Phila., John Grigg 3d ed. 1830). Because minors could not sue or defend except through a guardian or a guardian ad litem and since the minor could easily be kept from the guardian by those with custody over the minor, the law was changed to allow anyone to sue as *prochein ami* (next friend) on behalf of the minor. 1 SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 88b n.15 (spec. ed. 1985).

⁶² BALLOW, *supra* note 61, at 510. Earlier versions of the treatise had mentioned guardians ad litem only in the context of the chancery court's developing jurisdiction over minors. 2 HENRY BALLOW, *A TREATISE OF EQUITY* 223-29 (John Fonblanque ed., Phil., P. Byrne 3d ed. 1807); 2 HENRY BALLOW, *A TREATISE OF EQUITY* 231 (John Fonblanque ed., Phil., Abr'm Small 2d Am. ed. 1820).

⁶³ BALLOW, *supra* note 61, at 510.

Certainly, the courts were vigilant in protecting minors from their incompetent guardians ad litem. The appointment of a guardian ad litem was not a matter of form but was necessary to provide the infant with a proper defense.⁶⁴ The guardian ad litem was held to have duties to ascertain the ward's legal and equitable rights, assert the independent interests of his ward, and mount a defense;⁶⁵ the failure of a guardian ad litem to investigate the legal and equitable rights of the wards was thus held woefully inadequate.⁶⁶ Because the guardian ad litem served such an important role, his admissions or omissions constituted prejudice; thus, appellate courts held that it was fraud and an abuse of discretion to allow a case against the minors to proceed.⁶⁷ The courts were more than willing to compel the guardian ad litem to defend the ward if necessary and would even exclude incompetent and illegal evidence on the court's own motion.⁶⁸

On the other hand, courts clearly had the authority to appoint guardians for orphans or children whose parents were deemed unfit. That courts had this power at all stemmed from the unquestioned assertion that it was a necessary part of a well-regulated society.⁶⁹ A leading nineteenth-century manual for guardians and trustees in Ohio, for example, stated authoritatively that if the parents were "unsuitable," then the court could

⁶⁴ *Long v. Mulford*, 17 Ohio St. 484, 502-03 (Ohio 1867). In *Long*, the only evidence that there was a guardian ad litem on the case was a formal answer which was filed at the time of the judgment and was in the handwriting of the counsel for the adult brothers who were adversaries to the minors. *Id.* at 495. "No attention was paid to the interests of the infants, and the suit throughout was conducted as though it were an amicable or *ex parte* proceeding, involving no subject of real controversy." *Id.* at 503. The minors' brothers had complete management of the case. *Id.* at 502.

⁶⁵ *Id.* at 503 (citing *Dow v. Jewell*, 1 Foster (N.H.) 486; *Sconce v. Whitney*, 12 Ill. 150, 150 (1850); *Knickerbacker v. De Freest*, 2 Paige Ch. 304, 305 (N.Y. Ch 1830)).

⁶⁶ *See, e.g., Smith v. Taylor*, 34 Tex. 589, 593-97 (1871) (finding the guardian ad litem had come to court without a single title paper and without investigating what rights his wards had).

⁶⁷ *BALLOW, supra* note 61, at 503; *Long*, 17 Ohio St. at 504-05.

⁶⁸ *See, e.g., HENRY CLARY HORNER, HORNER'S PROBATE PRACTICE: COVERING PRACTICE IN ADMINISTRATION, GUARDIANSHIP AND INSANITY PROCEEDINGS IN THE STATE OF ILLINOIS, WITH COMPLETE FORMS* §190 (3rd ed. Ferdinand Goss 1925) (citing *Cartwright v. Wise*, 14 Ill. 418 (1853); *Johnston v. Johnston*, 138 Ill. 389 (1891); and cases cited therein). The author expressed a similar concern as to whether the guardian ad litem could be trusted to uphold the minor's rights. The "duties of a guardian ad litem are usually performed in a perfunctory manner, and an opportunity at least should be given the legal guardian to present any real defense that may exist." *Id.* at § 190 n.93. For this reason the author suggests that the court require the custodial guardians of every minor to be served with notice so that they may present any defenses the minor had. "The minor is the ward of the court, and the guardian ad litem can waive none of his rights." *Id.* at § 413.

⁶⁹ Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 327-28 (2002) ("In the standard nineteenth-century view, the racial inferiority of . . . immigrants was particularly likely to manifest itself as a profound and permanent unfitness for self-government, in both its public and private forms. Some native-born critics focused on the immigrant's supposedly inborn incapacity for self-government in the political arena Other commentators and policymakers described immigrants' failures within their own households in parallel terms."). *See also Cowles v. Cowles*, 8 Ill. 435, 437 (1846) ("This is a power which must necessarily exist somewhere, in every well regulated society, and more especially in a republican government, where each man should be reared and educated under such influences that he may be qualified to exercise the rights of a freeman and take part in the government of the country. It is a duty, then, which the country owes as well to itself, as to the infant, to see that he is not abused, defrauded or neglected"). Interestingly, *Cowles* involved a support action after divorce. *Id.*

appoint a guardian to have custody and provide for the minor's education and maintenance.⁷⁰ Unfitness encompassed not only abuse and neglect but moral turpitude; thus, drunkenness, blasphemy, "low and gross debauchery," irreligious principles, and "domestic associations . . . such as tend to the corruption and contamination of . . . children" were grounds for the courts to remove children from their parents' custody.⁷¹ Importantly, the appointment had to serve the interests of the child, which were of paramount consideration, and encompassed not only the minor's temporary welfare but his "affections, attachments[,] . . . training, education, and morals."⁷² Furthermore, the court could set aside the child's selection of a guardian, even after the child reached the age of fourteen (twelve if the child were a female), if the choice was unsuitable.⁷³

The juvenile court movement at the end of the nineteenth and beginning of the twentieth centuries firmly embraced a separate family law for the poor.⁷⁴ The need to protect juveniles who were deemed neglected, dependent, or destitute was seen as an extension of the chancery court's authority to provide for the welfare and guardianship of children.⁷⁵ That authority, in turn, stemmed from the view that the state, as *parens patriae*, was the "guardian of social interests"⁷⁶ and had the power to act as the "ultimate parent of the child."⁷⁷ Although conceding that chancery jurisdiction had been exercised on behalf of only those children with property, juvenile court proponents now asserted that the chancery courts always had the jurisdictional authority to protect poor children, but were without the means to provide for their support until the state began to enforce parental obligations of support and provide public funds for the support, education, and maintenance of children.⁷⁸ The juvenile court thus could interfere with the parental right of custody when the child's welfare so demanded, as when the parent was deemed neglectful, incompetent or had failed to provide for the child as "required by both law and morals."⁷⁹ From this perspective, parental duties were owed not simply to the child but to the public as well, and the juvenile court had the power to compel parents to

⁷⁰ FLORIEN GIAUQUE, *A MANUAL FOR GUARDIANS AND TRUSTEES: OF MINORS, INSANE PERSONS, IMBECILES, IDIOTS, DRUNKARDS, AND FOR GUARDIANS AD LITEM, RESIDENT AND NON-RESIDENT, AFFECTED BY THE LAWS OF OHIO* 23 (1881).

⁷¹ *Id.* at 6 n.1.

⁷² *Id.* at 23 n.4 (citing cases from multiple jurisdictions therein).

⁷³ *Id.* at 25. The minor, however, had no power to override the selection of a testamentary guardian. *Id.* at 25 n.2.

⁷⁴ Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 *STAN. L. REV.* 257, 262 (1964).

⁷⁵ HERBERT LOU, *JUVENILE COURTS IN THE UNITED STATES* 2-5 (1927).

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 5.

⁷⁸ Julian W. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 105 (1909).

⁷⁹ LOU, *supra* note 75, at 8-9.

assume those responsibilities.⁸⁰

The juvenile court thus assumed the mantle of guardian for those children appearing before it, just as probate court officials had in the preceding century. The juvenile judge was likened to a “wise and merciful father,”⁸¹ who functioned as the “defender” of the juveniles brought before the court.⁸² Attorneys for children (and their parents) were not simply unnecessary—they were counterproductive.⁸³ Although guardians could be appointed in some juvenile courts, primarily in adoption matters,⁸⁴ there is no evidence that juvenile courts routinely—or ever—appointed independent guardians to represent the interests of juveniles in neglect cases. The assumption was that the courts would protect the interests of children.⁸⁵

By mid-century, commentators began to question some of the assumptions on which the juvenile court rested. Some argued that the lack of procedural safeguards and fundamental due process unacceptably increased the potential for abuse of individual rights.⁸⁶ Critics also pointed to the almost unfettered discretion and inevitable fallibility of juvenile court judges as additional evidence of rights abuses.⁸⁷ Moreover, there was a growing recognition that lawyers did have a role to play in the juvenile court; in neglect cases, that role required the attorney to ascertain the best interests of his ward and to ensure that the disposition imposed by the court would serve those interests.⁸⁸ Colorado⁸⁹ and New York⁹⁰ were among the first states to enact provisions requiring the appointment of a guardian for a minor in a child neglect case, and by the mid-1970s seventeen states and the Uniform Juvenile Court Act mandated the appointment of an independent representative for the child in neglect and abuse proceedings.⁹¹

⁸⁰ *Id.* at 9.

⁸¹ Mack, *supra* note 78, at 107.

⁸² LOU, *supra* note 75, at 138.

⁸³ *Id.* at 138 (“[T]he appearance of attorneys usually complicates the proceedings and serves neither the interests of the child nor the interests of justice [W]hen a lawyer does appear, which is usually in the interests of the parents, it is possible in most cases to enlist his cooperation to protect the real welfare of the child.”).

⁸⁴ Some juvenile courts also had jurisdiction over adoption cases. *Id.* at 64. Pennsylvania’s Orphan Court, for example, appointed a guardian ad litem for minors under fourteen whose natural guardians had failed or neglected their duty. *See, e.g.,* RAYMOND MOORE REMICK, 1 PRACTICE AND PROCEDURE IN THE ORPHANS’ COURTS OF PENNSYLVANIA §228 (1924). It appears, though, almost as an afterthought, mentioned in a provision pertaining to the requirements of a petition.

⁸⁵ Court officers and social service agencies, too, were viewed as acting in the child’s best interests.

⁸⁶ Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 503 (1962).

⁸⁷ *Id.* at 503-04.

⁸⁸ *Id.* at 519.

⁸⁹ COLO. REV. STAT. § 22-10-8 (1963). Some commentators contend that Colorado was the first state to enact such a provision. Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W. L. REV. 16, 17 n.7 (1977).

⁹⁰ N.Y. FAM. CT. ACT § 242 (1963).

⁹¹ Brian G. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 118 (1974). Fraser noted that five states required the appointment of a guardian ad litem: Alaska, Colorado, Kansas, New York, and Tennessee. *Id.* at 118 n.56.

Federal law further cemented the role of the guardian ad litem in abuse and neglect cases. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), conditioning the receipt of federal funding on the requirement that the state appoint a guardian ad litem for every abused or neglected child whose case results in a judicial proceeding.⁹² In 1996, the Adoption and Safe Families Act (ASFA) added an additional requirement that the guardian ad litem should “make recommendations to the court concerning the best interests of the child.”⁹³ These changes were precipitated in part by a growing concern about the quality of the legal representation for the child. A study authorized by Congress on the effectiveness of legal representation of children in abuse and neglect cases concluded that the inclusion of a best interests standard would provide much needed clarification to the guardian ad litem’s role.⁹⁴

III. RACE, CLASS, AND BEST INTERESTS

The role of the guardian ad litem today remains far from clear.⁹⁵ A recent survey of the fifty-six United States jurisdictions revealed that no two jurisdictions took identical approaches.⁹⁶ Thirty-nine jurisdictions, for example, provide for the child’s expressed wishes to be heard by the court, but a super-majority requires the appointment of a guardian ad litem to represent the child.⁹⁷ Moreover, almost every jurisdiction requires the child’s advocate, regardless of the nature of his appointment, to consider the child’s best interests.⁹⁸ The child’s advocate, then, must act to further and protect those interests, although the best interests of the child is an indeterminate standard.⁹⁹

⁹² 42 U.S.C. §5103(b)(2)(G) (1976) (repealed 1996). CAPTA has no requirement that the guardian ad litem be an attorney. Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER FOR CHILD. & CTS. 63, 64 (1999). In 1977, a Seattle judge, David Soukup, frustrated by the inability of attorneys to provide the court with detailed factual findings, established the first Court Appointed Special Advocate (CASA) program. *Id.* The CASA program trained volunteers to provide that detailed fact-finding while advocating for the best interests of children in abuse and neglect cases. *Id.* The National Council of Juvenile and Family Court Judges established the National Court Appointed Special Advocate Association in 1984 and in 1990, federal legislation was enacted to provide funding for the further expansion of the CASA program. *Id.*

⁹³ 42 U.S.C. § 5106a(b)(2)(A)(ix) (1994 & Supp. 1996) (current version at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006)).

⁹⁴ Federle, *Children’s Rights and the Need for Protection*, *supra* note 9, at 424 n.7.

⁹⁵ Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1014 (2006).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Federle, *Children’s Rights and the Need for Protection*, *supra* note 9, at 427-28.

⁹⁹ For a non-exhaustive list, see, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL’Y REV. 267 (1987); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523 (1994); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Michael S.

This emphasis on best interests is problematic for a number of reasons. First, it may reflect dissatisfaction with the court's ability to ascertain the best interests of the child through the adversarial process. In part, this stems from a cynical view about parents and their claims to act in their child's best interests, a view which in turn is grounded in earlier racist and classist notions about poverty, neglect, and poor parenting. But it also suggests disillusionment with state systems and institutions generally, and a deep skepticism about the approach taken by child protective services agencies. What is intimated by this legislative approach becomes explicit in practice: the court needs help in ascertaining best interests, assistance that is unlikely to be provided by the other parties to the abuse or neglect proceeding.¹⁰⁰

The indeterminacy of the best interests standard thus increases the risk of arbitrariness. Because state statutes typically provide little guidance as to the meaning or content of best interests,¹⁰¹ and the child's express preferences are not binding or controlling, the guardian ad litem and the judge in dependency courts are free to determine best interests without meaningful constraints.¹⁰² Attorneys are not prepared either by legal training or experience to determine what will be best for any particular child.¹⁰³ Consequently, it should not be surprising that guardians ad litem may resort to "self-referential, unprincipled determinations about what is the best course for the child and the weight of risks and benefits attendant to any course of action."¹⁰⁴ This leaves considerable room for bias—personal and social, conscious and unconscious.¹⁰⁵ Attorneys left adrift by the ambiguous

Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381 (2006).

¹⁰⁰ Federle, *Children's Rights and the Need for Protection*, *supra* note 9, at 426-27.

¹⁰¹ Some states provide a list of factors for guardians ad litem and judges to consider when considering what is in the child's best interests. Charlow, *supra* note 99, at 268. *See, e.g.*, KY. REV. STAT. § 403.270(2) (2006) (court must consider wishes of child's parents, wishes of the child, interaction and interrelationship of the child, child's adjustment, mental and physical health of all the individuals involved, reports of domestic violence, the extent of care the child has received by any de facto custodian, and several other factors); WIS. STAT. § 767.41(5) (2006) (guardian ad litem and court must consider wishes of parents stipulated by all parties, child's wishes expressed through a professional, adjustment of child, mental health of parties, need for stability, availability of child care services, cooperation between parties, history of physical or drug abuse by parent or parent's partner, reports of professionals and anything else that may be relevant). Other states simply allow the courts to determine what factors will be relevant in any given case. Charlow, *supra* note 99, at 268. *See, e.g.*, N.J. STAT. § 9:2-4(c) (2006); TENN. CODE § 36-6-101(2)(A)(i) (2009). In no state, however, is it clear whether the best interests standard should be applied to produce a happy childhood or a well-adjusted adult. Charlow, *supra* note 99, at 268.

¹⁰² Federle, *Righting Wrongs*, *supra* note 9, at 108 n.30; *see also* Charlow, *supra* note 99, at 267; Mnookin, *supra* note 99, at 226.

¹⁰³ Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 599 (2008).

¹⁰⁴ *Id.* at 600.

¹⁰⁵ Federle, *Children's Rights and the Need for Protection*, *supra* note 9, at 422; *see also* Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 416 (2008).

standard of the child's best interests will draw on what they know.¹⁰⁶ Because guardians ad litem are predominately white and middle class, what they know and value are middle class values, and a standard of living that is neither accessible to everyone¹⁰⁷ nor necessarily the optimal way to rear children.

Indeterminacy is particularly disturbing in a system that historically has disadvantaged poor and minority families.¹⁰⁸ As part of the machinery for administering the child welfare system, the juvenile court disproportionately facilitates the removal of poor and minority children from their families.¹⁰⁹ Thus, children of color constitute 41% of all children in the United States, but 59% of the child welfare population¹¹⁰ and 58% of the foster care population.¹¹¹ Because the family law for the poor historically was based on assumptions about poverty and parental fault, it should come as little surprise that the child welfare system continues to intervene in ways that promote state control and oversight.¹¹² This history also suggests that this middle class bias has contributed to disproportionate impact.

Bias not only may result in the removal of a disproportionate number of poor and minority children, but may result in less efficacious decision-making. Some commentators have suggested that lawyers, judges, and social workers view child welfare cases through a white middle class lens, which fails to account for cultural differences that may not be harmful to the child.¹¹³ This institutional bias can lead to unneeded disruption for kids and ineffective representation of their interests.¹¹⁴ Additionally, it may be difficult for guardians ad litem, who are mostly white and middle class, to relate to their clients.¹¹⁵ Consequently, guardians may be less respectful of their wards' preferences, viewpoints, and desires, choosing instead to

¹⁰⁶ Federle, *Children's Rights and the Need for Protection*, *supra* note 9, at 426-427.

¹⁰⁷ See Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 352 (1999).

¹⁰⁸ PETERS, *supra* note 40, at 542 app. A.

¹⁰⁹ Clement, *supra* note 105, at 400-01.

¹¹⁰ Theresa Hughes, *The Neglect of Children and Culture: Responding to Child Maltreatment with Cultural Competence and a Review of Child Abuse and Culture: Working with Diverse Families*, 44 FAM. CT. REV. 501, 503 (2006); see also SUSAN CHIBNALL ET AL., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY (Dec. 2003) (discussing issues of over-representation of children of color in the child welfare community and strategies for the child welfare system to accommodate the needs of children of color), http://www.acf.hhs.gov/programs/opre/abuse_neglect/respon_coc/reports/persp_ch_welf/child_of_color.pdf.

¹¹¹ *Facts About Foster Care*, CHILDREN'S RIGHTS, <http://www.childrensrights.org/issues-resources/foster-care/facts-about-foster-care/> (last visited March 22, 2011).

¹¹² See PETERS, *supra* note 40, at app. A.

¹¹³ See Sinden, *supra* note 107, at 366-67; see also Susan L. Brooks, *The Case For Adoption Alternatives*, 39 FAM. & CONCILIATION CTS. REV. 43, 50 (2001) (stating that child welfare systems tend to "discount and devalue the cultural backgrounds In trying to protect children, we disregard the parents' rights and their communities' cooperative values.").

¹¹⁴ Clement, *supra* note 105, at 418.

¹¹⁵ Appell, *supra* note 103, at 595-96 ("[A]ttorneys are unlikely to share the same socio-economic background, cultural values, or kin as the children they represent").

exert extraordinary power over the direction of the case.¹¹⁶ Bias may also lead guardians to assume a more adversarial posture with respect to parents and align with the state agency seeking to remove children.¹¹⁷ This, in turn, may engender mistrust and generate even deeper misunderstandings. Certainly, there is strong evidence that poor and minority people of color distrust the child welfare system and its white, middle class professionals.¹¹⁸

IV. THE CURIOUS CASE OF THE GUARDIAN AD LITEM

In light of the historical approach to the children of the poor, the debate about the proper role of the child's advocate in abuse and neglect cases has ominous overtones. On one side are those who focus on children's incapacity and the importance of protecting children from their abusive or neglectful parents.¹¹⁹ They argue that because children lack the maturity and cognitive capacity to assess their own long-term interests, society has a responsibility to protect and nurture them.¹²⁰ From this perspective, the guardian ad litem shields the child from the pressures they may feel from parents and the court system by taking away whatever decision making authority the child may have.¹²¹ On the other side are those who advocate for an attorney to represent the expressed wishes of the child. Under this view, permitting the voices and preferences of children to be heard empowers them and is good in itself.¹²² Moreover, advocates of an

¹¹⁶ *Id.* at 596.

¹¹⁷ Clement, *supra* note 105, at 417-18. Clement notes the importance of power dynamics when a white person with the legal right to take away a child from the family is sent into the home of a poor minority family. *Id.* Furthermore that white professional may automatically assume they are in danger because of the hostility of the situation. *Id.* All of these factors from the professional's perception of how cooperative the family is and the families response to the professionals. *Id.* While Clement is speaking of white, middle-class social workers the same power dynamics apply for guardians ad litem. Appell, *supra* note 103, at 596.

¹¹⁸ See Clement, *supra* note 105, at 414-15; see also Sinden, *supra* note 107, at 352.

¹¹⁹ Emily Buss, "You're My What?" *The Problem of Children's Misperception of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1702 (1996); see ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 6 (1993).

¹²⁰ Buss, *supra* note 119, at 1702.

¹²¹ *Id.* at 1702-03. See also Stanley S. Clawar, *Why Children Say What They Say*, 6 *FAM. ADVOC.*, no. 2, 1983, at 25, 45 (stating children are motivated by, inter alia, fear, guilt, desire to protect parents, the parent's promise to change and a fear of the unknown in their statements to lawyers, judges, and other professionals); Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 *CREIGHTON L. REV.* 1369, 1375-86 (1984) (suggesting that children's feelings of guilt, difficulty in understanding and articulating responses to lawyers' questions, and their lack of understanding about the court process make a traditional lawyer-client relationship difficult); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 *FAM. L.Q.* 287, 307 (1983) (suggesting that a child's emotions may interfere with decision-making); JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* 32-33 (1986) (suggesting that a child development expert might be necessary to distinguish between the child's expressed preferences and real preferences).

¹²² Buss, *supra* note 119, at 1703-04. See also Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76, 85-93 (arguing for child-directed representation when the child is mature enough to be "deemed to be an autonomous individual."); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 *J. FAM. L.* 1, 16-17 (1977) (arguing that a traditional attorney for the child minimizes the outside intervention into the family while protecting the child's right to participate in matters affecting

express-preferences attorney recognize that a guardian ad litem may lack training to determine what is in the best interests of the child,¹²³ and therefore may substitute personal values and biases for a robust and culturally competent standard.¹²⁴

The idea that a child must have a guardian ad litem is a curious one. For good or ill, we have an adversarial legal system. We strongly embrace the belief that the clashing presentation of stories from each of the parties will uncover the truth. But in the abuse and neglect context, we seem to think the adversarial system should be set aside in favor of “protecting” the child (although we may not be sure the child actually needs protection), even if that means that we allow the court the authority to appoint someone (in this case, the guardian ad litem) to help the court find the truth. By denying the child a lawyer to advocate for the child’s express wishes, we are saying that the child’s voice does not add to our understanding or appreciation of his situation, that we already know what is unacceptable, or that we know what is best. The reality, however, is that this approach promotes dominant norms and understandings and historically has proven to be a racist and classist approach to the problems of the poor.

Although the guardian ad litem in dependency court is a peculiar institution, without definite standards of representation, history tells us that where status, wealth, and land were involved, the guardian ad litem was an attorney who defended the legal interests of his ward. The children of the poor are entitled to the same respect. Perpetuating children’s dependencies and vulnerabilities under the guise of best interests will not protect them and may actually harm them. But empowering children to participate in proceedings affecting their relationships with their parents, providing them with a voice, and recognizing differences, should ensure a more accurate and just determination. Respect for children means taking their claims seriously, but that is only possible if we acknowledge that the guardian ad litem is a barrier to reform.

his life); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 349 (1993) (arguing that if the child can articulate a preference the counsel should advocate for that position); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 693-94 (arguing attorney’s duty to advocate for a client’s wishes is not less significant when that client is a child).

¹²³ Buss, *supra* note 119, at 1705.

¹²⁴ Wald, *supra* note 99, at 423.