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Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes

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LETTING DOWN THEIR GUARD: WHAT GUARDIANS AD LITEM SHOULD KNOW ABOUT DOMESTIC VIOLENCE IN CHILD CUSTODY DISPUTES

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Abstract: Children who are exposed to adult domestic violence frequently suffer long-term negative consequences as a result. Consequently, courts and legislatures have begun to consider the perpetration of domestic abuse as an important factor in private child custody disputes. Yet guardians ad litem, who are appointed with increasing regularity in these cases, are often inadequately prepared to recognize and address this complicated issue. This Note looks at the historical use of guardians ad litem, as well as the current understanding of connections between domestic violence and child custody disputes, and concludes that with adequate standards and guidelines in place, guardians ad litem could help protect children who are exposed to domestic violence from further harm. The Note concludes with a set of recommended uniform guidelines that could be adapted to each state's particular system of guardian ad litem use to protect children from further exposure to domestic abuse.

> *In my first meeting with the guardian ad litem, I had told him that there was a significant history of domestic violence, [that] my ex-partner had been to [a batterer's intervention program] and that I was disabled as a result of the abuse, and he told me, "No one cares about that abuse crap."*[1]

INTRODUCTION

Lorie suffered years of severe violence at the hands of her husband, Noah.[2] He pulled out her hair, slapped her, tore her clothing, and threatened her life.[3] He hit her in the face with his head so hard that he

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[1] CARRIE CUTHBERT ET AL., BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 19 (2002) (quoting a woman whose custody dispute, litigated in Massachusetts, involved the appointment of a guardian ad litem) (alteration in original).

[2] *Id.* at 46.

[3] *Id.*

broke her tooth.[4] Lorie and Noah's children lived with the ongoing abuse and often witnessed the violence.[5] During one incident, Lorie was holding their baby in her arms when Noah picked up a butcher knife.[6] "Put the kid down," he said, "I'm going to kill you now."[7]

When litigation began over custody of their children, Lorie was prepared with evidence of the abuse, including dental records documenting her broken tooth and written statements of observers who witnessed the abuse and her injuries.[8] The guardian ad litem appointed to her case, however, refused to look at any of the documentation she offered.[9] Furthermore, during the investigation he said to Lorie, "I know you lied to me [about the abuse]. You better tell the truth now, because I'm getting phone calls from people and they can tell me the truth."[10]

Ignoring the trauma of the abuse Lorie suffered, the guardian ad litem's report to the judge described Lorie as "irrationally angry" and "overly emotional," citing her tendency to burst into tears.[11] The guardian ad litem also discredited Lorie's reports of domestic violence to the court, despite his own acknowledgement that he found Noah to be controlling, domineering, and dishonest.[12] The court ultimately granted Noah full custody of the children.[13] The judge never saw Lorie's extensive documentation, and thus could not consider the impact of Noah's abusive behavior on the children.[14]

Considering their role in custody cases, it is disquieting that guardians ad litem (GALs) are often unaware of the dynamics of domestic violence or insensitive to its impact on children.[15] Perhaps it

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[4] *Id.*

[5] *Id.* For further discussion of how exposure to battering affects children, see *infra* Part II.D.

[6] CUTHBERT ET AL., *supra* note 1, at 46.

[7] *Id.* This scenario is not uncommon as children, especially young children, are often in the arms of their parents and thus become caught in the middle of battering incidents. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 244 (1999); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 82 (2001); *see also* discussion *infra* Part II.D.

[8] CUTHBERT ET AL., *supra* note 1, at 46.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] CUTHBERT ET AL., *supra* note 1, at 46.

[14] *See id.*

[15] *See* CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 449 (2001).

should not be surprising, though.[16] After thirty years of advocacy, society is only just beginning to recognize the pervasive and devastating impact of partner abuse.[17] In addition, only in the last ten years have we begun to recognize the consequences of partner abuse on children.[18]

The court system trusts GALs, like Lorie's, to help ensure that children are protected during custody disputes.[19] Courts are appointing GALs with increasing regularity in cases where custody is contested.[20] Many, if not most, of these custody disputes involve a history of domestic violence.[21] In addition, the presence of partner abuse in a dispute

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[16] *See id.*

[17] *Id.*; ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 3, 20 (2000) (stating that virtually no public discussion of domestic violence occurred until the mid-1970s); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991) (noting that feminist activism of the early 1970s brought battering to public attention). For example, newspapers, which both reflect and shape public attitudes, still fail to report non-homicide domestic violence, making it difficult for people to understand and address the problem. JOHN MCMANUS & LORI DORFMAN, BERKELEY MEDIA STUDIES GROUP, DISTRACTED BY DRAMA: HOW CALIFORNIA NEWSPAPERS PORTRAY INTIMATE PARTNER VIOLENCE 3, 18 (Lori Dorfman ed., 2003). For a historical perspective of domestic violence and the battered women's movement, see SCHNEIDER, *supra*, at 13–20, 20–28.

[18] LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 1 (2002); *see* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 285 (1999); Weithorn, *supra* note 7, at 7. The first published article to explore the exposure of children to domestic violence appeared in 1975, but the scholarship in this area did not flourish until the 1990s. *See* Dalton, *supra*, at 285. There were fifty-six articles published by 1998, and by 1999, four books had been published. *Id.* The increased focus on the harm of exposing children to domestic violence may be a part of a larger concern for the psychological and emotional abuse of children. *See* Weithorn, *supra* note 7, at 7 n.11; *see also* PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY 4 (1996) [hereinafter AM. PSYCHOLOGICAL ASS'N] (defining psychological maltreatment of children to include exposure to violence between parents).

[19] *See* Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 530 (2000).

[20] *See* Marcia M. Boumil, *Ethical Issues in Guardian Ad Litem Practice*, 86 MASS. L. REV. 8, 8 (2001); Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 643 (1990); Prescott, *supra* note 19, at 530. One Massachusetts attorney notes that courts are currently appointing GALs in record numbers in that state due to increases in contested custody and visitation cases. Boumil, *supra*, at 8. The appointment of GALs in custody and visitation cases appears to have increased during the late 1990s; in the early part of the decade, commentators noted that these appointments were rare. *See, e.g.*, Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 270 (1991); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53, 55 (1992).

[21] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100 (reporting that custody disputes occur more frequently in families with a history of domestic violence); CUTHBERT ET AL., *supra* note 1, at 2 (suggesting that a majority of highly disputed custody cases involve a

increases the likelihood that a judge will appoint a GAL.[22] Therefore, GALs are likely to influence the outcome of a significant number of custody disputes involving domestic violence.[23] When GALs lack understanding or are simply inattentive to the repercussions of partner abuse, they may adversely affect a significant number of custody decisions.[24]

Yet GALs can play a positive role in these cases.[25] GALs who have training and experience with partner abuse may be in the best position to ensure that courts are aware of any history of domestic violence.[26] They can bring to courts' attention evidence of abuse that parents or attorneys may be reluctant to introduce, use their investigation to determine the effects of exposure to domestic violence on children, and make recommendations that address any safety concerns of children and abused parents.[27]

Therefore, this Note proposes that despite current problems with the GAL system, simple reforms could enable the appointment of GALs in custody cases involving domestic violence to benefit courts, litigants, and especially children. Part I provides a history of the judicial system's use of GALs to protect the interests of children and discusses the current status of their use in private child custody litigation. Part II presents a brief overview of the widespread problem of domestic violence,

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history of domestic violence); Dalton, *supra* note 18, at 287 (reporting that at least 50% of contested custody cases involve physical violence); Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 214 (2002) (noting that domestic violence is present in most custody and visitation cases). Domestic violence is disproportionally represented in custody disputes primarily because batterers are more likely than nonbatterers to contest custody. *See* BANCROFT & SILVERMAN, *supra* note 18, at 113; *see also* discussion *infra* Part II.C. One judge, commenting on the high involvement of domestic violence in custody disputes, worried that "the very frequency of domestic violence in disputes about child custody may have the effect of inuring courts to it and thus minimizing its significance." Custody of Vaughn, 664 N.E.2d 434, 439–40 (Mass. 1996).

[22] DALTON & SCHNEIDER, *supra* note 15, at 450; Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 135 (2002). A common tactic of batterers is to deny and minimize their abusive behavior while finding blame with their partner. BANCROFT & SILVERMAN, *supra* note 18, at 17–19. This is particularly likely to result in the kind of conflicting testimony that will prompt a judge to appoint a GAL. DALTON & SCHNEIDER, *supra* note 15, at 450; *see* Shelia M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 287–91 (1999).

[23] *See supra* notes 20–22 and accompanying text.

[24] DALTON & SCHNEIDER, *supra* note 15, at 450.

[25] Mass. Chapter of the Nat'l Ass'n of Soc. Workers Comm. on Domestic Violence & Sexual Assault, Report of "the GAL Resource and Training Project" 14 (Nov. 4, 1998) (unpublished report) [hereinafter GAL Report]. For further discussion of the potential benefits of GALs in cases involving domestic violence, see *infra* Part III.

[26] *See* Murphy, *supra* note 22, at 287.

[27] *See* BANCROFT & SILVERMAN, *supra* note 18, at 200; Murphy, *supra* note 22, at 287.

paying particular attention to its impact on children. Part II also explains why domestic violence continues to be an issue even in a post-separation context, and how the dynamics of abuse affect disputes over custody. Part III examines the influence of GALs in cases involving domestic violence, which currently tends to be more problematic than beneficial for the children whose interests GALs are meant to protect. This section also argues, however, that with reforms, the GAL system should be retained in child custody disputes involving domestic violence. With that in mind, Part IV proposes several model guidelines for GALs that, if adopted by a state court, would increase the safety and well-being of the adult and child victims of battering during custody disputes.

I. The Evolution of the Guardian Ad Litem in Custody Disputes

The contemporary use of GALs in child custody and visitation disputes developed from a long judicial tradition of appointing a representative for individuals deemed incapable of protecting their own interests in a lawsuit.[28] A review of the historical roots of this tradition shows that the purpose of appointing GALs for children has expanded over time.[29] While the motivation to appoint GALs for children was originally limited to the protection of a child's financial interests, modern courts are now likely to appoint a representative when they have concerns for a child's safety or well-being.[30] In addition, developments in the mental health field regarding the effect of divorce on children have led to an increasing use of GALs in the family law context.[31] Finally, although American courts have utilized GALs since this country's inception, a survey of the current status of GAL use in the context of

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[28] *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 291 (1998); Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 Fordham L. Rev. 1785, 1794 (1996). "Ad litem" literally means "for the suit." Black's Law Dictionary 43 (7th ed. 1999). A "guardian ad litem" is appointed by the court to appear on behalf of an incompetent or minor party for the purposes of an ongoing lawsuit only. *Id.* at 713.

[29] *See* George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895, 897–98 (1976); Lidman & Hollingsworth, *supra* note 28, at 291.

[30] *See* Curtis, *supra* note 29, at 897–98; Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 330–31 (1993).

[31] William Halikias, *The Guardian Ad Litem for Children in Divorce: Conceptualizing Duties, Roles, and Consultative Services*, 32 Fam. & Conciliation Cts. Rev. 490, 490, 493 (1994).

private child custody disputes[32] demonstrates that there are still many unsettled and even controversial aspects of the GAL role.[33]

A. *Historical Background*

The concept of appointing guardians for the legally incompetent originated in Roman law, and the practice later was incorporated into English common law.[34] The judicial tradition of appointing GALs stems from the English doctrine of *parens patriae*,[35] which established the king as the protector and general guardian of all "infants, idiots, and lunatics."[36] The king could also delegate his authority to a guard-

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[32] Although much of what is discussed here will also apply to the use of GALs in other contexts, this Note focuses specifically on the use of GALs in private custody litigation. Private custody disputes involve litigation between private parties. Ducote, *supra* note 22, at 109; Weithorn, *supra* note 7, at 14 n.38. Private child custody disputes can arise from a number of proceedings, including paternity suits, third-party custody actions, and complaints for modification. *See generally* 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES §§ 3, 7, 10 (2d ed. 1993). North Dakota also provides for the discretionary appointment of GALs in abuse prevention protective order cases. Muhlhauser, *supra* note 20, at 645–46 (citing N.D. CENT. CODE § 14–07.1–05.1 (1981 & Supp. 1989)). The majority of private custody disputes, however, arise within divorce actions, 2 THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS & OBLIGATIONS § 6:06, at 14 (1995), despite the fact that in 90% of divorce actions the parties will come to an agreement, Comm. on Prof'l Practice & Standards, Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677, 677 (1994) [hereinafter APA Guidelines].

In public custody disputes, as opposed to private custody cases, the role of the state is adversarial to the parties. Weithorn, *supra* note 7, at 14 n.38. Generally, a public custody dispute stems from a child abuse and neglect investigation where the state believes it is in the best interest of the child to terminate parental rights. *See id.*

[33] *See* discussion *infra* Part I.C.

[34] Stuckey, *supra* note 28, at 1794. One of the earliest appearances of a guardian for a child in English law was in a case from the fourteenth century. Lidman & Hollingsworth, *supra* note 28, at 291. A guardian was appointed to protect the interests of a child in the land of his deceased father. *Id.* In that case, the guardian's purpose was only to protect the child's economic interests (and thus the king's interests) in the land, not to protect the child himself. *Id.*

[35] *See* ANN M. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 6 (1993) (the conception of the GAL is an extension of the state in its *parens patriae* role); Halikias, *supra* note 31, at 493 (under *parens patriae* the state assumes guardianship over legally incompetent individuals); Lidman & Hollingsworth, *supra* note 28, at 291 (guardian concept has become linked with concept of *parens patriae*); Stuckey, *supra* note 28, at 1794 (government's claim of authority to appoint GALs is based on the doctrine of *parens patriae*). The term *parens patriae*, literally meaning "parent of his or her country," is generally used to refer to the role of the state as provider of protection to those unable to care for themselves. BLACK'S LAW DICTIONARY, *supra* note 28, at 1137.

[36] 3 WILLIAM BLACKSTONE, COMMENTARIES *48.

ian through a court appointment.[37] Since the doctrine was primarily used as a means for the king to protect his economic interests in his lands, *parens patriae* authority was rarely invoked for children unless they were dependants of the landed gentry.[38]

Subsequently, American courts adopted both the mantle of *parens patriae* and the inherent power to appoint GALs when the situation warranted.[39] American courts, however, abandoned the economic motives behind *parens patriae* in favor of a child welfare perspective.[40] *Parens patriae* thus imbued the state and its courts with the responsibility to protect the safety and well-being of children.[41]

Until the mid-twentieth century, it was assumed that the court, as an arm of the state, would sufficiently protect the welfare of children.[42] The 1967 U.S. Supreme Court case of *In re Gault*, however, challenged that assumption.[43] *Gault* established for the first time that children have a constitutional right to counsel in juvenile delinquency proceedings, implicitly asserting that any protection provided solely by the court was insufficient.[44] Consequently, after *Gault*, the use of GALs to protect the interests of children in litigation gained significant momentum.[45]

Once accepted in the juvenile court system, GALs next gained widespread use in abuse and neglect cases.[46] During the 1960s and 1970s, concern about the issue of child abuse in the family attracted

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[37] Lidman & Hollingsworth, *supra* note 28, at 291.

[38] Curtis, *supra* note 29, at 897–902.

[39] 1 LEGAL RIGHTS OF CHILDREN § 12.01, at 531 (Donald T. Kramer ed., 2d ed. 1994); Lidman & Hollingsworth, *supra* note 28, at 291.

[40] *See, e.g.*, Morman Church v. United States, 136 U.S. 1, 57 (1890) (stating that the *parens patriae* doctrine is "inherent in the supreme power of every state . . . a most beneficial function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves"); *In re* S.G., 677 N.E.2d 920, 928 (Ill. 1997) ("[T]he doctrine of *parens patriae* . . . represents an expression of the general power and obligation of the government as a whole to protect minors and the infirm . . .").

[41] *See In re S.G.*, 677 N.E.2d at 928.

[42] *See* Lidman & Hollingsworth, *supra* note 28, at 291 n.177.

[43] *See* 387 U.S. 1, 41 (1967).

[44] *Id.* ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").

[45] *See* LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 12.01, at 531; Ducote, *supra* note 22, at 109–10; Goodmark, *supra* note 7, at 317.

[46] *See* Muhlhauser, *supra* note 20, at 633–34.

new prominence.[47] The courts shared this concern and consequently began appointing GALs to protect children in abuse and neglect proceedings.[48] The passage of the Child Abuse and Neglect Prevention and Treatment Act in 1974 further encouraged the use of GALs to protect the safety and well-being of children.[49] The Act required state recipients of federal funding to ensure, through statutory provisions, that every child affected by an abuse and neglect proceeding had access to a GAL.[50]

While the use of GALs gained favor in the realm of abuse and neglect cases, a similar movement began in the family courts.[51] Developments in mental health and child psychology suggested that divorce and custody disputes had negative consequences on the emotional and psychological well-being of the children involved.[52] The advent of no-fault divorce also had increased the contentiousness of custody proceedings.[53] Therefore, judges presiding over child custody disputes began to appoint GALs for minors in order to ensure that children's interests were adequately protected.[54]

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[47] Weithorn, *supra* note 7, at 7; *see* Muhlhauser, *supra* note 20, at 633 n.1. The 1962 publication of C. Henry Kempe's article, *The Battered Child Syndrome*, brought child abuse to the attention of the nation. Heartz, *supra* note 30, at 329; Weithorn, *supra* note 7, at 55–56. The 1980s and 1990s witnessed a similar movement against child sexual abuse. Weithorn, *supra* note 7, at 7. One author suggests that a new era is now beginning, one that will focus on the concern for children exposed to domestic violence. *Id.*

[48] *See* Heartz, *supra* note 30, at 327–28. Judges appointed GALs in abuse and neglect cases before statutory mandates required them to do so. *Id.* at 328. Courts recognized the need to appoint a representative for the child in protection cases, where the interests of the parent often conflict with the interests of the child. *Id.* at 330.

[49] *See* Child Abuse and Neglect Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(b)(2)(G), 88 Stat. 4, 7 (codified at 42 U.S.C. § 5106a(b)(2)(A)(ix) (2000)). The Act was reauthorized in 1988. Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 102 Stat. 102.

[50] § 4(b)(2)(G); *see, e.g.*, ALA. CODE § 26–14–11 (1992); N.D. CENT. CODE § 50–25.1–08 (1999). As of 1990, however, twenty-six states were not yet in compliance with the spirit and intent of requirement. Heartz, *supra* note 30, at 333–34.

[51] *See* § 4(b)(2)(G); Halikias, *supra* note 31, at 492; Muhlhauser, *supra* note 20, at 633–34. Wisconsin began using GALs in child custody cases in 1955, followed by New Hampshire. Halikias, *supra* note 31, at 494. By 1988, nineteen other states created statutory authority for the appointment of GALs in custody cases. *Id.*

[52] Halikias, *supra* note 31, at 492. In actuality, research on children of divorce has been mixed. *Id.* The number of variables that may be at play make it difficult to study the relationship between divorce and mental health of children exclusively. *Id.*

[53] *See id.* at 491; Muhlhauser, *supra* note 20, at 636. Since fault was no longer a relevant factor in divorce, custody hearings increasingly emphasized parental behavior, with each party attempting to paint the other as an unfit parent. Halikias, *supra* note 31, at 491. Consequently, many refer to custody cases as the "ugliest litigation." *Id.*

[54] Halikias, *supra* note 31, at 493; Robert W. Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181, 183 (1964). It is generally

B. *Guardians Ad Litem in Child Custody Disputes*

The first recorded use of a GAL in a private child custody dispute took place in Wisconsin.[55] In *Edwards v. Edwards*, the Wisconsin Supreme Court remanded the divorce suit for further hearing with a recommendation that the trial court appoint a GAL for the minor children of the parties.[56] Following this decision in 1955, the state supreme court persisted in suggesting the appointment of GALs to protect the interests of minor children in custody disputes.[57] Initially, the language of the court's opinions merely reminded the trial court of its responsibility to protect the welfare of children, implicitly suggesting a need for further protections such as those provided by a GAL.[58] In subsequent cases, however, the court used increasingly authoritative language to require the appointment of GALs in this context.[59]

The Wisconsin Supreme Court continued to advocate for the mandatory appointment of GALs until 1971.[60] By that time, the Wisconsin legislature had considered several bills that would have mandated the appointment of a GAL in all divorce-related actions involving children, but each bill was defeated.[61] As a result, in 1971, the state supreme court invoked its rule-making power to mandate the appointment of a GAL whenever the trial court had special concerns for the welfare of minor children.[62] That rule was eventually codified

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accepted that courts have inherent authority to appoint GALs to protect the interests of minor children. *See, e.g., In re* Marriage of Vucic, 576 N.E.2d 406, 411 (Ill. App. Ct. 1991) (stating that courts have inherent power to appoint a GAL for a minor involved in litigation); Verrocchio v. Verrocchio, 429 S.E.2d 482, 486 (Va. Ct. App. 1993) (stating court has discretionary power to appoint a GAL for a child in a custody dispute); *see also* LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 12.01, at 531.

[55] *See* Edwards v. Edwards, 71 N.W.2d 366, 367 (Wis. 1955); Halikias, *supra* note 31, at 494.

[56] *Edwards*, 71 N.W.2d at 367.

[57] *See* Halikias, *supra* note 31, at 494; Ralph J. Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103, 103–05 (1973).

[58] *See* Kritzik v. Kritzik, 124 N.W.2d 581, 585 (Wis. 1963) ("This power vested in the family court, reflects a recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare.").

[59] *See* Weichman v. Weichman, 184 N.W.2d 882, 886 (Wis. 1971) (stating that upon remand, trial court *should* appoint GAL); Dees v. Dees, 164 N.W.2d 282, 287 (Wis. 1969) (stating that trial court *should have* appointed GAL); Koslowsky v. Koslowsky, 163 N.W.2d 632, 636 n.3 (Wis. 1969) (*recommending* and *commending* use of GALs); Wendland v. Wendland, 138 N.W.2d 185, 191 (Wis. 1965) (recommending that the trial court give *serious consideration* to the appointment of a GAL).

[60] Halikias, *supra* note 31, at 494; Podell, *supra* note 57, at 103–05.

[61] Halikias, *supra* note 31, at 494; Podell, *supra* note 57, at 105.

[62] LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 2.25, at 107.

and became the nation's first statute to require the appointment of a GAL in custody disputes arising in domestic relations cases.[63]

Currently, every jurisdiction has a mechanism for the appointment of a representative to protect the interests and well-being of children affected by divorce, custody, and visitation litigation.[64] Appointment of a GAL is usually discretionary, especially in child custody disputes.[65] Only Wisconsin mandates the use of GALs in all do-

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[63] WIS. STAT. § 747.045 (1975) (current version at WIS. STAT. § 767.045 (West 2001 & Supp. 2003)); Ducote, *supra* note 22, at 110. The original statute provided, in pertinent part, that: "In any action for an annulment, divorce, legal separation, or otherwise affecting marriage, when the court has reason for special concern as to the future welfare of the minor children, the court *shall* appoint a GAL to represent such children." WIS. STAT. § 747.045 (1975) (emphasis added); Podell, *supra* note 57, at 105–06.

[64] ALA. CODE § 26–14–11 (1992) (Alabama); ALASKA STAT. § 25.24.310 (Michie 2002) (Alaska); ARIZ. REV. STAT. ANN. § 25–321 (West 2000 & Supp. 2003) (Arizona); ARK. CODE ANN. § 9–13–101(d) (Michie 2002) (Arkansas); CAL. FAM. CODE §§ 3150, 3151 (West 1994 & Supp. 2004) (California); COLO. REV. STAT. § 14–10–116 (2003) (Colorado); CONN. GEN. STAT. §§ 46b–54 (2004) (Connecticut); DEL. CODE ANN. tit. 13, § 721 (1999) (Delaware); D.C. CODE ANN. § 16–918 (2001) (District of Columbia); FLA. STAT. ANN. § 61.401 (West 1997 & Supp. 2004) (Florida); GA. CODE ANN. § 29–4–7 (2003) (Georgia); HAW. REV. STAT. ANN. § 571–46(8) (Michie 1999 & Supp. 2003) (Hawaii); IDAHO CODE § 32–704 (Michie 1996) (Idaho); 750 ILL. COMP. STAT. ANN. 5/506 (1999 & Supp. 2003) (Illinois); IND. CODE ANN. §§ 31–15–6–1, 31–17–6–1 (Michie 2003) (Indiana); IOWA CODE ANN. § 598.12 (West 2001) (Iowa); KAN. SUP. CT. R., Admin. Order No. 100 (Kansas); KY. REV. STAT. ANN. § 403.090 (Michie 1999) (Kentucky); LA. REV. STAT. ANN. § 9:345 (West 2000) (Louisiana); ME. REV. STAT. ANN. tit. 19-A, § 1507 (West 1998 & Supp. 2003) (Maine); MD. CODE ANN., FAM. LAW § 1–202 (1999) (Maryland); MASS. GEN. LAWS ch. 215, § 56A (2002) (Massachusetts); MICH. STAT. ANN. § 27.3178(598.17d) (Michie Supp. 2000) (MICH. COMP. LAWS § 712A.17d (LEXIS current through P.A. 243, Dec. 23, 2003)) (Michigan); MINN. STAT. ANN. § 518.165 (1990 & Supp. 2004) (Minnesota); MISS. CODE ANN. § 93-5-13 (1972) (Mississippi); MO. ANN. STAT. § 452.423 (West 2003) (Missouri); MONT. CODE ANN. § 40–4–205 (2003) (Montana); NEB. REV. STAT. § 42–358 (1993 & Supp. 1996) (Nebraska); NEV. REV. STAT. 432B.505 (2002) (Nevada); N.H. REV. STAT. ANN. § 458:17-a (1992 & Supp. 2003) (New Hampshire); N.J. STAT. ANN. § 9:2–4 (West 2002) (New Jersey); N.M. STAT. ANN. § 40–4–8 (Michie 1999) (New Mexico); N.Y. FAM. CT. ACT § 241 (McKinney 2000) (New York); N.C. ST. R. CIV. P. 17 (North Carolina); N.D. CENT. CODE § 14–09–06.4 (1997) (North Dakota); OHIO REV. CODE ANN. § 3109.04 (West 2000 & Supp 2003) (Ohio); OKLA. STAT. ANN. tit. 43, § 107.3 (West 2001 & Supp. 2004) (Oklahoma); OR. REV. STAT. § 107.425 (2001) (Oregon); PA. R. CIV. P. 1915.11 (Pennsylvania); R.I. GEN. LAWS § 15–5–16.2 (2003) (Rhode Island); S.C. CODE ANN. § 20–7–1545 (Law. Co-op. Supp. 2003) (South Carolina); S.D. CODIFIED LAWS § 25–4–45.4 (Michie 1999) (South Dakota); TENN. CODE ANN. § 36–4–132 (2001) (Tennessee); TEX. FAM. CODE ANN. §§ 107.011, 107.014 (Vernon 2002 & Supp. 2004) (Texas); UTAH CODE ANN. § 30–3–11.2 (1998), § 78–7–45 (2002) (Utah); VT. STAT. ANN. tit. 15, §§ 594, 669 (2002) (Vermont); VA. CODE ANN. § 16.1–266 (Michie 2003) (Virginia); WASH. REV. CODE ANN. §§ 26.12.175, 26.09.220 (West 1997 & Supp. 2004) (Washington); W. VA. CODE ANN. §§ 48–9–302 (Michie 2001) (West Virginia); WIS. STAT. § 767.045 (West 2001 & Supp. 2003) (Wisconsin); WYO. STAT. ANN. § 14–3–211 (Michie 2003) (Wyoming).

[65] *See* HARALAMBIE, *supra* note 35, at 2; LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 2.25, at 106. Some commentators take the position that courts should not routinely ap-

mestic relations cases,[66] although a few other states also require their use in particular circumstances.[67] Each state, however, has vastly different requirements as to whom may be appointed, under what circumstances, and what the appropriate role of that person should be.[68]

C. *Defining the Current Use of Guardians Ad Litem*

Defining the role of the GAL is a difficult task.[69] In general terms, a GAL is a legal representative appointed by the court to protect a child's best interests in litigation before the court.[70] Beyond that, the definition greatly varies depending on the jurisdiction and the type of case involved.[71] To further confuse matters, courts and commentators

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point GALs in child custody disputes, but rather should reserve them for those cases for which their services are necessary in light of the facts of the case. *See* American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (with Commentary)*, 13 J. AM. ACAD. MATRIM. LAW. 1, 2 (1995) [hereinafter AAML]; Lidman & Hollingsworth, *supra* note 28, at 261. These commentators do not mention whether the presence of a history of domestic violence would be reason for the appointment of a GAL, but considering the high number of contested custody cases involving domestic violence, it is unlikely they would take that position. *See* AAML, *supra*, at 2; Lidman & Hollingsworth, *supra* note 28, at 261; sources cited *supra* note 21.

[66] WIS. STAT. § 767.045 (West 2001 & Supp. 2003); HARALAMBIE, *supra* note 35, at 2 n.6; Halikias, *supra* note 31, at 494. Until 1992, both Wisconsin and New Hampshire mandated the appointment of a GAL in custody and visitation proceedings. *See* HARALAMBIE, *supra* note 35, at 2 n.6; Halikias, *supra* note 31, at 494. In 1992, New Hampshire amended its statute to make these appointments discretionary. N.H. REV. STAT. ANN. § 458:17-a (1992 & Supp. 2003).

[67] *See, e.g.*, OR. REV. STAT. § 107.425(6) (2001) (requiring courts to appoint a GAL in a custody or visitation dispute only if one or more of the children request it); VT. STAT. ANN. tit. 15, § 594(b) (2002) (requiring appointment only if the children will be called as witnesses).

[68] *See* discussion *infra* Part I.C.

[69] *See* DALTON & SCHNEIDER, *supra* note 15, at 444; Ducote, *supra* note 22, at 116; Lidman & Hollingsworth, *supra* note 28, at 256–57. Most lawyers, judges, and GALs would admit that they are not sure how to explain the GAL concept. Lidman & Hollingsworth, *supra* note 28, at 256.

[70] LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 12.05, at 542; Stuckey, *supra* note 28, at 1785.

[71] *See* GOVERNOR'S/MASS. BAR ASS'N'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN, REPORT OF THE GOVERNOR'S/MASSACHUSETTS BAR ASSOCIATION'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN 25 (1988) [hereinafter UNMET LEGAL NEEDS]; Elrod, *supra* note 20, at 57. The variety of legal proceedings that utilize GALs contributes to the lack of a precise definition. *See* UNMET LEGAL NEEDS, *supra*, at 25.

Some types of litigation in which GALs are commonly appointed for children include: civil litigation involving property or other financial interests (such as probate cases where the child is a beneficiary, tort litigation, or contract cases); medical and mental treatment cases (such as commitments); child welfare cases (including child abuse, neglect, and dependency actions, termination of parental rights, and adoption); juvenile delinquency; application of a minor for abortion without parental consent; and domestic relations dis-

often loosely apply the term "guardian ad litem" to various kinds of representatives serving disparate functions.[72]

State statutes generally control who may serve as a GAL in a custody case.[73] Where no statute exists, court rules and case law provide guidance as to who may be appointed and when.[74] For example, many states require GALs to be attorneys, while other states allow discretionary appointments of social workers, mental health experts, and other similarly-licensed professionals.[75] Still other states allow lay volunteers to serve in the role.[76] Expertise in a particular area, such as domestic violence, may be a factor in the judge's decision as to whom

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putes (divorce-related custody and visitation disputes, post-divorce modifications, and paternity actions). HARALAMBIE, *supra* note 35, at 1 nn.1–2; LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 12.04, at 536–45; UNMET LEGAL NEEDS, *supra*, at 25; Stuckey, *supra* note 28, at 1785.

The criminal justice system is a newer context for the use of GALs in which courts appoint GALs for children who are victims or witnesses in criminal proceedings. HARALAMBIE, *supra* note 35, at 3; Muhlhauser, *supra* note 20, at 643–44. *See generally* DEBRA WHITCOMB, GUARDIANS AD LITEM IN CRIMINAL COURTS (1988); Mark Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 J. FAM. L. 687 (1987).

[72] UNMET LEGAL NEEDS, *supra* note 71, at 25; Lidman & Hollingsworth, *supra* note 28, at 256–57. For clarity, this Note differentiates an attorney for the child from the traditional role of GAL. An attorney for the child is expected to be a zealous advocate for the expressed preference of the child. HARALAMBIE, *supra* note 35, at 12. The traditional GAL, however, is not bound by the child's wishes but rather is permitted to recommend the result that the GAL determines is in the child's best interests. *Id.* at 6. This is not to suggest that these roles are always clear in practice, however. Considerable blurring can result when courts appoint a representative to act as both attorney for the child and GAL. *See* 750 ILL. COMP. STAT. 5/506(a) (Supp. 2003) (permitting appointment of an attorney to serve as a child's representative in a role that combines the attorney and GAL roles); HARALAMBIE, *supra* note 35, at 3. In addition, even when representatives purport to have a clear understanding of their role, they may act in ways that are not consistent with their identified role. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1146–53 (1978) (reporting the findings of the author's study in which she interviewed Connecticut lawyers acting as GALs).

[73] *See* LEGAL RIGHTS OF CHILDREN, *supra* note 39, § 2.25, at 106.

[74] *See* CUYAHOGA CO. CT. DOM. REL. R. 35(B) (WESTLAW 2003 legislation) (rule of Cuyahoga County, Ohio, specifying that a GAL must have a law degree or a graduate degree in psychology, psychiatry, or social work); Custody of a Minor, 489 N.E.2d 1266, 1268 (Mass. App. Ct. 1986) (holding that a GAL must be a "disinterested person").

[75] *See, e.g.*, ALA. CODE § 26–14–11 (1992) (specifying that an attorney shall be appointed to serve as GAL); HAW. REV. STAT. ANN. § 571–46(8) (Michie 1999 & Supp. 2003) (allowing the appointment of attorneys, social workers, or psychologists as GALs); WIS. STAT. § 767.045(3) (West 2001 & Supp. 2003) (mandating that GALs be attorneys admitted to practice in Wisconsin).

[76] *See, e.g.*, FLA. STAT. ANN. § 61.402 (1997 & Supp. 2004) (stating that a GAL may be a citizen certified by the Guardian Ad Litem Program); WASH. REV. CODE ANN. § 26.12.175 (West 1997 & Supp. 2004) (allowing GALs to be appointed from a court-appointed special advocate program).

to appoint, but consideration of specialized knowledge is generally not a statutory or regulatory requirement.[77]

The variations in local requirements reflect the states' differing interpretation of the necessary functions of GALs.[78] The particular knowledge, skills, and experience required to perform as a GAL in a certain jurisdiction will largely influence whom the courts may appoint to serve in that capacity.[79] It may also account for some of the differences in states' GAL training requirements.[80] Some jurisdictions require forty hours of pre-appointment training, while others require no training at all.[81] Even those states that do require training for GALs generally do not include specific training on domestic violence issues.[82]

While a few state statutes define the expected duties and role of GALs, most do not.[83] In addition, many states do not have court-enacted guidelines or standards in place detailing the functions of GALs.[84] Thus, GALs may be expected to function in roles as varied as

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[77] *See* Dalton, *supra* note 18, at 287. For example, in cases involving domestic violence, the Massachusetts Family and Probate Court has appointed GALs from the Child Witness to Violence Project at Boston Medical Center in Boston, Massachusetts. *Id.* at 287 n.62. For more information about the Child Witness to Violence Project, see http://www.bmc.org/pediatrics/special/CWTV/overview.html (last visited Jan. 30, 2004).

[78] *See* Charles T. Cromley, Jr., *"[A]s Guardian Ad Litem I'm in a Rather Difficult Position.,"* 24 Ohio N.U. L. Rev. 567, 586 (1998) (stating that the definition of "qualified volunteer" suitable for appointment as GAL depends on which aspect of the GAL's role the court emphasizes).

[79] *See* Dalton & Schneider, *supra* note 15, at 444.

[80] *See id.*

[81] Mass. Senate Comm. on Post Audit and Oversight, Guarding Our Children: A Review of Massachusetts' Guardian Ad Litem Program Within the Probate and Family Court, S. Rep. 1828, 2000 Sess. (Mass. 2001), *at* http://www.state.ma.us/legis/senate/guardchild.htm (last visited Feb. 8, 2004). Minnesota, for example, currently requires forty hours of training prior to the acceptance of an appointment and eight hours of training annually to stay active. *Id.* Maine requires sixteen hours of training for all prospective GALs, and six hours of continuing education each year. Me. R. Guard. Ad Litem R. II (2)(C)(ii), (2)(E) (WESTLAW through 2003 legislation). Massachusetts requires six hours of training per year to remain on the active list, but does not require pre-appointment training. Mass. S. Rep. 1828. Alabama, on the other hand, has no training requirements, either before or after appointment. *See* Ala. Code § 26–14–11 (1992).

[82] *See* Dalton & Schneider, *supra* note 15, at 446.

[83] *See, e.g.*, Ariz. Rev. Stat. Ann. § 25–321 (West 2000 & Supp. 2003) (providing merely that GAL will represent the interests of the minor); Mo. Ann. Stat. § 452.423 (West 2003) (providing that the GAL shall, inter alia, conduct interviews, examine witnesses, and testify); N.H. Rev. Stat. Ann. § 458:17-a (1992 & Supp. 2003) (discussing appointment, standing, and fees, but not duties).

[84] Tara Lea Muhlhauser & Douglas D. Knowlton, *The "Best Interest Team": Exploring the Concept of a Guardian Ad Litem Team*, 71 N.D. L. Rev. 1021, 1024 (1995); *see also* Mass. S. Rep. 1828 (recommending that the Massachusetts Probate and Family Court develop clear guidelines describing the duties of the GAL).

attorney, investigator, evaluator, party, witness, mediator, or in any combination of these roles.[85] Because of the lack of uniformity in these roles, the duties performed by GALs are likely to vary, not only from state to state, but often even from court to court.[86] Due in part to this lack of clarity in the GAL's role, many states have considered reforming the GAL system.[87] The recommendations, however, rarely involve abolishing the GAL system altogether.[88] Instead, the focus is on improvement of the system through the implementation of standards and guidelines that would provide guidance to GALs in fulfilling their role.[89]

To understand why GALs must be familiar with the dynamics of domestic abuse in order to do their work effectively, it is important to understand the prevalence of the problem and, in particular, the ways in which it can impact child custody litigation.[90] The next section will therefore look more closely at the epidemic of battering, incidents of separation assault, the relationship between custody litigation and domestic violence, and how battering affects the children who are exposed to it.[91]

II. Domestic Violence and Children Exposed to Battering

Domestic violence, culture, and the law share an interactive relationship.[92] Domestic violence and the cultural assumptions surrounding it influence the substance of the law and affect the process of litigation, which, in turn, affects cultural perceptions of domestic violence.[93] Law, therefore, has a unique ability to influence both the incidence and understanding of domestic violence.[94]

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[85] Haralambie, *supra* note 35, at 10–11; Cromley, *supra* note 78, at 578–84; Lidman & Hollingsworth, *supra* note 28, at 256–57; Stuckey, *supra* note 28, at 1786.

[86] *See* Cromley, *supra* note 78, at 568 (noting that each of the eighty-eight counties in Ohio are left to determine individually the appropriate role of the GAL); Elrod, *supra* note 20, at 57. Because of the various ways in which courts use GALs, this Note refrains from taking a position on what the appropriate role of a GAL should be. Instead, this Note argues that if the current systems are to remain in place, then regardless of the specific duties, protecting children in child custody disputes requires that standards and guidelines established by each jurisdiction ensure that GALs have adequate knowledge and expertise in issues of domestic violence.

[87] Dalton & Schneider, *supra* note 15, at 446; Ducote, *supra* note 22, at 111–16.

[88] Ducote, *supra* note 22, at 111–16.

[89] Dalton & Schneider, *supra* note 15, at 446; Ducote, *supra* note 22, at 111–16.

[90] *See* Am. Psychological Ass'n, *supra* note 18, at 9, 100.

[91] *See* discussion *infra* Part II.

[92] *See* Mahoney, *supra* note 17, at 2.

[93] *See id.*

[94] *See id.*

This relationship between domestic violence, culture, and the law is particularly evident in custody litigation, where domestic violence both influences the law and is affected by the outcome of litigation.[95] In this context, the cultural assumptions of actors in the legal system, including GALs, can have a strong positive or negative effect on the messages communicated to parents and children about the acceptability of violence in the home.[96] Thus, a GAL's misunderstanding or denial of the extent, nature, and impact of domestic violence in and on families has the potential to result in serious harm.[97]

A. *The Epidemic Proportions of Domestic Violence*

Domestic violence[98] is a widespread problem, one that many have described as an epidemic.[99] Nationally, it has garnered the attention of

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[95] *See id.*

[96] *See id.*; Weithorn, *supra* note 7, at 40.

[97] *See* DALTON & SCHNEIDER, *supra* note 15, at 450.

[98] The term "domestic violence," as used in this Note, refers to a batterer's use of a pattern of coercive control, including physical violence, emotional abuse, threats, sexual assault, financial control, or psychological terrorism against an intimate partner. BANCROFT & SILVERMAN, *supra* note 18, at 3; Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 719 n.1 (1999). This Note also uses "battering," and, to a lesser extent, "partner abuse," interchangeably with "domestic violence."

The naming of a problem carries significant implications. *See* Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 405 (2002). It can convey a particular perspective, emphasize certain aspects of a problem, and can be either a barrier or a bridge to communication with a listener or a reader. *See id.* As Elizabeth Schneider describes:

> Ever since the women's movement first articulated the concept of battering, feminists have grappled with the issue of what the "problem" should be called. Each of the possible terms—wife abuse, spouse abuse, domestic violence, intimate violence, wife battering, or women abuse—reflects a different perception of battering. Is the critical determinant marriage, gender, familial relationship, intimacy, or physical violence?

SCHNEIDER, *supra* note 17, at 60.

While the term "domestic violence" has been criticized for being euphemistic and obscuring the true nature of battering, *see* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 81 (1994), as well as for its communicative emphasis on physical violence over other forms of abuse, the author has chosen to use this term because it is inclusive, widely accepted, and readily familiar to most readers. Similarly, the term "batterer" is used because it also is inclusive and easily understood. While there is a risk that this term can imply that battering behavior is somehow a permanent or inherent trait, that is not the intention here. *See* BANCROFT & SILVERMAN, *supra* note 18, at xiv.

[99] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 9 ("family violence and abuse are at epidemic proportions"); Goodmark, *supra* note 7, at 239–40 ("it has almost become trite to declare that violence against women is an epidemic"); Jill Smolowe, *What the Doctor Should*

the President, Congress, the U.S. Supreme Court, various governmental bodies, and numerous professional associations.[100] Each has recognized that domestic violence is a pervasive problem with a devastating impact on individuals, families, and society.[101] While precise statistics on the incidence of domestic violence are difficult to gather, available numbers suggest alarming levels of abuse.[102] Some reports estimate that 960,000 episodes of violence are perpetrated each year by current or former intimate partners, while others suggest that as many as four million women are physically abused each year by a husband or boyfriend.[103] Nearly one-third of American women report having experienced domestic violence by a male partner at some point in their lives.[104] In many cases, the violence is fatal: in the past twenty-five years,

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Do, TIME, June 29, 1992, at 57, 57 (stating that the American Medical Association has characterized domestic violence as an "epidemic").

[100] *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (providing renewed and additional funding for law enforcement and domestic violence services); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 888–94 (1992) (discussing the prevalence of domestic violence to support striking down a spousal notification requirement for abortions); Proclamation No. 7717, 68 Fed. Reg. 59,079 (Oct. 8, 2003) (statement by President George W. Bush declaring October to be National Domestic Violence Awareness Month); AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 9 (stating that the U.S. Surgeon General declared domestic violence a national epidemic in 1985, as did the U.S. Centers for Disease Control and Prevention). The American Psychological Association and the American Bar Association have both released reports on domestic violence. *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18; HOWARD DAVIDSON, AM. BAR ASS'N, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION XX (1994) [hereinafter AM. BAR ASS'N]. In addition, the Amercian Medical Association issued guidelines recognizing the role of physicians in identifying victims of domestic violence. Smolowe, *supra* note 99, at 57.

[101] *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); *Casey*, 505 U.S. at 888–94; Proclamation No. 7717, 68 Fed. Reg. at 59,079; AM. BAR ASS'N, *supra* note 100, at 1; AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 9; Smolowe, *supra* note 99, at 57.

[102] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 9; *see also* Fineman, *supra* note 21, at 217 (stating that statistics do not reflect the true extent of the problem because a substantial amount of violence is hidden and goes unreported).

[103] AM. BAR ASS'N, *supra* note 100, at 1 (stating that between 1.8 and 4 million women are victimized each year); AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 10 (stating that an estimated 4 million women experience serious assault by an intimate partner annually); LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 1 (1998) (reporting that more than 960,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend occur each year), *available at* http://www.ojp.usdoj.gov/bjs/abstract/vi.htm (last visited Feb. 8, 2004).

[104] KAREN SCOTT COLLINS ET AL., HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN'S HEALTH 8 (1999), *available at* http://www.cmwf.org/programs/women/ksc_whsurvey99_332.asp (last visited Feb. 8, 2004). This figure is based on telephone interviews with 2,850 women, including samples

there were 57,000 murders committed against current or former intimate partners.[105]

Furthermore, domestic violence creates a tremendous strain on the provision of services in this country.[106] Hospitals,[107] police officers,[108] and welfare and homeless service providers all require significant resources to counteract the fallout.[109] Even the courts struggle with the impact of domestic violence on their caseloads.[110] Yet despite the pervasive nature of the problem, court actors, includ-

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of African American, Hispanic, and Asian American women. *Id.* at ix. For the purposes of the survey, domestic violence was defined as having responded "yes" to any of the following items: has spouse or boyfriend ever thrown something at you; pushed, grabbed, shoved, or slapped you; kicked, bit, or hit you with a fist or some other object; beaten you up; choked you; or forced you to have sex against your will. *Id.* at 8 n.4. Similar findings have been reported previously. *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 10 (stating, in 1996, that nearly one in three adult women experience physical assault by a partner).

[105] Proclamation No. 7601, 67 Fed. Reg. 62,169 (Oct. 1, 2002).

[106] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 24.

[107] *See id.* at 24–25 (stating that domestic violence increases U.S. health care costs); COLLINS ET AL., *supra* note 104, at 8–9 (finding that abused women are at a high risk for psychological problems, have more health problems, and are also twice as likely to smoke); MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, VIOLENCE RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 5 (1997) (reporting that 17% of all patients—about 37% of female patients—seeking medical treatment in emergency rooms for violence-related injuries were injured by a current or former intimate partner), *available at* http://www.ojp.usdoj.gov/bjs/abstract/vrithed.htm (last visited Feb. 8, 2004).

[108] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 24 (noting that domestic violence increases costs for police and criminal justice systems).

[109] *See id.*; BANCROFT & SILVERMAN, *supra* note 18, at 117 (stating that domestic violence is an important cause of homelessness for women and children); Buel, *supra* note 98, at 731 (discussing violence as a leading cause of homelessness and poverty for women and children); Graciela Sevilla, *Violence Helps Fill Shelters: Survey Finds That Abuse Leads to Homelessness*, WASH. POST, Jan. 6, 1994, at M01 (citing a county report in Maryland that found that 42% of homeless shelter residents were there due to domestic violence, duplicating findings of the National Coalition Against Domestic Violence that up to 50% of homeless women and children in the United States are homeless due to domestic violence). Nearly all studies have found that over half of the women receiving welfare report having been physically abused by an intimate partner during their adult lives; between 9% and 23% were abused in the last year. Eleanor Lyon, *Welfare and Domestic Violence Against Women: Lessons from Research*, Violence Against Women Online Resources, *at* http://www.vaw.umn.edu/documents/vawnet/welfareanddv/welfareanddv.html (Aug. 2002).

[110] Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329, 333 (1994); *see* Buel, *supra* note 98, at 732 (discussing frequency of arrests and applications for restraining orders due to domestic violence). More than two hundred specialized domestic violence courts have appeared throughout the United States to deal with the caseload. Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAMILIES, CHILD. & CTS. 23, 23 (2000).

ing GALs, often have difficulty believing that domestic violence could be a factor in more than just a few extreme cases.[111]

B. *Separation Assault*

Despite the prevalence of domestic violence in this country, GALs often minimize or ignore evidence of abuse in their assigned cases.[112] This is true despite the fact that the caseload of an average GAL will contain a disproportional number of cases involving domestic violence.[113] Even when they do recognize and acknowledge the batterer's behavior, however, GALs may not recognize the continuing danger that the batterer may pose once the parties are separated.[114] Thus, they may conclude that the history of domestic violence has no connection to the custody litigation before them.[115]

It is not uncommon for actors in the legal system to believe that domestic violence will cease once the parties are apart.[116] Rather than decreasing the abuse, however, it is well documented that separation can serve as a catalyst for increased violence.[117] Studies find that divorced women report being battered fourteen times as often as those still with their partners.[118] Married women no longer living with their husbands suffer four times as many physical and sexual assaults as

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[111] *See* Mahoney, *supra* note 17, at 3 (discussing court actors' perception that domestic violence is rare or exceptional).

[112] DALTON & SCHNEIDER, *supra* note 15, at 451; The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 220 (1995) [hereinafter Family Violence Project].

[113] *See* BANCROFT & SILVERMAN, *supra* note 18, at 113; CUTHBERT ET AL., *supra* note 1, at 20. The fact that domestic violence is likely to be over-represented in the cases of GALs may, to some extent, be the cause of their inadequate response. BANCROFT & SILVERMAN, *supra* note 18, at 120. Lacking awareness of the statistical probability that domestic violence will be present in a large number of their cases, GALs may react with suspicion to the unexpected frequency of abuse allegations. *Id.*

[114] CUTHBERT ET AL., *supra* note 1, at 17.

[115] *See* BANCROFT & SILVERMAN, *supra* note 18, at 119; CUTHBERT ET AL., *supra* note 1, at 21. "Many GALs who are instructed to investigate and make recommendations regarding custody and visitation say that the 'past abuse' of one parent by another is irrelevant and that the parents need parenting education to learn how to move on in a way that spares the children." CUTHBERT ET AL., *supra* note 1, at 21 (quoting a battered women's advocate).

[116] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 39; Dalton, *supra* note 18, at 288; Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996).

[117] *E.g.*, BANCROFT & SILVERMAN, *supra* note 18, at 99; Buel, *supra* note 98, at 727; Fineman, *supra* note 21, at 213.

[118] Goodmark, *supra* note 7, at 240; Zorza, *supra* note 116, at 1115.

those still living with the batterer.[119] More victims are killed in the process of leaving than at any other time.[120] In fact, escalated abuse by the batterer as a response to actual or perceived separation is so common that experts have coined the phrase "separation assault" to describe it.[121] Separation assault is the manifestation of the batterer's attempts to retain or regain power in a relationship, or to punish the victim for leaving the relationship.[122]

Ignoring separation assault can lead to potentially lethal consequences for abused parents and their children, especially during custody and visitation litigation.[123] Batterers whose abuse escalates in response to the end of the relationship have proved particularly dangerous following separation, placing their children at high risk for exposure to additional abuse.[124] For example, one newspaper reports that a six-year-old watched his father fatally stab his mother during a court-ordered custody transfer in front of Santa Monica City Hall.[125] In another case, a woman was shot five times by her estranged husband.[126] She had just dropped off their infant son at her sister-in-law's house for the husband's court-ordered visitation when he confronted and

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[119] BANCROFT & SILVERMAN, *supra* note 18, at 99.

[120] *E.g.*, David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON B.J., July/Aug. 1989, at 23, 23; Buel, *supra* note 98, at 727; Mahoney, *supra* note 17, at 65.

[121] Mahoney, *supra* note 17, at 65. This behavior has also been referred to as "separation violence," Buel, *supra* note 98, at 727, and "post-separation abuse," Mahoney, *supra* note 17, at 64. The use of "separation assault," as opposed to "post-separation abuse," has the advantage of including abuse that may occur before the actual separation, resulting from the abuser's perception of impending separation or the victim's decision to leave. *See* Mahoney, *supra* note 17, at 64–65.

[122] Mahoney, *supra* note 17, at 65–66. Professor Mahoney, who introduced the legal concept of separation assault, defines it as "the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return." *Id.* at 65.

[123] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 67 (stating that professionals must not minimize the danger at and after separation, especially if visitation is involved). Safety can be an issue even at the courthouse itself. *See* Alexa Capeloto, *Justice After Shooting: Man Gets Prison Term for Wounding His Wife*, DETROIT FREE PRESS, Jan. 29, 2003, 2003 WL 2541671. Laura Smart was shot by her ex-husband outside of the courthouse after a visitation hearing regarding their three-year-old daughter. *Id.* Laura survived and her ex-husband was sentenced to twelve years in prison. *Id.* His attorney unsuccessfully argued that Calvin Smart was driven to violence by a court system that does not care about fathers' rights. *Id.*

[124] BANCROFT & SILVERMAN, *supra* note 18, at 145; *see* AM. BAR ASS'N, *supra* note 100, at 15.

[125] Jean Guccione, *Officials Seek Safe Sites to Swap Custody*, L.A. TIMES, Jan. 13, 2003, at B3.

[126] Commonwealth v. Bianchi, 757 N.E.2d 1087, 1089 (Mass. 2001).

killed her.[127] In yet another case, not only was the mother shot and killed by her ex-husband during a visitation exchange, but he also shot and killed their two-year-old daughter.[128] Even once the parties separate, therefore, the safety of the children and abused parent must remain a priority when the GAL offers custody or visitation recommendations. Otherwise, the batterer may find additional opportunities to perpetrate abuse.[129]

Separation assault does not only refer to increased acts of violence.[130] It can also take the form of less violent coercion intended to reassert the batterer's power in the relationship or to punish the victim for leaving.[131] Stalking, verbal abuse, threats, and harassment are all frequently reported by abused partners after separation.[132] Batterers also attempt to intimidate their partners by threatening to take the children away, either by making false reports to state child protective services, by kidnapping, or by winning custody through the courts.[133] Thus, separation assault provides an additional context within which to understand the potential motivations for custody litigation.[134]

C. *Connections Between Domestic Violence and Custody Disputes*

The batterer's desire to regain power and control in the relationship provides a subtext to child custody litigation involving a history of domestic violence.[135] Awareness of that subtext is critical if GALs

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[127] *Id.*

[128] Dalton, *supra* note 18, at 288 (citing George Tibbets, *Washington Woman Couldn't Escape Husband*, ASSOCIATED PRESS, Dec. 21, 1998).

[129] *See* Michelli v. Michelli, 655 So. 2d 1342, 1347–49 (La. Ct. App. 1995) (finding it reasonable to assume that child visitation would be a new forum for abuse of the child or the abused parent, especially as the violence had escalated over time and some of the abuse took place in front of the children); AM. BAR ASS'N, *supra* note 100, at 14.

[130] *See* Mahoney, *supra* note 17, at 67–68.

[131] *See id.* at 65.

[132] *See* Adams, *supra* note 120, at 24; Mahoney, *supra* note 17, at 64.

[133] BANCROFT & SILVERMAN, *supra* note 18, at 74–75; Adams, *supra* note 120, at 23. Batterers make these threats primarily because they are effective: according to one study, 20% of battered women return to their batterers at least once because of threats to take the children. *See* BANCROFT & SILVERMAN, *supra* note 18, at 129; Zorza, *supra* note 116, at 1117. The fear of losing custody is also one of the primary reasons victims delay leaving their abusive partners. BANCROFT & SILVERMAN, *supra* note 18, at 129. Many also cite it as the reason they returned to an abusive relationship. Zorza, *supra* note 116, at 1117.

[134] *See* Mahoney, *supra* note 17, at 75.

[135] *See id.* at 43–44. One woman describes the subtext this way:

> A custody battle is *the* quintessential power struggle between men and women. It's about who controls a woman's mind and body. It's also about who gets to control the future. Children are the future. Men think of children as the nec-

are to assume the task of determining whether custody and visitation arrangements will contribute to the children's safety and healing, or will instead create an opportunity for batterers to continue to control and victimize their former partners and children.[136] Nevertheless, actors in the legal system, including GALs, continue to overlook the connections between domestic violence and custody disputes.[137]

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essary chains to keep wives from flying away. If we fly away anyway, they transfer their needs to the children.

Id. at 43 (quoting an anonymous mother speaking about custody disputes). Custody litigation has the potential to give batterers, and the courts, power over the victim's life. BANCROFT & SILVERMAN, *supra* note 18, at 129.

[136] *See* BANCROFT & SILVERMAN, *supra* note 18, at 129.

[137] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100; CUTHBERT ET AL., *supra* note 1, at 2; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1042 (1991). According to one GAL, "the presence of abuse in and of itself is not enough to rule out joint custody." CUTHBERT ET AL., *supra* note 1, at 42.

In recent years, however, legislatures and the courts have begun to recognize and codify the relationship between domestic violence and custody disputes. Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 613 (2001). This recent movement was initiated by a number of national policy statements supporting the inclusion of domestic violence as a factor in custody decisions. *See* H.R. Con. Res. 172, 101st Cong. (1990); MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994); AM. BAR ASS'N, *supra* note 100, at 15. In 1990, Congress passed a resolution to encourage the states to pass their own statutes establishing a presumption that custody should not be given to batterers. *See* H.R. Con. Res. 172. In 1994, the American Bar Association also recommended that states create custodial protections for abused parents and children, and stated that it is always appropriate to consider evidence of domestic violence when making custody determinations. AM. BAR ASS'N, *supra* note 100, at 13, 15. The 1994 *Model Code on Domestic and Family Violence* also contained a provision for a rebuttable presumption against the granting of custody to an abuser. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401; *see also* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 99 (recommending that in custody disputes preference be given to the nonviolent parent).

By 2001, forty-seven states and the District of Columbia had enacted legislation that either allowed or mandated the courts to take evidence of domestic violence into account when making custody and visitation determinations. Lemon, *supra*, at 613.

For further discussion about the history of this legislation and analysis of its effectiveness, see Family Violence Project, *supra* note 112; Lemon, *supra*; Pauline Quiron, *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501 (1997); Lynne R. Kurtz, Comment, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345 (1997). *But see* Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737 (2000) (arguing that use of custodial presumption statutes serves to stigmatize the parent for acts more appropriately dealt with in criminal contexts, and does not successfully protect children from harm).

Batterers are more likely than nonviolent parents to seek custody of their children.[138] Custody litigation often serves as an opportunity to reassert the control batterers feel themselves losing as the relationship ends.[139] Custody litigation is itself an effective way to maintain control: it intimidates the abused spouse through the threat of losing custody and can be financially devastating.[140] Furthermore, batterers in one treatment program for abusers revealed that their primary motive for seeking custody was not concern for the children's well-being, but to hurt and frighten their former partners.[141] Some of the program participants indicated that they saw custody litigation as a "bargaining chip" that could be used to trade off against alimony, child support, or division of property.[142] Batterers also use custody litigation to coerce former partners to drop criminal charges against them.[143]

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[138] *E.g.*, AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 40; BANCROFT & SILVERMAN, *supra* note 18, at 98; CUTHBERT ET AL., *supra* note 1, at 64; Zorza, *supra* note 116, at 1117. Studies of custody disputes show that batterers are twice as likely as nonbatterers to seek sole physical custody of their children. AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 40. Batterers are especially likely to fight for custody when they have male children. BANCROFT & SILVERMAN, *supra* note 18, at 113.

[139] *See* BANCROFT & SILVERMAN, *supra* note 18, at 114; Mahoney, *supra* note 17, at 44.

[140] BANCROFT & SILVERMAN, *supra* note 18, at 74–75, 114 (noting that costs can be devastating to abused parent's financial position); CUTHBERT ET AL., *supra* note 1, at 66 (reporting that some of the women interviewed stated they were "financially devastated" by custody litigation).

[141] BANCROFT & SILVERMAN, *supra* note 18, at 114; *see also* Zorza, *supra* note 116, at 1117 (noting that abusers often discover that after separation using the children is the best way to hurt their former partners). Frequently used tactics include filing repeated motions to cause emotional stress and missed work, filing affidavits that include upsetting statements and accusations, and requesting visitation on days that are important to the abused parent. BANCROFT & SILVERMAN, *supra* note 18, at 125.

[142] BANCROFT & SILVERMAN, *supra* note 18, at 115; *see also* Mahoney, *supra* note 17, at 44. While only a few batterers seek custody primarily to avoid having to pay child support, batterers as a group have been found to be far less likely to pay child support when it is ordered. BANCROFT & SILVERMAN, *supra* note 18, at 113, 115; Buel, *supra* note 98, at 742; Zorza, *supra* note 116, at 1117. In fact, they are three times as likely to be in arrears. AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 40. Because the non-payment of support is generally considered to be unrelated to orders pertaining to custody and visitation, batterers suffer few consequences for not meeting their financial obligations. *See* BANCROFT & SILVERMAN, *supra* note 18, at 113. In addition, victims may not enforce child support orders if they fear retaliation in the form of physical assault or the initiation of custody actions. *Id.*; *see* CUTHBERT ET AL., *supra* note 1, at 61. Refusing to pay child support can be understood within the context of other abusive behaviors as yet another way for batterers to exert control over the victim or to force the victim to return to the relationship due to a lack of financial resources. *See* BANCROFT & SILVERMAN, *supra* note 18, at 113; Buel, *supra* note 98, at 743.

[143] BANCROFT & SILVERMAN, *supra* note 18, at 115. The victim's attorney can also play a role in this pervasive problem. *See* Buel, *supra* note 98, at 742 (discussing client who was

Male batterers are also likely to win custody of their children.[144] Although family courts are widely perceived as biased in favor of mothers in custody disputes, studies demonstrate that fathers succeed in their attempts to gain custody as often as 70% of the time.[145] Batterers frequently have several advantages over their partners in custody litigation.[146] They often have greater financial resources.[147] They may outperform their partners in psychological testing, particularly if the evaluator is unfamiliar with the impact of domestic violence trauma on test results.[148] Furthermore, batterers may directly coach or indirectly influence the statements and behavior of children to GALs.[149]

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advised by her attorney to refuse to testify in the criminal case in order to get a better financial settlement from the divorce).

[144] BANCROFT & SILVERMAN, *supra* note 18, at 115; Mahoney, *supra* note 17, at 45. According to one study, 59% of fathers who successfully won custody had physically abused their wives and 36% had kidnapped their children. Mahoney, *supra* note 17, at 45.

[145] *E.g.*, CUTHBERT ET AL., *supra* note 1, at 3; MASS. GENDER BIAS STUDY COMM., MASS. SUPREME JUDICIAL COURT, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 59 (1989); Buel, *supra* note 98, at 735. Other findings have ranged between 9.6% and 63%. DALTON & SCHNEIDER, *supra* note 15, at 350. Since the majority of batterers are men, they may benefit from the favor toward fathers in custody cases. CUTHBERT ET AL., *supra* note 1, at 3.

[146] *See* BANCROFT & SILVERMAN, *supra* note 18, at 98, 115–22.

[147] *Id.* at 117; CUTHBERT ET AL., *supra* note 1, at 66. Greater financial resources permit the batterer to retain better legal counsel or withstand a protracted custody battle. BANCROFT & SILVERMAN, *supra* note 18, at 117. Court actors may also be less likely to believe an allegation of abuse when the batterer is a professional or is well-educated, despite the cross-class nature of domestic violence. CUTHBERT ET AL., *supra* note 1, at 39. Furthermore, a GAL may be more likely to recommend custody to the parent with financial means. BANCROFT & SILVERMAN, *supra* note 18, at 117; CUTHBERT ET AL., *supra* note 1, at 39. One woman reported that the GAL assigned to her case "said something to the effect of . . . I can't be that good of a parent, and dad's a better parent because he works, he has a job, [while] I get [social security income] and [he] just bought a house" CUTHBERT ET AL., *supra* note 1, at 39.

[148] BANCROFT & SILVERMAN, *supra* note 18, at 117–19; *see also* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 67 (discussing diagnostic errors by mental health professionals who do not understand domestic violence). Some GALs and custody evaluators believe that psychological testing should be used whenever abuse is alleged. BANCROFT & SILVERMAN, *supra* note 18, at 118. Yet these tests are actually poor predictors of parenting ability: a parent without psychological problems is not necessarily a parent with good parenting skills. *See id.* In addition, an evaluator unfamiliar with domestic violence issues may misdiagnose abused parents who answer honestly questions such as whether they believe someone may be following them, whether they worry frequently, and whether they believe another individual is responsible for their problems. *Id.*

[149] BANCROFT & SILVERMAN, *supra* note 18, at 116–17; *see* Adams, *supra* note 120, at 24–25; Buel, *supra* note 98, at 741. Children may feel free to act out their anger when the abuser has left the home, but GALs may mistake such behavior as evidence that the abused parent lacks parenting skills. BANCROFT & SILVERMAN, *supra* note 18, at 116. Similarly, the GAL may observe the children behaving better in the batterer's care, and assume that it is

Counterintuitively, allegations of domestic violence can often work against an abused parent in custody litigation.[150] Court actors frequently display skepticism toward allegations of abuse brought during custody proceedings, assuming that they are false or exaggerated for tactical purposes.[151] Since batterers often exhibit a much different persona in public than they do at home, they may appear more credible or rational in legal proceedings than their partners do, giving the court further reason to question the alleged abuse.[152] Furthermore, family courts tend to favor a shared parenting model.[153] Under this framework, an abused parent's reluctance to allow the batterer unrestricted access to the children may appear vindictive and uncooperative, rather than a rational expression of legitimate safety concerns.[154] In contrast, the batterer's willingness to share access to the children, which also assures continued access to the abused parent, often makes the batterer the more attractive candidate for custody.[155]

In addition, courts often consider the one factor that should be the abuser's biggest liability in custody proceedings—battering—to be unrelated to the ability to parent.[156] An increasing body of research,

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a result of effective parenting, rather than fear. *See id.* In addition, children may appear to be supportive of the batterer in conversations with the GAL. *Id.*

[150] *See* Fineman, *supra* note 21, at 217–18; Mahoney, *supra* note 17, at 45.

[151] BANCROFT & SILVERMAN, *supra* note 18, at 122; Cahn, *supra* note 137, at 1085; Dalton, *supra* note 18, at 282. At least one judicial manual encourages judges to be suspicious of allegations of abuse during domestic relations cases. Fineman, *supra* note 21, at 217. Court personnel, especially judges and GALs, are particularly suspicious if reports of domestic violence are asserted by a woman. *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 12 ("many people believe that *women* especially will lodge false charges") (emphasis added); CUTHBERT ET AL., *supra* note 1, at 41 (quoting a GAL who states that "[m]any *women* use allegations of abuse as a tool [in divorce proceedings] when indeed there is no abuse") (emphasis added) (alteration in original). Yet false reporting of domestic violence occurs infrequently; in fact, the rate of false reports in custody disputes is no greater than for any other crimes. AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 12. Batterers, however, find they can use this suspicion to their advantage by suggesting to the GAL that the allegations never arose until custody was contested. *See* BANCROFT & SILVERMAN, *supra* note 18, at 127.

[152] Adams, *supra* note 120, at 23; *see* CUTHBERT ET AL., *supra* note 1, at 36, 40; Buel, *supra* note 98, at 740.

[153] Dalton, *supra* note 18, at 276, 277; *see* Zorza, *supra* note 116, at 1122.

[154] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 40; Dalton, *supra* note 18, at 277.

[155] Dalton, *supra* note 18, at 277.

[156] BANCROFT & SILVERMAN, *supra* note 18, at 115; Buel, *supra* note 98, at 735; *see also* Buel, *supra* note 98, at 736 n.61 (discussing a case where a man was granted custody of his four children despite his threats to kill his wife if she persisted in trying to obtain custody). According to one judge, "a person may be violent and vindictive towards a spouse and yet be the best, most loving, caring parent in the world." Cahn, *supra* note 137, at 1073. One woman described her experience in family court this way: "The judge gave my husband custody of the kids, declaring that his violence towards me had nothing to do with his abil-

however, contradicts this view.[157] Exposing a child to domestic violence can have lasting and harmful repercussions for the child.[158] Some commentators believe that the exposure of a child to battering is itself a form of child abuse that should be criminalized.[159] GALs, therefore, must consider the harm to children from past exposure to domestic violence, as well as the risks of continued post-separation exposure, when recommending custody and visitation arrangements to courts.[160]

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ity to be a good father. 'It's between the adults involved.'" AM. BAR ASS'N, *supra* note 100, at 13 (quoting anonymous woman).

As a more extreme example, courts on several occasions have awarded custody to batterers even after they were convicted for murdering the child's other parent. *See, e.g., In re* James M., 135 Cal. Rptr. 222, 229 (1976) (finding that although the father was convicted of murdering the mother by stabbing her twenty-two times, that did not necessarily prove the father unfit to have custody of children); *In re* Lutgen, 532 N.E.2d 976, 987 (Ill. App. Ct. 1988) (finding that it was in the best interests of the children for the father to have custody, notwithstanding the fact that he had been convicted for choking their mother to death); Cahn, *supra* note 137, at 1077–81 (discussing additional cases). *But cf.* AM. BAR ASS'N, *supra* note 100, at 15 (recommending a rebuttable presumption against custody or visitation to a parent who has killed the other parent).

As one commentator aptly states, "the idea that battering is unrelated to parenting is almost beyond belief." Cahn, *supra* note 137, at 1073.

[157] *See generally* BANCROFT & SILVERMAN, *supra* note 18; Jeffrey L. Edleson, *Problems Associated with Children Witnessing Domestic Violence, in* MANAGING YOUR DIVORCE: A GUIDE FOR BATTERED WOMEN 41 (Nat'l Council of Juvenile & Family Court Judges ed., 1998), *available at* http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=SFVIP (last visited Feb. 8, 2004).

[158] *E.g.*, CUTHBERT ET AL., *supra* note 1, at 2; Cahn, *supra* note 137, at 1055–58; Zorza, *supra* note 116, at 1115. For a powerful expression of the pain of witnessing domestic violence from a child's perspective, visit the Gallery of Children's Art, collected at the Minnesota Center Against Violence and Abuse, *at* http://www.mincava.umn.edu/documents/drawings/ (last modified Apr. 22, 2003).

[159] *See* Goodmark, *supra* note 7, at 245; Murphy, *supra* note 22, at 296; Weithorn, *supra* note 7, at 26–41. A few states have passed legislation that incorporates child exposure to domestic violence as a type of criminal child abuse. *See, e.g.*, GA. CODE ANN. § 16–5–70(c) (2003); Weithorn, *supra* note 7, at 12. Some commentators argue that criminal penalties for exposing children to domestic violence send a clear message about the damage that it does to children. *See* Murphy, *supra* note 22, at 296; Weithorn, *supra* note 7, at 26. A few states have already implemented statutory reforms that increase the penalty for an existing crime, such as assault and battery, if the crime is committed in front of a child. Murphy, *supra* note 22, at 297; Weithorn, *supra* note 7, at 16; *see also* Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205 (1997).

[160] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 101; BANCROFT & SILVERMAN, *supra* note 18, at 156.

D. *Exposing Children to Battering*[161]

Too many children are exposed to domestic violence.[162] Although it is unclear exactly how many are affected, estimates suggest that literally millions of children witness abuse between their parents each year in the United States.[163] In homes with children where battering is present, as many as 87% of the children witness the abuse.[164] Furthermore, children witness about half of all battering incidents.[165] Since most contested custody cases involve domestic violence,[166] a majority of the children involved in those cases have likely been repeatedly exposed to that violence.[167] Therefore, in order to assess and recommend custody and visitation arrangements that are safe and in the best interests of children, GALs must consider the harmful effects that exposure to battering can have on children.[168]

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[161] The phrase "children exposed to batterers" might be more accurate. BANCROFT & SILVERMAN, *supra* note 18, at 2. While children are harmed by their awareness of battering incidents in the home, they also are at risk from simply being exposed to batterers: the typical parenting style of batterers, the way they affect the family dynamics, and their beliefs and attitudes. *Id.*

[162] *See* AM. BAR ASS'N, *supra* note 100, at 1; AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 11; Goodmark, *supra* note 7, at 242–43.

[163] *See* AM. BAR ASS'N, *supra* note 100, at 1; AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 11; Goodmark, *supra* note 7, at 242–43. Estimates range between 3.3 and 10 million witnesses in the United States annually. AM. BAR ASS'N, *supra* note 100, at 1. The estimate of 3.3 million is probably too low, as it is based on twenty-year-old data, and the research did not include families in which the parents were divorced or had children under age three. *See* John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 21, 24 (Winter 1999), *available at* http://www.futureofchildren.org (last visited Feb. 8, 2004). A Massachusetts report concludes that 40,000 children in that state alone are exposed to battering in their homes each year. CUTHBERT ET AL., *supra* note 1, at 2.

[164] AM. BAR ASS'N, *supra* note 100, at 1; Goodmark, *supra* note 7, at 243.

[165] Goodmark, *supra* note 7, at 243. Parents, however, often minimize what their children have seen or deny its impact. *Id.* In part, this is a coping strategy to allow the abused parent to survive the stress of abuse. *Id.* One study reports that 36% of children could describe the violence that had occurred when at least one parent reported the child had not witnessed the incident. *Id.* at 243–44 (citing Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 843–44 (1999)); *see also* Dalton, *supra* note 18, at 286 (stating that children witness much more violence than their parents report).

[166] CUTHBERT ET AL., *supra* note 1, at 2; *see also* sources cited *supra* note 21.

[167] *See* AM. BAR ASS'N, *supra* note 100, at 1 (reporting that an estimated 87% of children in homes with domestic violence witness the abuse); Goodmark, *supra* note 7, at 243 (stating that children witness about half of all battering incidents).

[168] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 101; BANCROFT & SILVERMAN, *supra* note 18, at 201.

Exposure to battering is not limited to what children witness visually when they observe a violent incident.[169] Rather, "exposure" is an intentionally broad descriptor that not only includes what children may observe contemporaneously with a battering incident, but also attempts to capture the experience of living with ongoing abuse.[170] Children may hear yelling, objects breaking, and crying.[171] They may observe violence from a short distance, or they may be even closer than the term "witness" would suggest.[172] Children also experience the aftermath of violence.[173] They may see damaged property, blood from injuries, the abuser's arrest, or even be forced by the abuser to participate in the cleanup.[174] Events apart from the actual battering incident also affect children, such as hearing the event recounted to the court or having to relocate to a domestic violence shelter.[175]

Experts broadly agree that exposure to battering harms children.[176] Children exposed to battering are at risk of developing a range of physical, behavioral, emotional, and cognitive problems.[177] Each child's reaction to exposure is unique, however, and may de-

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[169] AM. BAR ASS'N, *supra* note 100, at 1 n.13; Fantuzzo & Mohr, *supra* note 163, at 22; Weithorn, *supra* note 7, at 81–82. Early researchers referred to children as "witnesses" to violence. Fantuzzo & Mohr, *supra* note 163, at 22; Weithorn, *supra* note 7, at 81. Children are aware of violence in the home, even if they do not observe it first-hand. AM. BAR ASS'N, *supra* note 100, at 1 n.13.

[170] *See* BANCROFT & SILVERMAN, *supra* note 18, at 2; Fantuzzo & Mohr, *supra* note 163, at 22; Weithorn, *supra* note 7, at 82.

[171] Goodmark, *supra* note 7, at 244; *see* Weithorn, *supra* note 7, at 81.

[172] Goodmark, *supra* note 7, at 244; Weithorn, *supra* note 7, at 82. For example, young children are often in their parent's arms or in a crib nearby at the time of a battering incident. Goodmark, *supra* note 7, at 244; Weithorn, *supra* note 7, at 82. One study found that some batterers deliberately arrange to have their children watch the abuse. AM. BAR ASS'N, *supra* note 100, at 1 n.13; *see also* People v. Liberta, 474 N.E.2d 567, 569 (N.Y. 1984) (stating that defendant violently raped his wife during a visitation with his two-and-a-half year old son; he forced his wife "to tell their son to watch what the defendant was doing to her").

[173] Fantuzzo & Mohr, *supra* note 163, at 22; Goodmark, *supra* note 7, at 244; Weithorn, *supra* note 7, at 84.

[174] Goodmark, *supra* note 7, at 244; Weithorn, *supra* note 7, at 82, 84. In one incident, the batterer pulled his son out of bed to clean up his battered and bleeding mother. Weithorn, *supra* note 7, at 82 n.357.

[175] Goodmark, *supra* note 7, at 244; Weithorn, *supra* note 7, at 85.

[176] Custody of Vaughn, 664 N.E.2d 434, 439 (Mass. 1996) (stating that it is well-documented that exposure to domestic violence profoundly affects children); CUTHBERT ET AL., *supra* note 1, at 4; *see* Adams, *supra* note 120, at 24; Cahn, *supra* note 137, at 1055; Dalton, *supra* note 18, at 286; Zorza, *supra* note 116, at 1115. The court in *Vaughn* states that "a child who has been either the victim or spectator of such abuse suffers a distinctively grievous kind of harm." *Vaughn*, 664 N.E.2d at 437.

[177] Cahn, *supra* note 137, at 1055; Dalton, *supra* note 18, at 286; Goodmark, *supra* note 7, at 245.

pend on a number of factors including gender, age, length of exposure, and relationship with the adults in the home.[178]

Children experience more physical problems when they grow up in a household with domestic violence.[179] For example, they report more health problems, including headaches, failure to thrive, stomachaches, diarrhea, and peptic ulcers.[180] Studies demonstrate that children exposed to battering have almost twice as many hospital admissions and are absent from school more often than children from the general population.[181] Children are also more likely to suffer injuries in violent homes.[182] Violence targeted at the abused parent can accidentally or recklessly harm children caught in its crossfire.[183] A child may be injured when hit by thrown objects, when struck by blows meant for the abused parent, or when attempting to intervene to stop the violence.[184]

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[178] Edleson, *supra* note 157, at 44. Studies on the role of gender have been somewhat contradictory, however, and thus may be inconclusive thus far. Dalton, *supra* note 18, at 286 n.58.

[179] *See* CUTHBERT ET AL., *supra* note 1, at 2; Edleson, *supra* note 157, at 42; Goodmark, *supra* note 7, at 246–47.

[180] CUTHBERT ET AL., *supra* note 1, at 2; Goodmark, *supra* note 7, at 246.

[181] Edleson, *supra* note 157, at 42.

[182] *See* BANCROFT & SILVERMAN, *supra* note 18, at 44; Goodmark, *supra* note 7, at 247. Children's health problems resulting from exposure to domestic violence may begin even before birth. BANCROFT & SILVERMAN, *supra* note 18, at 44; CUTHBERT ET AL., *supra* note 1, at 2. Battering often begins or intensifies during pregnancy. AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 31 (explaining that some experts suggest that the increased risk of battering during pregnancy takes place because the batterer is threatened by the coming child, while others believe that it explained by the fact that childbearing couples are younger); Goodmark, *supra* note 7, at 246; Mahoney, *supra* note 17, at 20 (suggesting that the onset of violence often coincides with a deepening of commitment to the relationship, such as marriage and pregnancy). Nearly 50% of abusive husbands batter pregnant wives, increasing by four times the likelihood that they will deliver low-birth weight infants. AM. BAR ASS'N, *supra* note 100, at 1. According to one study, approximately 156,000 to 332,000 women experience violence during pregnancy each year in the United States. CUTHBERT ET AL., *supra* note 1, at 2. Furthermore, abused women report that during pregnancy, blows are often intentionally aimed at their abdomens. BANCROFT & SILVERMAN, *supra* note 18, at 44.

[183] AM. BAR ASS'N, *supra* note 100, at 2; BANCROFT & SILVERMAN, *supra* note 18, at 44; Goodmark, *supra* note 7, at 247.

[184] AM. BAR ASS'N, *supra* note 100, at 2; BANCROFT & SILVERMAN, *supra* note 18, at 44; Goodmark, *supra* note 7, at 247. Young children receive the most serious injuries. Goodmark, *supra* note 7, at 247; Zorza, *supra* note 116, at 1115. Older children, however, are more likely to be injured because they try to intervene to stop the violence. Goodmark, *supra* note 7, at 247; Zorza, *supra* note 116, at 1115; *see also* Weithorn, *supra* note 7, at 83 n.361 (describing an incident where a child was shot while trying to protect her mother from her father's violence). One frequently reported statistic is that 63% of males between eleven and twenty years old who are incarcerated for homicide were convicted for killing their mother's batterer. AM. BAR ASS'N, *supra* note 100, at 2 n.21; Goodmark, *supra* note 7,

Children exposed to battering are also significantly more likely to exhibit a range of cognitive and developmental problems.[185] They frequently demonstrate an impaired ability to concentrate, poor performance on their schoolwork, and lower scores on tests measuring cognitive skills.[186] Young children exhibit delays in verbal development.[187] Similarly, studies consistently find that children exposed to battering present a range of emotional and behavioral problems.[188] For example, they are more likely to have problems with anxiety, self-esteem, depression, and temperament.[189] They are also more likely to display aggression in their relationships with others and to exhibit borderline to extreme behavioral problems.[190]

The effects of exposure to battering follow children into adolescence and even adulthood.[191] Adolescents from families with a batterer have a higher risk of both suicide and drug use.[192] Exposure to domestic violence is also linked to higher incidences of juvenile delinquency.[193] The criminal behavior appears to continue into adulthood,

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at 251; Salzman, *supra* note 110, at 334 n.29. *But see* Richard J. Gelles, *Domestic Violence Factoids*, Minnesota Center Against Violence and Abuse Electronic Clearinghouse (1995) (stating that the source and foundation of this statistic is not verifiable), *at* http://www.mincava.umn.edu/papers/factoid.htm (last modified Apr. 16, 2003).

[185] Edleson, *supra* note 157, at 41; Fantuzzo & Mohr, *supra* note 163, at 27; Goodmark, *supra* note 7, at 250.

[186] Edleson, *supra* note 157, at 41; Fantuzzo & Mohr, *supra* note 163, at 27.

[187] Fantuzzo & Mohr, *supra* note 163, at 27; Goodmark, *supra* note 7, at 250.

[188] Dalton, *supra* note 18, at 286; Salzman, *supra* note 110, at 331. For an extensive list of some of the emotional and behavioral problems exhibited by children exposed to battering, see Dalton, *supra* note 18, at 286 n.58.

[189] Adams, *supra* note 120, at 24; Edleson, *supra* note 157, at 41.

[190] BANCROFT & SILVERMAN, *supra* note 18, at 38; Goodmark, *supra* note 7, at 249–50. Some of the psychological abuse that children experience is a result of the batterer's actions against the child's parent. BANCROFT & SILVERMAN, *supra* note 18, at 37, 45. A batterer may be psychologically cruel to the child with the intent of intimidating his partner. *Id.* at 45. For example, one batterer relates that he shredded his teenage daughter's prom dress because he wanted to punish his wife. *Id.* Also, as children often form strong attachments to pets, the commonly-used tactic of batterers to abuse or kill family pets may have severe emotional consequences for children. *Id.* at 37, 45.

[191] *See* Buel, *supra* note 98, at 734.

[192] *Id.*; Goodmark, *supra* note 7, at 249. One study found that juveniles who were exposed to domestic violence in their home were six times more likely to attempt suicide and had a 50% higher risk of drug abuse. Buel, *supra* note 98, at 734. One of the effects of this exposure is to create an increased sense of fatalism, leading juveniles to participate in reckless behavior such as drinking, abusing drugs, or using weapons. Goodmark, *supra* note 7, at 249.

[193] Buel, *supra* note 98, at 734; Goodmark, *supra* note 7, at 251; Salzman, *supra* note 110, at 334 nn.27–28. For example, a Massachusetts study conducted by the Department of Youth Services found that children exposed to domestic violence were twenty-four times more likely to commit sexual assault, and seventy-four times more likely to commit crimes against persons. Buel, *supra* note 98, at 734 (citing SUSAN GUARINO, DELINQUENT YOUTH

as there is a strong correlation between exposure to battering and committing crimes later in life.[194] A large percentage of incarcerated men and women report that they were exposed to violence in the home as children.[195] Similarly, a national survey of federal violent offenders revealed that over 85% had been exposed to battering as children.[196]

One of the most distressing effects of childhood exposure to domestic violence is the possibility that battering will infect future relationships.[197] Most experts agree that domestic violence is a learned behavior.[198] The majority of batterers witnessed the abuse of their mothers when they were children, and the only consistent risk factor identified among women who are battered is exposure to domestic violence in the family during childhood.[199] The risk of violence in future relationships is not necessarily reserved for adult victims: children who grow up in abusive families are more likely to abuse or be abused in teen dating relationships as well.[200]

Finally, there is an additional danger to children living with batterers.[201] Men who batter their partners are also more likely to abuse

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AND FAMILY VIOLENCE: A STUDY OF ABUSE AND NEGLECT IN THE HOMES OF SERIOUS JUVENILE OFFENDERS (Mass. Dep't of Youth Servs. Publ'n No. 14,020–200–74–2–86–CR, 1985)); Goodmark, *supra* note 7, at 251 (same); Salzman, *supra* note 110, at 334 nn.27–28 (same).

[194] Zorza, *supra* note 116, at 1116 (explaining that sons who witness the abuse of their mothers are at increased risk of perpetrating violent crimes as adults); *see* Salzman, *supra* note 110, at 331.

[195] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 24.

[196] Salzman, *supra* note 110, at 331.

[197] Goodmark, *supra* note 7, at 250.

[198] *E.g.*, AM. BAR ASS'N, *supra* note 100, at 1; Buel, *supra* note 98, at 736; Goodmark, *supra* note 7, at 248. According to one court:

> Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved one is acceptable. Children also fail to grasp the full range of negative consequences for the violent behavior and observe, instead, the short term reinforcements, namely compliance by the victim.

Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 18 (W. Va. 1993). Although there is a high correlation between childhood exposure to battering and abusive relationships in adulthood, it is not an inevitable link. AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 22. Many adult perpetrators report no history of exposure and many children who witness domestic violence do not become abusive adults. *Id.* Researchers, however, caution against drawing concrete conclusions, because studies have thus far used a self-reporting methodology, which has limitations. Weithorn, *supra* note 7, at 90 n.403.

[199] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 34, 113; Buel, *supra* note 98, at 735.

[200] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 32; Buel, *supra* note 98, at 734.

[201] *See* BANCROFT & SILVERMAN, *supra* note 18, at 42; Buel, *supra* note 98, at 733.

their children directly.[202] Depending on the research methodology, studies suggest the co-incidence of child physical abuse and partner battering to be at least 30%, and possibly as high as 70%.[203] There is also a correlation in severity: the greater the severity of the partner abuse, the greater the severity of the child abuse.[204] Exposure to batterers may also be one of the strongest risk factors for sexual abuse, including incest.[205] A batterer is between four and nine times more likely to be an incest perpetrator.[206] Daughters are particularly at risk—they are six times more likely to be sexually abused in homes where there is also domestic violence.[207]

Even after the children's parents separate, the batterer's behavior continues to place the children at risk.[208] Children remain the link between the batterer and the abused parent after separation.[209] Thus, custody and visitation arrangements are potentially dangerous for both the abused parent and the children.[210] Due to separation assault, children may be exposed to the batterers' use of escalating violence designed to reassert power and control over the former partner.[211] Evidence also suggests that batterers' use of their children to intimidate their former partners will intensify in a post-separation context.[212] Even without incidents of separation assault, however, children

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[202] BANCROFT & SILVERMAN, *supra* note 18, at 42; Buel, *supra* note 98, at 733.

[203] AM. BAR ASS'N, *supra* note 100, at 18 (40–60%); Buel, *supra* note 98, at 733 (70%); Cahn, *supra* note 137, at 1056 (70%); Dalton, *supra* note 18, at 286 (20–100%). It may be difficult to disentangle the two forms of abuse as they are often interrelated. *See* Weithorn, *supra* note 7, at 83. Individual incidents, for example, may involve both child abuse and partner abuse, with the parent being battered for stepping in to protect the child or vice versa. *Id.* The batterer may also lash out at various family members simultaneously. *Id.*

[204] BANCROFT & SILVERMAN, *supra* note 18, at 43; Buel, *supra* note 98, at 733–34; Cahn, *supra* note 137, at 1056.

[205] BANCROFT & SILVERMAN, *supra* note 18, at 84. For an extensive discussion of the link between partner abuse and incest, see Lundy Bancroft & Margaret Miller, *The Batterer as Incest Perpetrator, in* THE BATTERER AS PARENT, *supra* note 18, at 84–97.

[206] BANCROFT & SILVERMAN, *supra* note 18, at 97.

[207] *Id.* at 85; Goodmark, *supra* note 7, at 247.

[208] BANCROFT & SILVERMAN, *supra* note 18, at 153.

[209] Dalton, *supra* note 18, at 288.

[210] *See* BANCROFT & SILVERMAN, *supra* note 18, at 153; Buel, *supra* note 98, at 734. For example, studies of abused parents who sought abuse prevention protection orders against their batterers found that those who had children in common with the batterer were nearly four times as likely to suffer further abuse. BANCROFT & SILVERMAN, *supra* note 18, at 152–53.

[211] *See* discussion *supra* Part II.B.

[212] BANCROFT & SILVERMAN, *supra* note 18, at 153; Buel, *supra* note 98, at 734.

are still at risk of exposure to battering.[213] Because battering is a serial behavior, the children are likely to witness abuse perpetrated by the batterer against a new partner.[214] Therefore, GALs need to consider both the harm to the children from past exposure to the batterer's behavior and the risks of continued post-separation exposure when making custody and visitation arrangements.[215]

A GAL who is inattentive to the intersection of domestic abuse, its effects on children, and child custody litigation, can unintentionally put a child at risk.[216] For that reason, some commentators have understandably called for the reform of the GAL system.[217] After all, there have been numerous criticisms of the use of GALs in all custody cases, particularly in cases involving domestic violence.[218] In addition, addressing these concerns is a daunting task when the use of GALs is distinctive to each jurisdiction.[219] As the next section demonstrates, however, retaining the GAL system for private child custody disputes may offer more benefits to children exposed to domestic violence than would eliminating the GAL system altogether.[220]

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[213] *See* BANCROFT & SILVERMAN, *supra* note 18, at 19, 156; CUTHBERT ET AL., *supra* note 1, at 33. Children may still be at risk of direct abuse as well, although there do not appear to be any studies specifically investigating post-separation child abuse. BANCROFT & SILVERMAN, *supra* note 18, at 43. Since the correlation between child abuse and partner abuse follows logically from the batterer's attitudes and patterns of behavior, there is no reason to believe the risk would decrease. *Id.* In addition, the batterer's partner is no longer present to intervene on behalf of the children. *Id.* at 44.

[214] BANCROFT & SILVERMAN, *supra* note 18, at 19, 153, 156; *see also* CUTHBERT ET AL., *supra* note 1, at 33 (discussing a case where visitation, supervised by the batterer's new partner, was terminated when it was revealed that the batterer had been physically abusing the new partner).

[215] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 101; BANCROFT & SILVERMAN, *supra* note 18, at 156. The American Bar Association recommends that the occurrence or recurrence of domestic violence after a court has entered custody or visitation orders should satisfy the "material change in circumstances" basis required for modification of those orders. AM. BAR ASS'N, *supra* note 100, at 14.

[216] *See* DALTON & SCHNEIDER, *supra* note 15, at 450; GAL REPORT, *supra* note 25, at 5.

[217] *See* CUTHBERT ET AL., *supra* note 1, at 73 (concluding the GAL system needs substantial reform); DALTON & SCHNEIDER, *supra* note 15, at 451 (arguing that the current level of insight among GALs is insufficient to evaluate family dynamics accurately when there is a history of domestic violence); Ducote, *supra* note 22, at 136 (calling the placing of children in the care of batterers a "tragedy" that occurs because of GALs).

[218] *See* Ducote, *supra* note 22, at 109 (arguing that the GAL system should be eliminated for a number of reasons, including the disappointing actions of GALs in cases involving domestic violence).

[219] *See* Cromley, *supra* note 78, at 568; Elrod, *supra* note 20, at 57.

[220] *See* discussion *infra* Part III.

III. The Guardian Ad Litem System Should Be Retained in Cases Involving Domestic Violence

The GAL system, while flawed, should be retained.[221] At least one commentator has asserted that the system of appointing GALs to protect the interests of children should be abolished.[222] While there are unquestionably valid criticisms of the current GAL system, few mention how the elimination or alteration of GALs may affect those children coming from homes characterized by ongoing domestic abuse.[223] Proponents and even some critics do agree, however, that GALs have the potential to be most useful in higher risk cases.[224] More importantly, commentators agree that the family court system, operating on its own, does not always adequately protect children who have been exposed to domestic violence.[225] From this perspective, well-trained and skillful GALs can serve as a safety net for abused parents and children enmeshed in custody litigation.[226]

In many jurisdictions, however, the GAL system does not currently live up to its potential to protect the interests of children exposed to domestic violence.[227] This primarily results from a lack of training and

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[221] *See* Buel, *supra* note 98, at 733 (recommending the use of GALs to ensure that children's interests are protected in cases involving domestic violence issues); Muhlauser & Knowlton, *supra* note 84, at 1022 (stating that the role of the GAL has greater importance in domestic relations cases, especially domestic violence cases); Murphy, *supra* note 22, at 287 (suggesting that GALs are particularly necessary in custody and visitation litigation); *cf.* Mass. Senate Comm. on Post Audit and Oversight, Guarding Our Children: A Review of Massachusetts' Guardian Ad Litem Program Within the Probate and Family Court, S. Rep. 1828, 2000 Sess. (Mass. 2001) (finding, after reviewing GAL system, that standards should be enacted, and not suggesting elimination of the system), *at* http://www.state.ma.us/legis/senate/guardchild.htm (last visited Feb. 8, 2004); Bancroft & Silverman, *supra* note 18, at 197–200 (recommending not abolition, but that specific actions should be taken by GALs in custody disputes involving domestic violence); Cuthbert et al., *supra* note 1, at 74 (arguing for reform of GAL system, not elimination).

[222] *See* Ducote, *supra* note 22, at 109.

[223] *See generally* Lidman & Hollingsworth, *supra* note 28; Muhlauser & Knowlton, *supra* note 84; Stuckey, *supra* note 28.

[224] *See* Muhlauser & Knowlton, *supra* note 84, at 1026. Higher risk cases are defined as those involving protracted litigation, child sexual abuse allegations, emotionally disturbed children, and children in persistently violent homes. *Id.*

[225] *See* Buel, *supra* note 98, at 733; Cahn, *supra* note 137, at 1071; Dalton, *supra* note 18, at 276.

[226] *See* GAL Report, *supra* note 25, at 2, 14; Dalton, *supra* note 18, at 286 (finding that GALs play a pivotal role in protecting children's interests).

[227] *See* Dalton & Schneider, *supra* note 15, at 450 (discussing anecdotal charges that GALs were serving children poorly).

awareness of the implications of battering on the family.[228] The courts assume that attorneys and mental health experts, because of the nature of their professions, have a sufficient understanding of domestic violence before becoming GALs.[229] Yet education in both the legal and mental health professions has traditionally paid little attention to issues of domestic violence.[230] Thus, GALs actually may be the least prepared of any actors in the family court on this issue.[231]

This lack of understanding of the dynamics of domestic violence puts GALs at a disadvantage when conducting evaluations or making recommendations to courts.[232] For example, without a sufficient understanding of domestic violence, GALs may rely on their subjective interpretations of demeanor to recognize abusive relationships.[233] Domestic violence has a complex nature, however, and thus a GAL's instinctive

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[228] CUTHBERT ET AL., *supra* note 1, at 16; Family Violence Project, *supra* note 112, at 220; Zorza, *supra* note 116, at 1119.

[229] Custody of Vaughn, 664 N.E.2d 434, 439 n.10 (Mass. 1996) (noting that it is not wrong to give weight to the testimony of a GAL who is not a domestic violence specialist since "a qualified clinical psychologist with experience in family matters will . . . have encountered this issue in his training and, unfortunately, all too frequently in his clinical practice"). *But see* BANCROFT & SILVERMAN, *supra* note 18, at 200 (asserting that GALs without a background in domestic violence should seek consultation from a domestic violence professional on all custody cases involving battering).

[230] DALTON & SCHNEIDER, *supra* note 15, at 449. Graduate training programs for psychologists have traditionally ignored domestic violence issues. BANCROFT & SILVERMAN, *supra* note 18, at 119. Law schools offer some, but not enough, courses on domestic violence. Buel, *supra* note 98, at 722. For example, domestic violence is generally not incorporated into law courses discussing custody. Family Violence Project, *supra* note 112, at 214; *see also* DEBORAH GOELMAN ET AL., WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT (1997) (describing the need to incorporate domestic violence issues into the law school curriculum). For a survey of legal education programs focusing on domestic violence, see GOELMAN ET AL., *supra*; Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 NEW ENG. L. REV. 383 (1993).

[231] DALTON & SCHNEIDER, *supra* note 15, at 452 (noting that employees of the Massachusetts Probate and Family Court receive domestic violence training, but GALs do not); Family Violence Project, *supra* note 112, at 220. According to one limited survey, GALs were identified as the family court professionals with the least amount of training in domestic violence. Family Violence Project, *supra* note 112, at 220. The survey was conducted by interviewing judges, attorneys, advocates, court administrators, court services personnel, and law professors in the eight states (Delaware, Florida, Idaho, Louisiana, Minnesota, North Dakota, Oklahoma, and Wisconsin) that at that time had enacted custodial presumption statutes. *Id.* at 208 n.54, 211 n.70.

[232] *See* BANCROFT & SILVERMAN, *supra* note 18, at 198; Cahn, *supra* note 137, at 1082; Dalton, *supra* note 18, at 283.

[233] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 13; CUTHBERT ET AL., *supra* note 1, at 40. Hard evidence is also frequently lacking in abusive relationships; thus, credibility may be the determining factor. Cahn, *supra* note 137, at 1082. A thorough investigation, however, will often eliminate the need to rely on personal impressions. BANCROFT & SILVERMAN, *supra* note 18, at 198.

understandings may be misleading.[234] This is particularly true regarding the evaluation of batterers, who often manipulate professionals and portray a public persona that is quite different from their abusive behavior in the home.[235] Moreover, GALs may expect children who have been harmed by exposure to battering to exhibit fear of the abusive parent.[236] Contrary to expectations, however, children of batterers may actually have a closer bond with the batterer than with the abused parent due to a condition known as "traumatic bonding."[237] When GALs fail to consider the history of abuse, the abused parents' reasonable efforts to protect themselves and their children may be easily misinterpreted as instability or even vindictiveness.[238]

Consequently, insufficiently trained GALs recommend visitation and custody arrangements that are adverse to the safety of the abused parent and of the children whose interests they are appointed to protect.[239] GALs may recommend that the court grant custody of the children to the batterer without considering the harm caused to the children by exposure to the batterer's abusive behavior.[240] There are also anecdotal reports of GALs who created unsafe situations, such as arranging joint interviews of the parties or revealing the whereabouts

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[234] *See* BANCROFT & SILVERMAN, *supra* note 18, at 198; Cahn, *supra* note 137, at 1082; Dalton, *supra* note 18, at 283.

[235] *See, e.g.*, BANCROFT & SILVERMAN, *supra* note 18, at 119, 199; Adams, *supra* note 120, at 23; Buel, *supra* note 98, at 740. Personal observations of the batterer should be compared to the batterer's past and current behavior and should not be weighed heavily by the GAL. BANCROFT & SILVERMAN, *supra* note 18, at 199.

[236] *See* BANCROFT & SILVERMAN, *supra* note 18, at 39.

[237] *Id.* at 39–41. Traumatic bonding describes the unusually strong but unhealthy bond that develops between two people when one is abusive. *Id.* It is also known as "Stockholm Syndrome." *Id.*

[238] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100; CUTHBERT ET AL., *supra* note 1, at 36, 41; *see* Dalton, *supra* note 18, at 283. As one woman described a GAL's assessment of her:

> [The guardian ad litem] was saying [that I] was psychologically unstable and, you know, irrational, emotional, and angry. It's like, yeah, if you've been through 10 years of what I've been through . . . . You go through hell and try to get out of hell and they punish you, saying "Oh, you cry too much and you're upset, so you know, the kids are more stable with the father, there's no emotion."

CUTHBERT ET AL., *supra* note 1, at 36.

[239] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 120; *see also* Buel, *supra* note 98, at 724 (stating that batterers obtaining custody and unsafe visitation are two of the most pressing problems facing women who are abused).

[240] *See* CUTHBERT ET AL., *supra* note 1, at 16; Ducote, *supra* note 22, at 135–36. *see also* discussion of the harm caused by exposure of children to battering *supra* Part II.D.

of a parent in hiding from the batterer.[241] Furthermore, because GALs do not routinely conduct risk assessments before recommending visitation arrangements, they often do not take advantage of the option to recommend the use of professional supervised visitation centers.[242] As a result, they inappropriately recommend that a family member or current intimate partner supervise the visitation.[243]

Finally, reformers criticize GALs for minimizing abuse or assuming that reports of abuse are fabricated for a tactical advantage in litigation.[244] When GALs assume that allegations of domestic violence are invalid or irrelevant, they may be less likely to investigate fully.[245] Thus, GALs could submit reports to judges that omit important indicators of abuse.[246] This is especially troublesome in those jurisdictions that re-

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[241] BANCROFT & SILVERMAN, *supra* note 18, at 153; CUTHBERT ET AL., *supra* note 1, at 54; DALTON & SCHNEIDER, *supra* note 15, at 451. In two separate cases, the GAL reportedly disclosed to the batterer the location of the confidential domestic violence shelter where the abused parent was in hiding. BANCROFT & SILVERMAN, *supra* note 18, at 153. Similarly, another GAL reportedly tried to convince the abused parent to leave the shelter where she was hiding. CUTHBERT ET AL., *supra* note 1, at 54.

[242] *See* CUTHBERT ET AL., *supra* note 1, at 18 (finding that safe visitation arrangements should be standard, but GALs routinely overlook the dangers posed by visitation involving a batterer). Abuse victims and their children often face renewed violence in the course of visitation. *See* Kathleen Sweeney, *Victim Did Everything Right, but System Let Her Down: Mother of 6-year Old Slain as She Tries to Obey Court Order*, L.A. DAILY NEWS, Oct. 6, 2002, at SC1. Supervised visitation, especially when it takes place at a visitation center, has been lauded for its potential to keep parents and children safer during visits and visitation exchanges. AM. BAR ASS'N, *supra* note 100, at 14; Buel, *supra* note 98, at 736; *see* Dalton, *supra* note 18, at 274 n.5. It can also serve as a way to determine whether a batterer is more interested in visiting the children or in controlling an ex-partner. Batterers may stop attending visits at visitation centers if the visitation arrangements do not allow them access to their ex-partner.

Louisiana goes a step further in protecting victims and requires that visitation be supervised until the batterer has completed a batterer's intervention program. LA. REV. STAT. ANN. § 9:364(C) (West 2000). The court system could be a powerful motivator for a population that is rarely independently motivated to seek treatment—as few as one in two hundred batterers completes treatment. *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 79, 98.

[243] CUTHBERT ET AL., *supra* note 1, at 18. Visitation supervised by friends or family members is recommended only to prevent kidnapping, as it is not adequate protection from other dangers, including violence. BANCROFT & SILVERMAN, *supra* note 18, at 173.

[244] AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 67; BANCROFT & SILVERMAN, *supra* note 18, at 120; Family Violence Project, *supra* note 112, at 220.

[245] BANCROFT & SILVERMAN, *supra* note 18, at 119; Family Violence Project, *supra* note 112, at 220; Lidman & Hollingsworth, *supra* note 28, at 280.

[246] *See* BANCROFT & SILVERMAN, *supra* note 18, at 98–99 (noting that in the absence of a thorough investigation, a court has to evaluate abuse allegations with only limited evidence); Buel, *supra* note 98, at 737 (reporting that only about 27% of psychologists consider domestic violence to be relevant to custody; consequently, psychologists frequently ignore domestic violence in their custody recommendations).

quire courts to consider domestic violence as a factor in custody decisions.[247] Adequate training, however, could alert GALs to the impact of domestic violence on family dynamics and therefore prepare them to conduct accurate and thorough investigations into the impact of battering on the family.[248] This issue can also be addressed by more specifically enumerating guidelines for investigations and requiring GALs to address domestic violence issues in every report they submit.[249]

The use of GALs could provide a number of benefits in custody litigation involving domestic violence.[250] For example, critics assert that a GAL's investigation simply duplicates the responsibility of the parties' attorneys to bring relevant evidence before the court.[251] What critics do not consider, however, is that attorneys commonly fail to introduce evidence of abuse during custody litigation.[252] Even if attorneys routinely discuss domestic violence issues before the court, parties increasingly come before the court pro se and are therefore less likely to know how to gather and present evidence of domestic violence in a meaningful way.[253] A GAL who is familiar with the court

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[247] *See* MASS. SENATE COMM. ON POST AUDIT AND OVERSIGHT, GUARDING OUR CHILDREN: A REVIEW OF MASSACHUSETTS' GUARDIAN AD LITEM PROGRAM WITHIN THE PROBATE AND FAMILY COURT, S. Rep. 1828, 2000 Sess. (Mass. 2001) (finding that the GAL system does not adequately incorporate the standards of the presumption of custody law), *at* http://www.state.ma.us/legis/senate/guardchild.htm (last visited Feb. 8, 2004); Lemon, *supra* note 137, at 613 (explaining that almost every jurisdiction allows or mandates consideration of domestic violence in custody decisions). If GALs do not include domestic violence in their reports, judges may not be able to consider fully the issues of domestic violence in their custody decisions. *See* BANCROFT & SILVERMAN, *supra* note 18, at 99.

[248] *See* BANCROFT & SILVERMAN, *supra* note 18, at 197; CUTHBERT ET AL., *supra* note 1, at 74, 77.

[249] Mass. S. Rep. 1828 (suggesting that the quality of GAL reports varies widely due to the lack of state standards for investigations and reports); CUTHBERT ET AL., *supra* note 1, at 75 (recommending guidelines for investigations and reports); *see also* Buel, *supra* note 98, at 729 (stating that the entire history of abuse must be uncovered for consideration in custody and visitation disputes).

[250] Murphy, *supra* note 22, at 287.

[251] Lidman & Hollingsworth, *supra* note 28, at 303–04 (arguing that GALs are unnecessary because the same functions are served by other trial participants).

[252] Family Violence Project, *supra* note 112, at 214; Murphy, *supra* note 22, at 288. Attorneys fail to introduce evidence of abuse for several reasons. Some attorneys are simply unaware of the dynamics of abuse and do not consider evidence of partner abuse to be relevant to a custody proceeding. Buel, *supra* note 98, at 722, 733. Other attorneys may make a strategic decision not to introduce the evidence. Murphy, *supra* note 22, at 288. Not only is it likely that the batterer's attorney will be reluctant to introduce such evidence, but the abused parent's attorney may be as well, due to the well-documented risks that the evidence will be used against her or his client. Mahoney, *supra* note 17, at 45.

[253] Prescott, *supra* note 19, at 534; *see* CUTHBERT ET AL., *supra* note 1, at 71. This is especially true for battered spouses who may not have access to the financial resources to

system and knowledgeable about documenting domestic violence, however, would be well equipped to present to the judge the information necessary to apply custodial statutes mandating consideration of domestic violence.[254] Furthermore, GALs have a unique opportunity to refer parties to community resources and to educate actors in the legal system about the effects on children of exposure to domestic violence.[255] In addition, GALs that are properly aware of separation assault and other issues stemming from domestic violence may be in the best position to conduct risk assessments and to incorporate safety into their custody and visitation arrangement recommendations.[256]

GALs, therefore, can serve as a resource for victims, a check for batterers, and, most importantly, a protector for children exposed to domestic violence.[257] Currently, however, GALs cannot fulfill their potential in this area because of a lack of professional guidelines that impose requirements and considerations specific to the domestic violence context.[258] Guidelines that encourage, and in some cases require, GALs to be sensitive to issues of domestic violence ultimately will serve to increase the safety of the children whose lives are affected

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hire an attorney. *See* CUTHBERT ET AL., *supra* note 1, at 69; Family Violence Project, *supra* note 112, at 215 & n.84.

[254] Murphy, *supra* note 22, at 288. This is not to suggest that attorneys have no responsibility to be knowledgeable and sensitive to the issues of domestic violence affecting their clients. *See* Buel, *supra* note 98, at 725; Dalton, *supra* note 18, at 283. On the contrary, attorneys have a responsibility to incorporate domestic violence screening and safety protocols into their practices. Buel, *supra* note 98, at 725. Without adequate knowledge of the abuse, attorneys are handicapped in their efforts to advise their clients sufficiently. *See id.*

[255] *See* AM. BAR ASS'N, *supra* note 100, at 7 (suggesting GALs could provide referrals to services and provide parties with information on the effect of exposure to battering); Prescott, *supra* note 19, at 533 (suggesting courts need to evolve into something analogous to a social service agency); *see also* BANCROFT & SILVERMAN, *supra* note 18, at 99–102 (discussing an example of a GAL making referrals to services).

[256] *See* BANCROFT & SILVERMAN, *supra* note 18, at 199. Through their investigations, GALs are in the best position to evaluate evidence from parties, children, and other sources to determine the possible risk involved in future arrangements. *See id.* at 157, 158, 199. While attorneys can also conduct risk assessment, they may not have the same access to both parties as GALs. *See id.* at 156 (stating that risk assessment should be based on information from a number of sources, not just the batterer); Buel, *supra* note 98, at 725 (recommending that lawyers assess safety issues, whether their client is the victim, perpetrator, or child). Further, since judges frequently rely on GALs' recommendations, they may be more likely to incorporate any safety conditions that GALs recommend for custody or visitation arrangements. *See* CUTHBERT ET AL., *supra* note 1, at 54. For a discussion of some of the factors to be weighed in a risk assessment, see BANCROFT & SILVERMAN, *supra* note 18, at 156–71.

[257] *See* AM. BAR ASS'N, *supra* note 100, at 7; AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 79; Murphy, *supra* note 22, at 288.

[258] *See* Muhlauser & Knowlton, *supra* note 84, at 1024.

by exposure to battering.[259] The next section proposes guidelines for GALs that incorporate the concerns raised by the presence of domestic violence in custody disputes.

IV. Recommendations

While the GAL system can be reformed by state legislatures, change is more likely to come from the state courts.[260] Change from the courts would probably take the form of standards and guidelines that establish qualifications, training requirements, professional duties, and responsibilities for GALs.[261] Several states have recently begun to address problems with the GAL system by developing such guidelines.[262] While some of these states have addressed domestic violence concerns by including the dynamics of abuse in their training requirements, they have yet to address other aspects of the GAL role, which can also have a significant impact in cases involving domestic violence.[263]

Courts should enact standards and guidelines that fully address the GAL's role in cases involving domestic violence in order to help GALs protect children exposed to battering.[264] Therefore, what fol-

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[259] It will also increase public confidence in the courts. Cuthbert et al., *supra* note 1, at 72. Abused parents currently cite fear of losing custody of their children to the batterer as one of the primary reasons they delay leaving the abusive rtelationship. Bancroft & Silverman, *supra* note 18, at 129; Zorza, *supra* note 116, at 1117. If they could have confidence that the batterer's abusive behavior would be considered in the custody litigation, they might be less fearful. *See* Cuthbert et al., *supra* note 1, at 72.

[260] Dalton & Schneider, *supra* note 15, at 446.

[261] *See* Me. R. Guard. Ad Litem R. II (WESTLAW through 2003 legislation) (Maine); Cuyahoga Co. Ct. Dom. Rel. R. 35(B) (WESTLAW through 2003 legislation) (Ohio).

[262] *See* Dalton & Schneider, *supra* note 15, at 446–49 (discussing guidelines enacted in Minnesota and Missouri); Ducote, *supra* note 22, at 111–15 (discussing reform efforts in South Carolina, Ohio, Minnesota, and Massachusetts).

[263] Me. R. Guard. Ad Litem R. II (requiring that GALs complete sixteen hours of preservice training that covers, among other things, the dynamics of domestic violence and its effects on children); Cuthbert et al., *supra* note 1, at 76 (recommending standards for inclusion of domestic violence in GAL reports); Dalton & Schneider, *supra* note 15, at 446 (noting that state standards sometimes incorporate domestic violence in training requirements). For example, GAL reports may be incomplete, inaccurate, or biased. Cuthbert et al., *supra* note 1, at 53. Since GAL reports are generally relied upon as significant sources of evidence by the court in custody cases, omission of evidence of abuse from the reports can affect custody decisions. *Id.* at 54 (citing case in which the GAL's report omitted that the mother fled to a battered woman's shelter after the batterer repeatedly ransacked her house; custody was granted to the batterer).

[264] *See* Mass. Senate Comm. on Post Audit and Oversight, Guarding Our Children: A Review of Massachusetts' Guardian Ad Litem Program Within the Probate and Family Court, S. Rep. 1828, 2000 Sess. (Mass. 2001) (recommending the adoption of guidelines for GALs in Massachusetts, including standards that address issues of domestic violence), *at* http://www.state.ma.us/legis/senate/guardchild.htm (last visited

lows is a sampling of suggested guidelines, in the format of a model code, that a state court could adopt in order to address the neglected domestic violence issue in GAL systems.[265] This proposal is not intended to be a complete set of GAL guidelines, but rather includes only those standards and recommendations that are particularly relevant to addressing the role of the GAL in child custody cases involving a history of domestic violence.[266]

Feb. 8, 2004); CUTHBERT ET AL., *supra* note 1, at 74 (recommending the adoption of mandatory practice standards, including provisions relating to abuse); Ducote, *supra* note 22, at 118 (asserting that standards can address quality control, professionalism, clarity, uniformity, and predictability in how individual GALs, judges, and court systems will act); Elrod, *supra* note 20, at 68 (arguing that minimum standards should be adopted). Many jurisdictions currently have no standards or guidelines in place for GALs. Muhlauser & Knowlton, *supra* note 84, at 1024.

[265] Several professional associations and others have also recommended guidelines. *See generally* AAML, *supra* note 65; APA Guidelines, *supra* note 32; Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*, 32 FAM. & CONCILIATION CTS. REV. 504 (1994) [hereinafter AFCC]; Cromley, *supra* note 78, at 599–606. These guidelines, however, are either limited in application or do not fully address the concerns raised by GAL interaction with families that have a history of domestic violence. *See* AAML, *supra* note 65, at 27–34 (providing standards for GALs that contain no references to domestic violence); AFCC, *supra*, at 504 (providing guidelines that apply only to members of the AFCC that conduct custody evaluations, and not addressing domestic violence issues in training requirements or reports); APA Guidelines, *supra* note 32, at 677 (mandating guidelines applicable only to psychologists conducting custody evaluations); Cromley, *supra* note 78, at 599–606 (referrring to domestic violence issues only in the context of recommended training topics).

[266] For example, standards regarding fees and immunity from liability are not included in this proposal. *See* ME. R. GUARD. AD LITEM R. III (2003) (including standards for immunity); CUYAHOGA CO. CT. DOM. REL. R. 35(B) (including standards for fees); *see also* Ducote, *supra* note 22, at 149–50 (discussing fees as excessive); Lidman & Hollingsworth, *supra* note 28, at 257–58 n.11 (discussing cases dealing with immunity of GAL), Lidman & Hollingsworth, *supra* note 28, at 302–04 (discussing fees and payment); Prescott, *supra* note 19, at 543 n.53 (discussing cases involving the immunity of GALs). While custody cases involving domestic violence may also encounter difficulties with GAL fees or immunity from liability, these issues are not unique to families with a history of domestic violence and, thus, are not addressed in the suggested guidelines.

MODEL GUIDELINES FOR GUARDIANS AD LITEM IN CHILD CUSTODY AND VISITATION PROCEEDINGS INVOLVING A HISTORY OF DOMESTIC VIOLENCE

Standard 1.0: Pre-Appointment Training Requirements for New Guardians Ad Litem

1. Any person intending to serve as a guardian ad litem shall complete [insert number][267] hours of training before accepting appointments. He or she will then provide to the [office responsible][268] a certificate of completion to be kept on file.
2. A panel shall be established for the purpose of reviewing and evaluating training requirements and will make adjustments in the requirements or contents of the training as necessary. The training curricula and hourly requirements should be reviewed at least every [insert number][269] years.
3. Training content will be determined by the panel established in Standard 1.0(2). At a minimum, however, the training must cover the following:
   a. Laws relevant to domestic violence, including, but not limited to, any custody laws that reference domestic violence;
   b. How to identify partner abuse and assess safety concerns;
   c. The latest research on the connections between domestic violence and its effects on children; and
   d. Sensitivity and awareness of personal bias and cultural perspectives.
4. In addition to satisfying the training requirements above, any person who intends to serve as a guardian ad litem shall observe a variety of family court proceedings, including, but not limited to, at least one child custody hearing and one domestic abuse hearing.
5. The [office responsible] will maintain a list of current guardians ad litem who are willing to serve as consultants to new guardians ad litem. The list should include guardians ad litem with

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[267] The exact number of hours required to train GALs adequately depends on the jurisdiction's particular use of GALs, and, thus, is left to their discretion.

[268] Each state may have a different office or organization that is responsible for overseeing GALs.

[269] The frequency of review can appropriately be left to the state's discretion, as availability of resources may be a factor.

various specialties, including those who specialize in domestic violence.

Commentary: The purpose of the pre-service training requirement in subsection (1) is to equip all guardians ad litem (GALs) with the skills, techniques, knowledge, and understanding necessary to protect effectively the best interests of children.[270] Although in many states GALs are licensed professionals, rarely will a professional background in any one field adequately prepare an individual for the varying roles required of service in the family court.[271] In addition, licensed professionals do not necessarily have sufficient education or experience with domestic violence issues to assess and address adequately the concerns raised by the presence of abuse in the family.[272]

The panel established in subsection (2) to oversee the training of GALs should include a range of disciplines and professions. To the extent possible, the panel should include family court judges, attorneys who routinely practice in family court, existing GALs, mental health professionals, and members of the domestic violence community (including battered women's advocates and/or batterer intervention programs), and any other professionals the jurisdiction deems appropriate.

The topics for training listed in subsection (3) should in no way be considered exhaustive, but merely a listing of the core domestic violence topics without which a GAL would be unable to serve effectively.[273] Since a large number of contested custody cases involve domestic violence, and since GALs will probably not have received

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[270] There is a tremendous amount of support for GALs to receive standardized training, especially in the area of domestic violence. *See, e.g.*, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §§ 510, 511, 512 (1994) (imposing training requirements on court personnel, including custody evaluators and attorneys); AM. BAR ASS'N, *supra* note 100, at 5, 18 (stating that it is critical for all personnel involved in domestic relations, including GALs, to receive training about domestic violence and children); AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 67, 125 (recommending training in domestic violence for service providers to learn how to recognize and assess abuse); CUTHBERT ET AL., *supra* note 1, at 77 (including recommendation that GALs receive standardized training that includes domestic violence issues); Stuckey, *supra* note 28, at 1799 (stating that GALs need training and uniform objectives to guide their efforts). Some states, such as Missouri, are already moving toward mandating domestic violence training for all GALs. Dalton, *supra* note 18, at 287 & n.61.

[271] *See* DALTON & SCHNEIDER, *supra* note 15, at 444 (questioning whether attorneys or mental health professionals are sufficiently qualified to serve as GALs without further training); Muhlauser & Knowlton, *supra* note 84, at 1022 (noting that complex cases may require skills not available from any one profession).

[272] *See* CUTHBERT ET AL., *supra* note 1, at 76.

[273] *See id.* at 77 (recommending similar training topics).

sufficient prior education in this area, it is important to include domestic violence issues in training.[274]

GALs will attend many custody hearings as a result of their appointments. Subsection (4) requires that GALs attend at least one of these hearings prior to assuming cases as a GAL. This is particularly recommended for those jurisdictions that do not restrict appointments to licensed attorneys.[275] Subsection (4) further recommends that GALs familiarize themselves with related family law and domestic abuse proceedings which they may not ordinarily attend, but which will also impact the children whose interests they are appointed to protect.[276]

Subsection (5) addresses two issues. First, not all GALs have access to a professional association or an office designed to provide support for their daily activities as a GAL. Therefore, it is important, particularly for new GALs, to have access to the guidance and support of other, more experienced GALs.[277] Second, few GALs will have the expertise necessary to handle every case with a history of domestic violence.[278] If GALs can identify and access specialists in this area, they will be able to seek advice when needed or to recommend that the court appoint a domestic violence specialist to the case.[279]

Standard 2.0: Professional Development Requirements

1. Once a guardian ad litem has been approved, eligibility to accept appointments may be maintained only by completing [insert number][280] hours annually of continuing professional development training in the domestic violence field.

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[274] *See* DALTON & SCHNEIDER, *supra* note 15, at 449 (noting that professional education has traditionally paid little attention to domestic violence); Family Violence Project, *supra* note 112, at 220 (stating that GALs may be the court professionals least trained in domestic violence); sources cited *supra* note 21 (discussing that many, if not most, contested custody cases involve a history of domestic violence).

[275] *See, e.g.*, COLO. REV. STAT. § 14–10–116 (2003); WASH. REV. CODE ANN. § 26.12.175 (West 1997 & Supp. 2004).

[276] *See* DALTON & SCHNEIDER, *supra* note 15, at 447 (discussing a similar proposition in Minnesota's Supreme Court Rules).

[277] *See* BANCROFT & SILVERMAN, *supra* note 18, at 200.

[278] *See id.* (recommending that GALs without a professional background in domestic violence consult with domestic violence professionals on all cases involving allegations of battering); AFCC, *supra* note 265, at 511 (requiring consultation of a domestic violence specialist in all cases where abuse is alleged or appears to exist).

[279] *See* BANCROFT & SILVERMAN, *supra* note 18, at 200.

[280] The exact number of hours required to train GALs adequately depends on the jurisdiction's particular use of GALs, and, thus, is left to its discretion.

Commentary: The requirement of annual training ensures that GALs keep abreast of current information on the status of the law, as well as theories of family and social relationships relevant to domestic violence.[281] Requirements for professional development also reassure members of the judiciary that the GALs they appoint will have current knowledge on the connections between battering and children's well-being. The parties will also have increased confidence in their GAL, and in the court system, if they believe the GAL is fully prepared to address the issues in their case.[282]

Standard 3.0: Appointment of Guardian Ad Litem

1. Only a person who [insert qualifications] and who has fulfilled the training requirements set forth in these guidelines may be appointed as a guardian ad litem.

Commentary: This guideline takes no position on whether GALs must be attorneys, licensed mental health professionals, law volunteers, or have any other required background. First, such requirements are generally determined within the state's appointment statutes.[283] Second, the background required to fulfill this position is largely dependent on the role that the court expects the GAL to serve.[284] For example, in states where the GAL is expected to act as counsel for the child, calling witnesses and presenting evidence, it may be more important for the GAL to be an attorney. If the role of the GAL is restricted to an investigatory capacity, however, then a well-trained volunteer may serve just as well, if not better, than a licensed professional.[285] Third, while each category of applicants will have its advantages, the most important criterion from the perspective of a parent and child experiencing partner abuse is that the GAL displays understanding, sensitivity, and skill in the

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[281] *See* DALTON & SCHNEIDER, *supra* note 15, at 448 (noting continuing education requirements for GALs in Minnesota and Missouri).

[282] *See* CUTHBERT ET AL., *supra* note 1, at 72.

[283] *See* sources cited *supra* note 64 (appointment mechanisms for fifty-one jurisdictions).

[284] *See* DALTON & SCHNEIDER, *supra* note 15, at 444; Cromley, *supra* note 78, at 585–86.

[285] OFFICE OF HUMAN DEVELOPMENT SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION 41 (1990) (finding that volunteer GALs actually outperformed licensed professionals).

area of domestic violence. A professional education in law or mental health does not guarantee any of the above.[286]

Standard 4.0: Certification; Domestic Violence Specialists

1. Any person who wishes to be listed as a domestic violence specialist must submit to an interview with [office responsible][287] and supply documentation that he or she has met all requirements for certification.

Commentary: A one-time training prior to becoming a GAL, while sufficient to establish certain skills, does not make one an expert in the area of domestic violence.[288] Furthermore, some cases involving domestic violence may be particularly complex, requiring the skills of an individual with specialized expertise.[289] Therefore, the state court should establish criteria for certification in domestic violence that includes, but is not limited to, educational requirements, experience requirements, and references.

The interview requirement set forth in subsection (1) is intended to serve as an additional screening function. Working with families experiencing domestic violence is a very sensitive, and potentially dangerous, endeavor; the interview is one way to determine that someone who wishes to work with these cases in particular is qualified to do so.[290] The existence of domestic violence specialists, however, is in no way intended to indicate that other GALs, or other members of

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[286] *See* DALTON & SCHNEIDER, *supra* note 15, at 449; *see also supra* notes 229–230 and accompanying text (discussing lack of attention to domestic violence in legal and mental health professions).

[287] Each state may have a different office or organization that is responsible for overseeing GALs.

[288] *See* Dalton, *supra* note 18, at 287 (noting that most training programs are constrained by time and are often superficial and ineffective). Simply encountering victims, batterers, or children of violent homes as a small part of a general practice or caseload is also not sufficient. *Id.* Expertise comes only through studying the dynamics of domestic violence and working specifically with victims, batterers, or children exposed to domestic violence. *Id.*

[289] *See id.* Some states have informally adopted the practice of appointing specialists as GALs in cases involving a history of domestic violence. *Id.* For example, in Massachusetts, some judges utilize the domestic violence specialists at the Child Witness to Violence Program. CUTHBERT ET AL., *supra* note 1, at 24; Dalton, *supra* note 18, at 267 n.62.

[290] In this interview it may be particularly important to screen for any inherent biases, including bias toward victims, as occasionally courts may believe experts in a certain area are biased and thus refuse to accept their recommendations. *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100.

the court system, have any less responsibility to be knowledgeable about and sensitive to domestic violence issues.[291]

Standard 5.0: Screening

1. Every court should implement a mechanism for screening contested child custody cases for the purpose of determining the existence of any history of domestic violence.
2. Regardless of whether such a mechanism is in place, guardians ad litem should also screen the parties for any history of domestic violence as part of their initial investigation.

Commentary: Screening allows for early identification of the victims and perpetrators of abuse.[292] Early identification then gives the court the opportunity to appoint a GAL or certified domestic violence specialist as early as possible in the custody litigation process, allowing time for adequate investigation and assessment of safety concerns.[293] Qualified individuals who are trained to identify abuse should conduct these screenings so that courts do not have to rely solely on pleadings or party disclosures.[294]

Subsection (2) has two goals. One is to recognize that abuse is often difficult to identify and that for many reasons, it may not be discovered through the court's initial screening process.[295] The second is to indicate that in order to conduct a complete investigation, GALs must always consider the possible existence of domestic violence.[296] Exploring these areas early will avoid such safety concerns as conduct-

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[291] *See* Dalton, *supra* note 18, at 287 (suggesting that using specialists has the drawback of allowing nonspecialists to lag behind in their professional development in that area).

[292] AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2 (2002). The American Law Institute has recommended that all courts develop a screening process to identify victims and perpetrators of domestic violence. *Id.* Dade County, Florida has already implemented such a process to screen all adults and children for abuse under the direction of Judge Cindy Lederman. Buel, *supra* note 98, at 725 n.16.

[293] *See* AAML, *supra* note 65, at 5 (recommending that appointment of a GAL take place at the earliest possible stage of the proceeding).

[294] *See* Dalton, *supra* note 18, at 283.

[295] *See id.*

[296] *See* BANCROFT & SILVERMAN, *supra* note 18, at 197; Buel, *supra* note 98, at 729. GALs need to consider the entire history of abuse in all its forms, because the absence of current incidents of violence does not mean that there is no abuse or that the family is safe. Buel, *supra* note 98, at 729. This is especially true considering that custody litigation generally occurs at the time of separation, when there is a greater chance for new or increased violence. *E.g.*, BANCROFT & SILVERMAN, *supra* note 18, at 99; Buel, *supra* note 98, at 727; Fineman, *supra* note 21, at 213; *see also* discussion of separation assault *supra* Part II.B.

ing joint interviews with the parents or inappropriately initiating mediation (see Standard 6.0).[297]

Standard 6.0: Mediation

1. In those jurisdictions where the guardian ad litem routinely conducts mediations with the parties, the guardian ad litem shall:
   a. Make a determination prior to beginning mediation as to whether domestic violence is a factor in the case; and
   b. Refrain from conducting mediation between the parties if domestic violence is a factor.

Commentary: Mediation and negotiation are generally discouraged in cases involving domestic violence.[298] If domestic violence is present, the dynamics of the parents' relationship may make it impossible to arrive at an agreement without concern that the agreement was coerced or manipulated by the batterer.[299] Jurisdictions may, however, create an exception to this rule if both parties agree to the mediation after consulting with the GAL separately and the GAL determines that each party agreed under his or her own free will.[300]

Standard 7.0: Inclusion of Domestic Violence in Report

1. Guardians ad litem shall be required to include in their reports any findings regarding the existence of domestic violence in the family.

Commentary: This guideline is only applicable in jurisdictions that expect a report from the appointed GAL.[301] The goal of this guideline is

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[297] Dalton, *supra* note 18, at 288.

[298] *E.g.*, AM. BAR ASS'N, *supra* note 100, at 15 (stating that mediation is inappropriate in cases involving domestic violence); AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100 (providing that, in cases of domestic violence, mediation is usually inadvisable); Buel, *supra* note 98, at 731 (asserting that mediation is not only inappropriate in domestic violence cases, but clearly dangerous).

[299] *See* AM. PSYCHOLOGICAL ASS'N, *supra* note 18, at 100.

[300] *See* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §§ 408(A), 408(B) (1994) (allowing referral to mediation only if three requirements are met: it is requested by the victim, it is conducted by a mediator trained in domestic violence so that the mediation promotes the safety of the victim, and attendance of a supportive person for the victim is permitted); Dalton, *supra* note 18, at 283 n.50 (noting that mediators and GALs who never interview the parties separately cannot expect the abused partner to disclose the abuse).

[301] *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1507(3)(A)(3) (West 1998 & Supp. 2003) (requiring GALs to file a written report of their findings and recommendations with the court).

to standardize the inclusion of domestic violence findings in the GAL report.[302] Since almost all jurisdictions allow consideration of domestic violence as a factor in custody proceedings, GALs should consistently include their findings on domestic violence to alert judges to the presence or absence of this important issue.[303] A second goal of this guideline is to encourage GALs to assess domestic violence and safety concerns routinely in every case. This standard additionally reinforces the idea that partner abuse could be a factor in the investigation, even if the GAL was not appointed specifically for that reason.[304] As a general rule, a GAL's report should include all relevant evidence discovered through the GAL's investigation, not just the evidence that supports the GAL's recommendations.[305]

Conclusion

Despite the many criticisms of the GAL system, GALs have become entrenched as participants in family court proceedings. They are appointed in ever increasing numbers as judges struggle to address complex child custody disputes arising from divorce and other actions. At the same time, advocates increasingly recognize that children need protection not just from direct physical and sexual abuse, but also from the emotional and psychological ramifications of exposure to domestic violence.

Since the role of the GAL is to protect the interests of children, it is a natural step to conclude that a GAL's involvement is even more important in child custody disputes that involve a history of domestic violence than in less volatile cases. Yet many GALs, especially those in states without specific guidelines, perform their work without training or expertise in domestic violence issues. A GAL who lacks understanding of and sensitivity to domestic violence can easily jeopardize the safety and well-being of adult and child victims of battering.

It does not follow, however, that the system of appointing GALs for children should be completely abolished. Such a reaction would leave children, whose interests are already vulnerable, without any

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[302] *See* Cuthbert et al., *supra* note 1, at 76 (recommending that courts develop a form for GALs that lists required elements of the report).

[303] *See* Bancroft & Silverman, *supra* note 18, at 99 (noting that judges are often forced to evaluate allegations of domestic violence without full information); Lemon, *supra* note 137, at 613.

[304] *See* sources cited *supra* note 21 (asserting that many, if not most, contested custody cases involve a history of domestic violence).

[305] Cuthbert et al., *supra* note 1, at 75.

protection in the proceedings at all. Therefore, jurisdictions that wish to utilize GALs in cases involving domestic violence should enact standards and guidelines that not only require professionalism from the GAL, but also ensure that the GAL is equipped with the knowledge and skills needed to work effectively with a family battered by the impact of domestic violence.