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Article

***106 GUARDIANS AD LITEM IN PRIVATE CUSTODY LITIGATION: THE CASE FOR
ABOLITION**

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I. Introduction

On July 17, 2000, the San Francisco Daily Journal published an editorial written by then sixteen-year-old Alanna Krause, an honor student and the daughter of a prominent and wealthy California attorney. [FN1] The essay poignantly brought a very rarely seen 'consumer's' perspective to the issue of guardians ad litem in private custody cases. She began her articulate discussion with accurate observations:

***107** Hundreds of years of legal history have lead the United States to implement a system that ensures that every party in a legal proceeding gets a voice. We rest assured that, unlike in other nations, we cannot be incarcerated, so well thought out: God Bless America.

But there is a forgotten minority that is not afforded those basic rights. They are not criminals or foreign aliens. In contrast, they are a group we hold dear- one innocent and well meaning, with no hidden agendas or twisted motives-children.

Instead of being actually represented, children get their 'best interests' represented by adults. We children have no choice and no recourse when those adults have their own agendas. A case in point? Mine. [FN2]

Ms. Krause explained that during her parents' nine year custody case in Marin County, California, she was forced to live against her will with her father, who she described as 'an abuser' against whom she herself filed over nine reports with the county child protection agency and the local police. [FN3] According to Ms. Krause, life with her father was 'Hell,' as he was a substance abuser who violently mistreated her and eventually intimidated her mother away from the expensive and frustrating litigation. [FN4] Of the attorney appointed to represent her interests, [FN5] the equivalent of her guardian ad litem in other states, Ms. Krause complained:

The lawyer appointed to represent my 'best interests' . . . ***108** spent her allotted time with me parroting my father's words, attempting to convince me that I really wanted to live with him. She ignored my reports of abuse. . . .

I wrote the judge letters, called her office and did everything I could to make myself heard. She ignored my pleas. I had no rights. I couldn't replace my lawyer with one who would speak for me nor could I speak for myself in court. I couldn't cross-examine the court evaluators or therapists and their claims were thus untouchable. I felt like I was witnessing the proceedings from the wrong side of soundproof glass. [FN6]

After she eventually ran away from her father's home at age thirteen, Ms. Krause was taken under the jurisdiction of the Los Angeles County Juvenile Court, where she was an actual party, unlike in the private custody case in Marin

County. [FN7] Following new investigations there she was returned to her mother's custody. [FN8] Her editorial plea wisely explains the context of this article:

The practice of trying to ascertain what is in a child's best interest exists because minors supposedly cannot speak for themselves. Yet, at 11, I could speak for myself. I had a mind and set of opinions, but no one seemed to care. The judge denied my right to legal representation, especially when the court-appointed lawyer wouldn't speak the truth. Granted there is no guarantee that hearing me would have inspired the judge to untwist her motives and unclench her hold on personal allegiances [FN9] and biases, but who knows? At least it would have been in the court record. [FN10]

Of course, Alanna Krause's case alone does not mandate the abolishment of guardians ad litem in private custody cases. However, the inherent systemic problems manifested in her case, *109 clearly representative of those pervasive in the nationwide use of such guardians ad litem, do establish the convincing argument that the role of guardian ad litem (GAL) must be abolished in private custody cases, i.e. litigation between parents and non-governmental parties. [FN11] This article examines the purported historical justification for the use of GALs, the plethora of criticism nationwide concerning their involvement, their poorly defined role, their particular failures in cases of child abuse and domestic violence, their unaccountability, their unjustified cost, and alternatives to their use.

II. History And Background

Most jurisdictions by statute have now provided for either mandatory or discretionary appointment of some type of legal representative for children in custody cases, with guardians ad litem who may or may not be attorneys filling the shoes in the majority of those. [FN12] The seminal case of *In re Gault* [FN13] in 1967, *110 recognizing a juvenile's constitutional right to counsel in a delinquency proceeding, generally began the push for children's attorneys. Although courts always had inherent power to make such appointments, [FN14] Wisconsin enacted the first statute requiring GALs in custody disputes in 1971 at the strong urging of its Supreme Court. [FN15] In 1972, the American Bar Association Family Law Section drafted a proposed amendment to the Uniform Marriage and Divorce Act requiring an attorney for every child in a contested custody proceeding. [FN16] Congress enacted the Child Abuse and Prevention and Treatment Act in 1974, and therein required states to give children in juvenile court dependency cases GALs. [FN17] In 1979, New Hampshire became the second state ordering the appointment of GALs in custody cases. [FN18] Now, it is estimated that more than 1,100 GALs are appointed weekly in the United States in custody cases. [FN19]

The flawed rationale for appointing these GALs in custody cases is that all parents, who are presumed competent to raise *111 their children and beyond the state's heavy hand prior to the commencement of the divorce case, are somehow automatically transformed into mere combatants inherently blind to their children's needs, and whose offspring now need the wisdom and control of some typically young lawyer, needing the fee, to avoid falling into the vortex of the litigation.[FN20]

As shown here, the road to Hell is indeed paved with good intentions and detours through the family courts.

III. First, Let's Decommision All Of The GALs

Young Alanna Krause is not alone in her concern for the realities of the GAL system. A July 20, 2001, news story echoed the apprehension:

There are no laws governing guardians ad litem, yet the legal go-betweens continue to make decisions in South Carolina's courtrooms that affect children throughout the state.

Often those decisions are to the detriment of the children, according to a task force of approximately 40 people who gathered Thursday night in Aiken County to discuss a domestic court reform movement . . .

Cases involving divorce, child custody and child support are handled by . . . guardians ad litem- who must be paid for their services. No laws or office governs them, and no training course is required . . .

[I]t is the guardian ad litem that has parents and grandparents concerned.

Many of the parents and grandparents at the meeting complained that paid guardians ad litem showed no concern for the cases they handled and made poor decisions that were not in the children's best interests. [\[FN21\]](#)

State oversight committees have formed in response to such expressions of public concerns.

***112** On June 28, 2001, Chief Justice Thomas Moyer of the Ohio Supreme Court appointed a thirteen member task force to develop statewide standards for GALs, including qualifications, fees, training, and scope of responsibilities. [\[FN22\]](#) The Wisconsin Joint Legislative Council began addressing the problem in a special committee on guardians ad litem in 2000. At the September 13, 2000 Council meeting, several important problems were noted. [\[FN23\]](#) If the GALs were to be paid by the parties, they would only accept cases with wealthy parents, since such cases were bankrupting the parent or parents. [\[FN24\]](#) Also, GALs were often described as biased, untrained, and free to express a child's wishes without being subject to cross-examination. [\[FN25\]](#)

Minnesota's Office of the Legislative Auditor, Program Evaluation Division, on February 28, 1995, published a report on that state's guardian ad litem program. [\[FN26\]](#) The findings were consistent with the experiences in other states:

Many concerns have been raised about the use of guardians ad litem. Most complaints have centered on guardian actions in family court cases, primarily in contested divorce actions. Complaints have focused on guardian bias, lack of oversight and accountability, inadequate training, and inappropriate communications between guardians and judges. Parents have also complained that there is no relief if they have a problem with a guardian.

* * *

[T]he guardians are not effective. Judges differ in how they use guardians ad litem. In some cases, guardians simply gather information and present recommendations to the court. In other cases, guardians may act as custody evaluators, or visitation expeditors. [\[FN27\]](#) Judges, court ***113** administrators, and guardians do not always agree on what constitutes the guardians' responsibilities. Judges also differ in their expectations of guardians for communicating and reporting. People told us the multiplicity of the guardian roles can be confusing, especially to parents who may not always understand why guardians were appointed. [\[FN28\]](#)

The Minnesota report recommended sweeping changes in role definition, training, caseload size, supervision, and accountability. [\[FN29\]](#) Nonetheless, Minnesota courts remain unconvinced as recently as December 18, 2001. In *In re Marriage of Smith*, the trial court appointed a GAL to conduct a 'preliminary investigation into the appropriate visitation arrangements' with the father after the mother was awarded temporary custody. [\[FN30\]](#) Unsatisfied with such a limited role, the GAL wrote a full blown 'custody report' recommending custody to the father and issued it only six days before trial. [\[FN31\]](#) However, a study by the county social services department found the mother to be the better custodian. Although a statute [\[FN32\]](#) defines the GAL's duties broadly, the specific order appointing the GAL in this case under the controlling court rules limited her role to the visitation question. [\[FN33\]](#)

The appellate court was not willing to read the relevant statute to restrict the GAL's 'traditional role' and held that nothing in the statute precludes a 'guardian from 'unilaterally choosing to investigate all the circumstances of a case and reporting to the court.'" [\[FN34\]](#) The court's justification for affirming the trial court's award to the father illustrates two common aspects of GAL cases. First, the opinion notes that the trial court ***114** gave 'considerable weight to the guardian ad litem's report.' [\[FN35\]](#) However, there is no rationalization for the value ascribed to the guardian's position. Next, the court found that the GAL's report 'mirrored the evidence at trial.' [\[FN36\]](#) The interplay between 'evidence' and the 'GAL report' is circular. If the evidence supports the decision below, why bother with the

GAL's ideas about the situation? Why have a GAL? Lacking is any admission of the unfairness and due process problems caused by the GAL's actions. As frequently happens, the GAL compromised and confounded the orderly fact-finding judicial process.

The Massachusetts Senate Committee on Post Audit and Oversight published a report in March 2001, essentially condemning the GAL system. [FN37] Finding system-wide deficiencies in guidelines, standards, training, role definition, accountability, and investigations, the report found that GALs frequently and actively cause children to be left unprotected from documented physical abuse, sexual molestation, and domestic violence. [FN38] In March 1999, the National Council of Juvenile and Family Court Judges, in cooperation with the Violence Against Women Office of the United States Department of Justice, convened a task force to identify and discuss the complicated issues surrounding the overlap between domestic violence and child custody cases. The group's final report observed that the current GAL system often works against battered women and their children, and thus recommended that GALs be prohibited from making recommendations about custody and visitation. [FN39] Decision making should not be their role, the report emphasized. [FN40] In other words, do not allow GALs to be GALs.

Criticism has been expressed in Washington state as well. One article in the Washington State Bar News cogently defines the universal dilemma:

While most people have strongly held opinions about GALs, *115 most people admit that they do not have a clear understanding of what one is. GALs are referred to as 'investigators,' 'expert witnesses,' 'lawyers,' 'lay advocates for the incompetent child's best interests,' 'mediators,' 'negotiators,' 'supervisors,' 'monitors,' 'friends or advisors to the court,' 'eyes and ears or arms of the court,' 'recommenders,' 'fact finders,' and 'de facto decision makers.' Sometimes all are rolled into one figure. Many of us (lawyers, commissioners, and judges) have sounded as if we were talking in circles when we tried to explain what a GAL is. [FN41]

Guardians ad litem must be abolished in private custody cases for well-established reasons: [FN42] 1) the role is not subject to definition in any way consistent with appropriate judicial proceedings; 2) there is no documented benefit from their use [FN43]; 3) they undermine and compromise fact finding by usurping the role of the judge and depriving parents of due process; 4) they *116 undermine parental authority and privacy; 5) the costs and fees resulting from their use ultimately deprives parents and children of resources that would actually benefit the child; 6) in child abuse and domestic violence cases, they routinely advocate against the child's safety and protection and directly contravene the child's interests; and, 7) they are unaccountable for their actions.

IV. The Role Of The Guardian Ad Litem: I'll Know It When I Do It . . . Maybe

It should be sufficiently alarming to a legal system cast with life altering decisions power that the role of the guardian ad litem, one of its sacred cows, is apparently more elusive than is the definition of 'best interest'. Yet, there is something so appealing for altruistic attorneys who want to 'help children' that they will wade into the slough despite the known conflicts and confusions, and the unknown dangers. A recent law review student note could not put the allure better:

Representing a child whose parents are in the midst of an acrimonious divorce litigation is always a daunting task for an attorney. Add to the mix a heated custody dispute, confusion over whether you are supposed to advocate for your client's wishes or what you think are her best interests, and a client who is unable to articulate particular reasons for wanting to live with one parent over the other, and your initial response is probably to head for the nearest exit. But, as the sole advocate for this child whose family is collapsing around her, you will want to ensure that her voice is heard, that her interests are protected, and whatever the outcome, her welfare was adequately taken into account. [FN44]

What about facts? What about evidence? How can the vague *117 and ambiguous role be so quickly overlooked? What qualifies this attorney to make decisions for this child? Why should it matter 'what you think are her best interests?' On what basis should the judge listen to you and your 'thoughts?' How can it be assumed that your thoughts ensure that her interests are protected and her welfare is adequately taken into account? Is it not obvious that the uncertainty of the role and your thoughts might actually result in the child's voice being silenced? Should you not be extremely frightened that the judge might listen to you simply because you are cloaked in the mighty cape of the GAL? The student author of this cited note at first glance agrees that these are important questions:

One objection to the lawyer as the child representative is that his role in custody proceedings is superfluous. Indeed, the lawyer serves no function beyond that which the parents' lawyers or family court judges already provide. This view is untenable in practice however, as the judge's considerable caseload and overburdened calendar require that she resolve her cases quickly, leaving little time for careful consideration of all relevant facts and concerns. And to force the parents' lawyers to consider not only the wishes of their clients, but also the needs and interests of their clients' children, would immerse them into a morass of conflicting loyalties that may prevent them from providing full and adequate representation to any of the parties involved. [\[FN45\]](#)

However, this analysis is flawed in several ways. First, it would be more consistent with the role of the court, given the goal of improved decision making, to lighten the judicial caseload by adding more judges than to punt the job to an unaccountable attorney who 'thinks' something is in the best interest for this particular child. Next, there is absolutely no basis for the presumption that neither parent in a custody litigation is advocating for the child's best interest. Nature has indeed arranged it so that most parents do, in fact, have more invested in the child's welfare than the guardian ad litem du jour.

In the most ambitious attempt yet to grapple with the plethora of flaws inherent in using guardians ad litem in private custody suits, the American Bar Association's Family Law Section seems ready to concede:

***118** Unfortunately, few jurisdictions currently have clear standards to tell parents and lawyers when or why an independent representative for a child should be appointed or precisely what the representative should do. All too often, appointments are made without necessary guidance to ensure that the representative's duties are defined and fulfilled satisfactorily.

Partly because of this lack of clarity and definition, too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or the representatives themselves understand children's representatives' roles, duties and powers. Judges and representatives have been targets of litigant's resentments, public criticism, and even pro se legal actions. Meanwhile, children's court appointed representatives have struggled with the very real contradiction between this perceived role as lawyer, protector, investigator, and substitute judge.

* * *

As for the role of Guardian ad litem specifically, these standards do not purport to resolve or eliminate all of the inherent theoretical and practical contradictions that arise from such appointments nor to provide a complete substitute code of ethics for them; but, they do impose substantial requirements for qualify control, professionalism, clarity, certainty, uniformity, and predictability in how individual Guardians ad litem, judges and court systems will act. [\[FN46\]](#)

The recent judges' manual published by the American Bar Association in conjunction with the State Justice Institute professes the importance of appointing attorneys for children in custody cases, but nonetheless advises:

Depending on the individual state statute, a judge may have the discretion to appoint only an attorney, an attorney and a non-attorney GAL, or an attorney GAL. State statutes usually do not clearly define the role of the child's ***119** representative. Many indicate that this individual will represent the child's 'interests' and do not clarify whether these 'interests' encompass the child's preference, his or her best interest, or both. [\[FN47\]](#)

It is certainly reasonable to conclude, therefore, that after two decades of experience and experimentation without substantial progress in solving the most basic problem of role definition, the GAL's place in custody cases should be extinguished.

The elusive role issue is not merely a curious topic for academic comment. Unfortunately, most courts believe that the GAL's role is crisp, yet refer to it in general and vague platitudes. Worse, though, is that most courts, usually with statutory encouragement, ascribe to the GAL and his or her opinion a level of competence, validity, wisdom, credibility, and objectivity richly undeserved. To the contrary, such judicial and legislative fawning is outright dangerous and fosters an illusion of the child's protection. The rather bizarre extent to which courts will enshrine the GAL's mantle of the 'child's best interest' is illustrated in *In re Rosa L.C.*, [\[FN48\]](#) a juvenile court termination of parental rights case. Wisconsin, unlike most states, allows a jury trial in this situation. [\[FN49\]](#) The father who permanently lost his parental rights in the case assigned as error the trial court's introduction of the GAL for the child to the jury as the individual responsible for representing the best interests of the child. [\[FN50\]](#) Although the

trial judge had admitted on the record that he probably erred in making the statement to the jury, the appellate court held to the contrary that such an introduction was 'both informative and desirable' since the characterization accurately tracked the statute creating GALs. [FN51] A jury hearing a judge *120 pronounce from the bench that one particular attorney is representing the child's best interests is likely to give the GAL's position undue consideration and importance, as it is unlikely that a jury would want to do anything that is not in the best interest of the child. The evidence and the facts may become secondary to 'doing right by the child.' In a criminal context, no court would sanction an instruction to the jury that the District Attorney's role is to represent the 'truth' or that the defense attorney's job is to represent the 'defendant's freedom.' However, this case is a valid analogy.

It is common for courts to 'clarify' a general pronouncement of a purportedly concrete role for the GAL with inherently confusing or contradictory explanations. For example, in *Fernando v. Nieswandt*, [FN52] a Washington appellate court believed that it could explain the GAL's job:

A guardian ad litem is not appointed as an 'expert.' Rather, she is appointed to investigate the child and family situation for the court and make recommendations. In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a common sense impression to the court. [FN53]

One could reasonably argue that this sentence alone is one of the strongest pieces of evidence that no such creature should be allowed anywhere near a courtroom, where due process, the rules of evidence and facts are supposed to rule the day.

Another example is more elaborate. In *Perez v. Perez*, [FN54] the Florida Court of Appeal initially proclaimed that the 'universally recognized' function of a guardian ad litem in a custody dispute is to protect the best interests of children. [FN55] Lest any GAL be still uncertain what she is supposed to do under that 'universally recognized' mandate, the court elaborated:

Litigation involving custody issues can be particularly acrimonious and, unfortunately, children are particularly *121 vulnerable to the harms commonly associated with hostility and conflict between parents. Guardians ad litem serve an important role under limited circumstances, by acting as representatives of children and promoting society's interest in protecting children from the traumas associated with divorce and custody disputes. [FN56]

However, the court flatly rejected the GAL's desire to participate in the appeal, because the GAL would then improperly become an 'advocate.' [FN57] Despite the fact that the specific Florida statute providing for such GALs states that he 'shall be a party to any judicial proceeding', [FN58] the court interpreted that to mean only in the trial court, invoking 'common sense.' [FN59]

The *Perez* court described the GAL as a 'fact investigator' prohibited from calling or questioning witnesses. [FN60] Given that the court expected the GALs to be 'representatives of children,' [FN61] surprisingly, the court was 'disturbed' that the GAL retained an attorney to represent the GAL 'on behalf of the children.' [FN62]

Citing the controlling statute, [FN63] the court limited the GAL's role to 'act as next friend of the child, investigator or evaluator, not as attorney or advocate.' [FN64] In a final futile effort to eliminate any and all possible remaining confusion, the court summarized:

In conclusion, there is no authority for a Guardian, or an attorney purportedly representing a Guardian, to submit motions or a brief in a child custody appeal. Guardians render an important service to the courts of this state, and we recognize that the lines separating the functions of an attorney or Guardian and an attorney as advocate, can become easily blurred. We hope the line has now become more distinct. [FN65] *122 There is more, though. The court in a footnote then, despite the labored discourse on the absolute impropriety of the GAL's attempt to file a brief and an order to 'prohibit further involvement of the Guardian in these appellate proceedings,' [FN66] allowed the GAL to file an amicus brief. [FN67]

Not satisfied with the majority's job of navigating the maze, Judge Sorondo wrote a concurring opinion. [FN68] He attempted to refine the majority's demarcation between an attorney/advocate and an attorney/GAL:

In short, the guardian's role is to discover, analyze, and communicate facts to the judge which will assist the trial court in the performance of its duty to determine the best interest of children in divorce proceedings. The role of advocate for

the child, the legislature has reserved for counsel, which the court can appoint if it considers appropriate and necessary. [FN69]

Judge Sorondo was compelled to expand on the majority's analysis that the GAL could not as a 'non-party' participate in the appeal by filing a brief, other than an amicus brief, [FN70] by citing a statute which allows the GAL to file pleadings, but only through counsel. [FN71] His attempt to reconcile the majority's 'disturbance' with the GAL retaining counsel to file a brief in this case [FN72] and that statute did not lay, by any means, all debate to rest.

Perhaps the most important observation, amid all of the contortive efforts to resolve the great question of the GAL's place, is indeed found in the concurrence. The guardian's position is declared superfluous. [FN73] The GAL agreed with the father's position, and of course, as these cases circularly go, the father *123 'relied heavily on the recommendation of the guardian.' [FN74] Nowhere is there any suggestion that the GAL 'discussed, analyzed, or communicated to the judge' any facts which the father or mother could not or did not. Despite all of the analytical contortions to explain what the GAL could or could not do, the opinion makes no case for the GAL's necessity or significance. While the court chided the GAL for increasing the costs of the litigation to the parents by hiring a separate attorney to represent herself, [FN75] there is no mention of the increased expense created by the GAL's mere presence.

Although there is an apparent bright academic distinction between a GAL and an attorney actually representing the child personally, [FN76] courts still struggle with the difference and the correct response to the varying roles. In *Schult v. Schult*, [FN77] the court considered whether an attorney actually representing a child in a private custody case could advocate a position contrary to that of the child's GAL. A basic understanding of the difference in the roles and the fact that there were appointments for each role should point to an obvious affirmative answer. Yet, the court held that the two positions could diverge because it was in the child's best interest to allow the two arguments to be heard. [FN78] The child's attorney, over the objection of the GAL, was allowed to call witnesses and conduct direct and cross examination, as attorneys are prone to do. [FN79] The GAL, exhibiting an arrogance unfortunately common with the job, asserted that the child's attorney should be limited to asking questions the GAL prepared. [FN80] The GAL, unlike the child's attorney, was called as a witness by the mother and testified that the mother should be granted custody. [FN81] The only other witness supporting the *124 GAL's position was the mother. [FN82]

This case is important in several respects, and, unfortunately, represents the obstruction and vexation created by GALs under the guise of benefiting children. In *Schult*, the GAL forcefully argued that the child's attorney prevented a 'fair trial' by daring to disagree with her. [FN83] The GAL's rather absurd legal logic was that the child's attorney must actually represent the GAL since she is appointed to decide what is best for the child. [FN84] Unfortunately, this case depicts a far too common situation where the GAL argues for the child's placement in an abusive home. Here, the trial court found that this three year old developmentally delayed boy suffered a broken leg at the hands of the mother's fiancé and then conspired with her to cover up the abuse. [FN85] Sole custody of the child was granted to his grandmother. [FN86] Although this result was that advocated by the child's attorney, more importantly that was the disposition mandated by the evidence. The opinion does not discuss the purported factual basis for the GAL's posture, though it is not uncommon for such to be non-existent in the 'Kafkaesque' world of the GAL.

The Connecticut Supreme Court's opinion in *Schult* falls short in two major respects. First, the court missed an excellent opportunity to criticize and challenge the actions of this particular GAL under the presented facts, and to then explore the significance of this situation in the context of the general use of GALs in custody cases. Next, the court unwittingly perpetuated the problem by allowing the trial court to neuter the possible counter-protection afforded a child by the appointment of a separate attorney independent of the GAL. In reasoning extremely difficult to reconcile with due process and the basic function of an attorney in the courtroom, the court held:

[W]e conclude that where a court has appointed both an attorney and a guardian ad litem to represent a child in a dissolution action, the attorney for the child may advocate a position different from that of the guardian ad litem so long as the trial court determines that it is in the best interest of *125 the child to permit such dual, conflicting advocacy. [FN87]

How can any appellate court actually hold that the trial court can throttle simple argument because the expression of

the argument itself is not in the child's best interest? On what criteria could such a determination ever be made? Indeed, those are extremely dangerous threats to a legal system in whose hands society's children are entrusted.

Similar questions have arisen in Texas. In *Samara v. Samara*, the trial judge appointed both a non-lawyer GAL and an attorney ad litem for the children. [FN88] On the GAL's motion, an attorney for the GAL was then appointed. [FN89] The father was assessed the GAL's attorneys fees and appealed. [FN90] Although Texas statutes state that both guardians ad litem and attorneys ad litem are to address respectively the 'best interests of the child' and the 'interests of the child,' [FN91] the court found no authority for an attorney to be appointed to represent the GAL. [FN92] The court's solution, though, is dizzying:

If [the GAL] needed legal advice to protect the children's interests, she should have consulted . . . the attorney ad litem. If dissatisfied with [the attorney ad litem], [the GAL] should have requested a different attorney ad litem or resigned and requested the judge to appoint an attorney as guardian ad litem. [FN93]

Again, the opinion omits discussion of any possible benefits to be derived from this bumper crop of legal minds, or how the case may have turned out substantively different without its own mini bar association.

The Wyoming Supreme Court was completely bewildered in explaining the GAL's role in *Clark v. Alexander*. [FN94] In that case, a mother who lost custody of her child to the father appealed *126 assigning as error the attorney GAL's authorization for the father to tape record the children's calls with their mother and the allowance of the GAL's testimony. [FN95] The tapes were admitted into evidence through the testimony of the GAL, who believed that she could give the children's consent to the taping and thus circumvent the state's wiretapping statute. [FN96] In setting out to address the issues presented, the court analysis is steeped in frustration:

The role of the attorney/guardian ad litem during the proceeding is central to the disposition of the case. Mother claims that because the guardian ad litem actively participated as the children's attorney, it was improper to allow her to testify at the modification hearing . . .

. . . However, '[t]he definition of the precise roles of the attorney and the guardian ad litem is still evolving and not without difficulty . . .' In Wyoming, the role of an attorney or guardian ad litem in custody cases is not addressed by statute, and like many jurisdictions, case law has failed to clearly delineate the parameters incumbent upon appointment. Moreover, the juxtaposition of the separate roles of attorney and guardian ad litem into one 'attorney/guardian ad litem,' appears especially problematic. . . Given the lack of clear direction provided to those who must fulfill this role in Wyoming, and our certainty that the issues in this case will reappear in the future, we speak to these issues here. In providing guidance to the role of an attorney to represent a child while at the same time acting as a guardian ad litem, we do not intend to usurp the role of the district court in appointing individuals to act solely as attorney or as guardian ad litem. It is imperative, however, that the appointee request clarification from the appointing court if questions regarding the duties arise. [FN97]

The court was correct in bifurcating the attorney/guardian ad litem roles. Yet, the court was still lost in its discussion of what exactly the GAL is:

Our decision here does not address many areas of chronic *127 confusion in the appointment of a guardian ad litem, e.g. when an appointment is necessary, the necessary qualifications to serve as guardian ad litem, and the timeliness of the court's communication of the specific duties expected by the court. In recognition of the need for clarification and the lack of uniformity throughout the state, we urge our courts, legislators, professionals and concerned citizens to undertake a consolidated effort to address the appointment of counsel and guardians ad litem for Wyoming's children. [FN98]

The court then embarked on a review of the literature and caselaw nationwide, [FN99] and wondered if the GAL in Wyoming was 'an investigator, monitor, and champion' [FN100] for the child; 'an agent or arm of the court'; and/or an overseer of the progress of the proceedings involving the child. [FN101] The Wyoming enabling statute presented the court with a particular problem, since it combines the role of attorney for the child with the GAL's role, if no separate GAL is appointed. [FN102] After finding intractable and troubling conflicts inherent in the statutory scheme for GALs, the court ultimately settled on two points which could be articulated into a holding: 1) the attorney/GAL cannot be a fact witness at a custody hearing so that his credibility is not at issue, but 2) the GAL's recommendations can be made in closing arguments. [FN103] The court then ruled that the testimony of the GAL was improperly admitted into evidence, as were the telephone tapes *128 admitted through the GAL. [FN104] In the

court's next challenge, the trial court's ruling had to be reviewed while paring the inadmissible evidence generated by the GAL from the rest of the trial judge's reasons for awarding the father custody. Unfortunately, the court's analysis leaves the reader with the sense that the GAL has carried the day, despite the ethical and evidentiary lapses she brought to bear:

What is more difficult to assess is whether the lay opinion testimony of the guardian ad litem on the ultimate issues in the case was enhanced in the eyes of the district judge because she had served as an advocate for the children's best interests. Indeed, the district judge specifically found that the testimony of the guardian ad litem in every instance, was more credible than that of the Mother. Our review is further complicated by the fact that the tapes conversations, evidence which the district judge found 'shocking,' were admitted though this witness . [footnote omitted]

After careful review of the record, and eliminating from consideration the opinions of the guardian ad litem and the contents of the tape recordings, we find that the record clearly supports the district court's determination that the best interests of the children were served by the Father's continuing custody. [\[FN105\]](#)

The evidence cited by the appellate court to uphold the trial judge's ruling is relatively lame, compared to the bombshell impact ascribed to the extracted contributions of the GAL: the mother's coping problems with the eldest child, the mother's 'refusal to credit father's cooperation in scheduling visitations,' the father allowed the children to contact the mother, the children appeared to be happy with the father. [\[FN106\]](#) However, it is impossible to discern how much of the mother's credibility was damaged by the GAL's opinion of her, since her credibility would factor into the judge's findings on these other issues. In effect, it would seem unlikely that any realistic efforts can be made to un-ring the bell the GAL rang. The end result is that even when the GAL is roped into bounds, she still prevails.

In its careful efforts to resolve the myriad difficulties *129 identified with using GALs, the Wyoming Supreme Court unwittingly unleashed a new virus into the GAL environment. In Clark, the GAL was cross-examined, although the appellate court ruled that she should not have been allowed to testify at all. [\[FN107\]](#) Instead of testimony which puts the GAL's credibility at issue, the court ruled that the GAL could present her recommendation in closing argument. [\[FN108\]](#) However, it is a far stronger safeguard to allow GAL testimony and cross examination than to allow unbridled pontificating at the close. It is extremely naïve to believe that the GAL's credibility should not be subjected to rigorous scrutiny, giving the tremendous power she wields in custody cases. While the Clark court bars the GAL from serving as a fact witness, her role as an un-cross-examined, un-qualified expert witness appears intact. For this reason, the Court of Appeals of Missouri recently held in Dickerson v. Dickerson that no such unsworn statements and recommendations from a GAL would be allowed. [\[FN109\]](#) Once again, taking the Clark opinion at face value, the GAL was superfluous [\[FN110\]](#) because her input was not shown to be necessary.

The South Carolina Court of Appeals tackled the GAL in Shainwald v. Shainwald. [\[FN111\]](#) A mother who lost custody argued on appeal that the trial court had placed too much weight on the GAL's written report. [\[FN112\]](#) Due process appeared under assault early on when the trial judge instructed the GAL, ' I think it would work best that you give us your recommendation . . . and then you can follow up with a written report and put it in the record. ' [\[FN113\]](#) In her written report, the GAL opined in the typical speculative, vague, and fact-poor 'thoughts' upon which courts nationwide are eager to rest their decisions: 'I think based on what I know so far, I think the children would be well placed with their father only because of the issue of access. I think he would *130 guarantee access to the mother.' [\[FN114\]](#)

The opinion discusses additional aspects of the GAL's written report:

In her report, the guardian ad litem found there had been considerable 'difficulty arranging and effecting visitation between the children and their father because the mother has exercised undue control which has limited the children's opportunities for a positive relationship with the father.' She also found if the mother obtained custody, she might leave the Charleston area to reside in Spartanburg. This finding was apparently based on the observation the children and mother spent a great deal of time in Spartanburg. [\[FN115\]](#)

It is especially distressing that such conjecture rises to the level of 'findings,' which suggests that indeed the GAL is operating as a de facto judge. This problem was not lost on the appellant mother:

The mother interprets the court's direction to the guardian ad litem as a statement that there would be no written report. [\[FN116\]](#) She contends the 'report was inadequately based . . . internally unclear, and makes no real analysis of the situation.' The mother also contends the order of the court in its dispositive parts is almost an exact copy of the written

report and depends heavily on the report. She also argues guardians ad litem should be precluded from making custody recommendations to the courts. [\[FN117\]](#)

Acknowledging the modicum of merit in the mother's concerns, as is common when courts wish to fix the GAL problem, more pitfalls are created:

There is a dearth of caselaw in this state regarding the proper role of a guardian ad litem report in a custody case . . . We recognize the concern of the mother that a family court may give undue weight to the recommendations contained in the guardian ad litem's report. However, we do not think such concern should annul the long practice in this state of *131 permitting guardians ad litem to make written reports to the court as long as the parties' right to confrontation are protected. As stated in [a prior decision] this may be accomplished by affording to the parties the right of cross-examination of the guardian ad litem and all other persons the guardian may have talked to whose testimony formed the basis of his recommendations. [footnote omitted]

We reject the mother's somewhat novel argument that guardians ad litem should be precluded altogether from giving opinions regarding custody. We think much of the criticism of guardians ad litem stems from the failure of the bar to recognize the proper function of a guardian ad litem. A guardian ad litem is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person . . .

The requirement that the children have independent legal representation does not in any way suggest that the parents or the trial court were unmindful of the children's welfare. Rather, it reflects the conviction that the children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. Properly understood, therefore, the guardian ad litem does not usurp the judge's function; he aids it . . . [footnoted omitted]

We hold the extent to which a guardian ad litem is permitted to testify and give an opinion or recommendation in a child custody case is left to the sound discretion of the trial judge. However, judges should be mindful of the duty of the guardian ad litem to advocate and fully protect the interests of his ward. Any exercise of discretion by the court which unreasonably interferes with the performance of that duty amounts to an abuse of discretion. [\[FN118\]](#)

Nonetheless, the decision was affirmed. [\[FN119\]](#) The mother's argument was discounted because even though the trial court parroted much of the GAL's report, the father testified to many of the same issues and the trial judge relied on findings *132 unmentioned in the GAL's report. [\[FN120\]](#) In justifying its affirming of the ruling below, the appellate court did not realize that it illustrated that no guardian ad litem was needed in the first place. If the decision was based on grounds that the GAL failed to raise and the father provided the same evidence as did the GAL, her role was completely superfluous. Unfortunately, though, rather than observe this paradox, by leaving to the court's discretion the question of permitting the GAL to render ultimate recommendations and by warning the state's trial judges to go lightly on the reins, enormous flaws in the system are blessed and encouraged. In the same breath, while itself falsely equating GAL activity with independent legal representation of the child, the court just cannot understand why the bar does not comprehend the GAL's place in these cases. [\[FN121\]](#) It is no surprise that nearly a decade later, in *Shirley v. Shirley*, the same court is still bemoaning that the bar simply does not understand what the judges, but no one else, believe to be so clear- the role of GAL's in custody cases. [\[FN122\]](#)

The GAL's written report was the primary issue in *Gilbert v. Gilbert*, a case that richly demonstrates the abundant flaws in GAL use, and an alleged hard drinking, child abusing father's successful manipulation of those defects to his advantage. [\[FN123\]](#) There, in an earlier hearing on temporary matters, the parents' attorneys stipulated, for apparently the sake of expedience over the interests of their clients, that the yet unwritten report could be entered into evidence. [\[FN124\]](#) At the final trial, the court admitted the finished report over the mother's objection and, following the GAL's recommendation, awarded the ten-year-old son to the father. [\[FN125\]](#) The court reversed and remanded because the GAL's report was improperly admitted into evidence. [\[FN126\]](#)

The decision reflects a different, but equally confused, role of the GAL in Vermont 'to minimize the harm suffered by the child during the breakup of the family rather than to assist the attorney and the child in making choices that parties must make *133 in our adversarial system.' [\[FN127\]](#) Nevertheless, the GAL 'shall not testify, unless the testimony is 'directly probative of the child's best interest, and no other persons could be employed or subpoenaed to testify on the same subject matter.' [\[FN128\]](#) A potential domino effect is also created, because if the GAL testifies, the court may appoint a new GAL. [\[FN129\]](#) While describing the GAL's purpose as presenting a neutral party's view

of the child's best interest, the court cited the state's legal system gender bias study which colored GALs as prejudiced loose cannons carrying tremendous influence in the judges' minds. [\[FN130\]](#)

The contrast between the majority and dissenting opinions' approaches to the GAL is as fine as example of the rudimentary conflict as is found in the caselaw. The dissent suggested that parents should agree to the submission of the report before the pen hits the paper, [\[FN131\]](#) and regretted that without those trusty GAL reports, 'the family court [is left] with nothing to rely on in making custody determinations except the partisan presentation of the parties, who unfortunately are too often interested in getting their way than fostering their children's best interests.' [\[FN132\]](#) Many judges do strongly believe that a mother who asserts that a young child should be in her custody instead of living with a violent inebriate is only interested in 'winning' and not in what is best for her child. Evidence of the veracity of her complaint attracts no interest in those courtrooms, unlike the idolized opinion of the GAL. Unfortunately, these judicial notions seem incurable and fostered by 'co- dependent' GALs.

One confused Delaware attorney appointed as a GAL requested an advisory opinion from the Delaware State Bar Association's Commission on Professional Ethics as to whether he could act as a GAL and still be an ethical attorney. [\[FN133\]](#) While ***134** recognizing that the role carries 'potential ambiguity' the committee found that the attorney could ethically serve as a GAL, because he actually 'serves as counsel for the guardian ad litem.' [\[FN134\]](#) The committee was, however, troubled that the GAL's role would cause him to violate Rule 3.7 of the Rules of Professional Responsibility prohibiting an attorney from acting as a witness, so two solutions were tendered. [\[FN135\]](#) The GAL could withdraw, or the Delaware Supreme Court should take the committee's recommendation that Rule 3.7 be amended to exempt GALs.

Much of the criticism aimed at GALs points to inadequate training. In Illinois, however, the training perpetuates the problem. In October 2000, the Illinois Institute for Continuing Legal Education attempted to mold that state's champions for children. [\[FN136\]](#) The good news is that a manual was presented to all participants. The not-so-good news is the information contained inside:

The GAL does not act as an independent advocate but acts under the control and direction of the court. Once appointed, the GAL is charged with defending the interest of the minor. . . .Unlike the [attorney for the child], however, the GAL may testify, present a report to the court concerning what is in the best interest of the child, and offer an in-court personal opinion not based on the evidence. [\[FN137\]](#)

That the Illinois bench and bar, like those in most states, apparently embrace a juridical player with license to unabashedly affect the lives of children through 'personal opinion not based on the evidence' - it merits repeating - bears potent witness to the catalepsy wrought by GAL adulation.

Fortunately, at least Pennsylvania has seen the light and declared this judicial culture of GAL veneration 'egregious.' [\[FN138\]](#) In *C.W. v. K.A.W.*, the trial court appointed an 'experienced custody attorney' to serve as GAL because of the 'lack of communication' ***135** between the parents and their 'extreme hostility.' [\[FN139\]](#) In denouncing the appointment of the GAL and reversing the judgment reflecting the GAL's position, the appellate court rested on several important points: 1) even parents bitter toward each other are focused on the child's best interest in custody litigation; [\[FN140\]](#) 2) the trial judge essentially abdicated his role to the GAL, which the court deemed a 'gross' abuse of discretion; [\[FN141\]](#) and 3) the trial judge's role is to determine the best interests of the child based on the evidence presented. [\[FN142\]](#) In refreshing logic consistent with the way courts are expected to function, Pennsylvania has derailed the runaway GAL train.

V. Enablers Ad Litem: Child Abuse and Domestic Violence Cases

One of the great paradoxes in the nation's family courts is the role of the guardian ad litem in custody cases involving domestic violence and child abuse. On one hand, the appointment of a GAL in an ordinary situation where the child is not subject to potential harm from such dangers at worse can simply raise the expenses of the parents, increase the arbitrariness [\[FN143\]](#) already inherent in deciding the amorphous best interest issues, and compromise due process. However, in domestic violence and abuse cases, where courts are even more eager to appoint GALs, [\[FN144\]](#) children are frequently ending up in ***136** the custody of the abusers and separated from their protecting

parents. This tragedy does not happen in spite of the GALs, but rather because of the GALs. Professionals across the country are appalled that the GALs are actively and forcefully advocating for the children whose interest they are mandated to protect to be placed with violent child abusers and sexual molesters. [\[FN145\]](#)

One of the most perplexing failures in family court custody litigation is the lack of protection and support for women and children fleeing violent homes, despite the abundant legal and societal demand for abused women to leave their abusers and protect their children. [\[FN146\]](#) This 'damned if you do, damned if you don't' dilemma causes battered women to risk losing custody in juvenile court for neglect if they stay in the violent home, and to also risk losing custody in family court if they leave and insist on the child's protection. The primary reason for this calamity is the clash between the pervasive statutory emphasis on the parent who will encourage the child's relationship with the other parent, and the domestic violence law [\[FN147\]](#) and policy that supports parents who insist on proper protection and the separation of the abusive parent and the child. A landmark American Psychological Association report summarizes the situation:

*137 [Child] custody and visitation disputes appear to occur more frequently when there is a history of domestic violence. Family courts often do not consider the history of violence between the parents in making custody and visitation decisions. In this context, the non-violent parent may be at a disadvantage, and behavior that would seem reasonable as a protection from abuse may be misinterpreted as a sign of instability. [\[FN148\]](#)

The custodial preference for the parent who encourages the child's relationships with the other parent, often referred to as the 'friendly parent,' typically trumps the mother and child's protection despite the fact that such 'friendliness' is contraindicated. [\[FN149\]](#)

Since GALs are usually plucked from the family court bar, they bring these same misguided principles to bear on the cases. Any attempt to claim, despite the abundant proof of the reality of the situation, that a father is dangerous is simply dumped into *138 the category of 'conflict' [\[FN150\]](#) - the ultimate anathema in the eyes of the family court judge. In a study undertaken by the National Council of Juvenile and Family Court Judges, GALs were identified as a major problem:

Participants [in the study] noted that custody evaluators and guardians ad litem were the professionals least trained about domestic violence of any actors in the civil justice system Evaluators and guardians are heavily influenced by the social and legal policies that facilitate contact with the noncustodial parent with regard to the risks attendant upon contact or relationship. They, like mediators, are not guided much by law as by their training and predilections about appropriate post-separation custodial arrangements. Many appear to marginalize domestic violence as a factor with significant import for abused adults and children in custodial outcomes. [\[FN151\]](#)

Consequently, the question of whether or not brutal domestic violence or heinous child abuse occurred - a fact subject to proof as any other fact in a civil or custody case - is forgotten, ignored, or completely subjugated to the overriding concern preoccupying *139 the judge and the GAL: Does Mommy say nice things about Daddy and does she encourage the relationship between the two? [\[FN152\]](#) The maiming of the fact-finding process by the GALs circumvents the statutes now found in 48 jurisdictions that either prohibit batterers from obtaining custody or require courts to consider family violence as a custody factor. [\[FN153\]](#)

Family courts throughout the United States, with the help of guardians ad litem, are likewise placing sexually abused children with parents who molested them. This outrageous trend is primarily the product of two developments. [\[FN154\]](#) First, there is widespread - but absolutely false - assumption that a sexual abuse allegation made in the context of a divorce or custody case is likely to be false. The 1996 American Psychological Association's Family Violence Report explains that reports of child abuse and child sexual abuse are commonly discounted when made during a custody dispute, but that to the contrary 'research shows that such charges are as reliable during custody disputes as at other times.' [\[FN155\]](#) One groundbreaking treatise explains the forces bent on disbelieving the child abuse victim and on punishing the mother:

There even appears to be a danger that some parents, particularly mothers, may automatically be regarded as paranoid, hysterical, or perverted in their thinking for simply suspecting their ex-husbands of such a thing as child sexual abuse. It is a reflection of society's longstanding refusal to acknowledge the widespread existence of incest. For divorcing mothers, the assumptions made about their motives can serve as an insurmountable barrier to getting *140 help. This bias may be so strong that their reports to others of what their children have told them can actually jeopardize their own positions as future custodians of their children. This form of double jeopardy will only serve to reinforce the silence that already surrounds this problem, and to endanger children further. Very young children are not prone to fantasizing

about molestation and are rarely capable of describing or re- enacting things about which they have no knowledge or experience.

We must guard against our own unconscious motives for participating in this bias. We must recognize that it is much easier and more in accordance with our images of the world to regard a mother as crazy or hysterical than to recognize an otherwise seemingly rational and caring father as capable of the behaviors described. Beyond that, such a view may serve to reinforce our own denial of what we, like most people, would rather not see. [\[FN156\]](#)

Second, family court judges and guardians ad litem [\[FN157\]](#) often succumb to the dangerous lure of the discredited and essentially pro- pedophilia [\[FN158\]](#) theory concocted by Richard Gardner [\[FN159\]](#) called *141 'Parental Alienation Syndrome' [\[FN160\]](#) or 'PAS.' This non- existent 'syndrome' posits that when children display fear of one parent, typically the father, report abuse by that parent, and exhibit symptoms of trauma such as sexual abuse, the real culprit is the child's mother who 'programmed' the child into this damaged relationship. The 'treatment of choice' is to give the 'alienated parent' - or the true abuser - custody and severely limit the other parent's contact with the child. One irony of this so- called 'PAS' is that the increased existence of valid evidence of true sexual abuse leads Gardner and his devotees to more fervently diagnose 'PAS.' Thus, 'PAS' is the criminal defense attorney's dream, since the greater the proof of the crime, the greater the proof of the defense.

A very recent American Bar Association guide for judges warns:

Related to the Friendly Parent Provision is the controversial issue of Parental Alienation Syndrome. Under this theory, a parent who 'bad mouths' another parent in front of the child, or 'brain washes' the child to turn against the other parent, is considered to be not acting in the child's best interests. This theory is highly controversial and has been rejected by many courts as bad science. In domestic violence cases, it can be dangerous. Domestic violence victims, often for the safety of the children and themselves, take active steps to minimize contact and relationships with the abuser. To punish them for doing so, by giving favorable custody or visitation *142 treatment to the abuser, it is counterproductive and can be dangerous. [\[FN161\]](#)

The American Psychological Association's family violence task force also complains that:

Although there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children's attachment to their fathers, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations. [\[FN162\]](#)

Thus, when a GAL is poised to represent the 'interests' of a child who is exhibiting extreme fear of a parent, it is frequently the GAL's argument across the nation that the child should be in the custody of that same parent, despite substantial evidence of abuse warranting the fear, in order to 'treat' PAS. [\[FN163\]](#)

VI. Rules? We Don't Need No Stinkin Rules! [\[FN164\]](#)

When GALs go awry, there is little that can be done to hold them accountable. [\[FN165\]](#) As one law review article explains, the *143 faulty role definition fosters the GALs motivated by personal interests:

Furthermore, some individuals thrive in being in a position of power over others. A guardian ad litem can insert herself into a family to structure the interactions among the family members, without having any historic, emotional, financial or physical commitments and responsibility for the consequences. Without the controls and limits which are inherent in the judicial system and which constrain judges, the guardian ad litem, with or without admirable motives is not accountable. [\[FN166\]](#)

Some GALs, without any authority to do so, want to determine acceptable playmates for the child, insist on screening letters and gifts to the child, and unilaterally alter court ordered visitation schedules. [\[FN167\]](#)

Few things completely undermine due process and the right to an impartial trial judge as do ex parte communications between the court and one attorney. [FN168] Yet, many courts allow, or even encourage, GALs to engage in ex parte communications with the judges. [FN169] This practice is typically unchallenged by the attorneys *144 for the parents who are not inclined to 'make waves.' Parents' lawyers reasonably fear that challenging the GAL on ethical grounds will result in the GAL's retaliation against their clients. [FN170] However, one conscientious Alabama lawyer serving as a GAL did question the status quo and recently requested an ethics opinion from the state bar about the propriety of this practice when he became aware from 'sources that certain jurisdictions consider it appropriate for a guardian ad litem to communicate directly and ex parte with the court.' [FN171] The bar counsel correctly concluded that such conduct was ethically prohibited. [FN172]

One major treatise advises GALs on specific techniques to avoid such ex parte contacts, even where initiated by the judge, in a tone that patently suggests that judges are habituated to such encounters:

The major source to be avoided is the trial judge. As early as the time of appointment, the judge may attempt to fill in the attorney-guardian ad litem on what has transpired so far, and express her preliminary thoughts on the matter. In doing this, the judge may communicate her expectations to the attorney guardian ad litem, or share a view of the parties, ex parte. Unless the attorney-guardian ad litem is working in a state where his role has been defined as assisting the court as an aide-de-camp for a specific piece of legislation, ex parte communications with the judge should be avoided. If the attorney-guardian ad litem is to advocate an arrangement in *145 the best interests of the child, and the judge is to impose it, they may be seen as more of a team than the traditional lawyer/judge relationship. Entering the case without an identified adversary gives an illusion of neutrality that invites private dialogue between judge and attorney. But the attorney-guardian ad litem is, in many jurisdictions, merely another voice, representing another interested party, and should take pains to discourage any off-the-record dialogue with the bench.

Asking the judge not to talk about a case off the record can be awkward at best. The most expeditious way to sidestep this quagmire may be to say matter-of- factly, 'Excuse me for one moment, your Honor, while I get other counsel to join us,' and leave the room and summon the other attorneys. If the judge persists in conveying his views, the attorney-guardian ad litem should indicate that she is concerned about committing an ethical breach with respect to ex parte communications, as it is likely that the court simply has not considered the conversation in that light. [FN173]

In *Moore v. Moore*, [FN174] the Wyoming Supreme Court addressed these sorts of GAL ex parte problems. Despite a resounding proclamation that ex parte communications between a GAL and a judge are an ethical violation, the court rejected the mother's appeal and affirmed the decision awarding the custody of the child to the father. [FN175] The holding rested on the theory that the GAL's refusal to make any custody recommendation rendered the communication harmless error. [FN176] In a biting dissent, Chief Justice Urbigkit and Justice Macy were 'more than offended' by the ex parte contacts and condemned the commonly accepted habit explained by one Wyoming attorney quoted in the dissent as, 'We trust each other. One time I go to see the judge, the next time the other guy does. We have to.' [FN177]

*146 One of the particularly stealthy problems of GALs is the conflict of interest issue. This most commonly occurs when a GAL fights to keep a child in the custody of a parent previously endorsed and exonerated by the GAL, despite mounting proof that the parent is indeed abusive and the GAL erred, often through gross negligence, in the first recommendation. In such instances, GALs have forcefully opposed the introduction of new abuse evidence and instead have increased the blame on the non-abusive parent. In this way, the GAL hopes to avoid any judicial finding that suggests his or her incompetence and jeopardizes future lucrative GAL appointments. One law review article confronts this seldom discussed concern:

Aside from duties to nonclients, lawyers' own interests may impinge on the representation of the client. This is one of the most difficult types of conflict to monitor, as lawyers are understandably reluctant to reveal all of the various ways in which they might be tempted to sacrifice a client's interest for their own. Moreover, while lawyers routinely reveal their own financial interests in the subject matter of representation, they are less likely to disclose other types of personal interests. . . . As with adult clients with disabilities, lawyers can exercise enormous power over clients who are children, and attorneys can use the power to steer litigation in their own desired directions. Unfortunately, there is very little that is presently done under the rules of professional conduct to monitor these conflicts effectively [FN178]

The inconsistent judicial support for discovery against and cross- examination of GALs allows such conflicts to escape exposure. An excellent example of the confusion in this regard is *Deasy-Leas v. Deasy*. [FN179] There, the court reversed the trial court's denial of an attorney GAL's motion to quash discovery motions seeking access to her

files compiled in her investigation. [FN180] While admitting that the GAL's role is vague and ill-defined, and that no statutory authority exists to support the ruling, the court held the files non-discoverable under general confidentiality principles. [FN181] In *Richards v. Bruce*, [FN182] without much explanation, *147 the Supreme Judicial Court of Maine held that the GAL's files were protected from disclosure because the GAL's report itself must be disclosed by statute [FN183] to the parties fourteen days before the trial. [FN184] Despite noting that the fourteen day rule was not met in this case by the GAL and that the father wanted the files to seek evidence of witness bias, the court determined that cross-examination of the GAL without prior access to the files was sufficient. [FN185] In no other circumstance would that analysis fly.

In *In Re Custody of Krause*, [FN186] the Montana Supreme Court allowed discovery 'when consistent with state and federal law' of the GAL's reports, data, and persons consulted. [FN187] However, on what may be the most critical information for the purposes of determining the weight to give the GAL's recommendation, the court held that disclosure of the GAL's qualifications and experience was not required. [FN188]

Sometimes due process, while noted, is just not deemed important. In *Evans v. Evans*, [FN189] the Ohio Court of Appeals held that failure to allow a parent the opportunity to cross-examine a GAL was error, but harmless error. Similarly, the Arkansas Court of Appeals entertained the very bizarre case of *Trammel v. Isom*. [FN190] There, a GAL operating under a court appointment which did not specify her duties prepared a report with recommendations she intended to present in the custody trial. [FN191] When the parents demanded discovery of the report going to the judge, the GAL hid the report and claimed that if she were to be subjected to cross-examination, she would rather act as an 'advocate' for the child. [FN192] The court found no problem with any of this since the GAL-turned advocate's 'effectiveness' would have been 'largely destroyed' were she cross-examined. [FN193]

*148 The most overwhelming obstacle to GAL accountability is their general immunity against civil liability. Courts have held that GALs enjoy absolute immunity from actions arising from the performance of their duties to the same extent as do judges. [FN194] The questionable footing for this protection is usually that GALs owe their duty to the court- not to the child - and that no attorney would accept a GAL appointment if liability could result. Accordingly, in *Berndt v. Molepske*, a Wisconsin GAL who, despite significant evidence of molestation, succeeded in placing the two girls whose interest he was 'protecting' in the custody of their abusive father. [FN195] After the girls were re-abused by their father, who was then convicted in criminal court and imprisoned, the court found the GAL immune from the malpractice suit brought against him by the children. [FN196] The court confidently reasoned that despite the fact that these children had 'one less remedy than other litigants injured by their attorney's malpractice,' 'it is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' [FN197] Such pronouncements imply that children, unlike adults, are fair game for incompetent or misguided lawyers and completely undermine the purported purpose for the GALs in the first place- the *149 protection of vulnerable children.

VII. Fees: There Goes The College Tuition

Fees for guardians ad litem in contested custody cases can amount to many thousands of dollars. The court then forces the parents to pay through its contempt of court power. Fees exceeding \$20,000 are not rare. [FN198] Furthermore, parents incur additional fees for their own attorneys whose work is increased by having to communicate with the GAL or take counter-measures to undue the GAL's damage. The justification for these GAL fees is generalized, contradictory, and hollow as is the stated purpose for appointing a GAL. One judge commented, perhaps with a twinge of guilt:

A big problem is economic- adding the fees for a third attorney in litigation which is already straining the parents' budgets to the breaking point. [FN199] But the child's need for independent counsel, and the benefit over future years of the child having had counsel at such a crucial time, cannot be minimized despite the financial strain on the parents. [FN200]

Beyond the available contempt power to assist in fee collection, GALs are also cloaked with a priceless safeguard. Divorcing parents commonly land in bankruptcy court, but the GAL's fees are not dischargeable. [FN201] In naïve analysis, the federal courts have equated GAL fees with child support, [FN202] without *150 realizing that these nondischarged fees are indeed taking food from children's mouths and clothing from their backs.

VIII. Conclusion: It's A Jungle Out There

It now seems obvious that the law libraries are teeming with castigation of the GALs in private custody suits with little counterweight in their defense. Thus, the questions are loudly repeated: Why do they exist? Why do they thrive? Why are they left unbridled? Tedious exploration has finally revealed that the answer is not found in the law of the land, but in the law of the jungle. The truth lies in the symbiotic relationship between the tickbird and the rhinoceros. For those not conversant with life in the wild, the rhino roams about with an ever-present tickbird perched just behind his neck feasting upon the living smorgasbord found there. The rhino (family court judge) is relieved of the annoying and arduous task of disposing of the irritating insects (child custody cases) by delegating it to an eager member of another species (the GAL). [FN203] In return, the bird is well fed (fees, collected with the help of the court's contempt power) and enjoys a free ride (immunity from screw-ups). There is ample precedent for metaphor use in the discussion of GALs, often cited as the eyes, ears, and arms of the court. [FN204] This allegory, though, may be more precise. [FN205]

*151 The family court system need not despair, even if GALs become an endangered species. The same goals articulated in the GAL's *raison d'être* can be obtained through adding additional family court judges where there is a true shortage, or by requiring underutilized family court judges to actually conduct evidentiary trials, with all judges mandated to decide custody cases on facts and evidence. To ensure that all material facts are properly presented at trial, more attorneys to represent parents unable to afford private counsel can be provided utilizing the resources now consumed by GAL programs. Essential to all of these improvements, though, is extensive mandatory education for the bench and bar, with particular emphasis on domestic violence and child abuse. Perhaps, then, the illusion of protection of children's interests can morph into reality.

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[FNaa1] . This article is dedicated to my four wonderful children, who patiently shared me with so many other parents' children for so many years, that they might never fear swimming upstream when necessary to buoy justice.

[FN1] . Alanna Krause, *Letting Children Speak for Themselves: Youth in Court Need Attorneys Who Represent Their Interests Fairly, Strongly*, S.F. Daily Journal, July 17, 2000, available at [http://www.ocof.org/KidsSpeakOut/Alanna's% 20Truth.htm](http://www.ocof.org/KidsSpeakOut/Alanna's%20Truth.htm).

[FN2]. Id.

[FN3]. Id.

[FN4]. Id.

[FN5]. Cal. Fam. Code § 3150 (West 1994), § 3151 (West Supp. 2002). Under §3151(a) , the 'child's counsel' is charged with representation of the child's interests. The 'counsel's duties' include interviewing the child, reviewing the court files and all relevant records available to both parties, and making any further investigation as the counsel considers necessary to ascertain facts relevant to the custody or visitation hearings. § 3151(a). The attorney may also call and examine witnesses and present argument. §3151(b) . However, in a clause inviting disaster, the attorney is authorized to disregard these mandates completely when ' under the circumstances it is inappropriate to exercise the duty.' §3151(a) . Such vague, broad and unjustified exemptions completely undermine the protection of children and, instead create a cruel illusion of representation. Alanna undoubtedly represents only one of legions of young victims of their own counsel. See also, Susan Goldsmith, *A Little Girl's Hell*, New Times L.A., July 22, 1999 at [http:// www.newtimesla.com/issues/1999-07-02/feature.html/1/index.html](http://www.newtimesla.com/issues/1999-07-02/feature.html/1/index.html).

[FN6]. Krause, *supra* note 3.

[FN7]. Id. Her father did not contest a child endangerment finding under California Welfare and Institutions Code § 300. Cal Wel. & Inst. Code § 300 (West Supp. 2002). Ms Krause has filed a state bar complaint against the guardian ad litem who billed approximately \$17,000 for her services. Krause, *supra* note 3. Ms. Krause, now an honors university student, is a featured speaker at child abuse and domestic violence conferences.

[FN8]. Id.

[FN9] . Id. The editorial asserts that the Marin County family court commissioner responsible for appointing the guardian and for issuing the orders keeping her in her father's custody had a close professional relationship with her father for many years.

[FN10]. Krause, *supra* note 3.

[FN11] . This article does indeed support the proposition, however, that children benefit from attorneys with clearly assigned roles to advocate for their wishes in many ordinary contested child custody proceedings. This article does not address juvenile court dependency cases where the state or county has assumed control over a child's life.

[FN12]. Alabama: Ala. Code § 12-15-8 (1995), § 26-14-11 (1992); Alaska: Alaska Stat. § 25.24.310 (Michie 2000); Arizona: 17B Ariz. Rev. Stat. Juv. Ct. Rules of Proc. Rule 40 (Supp. 2001); California: Cal. Welf. & Inst. Code § 326.5 (West Supp. 2001); Colorado: Colo. Rev. Stat. Ann. §§ 14- 10-116, 19-3-203(West Supp. 2001); Delaware: Del. Code Ann. tit. 13, § 701, tit. 29 § 9007A (West Supp. 2001); District of Columbia: 2001 D.C. Stat. § 16-911; Florida: Fla. Stat. Ann. § 39.807 (West Supp. 2002); Hawaii: Haw. Rev. Stat. §587-34 (1999); Idaho: Idaho Juvenile Rules, Rule 44 (2001); Illinois: 705 Ill. Comp. Stat. Ann. 405/2-17 (West 1999), 750 Ill. Comp. Stat. Ann. 5/506 (West Supp. 2001); Indiana: Ind. Code §§ 29-3-3- 6 (2000), 31-9-2-50 (Supp. 2001); Kansas: Kan. Stat. Ann. §§ 38-1505, 38-1505a (1994); Kentucky: Ky. Rev. Stat. Ann. § 625.041 (Michie 1999); Maine: Me. Rev. Stat. Ann. tit. 4, § 1501 (West 1989 & Supp. 2001), Me. Rev. Stat. Ann. tit. 19-A, § 1507 (West 1998 & Supp. 2001), Maine Rules for Guardians Ad litem, Rule II (2001); Massachusetts: Mass. Gen. Laws Ann. Ch. 201, § 2 (West 1994 & Supp. 2002); Michigan: Mich. Comp. Laws Ann. § 722.24 (West Supp. 2001); Minnesota: Minn. Gen. R. Prac., Rule 357.04 51 (Family Ct. Proc. 2001); Mississippi: Miss. Code Ann. § 43-21-121 (1999 & Supp. 2001); Missouri: Mo. Ann. Stat. §§ 210.160 (West 1996 & Supp. 2002), 211.462 (West 1996), 452.490 (West Supp. 2002); Montana: Mont. Code Ann. §§ 40-4-205, 41-3-112 (West 1997 & Supp. 2001); Nebraska: Neb. Rev. Stat. § 43-272.01 (1997); Nevada: Nev. Rev. Stat. 432B.505 (1999), 432B.500 (2001); New Hampshire: N.H. Rev. Stat. Ann. §§ 169-C:10 (1997), 458:17-a (1992), Guardian Ad litem Guidelines, Guideline 3, Abuse and Neglect Cases Guideline 11; New Jersey: N.J. Stat. Ann. § 9:2-4 (West 1997); New Mexico: N.M. Stat. Ann. §40-4-8 (Michie 1993); North Carolina: N.C. Gen. Stat. §35A-1379 (1995); North Dakota: N.D. Cent. Code §§14-09-06.4, 50-25.1-08 (2001); Ohio: Ohio Rev. Code Ann. § 2151.28.1 (West 2000); Oklahoma: Okla. Stat. Ann. tit. 10, §7002-1.2 (West 1998), § 7112 (West 1999); Rhode Island: R.I. Gen. Laws § 40-11-14 (1982); South Carolina: S.C. Code Ann. §§20-7- 110, 20-7-124 (Law. Co-op, 1996); South Dakota: S.D. Codified Laws §§ 26- 8A-18, 26-8A-20 (Michie 1991), Tennessee: Tenn. Code Ann. § 36-4-132 (2000); Texas: Tex. Fam. Code Ann. § 107.001 (Vernon 1997); Utah: Utah Code Ann. §78-7-9 (2001); Vermont: Vt. Stat. Ann. tit. 15, §669 (1989); Virginia: Va. Code Ann. §16.1-266 (Michie 1997); Washington: Wash. Rev. Code Ann. § 13.34.100 (West 2000); West Virginia: W. Va. Code §48-11-302 (2000), Family Law Rule 40; Wisconsin: Wis. Stat.

Ann. § 767.045 (West 1997); Wyoming: Wyo. Stat. Ann. §§14-3-211, 14-3-416 (Michie 1978). See also 2 Legal Rights of Children 106 (Donald T. Kramer, ed, Shephard's/McGraw-Hill 1994) .

[FN13]. 387 U.S. 1 (1967).

[FN14]. See Hansen, Guardians Ad litem in Divorce and Custody Cases, 4 J. Fam. L. 181 (1964).

[FN15]. Wis. Stat. Ann. § 767.045 (West 1993) urged by Wendland v. Wendland, 138 N.W. 2d 185 (Wis. 1965), and Welchman v. Welchman, 184 N.W.2d 882 (1971). See also, supra note 14, at 107.

[FN16]. ABA, Proposed Revision of the Uniform Marriage and Divorce Act, 7 Fam. L. Q. 135 (1972).

[FN17]. Pub. L. No. 93-247, 42 U.S.C. §§ 5101-5106 (1994). See also 45 C.F.R. § 1340.14(g) (1997).

[FN18]. N.H. Rev. Stat. § 458.17-a (1992). See also Kramer supra note 12, at 108.

[FN19]. Raven C. Lidman and Betsy R. Hollingsworth, The Guardian Ad litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition, 6 Geo. Mason L. Rev. 255, 256, fn.4 (1998).

[FN20]. Id. at 301.

[FN21]. Josh Gelinas. Group Calls for Oversight of Guardians, Augusta Chronicle, July 20, 2001 at C2.

[FN22]. . Press release, Ohio Supreme Court Communication Office, June 28, 2001. See also Supreme Court to Develop Standards for Children's Guardians, Business First (June 28, 2001) at <http://columbus.bcentral.com/columbus/stories/2001/06/25/daily30.html>.

[FN23]. Anne Sappenfield, Guardians Ad litem in Actions Affecting the Family, Memo at 1, October 13, 2000 available at <http://www.legis.state.wi.us/lc/studies/GAL/memo1.pdf>.

[FN24]. Id.

[FN25]. Id. at 2.

[FN26]. Executive Summary No. 95-03 at <http://www.auditor.leg.state.mn.us/ped/1995/guardsum.htm>.

[FN27]. . An October 1999 Minnesota Legal Assistance Office publication distributed to parents in custody cases summarily advised that guardians ad litem ' tell the court what is best for the child.' Parents are told to cooperate with the GAL's investigation and recommendations. GALs ' make up [their own] decision about what is best for the child. It might not be exactly what the child wants.' This simple two page flier accurately portrays the GAL's omnipotent authority. What is a Guardian Ad litem? available at http://www.mnlegalservices.org/publications/fact_sheets/b8.html.

[FN28]. Id. at 1-2.

[FN29]. Id. at 2-5.

[FN30]. In re Marriage of Smith, 2001 WL 1608365, at *1, (December 18, 2001 Minn. App. Ct).

[FN31]. Id.

[FN32]. Minn. Stat. § 518.165 (2001).

[FN33]. Minn. R. Gen. Prac. §904.04 (2001)

[FN34]. In re Marriage of Smith, 2001 WL 1608365 at *1.

[FN35]. Id. at *4.

[FN36]. Id.

[FN37]. Guarding Our Children: A Review of Massachusetts' Guardian Ad litem Program Within the Probate and Family Court (March 2001) at <http://www.state.ma.legis/bills/st01828.htm>.

[FN38]. Id.

[FN39]. Final Report of the Child Custody and Visitation Focus Group, Minnesota Coalition Against Domestic Violence (March 1-3, 1999) [on file with author].

[FN40]. Id.

[FN41]. Raven Lidman & Betty Hollingsworth, Rethinking the Roles of Guardians ad litem in Dissolutions: Are We Seeking Magicians? Wash. State Bar News, December 1998, at <http://www.wsba.org/barnws/archives97/roles.html>.

[FN42]. An excellent and very exhaustive analysis of the GAL conundrum is found in a law review article whose title says it all: Raven C. Lidman & Betty Hollingsworth, The Guardian Ad litem in Child Custody Cases: the Contours of Our Legal System Stretched Beyond Recognition, 6 Geo. Mason L. Rev. 255 (1998); See also Martin Guggenheim, The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76 (1984) ; Kim J. Landsman & Martha L. Minow, Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce, 87 Yale L. J. 1126 (1978); Dana Prescott, The Guardian ad litem in Custody and Conflict Cases: Investigator, Champion, and Referee?, 22 U. of Ark. Little Rock L. Rev. 529 (2000); Judge Debra Lehmann, Who Are We Protecting: An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad litem, 63 Texas Bar Journal 123 (2000) ; Wallace J. Mlyniec, The Child Advocate in Private Custody Disputes: A Role in Search of a Standard, 16 J. Fam. L. 1 (1977-78); James M. Peden, The Guardian ad litem Under Guardianship Reform Act: A Profusion of Duties, a Confusion of Role, 68 U. Det. Mercy L. Rev. 19 (1990) ; Ellen Solender, The Guardian ad litem, A Valuable Representative or an Illusory Safeguard?, 7 Texas Tech. L. Rev. 619 (1976); Jonathan Hafen, Children's Rights and Legal Representation: The Proper Roles of the Children, Parents and Attorney, 7 Notre Dame J. Ethics & Pub. Pol'y 423(1993); Representation of Children in the United States of America, in Olive M. Stone, The Child's Voice in the Court of Law 89 (Butterworths, 1982)(international review of child representation in civil proceedings).

[FN43]. Several attempts have been made to document the benefits. A.B. Sivan and M. Quigley-Rick, Effective Representation of Children by the Guardian ad litem: An Empirical Investigation, 19 Bull. Am. Acad. Psych. L. 53 (1991); S. Aitken, L. Condelli, and T. Kelly, National Study of Guardian Ad litem Representation (U.S. Department Health & Human Services, 1990).

[FN44]. Jessica Cherry, Note, The Child as Apprentice: Enhancing the Child's Ability to Participate in Custody Decision-Making by Providing Scaffolded Instruction, 72 S. Cal. L. Rev. 811 (1999) . The author proposes that attorneys become experts in the 'Zone of Proximal Development and Scaffolding', and the distinction between Vygotsky and Piaget. Id. at 839- 842. On the other hand, a more compelling argument can be made that lawyers should focus on facts, evidence, and statutes.

[FN45]. Id. at 819. (citations omitted, emphasis in original).

[FN46]. DRAFT, Standards on Independent Representative Children's Interests in Custody and Visitation Cases (September 5, 2001). These standards are in committee development and are subject to revision. At this stage, they do not represent the official position of the ABA or any other organization. Until formally adopted by the ABA, they merely express the opinions of various committee members, all of whom, though, are very familiar with the problem [on file with author].

[FN47]. A Judge's Guide: Making Child-Centered Decisions in Custody Cases 11 (ABA Center on Children & the Law, 2001).

[FN48]. 589 N.W.2d 455 (Wis. Ct. App. 1998) (table decision), reported at 1998 WL 851140

[FN49]. Wis. Stat. § 48.415 (2000)

[FN50]. In re Rose L.C., 1998 WL 851140, at *1.

[FN51]. Id. at *2; Wis. Stat. § 48.235(3)(a) (2001) . There the GAL is described as an advocate for the best interest of the child, and shall function independently, as an attorney for the party to an action. The GAL shall consider, but is not bound by the child's wishes or anybody else's position. If the child's wishes, according to the GAL, are substantially inconsistent with the child's best interests the GAL is required to inform the court. The court, at that point, may appoint counsel to represent the child. This statute is typical in the discretion and arbitrariness granted the GAL. The fact that the court is not required to appoint counsel to actually represent the child creates the conditions under which a misguided GAL can give the false illusion of the protection of the child's interests.

[FN52]. 940 P.2d 1380 (Wash. App. Ct. 1997).

[FN53]. Id. at 1383.

[FN54]. 769 So.2d 389 (Fla. Dist. Ct. App. 1999).

[FN55]. Id. at 393.

[FN56]. Id. [emphasis added].

[FN57]. Id. at 394.

[FN58]. Fla. Stat. Ch. 61.401 (1997).

[FN59]. Perez, 769 So.2d at 397, n.7.

[FN60]. Id. at 394.

[FN61]. Courts and commentators frequently use the terms 'representatives,' 'guardians ad litem,' and 'children's counsel' interchangeably.

[FN62]. Perez, 769 So.2d at 394.

[FN63]. Fl. Stat. Ch. 61.401, 61.403 (1997).

[FN64]. Perez, 769 So.2d at 393 (quoting Fla. Stat. Ch. 61.401).

[FN65]. Perez, 769 So.2d at 394-95.

[FN66]. Perez, 769 So.2d at 393.

[FN67]. Id. at 395, n.11

[FN68]. Id. at 395.

[FN69]. Id. at 396 (Sorondo, J. concurring).

[FN70]. It is inconceivable that such an amicus brief would not in any way advance the position the GAL took in the trial court, and thus, make the GAL an 'advocate' as feared by the appellate court.

[FN71]. Fl. Stat. Ch. 61.403(2),(3),(6). It is not clear from the opinion whether the GAL filed an amicus brief, and, if so, whether it was through counsel. Perez, 769 So.2d at 397.

[FN72]. Id. at 396.

[FN73]. Id. at 396-97.

[FN74]. Id. at 397.

[FN75]. Perez, 769 So.2d at 397, n.13

[FN76]. The commonly stated distinction is that an attorney for the child must advocate for the child's wishes, and that the GAL advocates for whatever the GAL thinks is in the child's 'best interest'. For a thorough examination of the entire issue, see Cheryl Rosen Weston, Legal Representation of Children in Custody and Visitation Cases, in *Child Custody and Visitation Law and Practice*, (John P. McCahey ed., Matthew Bender 1999).

[FN77]. 699 A.2d 134 (Conn. 1997)

[FN78]. Id. at 140.

[FN79]. Id. at 137.

[FN80]. Id.

[FN81]. Id.

[FN82]. Schult, 699 A.2d at 137.

[FN83]. Id. at 138.

[FN84]. Id. at 139.

[FN85]. Id. at 141.

[FN86]. Schult, 699 A.2d. at 135.

[FN87]. Id. at 140.

[FN88]. 52 S.W.3d 455, 456 (Tex. Ct. App. 2001).

[FN89]. Id. at 456.

[FN90]. Id.

[FN91]. Tex. Fam. Code Ann. §§107.002(a)(1), (c)(4), (c)(6) (Vernon Supp. 2001)[GAL] and Tex. Fam. Code Ann. §§107.011, 107.014 (Vernon 1996 & Supp. 2001)[attorney ad litem].

[FN92]. Samara, 52 S.W.3d at 458

[FN93]. Id.

[FN94]. 953 P.2d 145 (Wyo. 1998)

[FN95]. Id. at 148-150.

[FN96]. Id. at 149.

[FN97]. Clark, 953 P.2d at 151-52.

[FN98]. Id. at 151, n.2. It would appear that the Wyoming Supreme Court would be in the best position, and would have the most clout, in answering these questions. So it is not clear to what other courts the buck has passed. The Wyoming Supreme Court again ventured into the GAL arena in Pace v. Pace, 22 P.3d 861 (Wyo. 2001), and failed to heed its own advice. Here the court embraced the hybrid role of attorney/GAL in order to 'decrease costs.' Id. at 868. Regarding the role confusion, however, the court invoked an odd method of addressing it. The GAL, counsel, and the trial court should 'work together at the beginning of the case to develop and articulate clearly the scope and nature of the guardian ad litem's responsibilities.' Id. at 870 (emphasis added). So, if the state supreme court cannot figure exactly what this hybrid is supposed to do, is it rational to now require the GAL, the attorneys, and the judge to do so by consensus on an ad hoc basis?

[FN99]. Clark, 953 P.2d at 152-54.

[FN100]. The term 'champion' conjures up the stoic, but determined Simon Baker character in the highly rated CBS 2001 television drama, 'The Guardian.'

[FN101]. Clark, 953 P.2d at 152.

[FN102]. Wyo. Stat. Ann. § 14-3-211 (1977).

[FN103]. Clark, 953 P.2d at 154.

[FN104]. Id.

[FN105]. Id. at 155.

[FN106]. Id.

[FN107]. Id. at 148

[FN108]. Clark, 953 P.2d at 154.

[FN109]. 55 S.W.3d 867, 874 (Mo. Ct. App. 2001).

[FN110]. Another example of a case with no discernable value from the GAL's participation, despite much discussion of the GAL's presence is Wallace v. Chapman, 64 S.W.3d 853 (Mo. Ct. App. 2002). See also Gander v. Barsic, No. C1-01-510, 2002 WL 4584 (Jan. 2, 2002 Minn. Ct. App.) and D'Onofrio v. D'Onofrio, 738 A.2d 1081 (R.I. 1999).

[FN111]. 395 S.E.2d 441 (S.C. Ct. App. 1990).

[FN112]. Id. at 442.

[FN113]. Id. at 443 (emphasis added).

[FN114]. Id.

[FN115]. Shainwald, 395 S.E.2d at 443.

[FN116]. The trial judge suggested at one point that a transcript of the GAL's testimony would substitute for a written report. Id. at 443.

[FN117]. Id.

[FN118]. Shainwald, 395 S.E.2d at 444 [internal citations omitted].

[FN119]. Id. at 442.

[FN120]. Id. at 458.

[FN121]. Id. at 444.

[FN122]. 536 S.E.2d 427 (S.C. Ct. App. 2000)

[FN123]. 664 A.2d 239 (Vt. 1995).

[FN124]. Id. at 240.

[FN125]. Id.

[FN126]. Id. at 243, 245.

[FN127]. Id. at 241.

[FN128]. Gilbert, 664 A.2d at 241.

[FN129]. Id.

[FN130]. Id. at 242 (citing Vt. Sup. Ct. & Vt. B. Ass'n., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System 199-200 (1991)).

[FN131]. Id. at 246-247 (Morse, J., dissenting).

[FN132]. Id. at 248.

[FN133]. Delaware State Bar Association, Commission on Professional Ethics, Opinion 2001-1, at 1. (May 8, 2001) available in PDF form at: <http://www.dsba.org/ethics01.htm>. The opinion is the usual struggle to fit this square peg in a round hole. Unfortunately, the committee did not suggest that the role simply be eliminated since absolutely no one seems able to reconcile it with the American judicial system.

[FN134]. Id. at 2.

[FN135]. Id. at 11-12

[FN136]. Id.

[FN137]. James L. Rubens and Sara A. Kahn, Guardians Ad litem, Attorneys for the Child, and Child's Representatives 1 (2000) (emphasis added).

[FN138]. C.W. v. K.A.W., 774 A.2d 745, 749 (Pa. Super. Ct. 2001).

[FN139]. Id.

[FN140]. Id. at 748, n.3.

[FN141]. C.W., 774 A.2d at 750.

[FN142]. Id. at 748.

[FN143]. See H. Clark, The Law of Domestic Relations in the United States 539-45 (West 2nd ed. 1988). See also, e.g., D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981).

[FN144]. See e.g., Taylor v. Taylor, 60 S.W.3d 652 (Mo. App. 2001). In this case, the record is replete with evidence that the father, who was awarded custody, was extremely violent and returned the child from visits with odd injuries. Id. at 653-55. The appellate court reversed and ordered the appointment of a GAL. Id. at 656. See also Kerin S. Bischoff, The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged, 138 U. Pa. L. Rev. 1383 (1990); Leonard P. Edwards and Inger J. Sagatun, Who Speaks for the Child in Symposium: Domestic Violence, Child Abuse and the Law, 2 U. of Chi. L. School Roundtable 67 (1995); David Peterson, Judicial Discretion is Insufficient: Minors' Due Process Right to Participate With Counsel When Divorce Custody Disputes Involve Allegations of Child Abuse, 25 Golden Gate U. L. Rev. 513 (1995). See also Sheila M. Murphy, Guardians ad litem: The Guardian Angels of Our Children in Domestic Violence Court, 30 Loy. U. Chi. L.J. 281 (1999). This essay discusses the GAL's function outside of family court custody cases, where the 'friendly parent' trap is not at play. In a courtroom which actually runs on facts and evidence, the GALs appear to actually serve a useful purpose as support for the victim. Id.

[FN145]. Dickerson v. Dickerson is a clear example. See supra page 24, '[G]uardians ad litem have encouraged the courts to respond in a punitive or non-supportive manner' to battered women in custody cases. Lenore E.A. Walker & Glenace E. Edwall, Domestic Violence and Determination of Visitation and Custody in Divorce, in Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence 127 (Daniel Sonkin, ed., Springer Pub. Co., 1987). See also David Kibbe, State Seeks Guidelines for Child Custody Investigators, Cape Cod Times (March 21, 2001) available at <http://www.capecodonline.com/cctimes/archives/2001/mar/21/stateseeks21.html>.

[FN146]. Randy Magen, In the Best Interest of Battered Women: Reconceptualizing Allegations of Failure to Protect, 4 Child Maltreatment 127 (1999); Melissa A. Trepiccione, At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?, 69 Fordham L. Rev. 1487 (2001); Kim Ahern, et al, Charging Battered Women With 'Failure to Protect': Still Blaming the Victim, 27 Fordham Urb. L. J. 849 (2000).

[FN147]. See Merry Nofford, et al, Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice, 29 Fam. L.Q. 197 (1995).

[FN148]. Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family 100 (1996).

[FN149] . Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Women Battering, *Violence Against Women* (1999) at [http:// www.vaw.umn.edu/Vawanet/overlap.htm](http://www.vaw.umn.edu/Vawanet/overlap.htm); Joan Zorza, Protecting Children in Custody Disputes When One Parent Abuses the Other, 29 *Clearinghouse Rev.* 113 (1996); Joan Zorza, Domestic Violence Seldom Considered in Psychologists' Child Custody Recommendations, 26 *Clearinghouse Rev.* 921 (1992); Kim Susser, Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children, 27 *Fordham Urb. L.J.* 875 (2000) ; Stephen E. Doyne, et al, Custody Disputes Involving Dispute Violence: Making Children's Needs a Priority, *Juv. & Fam. Ct. J.* 1 (1999); Rita Smith and Pamela Coukos, Family and Accuracy in Evaluations of Domestic Violence in Custody Determinations, *The Judge's Journal* 38 (1997); Clare Dalton, When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System, 37 *Fam & Conciliation Cts. Rev.* 273 (1999); Leigh Goodmark, From Property to Parenthood: What the Legal System Should Do for Children in Family Violence Cases, 102 *W. Va. L. Rev.* 237 (1999); Amy Levin, Child Witnesses of Domestic Violence: How Should Judges Should Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence? 47 *UCLA L. Rev.* 813 (2000); Developments in the Law- Legal Response to Domestic Violence, 106 *Harv. L. Rev.* 1501, 1599-1601 (1993); Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 *Hofstra L. Rev.* 407 (1985); Naomi Cahn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 *Vand. L. Rev.* 1041 (1991); Nancy Ver Steegh, The Silent Victims: Children and Domestic Violence, 26 *Wm. Mitchell L. Rev.* 775 (2000) ; See also H.R.J. Res. 172, 101 Cong. (1990) (parents with a history of perpetuating domestic violence should not be granted custody of children).

[FN150] . The American Bar Association Family Law Section and the Johnson Foundation recently convened a three day conference in Racine, Wisconsin to 'reduce the impact of high-conflict custody cases on children.' The final report, High-Conflict Custody Cases: Reforming the System for Children- Conference Report and Action Plan, 34 *Fam. L.Q.* 589 (2001) unfortunately defines high-conflict cases as, inter alia, cases with 'allegations of domestic violence, or child abuse or neglect' *Id.* at 590. Although the report discusses family violence and abuse, it misses an excellent opportunity to instruct the bench and bar that cases where these ills do exist should be viewed from a completely different perspective, with the focus on factual adjudication and protection of the victims. Instead, the emphasis is on such generalizations as

the conference identified mental health professionals, lawyers, and judges as those having the greatest power to influence the conduct of high custody cases and concluded that they should bear the primary responsibility for preventing or reducing conflict in high-conflict cases.... These new models should hold all participants in custody cases accountable for their contribution to increasing or decreasing the conflict, be sensitive to the rights and privacy of individuals and be prepared to intervene to the extent necessary to protect children.

Id. at 591. This language reinforces the wrongful notion that abused mothers, or those protecting their abused children, are simply increasing conflict to the child's detriment by insisting on proving the abuse and pleading for protection, whereas the mother who ignores the dangers and capitulates to the father's intimidation is lauded for 'reducing conflict.' This represents the classic mismatching of the family court bench and bar's 'can't we all get along' approach against the realities of violence and child abuse.

[FN151]. Noford, *supra* note 147, at 217.

[FN152] . 'Mediators, guardians ad litem, custody evaluators, and judges confusing abuse with conflict may also conclude that parents who oppose share parenting are acting vindictively and subordinating the interests of their children to their own rather than expressing their legitimate anxieties about their own and their children's ongoing safety.' Dalton, *supra* note 149, at 277 (1999).

[FN153]. See Nancy K.D. Lemon, Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?, 28 *Wm. Mitchell L. Rev.* 601 (2001).

[FN154] . See Sharon S. Keating, Children in Incestuous Relationships: The Forgotten Victims, 34 *Loy. L. Rev.* 111 (1988); Susan B. Apel, Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt, 38 *Am. U. L. Rev.* 491 (1989) ; see also Billie Wright Dziech and Charles B. Schudson, On Trial: America's Courts and Their Treatment of Sexually Abused Children (Beacon Press, 1991); John E.B. Myers, A Mother's Nightmare- Incest: A Practical Guide for Parents and Professionals (Sage Publications, 1997).

[FN155]. Violence and the Family, *supra* note 148, at 101.

[FN156]. Kee MacFarlane & Jill Waterman, Sexual Abuse of Young Children 149 (Guilford Press, 1986).

[FN157]. See *infra* note 163.

[FN158] . In his self-published book, True and False Allegations of Child Sexual Abuse (1992), Gardner makes such absurd claims as sexual activity between parents and children is the global norm, but that the United States is unfortunately punitive and moralistic, *Id.* at 549, 585, 593, that pedophilia serves an important procreative purpose for species survival, *Id.* at 24-25, that Jews are the only people who always punished pedophilia, *Id.* at 46-47, and that incest can be treated by giving the child's mother a vibrator, *Id.* at 584-95. He also cites one case of a four year old girl who was repeatedly molested by her school bus driver. *Id.*

at 608-613. Gardner admits that he convinced the mother not to report the bus driver to the police, since the only damage to the child, according to Gardner, was that she was sexually frustrated because she was not brought to orgasm. *Id.* at 608-12. See also Stephanie Dallam, Dr. Richard Gardner: A Review of His Theories and Opinions on Atypical Sexuality, Pedophilia, and Treatment Issues, 8 *Treating Abuse Today* 16 (1998). In Los Angeles County, the largest family court system in the country, PAS is regularly taught to GALs. For example, the manual distributed at the 19th Annual Child Custody Colloquium entitled 'Who Cares About the Children?' sponsored by the Family Law Section of the Los Angeles County Bar Association and the Los Angeles County Superior Court on January 25, 1997, contains a favorable chapter on PAS entitled 'A Brief Outline of Parental Alienation Syndrome.' The ten page chapter written by a local psychologist who worked directly for an arm of the superior court contains only two references, both of which are to Gardner's self-published books.

[FN159]. Gardner unfortunately gains initial respect from his status as a 'Clinical Professor' at Columbia University. This courtesy title confers upon him no true faculty position and his connection there is minimal. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 *Fam. L. Q.* 527, 534-36 (2001). In fact, Columbia University openly winces at Gardner's involvement there. In a November 23, 1999, letter to Valerie Sobel, President of the Andre Sobel River of Life Foundation, Dr. Herbert Padres, Dean of the Columbia Faculty of Medicine admits that Gardner's views are 'offensive' to some people, that he does not claim that his opinions are based on any research, and that Columbia would never ask Gardner to teach undergraduates. [Letter on file with author]. In something quite less than enthusiastic endorsement for Gardner's continued connection to the school, Dr. Padres stated, '...the principles of academic freedom have served our society well, however, trying or even abhorrent we may occasionally find views espoused by individual faculty of the University.' *Id.*

[FN160]. For an excellent critique of Gardner and his contrived syndrome, see Bruch, *supra* note 159, at 527. See also Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 *Loy. L.A. L. Rev.* 1367 (1994). Testimony based on 'PAS' is inadmissible. See *People v. Fortin*, 706 N.Y.S.2d 611 (N.Y. Crim. Ct. 2000).

[FN161]. A Judge's Guide *supra* note 47, at 116-117 (2001).

[FN162]. Violence and the Family, *supra* note 148, at 40.

[FN163]. See *Scaringe v. Herrick*, 711 So.2d 204 (Fl. Dist. Ct. App. 1998). The GAL advocated custody to the mother, whom the child 'hated.' *Id.* In affirming custody to the mother based on 'alienation,' the court criticized to an unusually strong degree the fact that the GAL essentially acted as the judge. *Id.* Although the practice was condemned, it was not reversible error. *Id.*

[FN164]. This, of course, is an adaptation of the famous lines in the 1948 film *The Treasure of the Sierra Madre*. In that movie, the character Gold Hat is asked by Humphrey Bogart's character Fred Dobbs to show proof that he was a police officer. His reply was, 'Badges? We ain't got no badges. I don't have to show you any stinkin' badges.' The lines were shortened to the more popular version, 'We don't need no stinkin' badges!' in Mel Brooks's 1974 *Blazing Saddles*. The phrase's connotation is useful in most discussions of the arrogance of those overstretching questionable authority. For example, Thomas Sowell wrote a biting essay titled, *No Stinkin' Badges: The Case Against Judicial Activism*, *Capitalism Magazine*, December 12, 2000 available at http://www.capitalismmagazine.com/2000/december/ts_badges.htm (condemning the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000)).

[FN165]. Missouri provides for preemptory disqualification of GALs. But the disqualified GAL can still influence the court's decision from beyond. See *Harrison v. King*, 7 S.W.3d 558 (Mo. App. 1999).

[FN166]. Lidman & Hollingsworth, *supra* note 19, at 306, n.211.

[FN167]. Some argue that the GAL should function as a new parent for the child. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *Fordham L. Rev.* 1785 (1996). This expanded role only enhances the myriad of problems discussed in this article. Some GALs insist that children discuss important issues only with them, to the exclusion of the custodial parent, and seek to conceal evidence of abuse from the court under their questionable authority to invoke testimonial privileges on behalf of the child. Often, though, the child is never consulted. The ethics rules are still subject to intense debate and lack teeth. See David Katner, *Coming to Praise, Not to Bury, the New ABA Standards for Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 *Geo. J. of Legal Ethics* 103 (2000); *Representing Children: Standards for Attorneys and Guardians ad litem in Custody or Visitation Proceedings*, 13 *J. Am. Acad. Matrim. Law.* 1 (1995).

[FN168]. See *Sullivan v. Dept. of Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ryder v. United States*, 585 F.2d 482 (Ct. of Cl. 1978); *D'Acquisto v. Washington*, 640 F. Supp. 594, 621 (N.D. Ill. 1986); *Davis v. Alabama State University*, 613 F. Supp. 134 (M.D. Ala. 1985).

[FN169]. The author has personal experience with such GALs. An Ohio GAL, who was seeking to 'deprogram' the sexually abused children whose interests she was appointed to represent into believing that they were not molested (using PAS), submitted a motion to have the children's mother pay her expenses for traveling to South Carolina, where the children had been placed under juvenile court protection to thwart the GAL's plans. Attached to her motion was a copy of her hotel bill containing evening phone calls to the Ohio family court judge's home. When confronted with this evidence, the Ohio judge deferred jurisdiction to South Carolina. In a Florida case, the GAL for two abused children openly admitted that he met with the judge in chambers before each hearing to tell the judge what to do. When pleadings were filed on behalf of the father to expose these improprieties, the new juvenile court judge without comment dismissed the entire case. In a Cobb County Georgia case, a GAL admitted in a deposition that she had ex parte communications with the family court judges, as the judges there encourage the practice. In a telephone conversation with the author regarding a complaint filed against one such judge in March 2002, the Director of the Judicial Qualifications Commission in Georgia stated that she did not see an ethical violation because all of the judges 'do that.' She queried, 'How else are the guardians supposed to communicate confidentially with the judge?'

[FN170]. Lidman & Hollingsworth, supra note 21.

[FN171]. J. Anthony McClain, Opinions of the General Counsel: Ex Parte Communications Between the Court and a Guardian Ad litem, 61 Alabama Lawyer 306 (September, 2000).

[FN172]. Id. at 307.

[FN173]. Weston supra note 76, at 12-A-35-36. The reference to the 'aide- de-camp' cites Ky. Rev. Stat. Ann. § 403.090 (3)-(4); Gilmore v. Gilmore, 341 N.E.2d 655 (Mass.1976) (which make the GAL primarily an investigator.) It is troublesome, though, that ex parte contacts with these GALs are condoned without any explanation for treating them differently. There is no justification for the distinction. See Podell, The Role of the Guardian ad litem, 25 Trial 31 (April, 1989).

[FN174]. 809 P.2d 261 (Wyo. 1991).

[FN175]. Id. at 263-264.

[FN176]. Id. at 264.

[FN177]. Id. at 265, 265 n.1, (Urbigkit, J., dissenting).

[FN178]. Nancy Moore, Conflicts of Interest in the Representation of Children, 64 Fordham L. Rev. 1819, 1843 (1996).

[FN179]. 693 N.E.2d 90 (Ind. App. 1998).

[FN180]. Id. at 92, 99.

[FN181]. Id. at 95, 99.

[FN182]. 691 A.2d 1223 (Me. 1997)

[FN183]. Me. Rev. Stat. Ann. tit. 19, § 752-A(4) (repealed 1997)

[FN184]. Richards, 691 A.2d at 1226, n.6

[FN185]. Id. at 1225

[FN186]. 19 P.3d 811 (2001)

[FN187]. Inexplicably, the court failed to define this parameter. Id. at 816.

[FN188]. Id. at 816 See also Mont. Code Ann. § 40-4-215 (2001).

[FN189]. No. 00AP-1459, 00AP-1466, 2001 WL 1098065, at *3, (Ohio App. Ct. September 20, 2001)

[FN190]. 753 S.W.2d 281 (1988)

[FN191]. Id. at 283.

[FN192]. Id.

[FN193]. Id. at 284

[FN194]. Laura Morgan, Malpractice Liability of Guardians Ad Litem, 7 Divorce Litigation 107 (1995); Dana E. Prescott, The Liability of Lawyers as Guardians ad litem: The Best Defense is a Good Defense, 11 J. Am. Acad. Mat. Law. 65 (1993); Dolan v. Kronenberg, No. 76054, 1999 WL 528202, (Ohio App. Ct. July 22, 1999); Fleming v. Asbill, 483 S.E.2d 751 (S.C. 1997); Winchester v. Little, 996 S.W.2d 818 (Tenn. App. 1998); Tindell v. Rogosheske, 428 N.W.2d 386 (Minn. 1988); See also Offcutt v. Kaplan, 884 F. Supp. 1179 (N.D. Ill. 1995); Gardner v. Parson, 874 F.2d 131 (3d Cir. 1989); 42 U.S.C. § 1983 (2001); See also Kennedy v. State, 730 A.2d 1252 (Me. 1999). For an interesting history of the Fleming case prior to the South Carolina Supreme Court's decision on certification from the federal court; see Fleming v. Asbill: South Carolina Guardian Ad litem Not Immune From Civil Liability, 29 Creighton L. Rev. 1711 (1995). Fortunately, in Georgia, GALs are answerable in negligence, see Ga. Code Ann. § 29-4-7 (2001). See also Speck v. Speck, 156 S.E.2d 766 (Ga. App. 1931).

In Michigan, after an appellate court held that GALs could be held liable for negligence, the legislature specifically amended the governmental immunity statute by adding Mich. Comp. Laws § 691.1407(6) to neuter the decision. Bullock v. Huster, 532 N.W.2d 202 (Mich. App. 1995), vacated and remanded 549 N.W.2d 573 (1996), on remand 554 N.W.2d 47 (1996).

[FN195]. 565 N.W.2d 549, 550-551 (Wis. 1997). The court found that the threat of disciplinary action against the guardian ad litem by the bar was sufficient incentive for the guardian to conduct himself reasonably. Id. at 554.

[FN196]. Id. at 551.

[FN197]. Id. at 553.

[FN198]. See, e.g. Joel R. Brandes and Carole L. Weidman, Where the Buck Stops for Law Guardians, N.Y. L. J. 3 (September 26, 1995). In New York, the law guardian is the equivalent of the GAL. See also Metcalfe v. Metcalfe, 655 So.2d 1251, 1254 (Fl. Dist. Ct. App. 1995) [\$24,300 fee].

[FN199]. Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases 280 (Shepard's/ McGraw-Hill, 1987).

[FN200]. Id.

[FN201]. Miller v. Gentry (In re Miller), 55 F.3d 1487 (10th Cir. 1995); Olszewski v. Joffroin (In re Joffroin), 240 B.R. 630 (M.D. Ala. 1999); Shannaheln v. Strickland, 207 B.R. 752 (M.D. Fl. 1995)[\$9,430.50 fee]; Bower v. Deickler (In re Deickler), No. 98-11502-JMD, 1999 WL 33457772 (D. N.H. 1999)[\$12,808.93 fee]; Chang v. Beaupied (In re Chang), 210 B.R. 578 (9th Cir. 1997)[\$10,979.00 fee].

[FN202]. In an apparent attempt to circumvent this problem, the Maryland Court of Special Appeals specifically excluded the GAL's fees from the umbrella of 'child support.' Miller v. Miller, 788 A.2d 717 (Md. App. Ct 2002).

[FN203]. 'Deciding custody disputes greatly troubles decision makers, and many seek ways to lighten that responsibility. Judges often articulate that custody determinations are the most difficult to make. [A] recent statement by the Illinois Appellate Court citing In re Marriage of Russell, 523 N.E.2d 193, 199 (Ill. App. Ct. 1988) is astounding in its view of the guardian ad litem as one who confirms the judge's decision. More often, the process is seen as the reverse. The judge merely confirms the guardian ad litem's decision.' Lidman & Hollingsworth, *supra* note 21, at 297. In one case, the trial judge lamented that the GAL was not making a recommendation, but oddly noted that 'the ultimate responsibility always lies with the court, even as distasteful as that might sometimes be.' Moore v. Moore, 809 P.2d 261, 263 (Wyo. 1991) (emphasis added).

[FN204]. See French v. French, 452 So.2d 647, 651 (Fl. Dist. Ct. App. 1984); In re Marriage of Wycoff, 639 N.E. 2d 897, 894 (Ill. App. 1994); Collins v. Tabert, 806 P.2d 40, 42 (N.M.1991).

[FN205]. My apologies to my colleagues involved in volunteer GAL programs. It was also tempting to call the GAL the judicial dues ex machina, but the Shakespearean themes will be saved for another time.