

MANDATORY APPOINTMENT OF GUARDIANS AD LITEM FOR CHILDREN IN DISSOLUTION PROCEEDINGS: AN IMPORTANT STEP TOWARDS LOW-IMPACT DIVORCE

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INTRODUCTION

It is a truism that society wishes to protect its children. However, when children become entangled in legal proceedings, the need to protect them takes on strange dimensions. Although we understand the basics of child care, such as food, shelter, love, understanding, discipline, and education, we seem to fall short on recognizing how to protect the interests of a child caught in a domestic legal dispute. This is primarily because the individuals previously responsible for protecting the child are now in dispute with each other.

At first, one might think that our lack of attention to children in the legal environment is due to the belief that they are not normally involved in legal proceedings. However, this is far from reality. Divorce involves countless children in the legal process every year. In fact, “[a]bout forty-five percent of all children born in the 1980s will experience parental divorce, thirty-five percent will experience parental remarriage, and twenty percent will experience redivorce.”¹ Given the number of children affected by divorce and the natural desire to protect our children from harm, it seems that there should be a structure within which children would be regularly monitored and represented in the divorce process. But today, apart from random appointment of representatives only when obvious problems surface, there is no such structure.²

The undeniable impact that dissolution of the family has on children is a strong justification for protecting a child’s welfare and interests. One means of focusing on the child’s perspective is to have the court appoint a guardian ad litem (GAL)³ to represent children whose parents undergo divorce. By understanding

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1. Dora Sybella Vivaz, Note, *Balancing Children’s Rights into the Divorce Decision*, 13 VT. L. REV. 531, 532 (1989).

2. See Howard A. Davidson, *The Child’s Right To Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991).

Only a few states require a court to appoint counsel or a guardian ad litem for the child in a custody or visitation case, even when one parent accuses the other of child abuse. It is clear, however, that judges always have discretion, even if rarely exercised, to appoint legal counsel or a guardian ad litem for the child. However, appellate courts may still find that the trial court abused its discretion by failing to appoint separate representation for the child.

Id. at 269-70. For examples of statutes regarding appointment of guardians ad litem, see *infra* note 7.

3. “‘Ad litem’ is a Latin term meaning ‘for the suit.’ Guardian ad litem (GAL) is a legal

the child's often unique perspective, it might become possible to prevent undue harm and reduce the negative impact that divorce will inevitably have on the child. This appointment should be made at the beginning of the process in order to assure complete representation.

The evolution of appointment of GALs for children began with juvenile proceedings and then progressed to child abuse and neglect cases.⁴ Currently, appointment of a representative is required in some states when abuse and neglect has been alleged, for paternity actions, and for termination of parental rights.⁵ However, divorce remains the most common legal proceeding that children will be exposed to during their childhood.⁶

Although it is established law in most states that courts have the discretion to appoint a GAL to protect the interest of minors in a dissolution proceeding,⁷ especially when a custody dispute has developed,⁸ there is a substantial need to

term referring to someone appointed by the court to protect the interests of an incompetent person." William Halikias, *Divorce and Child Advocacy*, VT. B. J. & L. DIG., Feb. 1994, at 17, 17.

4. *Id.*

5. See Davidson, *supra* note 2, at 268.

By statute in almost every state, children in civil child protective proceedings initiated by the state or county (child abuse and neglect cases) have a right to have a representative appointed by the court to independently protect their interests in the litigation. A primary impetus for such laws was not a Supreme Court decision, but rather the 1974 Federal Child Abuse Prevention and Treatment Act.

Id. "Under the Uniform Parentage Act (UPA), which has been adopted in only a few states, a child must be made a party to a paternity action." *Id.* at 271. "Similarly, section 60 of a recent draft of a proposed Uniform Adoption Act makes appointment of an attorney or guardian ad litem for the child merely discretionary, both in agency placement as well as independent adoptions." *Id.* at 273.

6. See Vivaz, *supra* note 1.

7. Samples of statutes allowing the court to appoint a GAL or an attorney include the following: ALASKA STAT. § 25.24.310(a), (c) (1996); 750 ILL. COMP. STAT. ANN. 5/506 (West Supp. 1997); IND. CODE § 31-1-11.5-28(c), (e) (Supp. 1996); MICH. COMP. LAWS ANN. § 722.27(1)(e) (West Supp. 1997). Statutes specifically allowing courts to appoint a GAL include: FLA. STAT. ANN. § 61.401 (West Supp. 1997); HAW. REV. STAT. ANN. § 571-46(8) (Michie 1997); KY. REV. STAT. ANN. § 403.090(3) (Michie Supp. 1996); MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989).

8. "Under current law, in most states courts generally have authority to appoint representatives for children in court proceedings. Yet there are few consistent standards when such guardians should be appointed or what their roles are when appointed." *Matrimonial Lawyers Provide Guidance When Children Assert Rights in Divorce*, WIS. LAW., Feb. 9, 1995, at 9, 9 [hereinafter *Matrimonial Lawyers*]. Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1553-54 (1994).

Eleven states, including one pursuant to a court rule, permit the appointment of either an attorney or a guardian *ad litem*. Nine states permit the court to appoint a guardian *ad litem*. Of those states that allow appointment of a guardian *ad litem*, five require that the guardian be an attorney.

consider making this practice mandatory.⁹

Although the idea of mandatory appointment of GALs in divorce proceedings may seem extreme and full of practical problems, the need for such representation of children outweighs any potential costs of routine appointment. Part I of this Note illustrates this need, which not only encompasses the protection of children from the conflict of the proceeding itself, but the protection of the child's economic and family interests affected by the dissolution.

Part II discusses the legal hurdles that must be cleared to support such a requirement, including the rights of parents to make decisions concerning their children. This section will suggest a way to avoid the obstacle completely by basing the argument less on the state's right to intervene and more on the child's rights to certain fundamental familial associations and needs.

Part III proposes a defined role for the GAL which centers around providing more objective information to the courts so that decisions may be more accurate and thoughtful. It also illustrates why the traditional role of a GAL is more suitable as the child's representative, as opposed to the standard attorney role.¹⁰ Part IV suggests ways to address the practical issues of appointing a GAL, including costs and training.

I. THE NEED FOR REPRESENTATION

The bottom line in the argument for representation of children in divorce is simply that decisions are made in these proceedings that greatly impact the child's life.¹¹ Decisions are being made about "their living arrangements, future access

Id. (citations omitted). "Discretionary appointments are occasionally made when an appointment proceeding is contested." Davidson, *supra* note 2, at 273. *Accord* Halikias, *supra* note 3, at 17.

In 1971, the Wisconsin Supreme Court created a statutory law mandating the use of GALs for children in contested divorce cases.

Following the Wisconsin example . . . was New Hampshire in 1979. By 1988, judges in 19 other states had statutory authority to appoint GALs. In addition, the Uniform Marriage and Divorce Act permitted a judge to appoint GALs for children in contested divorce cases, and the use of advocates for children in divorce has steadily increased.

Id. "The current version of the Uniform [Marriage and Divorce] Act provides for the permissive appointment by the court of an attorney to represent the interests of a child in divorce." William D. Horn, *Mandating Appointment of an Attorney for Children in Divorce*, 27 FAM. L.Q. 473, 474 (1993).

9. "Finally, while statutes mandating the appointment of a guardian ad litem in contested custody cases broaden the scope of mandatory representation, they do not recognize the value of representation for the child during the pretrial stage of a divorce nor do they accord the child with a right to legal counsel." Federle, *supra* note 8, at 1553.

10. "There is little consensus among the states as to whether the child should have an attorney or a guardian ad litem and what the individual's role should be." *Id.*

11. See Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 51 (1994).

to parents, grandparents, friends, and others, as well as their religion and primary through college education."¹² One of the most fundamental principles in the legal system is that when a person has an interest in the outcome of a legal proceeding, he has a right to representation.¹³

This is not to suggest that children are not afforded an opportunity to be heard in courtrooms. There are examples where courts have clearly recognized a child's interest in an action and permitted the child to intervene.¹⁴ In the case, *In re Marriage of Vucic*, the court held that the trial court erred because it did not appoint a GAL for a child (the husband's son by another woman) who held title to property being disposed of in the divorce.¹⁵ The court noted the rule that the "court has a sua sponte duty to join [a] party whose property interest will be affected by the proceedings where such is brought to the court's attention."¹⁶ Although it has been recognized that children may have an affected interest in legal proceedings, this theory is not routinely applied to divorce.

Perhaps this is because there is a presumption, although clearly rebuttable, that the parents will be protecting the child's interests in a divorce. The problem with this concept is that, in the heated battle of divorce, parents do not often make rational decisions and are sometimes focused on "winning" and even exacting revenge.¹⁷ There are numerous situations that can quickly make the child and

From a child's perspective of dependency and family belonging, the legal issues of child support and custody bear most profoundly on childhood. . . . Indeed half of all children whose parents are now married will likely experience the upheaval of their parents' divorce at some point in childhood, an event threatening not only their economic security, but also the family's ability to sustain family bonds.

Id.

12. Horn, *supra* note 8, at 473.

13. Hillary Rodham Clinton has asserted:

[T]he presumption of identity of interests between parents and their children should be rejected whenever the child has interests demonstrably independent of those of his parents (as determined by the *consequences* to both of the acts in question), and a competent child should be permitted to assert his or her own interests.

Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 433-34 (1993) (quoting Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 507 (1973)). Cf. *Martin v. Wilks*, 490 U.S. 755, 761 ("All agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'") (internal citations omitted).

14. See *English v. Miller*, 370 So. 2d 968, 968 (Ala. 1979) (children's potential interest in an uncle's bank accounts made them indispensable parties to the action); *J.A.R. v. Maricopa Superior Court*, 877 P.2d 1323 (Ariz. Ct. App. 1994).

15. 576 N.E.2d 406, 412 (Ill. App. Ct. 1991).

16. *Id.*

17. See Horn, *supra* note 8, at 477 (suggesting that an advocate for the child would be advantageous when the parents' preoccupation with their own anger distracts them from the child's

parents' interests diverge. For example, one spouse may prolong litigation in order to punish the other spouse, or one spouse may allege that the child is not a child of the marriage. Clearly, it is not in the child's interest to have the two parents she loves battling in court for months or even years. Although there are certainly many parents who are able to adapt their parenting to a divorce situation, even the best parents with the best intentions can find their judgment compromised in the midst of emotional turmoil.

Even the attorney for the parents may not always be in a position to consider the child's needs. "In most states the attorneys for the parents owe no duty to the children, except as third parties. This means that where the parents' and the children's interests are not identical, the attorneys for the parents must advocate for the parents' and not the children's interest."¹⁸

Courts have also recognized that in some situations, a child's interests in a legal proceeding may be separable from those of the child's parents.¹⁹ The Indiana Court of Appeals, discussing that children are, by state statute, necessary parties to a paternity action,²⁰ noted that the interests of the child are not necessarily the same as those of a mother bringing such an action, and that child support issues as well as other rights of the child are "of constitutional dimensions and are entitled to protection under the equal protection clause of the United States Constitution."²¹ One court has suggested that even siblings may have different

interests). "[P]arents also lose sight of the separable interests of their children during a divorce; for this additional reason, assuming that children do not need independent representation has profoundly negative consequences." Federle, *supra* note 8, at 1558. See also Verrocchio v. Verrocchio, 429 S.E.2d 482 (Va. Ct. App. 1993).

The established practice is that a guardian ad litem may be appointed after a trial judge makes a preliminary finding that the best interests of the child require such an appointment. This practice is necessitated by the reality that the interests of a parent in a volatile custody dispute are not always consistent with those of the child.

Id. at 484.

18. Horn, *supra* note 8, at 479. See also Person v. Behnke, 611 N.E.2d 1350, 1355 (Ill. App. Ct. 1993) ("[L]awyers in a divorce proceeding owe a duty to their clients—the parents—not the children of their clients.") (emphasis added); Lamare v. Basbanes, 636 N.E.2d 218, 218-20 (Mass. 1994) (holding that parent's attorney owes no duty to the children).

19. See generally Ford v. Ford, 216 N.W.2d 176 (Neb. 1974).

20. IND. CODE § 31-6-6.1-2(c) (Supp. 1996).

21. Kieler v. C.A.T., 616 N.E.2d 34, 38 (Ind. Ct. App. 1993). See Davidson, *supra* note 2. In Mills v. Habluetzel, Justice O'Connor identified a rationale for making the child a party to a paternity action and providing the child with independent representation. She noted that a mother may decide to bring a paternity action because of motives unrelated to the child's best interests, such as the mother's desire to maintain a cordial relationship with the father.

Id. at 272. See also *In re Paternity of H.J.F.*, 634 N.E.2d 551, 553 (Ind. Ct. App. 1994) (holding that the judgment in a paternity action was void because the child was not joined as a party stating: "Our law recognizes that in a paternity action, the child's interests are not necessarily the same as the parents' or of the State. . . . The protection of those interests demands the joining of the child

interests in a proceeding.²²

One disturbing example of the parents' interests standing in contradiction to their children's interests is the "custody trade." These trades are bargains where one spouse tells the other to "give me a good financial settlement, or else I will litigate custody."²³ Such trading of custody for money has both economic and psychological consequences for the child. When the threatened spouse succumbs to such a threat, the result is often an inadequate property settlement or support "to avoid the risk, pain, cost, and delay of litigation."²⁴ Such threats may also increase the animosity between the spouses which will almost certainly adversely affect the child.

Although the prevalence of this practice is not entirely known, one survey indicated that these practices are "widespread."²⁵ Increasing third party involvement by appointment of a GAL might prevent some of this "trading."²⁶ If a third party or other mediator is involved, "parents might hesitate to threaten litigation or to link custody with financial terms out of fear that a mediator will discover the tactic and report it to a judge."²⁷ Appointment of a GAL might reduce the likelihood that children will be treated as "bargaining chips."²⁸

After recognizing that a child clearly has interests in a divorce proceeding that may not always be represented by her parents, it becomes important to discuss the nature of those interests and the risks to children when they are not protected. A child's interests in a divorce fall into two general categories: economic and psychological.

From an economic standpoint, children are among the poorest group in the country,²⁹ and after divorce their financial situations often deteriorate.³⁰ According to statistics, "about thirty-five percent of the children of divorce live in poverty. A large percentage live near poverty and, in almost all cases, children live more poorly after divorce."³¹ And the economic effects of divorce are not equally distributed among the family members:

as a necessary party."). Cf. *K.S. v. R.S.*, 669 N.E.2d 399, 405 (Ind. 1996) (allowing child to relitigate paternity where child was not made a party to paternity proceeding).

22. See *Montigny v. Montigny*, 233 N.W.2d 463, 468 (Wis. 1975).

23. Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 494 (1995).

24. *Id.*

25. *Id.* at 499.

26. *Id.* at 520.

27. *Id.* at 507.

28. Federle, *supra* note 8, at 1563.

29. "Children are the poorest group in the United States. Nearly one-fourth of all preschool children, almost one-half of black children, and over half of the children living in female-headed households will experience childhood poverty." Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 384 (1994).

30. One study reported that "wives and children were twelve times as likely to be on welfare if they experienced separation or divorce." JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 711 (3d ed. 1992).

31. Vivaz, *supra* note 1, at 535.

While the standard of living for men increases by over forty percent after divorce, the standard of living for women and children decreases by over seventy percent. . . . For children, as well as for their mothers, divorce may be an economic catastrophe. In contrast, for the fathers of divorce it can be a windfall.³²

It appears that somewhere in the divorce proceeding, financial issues are sometimes resolved in a manner that produces unfavorable economic conditions for the child. An example is the observation that child care costs alone can consume most of the child support awards.³³

Aside from a financial loss, children are faced with a conflict even more devastating to them: the severance of family bonds. There are certain to be psychological consequences from interference with relationships with parents, siblings, extended family members, neighbors, and friends.³⁴ Permanency in a child's life is important,³⁵ and divorce interrupts permanency. There is even evidence to suggest that clinical depression is prevalent in children who have experienced divorce.³⁶

Although one may argue that no childhood is perfect and that the exposure of children to divorce is even becoming the norm in society, there still exists a duty to lessen the impact that divorce has on children.³⁷ By appointing a GAL for the child, it may be possible to prevent the trading of custody for financial support that often leaves the custodial parent and the child economically disadvantaged. The GAL might also be able to remind the court of the child's financial needs as the court decides support issues and division of property. A GAL can help protect the child from emotional harm by encouraging the court to move quickly, keeping the child informed, and reducing fear and anxiety by helping her to understand what is happening—something that even parents may not be able to do if unfamiliar with the process themselves.

Some have questioned the need for representation of children in divorce, stating, for example, that “[g]enerally, both parents are fit to raise the child; indeed, few other legal decisions are as certain to be decided with so small a risk of seriously damaging the child.”³⁸ In addition, the American Academy of

32. *Id.* at 536-37.

33. *Id.* at 535-36.

34. *See* Fitzgerald, *supra* note 11, at 52.

35. *See* Kathryn E. Stryker & Gregory G. Gordon, *Representing Children*, NEV. LAW., Oct. 1995, at 12, 14.

36. *See* Vivaz, *supra* note 1, at 533.

37. *See* Halikias, *supra* note 3.

Clinicians in the 70s and early 80s published in law journals and books the premise that children in divorce were irreparably harmed. . . . As the sheer number of these children increased, divorce became normalized and children's reactions less extreme. However, legal professionals are primarily aware of the divorce-as-disaster assumption.

Id. at 17.

38. Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal*

Matrimonial Lawyers recently approved guidelines to help courts decide when representation for children is appropriate and what those representatives should do.³⁹ These guidelines state that children in divorce, custody, or visitation proceedings should not be represented unless requested by both parents or there is a "special need."⁴⁰ The underlying problem with these viewpoints is the assumption that there is no risk of harm to a child in these decisions or that a judge will be able to recognize a "special need."⁴¹ This position misses the point: how will the court be able to detect when there is a "special need" or a potential for harm unless someone provides the court with objective information about the child's situation?⁴² Consider this author's statement:

A judge who is a wise man can certainly formulate a conclusion about many of [the facts] from observation of parties in the light of the full factual report. But there is serious doubt whether observations can be fair and effective where, without further aids, it consists solely of impressions in the unnatural atmosphere of a courtroom, during the course of contentious proceedings in the outcome of which the parties have an almost violent interest. . . . [Lawyers and judges] should . . . have the benefit of investigations by persons who, because they do have the requisite knowledge, will be able to appreciate and search out those facts.⁴³

Another justification for representation is that it will aid in the application of

Representation for Children, 59 N.Y.U. L. REV. 76, 122 (1984).

39. See *Matrimonial Lawyers*, *supra* note 8, at 9.

40. *Id.*

41. "Children who appear in court need effective representation. No longer can we rely upon the good will of other litigants, the support of parents, or judicial oversight to ensure that children are adequately represented in our court system." Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L.Q. 417, 431 (1993).

42. See Jinanne S. J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, BOSTON B.J., Jan.-Feb. 1991, at 6, 9.

Because [the judicial-social welfare] system is often dysfunctional, placement decisions are often based on institutional constraints and personal biases rather than on a true perception of the needs of the child. A lawyer who defines and serves as the proponent for each child's unique perspective necessarily challenges the system and increases the opportunity for it to respond to and serve the interests and needs of the children before it.

Id. Some note that it may be asking too much of judges to "assess the abilities of the parents at a time of significant stress and reach a conclusion about who will better serve the child's interests." Federle, *supra* note 8, at 1541.

43. Robert J. Levy, *Custody Investigations as Evidence in Divorce Cases*, 21 FAM. L.Q. 149, 152 (1987) (quoting Gellhorn, *Children and Families in the Courts of New York City*, in NEW YORK CITY BAR ASS'N, SPECIAL COMMITTEE REPORT 310-11, 314 (1954)).

the ever-evasive “best interests” standard used to make decisions about children.⁴⁴ Some criticize the “best interests” standard as indeterminate and claim that it “invite[s] the subjective bias of the particular court adjudicating the standard.”⁴⁵ Using a GAL, a more neutral source of information than the parents and their attorneys, offers a way to eliminate some of the unintentional bias that creeps into judicial decision-making.⁴⁶ Thus, by appointing a representative for a child, it becomes easier for the court to more accurately understand the child’s needs and make already tough decisions more enlightened.

There are certainly many good parents who will work together through the divorce process to protect their child. However, we cannot always predict how previously reasonable people will react in situations of significant emotional stress.⁴⁷ Divorce has been ranked very high on the scale of life stresses⁴⁸ and can temporarily impair the judgment of rational adults. By appointing a GAL for a child, it becomes possible to keep the parents focused on their child’s needs. We need to send a message to the courts and divorcing couples that when children are involved, they are not only dissolving a marriage, but restructuring a family.

II. LEGAL HURDLES OF THE APPOINTMENT OF A GAL

The fear immediately evoked by suggesting appointment of a representative for each child is that such a representative will trample upon the privacy rights of the family and may interfere with the right to raise one’s children.⁴⁹ However, the

44. For a discussion of the “best interests” standard, see *Ex Parte Devine*, 398 So. 2d 686 (Ala. 1981) (rejecting “tender years” presumption, which favors giving custody to the mother for young children, and replaced it with a “best interests” determination, which requires the court to consider a number of factors).

45. Fitzgerald, *supra* note 11, at 61.

46. “Decisions rendered in this system are only as good as the information upon which they are based, and under-represented parties, whose cases are not adequately pled, cannot expect to obtain justice. . . . Children have a right to be healthy and safe.” Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 282 (1995).

47. See *Bahr v. Galonski*, 257 N.W.2d 869, 874 (Wis. 1977).

The requirement that the children have independent 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.

Id.

48. Divorce is ranked number two (second only to “Death of Spouse”) on a list of significant life events that can have an impact on one’s susceptibility to illness. DENNIS COON, *INTRODUCTION TO PSYCHOLOGY: EXPLORATION AND APPLICATION* 344 (4th ed. 1986).

49. For cases that define these family privacy rights, see *Roe v. Wade*, 410 U.S. 113 (1973)

justification for appointment of a GAL is grounded in protection of a child's rights. By strictly defining and limiting the GAL's role in divorce proceedings, these family privacy concerns can be adequately addressed. Constitutional questions, although always deserving of utmost attention, should not stand in the way of promoting protection of the large population of children who are affected by divorce.

The basis for a state's interference with parenting decisions is the doctrine of *parens patriae*,⁵⁰ which allows the state to intervene to protect those who cannot protect themselves.⁵¹ Traditionally, the states have avoided intervening in child-parent relationships unless there is some showing of unfitness of the parents, such as abuse or neglect.⁵² Some scholars assert that by allowing a representative to represent a child's (or her own) wishes contrary to the parent's wishes, a parent's rights are infringed absent this finding of unfitness.⁵³ Others assert that interference with custody decisions in a divorce lacks constitutional grounds because, for example, states do not get involved in intact marriage decisions or in

(right of a woman to terminate pregnancy in the first trimester); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use birth control); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents have the right to make decisions about the education of their children). *See also* *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 564 (1996) ("Choices about marriage, family, and the *upbringing of children* are among associational rights this Court has ranked as of basic importance to our society, . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (citations and internal quotation marks omitted) (emphasis added).

50. *Parens patriae* literally means "parent of the country" and refers to the role of the state as guardian of those who are under legal disability. *BLACK'S LAW DICTIONARY* 1114 (6th ed. 1990).

51. *See Vivaz, supra* note 1, at 550.

When intervention becomes necessary, the state derives its power from one of two sources. First, it may act through its police power to prevent harm to its citizens or to promote the public welfare. Second, it may act through its *parens patriae* power to protect individuals who lack the capacity to act for themselves. When acting through its *parens patriae* power, the state may reach further than would be permissible under its police power, but it must always act in the best interests of the child and may not attempt police power objectives which would conflict with her welfare.

Id.

52. *Id.* at 546.

Increasingly, the state has assumed power to intervene when necessary to protect or promote the welfare of those without capacity to act in their own best interests. Because the state recognizes that children do not belong solely to the state, however, it will not intervene unless the child's parents are somehow unfit, unable, or unwilling to discharge their responsibilities adequately. Thus, the state generally reserves intervention for cases of gross deviation such as serious child abuse or juvenile delinquency.

Id.

53. *Id.* at 546-47.

custody decisions made between parents who never married.⁵⁴

But to argue that a married couple has a right to have a court grant a divorce but also that the court does not have a right to take steps to insure that the children's interests are guarded seems disingenuous. In divorce, parents have chosen to submit their affairs to the court for a dissolution in which the court is required to make a custody determination. Even if the parents come to a custody agreement and property settlement on their own, the court must approve it. Because the parents have placed the issues before the court, they have temporarily waived some of their rights with respect to their children.

Perhaps a better argument, though, lies in a different perspective. Why should the rights of the child be subordinated to the parents' rights? "Initially parents at least chose each other of their own free will and chose to dissolve the relationship. The child, however, had no such choice in selecting a family or in the decision of the parents to divorce."⁵⁵ There should be a set of basic rights that a child possesses, separate from the parents,⁵⁶ that would require protection when her family is being dissolved.⁵⁷ If such rights were recognized, then the appointment of a representative for the child would be viewed as supporting the child's rights rather than interfering with the rights of the parents.⁵⁸ So a clear argument for appointing a GAL to represent the child's interests can be found in the recognition that a child has definable rights, separate from her parents', that should be constitutionally protected.⁵⁹

Although children's rights are hardly solidified in the relatively immature field of "pediatric law," there is a definite trend in this direction that gains momentum daily. "Legal scholars argued that children have, or ought to have, rights and interests that are protected when parents divorce. These interests include the child's happiness, property, and financial interests."⁶⁰ In addition, "Article 12 of the United Nations Convention on the Rights of the Child addresses the right of children to have their voices heard, with the assistance of effective legal counsel, in all judicial procedures or administrative hearings affecting them."⁶¹

It is relatively easy to fashion a basic set of rights for a child deserving of protection. Consider the following list representing the basic needs of a child:

54. See Fitzgerald, *supra* note 11, at 53-54. But states do become involved when children's interests are being litigated in paternity and adoption actions. See *supra* note 5.

55. Horn, *supra* note 8, at 474.

56. "From the first books on law relating to children until the recent past, commentators focused not on children, but on the rights of adults with respect to their children." Ventrell, *supra* note 46, at 261.

57. See generally Fitzgerald, *supra* note 11 (arguing for a theory of "family estates" to protect the interests of children in divorce).

58. "A parent wishing to free himself from a marriage can unilaterally deprive a child of familial association as it was known to her and can reduce her standard of living by as much as seventy percent—without her consent or her chance to contest." Vivaz, *supra* note 1, at 531-32.

59. See *supra* notes 46, 56 and accompanying text.

60. Halikias, *supra* note 3, at 17.

61. Davidson, *supra* note 2, at 255.

1. Provision of basic needs—food, clothing, shelter, medical care, preventative medical care, and education
2. Provision and maintenance of nurturance, stability and continuity—promotes emotional growth and development.
3. Freedom from abuse or neglect.
4. Maintenance of the family—maintaining the family unit or at least family ties with parents, siblings and non-biological caretakers.⁶²

This list could easily be construed as a child's basic "rights." Most of these fundamental needs will be tangentially, maybe even profoundly, affected by a divorce.

The advantages of defining and protecting a child's rights in divorce are numerous. First, the highly criticized best interests standard would be less indeterminate and subjective if grounded in articulated rights; it will provide judges with a rule of decision.⁶³ "Rights demand the attention and respect of judges and provide grounds for decisions by mandating certain outcomes in specific cases; in this sense, rights limit the court's responsibility by articulating justifications for judicial decisions."⁶⁴ Defined rights will also assist in the definition of the role of the GAL.⁶⁵ This will help prevent problems in the area of family privacy by limiting the scope of the GAL's investigations.

Others have articulated benefits of recognizing the rights of a child in the divorce process:

Under a strong version of rights . . . hearing a child's voice and giving her input would mean more than simply permitting her participation in the process; it would also signify that any negotiated settlement would be approved and accepted by the child. . . Giving the child the power of full participation in the divorce process would . . . reduce animosity between the spouses who would need to confront effects of their behavior on the child. At the very least, this greatly reduces the risk that the child would become an emotional football.⁶⁶

Beyond recognizing a child as a being with basic human rights that deserve protection, another theory exists to justify increased involvement of children in the divorce process. The idea of a "family estate" has been proposed as a means of recognizing the value that a child brings to a family.⁶⁷ Such a theory would give

62. Elder, *supra* note 42, at 8-9.

63. Federle, *supra* note 8, at 1540.

64. *Id.* at 1543.

65. *Id.* at 1551.

66. *Id.* at 1563.

67. *See generally* Fitzgerald, *supra* note 11.

the child an actual interest in the property distribution in a dissolution.⁶⁸ This idea is not completely new in that there once existed a historical property concept of the “family wage” which suggested that the husband’s wage “belonged” to the family.⁶⁹ By recognizing that a child brings love and other benefits to the family,⁷⁰ one can more firmly argue that a child’s interests in the dissolution should be recognized and guarded.

Thus, the constitutional hurdle of interference with parental rights can be overcome by arguing that the state has a compelling interest in protecting a child’s rights under the *parens patriae* doctrine, especially considering the large number of children who are affected by divorce each year. Moreover, one could argue that parents have temporarily waived some of their rights by seeking a dissolution.

There is still room for argument against appointment of a GAL for every divorce, however. In an amicable divorce, devoid of hostility between parents, one could reasonably argue that the state has no right to appoint a representative for the child.⁷¹ First and foremost, it is circular to argue that a GAL should only be appointed if there is a problem, when the GAL’s primary function, under the suggested proposal, would be to determine if a problem exists. If a GAL clearly recognizes that parents are working together well, respecting the child’s interests, and protecting the child from the conflict of divorce, then the GAL’s role would be minimal. But without the appointment of such a representative from the beginning, there is no adequate way for the court to detect a problem. A parent’s rights will not be interfered with unless there is a showing that there is a need to do so.

A remaining legal issue that requires attention is the problem with the potential interference of family privacy by a GAL, especially when the parents have agreed on custody and are settling the divorce matters privately. The argument is that to allow these types of investigations is to say that the child’s best interests outweigh the parents’ privacy rights. One author has suggested that:

The Investigator’s job. . . is to ferret out relevant information. And since under the best interests test virtually everything may be relevant,

68. *See id.* at 100.

What if the law accorded children recognition of their non-financial contributions to the family? Envision a law defining a “family estate” as all property acquired since formation of the family. Upon severance of the parents’ bond—the divorce, for example, of married parents—all family members would be entitled to an equal share in the distribution of the family estate. . . . The custodial parent would receive the child’s share in trust for the benefit of the child, just as custodial parents would receive child support payments.

Id.

69. Williams, *supra* note 29, at 403.

70. *See Fitzgerald, supra* note 11, at 101.

71. Some argue that because parents already enjoy a high degree of control over decisions that affect their children in an intact marriage (or for example in a legal separation) they should have no less control if they are seeking a divorce. *See Guggenheim, supra* note 38, at 119-20.

appointment of an Investigator to represent the child means that very little may be left of the parents' interest in privacy. Thus, in the guise of attorney for the child, the state may be able to discover the parents' most deeply-held secrets. Regardless of the value of the information discovered and brought to light, parents who go to court to resolve custody disputes should have the right to keep certain matters out of the controversy.⁷²

Although a parent's privacy rights should be respected, there are situations that warrant interference with this right to protect the child. Part of the fear of appointing GALs stems from having no standard for the role and function of the GAL. One way to prevent overly intrusive and unnecessary prying on the part of the GAL is to strictly define the role of the GAL. The next sections will address the role of the GAL in divorce.

III. DEFINING THE GAL'S ROLE

By setting a strict standard for the role of the GAL in divorce proceedings, one accomplishes two equally important objectives. First, it assures that the GAL is functional and efficient by having her focus on relevant tasks. Secondly, by placing clear boundaries on the scope of the GAL's powers, the parents' due process and privacy rights are protected.

A. *Confusion About the GAL's Role*

Examining the current use and responsibilities of guardians ad litem in the court system reveals a myriad of assigned responsibilities. The wide variety of roles held by GALs in the court system⁷³ has caused much role confusion and contributes to the uneasiness about appointing them in new contexts. The traditional definition of a GAL is "someone appointed by the court to protect the interests of an incompetent person."⁷⁴ The GAL does not necessarily represent the wishes of the charge but presents the court with a recommendation of what is in the charge's best interests.

There are many hats currently worn by a GAL in today's courts. GALs have been described with such terms as "advocate" or "factfinder,"⁷⁵ "lawyer-psychologist" or "child liberator-child saver,"⁷⁶ "investigator," "champion," and "monitor."⁷⁷ The basic role, however, seems to boil down to one who "performs the role of the child's advocate, calling and cross-examining witnesses in an effort

72. *Id.* at 121.

73. "Even within the same state, the role of the child's representative may vary from region to region and court to court." Federle, *supra* note 8, at 1554-55.

74. Halikias, *supra* note 3, at 17.

75. *Id.*

76. *Id.* at 18.

77. Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 638 (1990).

to elicit evidence that will aid the court in making a custody decision in the child's best interest."⁷⁸

B. Attorney v. Guardian Ad Litem

The largest gray area in defining the function of a GAL comes from the distinction between a GAL and an attorney appointed for the child. Although the roles are often confused when an appointment is made, there is a distinct difference between the two.

The ethical responsibilities of counsel and a guardian ad litem may differ dramatically: The guardian ad litem, both in representing the infant and as an officer of the court, is under a duty to make a report to the court of his activities . . . while counsel, in some respects, represents his ward as an attorney represents an adult client.⁷⁹

Another example illustrating the difference in the two roles is that an attorney cannot express to the court that she disagrees with her client's stated desires, while a guardian is free to disagree with the child and make a recommendation otherwise if she feels it is in the best interests of the child.⁸⁰

This Note specifically advocates the appointment of a GAL rather than an attorney for children in divorce. Although some advocate the appointment of an attorney for the child, who would perform all of the normal functions of an attorney, representing the client's wishes,⁸¹ this is not the most effective way to represent the child's interests for several reasons.

First, children below a certain age, some suggest the age of seven,⁸² are not fully capable of expressing their wishes and understanding what is in their own best interests.⁸³ By appointing a GAL, it allows the representative to present all information, including her own recommendation,⁸⁴ to the court rather than just the child client's desires. That is not to say that the GAL should not also present the child's desires to the court along with other relevant information. In fact, having the GAL represent the child's wishes, avoids placing the child in an uncomfortable position of directly expressing their wishes and worrying that he or she may hurt a parent's feelings.

78. *Crosby v. Crosby*, No. 92AP-1455, 1993 WL 212727, at *4 (Ohio Ct. App. June 15, 1993). See also IND. CODE § 31-6-1-18 (1993) (defining role of GAL).

79. Louis I. Parley, *Representing Children in Custody Litigation*, 11 J. AM. ACAD. MATRIMONIAL LAW 45, 46 (1993).

80. *Id.*

81. See Horn, *supra* note 8, at 479. See generally Fitzgerald, *supra* note 11.

82. See Guggenheim, *supra* note 38, at 77 (urging judges not to appoint counsel for children who are too young (under seven) to give direction to an attorney).

83. See *Goldstein v. Goldstein*, 341 A.2d 51, 53 (R.I. 1975) (court did not abuse its discretion when it gave substantial weight to the preference of a 9 ½-year-old child making a custody decision).

84. See Stryker & Gordon, *supra* note 35, at 13.

Another important reason why the GAL is the preferred model of representation is that, unlike an attorney-client relationship, a GAL has no duty of confidentiality.⁸⁵ This is important, because to prevent the parents from reviewing any of the representative's reports, for instance under the attorney-client privilege, would violate the due process rights of the parents.⁸⁶

Parents' rights of due process therefore mandate that they have an opportunity to counter evidence that a fact-finder will rely on in reaching a judgment determining their child's fate. Therefore, none of the information the guardian gathers can be shielded from discovery by the attorney-client privilege.⁸⁷

The purpose of appointment of a GAL should not be to shut the parents out, but to keep them and the court focused on the child's interests and working together.

C. Proposed Standard for GAL's Role

With a few qualifications, the proposed role for the GAL is not far from the traditional role. For example, the following list summarizes the basic day-to-day tasks the GAL would perform:

- a) introduce/examine witnesses and present evidence to the court;
- b) accompany the child to, and be present at, all court proceedings;
- c) speak regularly with the child and observe the child in his/her placement situation;
- d) conduct an independent investigation of the case, including interviews with the child's parents, caretakers, etc.;
- e) review all relevant records and reports;
- f) file a report and recommendations with the court related to the child's welfare; and
- g) monitor to assure that the court's orders and child welfare agency's responsibilities are being carried out.⁸⁸

But because this proposal includes appointing the GAL at the beginning of the divorce process, there is a large range of opportunities, in addition to those listed above, for the GAL to be proactive and help educate the parties as they move

85. *Id.* at 14.

Where the attorney is appointed as legal counsel for the child, communications between the attorney and the child are protected by the attorney-client privilege. On the other hand, courts have held that a child's communications with his or her guardian ad litem are not protected by the attorney-client privilege.

Id.

86. *See* *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988).

87. *Id.* at 1286.

88. Davidson, *supra* note 2, at 264. For more suggestions of duties for the GAL in divorce see COMMITTEE ON CHILDREN & THE LAW, NEW YORK STATE BAR ASS'N LAW GUARDIAN REPRESENTATION STANDARDS, VOLUME II: CUSTODY CASES (1994).

through the process.

As mentioned earlier, the general consensus for appointment of GALs in divorce cases is that it is at the discretion of the court to appoint if the court "makes a factual determination that it would be necessary to protect the interests of the child."⁸⁹ The proposal here is to appoint a GAL for each child at the beginning of the process because it may be unrealistic to expect the court to know that there is an actual need for one.

The GAL's duties would begin with a routine investigation of very basic facts concerning the divorcing couple and the status of the child. "As part of the investigation, the guardian should meet regularly with the child. In addition, the guardian ad litem should meet with teachers, neighbors, relatives, doctors, mental health professionals, and any other person directly involved with the case."⁹⁰ But the scope of this investigation should remain limited in order to protect the privacy rights of the parents and should only go beyond these limits if warranted by the findings (for example, abuse or neglect) and if approved by the court. The purpose of this investigation would be to detect overt problems that the court alone may not be able to discover. One reason cited by some for conducting these investigations is that it provides a "neutral expert, removed from the emotional turmoil of the dispute and the partisan advocacy of the lawyers, [who] can provide more reliable information to the judge than the embattled spouses are likely to provide."⁹¹ Although one might argue that parents who are observed are more likely to display appropriate behavior, at least being observed makes them more aware of their conduct.

If the GAL were to uncover a problem, such as allegations of abuse or neglect, there might be a need (or requirement by statute) for the court to take further action in protecting the child's interests, perhaps even by appointing an attorney for the child or involving child protection services. It is also important to keep in mind that there may be other situations that, in the court's determination, require an increased level of protection or representation beyond the GAL.

The GAL would also provide the court with information upon which to make decisions, not only about custody, but about support and property division. The involvement of the GAL at each of these decision points would help prevent the custodial spouse from accepting financial settlements that would adversely affect the child's standard of living.⁹² The GAL could call and cross-examine witnesses and present evidence if necessary to provide information supporting the child's interests.⁹³ As stated above, the GAL's reports and information presented would have to be completely open to the parents for review in order to protect their due

89. L.C.S. v. S.A.S., 453 S.E.2d 580, 588 (Va. Ct. App. 1995).

90. Stryker & Gordon, *supra* note 35, at 13.

91. Levy, *supra* note 43, at 152.

92. *See supra* note 30.

93. "It is clear that a guardian ad litem is appointed as an officer of the court and, as such, is accorded the presence at the hearing and the opportunity to voice a recommendation." Muhlhauser, *supra* note 77, at 639. *See infra* notes 105-10 and accompanying text for a discussion of whether the GAL must be an attorney.

process rights.⁹⁴

The GAL would be present whenever the child is being interviewed or evaluated with respect to the proceedings in order to protect the child's interests. At least one court has even held that an attorney may not interview a divorce client's minor children without consent of the GAL when there has been a GAL appointed.⁹⁵ This holding was based on the rule that prohibits a lawyer from communicating with a party represented by another lawyer.⁹⁶

As discussed earlier, there are always potential emotional effects of the divorce process on children. The GAL could serve a critical function by monitoring the child's emotional status throughout the ordeal and by making recommendations to the parents for ways in which to assist the child in coping and enhancing the child-parent relationship.⁹⁷ The GAL, presumably having experience in the field, would also be able to take some of the mystery and fear out of the divorce process by educating the child and parents about what is to be expected.⁹⁸ The GAL can be a resource for the parent who may seek additional assistance during the ordeal. This "monitoring" function is not an uncommon use of the GAL. For example, GALs have been used to help monitor children in foster care situations.⁹⁹

In general, by promoting a cooperative effort between the parents and the GAL, the GAL does not necessarily have to play an adversarial role. Regardless of the actual performance of the GAL's duties, the mere appointment of a representative for the child sends a message to the parents that they are expected to respect the child's situation and do everything in their power to protect the child's interests.

The scope of the overall involvement of the GAL should be situationally dependent. If the GAL is comfortable that the child's interests are being respected and the child is not being used as a bargaining chip, then the GAL might maintain a low profile and simply perform a monitoring and counseling function.

A reasonable concern about a GAL's involvement in the process is the issue of bias. Many commentators fear that GALs may bring hidden agendas to their

94. See *supra* notes 85-87.

95. See *In re Kinast*, 530 N.W.2d 387, 390 (Wis. 1995).

96. *Id.*

97. See Halikias, *supra* note 3, at 17-18.

98. "One of the attorney's greatest services to the child is to take the mystery out of the process. Conflicts regarding custody and placement are extremely stressful for children, and it is important for children to have an accurate sense of what is happening." Stryker & Gordon, *supra* note 35, at 14.

99. See Muhlhauser, *supra* note 77, at 635-36.

The 1980 Adoption Assistance and Child Welfare Act expanded the role of the guardian ad litem as it addressed the issues of children lingering and "drifting" in foster care. . . . The guardian ad litem subsequently assumed the very natural role of monitoring permanency plans for the courts that placed children in foster care for compliance with court orders and case plans.

roles and that their recommendations to the court will be influenced by such prejudices. One author suggests that there is always the potential for fact “shaping” and “suppression” on the part of the investigator who may, based on cultural bias or personal values, have already made up his or her mind about a situation.¹⁰⁰

There is no doubt that every human being in a position to make decisions will be influenced by some subjective factors. Judges are in this position every time they take the bench. But such concerns about bias on the part of the GAL can be put in perspective by noting that the court will always have the last word in these decisions and is free to reject the GAL’s recommendations if they appear ill-founded. The court also has the authority to order other evaluations, such as psychological or educational, if necessary, to “round out” the court’s information.

In order to protect against more subtle or undetectable bias, it will become critical to define clearly the role of the GAL and assure that all GALs are properly trained. By making GALs aware of biases that may enter into their investigations and reports, it might be possible to lessen the chances of skewed recommendations.¹⁰¹ Others suggest that GALs should be required to keep accurate records and to provide those records to the parents to review for accuracy.¹⁰² Appropriate supervision of GALs by other professionals can also prevent bias. The fear of bias, however, should be no greater than in other similar positions, such as judges and social workers. A bureaucracy of purely objective people always remains an ideal.

IV. PRACTICAL ISSUES/OBSTACLES

The bridges between ideas and their application are often the difficult ones to build. There is little argument that the mandatory or even routine appointment of a GAL for each child in a divorce would be a practical challenge.¹⁰³ However, there must first be a direction before actual change can occur.

A. Cost

The first question is always, “Who pays?” Usually, payment for a GAL falls

100. See Levy, *supra* note 43, at 160-64.

101. “The basis for the recommended decisions must be clear and based upon an articulated set of standards or values. Scrutiny must be used to ensure that recommendations and decisions focus on the needs of the child and are free of personal and cultural bias.” Muhlhauser, *supra* note 77, at 643.

102. See Levy, *supra* note 43, at 167.

103. See Fitzgerald, *supra* note 11, at 109.

In re-imagining the family dispute to include children’s own stories, I have presumed some necessary passage of time permitting the development of both new substantive rules to adjudicate the claims and new procedural mechanisms for courts to hear them. For now, the mechanisms of our justice system may appear impossibly child hostile and protecting children from the trauma they experience in court the primary necessity.

upon the parents, divided either by statute or at the discretion of the court.¹⁰⁴ At a time when even the friendliest of divorces can be costly, it is understandable that courts may be resistant to increasing the cost by adding a GAL to the list of expenses. Some have determined that, “[w]ith concern for both resource conservation and policy considerations, advocates should be appointed only in those cases where the child’s interests are significant, where some conflict is identified, and where the legal system is likely to ignore or overlook those interests.”¹⁰⁵ However, there are cost-effective alternatives to legally trained professional GALs. States are recognizing the value of these alternatives.

Now, due to three factors, many states have implemented an alternative and less expensive approach to advocacy for children. The first factor involves the rising expense involved in compensating court-appointed attorneys. The second factor was the often poor performance of the juvenile’s legal counsel. The third factor is the rise in court-appointed attorney’s caseload that often results in an attorney who cannot effectively represent the best interests of the child in court.¹⁰⁶

One readily available option is the use of Court Appointed Special Advocates (CASA),¹⁰⁷ lay volunteers trained specifically to represent children in legal proceedings.

The role of the guardian ad litem as a monitor is gaining recognition with the growth of the Court Appointed Special Advocate (CASA) program nationally. A national evaluative study found that the CASA model

104. See *State v. Salch*, 673 So. 2d 904 (Fla. Dist. Ct. App. 1996) (father must pay GAL fee); *Brakhan v. Brakhan*, 524 N.W.2d 74 (Neb. Ct. App. 1994) (county cannot be ordered to pay GAL fees unless parents found to be indigent).

105. Edwards, *supra* note 41, at 430.

106. Jennifer W. Bolden, *In Re: The Court-Appointed Special Advocate (CASA) Volunteers Providing the Missing Link in “The Best Interests of the Child”*, 19 S.U. L. REV. 421, 425-26 (1992).

107. See Edwards, *supra* note 41, at 424.

In 1977, David Soukup, then a juvenile court judge in King County, Washington, asked volunteers within his community to assist abused and neglected children through the dependency court process. His initiative started the Court Appointed Special Advocate Program (CASA), a nationwide endeavor which now has more than 500 programs across the nation and over 30,000 trained volunteers working in the court system on behalf of children.

. . . Child advocate responsibilities include case investigation, support for the child, case plan development, monitoring service delivery, resource identification, case reporting and advocacy. The role of the volunteer will vary greatly, depending on the needs of the particular community, the roles of the attorneys and other persons involved in the legal system, and available resources. Remarkably, these trained volunteer advocates have in some circumstances proven more effective in court than attorneys.

programs put strong emphasis on case monitoring. Overall, the study found that CASA representation as a guardian ad litem was superior to the use of attorneys in that role.¹⁰⁸

It does not appear, from the success of the CASA programs, that one must be a legally trained professional to function as a GAL. Although some states require GALs to be attorneys,¹⁰⁹ other states do not.¹¹⁰

It is also important to consider that many courts already have programs in place to protect the interests of children,¹¹¹ and GAL appointment should not duplicate, but supplement, resources already being provided.¹¹²

B. Training

In almost every occupation there are countless problems attributed to "training issues." Although training seems to be a standard scapegoat, there is an element of truth to the philosophy that proper training can prevent problems. Training will indeed play an important role in the effective use of GALs in the divorce context. As mentioned above, training GALs to recognize their own prejudices and tendencies will play an important part in keeping their personal biases from influencing their performance.¹¹³

Although persons with a variety of skills and backgrounds could feasibly function well as a GAL,¹¹⁴ working with children always presents unique

108. Muhlhauser, *supra* note 77, at 638 n.26.

109. *See supra* note 7.

110. "Case law does not dictate a preference for a law-trained guardian ad litem over a nonlaw-trained guardian ad litem in North Dakota." Muhlhauser, *supra* note 77, at 637 n.22.

111. Examples include "home studies" or "custody investigations."

The term "custody investigation" commonly signifies an out-of-court exploration of and written report about the circumstances of children who are the subjects of judicial custody awards in divorce cases. Investigations usually provide social, psychological, and economic data about the children as well as a variety of information about the adults who are litigating the right to the children's custody. The investigation is commonly conducted by a social worker employed by the divorce court's own social service arm or by an employee of a local welfare department or social service agency.

Levy, *supra* note 43, at 149-50. The caseworker, in the course of this investigation, interviews parents and children, visits the home of each parent, interviews the parent's therapist, the children's teachers, and neighbors and friends, and may refer parents or children for psychiatric treatment. *Id.* at 150. Another example of a program developed to help children through legal encounters is a "child advocacy coordinating council." *See generally* Edwards, *supra* note 41.

112. In a concurring opinion, Justice Beilfuss suggests that the opinions of a GAL can be redundant and a waste of resources where the court already has the advice of the family court commissioner or social workers, and that the court should not be required to appoint a GAL in such a case. *Montigny v. Montigny*, 233 N.W.2d 463, 470 (Wis. 1975) (Beilfuss, J., concurring).

113. *See supra* notes 99-101 and accompanying text.

114. *See Muhlhauser, supra* note 77, at 637 n.21.

By virtue of their legal training, lawyers may bring a different style and range of abilities

challenges. Therefore, it becomes important for GALs to have some understanding of child development.

Without an understanding of children's basic emotional, motor, and cognitive development patterns, an attorney cannot adequately communicate with the client, and thus understand and protect the child's interests. In order to develop reasonable expectations for the client, the attorney must evaluate the client's ability to comprehend questions, recall information, distinguish facts from fiction, and express themselves.¹¹⁵

Proper training and support will also prevent the "role confusion" that often plagues such appointed representatives.¹¹⁶ For example, many GALs find themselves performing a type of "hybrid psycho-lawyer" role.¹¹⁷ Certain factors have been observed to contribute to role perception problems, including:

- a) how the role is described, if at all, in state law;
- b) any instruction given by, or expectations of, the appointing judge;
- c) the training that has been received, if any, in the scope of the guardian ad litem's role; and
- d) the age of the child and the guardian ad litem's understanding of child development, bonding and attachment, and permanency planning issues.¹¹⁸

Another reason for having GALs clearly understand their role is so that they will be protected from liability.¹¹⁹ In general, GALs will enjoy immunity as long as they are performing within the scope of their duty.¹²⁰

to the role of guardian ad litem than non-attorneys. Similarly, nonlawtrained guardians, if they are members of another licensed or regulated profession such as social work or nursing, may have certain ethical limitations. They may also bring skills attributable to their profession that enhance their ability to fulfill the role of a guardian ad litem.

Id.

115. Stryker & Gordon, *supra* note 35, at 13.

116. See Halikias, *supra* note 3, at 18.

117. *Id.*

118. Davidson, *supra* note 2, at 263.

119. See Stryker & Gordon, *supra* note 35, at 14-15.

Some jurisdictions grant court appointed guardian ad litem absolute quasi-judicial immunity from any liability arising from the performance of his or her duties. The rationale being that immunity protects participants in the judicial process from harassment, intimidation, and interference with their ability to engage in impartial decision making. Despite this immunity, courts have the authority as well as a duty to remove a guardian ad litem who is not functioning competently. Appointed attorneys functioning as attorneys, on the other hand, are generally not granted similar immunity.

Id. See also IND. CODE § 31-1-11.5-28(g) (1993) (granting immunity to GALs who perform their duties in good faith); Gerber v. Peters, 584 A.2d 605 (Me. 1990).

120. See State v. Weinstock, 864 S.W.2d 376, 385-86 (Mo. Ct. App. 1993) (quasi-judicial immunity extends to statutorily mandated guardians ad litem when performing within the scope of

In general, training programs will have to be developed to ensure that GALs clearly understand their responsibilities and how to protect the child's interests while maintaining an unobtrusive posture in order to promote a low impact divorce proceeding.

CONCLUSION

In researching this topic, I often recalled a story my husband once told me about his childhood. When he was very young, he thought that he, his mother, and his father were all "married" to each other. This is a poignant view of how a child perceives the family. We should be less focused on the dissolution of marriage and more focused on the concept of dissolution of a family. Once children are born into a marriage, the family takes on a new shape, with new entanglements, expectations, and consequences. A responsible view of divorce is one that considers the impact on the family unit rather than the simple untying of marital bonds and promises.

By not listening to children or making sincere efforts to consider their perspectives, we risk exposing our children to harms that we, as adults, do not comprehend. Most people wish to protect their children. But how can we truly protect our children's interests if we do not have a clear understanding of what those interests are? "We must have no greater societal goal than to direct every resource available toward meeting the needs of children and families in the courtroom and in our communities."¹²¹ By providing routine representation of a child's interests in divorce, we are giving our children, our country's most precious resource, the consideration and protection they deserve.

her duties).

121. Muhlhauser, *supra* note 77, at 647.

