



**THE PROBLEMATIC ROLE OF
GUARDIANS AD LITEM
IN
CUSTODY AND ABUSE CASES**

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The Problematic Role of Guardians Ad Litem in Custody and Abuse Cases¹

by the
Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)²

Introduction

Over past decades, the use of *Guardians Ad Litem* (GALs) in custody cases involving domestic violence has come under fire. Problems identified by the critics include violations of parents' due process rights, GALs usurping the role of judges, and the failure of GALs to protect children from abusive fathers. In fact, some scholars now advocate the abolition of the GAL system, while others propose significant systemic reforms.

This paper contains a compilation of 28 stories from parents around the country who were in litigation with abusive ex-partners, but unfortunately felt victimized again by the legal system, and in particular, the GAL who had been appointed to protect their children. In the majority of these cases, there is evidence that corroborates the children and/or the mother's allegations of abuse. Following this compilation is an overview of the most trenchant critiques of the GAL system.

But first, understanding the scope of the GAL problem requires some background information:

¹ The DV LEAP Custody and Abuse Technical Assistance (TA) Project is supported by Grant No. 2011-TA-AX-K006 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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Prior to the 1974 passage of the Child Abuse Prevention and Treatment Act (“CAPTA”), legal representation of children was relatively uncommon.³ CAPTA was enacted to address the need for adequate representation of children, primarily in State-initiated abuse and neglect cases.⁴ In the years following CAPTA’s enactment, many states expanded guardian representation to other types of proceedings, including private litigation over custody and visitation.⁵

Most jurisdictions now have statutes that provide for the appointment of some type of legal representative for children in custody cases, and most courts appoint guardians ad litem (often, but not exclusively attorneys) to fulfill this role. In some jurisdictions they may be given other names such as law guardians or attorneys for children. For purposes of this paper, we use the label “GAL” to refer to all such appointed legal representatives for children or their “best interests.”

Despite their widespread use, the exact role of the GAL in any given case can be unclear. Indeed, variation among and within the states appears to be the norm—even neighboring counties often have different systems for the appointment, compensation, and training of GALs.⁶ Very few statutes adequately define the role, obligations, responsibilities and rights of GALs in a particular case, and the use of GALs can vary from judge to judge and case to case.⁷

In fact, a study by the U.S. Department of Health and Human Services undertaken to evaluate the effectiveness of the guardian system found that “a lack of legislative guidance and disagreement among and within States regarding how best to provide this representation has resulted in a chaotic and inconsistent system of GAL representation.”⁸ This study also found that “[s]eldom do guardians have written guidance as to the responsibilities that must be undertaken to provide adequate

³ Inga Laurent, “This One’s for the Children: The Time has Come to Hold Guardians Ad Litem Responsible for Negligent Injury and Death to Their Charges,” 52 Clev. St. L. Rev. 655, 660 (2004-2005).

⁴ *Id.*

⁵ *Id.*, at 661.

⁶ *Id.* at 662,

⁷ For an overview of various state GAL statutes, see generally Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine Guardians Ad Litem in Custody Disputes: The Reality and the Ideal*, 94 Minn. L. Rev., 2103, 2116 (2010) (“Current state statutes illustrate basic differences in appointment guidelines and the variations in terminology, roles and responsibilities, and levels of discretion of those appointed to represent the interests of children.”)

⁸ Inga Laurent, “*This One’s for the Children: The Time has Come to Hold Guardians Ad Litem Responsible for Negligent Injury and Death to Their Charges*,” 52 Clev. St. L. Rev. 655, 663 (2004-2005), citing U.S. Dep’t of Health and Human Services, Administration for Children, Youth and Families, National Study of Guardian Ad Litem Representation (1990).

services to the child..."⁹ But see S.C. Code Ann § 63-3-830(A) (2008)(setting forth the duties and responsibilities of a GAL)¹⁰

Defining the role of the GAL has become increasingly difficult, and correspondingly, significant confusion and debate has arisen in this area.¹¹

While many people have strongly held opinions about GALs, most people admit 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 of arms of the court,' 'recommenders,' 'fact finders,' and 'de facto decision makers.' Sometimes all are rolled into one figure [and] [m]any of us (lawyers, commissioners, and judges) have sounded as if we were talking in circles when we tried to explain what a GAL is.¹²

Indeed, in some jurisdictions, a GAL may act as both an attorney for the child and as an investigator for the court charged with making recommendations. This practice is ethically and legally problematic, insofar as it permits GALs to act simultaneously as attorneys and witnesses, both making recommendations and providing testimony.¹³ GALs in these roles also often make credibility judgments about the parties and provide

⁹ Inga Laurent, "This One's for the Children: The Time has Come to Hold Guardians Ad Litem Responsible for Negligent Injury and Death to Their Charges," 52 *Clev. St. L. Rev.* 655, 663 (2004-2005), citing U.S. Dep't of Health and Human Services, Administration for Children, Youth and Families, National Study of Guardian Ad Litem Representation (1990).

¹⁰ "The responsibilities and duties of a guardian ad litem include, but are not limited to: (1) representing the best interests of the child; (2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family. An investigation must include, but is not limited to: (a) obtaining and reviewing relevant documents...;(b) meeting with and observing the child on at least one occasion; (c) visiting the home settings if deemed appropriate; (d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case; (e) obtaining the criminal history of each party when determined necessary; and (f) considering the wishes of the child, if appropriate; (3) advocating for the child's best interest by making specific and clear suggestions, when necessary, for evaluators, services, and treatment for the child and the child's family; (4) attending all court hearings related to custody and visitation issues; (5) maintaining a complete file, including notes; and (6) presenting to the court and all parties clear and comprehensive written reports including, but no limited to, a final written report regarding the child's best interest..."

¹¹ *Id.*

¹² Raven Lidman & Betty Hollingsworth, Rethinking the Roles of Guardians ad Litem in Dissolutions: Are We Seeking Magicians?, *Wash. State Bar News* 22 (Dec. 1997)).

¹³ See ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, Rule III.B (Aug. 2003) ("A lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.") (emphasis added).

opinions that might otherwise be prohibited by their jurisdiction's evidentiary rules or rules of professional conduct.¹⁴

The problems surrounding a GAL's role are compounded by the power GALs have in custody and abuse cases. Judges who often face conflicting stories from the parties about abuse and the children's relationship with their parents may be tempted to rely on the recommendations of "neutral" third parties such as the GALs, especially when the GALs are tasked with seeking the children's best interests. Indeed, the recommendations of a GAL are often given great weight by judges, often even constituting the most important factor a judge considers.

This deference to GALs' opinions can be problematic because GALs may not be particularly qualified to determine children's best interests:

In custody cases, courts often ask those performing the role of guardian ad litem to render expert opinions even though they do not have the requisite training to do so. It is assumed that they can make such a recommendation merely because they have done an investigation at the request of the court. In effect they are imbued with expertise, merely by virtue of having been placed in that role, irrespective of their actual background. Most courts and voluntary programs require some type of training in order to qualify for appointment as a guardian ad litem, but such training could be as little as seven hours... Even if the training is for up to forty hours...very little time is spent on child development, family dynamics during stress, and the other substantive knowledge that one would expect from an expert.¹⁵

GALs often have even less expertise in domestic violence. As experts have noted, "GALs often do not have the necessary skills and training to deal with custody situations when DV is an issue. This places battered women and children in harm's way."¹⁶

The following stories¹⁷ will further illuminate in concrete detail both the significant influence GALs wield over custody cases and the lives of battered women and children, and their often disastrous effects.

¹⁴ See *Heistand v. Heistand*, 673 N.W.2d 541 (Neb. 2004)(reversing because the attorney GAL had been allowed to testify as an expert.)

¹⁵ Raven Lidman and Betty Hollingsworth, *The Guardian ad Litem in Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 276 (1998).

¹⁶ Araji, S. & Bosek, R. "Domestic Violence Contest Child Custody and the Courts: Findings from Five Studies" in *Domestic Violence, Abuse, and Child Custody* (Mo Hannah and Barry Goldstein, eds. 2010)

¹⁷ These stories were received from protective parents, and in some cases, children who experienced significant harm as a result of the GAL's actions. There was no benefit received in return for sharing these stories, which were collected in response to a request put out online for cases involving custody, abuse, and GAL misconduct.

II. Voices Unheard: Parents' Experiences With GALs from Across America

Alabama:

In this case, the GAL and Child Protective Services caseworkers accused the mother of parental alienation for reporting child abuse. In the 7 years of the child's case, the GAL only spoke to the child 3 times, and never met with the child in person. Even when the child was in foster care (and therefore not in the custody of his mother) and disclosed abuse committed by his father during visitation, the GAL did nothing to help. The GAL recommended that the father should have custody of the child, which the court ordered, despite repeated reports *by third parties* of the child's victimization during visits with his father (before custody was awarded).

Alaska

The mother in this case was married for 13 years to a career criminal and a violent husband. At the close of their relationship, after the divorce, the ex-husband abducted the mother, held her in an auto shop, and tortured her for approximately 17 hours. After bludgeoning her several times and trying to kill her with a claw hammer, he wrapped her in Visqueen plastic and strangled her to unconsciousness.

Four days later, he came to her house to "finish the job". During the course of this nightmare, an entire elementary school was shut down until he was caught. (The abuser chased her as she ran to the school for help.)

Four years later, a GAL was appointed to this case. She recommended that custody be given to the ex-husband. When the mother wrote to the GAL's supervisor, copying the GAL, the supervisor wrote back saying that, "often one parent is disgruntled at the decision [of the GAL] . . . and because the custody case was reopened in 2002, we could only look at your ex-husband's criminal history from that year forward." He had tried to kill the victim in 2002 and had 96 cases in front of the Kenai Court system in 27 years.

Alaska state law prohibits a parent convicted of a domestic violence felony from becoming primary custodian of a child. However, if that parent takes batterer's intervention classes or enters drug and alcohol treatment, s/he can be considered for primary custody. In addition, the felony must have been committed after 2004, the year the bill was approved.

In this case, there were over 33 felony assault charges against the ex-husband. The assistant district attorney let him plea bargain down to a "no contest" to one felony assault charge, provided that he enter batterer's intervention and rehabilitation. He complied.

The GAL investigating this case did not take into consideration the fact that the ex-husband had been keeping the children away from their mother in violation of a

court order or that the children were failing in school. The GAL did not investigate allegations that the ex-husband had strangled the couple's 16 year-old daughter in front of a room full of people (a qualifying domestic violence assault after 2004). The GAL was not concerned that the father was still on probation and also under investigation for tax fraud, among other crimes. Since the father received custody, the daughter repeatedly ran away from him, resulting in his putting her into a locked down behavioral health center.

According to the mother, the GAL spent about ten minutes with the couple's son and no time with the daughter. She spent most of her time listening to the ex-husband declare that it is wonderful to be sober, that the victim is a "terrible addict" and that "it's too bad that [she] doesn't get some help." The GAL was impressed by him.

Arizona

Names have been changed.

Until recently, Hayden's mother had been his primary caregiver for all of his life. His father had a history of being violent towards his mother, sometimes in Hayden's presence. When he was just a toddler, Hayden disclosed incidents of sexual abuse while in his father's care. These disclosures continued as Hayden turned six. Hayden has told his mother, siblings, professionals and several others about the abuse he has suffered.

His mother contacted CPS and the police. They investigated. In a custody hearing, expert evidence that Hayden had witnessed adult masturbation was presented. The court noted that he "displayed an interest/awareness of sexual matters beyond his years." Ultimately, however, the court gave his parents joint legal custody and his mother's home remained his primary residence. The court relied on a psychologist's testimony that there were other "possible explanations of the allegations," such as third party abuse or that he had witnessed his father showering. During trial, in a common punitive response to child sexual abuse allegations, the court told his mother not to make more allegations of abuse and ordered her to participate in counseling.

His father later challenged his child support obligation. He was informed that he would have to demonstrate that a continuing and substantial circumstance had changed. Around this time, Hayden came home with bruises on his arm in distinctive finger marks. His mother, on advice from counsel, informed his best interests' attorney ("BIA"), the equivalent of a GAL, that there was bruising on his arm. The BIA's *assistant* examined Hayden's arm and dismissed his statements because he said he had been hit with a closed fist, whereas his bruises indicated he had been grabbed forcefully. The BIA, who never examined Hayden, testified that when she asked Hayden about his bruising, he said his father did it, but first looked at his mother, which the BIA interpreted as coaching. The BIA, who did not interview Hayden's mother or Hayden

but spoke only to the father, recommended—and the Court ordered—that Hayden be removed from his mother’s custody.

His father then filed a complaint for custody without alleging the statutory requirement that remaining in the mother’s care would seriously endanger Hayden’s physical, mental, moral, or emotional health. The BIA argued that his mother had “alienated” Hayden from his father, although the mother had not reported any abuse and no one could testify to a single pejorative statement she had made about his father (other witnesses to whom Hayden had disclosed abuse *did* report to the authorities). Hayden’s father even testified that his relationship with Hayden was wonderful and that the allegations of abuse had not jeopardized it. At the second trial, evidence was presented that the father had punched one of his other children with a closed fist. There was also evidence that he had neglected to take Hayden to the appropriate doctors’ appointments for his severe motor tics.

Throughout this process, the BIA never visited the mother’s home, never met the child, and exhibited extreme bias in favor of the father, *even calling him her “client”* on several occasions. She met and contacted the father around twelve times, but contacted the mother only once. The BIA ordered that the mother undergo psychological testing and counseling. When the counselor was favorable toward the mother, she had the counselor replaced.

The court granted the father’s petition, giving sole legal and physical custody to Hayden’s father. Hayden’s mother was limited to brief supervised visits. The court found that she was complicit in the reports of abuse made by others because one had testified that “[Hayden] begged me several, several times to help him.” The court ruled that the father was more likely the “friendly parent” and would foster a healthy relationship between the mother and Hayden.

California

In September of 2004, this couple’s minor daughter left their home to live with her boyfriend and his mother for the third time since that June. Each time, she and her boyfriend’s mother made false allegations of child abuse against the daughter’s parents. The first two times, the police and county social workers found the allegations to be false and that the daughter only made them in an effort to get out of her home and to live with her boyfriend.

The third time, with the coaching of her boyfriend’s mother, the daughter requested different social workers who filed a petition against the girl’s parents. The petition alleged that they had threatened to kill their daughter by throwing her down a mineshaft in their yard and had burnt her with a cigarette lighter. No such mineshaft exists. Her friend testified that the daughter had planned to “set [her parents up] with

the burn to be with her boyfriend. The court appointed an attorney for the child to serve as a GAL.

Although the allegations were intrinsically false and there was contradictory testimony to rebut them, the GAL accepted the allegations without investigating them and ignored the contradictory evidence. A conflict of interest also existed, as the GAL had been previously unsuccessful in operating a law practice owned by the girl's parents' employer and friend. The GAL's behavior throughout the litigation, clearly demonstrated her personal animus toward the girl's mother.

The daughter suffers from juvenile arthritis and health conditions that require medication. The girl's parents told the court that their pharmacy had not filled her medications. The GAL rudely responded, "there are other pharmacies." The parents testified that their insurance company informed them that their daughter's birth control pills were filled, but that her arthritis medication had not been filled in several months. The daughter also received an unnecessary MRI, for which the GAL was not able to provide documents or account for their whereabouts. When the GAL provided a list of items the daughter needed (including such items as a new sweatshirt, jean shorts, socks, underwear, and hair ties), she neglected to include medication, her glasses or school books. The parents provided all medical information about their daughter to the court, but the GAL failed to ensure that she was provided the necessary medical care. During this time period, doctors prescribed unnecessary medication on which the daughter overdosed, requiring hospitalization.

The daughter's educational needs were also ignored. In court, the GAL stated that she was working closely with the daughter and school counselors and emphasized how well the daughter was doing. However, the girl's parents provided her report card, which they had received that morning, showing her 1.00 GPA. Later, the parents were told their daughter was enrolled in home schooling, although no proof of enrollment was available.

The GAL wouldn't allow any visitation despite the parent's numerous requests to see their daughter,. At one point during the litigation, t turned to the bailiff and said, "[s]he's a bitch," referring to the mother. At various times the daughter was placed with an alcoholic grandfather. The girl's parents no longer have any relationship with her.

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- *Names have been changed.*

Bryan was violent towards Trisha from the beginning of their relationship. He would pressure Trisha to have sex with other men. After Trisha found out Bryan was sleeping with his cousin and his cousin's wife, they argued, and Bryan threw her against the bed. Threats of violence and forced sexual encounters continued. When Trisha became pregnant via a natural donor, she and Bryan were married. Bryan began

drinking heavily, became involved with another woman, and began demanding that Trisha have sex with other men. Because of the violence and infidelity, Trisha filed for divorce. Bryan had reasonable visitation with his daughter.

When her daughter was five, Trisha became concerned about her sexualized behavior. She would remove her clothes and dance seductively. The next year, Bryan began having overnight visitation at the recommendation of the court evaluator. The daughter began having night terrors and refused to sleep in her own bed. Her sexualized behavior continued. Trisha observed her using her Barbie dolls to act out sexual activity in vivid detail. She made licking sounds during her reenactment and began to masturbate. She also began to draw graphic pictures. Trisha reported this to her daughter's therapist, who then reported it to CPS. A medical evaluation produced no physical evidence.

The sexualized behavior continued. When the daughter was nearly seven, she asked her mother to take a picture of her in the bath while she struck poses resembling Playmates. She was discovered engaging in sex play at school with her classmates. She explained that they were playing "sexy" and that she "just got carried away." The daughter continued to reenact sexual activity with her dolls. In an interview with CPS, she referred to a man in a picture she drew as her father and the girl holding his penis as her. A TRO was entered against Bryan. His daughter revealed that her father had threatened to kill her if she told anyone about the abuse. The court suspended reunification. A mediator concluded that she had been abused and recommended no contact. Visits ceased, as did the nightmares, stomach aches and sexual behavior. The therapist made a third CPS report based on the daughter's additional disclosures of abuse. Bryan was never arrested because he passed polygraphs and corroboration was lacking.

The court appointed a GAL, who recommended two evaluations. The first suggested that Bryan and his daughter attend family therapy to rebuild trust and that she visit a new therapist.

The next year, Bryan resumed his supervised visits. The new therapist refused to believe the past allegations of abuse. The daughter's sexual acting out resumed. She was denied admission to an elementary school because the other parents were concerned about her sexual behavior and its effect on their children. In spite of the abundant evidence, the new therapist and the GAL did not believe the allegations of abuse. Instead, the new therapist suggested that Trisha was alienating her daughter. The therapist, along with the GAL and other professionals designated by the GAL, had a reputation for not believing children's disclosures. He recommended reunification therapy, unsupervised visits, and eventual joint custody. These recommendations were adopted by the family court. The daughter continues to resist the forced visitations with her father and has even locked herself in the bathroom to avoid being alone with him.



- Adapted from www.savingdamon.com

Upon returning home from a weekend visit with his father, Damon recounted to his mother (and later, child protective services) that his father had climbed into the top bunk with him and put something hard on his backside. In vivid detail, Damon described how his father began breathing hard and how the pain and pressure (like the “walls of the house were coming down” on him) lasted for seven seconds before the hard thing made him wet. The police did not gather any evidence; rather, they called his father, told him what Damon had said, and asked that he come to the station. The next day, for the father gave an explanation for Damon’s story, but, he failed a polygraph test and became uncooperative. Damon refuted his father’s explanation and Damon’s brother corroborated Damon’s story.

Due to the lack of physical evidence, the detective could not refer the case to the District Attorney. The domestic violence court judge issued a restraining order, but the case was then transferred to family court. Although Damon repeatedly disclosed that the abuse occurred every night he was at his father’s, the courts would not continue the supervised visits and the abuse continued for over a year. Damon’s father refused to consent to a sexual abuse evaluation, the GAL declined to require that he do so. The GAL did not ask the siblings about the abuse and misled them to believe the case was about custody rather than abuse. The GAL even went so far as to threaten the mother that he would recommend she lose custody and be relegated to supervised visits if she didn’t “back off” with her accusations of abuse.

The hearing ultimately resulted in a finding of Parental Alienation Syndrome perpetrated by the mother. The father was awarded additional time with the children to compensate for the “alienation.” The children were extremely unhappy with this decision. After the first weekend visit following the hearing, Damon returned home, crawled under his desk and began crying. He was visibly distressed and revealed that his father had slept with him again. The mother reported this to the GAL, who said he would take action if Damon said the father slept with his arms around the boy, now almost eight years old. Damon indicated this was so, but the GAL took no action. Rather, the GAL focused his attention on making the mother look bad.

Damon and his brother began attempting to run away from the father’s house. Damon reported the abuse to his teacher and principal because he felt the court did not believe his mother. The GAL’s next report recommended that the children be taken from the mother for three months and then she receive only supervised visits. Damon directly disclosed the abuse to the GAL, but the GAL said Damon’s reports were inconsistent because he had not told him personally in a previous interview. The GAL never ordered a sexual abuse evaluation with a licensed psychologist.

The mother, feeling she had lost all other available options, fled with her children. They were in hiding for approximately three years. They eventually returned based on representations by the family court that a full investigation of the abuse allegations would be conducted. The court granted Damon's father full custody. Damon subsequently ran away. At age 16, Damon was finally liberated from the family court by becoming legally married by an individual who was willing to help him in this way. He now lives with the mother who fought to keep him safe.



- *Taken and adapted from Richard Ducote's Guardian Ad Litem in Private Custody Litigation: The Case for Abolition, 3 Loy. J. Pub. Int. L. 106 (2002).*

During her parents' nine year custody case in Marin County, California, Krause, an honor student, was forced to live with her father, who she described as "an abuser and against whom she filed over nine reports with the county child protection agency and the local police. According to Krause, life with her father was "Hell," as he was a substance abuser who violently mistreated her. He eventually intimidated Krause's mother out of continuing the expensive and frustrating litigation. Krause describes her experience with the attorney appointed to represent her interests, the equivalent of her guardian ad litem in other states, as follows:

The lawyer appointed to represent my "best interests" . . . 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.

After she eventually ran away from her father's home at age thirteen, Krause was taken under the jurisdiction of the Los Angeles County Juvenile Court, where, unlike in the private custody case in Marin County, she was treated as an actual party. Following new investigations, she was returned to her mother's custody. In her words:

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 and biases, but who knows? At least it would have been in the court record.

Richard Ducote, *Guardian Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy. J. Pub. Int. L. 106, 109 (2002).



- *Names have been changed.*

When Kristie and Derrick were married, she had custody of three sons from a previous marriage. The couple would have three children of their own, one son and two daughters. Kristie ended the marriage as a result of the abuse she and her sons suffered.

After the divorce, a hospital reported suspected child abuse after Kristie shared her daughters' disclosures of Derrick's sexually inappropriate conduct. Their pediatrician discovered hymenal damage in the older daughter. A month later, in the final divorce decree, Kristie was awarded physical custody and Derrick visitation.

A few months later, the court ordered a custody evaluation and appointed a GAL. The custody evaluator failed to investigate the children's therapists' concerns about the children's safety in Derrick's care. The custody evaluator recommended joint legal and physical custody with time divided equally between the parents.

Kristie obtained an order of protection based on her daughters' disclosures against Derrick. These allegations were substantiated by the Sheriff's department; they were also supported by medical, psychological, and collateral witnesses, including an eye witness to an incident of abuse. During the subsequent custody trial, the GAL filed and was granted a motion to exclude all evidence of Derrick's sexual abuse of the children. Kristie was not allowed to present any evidence of the abuse or Derrick's history of domestic violence. The custody evaluator testified that Kristie had encouraged the children to make false allegations of abuse and accused Kristie of "alienating" the children from their father. This evaluator would later be disciplined for his negligence. The children were placed in Derrick's custody and completely isolated from their mother.

During this process, the GAL acted aggressively to frustrate Kristie's contact with her children and break the bond between the children and their mother. The GAL told the children that Kristie was crazy and bad, and "that she would rather cause trouble for the courts than have [her children] back."

Kristie was later able to obtain regular visitation, but Derrick actively frustrated her visitation rights. When Kristie challenged his actions and requested additional visitation and ordered counseling for her children, the GAL fought against the visitation and attempted to block the therapy. Due to trauma and untreated depression, the son became suicidal. He would later leave Derrick's custody and return to his mother after the GAL repeatedly rebuffed his pleas to be rescued from his father's abuse. Her son, safe in his mother's care, described life with his father as one of "rigid control and oppression" in which he and his sisters "lived like prisoners," were "forced to keep secrets," and were not "allowed to show love or positive feelings for their mother." He also disclosed that his father would visit his sisters' bedrooms at night.

Subsequent litigation resulted in the appointment of a new GAL. This GAL had a conflict of interest, as she had previously represented Derrick. Because the GAL would not decline the appointment for this obvious conflict, Kristie was forced to file a formal objection to have her removed.



Karen separated from her husband Donald after he began abusing Karen's three children from her first marriage. Karen and Donald also had three children of their own named Jeff, Kari, and Stacey. A year after their separation, Kari and Stacey began disclosing to their mother that Donald was engaging them in sexually inappropriate behavior during court-ordered visits. He would sleep and shower with them, walk around in tiny underwear, and Stacey would walk around with no underwear on. They described to law enforcement officials Donald's acts of vaginal penetration, sodomy, oral copulation, and his showing them child pornography. Investigators found medical evidence of penetration and psychological evidence of trauma.

The judge appointed an attorney to represent the children in the litigation. After this GAL refused to believe the children's allegations of abuse, they attempted to terminate his appointment, one year into the litigation. Two months later, the GAL filed a motion to suppress all evidence of sexual abuse and any other form of domestic violence perpetrated by Donald, claiming it was for procedural reasons—even though he had admitted five months earlier on the court record that there was medical evidence of sexual abuse and penetration of Kari. Although he claimed that Donald was not the sexual abuser, the GAL never attempted to discover who the "real" perpetrator was. His motion was granted, and Karen was prohibited from presenting any evidence of the abuse at the custody trial. The court-appointed custody evaluator, who was a psychologist, "diagnosed" the children and Karen with parental alienation syndrome (PAS), a theoretical "disorder" whose scientific basis has been highly criticized by experts. Consequently, Karen was stripped of custody and ordered to have no contact with her children.

Although Karen was later granted supervised visitation and then unsupervised visitation, the GAL moved to force her back to supervised visitation for the sole reason that she had filed a lawsuit against Donald and thus allegedly harmed the children's interests. After a second judge was removed for bias, a visiting judge granted the GAL's motion to return to supervised visitation and to remove joint legal custody. Jeff then wrote his GAL a letter, disclosing his father's abuse of him and his sisters, and requested the GAL to file a motion on his behalf to place him in Karen's custody. The GAL refused. Jeff subsequently escaped from Donald's home and returned to Karen's sole physical custody. He then revealed that he had witnessed his father and court officials conspiring to ensure the case came out in Donald's favor, and that Donald, the children's court-appointed therapist, and the GAL had threatened the girls to be silent about Donald's abuse. He also described hearing his father enter his sisters' rooms for long periods of time late at night.

Connecticut & New York

- Names have been changed.

Throughout S's marriage (and even after), she suffered psychological, physical, sexual and financial abuse at the hands of her ex-husband, an alcoholic with a history of drug abuse. Her children were also subjected to his abuse and battering. S attempted to file for divorce once before, but as a stay-at-home mother, she did not have the financial resources to support herself or her children. Her husband was mostly absent while she raised the children. He was drinking, traveling, seeing other women and living in Florida while Susan and her children resided in Connecticut. That all changed when he returned.

S was now ready to divorce him. His plan, however, was to "hit [her] like a tidal wave" and leave her with nothing, especially not the children, who were then in the sixth and ninth grade. He threatened, terrorized, and abused both S and her children. S's children were now frightened, after having just spent a peaceful year apart from him while he was in Florida. At one point, he kidnapped the children and moved them to a home that he had been secretly renting for months.

The father was skilled at hiding the abuse. He joined forces with S's violent father and other individuals to do so.

S's children spoke to their therapist about their father's alcoholism, his Jekyll/Hyde personality, medical neglect, and the lack of supervision and rules at their father's home. S's lawyer at the time made a decision to ignore the children's pleas for help. She used parental alienation syndrome against S – her own client. She also flirted with the ex-husband.

No one investigated the abuse. The Connecticut GAL and the New York GAL were aligned with S's ex-husband's law firms. No one advocated for the children. The Connecticut GAL perjured himself throughout the court proceedings. The children wanted his visits terminated after their first meeting with him. He was insulting and sarcastic with the boys. He even frightened the youngest child to the point of tears. He ignored the children's very direct statements of fear of living with their father. However, S's lawyer refused to seek to replace him. The Connecticut GAL only spoke to S once in person, although he spoke to S's ex-husband numerous times. He had very few conversations with S's boys. He also had no experience as a GAL in the family court. S's sons' grades and physical health began to suffer.

The New York GAL spoke to the boys only while they were at their father's house, under his control, and in fear of him.

Florida

- Names have been changed.

Linda's ex-husband John, her child's father, was abusive to her. He also had a history of abusing his first wife. His controlling behavior included physical, mental, sexual, financial, and medical abuse.

When Linda's child was only three, he verbalized having seen his father's abuse toward his mother – yet the GAL took the position that the father would be a better residential parent.

John was a diagnosed alcoholic who at the time of this writing had not changed. Linda had also been alcoholic but has been in recovery for nearly 17 years. John used Linda's alcoholic past against her with this GAL. Linda admits to having made many mistakes in her past, but she had tried to correct them with varying degrees of success.

The GAL showed a bias in favor of my John. She refused to speak to any of Linda's witnesses. Instead, she relied solely on John's witnesses for the "truth." Those witnesses told her they were friends with both Linda and John. This was not true. She was even reprimanded by one of Linda's legal aid attorneys for not interviewing Linda's witnesses. Finally, she spoke to one of Linda's sisters. The GAL told Linda's sister that if Linda were to apologize to John and be a "good girl" from then on that the marriage could be saved (without concern for the abuse). The GAL told Linda's sister that the abuse was Linda's fault because she was "bad."

The GAL did not listen to the parties' child. The child told the GAL about her father's abusive conduct. The GAL acknowledged this with a one-line note in her report, but largely ignored it.

Hawaii

Names have been changed

James abandoned his daughter Alexis and her mother when Alexis was born. When Alexis turned three, however, James sued for custody. He was granted visitation while Alexis's mother, Lisa, retained custody. Shortly thereafter, Alexis revealed to her mother and daycare workers that James had "touched her phoonie," her term for genitals.

Lisa began reporting her daughter's disclosures to the GAL, who had Alexis examined by Dr. M, a psychotherapist with expertise in child sexual abuse. When Dr. M concluded that sexual abuse was a possibility and recommended suspending unsupervised contact between James and the child, the GAL denied having solicited the doctor's help altogether. She refused to submit the doctor's reports or call her as a witness during the next review hearing, resulting in increased unsupervised visitation for James. At the suggestion of a CPS case worker, Lisa set up a video camera to document any clearly spontaneous disclosures that Alexis might make. Sure enough, during a bath, Alexis impulsively showed her mother what Daddy does with his fingers when *he* gives her a bath. Lisa captured this graphic event on film. Dr. M and others found the tape to be credible and that it supported Alexis's earlier abuse allegations. CPS recommended immediate suspension of James's unsupervised visitations. The GAL, however, immersed herself in concerns that Lisa had violated her child's privacy.

As a result of an ambiguous polygraph result, and the existence of a postcard from Italy on her refrigerator, which supposedly indicated a flight risk, the court entered the motion without notice or a hearing, transferring Alexis into her father's custody. The order indicated no return date and there was never an adversary hearing as to custody. Lisa did not see her child for over a month, and then only saw her one hour per week at a supervised visitation center. Lisa filed suit for deprivation of her constitutional due process rights.

After this litigation began, the neutral visitation supervisor reported to the police that Alexis had complained of chafed and raw genitals, and that when Alexis spontaneously removed her clothing, the supervisor had noticed a foreign, dark-colored hair in her genital area. An emergency room doctor was unable to locate the hair and said that chafing was not abnormal. The center withdrew after James, without court approval, suspended all further visitations and threatened the center with litigation. The GAL has failed to obtain another supervisor. Instead, she refused to consider unsupervised or increased supervised visitation for Lisa unless Lisa waived her statutorily granted privilege to confidential communications with her therapist. The therapist has since withdrawn after being badgered by the GAL for the protected contents of Lisa's therapy sessions.

Kansas

- Names have been changed

Sam had a criminal record showing domestic violence, assault, battery, and drug-related convictions. He began abusing Carrie, who was then four months pregnant with his daughter, after Carrie discovered he was married to another woman. After four months of marriage to Carrie, when their daughter was eleven months old, Sam filed for divorce. Although Carrie obtained permission to move with their daughter to another city in Kansas for employment reasons and to escape the abuse, Sam then filed for custody.

During the custody litigation, Sam admitted to various instances of abuse. He conceded that he had told Carrie to leave, pushed her out of the home, and that he paid no child support. He also admitted to twisting Carrie's leg and scratching her face. Carrie claimed that he beat her two to three times a week, and that she would leave the home three to four times a week to escape the violence. According to Carrie, Sam once pointed and cocked a shotgun at her while she was feeding the baby, and would beat her when the baby dirtied the house. Once, he even hit her on the head so severely that she required twenty-eight internal and external stitches.

Court personnel ignored not only the domestic violence, but any concerns for the safety of the child. The judge seemed far more concerned about where the incident occurred, despite the undeniable fact that she had received twenty-eight stitches. Kansas law requires joint custody unless there is a reason to grant sole custody. The GAL recommended granting custody to Sam because he lived closer to the court and the daughter could be close to Sam's other three children from previous marriages. The GAL never spoke to the daughter, the day care center, the child's physician, or the battered women's shelter. He set aside the claims of abuse as being far-fetched – despite his knowledge of one of Sam's DUI convictions – and actually recommended anger management classes for Carrie.

Throughout eleven years of litigation, Carrie's reports of past and continuing abuse and court motions were largely ignored, while Sam's motions were frequently granted based upon flimsy evidence—or no evidence at all.

Maryland

Kevin displayed troubling behavior after visits with his mom. Kevin's dad took him to a therapist, who filed a report to the DSS after Kevin related incidents of sexual abuse by his maternal grandmother, his mother's boyfriend, and his maternal uncle. The social worker met Kevin and found him credible.

During a custody hearing, a GAL was appointed to represent Kevin, who had reported in detail incidents of abuse to his father, therapist, paternal grandmother, and aunt. Both his father and therapist reported the abuse to the police and DSS. More than five weeks after the initial hearing, the GAL met with the father for the first time, returning a few days later to meet Kevin. Kevin's father obtained an ex parte order against the maternal grandmother. During the GAL's visit with Kevin, his mother arrived with her boyfriend to pick him up. His father informed his mother that Kevin was to have no contact with the maternal grandmother or any non-family without the father's consent. The father did not consent to the boyfriend being near Kevin. The GAL demanded that the mother be allowed to take Kevin. The father reminded her of the reported abuse. The GAL said that only she could decide and that the father could not prevent this visitation.

Throughout that summer, Kevin resisted visitation and reported that the GAL had refused to help him when he was being "hurt" by his grandmother and his mother's boyfriend. Although her presence was requested, the GAL refused to come witness Kevin's reaction to his mother's arrival to pick him up.

The GAL later ordered the father to refrain from making any more reports of abuse or obtaining any more orders. She did not find any of Kevin's therapists to be credible. She told one therapist he was off the case and banned further contact; she threatened to revoke another therapist's license if she discussed Kevin's case with his father's attorney or anyone else. The GAL said she would not speak to Kevin again.

The abuse continued. Kevin reported that his uncle had placed his "finger up my hiney." The police took Kevin to a hospital where evidence of probable abuse was found. Upon hearing of another report, the GAL scheduled a hearing, asking that Kevin be removed from his safe father's care. She secured a TPO against the paternal grandmother, purportedly for too many medical examinations and emotional abuse. The GAL arrived with deputies to remove Kevin and place him into foster care. The deputies refused to take Kevin from the home, finding no cause. The GAL later removed Kevin and took him to live with his mother, with whom he stayed for two weeks. A judge later dismissed the ex parte order and ordered Kevin returned to his father.

Later incidents of abuse went unreported, as there was fear that Kevin would be taken again. Although the GAL said she would address reports of abuse, she did not. During the permanent custody hearing, the GAL intervened and would not allow Kevin's former therapists to testify about the abuse. Throughout the case, the GAL would sit and speak with the mother and her attorney but refuse to speak to the father, his family, or attorney. Since the GAL was appointed, numerous therapists have expressed concerns to her about Kevin's well-being when he is in his mother's care; she even received letters from his pediatrician. She never acted in response to these reports. As of this writing Kevin is still forced to visit his mother and dreads each visit. He has not

reported abuse in several years, but still speaks to his grandmother about how he will “survive” the weekend visits.



Patrick was the focus of his parents’ custody litigation that spanned over a decade. Both during and after the marriage, Patrick’s father used physical and emotional abuse to maintain tight control over his children.

Following a violent incident, his mother fled and moved outside the school district. Since both parents had protective orders issued against them (she had used pepper spray to defend herself), the court granted custody to the father based solely on the change in schools. Because the father did not comply with the visitation schedule, a GAL was appointed to represent the children during the years of litigation that ensued.

The GAL showed bias for the father from the beginning. Patrick overheard conversations in which his father and the GAL jointly strategized the case. The GAL gave the children her phone number and told them to call if their mother “did anything they didn’t like.” The GAL usurped the mother’s parental authority by entertaining the teenage daughter’s phone calls when her mother refused to buy her expensive jeans. Patrick revealed that their father had coached them to say they didn’t want to visit or live with their mother. Based on the children’s stated preferences, the GAL recommended suspension of visitation for four months, even though the father’s coaching was known. The judge complied. The GAL then began concealing information from the mother. She refused to provide her with the name or contact information of the children’s new therapist or allow the mother to meet him. She instructed school officials to refrain from discussing the children with anyone, including a former therapist. The judge extended the suspension of visitation for another eight months based on the GAL’s proffer of hearsay comments made by the unidentified child therapist.

In a letter dated later that year, Patrick described the abuse he was suffering and revealed that he had informed the GAL of this before the rehearing in which she recommended continuing the suspension of the mother’s visits. He described how his father repeatedly verbally abused him, hit him, picked him up and threw him, and threatened his life. In a letter, he requested to live with his mother without visitation with his father. No investigation took place. Patrick began to secretly call his mother and report the abuse. He also said his father withheld food from him and got violent when he asked to visit his mother. He told his mother that he had discussed this with the GAL, but that she said she could not do anything until the scheduled hearing three months later.

On one occasion, Patrick feigned illness to stay home from school and took a taxi to his mother’s house to escape the abuse. They went to the court to file an emergency

petition that was denied for insufficient evidence. Patrick's mother took him to a therapist and a physician, who found evidence of the abuse and a decline in overall health, and likened him to a "starving concentration camp survivor." When DSS tried to return Patrick to his father, he reacted so strongly that they placed him in foster care for the night. In an emergency hearing, the GAL dismissed Patrick's allegations of abuse, stating that Patrick was more prone to smile and use humor over the past year and that she had no reason to question the father's veracity. As a result of this and other manipulations by the GAL and the father, Patrick was granted one weekend of visitation a month with his mother. The GAL told the mother that for \$65,000 in cash, she would recommend that the children be returned to her custody.

Minnesota

Taken and adapted from Mary Grams, Guardian ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn, 22 Law & Ineq. 105 (2004).

Shortly after P.J. and N.D. began dating, P.J. became pregnant. With her two teenag sons from a previous marriage, she moved into N.D.'s home. P.J. eventually had a baby girl, M.D. Tension quickly developed and escalated between N.D. and P.J.'s sons. This tension climaxed when N.D. allegedly ordered both sons off his property with a shotgun. P.J. and the children left the next day and moved into her sister's home.

P.J. is Native American and has a large, close family. Visitation exchanges occurred in the presence of the police or in public because of P.J.'s continued fear of N.D., after he told one of her family members that he would kill P.J. The parties attempted to exchange notes through a notebook to communicate about child care issues. N.D. had regular monthly overnight visits with M.D. For reasons unknown to P.J., M.D. began to express fear when she went on visits with her father, and even refused some visits. P.J. also canceled some visits because M.D. was sick with chronic upper-respiratory problems.

Eventually, N.D. petitioned to modify custody to give him physical custody of M.D., claiming that P.J. was interfering with his visitation schedule. The judge appointed a GAL, who investigated the situations of both parties. The GAL interviewed P.J. on two occasions at her home, N.D. on several occasions at his home, members of P.J.'s family, N.D.'s fiancée, and medical personnel. The GAL also observed M.D. alone, in the presence of each of the parties, and during custody exchanges. The GAL issued two reports before trial, guardedly suggesting that P.J. be awarded custody of M.D., but noting that N.D. was a capable parent and was attached to M.D.

On the day of trial, upon examination by P.J.'s attorney, the GAL stated that she was reversing her custody recommendation in favor of N.D. She said that N.D. was "charming" and friendlier; he always offered her coffee. P.J., by contrast, seemed distant to the GAL and never offered her coffee. Furthermore, P.J. could not provide the

economic security that N.D. enjoyed. N.D. had a stable residence. P.J., however, had moved twice since leaving N.D.'s home. The GAL also related an excited reunion between the father and daughter during an exchange at which she was present. Finally, the GAL agreed with N.D.'s testimony that P.J.'s smoking was the cause of M.D.'s upper-respiratory infections.

The GAL minimized P.J.'s reports of N.D.'s abuse and threats even though protection orders had been issued to restrain him from contact with P.J. and her sons. The GAL also minimized M.D.'s attachment to her brothers and the role of P.J.'s extended family in M.D.'s life. The GAL made no reference to cultural differences regarding P.J.'s heritage and the effect this had on their lives. The GAL disregarded P.J.'s status as the primary caregiver.

Luckily, after protests by P.J.'s counsel that the GAL had acted improperly, the judge examined the case more closely and ruled in P.J.'s favor. This was a rare instance of a judge properly rejecting a poorly considered GAL opinion.

New York

Names have been changed

Sarah's mother divorced her father. Sarah continued to live with her mother for three years, while having visitation with her father.

During one of Sarah's visits with her father Sarah's grandmother observed an the father lying on his back with the child pressed tightly against his pelvis as he was gyrating. When she removed the child, his zipper was open and his pants were wet. The grandmother reported the incident of abuse to the child protection agency.

The child confirmed the abuse to the family therapist and to the Brooklyn Society for the Prevention of Cruelty to Children. However, BSPCC never investigated Sarah's statement and her father was never interviewed. Although he was initially charged with child abuse, the charges were abruptly dropped. Now they charged the mother with failing to protect the child from abuse and/or for making a false abuse report. Neither of these charges could be true, since the mother was not present when the alleged abuse occurred and she did not make the report. When the court was notified of this, BSPCC revised the charge, and alleged the mother had alienated the child. The mother was ordered to have a psychological examination. She missed the appointment for medical reasons. The family court removed Sarah from her mother's care because of her failure to make the appointment, even though her reasons had been communicated to the court and the father had not had his exam either. Sarah was placed in foster care. While in foster care, her foster mother reported another incident of possible sexual abuse.

A Law Guardian (GAL) was appointed. Neither BSPCC nor the GAL ordered Sarah to be screened by a psychologist specializing in sexual abuse. When the mother had a screening conducted, the GAL blocked all subsequent sessions after the specialist opined that Sarah had likely been abused on multiple occasions. The court prevented the mother from presenting any expert testimony. When the GAL's psychiatrist found that the mother had no mental illness and recommended returning Sarah to her, the GAL refused to share the report with the court.

After trial, a caseworker from the agency previously appointed as the GAL (Legal Aid Society) admitted that the GAL had known all along that the incident witnessed by Sarah's grandmother had occurred, though they had insisted throughout trial that it had not. This information from the whistle-blower was relayed during a legislative hearing investigating the case, but it was not allowed to be admitted in family court. The GAL never investigated Sarah's condition while in foster care and continuing visits with her father.

The child was placed in her father's care and began to suffer extreme anorexia. During a visit, her mother took her to the hospital, where one doctor described her condition as "by far one of the worst cases of emaciation I have ever seen." Because her mother had not consulted with Sarah's father before bringing her to the hospital, the court terminated her visits. The GAL withheld photos of Sarah's emaciated body from the court. After the mother pressed for an investigation, the case was taken up by the Fatality Review Board, which normally only investigates cases *after* the child dies. When her mother tried desperately to find out if Sarah had died, they refused to tell her, stating that they could only give this information to the GAL. Despite numerous requests, the GAL took weeks to inform the mother that her daughter was still alive.



- Names have been changed.

Kate's 16 month old baby girl was pulled out of her arms by the family court and given to her husband, Ethan. Ethan had been subject of multiple restraining orders brought by Kate and several of his previous girlfriends, as well as an arrest for felony assault with a deadly weapon (pled down to a misdemeanor conviction) in which he held a hunting knife to a man's throat.

The family court and the professional evaluating Kate's custody case did not screen for domestic violence, but challenged her disclosure of abuse as fraudulent and exaggerated. She presented the court with a tape recording of her husband verbally and psychologically abusing her and threatening to take her child from her. The GAL and custody evaluator insinuated that Kate had provoked the abuse. The GAL's report said, "While the father's side of the conversation is notable for its expression of outrage and anger and is saturated with obscenity, the mother's side of the conversation is

notable for its passivity, as if she were well aware of the reaction she was evoking in the father. . . . The father’s language in the taped conversation is understandable. The mother bears responsibility for having inspired such extreme emotion and anger on the father’s part.”

The court found, “The mother is provocative and provokes the father into his acts of rage and violence.” Kate has lost all parental rights. She sees her child only infrequently. Ethan continues to litigate against Kate as an extension of his abuse: He knows that nothing could inflict more pain than causing extreme damage to Kate’s relationship with her daughter.

The GAL was also negligent in performing her duties. As of this writing, the GAL had never been to Kate’s home. She never met Kate’s daughter’s sister, nor had she ever seen the two children interact. She never interviewed a single character reference or professional suggested by Kate. Kate gave her a copy of letters from concerned members of her family and community and asked her to call some of them, but she refused. Her reports omitted salient information, misled the court, and were unbalanced in their presentation. In addition, she ignored the neutral custody evaluator’s recommendation that the children be placed with Kate. The GAL’s report even referenced Kate’s daughter by the wrong name.

The GAL also failed to investigate an earlier violent incident where Ethan directly threatened and harmed the parties’ daughter. During a custody exchange, Ethan followed Kate into the ladies room, spit on her and her daughter, and tried to drag Kate out with their ten month old baby in her arms. He smashed the arm that Kate used to protect the baby’s head from a heavy oak door. Kate informed the GAL of this incident and gave her a copy of the police report. As of the time of this writing, the GAL had not spoken with either the police officer or the eye witness about the incident. The GAL nonetheless concluded that Kate provoked this violence and that it was somehow therefore justifiable. She refused to investigate Ethan’s continued harassment of Kate and his obstruction of her visits.



Names have been changed

Anna, a native of Moscow, met her ex-husband Ben while she was still in Russia. The couple had two children – a boy and a girl. When Ben decided to return to the U.S., he demanded that Anna go with him, forcing her to abandon her family and friends for a country in which she had nobody to depend upon but him. Living on Anna’s money, Ben verbally and physically abused her and even threatened her with a gun. Realizing she needed to support the family, Anna obtained a government grant and worked as a babysitter to finish her Mathematics degree and eventually obtained a job as a software engineer. She moved with the children to New York and filed for divorce, citing cruel and inhumane treatment as the grounds for her petition. This only caused Ben’s verbal

abuse and harassment to escalate; he would call her at home and at work more than twenty times a day, and would harass her as she came to work each morning.

When the custody and divorce hearings began, Anna and Ben were both ordered to pay an attorney to serve as a law guardian for their children. Later, it was revealed that this law guardian himself was in the midst of a custody battle for his daughter, and that in 2002, his bar license had been suspended for unethical conduct. Due to the recommendations of this law guardian, Ben's visitation rights were gradually increased from one day a week without overnight visits to forty percent unsupervised visitation time. This was despite Ben's arrest during this time for harassment and for violating Anna's first protection order.

The litigation was filled with instances of bias against Anna. Although she was able to provide thirteen witnesses to the abuse of the children while the father had none except for himself, her attorney threatened that if she did not accept joint custody, the judge would order sole custody for Ben. Later, without an evidentiary hearing, the judge transferred all custody to Ben; both he and the law guardian relied upon PAS to support this decision.

The judge and the law guardian interviewed the children one month after Ben was granted sole custody. Both children said they wished to live with their mother and not their father. The court record also indicated that they had said they hated the judge and law guardian.

Ohio

In this case, the GAL was known to be a proponent of alienation theory and recommended sole custody of the children to the father. The father, who was charged with possession of child pornography, had been convicted of a federal crime involving possession of obscene material involving children, animals, child rape, etc. The children repeatedly expressed fear, hatred and a clear, unequivocal position that they did not want to see the father. The GAL ignored their wishes. Despite Ohio's rule that when a GAL determines that a conflict exists between the child's best interest and the child's wishes, the GAL shall request in writing that the court promptly resolve the conflict by entering the appropriate orders, this was not done, and no independent representation was appointed for the children.

The court adopted the GAL's recommendation of custody to the father. The court also ordered the father to install video cameras in every room of his house and required that the children and the father be videotaped at all times. The court also required that the mother be deprived of visitation rights with her children until a therapist chosen by the father determines that the children are displaying "appropriate behavior" with the father. After the custody order issued, the father was hospitalized involuntarily for mental problems, and the children threatened suicide and were hospitalized as well, but no change was made to the custody order.

Pennsylvania

In this case, the GAL had spoken publicly on the radio about her support for “fathers’ rights” and her belief in the unscientific theory “parental alienation syndrome.” The GAL ignored the mother’s evidence – including that of the child’s counselor, therapist and pediatrician - concerning the child’s wellbeing.

Rhode Island

Courtney and Leon, 14, met in high school. When Courtney spent time with friends or talked to a boy, Leon would become aggressive and violent, even punching and wrecking her locker. After they were married, Leon later warned her not to talk about his violence, telling her, “Your dad has a bad heart.” She would never forgive herself if she caused her father’s death.

Leon became a deputy sheriff at family court and did plumbing and heating on the side. He printed business cards listing the cellblock phone where judges could leave messages when their lawn sprinklers needed repair. Courtney had other jobs, but loved being a mother most.

The day Courtney served Leon with divorce papers, police persuaded him to let them remove 29 firearms and a truckful of ammunition from their home. He used to warn her, “A piece of paper can’t stop a bullet.” When their youngest child went to a family therapist, the first thing she did was remove all the guns from the castle in the playroom. Angered by the divorce, Leon screamed at Courtney, “What do you love most in life?” “My children,” she replied. “Watch what I do to them!” he retorted.

Leon claimed to “own” family court. When Courtney sought a restraining order, seven judges recused themselves, stating they had conflicts. Finally, a police detective confronted the chief judge to ask why Courtney could not get a simple restraining order. Instead of sending the case to superior court as he should have, the judge sent it to the very courtroom where Leon had kept order as deputy sheriff.

The police arrested Leon for felony domestic assault on his girlfriend, who they found in handcuffs with a fractured jaw and eye socket. After the older children left home, the youngest one refused to visit her father and expressed her terror to her doctor. The GAL and judge accused Courtney of “alienating” her from her father. The GAL testified that she found Leon to be a “happy, calm, and level person.” She recommended that Courtney lose custody and have a psychiatric exam.



Anne's ex-husband, Phil, was an alcoholic who had nightly rages that included verbal and physical abuse. When she filed for divorce, she obtained a restraining order and had him removed from the house.

Their fifteen year old daughter had bipolar disorder and ADHD. She was hospitalized in a mental institution. The doctors recommended that she enter the hospital program for adolescents and teenagers full time for evaluation and treatment. While Phil is an heir and was trustee of considerable funds gifted to Anne and Phil's two children, he refused to pay for the treatment unless Anne dropped her lawsuit concerning his extensive financial abuses. At the time, Anne had no money to pay for the mental hospital, and he was withholding his required consent to her treatment.

After Anne filed for divorce, a GAL was appointed. Anne explained to him that her daughter needed treatment and that Phil had become physically violent. Anne relayed how one night he had tried to strangle her. The couple's church youth counselor came over that night and helped Anne and her daughter flee the house. Anne had to call the police several times. Although she explained to the GAL why she got a restraining order against Phil, the GAL did absolutely nothing. He never met with Anne's daughter or son. Anne's daughter, left untreated for bipolar disorder, became involved in drugs. She was providing other teenagers with alcohol and was smoking marijuana. Anne told her she was going to a teen substance abuse program. The GAL promised he would get an emergency order to get her to the local program. Instead, he went on vacation and later said he had forgotten about his promise.

Several months later, without consulting Anne, the GAL and Phil sent Anne's daughter to a wilderness drug rehab camp in Georgia that forbade parents from communicating with their children. She was there for six months. After she completed the program, they sent her to a school in Vermont. Phil instructed school officials not to provide lithium to Anne's daughter for her bipolar disorder. She could not cope, and was expelled. Finally, Anne got her daughter to the mental hospital program and to her old doctors. She attended the hospital school for bipolar teenagers and graduated from their high school.

Anne later learned that Phil had paid the GAL \$10,000 from the children's funds. Anne filed a motion to remove the GAL for incompetence. He was ultimately removed.



Kim and Tiger, 14, met at the corner store where teens hung out on Federal Hill. She was slim, pretty and friendly. He was a loner and intensely jealous. He walked her to her high school every morning. When she went inside, he would turn toward his own high school, but would disappear, going truant until he picked her up for lunch. Kim felt Tiger's fingers tighten on the back of her neck under her long hair, warning her not to look at other boys.

Tiger became a prison guard. Kim also had jobs, although she relished motherhood most. After two miscarriages, they consulted fertility experts and endured three difficult cycles of in-vitro fertilization. Their son was the sole survivor of fetal triplets.

A televised story about in-vitro fertilization featured his birth, but his parents' marriage was over. Tiger disappeared with girlfriends, blaming it on Kim's weight gain during the years pursuing pregnancy. He turned violent; she obtained restraining orders. His lawyer warned her to drop them: Tiger would lose his job if he could not carry a gun.

Tiger's violence was even reported by strangers at Little League who worried about the way he treated his son. When the boy refused to visit his father, the GAL accused Kim of "alienating" him against his father.

Kim's lawyer was in Florida on assignment on the day that the GAL persuaded the judge to issue an emergency order, allowing Tiger to haul his screaming son over his shoulder from the bedroom where the boy was hiding. Tiger's new wife sat outside in the truck. She made no secret of her longing for a child. Tiger delivered this son like a trophy. The judge ordered Kim to stop volunteering at her son's school and to stop coaching his Little League team, and permitted her to visit her son only one hour a week at the courthouse.

Washington

Names have been changed

Jerry, the father of Pamela's two children, had a long and troubled criminal background history. From 1992 to 2006, Jerry was involved in fourteen different criminal cases, one of them during the pendency of the custody proceeding between the parties. Many of these cases were convictions for crimes he committed against Pamela. He had six domestic violence protection orders granted against him, and was charged with a new count of domestic violence and with violating the protection order during the custody proceeding. Pamela, in contrast, had no criminal record. Their daughter had always lived exclusively with Pamela.

The GAL assigned to this case concluded that both parties were responsible for domestic violence. In describing Jerry and his troubled history, the GAL wrote:

He has taken some anger management and domestic violence classes and he believes he has his problems under control. The incident he is accused of in August is a 'he said/she said' situation with no physical evidence. The police are investigating and a resolution should be coming in the next few weeks....He has a felony conviction of indecent liberties back when he was 15 years old. He says it

was a result of improper upbringing and he went through extensive counseling at that time.

While the GAL described Jerry's documented criminal convictions in an understanding tone, the GAL described Pamela as "mean and vindictive," referring to her alleged "sophisticated...use of legal and social agencies to advance her agenda against Jerry." He described seeing the "many notes and pictures with cruel writing on them" that she supposedly sent to Jerry, although he did not include these notes in his report; nor did he verify their authenticity. The GAL noted that Pamela was "very cruel" to her son and "threatened to take their daughter out of state to prevent Jerry from seeing her." The GAL never met or spoke with either of the children. Yet, despite this, he wrote in his report that the daughter has an "affectionate relationship with her 15 year old brother." However he failed to mention that Pamela's son has adopted his father's violent propensities and had a pending charge against him for committing domestic violence against his own mother.

Although he relied on Jerry's statements as unequivocal truths, the GAL failed even to ask Pamela about her version of certain events. For instance, in describing Pamela and Jerry's exchanges of their daughter during visitation, he wrote, "Since I spoke to Jerry about making the exchanges he has been at the exchange location on time each week for the last three weeks. Pamela, however, did not show up one week to pick up their daughter, and then this last Sunday did not show up to drop her off." Not only was this impossible, as three weeks had not even passed since the GAL had spoken with Jerry, but the GAL never asked Pamela about it, and only received his information from Jerry. Ultimately, the GAL based the opinions and conclusions in his report on one side's claims, and downplayed the abundant and undeniable proof of Jerry's extensive history of violence.



Names have been changed

Richard and Danielle were divorcing and in the midst of custody proceedings. The problem with their GAL was not that he was biased or unfair, but that he failed to perform his duties altogether. Rather than conduct his own investigations and formulate his own opinions about the family and the children's affairs, he simply restated to the judge whatever he was told by the parties' attorneys, presenting it as his own research. Not only did he neglect to investigate the concerns about the children's safety voiced by the mother's attorney, he never even wrote a report.

Richard had a history of being violent toward his wife and committing violent acts in front of his family. In court, he admitted to holding a loaded gun to his own head and threatening to kill himself in front of Danielle and their children. He also admitted to threatening to "bury" Danielle, and to asking a relative shortly after making this

statement whether they would take care of his and Danielle’s children if something were to “happen to both of them.”

At every court appearance, the GAL would approach Danielle’s attorney, ask her about the situation, and simply report to the judge what he had just heard, as if he had discovered the information through his own research. After one instance in which Richard made several phone calls and left voicemails to various people, sounding as if he was about to do something desperate, Danielle’s attorney asked the GAL to look into the situation to ensure that the children would be safe for their visitation that upcoming weekend. The GAL did nothing, and hours before the visitation, Richard destroyed his car in a drunk driving accident – the car the children would have been riding only a few hours later.

When Richard was in jail for drunk driving, Danielle went to his home and discovered empty alcohol bottles and animal feces all throughout the house, as well as an audiotape of Richard interrogating the children about their time with Danielle and coaching them. The GAL, however, never investigated any of this.

The GAL was not even reliable with regard to the court procedure. When Danielle and her attorney arrived at court with a motion to modify visitation, the GAL told them he was meeting with Richard the next day. The judge ordered the GAL to serve Richard with notice of the upcoming hearing, and Danielle’s attorney faxed the GAL a Return of Service to use. The GAL, however, never visited Richard and never served him the papers; he also failed to tell Danielle’s attorney that he had not served him. Consequently, at the next hearing, the hearing did not proceed, because Richard lacked proper legal notice.



Names have been changed

Although Gayle and Greg both had a history of substance abuse problems, Gayle had been able to resolve her issues. Greg, however, was recently arrested on an alcohol-related charge. He also perpetrated severe, uncontrollable violence against many different people. Although the victims of his attacks survived, Greg’s intentional and deliberate acts were lethal.

While she was thorough in her work and gave top priority to the children’s welfare, the GAL’s crucial shortcoming was that she lacked an accurate understanding of domestic violence. She identified Gayle’s biggest problem as her tendency to become involved with abusive men. During negotiations, it was revealed that Gayle had recently sought a protective order against a former boyfriend, and had also enrolled in and was regularly attending domestic violence counseling. The GAL, livid that she had not been informed of this, insisted that the new order include a provision requiring Gayle’s

domestic violence counseling center to report to her any new instances of domestic violence against Gayle, any new relationships Gayle enters into, and any new people living in Gayle's home. Although the GAL's intention was to prevent Gayle from exposing her children to any new abusers, attacking Gayle and impeding her recovery had the perverse effect of undermining her as a parent and putting her at risk. As a result of the provision, Gayle became afraid to confide in her counselors and discuss her problems; if she did enter into another abusive relationship, she would be discouraged from seeking a protection order. When Gayle's attorney expressed this last concern to the GAL, she replied, "It better not be in the next two years."

This punitive approach placed Gayle in a situation where she could ultimately be forced to choose between two paths, both of which would result in losing her child. If Gayle is ever abused again, she cannot turn to the domestic violence center for help; nor can she obtain a protection order for fear of losing her child. Yet, if she does not seek help, she may be accused of exposing her child to a dangerous and abusive environment and lose her child anyway. As laudable as the GAL's intentions may have been, her approach subjected the mother, a survivor of domestic violence, to a court order that only made both she and her child less safe.

III. Scholarly Critiques and Suggestions for Reform

Each of the above stories is a unique tragedy in its own right. However, the cumulative effect of all of them illustrates some common problems: GALs lacking understanding of abuse; recommending children to be awarded to abusive parents; increasing the expense of costly litigation; due process concerns, circumventing rules of evidence and the parties' right to cross-examination; and lacking accountability for their actions. There follows an overview of the literature's critiques on these and other points.

a. GALs Do Not Understand Domestic Violence and Child Abuse and Frequently Recommend Placing Children in the Custody of Abusers

Many parents complain about GALs who are notorious in their jurisdictions for disbelieving mothers' allegations of abuse or favoring fathers. Despite the power afforded GALs in many custody and abuse cases, "[m]any of these attorneys are neither trained nor experienced in the complexities of family violence or in child development..."¹⁸ Participants in a study undertaken by the National Council on Juvenile and Family Court Judges noted that "custody evaluators and guardians ad litem were the professionals least trained about domestic violence of any actors in the civil justice system." Merry Hofford et al, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 Fam. L. Q. 197, 220 (1995). The study also noted that GALs were "heavily influenced by the social and legal policies that facilitate contact with

¹⁸ See American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*, 103 (1996).

the noncustodial parent without regard to the risks attendant upon contact or relationship.” *Id.* Moreover, GALs “are not guided as much by law as by their training and predilections about appropriate post-separation custodial arrangements...[and] [m]any appear to marginalize domestic violence as a factor with significant import for abused adults and children in custodial outcomes.” *Id.*

When GALs advocate granting custody to an abuser, they directly contravene the best interests of the child. Richard Ducote describes the role of the GAL in domestic violence contexts as a paradox:¹⁹

In domestic violence and abuse cases, where courts are even more eager to appoint GALs, children are frequently ending up in 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.²⁰

Ducote points to a number of factors that influence this trend. For instance, “there is a 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.”²¹ Also, attorneys for accused abusers can and frequently do advocate for the appointment of GALs whose views are sympathetic to their clients.²²

b. GALs Increase the Expense of Costly Litigation

In most, if not all, court systems, the costs of the GAL, the court-appointed evaluators, and other custody experts are placed upon the parties. Parents who are already expected to pay for their own legal representation (which is quite costly, as many custody cases can go on for years) are expected to pay tens of thousands of dollars to cover the cost of a GAL. Fees in excess of \$20,000 are not rare.²³ One mother who was extremely unhappy with her court-appointed GAL was even more outraged when she received a bill for \$23,000 for her services.²⁴ The limited resources that this mother has to provide for her child’s well-being were only further depleted by this added expense.

c. GALs Take On the Role of the Judge

Many parents believe that judges merely rubber stamp the GALs’ recommendations.²⁵ It is commonly acknowledged that a GAL’s report can “make or

¹⁹ Ducote, *supra*, at 135.

²⁰ *Id.* at 135-36.

²¹ *Id.* at 139.

²² Margaret K. Dore, *Court-Appointed Parenting Evaluators and Guardian Ad Litem: Practical Realities and an Argument for Abolition*, *Divorce Litigation* Vol. 18, No. 4, at 53 (April 2006).

²³ Ducote, *supra*, at 150.

²⁴ E-mail on file with DV LEAP.

²⁵ Grams, *supra*, at 105.

break a case,” because of the limited time and resources that judges can devote to each case.²⁶ Also, GALs are given broad authority akin to that of a judge:

A guardian has the power to advocate for the child’s best interest based on the relevant facts. A guardian is not barred by rules of discovery or privilege from investigating every nook and cranny of a child’s life. Guardians also have a right to determine what relevant facts should be entered into the record, or at the least to provide more credibility to one side’s presentation of the facts. GAL’s wide de facto power allows them broad discretion akin to a judge’s exercise of judicial power.²⁷

In fact, GALs “can easily have more power than any other person in a custody proceeding, including the judge.”²⁸ This power has serious constitutional implications for the parties: the usurpation of the judge’s role deprives the parents of due process.²⁹ Where one individual is already charged with gathering information to determine the child’s best interest, the court is prone to over-rely on this person’s conclusions – a person performing duties that ultimately belong to the judge.

Some courts have explicitly addressed the due process implications of such impermissible delegation of judicial authority to GALs. For example, in *C.W. v. K.A.W.*, 774 A.2d 745, 749-50 (Pa. 2001), the Superior Appellate court found that “the trial court [had] repeatedly asked the guardian ad litem his opinion on evidentiary rulings and followed his opinions... [and the trial court’s order] closely followed the recommendations of the guardian ad litem...” The *C.W.* court further noted “[i]t now appears that [the GAL] did the job of the trial court, at the request of the trial court, by interpreting evidentiary law and making factual findings.” The *C.W.* court found this to be “a clear and gross abuse of judicial discretion,” and further noted that in a non-jury trial such as this, “the role of the judge is to interpret the law, determine the facts and apply the facts to the law for an eventual decision on the controversy. The trial court may not delegate its judicial powers.”³⁰

d. When GALs act as Fact-Finders they Circumvent the Rules of Evidence and the Right to Cross-Examination

Because GALs are not subject to any rules of evidence in making their reports and recommendations, the information conveyed to the court and placed in the court record would often be inadmissible if it was not offered by the GAL. In one reported case, the GAL relied on unsigned written statements provided by the father—self-

²⁶ *Id.* at 120.

²⁷ *Id.* at 128-29.

²⁸ *Id.*, at 115.

²⁹ Ducote, *supra*, at 115-16.

³⁰ *Id.*

serving and inauthentic information that would likely have been excluded as hearsay had the father tried to offer it himself.³¹

In many states, the GAL can testify in court as an expert witness even though GALs do not meet any requirements regarding subject matter expertise. This is a powerful but potentially inappropriate way of reinforcing the impact and weight of a GAL opinion, as though it is “expert,” when in fact it is not.³²

Some courts have found that parties have due process rights to cross-examine GALs. See *In re. J.E.B.*, 854 P.2d 1372, 1375 (Colo. App. 1993)(requiring cross-examination where GAL “present[s] his or her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence.”; *Kelley v. Kelley*, 175 P.3d 400, 403-06 (Okla. 2007)(parties have the right to cross-examine the GAL and seek discovery concerning the basis for a custody recommendation, citing *Malone v. Malone*, 591 P.2d 296 (Okla. 1979) for the proposition that a family court’s reliance on evidence/reports untested by cross-examination would be “fundamentally unfair” and “amount to private investigations by the court...out of the sight and hearing of the parties, who are deprived of the opportunity to defend, rebut or explain..”) See also *In Marriage of Bates*, 819 N.E.2d 714 (Ill. Sup. Ct. 2004) (statute providing for admission of child representative’s recommendations without testifying was unconstitutional as applied because it deprived the wife of her due process right to cross-examine the child’s representative insofar as his recommendations were based on his observations.) In contrast, the Wisconsin Supreme Court has interpreted Wisconsin’s statute as indicating that the GAL’s role as an attorney prevents her from being called as a witness and subjected to cross-examination.³³

Even in cases where the court finds that there is a right to cross-examination, that right may ultimately provide little value to the parties when appellate courts employ a harmless error analysis. For example, in *People in Interest of M.G.*, 128 P.3d 332 (Colo. App. 2005), the mother asserted that the trial court erred in refusing to allow her to call the GAL as a witness. *Id.* at 334. The appellate court noted that if the GAL had based his recommendations on evidence gathered in independent investigation, he may be called as a witness as to his opinion. However, because the mother indicated that she only wanted to ask the GAL a question to show the GAL “did not know the children well enough to match their pictures with their names,” the court ruled that this was not an examination of the basis of GAL’s opinion and concluded that this line of inquiry was “only marginally relevant,” and that the court’s denial of the mother’s request was harmless error.³⁴

³¹ Dore, *supra*, at 55.

³² Grams, *supra*, at 123.

³³ *Hollister v. Hollister*, 496 N.W.2d 642 (Wis. Ct. App. 1992).

³⁴ *Id.*

Courts have also addressed the issue of *ex parte* communications with GALs. In *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991), the Wyoming Supreme Court held that *ex parte* communications between a GAL and a judge are an ethical violation. However, holding the violation was harmless error, the court rejected the mother's appeal and affirmed the decision awarding custody to the father. In a biting dissent, Chief Justices Urbigkit and Macy stated they were 'more than offended' by the *ex parte* contacts, and condemned the reported habit of Wyoming attorneys, described as follows: "We trust each other. One time I go to see the judge, the next time the other guy does. We have to."³⁵

e. GALs Lack Accountability For Their Actions

All of these problems are compounded by the fact that in many jurisdictions, GALs are not held accountable for their actions.³⁶ First, in many states, GALs are protected by immunity, denying parents and children any recourse when a GAL commits either gross negligence or reckless acts or failures to act. This immunity has been supported by the questionable notion that GALs owe their duty to the court that appoints them, and not to any child they represent - and the unverified assumption no attorney would accept an appointment with possible liability.³⁷

For example, in *Sarkisian v. Benjamin*, 820 N.E.2d 263 (Mass. App. Ct. 2005), a child filed a legal malpractice suit against his attorney, arguing that the attorney was not protected by judicial immunity.³⁸ The court found that while the attorney was assigned to represent the child at any hearing or trial, she was also asked to report and make recommendations to the court, and was therefore also acting as a guardian ad litem." The court held that "the guardian ad litem acts as an arm of the court and is an integral part of the judicial process."³⁹ As such, a guardian ad litem in that capacity should be entitled to absolute immunity in order to enable the guardian ad litem to act freely without the threat of personal liability." The court noted that other jurisdictions have held that guardians ad litem who perform quasi-judicial functions such as gathering information, preparing reports, and making recommendations are entitled to absolute immunity from suit.⁴⁰

³⁵ *Moore*, at 265.

³⁶ Richard Ducote, *Guardian Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy. J. Pub. Int. L. 106, 142 (2002)(noting that although GALs receive little training or guidance, immunity protects them from any repercussions for their mistakes).

³⁷ *Id.* at 148. All of these arguments were both brought out and refuted in Maryland, when, after the high court struck down GAL immunity, the state legislature tried to replace it. See note 41, *infra*.

³⁸ *Id.* at 266.

³⁹ See *Gilmore v. Gilmore*, 369 Mass. 598, 604, 341 N.E.2d 655 (1976).

⁴⁰ *Id.* citing *Cok v. Consentino*, 876 F.2d 1, 3 (1st Cir. 1989); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984); *Myers v. Morris*, 810 F.2d 1437, 1467 (8th Cir.), cert. denied, 484 U.S. 828 (1987); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 385 (Mo. App. Ct. 1993); *Fleming v. Asbill*, 326 S.C. 49, 54-57 (1997); *Delcourt v. Silverman*, 919 S.W.2d 777, 786 (Tex. App. 1996); *Paige K.B. v. Molepske*, 219 Wis. 2d 418 (1998).

Many scholars and practitioners are now endorsing an end to this immunity, and at least one state has abolished immunity for attorneys appointed to represent children⁴¹. In a recent memorandum to the National Conference of Commissioners on Uniform State Laws, six leading scholars and lawyers recommended that draft model legislation on “Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings” should state clearly that court-appointed attorneys for children should not be granted immunity.⁴² They stated, “Immunity is not in the best interests of abused and neglected children.”⁴³ To support this notion, they offered three real cases where GALs acted negligently to the detriment of the children for whom they were supposed to be speaking:

In one Maryland case, a court appointed attorney for a five-year-old child told the court that placing the child in the care of a convicted pedophile was an “acceptable risk,” based on her belief that the pedophile had reformed. The pedophile was not reformed, however, and the child was subsequently sexually abused for more than four years. The pedophile was then arrested by Washington County police.

In another Maryland case, the court-appointed attorney for a child told the court that the child would be better off in the custody of his father, who was allegedly physically abusing him. At the same time, the attorney faxed the mother a settlement offer that would have given custody of the child to the mother – but only if the mother agreed to pay the attorney’s \$35,000 fee, no questions asked.

In *Fox v. Wills*, a three-and-a-half-year-old child disclosed that her father was sexually abusing her during unsupervised visitations. The court-appointed attorney for the child repeatedly ignored evidence that the abuse was occurring, and further attempted to prevent that evidence from being presented to the court. As described by the Maryland Court of Appeals: “The complaint [against Wills]. . . alleged that Wills . . . failed to address the issues of the father’s

⁴¹ In contrast, Maryland attorneys appointed to represent a child’s interests are not protected by judicial immunity. See *Fox v. Wills*, 890 A.2d 720 (2006). In *Fox v. Wills*, the attorney for the child had been appointed pursuant to a statute that authorized the court to “appoint to represent the minor child counsel who may not represent any party to the action.” *Id.* at 735. The *Fox* court noted while the parties and lower courts used the term “guardian ad litem” to refer to the lawyer’s appointment, this term did not appear in the relevant statute and the MD General Assembly had never used the term in describing such appointments. See *Fox v. Wills*, 890 A.2d 720 (2006). Rather, his appointment was purely as counsel for the minor child and Maryland “has no [applicable] statute or rule which would support a conclusion that [the attorney] ‘was acting mainly as an arm of the court and performing judicial functions.’” *Id.* at 733-734. Moreover, the court found that nothing in the authorizing statute indicated that an attorney appointed pursuant to that statute owed his or her principal duty of allegiance to the court or did not function primarily as an advocate for the child. *Id.* at 734. The *Fox* court went on at some length to distinguish its statute from GAL statutes in other states.

⁴² Memorandum from Gregory F. Jacob, Joan Meier, et al., to the Voting Members of NCCUSL 5 (July 1, 2006) (on file with DV LEAP).

⁴³ *Id.* at 8.

inappropriate exhibitions of anger in front of K. The complaint also alleged that Wills deliberately prevented evidence of child sexual abuse from coming before the court by suppressing and distorting the report of a psychological expert appointed by the court to evaluate the claims of abuse, which report advised against unsupervised visitation between the child and her father. The complaint made several allegations that Wills breached his duties as counsel by improperly allowing his friendship with the child's father to influence his judgment regarding the child's best interest."⁴⁴

The parties involved in these cases had no recourse for the destructive and harmful actions of the children's court-appointed attorneys.

Finally, even when appellate courts find that GALs were derelict in their duties, they often uphold the custody decision anyway, treating the violations as harmless error. For example, in *In re Marriage of Bates*, 819 N.E.2d 714 (Ill. 2004), the child's representative's sealed report was admitted into evidence over the mother's objections that it contained hearsay and that she had been denied the right to cross-examine the child's representative. The Supreme Court of Illinois found that because the report was received in evidence, read, and relied on by the trial court, the mother's right to procedural due process was denied.⁴⁵ However, the court went on to apply a harmless error analysis. Ultimately, the court ruled that because none of the child representative's observations, conclusions or recommendations were inconsistent with the evidence at trial, the mother had failed to prove that the court's consideration of the report was prejudicial or affected the outcome.⁴⁶ The court held that the denial of due process in failing to allow cross-examination of the GAL was harmless error.

Similarly, the court in *In re Marriage of Bobbitt*, 135 Wn. App. 8, 144 P.3d 306 (2006) also applied a harmless error analysis. In this case, the GAL conducted 18 interviews with the mother and her witnesses but refused to interview the father or his witnesses. The father filed a motion to remove GAL, asserting that in refusing to investigate his side of the case, she violated both the trial court order appointing her and one of the court's GAL rules which requests that GALs maintain independence, treat parties with respect, become informed about the case, and perform duties in a timely manner. The appellate court found that the trial court did not abuse its discretion in denying the father's request to remove the GAL and appoint a new one. Further, the court found that despite the deficient GAL performance, in which the GAL failed to abide by the rules that require (1) contact with all parties; (2) that all parties be treated with respect; (3) timely performance of a parenting investigation; and (4) independence, objectivity and the appearance of fairness, the totality of the record supported the conclusion that the trial judge independently evaluated the evidence and the trial

⁴⁴ *Id.* at 9-10.

⁴⁵ *Id.* at 728.

⁴⁶ *Id.* at 730.

court's findings of fact (which the Father did not challenge), supported its modification decision. But see *Patel v. Patel* 347 S.C. 281, 555 S.E.2d 386 (S.C. 2001) (court holding that the GAL's actions and inactions, which included failing to keep notes of her observations during her investigation, contacting the husband's counsel nineteen times but never contacting wife's counsel, and listening to phone conversation between the husband and wife without wife's knowledge, so tainted the decision of family court as to deny wife due process, and as such, admission of *guardian ad litem's* recommendation was not harmless error).

IV. REFORMS

Abolition

The depth of the problems with GAL advocacy have led some scholars to call for the abolition of GALs. In addition to the above critiques, Ducote argues that abolition is necessary because a GAL's role "is not subject to definition in any way consistent with appropriate judicial proceedings [and] there is no documented benefit from their use."⁴⁷ He argues that even bitterly opposed parents would be more focused on the best interest of the child than would a third party.⁴⁸ Similarly, a group of expert lawyers has recommended to the NCCUSL that it eliminate the role of court-appointed attorneys from its model legislation.⁴⁹ One lawyer, after likening GALs to "spin doctors" and a filter between the court and the evidence, said, "the only reform that will eliminate the problem of the filter is the elimination of the filter itself."⁵⁰

Clarify GAL Roles

Another proposal is that rather than using the amorphous term "guardian ad litem," judges should appoint individuals to serve "in a discrete, recognized role— lawyer, expert witness, investigator, mediator, or party" in particular cases.⁵¹ These commentators further recommend that the following be clarified in each case: "(1) the specific role of the appointed individual; (2) the functions that are consistent with the role; (3) the qualifications that the potential appointee has to perform the role; and (4) the reasons why the parties could not provide this information to the court through the process of normal civil litigation without the need of an appointee."⁵²

Other commentators have recommended that, at a minimum, jurisdictions clarify the specific role that GAL is going to perform, enact court rules to explain the guardian's duties and provide additional information and training regarding the responsibilities and duties of the GAL:

⁴⁷ Ducote, *supra*, at 115.

⁴⁸ *Id.*, at 135.

⁴⁹ Jacob, *supra*, at 2.

⁵⁰ Dore, *supra*, at 57.

⁵¹ Raven Lidman and Betty Hollingsworth, *The Guardian ad Litem in Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 304 (1998).

⁵² *Id.*

A uniform description of the role and responsibilities of the GAL is needed within local jurisdictions...the description should lay out the minimum efforts and activities that are to be performed by the GAL. In addition, this description should contain guidelines for distribution of responsibilities. The guardians' roles should be classified into two separate categories: guardian as advocate, with duties of zealously representing the child's wishes; and the guardian who attempts to determine best interests, with duties of investigating and reporting on the child's circumstances.⁵³

American Bar Association Standards for Practice

This bifurcated concept has been elevated by the American Bar Association which embodies it in its standards of practice for lawyers for children. The ABA recommends that lawyers who are advocates for children or their interests should play one of two roles: the child's attorney or the best interests attorney.⁵⁴ The "Child's Attorney" is defined as "[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client." The "Best Interests' Attorney" is defined as "a lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives."⁵⁵ Rule III. The Commentary further clarifies that "[i]f these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted." The ABA has explicitly stated that "[a] lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations."⁵⁶

The Standards clearly explain why they do not use the term "Guardian Ad Litem.": The role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations. [The term] has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate."⁵⁷

⁵³ Laurent, *supra*, at 672-73, citing U.S. Dept of Health and Human Services, Representation for the Abused and Neglected Child: Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem 1-2 (1993).

⁵⁴ ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, Rule II, Commentary (Aug. 2003).

⁵⁵ *Id.*

⁵⁶ ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, Rule III.B (Aug. 2003) (emphasis added).

⁵⁷ *See* Commentary, Rule II.

Colorado Model

Colorado and Illinois, among others, have adopted similar statutory schemes. Prior to adoption of Colorado's current statute, court-appointed guardians ad litem ("GALs") in Colorado were allowed to present investigative and evaluative reports to the court on the condition that they be subject to cross-examination⁵⁸. However, this practice was ethically and legally problematic insofar as it permitted GALs to act simultaneously as attorneys and witnesses, both making recommendations and providing testimony, in violation of Colorado Rules of Professional Conduct Rules 3.4 and 3.7.

The legislature therefore eliminated the GAL position in 1997 and divided its former functions into two separate appointed roles: 1) the "Child's Legal Representative" ("CLR"), and 2) the "Child and Family Investigator" ("CFI") (formerly termed "special advocate").⁵⁹ The new statute expressly prohibits conflation of the two roles: "In no instance may the same person serve as both the [CLR] pursuant to this section and as the [CFI] for the court pursuant to section 14-10-116.5."⁶⁰ This careful boundary reflects the Legislature's and Colorado Supreme Court's determination that "[t]he role requirements of the [CFI] and the [CLR] are in conflict with each other."⁶¹ As an attorney representing the child's best interests, the CLR is limited by statute and ethical rules to submitting legal arguments based on evidence in the record, rather than providing her own out-of-court report.⁶²

Conversely, a CFI must have "*an independent perspective acceptable to the court*" and "shall investigate, report, and make recommendations . . . in the form of a written report filed with the court. . ." ⁶³ CFIs are barred from "provid[ing] legal advice to any party or otherwise act[ing] as an attorney in the case," and from "later accept[ing] an appointment as a [CLR]."⁶⁴

Illinois Model

⁵⁸ See, e.g., *In re J.E.B.*, 854 P.2d 1372, 1375 (Colo. App. 1993); *Saucerman v. Saucerman*, 461 P.2d 18, 20 (Colo. 1969).

⁵⁹ C.R.S. §§ 14-10-116 and 116.5.

⁶⁰ C.R.S. § 14-10-116(1) (emphasis added).

⁶¹ Chief Justice Directive (C.J.D.) 04-08, Standard 4, Commentary.

⁶² See C.R.S. § 14-10-116(2) (requiring compliance with ethical rules); CRPC Rules 3.4 (barring lawyers from stating personal opinions, mentioning matters unsupported by admissible evidence, and asserting personal knowledge of facts or credibility of witnesses), and 3.7 (prohibiting lawyers from "act[ing] as an advocate at a trial in which the lawyer is likely to be a necessary witness"). Unfortunately, at least one Colorado court has ignored these changes. *In re Marriage of Arthur Scott Chase and Angela Chase*, 09CA2046 (Colo. App. 2011)(unpublished).

⁶³ C.R.S. § 14-10-116.5(2) (emphasis added).

⁶⁴ C.J.D. 04-08, Standard 4.

Similarly, the Illinois Marriage and Dissolution of Marriage Act sets forth three roles for attorneys representing children⁶⁵: the attorney whose role is to “provide independent legal counsel for the child” and owes “the same duties of undivided loyalty, confidentiality, and competent representation...”; the guardian ad litem who is to “testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child”; and the child representative, whose role is to “advocate what the child representative finds to be the best interests of the child after reviewing the facts and circumstances of the case.” The child representative is to “have all the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem...”

New York Model (“Attorney for the Child”)

Another reform, adopted by New York in 2007, is the “attorney for the child” model. Under this model, the attorney for the child is required to zealously advocate for the child’s position⁶⁶ and is subject to the ethical requirements applicable to all lawyers, including constraints on conflicts of interest and becoming a witness in the litigation.⁶⁷ If the child is capable of “knowing, voluntary, and considered judgment,” the attorney for the child “should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child’s best interests”.⁶⁸ However, if the attorney is convinced that the child “either lacks the capacity for knowing, voluntary and considered judgment”, or that “following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child,” the attorney for the child can advocate a position that is contrary to the child’s wishes.⁶⁹

Require Abuse Expertise

Another proposed reform would require that GALs and children’s advocates have expertise in domestic violence and child abuse. GAL systems across the country have been criticized because they do not require GALs to have any expertise in domestic violence. One commentator recommends that the first year of service be limited to formal/informal instruction and observations with training on issues such as domestic violence, child development, and family dynamics.⁷⁰ The American Bar Association has stated that

[t]raining should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting

⁶⁵ See 750 ILCS 5/506(a) (2007).

⁶⁶ 22 NYCRR 7.2(d) (2007)

⁶⁷ 22 NYCRR 7.2(b) (2007)

⁶⁸ 22 NYCRR 7.2(d)(2) (2007)

⁶⁹ 22 NYCRR 7.2(d)(3) (2007)

⁷⁰ Mary Grams, *Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn*, 22 Law & Ineq. J. 105, 137 (2004)

time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.⁷¹

While educated, competent and compassionate GALs may do much to protect the safety and well-being of children at risk from a parent, significant reforms to the current system must be made to prevent the unfortunate outcomes that have been seen in too many cases. Clarifying GALs' roles in custody and abuse cases, requiring that they have a thorough understanding of domestic violence and child abuse, and ensuring that their actions are consistent with due process are steps that must be taken to protect the voices of the youngest victims of abuse.

⁷¹ ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, Rule VI. B.9 & Commentary, August 2003, available at http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf.