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HOUSE DEMOCRATIC POLICY COMMITTEE
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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

HOUSE DEMOCRATIC POLICY COMMITTEE HEARING
Topic: Child Custody Issues
Middletown Township Municipal Building – Langhorne, PA
September 17, 2018

AGENDA

2:00 p.m. Welcome and Opening Remarks

2:10 p.m. Panel One:
- Kathryn Sherlock
  Mother of Kayden Mancuso
- Eileen Bannon
  Grandmother
- Danielle Pollack
  Ambassador, CHILD USA
- Amy Tielemans
  President, Pennsylvania Association of Marriage and Family Therapy

2:50 p.m. Panel Two:
- Diane Ellis-Marseglia, LCSW
  Bucks County Commissioner
- Meg Groff
  Consulting Attorney, A Woman's Place
- Frank Cervone
  Executive Director, Support Center for Child Advocates

3:30 p.m. Closing Remarks

Eileen Bannon

HEARING 9/17/18

I am here today to tell you first hand that family members speaking up for children "at risk" in or around the hands of an abusive parent, (father or mother) whether it be mentally, physically, and equally as important Emotionally, should have the full attention of the Judges, Caseworkers, Family Therapists. I personally share today that we are not taken seriously, we are dismissed and considered biased.

Biased we may be but with good reason. I personally have given information to all who are involved and yet nothing has been done. I am told She has "rights".Why must it come to a tragedy before someone says, "I told you so".

When family members say something is wrong, please investigate the situation fully, and not with announced visits, surprise visits and often need to be conducted. All too often, these parents are on their "Best Behavior" when they know you are coming. The children are also on "best behavior" at announced visits, I know I was one of them many years ago.

I find it appalling that the people who know and understand the family dynamics the most are treated as less than credible.

Families are left feeling alone and defeated.

I am here today begging our Family Court System, Judges, Caseworkers, Counselors listen carefully to family members. They just might be right.

The System claims everything is in the "best interest of the child" I say the system is all about the Parents rights and not the children. They are afraid to challenge the parents. Change needs to take place today.

These precious children, our Future must be Priority, We must protect them at all cost. The checks and balances need further scrutiny.

Today's parents fighting for custody need to have their feet held to the fire. ALL boxes need to be checked off not here and there. There needs to be consistent proper behavior beyond a shadow of a doubt. PLEASE LISTEN TO THE FAMILIES.....

September 17, 2018
Danielle Pollack
CHILD USA

Hello and thank you. I am Danielle Pollack, here today as child advocate and Ambassador for CHILD USA, the think tank for child protection, which is founded and led by the nation's leading legal scholar on child sex abuse Statute of Limitations reform, among other things, Professor Marci Hamilton. The organization is housed at the University of Pennsylvania. Professor Hamilton couldn't be here today, but sends her support. I am speaking as someone who knows the family court system intimately and I lead CHILD USA's Family Court Reform initiative – one of eight areas of focus for the organization. And finally, I speak for all the children and safe parents who are too terrorized to speak out today, but desperate for relief from what is happening to them in the courts.

It is shocking and horrible what happened to Kayden, but unfortunately it's unsurprising for those of us who track family court procedures and outcomes for vulnerable children. We – the public – all want our children and grandchildren to be safe from violence, especially from physical or sexual violence and especially in a child's own home. That should be their safe place. We like to think that we have legal safeguards in place and systems that work well here in the Commonwealth, but in fact, much can be improved in our statutes to better protect our children. This legislation, proposed by Rep Tina Davis HB956 and Rep Mark Rozzi HB2058, takes important steps to protect our children and I commend and thank them for this. Both are leaders on this issue, legislators who take this to heart. Children, of course, cannot vote, make campaign contributions, or make laws. It is up to us – up to us to care enough to fight for these reforms on their behalf. Children are counting on us.

I was one of those people who assumed – before I came close to this problem – that our courts, as a first priority, of course protect abused, traumatized children from the source of their abuse, but I came to discover that when abuse is perpetrated within a family, by an adult against a child, the adult is protected first, not the child. Following court orders, safe parents or caregivers all over this Commonwealth and country, must bring their scared abused children into a home or visitation room to spend time with the child's abuser. These safe parents, usually mothers but not always, week after week after week are forced to deliver their at-risk children to their abuser, children who cling to them and beg to be kept safe from harm. Children will cower at the door, sometimes for the duration of the visit, for an hour twice a week, an entire weekend, or whatever the family court has ordered. Sometimes they blank out, dissociate, in order to get through it. I've seen children crying and pleading to be let out away from the abuser. I've seen children return from such visits so disassociated and traumatized from this ongoing contact they cannot function, cannot perform in school, fail to bond easily and do not trust others.

The children cannot escape this cycle no matter how much they plead or their safe parent advocates for them, seeking protection from the courts. This court-ordered

contact protects an abusing parent's rights, at the expense of an abused child's. By law, the abusers rights usurp the child's. Countless safe parents and children recount experiences of panic, severe stomachaches and even vomiting on the way to visits, accompanied by nightmares about being forced to have this visitation with their abusers. They ask when they can stop going, with safe parents having no answer because they must follow the courts orders, lest they be accused of "alienating" a child from their abuser. Safe parents rarely know exactly what happens during these visits between child and abuser and they sit in anguish counting the minutes until their child returns, if they return. Sometimes children are ordered into the custody of the abuser, to live full time with him despite pleadings and warnings to the court.

There's a horrible case of this right here in PA **right now**. A little boy who says he was being raped by his father for years, who was brave enough to testify in court, and still, full custody was given to the abuser. The safe parent is beside herself trying to get her son back, to get him to safety, but the courts have punished her for this, and put a gag order on her. She wanted to come today to testify, but could not, under threat from the court.

This is a grave error, sending children to be in the care of abusers or otherwise dangerous and violent parents, unsupervised. Research shows, that such decisions are made in family courts all over the nation, including here in Pennsylvania. One expert, Joyanna Silberg, who has been working in this area for nearly 40 years, has an interesting study of "turned around" cases, where safe parents have pleaded for safety for their children and been ignored or disbelieved by the family courts, lost custody to the abuser, only then to have the children so abused that the court was forced to reverse the order because the children were at such grave risk living with the abuser. Think what suffering we could prevented if the courts would listen to safe parents and the children from the outset, and know how to properly assess claims of domestic violence and child abuse, rather than disregard or minimize them. Children don't make the laws. They cannot. So, it is up to us to create this change, using valid evidence-based approaches, not mythologies. Abused children need a voice in the courts. The concept of guardian ad litem's or GALs to do this work, to speak on behalf of abused children in the courtroom, while well-intended, has proven inadequate and sometimes further endangers those it was designed to protect, children.

Current law allows for domestic abusers, persons who perpetrate violence against their own children and/or their adult partners, to have custody and/or eventual unsupervised visitation with their child victims. You might tell yourself, surely most family court judges do not rule this way; common sense would have them do otherwise. Surely, it's the exception not the rule, or surely if it does happen this problem is rare, limited to specific small areas or select cases. But no, this is not just anecdotal.

Child sexual abusers have been winning custody of children at a much higher rate than safe parents. A new national study from GW Law shows the alleged child *abuser* – not the safe parent - wins custody or ongoing unsupervised visitation with the child sexual abuse victim 81% of the time. 81%. This happens, even despite research showing that fewer than 10-14% of allegations are fabricated. It has gotten so bad that attorneys regularly advise safe parents to *not speak* of the abuse in family courts because it INCREASES the likelihood they will lose their children to their abuser. Does this seem right to anyone? Would any adult rape victim or victim of violent assault be court ordered to live with or visit over and over again the very person who raped or assaulted them? We would not dream of doing this. It's unthinkable. Consider the terror of the child victim – smaller in stature and incredibly vulnerable - having to see his or her abuser over and over, or worse, live with him full time. And yet, with children, somehow this is permissible by law, and in fact it's regularly ordered. In this way, we endanger and further traumatize vulnerable children. We can and must do better, and these proposals by Rep Davis and Rep Rozzi take concrete steps to do so.

You might ask how did our family courts across the country arrive at this point? For many years, unscientific theories about child abuse, especially child sexual abuse, were espoused and became adopted in family court culture and decision-making. These influential but unscientific theories, rife with personal biases of their proponents, were regularly taught in family court trainings. The most damaging called PAS wrongly claimed vengeful parents regularly employ false child abuse allegations as a powerful weapon to punish exes and ensure custody for themselves. Unfortunately, this invalid theory has been and still is the go-to solution successfully employed in courtrooms by abusers. When safe parents allege abuse, abusers allege PAS, and win. In short, family court judges everywhere over the past three or four decades have given undue weight to these invalid, unscientific theories which protect abusers and endanger children.

Fortunately we've made many advances in scientific research on child abuse and trauma in the past 3 decades, starting with ACEs studies which have been so crucial for our understanding the breadth of abuse impacts – lifelong impacts - on the health of child victims who experience adversity, abuse and trauma, YET, in our statutes we have still not caught up to speed. And so family court judges continue to order abused children to be in the care of the very adults who have caused children severe harm to them. The judicial education and training program encouraged here in Rozzi's bill 2058 amending sections of the domestic relations title allows *only* for scientifically valid theories that meet admissibility standards. This is not a minor point. His bill states that such trainings should take place no less than every 3 years, and I would add they could be more often and should be mandatory before a judge can begin a career hearing cases which deal with domestic violence, child abuse and child sex abuse allegations. In Davis's bill 956, which adds an entire subchapter to the title, it states that additional state funding may be necessary to meet the needs to train judges and other court professionals in the handing of such cases. Judges and Masters need evidence-based training on these things. We need a standardized,

fact-based approach, not a personal bias based approach. Kathy, Kayden's mom, brings this up. She asked the Governor for this. She's an ER nurse and said to me never in a million years in her field would a doctor be allowed to assess and practice in an area in which he or she is not specialized. Would you want your rheumatologist doing heart surgery on you? Or your podiatrist? It's absurd. In no other field – where lives are at stake – our little children's lives and futures, our most precious people – no where are such flimsy standards of practice and lack of training permitted to go on. It is time to update our code and to train the decision-makers on these cases on the facts of child abuse, especially child sex abuse. According to the Children's Alliance 2017 report on all of Pennsylvania's CACs the type of abuse most often reported is sexual abuse, far and away the most (12,504 cases vs 2605 of physical abuse) and the family relationship of alleged offender to child is most often the parent. Time is UP. At CHILD USA we have devised such a training, in consultation with the nation's leading experts on these matters and with the offices of the Bucks DA and Commissioner, who have been really amazing partners in formulating this with us. The keynote speaker will be Deputy AG Michelle Henry, who helped found the Bucks CAC. The training is the first of its kind, a comprehensive program using evidence-based legal, medical, and social science research to reform Family Court standards for responding to child abuse, especially child sexual abuse. It partners national experts with local leaders and decision-makers. It will run here in Bucks County at the Courthouse on Oct 2. I have fliers and more information here and encourage you to register and attend. It's a 6 credit CLE for the attorneys among us. This is the pilot, Bucks County is the beginning, and if it goes well here we will replicate it in other PA counties and other parts of the country.

Perpetrators are smart, they know how to use the gaps in our statues and the lack of judicial training to their advantage. It's not easy to accept, but it must be faced – if we want to keep children safe. Because for all the Sanduskys and Nassars, there are thousands of child sexual abusers right now in private homes, quietly allowed *by court order* – and against the urging of a safe parent - to continue their abuse on their children. This is done in the name of parental rights above child safety. Children are human beings, not property. Children and their protectors must be heard and protected, not silenced in our courts. Children are not property by which an abusive but "legal owner" - as our code stands now - has free reign to do what harm he may over and over and over to the child - unrestrained by law, until the child is 18. We must move into the 21st century on this. We must implement consistent evidence-based standards and train judges and masters properly.

I ask you to please support Rep Rozzi's amendments and Rep Davis's subchapter to help correct these deeply entrenched problems in our family courts so that we can better protect children here and everywhere throughout the Commonwealth and the nation. Pennsylvania can and should lead on this. Thank you

VAWnet.org
National Online Resource Center on
Violence Against Women

Applied Research

Parental Alienation Syndrome and Parental Alienation: A Research Review

Joan S. Meier

The willingness to pathologize capable mothers even extends to mothers' "warm, involved" parenting -- which they assert can powerfully fuel alienation in a child (Johnson et al., 2005, p. 208; Kelly and Johnston, 2001). Such discussions are more than sufficient to ensure that whenever a mother and child have ambivalence about the children's father, and certainly in most cases where mothers allege abuse, virtually any loving parenting by the mother can be labeled a form of "alienation."

Applied Research papers synthesize and interpret current research on violence against women, offering a review of the literature and implications for policy and practice.

VAWnet is a project of the National Resource Center on Domestic Violence.

Parental alienation syndrome (PAS) and parental alienation (PA) are often invoked in legal and legislative contexts addressing the rights of fathers and mothers in custody or visitation litigation. Indeed, alienation claims have become ubiquitous in custody cases where domestic violence or child abuse is alleged, as grounds to reject mothers' requests to limit paternal access to their children. This paper provides a historical and research overview of PAS and PA, identifies strategic issues for advocates working with abused women and children,* and offers guidelines to improve courts' treatment of these issues. While PAS and PA have much in common both as theories and with respect to how they are used in court, they have distinct scientific and research bases and critiques. This paper, therefore, addresses them separately.

Parental Alienation Syndrome

Historical Background

The notion of children's hostility to one parent in the context of divorce was first characterized as a pathology by divorce researchers Wallerstein and Kelly. They theorized that a child's rejection of a noncustodial parent and strong resistance or refusal to visit that parent was sometimes a "pathological" alignment between an angry custodial parent and an older child or adolescent and that this alliance was fueled by the dynamics of marital separation, including a child's reaction to it (Wallerstein & Kelly, 1976, 1980). Although significant, Wallerstein and Kelly's construct did not become a staple of custody evaluations or judicial determinations. Moreover, their early work does not use the phrase "parental alienation," but focuses instead on children's "alignment" with one parent against the other.

* *The use of gender-specific language in this paper to refer to both protective and abusive parents is in response to Richard Gardner's gendered framework for PAS and relevant research.*

Beginning in the early 1980's, attention to a purported "parental alienation syndrome" exploded as the result of the dedicated efforts of Richard Gardner, a psychiatrist loosely affiliated with Columbia Medical School[1] who ran a clinical practice that focused on counseling divorcing parents.

Based solely on his interpretation of data gathered from his clinical practice, Gardner posited that child sexual abuse allegations were rampant in custody litigation, and that 90% of children in custody litigation suffered from a disorder, which he called "Parental Alienation Syndrome (PAS)." He described PAS as a "syndrome" whereby vengeful mothers employed child abuse allegations as a powerful weapon to punish ex-husbands and ensure custody to themselves (Gardner, 1992a; 1992b). He further theorized that such mothers enlisted the children in their "campaign of denigration" and "vilification" of the father, that they often "brainwashed" or "programmed" the children into believing untrue claims of abuse by the father, and that the children then fabricated and contributed their own stories (Gardner, 1992b, p. 162, 193; 2002, pp. 94-95). He claimed – based solely on his own interpretation of his own clinical experience – that the majority of child sexual abuse claims in custody litigation are false (Gardner, 1991), although he suggested that some mothers' vendettas were the product of pathology rather than intentional malice (Gardner, 1987, 1992b). In short, Gardner claimed that when children reject their father and they or their mother makes abuse allegations, this behavior is most likely the product of PAS rather than actual experiences of abuse. PAS theory is thus premised on the assumption that child abuse claimants' believability and trustworthiness is highly suspect.[2]

While acknowledging that if there was actually abuse which explained a child's hostility there could be no PAS (Gardner, 1992a), Gardner's "diagnostic criteria" focused on various personality characteristics of the accuser, accused, and the child, rather than expert assessments of abuse itself or the other reasons that might explain a child's hostility to a parent (Gardner, 1992b; see also Hoult, 2006). Rather, Gardner's PAS theory presumes that a child's hostility to a father is pathological, which, in turn, encourages courts to suspect that mothers who make such allegations are doing so only to undermine the child's relationship with the father. Indeed, in differentiating between "fabricated" and "bona fide" abuse, Gardner uses "the Presence of the Parental Alienation Syndrome" as itself an "extremely valuable differentiating [criterion]" (Gardner, 1987, p. 109). By PAS, as previously discussed, he means a child's "campaign of denigration" of the father and the mother's supposed "programming" of the child/ren (Gardner, 2002, pp. 95-97). In short, Gardner's PAS theory essentially presumes PAS's existence from the mere presence of a child's hostility toward and/or fear of their father based on alleged abuse. This is unfortunately precisely how it has been applied in many courts.

It should be further noted that the Sexual Abuse Legitimacy Scale, which Gardner invented as a means of quantifying the likelihood that sexual abuse claims were valid, was so excoriated by scientific experts as "garbage" that he withdrew the scale; however, many of the factors continue to be reflected in his qualitative discussions of how to determine whether child sexual abuse allegations are legitimate (Bruch, 2001; Faller, 1998).

Gardner's Remedies for PAS

Gardner's "remedy" for purportedly severe PAS is extreme - including complete denial of maternal-child contact and "de-programming" the child through a concerted brainwashing effort to change the child's beliefs that they have been abused (Bruch, 2001; Gardner, 1992a; see also www.rachelfoundation.org). After being subjected to these procedures and ordered by the court to live with the father they said abused them, some children became suicidal or killed themselves (Bruch, 2001; Hoult, 2006). In other cases, courts have ordered children into jail and juvenile homes as part of Gardner's recommended "threat therapy" which is the stock in trade of strict alienation psychologists (Hoult, 2006;

Johnston & Kelly, 2004a). In one such case, a judge ordered a frail nine-year-old boy seized by three police officers and placed in a juvenile detention facility when he refused to get into his father's car for a scheduled visitation. The son of the father's girlfriend had sexually abused the boy, and he had also witnessed the father's violence against his mother. After three days of abuse by the other boys in the detention facility, the boy agreed to cooperate with the court order. The judge concluded that his "treatment" for parental alienation had worked (E. Stark, personal communication, May 2007).

As critiques of PAS have pointed out, PAS is a teflon defense to an accusation of abuse, because all evidence brought to bear to support the abuse claims is simply reframed as further evidence of the "syndrome" (Bruch, 2001). A child's or their protective parent's repetition of claims of abuse is routinely characterized as further evidence of extreme alienation, and punished by court orders prohibiting continued reporting of abuse. If the protective parent points to a therapist's opinion that the child has been abused, the therapist is accused of a "folie a trois" (a clinical term from the French for "folly of three") which suggests that all three parties are in a dysfunctional "dance" together (Bruch, 2001). All efforts to gather corroboration of the allegations is simply treated as further evidence of her pathological need to "alienate" the child from the father (Gardner, 1987, 1992a).

Gardner's underlying pro-pedophilic and misogynistic beliefs

Gardner's underlying beliefs regarding human sexuality, including adult-child sexual interaction, are so extreme and unfounded that it is hard to believe that courts would have adopted his theory if they were aware of what he had published. First, he asserted that the reason women lie about child sexual abuse in custody litigation is because "hell hath no fury like a woman scorned" (Gardner, 1992b, pp. 218-19), and/or because they are "gratifie[d] vicariously" (Gardner, 1991, p. 25; 1992a, p. 126) by imagining their child having sex with the father. There is of course no empirical basis or support for these offensive assertions.

Second, Gardner's views of sexuality were disturbing. He claimed that all human sexual paraphilias, including pedophilia, sadism, rape, necrophilia, zoophilia (sex with animals), coprophilia (sex with feces), and other deviant behaviors "serve the purposes of species survival" by "enhanc[ing] the general level of sexual excitation in society" (Gardner, 1992b, p. 20; see also Hoult, 2006; Dallam, 1998.)

Further, Gardner claimed that women's physiology and conditioning makes them potentially masochistic rape victims who may "gain pleasure from being beaten, bound, and otherwise made to suffer," as "the price they are willing to pay for gaining the gratification of receiving the sperm" (Gardner, 1992b, p. 26).

Regarding pedophilia, Gardner argued expressly that adult-child sex need not be intrinsically harmful to children, and that it is beneficial to the species, insofar as it increases a child's sexualization and increases the likelihood that his or her genes will be transmitted at an early age (Gardner, 1992b). Gardner claimed, "sexual activities between an adult and a child are an ancient tradition" a "worldwide phenomenon" and "has been present in just about every society studied, both past and present" (Gardner, 1992b, pp. 47-48). He viewed Western society as "excessively punitive" in its treatment of pedophilia as a "sickness and a crime" (Gardner, 1991, p. 115), and attributed this "overreaction" to the influence of the Jews (Gardner, 1992b, pp. 47, 49). Gardner opposed mandated reporting of child sexual abuse and specifically described a case in which he successfully persuaded a mother not to report a bus driver who had molested her daughter, because it would "interfere with the natural desensitization process, would be likely to enhance guilt, and would have other untoward psychological effects" (Gardner, 1992b, pp. 611-12; see also Dallam, 1998). Gardner's perspective on adult-child sexual interaction can be summed up in his reference

to Shakespeare's famous quote: "'There is nothing either good or bad, but thinking makes it so'" (Gardner, 1991, p. 115).

Despite his assertions that pedophilia is widespread and harmless, he asserted in a filmed interview that a child who tells his mother he has been sexually molested by his or her father should be told "I don't believe you. I'm going to beat you for saying it. Don't you ever talk that way again about your father" (Waller, 2001).[3] This response – and his beliefs described above – suggest that the animating intention behind the PAS theory's denial of the validity of child sexual abuse reports is not a genuine belief that child sexual abuse is often falsely reported, but rather a belief that such reports should be suppressed.

The Lack of Evidence Base for PAS

While Gardner and PAS have had many adherents, particularly among forensic evaluators and litigants, there is actually no empirical research validating the existence of PAS. And there is extensive empirical proof that the assumptions underlying the theory are false.

Sole empirical study of PAS does not validate the concept. Only one study has been published that purports to empirically verify the existence of PAS. Consistent with scientific standards, this study sought to assess the "inter-rater reliability" of PAS – i.e., the extent to which different observers can consistently identify PAS (Rueda, 2004). The study built directly on Gardner's criteria, taking for granted that those criteria reflect PAS. It then measured the degree to which a small sample of therapists agreed on whether five case scenarios presented to them reflect those PAS criteria or not (Rueda, 2004). The findings were that there was a reasonable degree of agreement about whether these cases indicated PAS. However, the findings do not prove its existence – rather, they prove that a small number of mental health professionals agreed on applying the *label* PAS to cases of estranged ("alienated") children. Many therapists surveyed, however, had refused to fill out the questionnaire and some expressly stated they didn't believe PAS existed. This study thus simply presumed rather than proved the key question: is the concept of PAS actually a disorder caused by a malevolent aligned parent's efforts, or is it simply a reframing of a child's estrangement flowing from abuse, other problematic conduct by the alienated parent, or other normative reasons? The author himself admits that the findings did not "differentiate PAS from parental alienation" (Rueda, 2004, p. 400). Since "parental alienation" is merely a label for behavior that is both more innocuous and more common (see below) than "PAS" purports to be, this admission essentially negates the study as a validator of PAS.

PAS' empirical bases are false or unsupported. The claims upon which Gardner based his PAS theory are thoroughly contradicted by the empirical research. Gardner (1991, 1992b) claimed that child sexual abuse allegations are widespread in custody cases and that the vast majority of such allegations are false. These claims have no empirical basis, other than Gardner's interpretation of his own clinical practice. In contradiction, the largest study of child sexual abuse allegations in custody litigation ever conducted found that child sexual abuse allegations were extremely rare (less than 2% of cases) and of those, approximately 50% of the claims were deemed valid, even when assessed by normally conservative court and agency evaluators (Thoennes & Tjaden, 1990). Other studies have found such allegations to be validated approximately 70% of the time (Faller, 1998). Moreover, leading researchers have found that the dominant problem in child sexual abuse evaluation is not false allegations, but rather, the "high rates of unsubstantiated maltreatment" in "circumstances that indicat[e] that abuse or neglect may have occurred" (Trocme & Bala, 2005, pp. 1342-44).

Indeed, empirical research has found that the PAS theory is built upon an assumption which is the opposite of the truth: Where PAS presumes that protective mothers are vengeful and pathologically "program" their children, it is not women and

children – but noncustodial fathers – who are most likely to fabricate child maltreatment claims. In the largest study of its kind, leading researchers analyzed the 1998 Canadian Incidence Study of Reported Child Abuse and Neglect. They found that only 12% of child abuse or neglect allegations made in the context of litigation over child access were intentionally false (Trocme & Bala, 2005). Notably, they found that the primary source (43%) of these intentionally false reports was noncustodial parents (typically fathers); Relatives, neighbors, or acquaintances accounted for another 19% of false reports. Only 14% of knowingly false claims were made by custodial parents (typically mothers), and 2% by children (Trocme & Bala, 2005).

PAS has been rejected as invalid by scientific and professional authorities. The dominant consensus in the scientific community is that there is no scientific evidence of a clinical "syndrome" concerning "parental alienation." Leading researchers, including some who treat "alienation" itself as a real problem, concur, "the scientific status of PAS is, to be blunt, nil" (Emery, Otto, & O'Donohue, 2005, p. 10; see also Gould, 2006; Johnston & Kelly, 2004b; Myers, Berliner, Briere, Hendrix, Jenny, and Reid, 2002; Smith and Coukos, 1997; Wood, 1994). The Presidential Task Force of the American Psychological Association on Violence in the Family stated as early as 1996 that "[a]lthough there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children's attachment to their fathers, the term is still used by some evaluators and Courts to discount children's fears in hostile and psychologically abusive situations" (p. 40). Dr. Paul Fink, past President of the American Psychiatric Association, describes PAS as "junk science" (Talan, 2003, line 9). Nonetheless, defenses of PAS against critiques have led even some respected social scientists to mis-cite and distort the research (Lasseur & Meier, 2005).

Thus, PAS has been rejected multiple times by the American Psychiatric Association as lacking in scientific basis and therefore not worthy of inclusion in the Diagnostic and Statistical Manual of Mental Disorders. The most recent all-out campaign by PAS proponents for inclusion of (the re-named) "Parental Alienation Disorder" (PAD) was flatly rejected by the DSM-V committee in 2012 (Crary, 2012).

Echoing the scientific consensus, a leading judicial body, the National Council of Juvenile and Family Court Judges (NCJFCJ), has published guidelines for custody courts stating:

> [t]he discredited "diagnosis" of "PAS" (or allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be "alienated" have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent (Dalton, Drozd, & Wong, 2006, p. 24).

The American Prosecutors' Research Institute and National District Attorneys' Association have also rejected PAS (Ragland & Field, 2003).

Court rulings on admissibility. Most family courts accept PAS contained in the opinion offered by an evaluator or Guardian Ad Litem (GAL) (legal representative for the child) without ever questioning its scientific validity or admissibility. Where it has been formally challenged on appeal, appellate courts have also avoided directly ruling on the issue. *See e.g., Hanson v. Spolnik*, 685 N.E.2d 71 (Ind. App. 1997), Chezem, J. dissenting (castigating both trial court and appellate court for reliance on "pop psychology" of PAS). As a result there are as of the date of this writing only three published opinions actually analyzing and ruling on the legal admissibility of PAS. Each opinion has concluded it lacked sufficient scientific validity to meet admissibility standards (*Snyder v. Cedar*, 2006 Conn. Super. LEXIS 520, 2009; *People v. Fortin*, 2001;

People v. Loomis, 1997). Four trial level decisions have ruled it was admissible, but the appeal of each decision resulted in no ruling on the PAS issue. No published decision exists for several of the purportedly favorable trial court opinions (Hoult, 2006).

PAS Continues to Garner Public and Judicial Attention

While the robust critiques and rejections of PAS as a "syndrome" have reduced the use of this label in court and in the research literature, it has continued to garner popular and political recognition. For example, the American Psychological Association and state and local bar associations continued to sponsor workshops on PAS during the first decade of the century. Since approximately 2005, roughly fifteen governors have issued proclamations concerning the purported problem of PAS at the urging of a relatively small group of PAS proponents (Parental Alienation Awareness Organization-United States, n.d.).

Parental Alienation

The many critiques of Gardner's PAS have resulted in a shift among leading researchers and scholars of custody evaluation from support for PAS to support for a reformulation of PAS to be called instead "parental alienation" or "the alienated child" (Johnston, 2005; Steinberger, 2006). Most recently, Johnston and Kelly (2004b) have clearly stated that Gardner's concept of PAS is "overly simplistic" and tautological, and that there are no data to support labeling alienation a "syndrome" (p. 78; 2004a, p. 622). Instead, they speak of "parental alienation" or "the alienated child" as a valid concept that describes a real phenomenon experienced by "a minority" of children in the context of divorce and custody disputes (Johnston, 2005, p. 761; Johnston & Kelly, 2004b, p. 78; see also Drozd & Olesen, 2004).

Johnston (2005) defines an alienated child as one

> who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. Entrenched alienated children are marked by unambivalent, strident rejection of the parent with no apparent guilt or conflict (p. 762).

What is the difference between PAS and PA? The primary shift appears to be away from Gardner's focus on the purportedly alienating parent and toward a more realistic assessment of the multiple sources of children's hostility or fear of their parents, including behavior by both parents and the child's own vulnerabilities (Johnston, 2005; Johnston & Kelly, 2004b; Kelly & Johnston, 2001). Johnston and Kelly (2004b) state,

> In contrast to PAS theory that views the indoctrinating parent as the principal player in the child's alienation, this study [their own] found that children's rejection of a parent had multiple determinants . . . [another study of theirs also] supported a multi-dimensional explanation of children's rejection of a parent, with both parents as well as vulnerabilities within the child contributing to the problem. Alienating behavior by an emotionally needy aligned parent (mother or father), with whom the child was in role-reversal, were strong predictors of the child's rejection of the other parent. Just as important as contributors were critical incidents of child abuse and/or lack of warm, involved parenting by the rejected parent (pp. 80-81).

Johnston also differentiates her approach from Gardner's by rejecting his draconian "remedies," including custody switching to the "hated" parent. Characterizing Gardner's prescriptions as "a license for tyranny," Johnston and Kelly (2004b, p. 85) call instead for individualized assessments of both the children and the parents' parenting, maintaining focus on the children's needs rather than the parents'

rights. In theory, the goal is a more realistic and healthy relationship with both parents, rather than reconciliation with the hated parent as the only desirable goal (Johnston, 2005). Unfortunately, the practice in court is far less nuanced and individualized (see below).

The notion that some children are alienated from a parent is both a less scientific and more factual assertion. It is thus easier to raise "alienation" in court without triggering a battle over the admissibility of scientific evidence (Gardner, 2002). However, debate continues to rage in research and advocacy circles over the extent to which parental alienation is something that can be measured, is caused by a parent, and/or has truly harmful effects, or whether it is simply a new less objectionable name for the invalidated PAS. To the extent that PA is widely used almost identically to PAS in court, it may not matter in practice what the theoretical differences are.

Critique of PA - Lack of Evidence Base

Questioning the empirical basis of parental alienation and PAS is challenging because these theories are described and referenced in a substantial social science literature (Turkat, 2002). Many of these materials make assertions about PAS and PA without any citation to scientific literature – yet their "publication" on the Internet and their association with apparently credentialed authors and/or supporters, give them an aura of credibility. Some articles do cite research selectively, but contain numerous unsupported assertions as well, about PAS, PA, and how they operate.

Custody evaluators and psychologists frequently insist as an anecdotal matter that alienation is present and is a terrible thing. However, the existing empirical basis for the assumption of alienation's harmfulness is limited to "clinical observation" (Johnston & Kelly, 2004b; see also Ackerman & Dolezal, 2006). Of course clinical observations are subjective, and do not constitute empirical evidence. Moreover, these statements do not indicate whether the relationship breaches between children and parents observed by these clinicians are a healthy or developmental response to their relationship with that parent, or if the "alienation" is wrongfully instigated by a favored ("aligned") parent (Johnston & Kelly, 2004b). Indeed, even if the clinical observers attempted to make the distinction there would be no objective way of discerning whether their judgment was correct (short of a comprehensive assessment of the child-father relationship, including any abusive, neglectful or cold, indifferent or hostile parenting by the disliked parent – most of which is lacking in the usual case).

In fact, the empirical evidence Johnston et al. (2005) have amassed actually indicates both that (i) actual "alienation" of a child is quite rare despite many parents' derogatory conduct or statements about the other parent and (ii) when children are estranged from a parent there are always multiple reasons, some of which are that parent's own conduct. Their research found that, despite the alienating behaviors of both parents in most of the families participating in their study, only 20% of children were actually "alienated" and only 6% were "severely alienated." Even among the children who rejected a parent, all had multiple reasons for their hostility, including negative behaviors by the hated parent, such as child abuse or inadequate parenting, or the children's own developmental or personality difficulties (Johnston, 2005; Johnston et al., 2005).

The fact that only a small fraction of children subjected to inter-parental hostilities and alienating conduct by their parents have been found to actually become "alienated" suggests that the focus on alienation is a tempest in a teapot – one that continues to distract from and undermine the accurate assessment of abuse and concomitant risks to children.

Lack of Evidence Base for Long-term Impact of Alienation

Johnston and others have acknowledged that "there is very little empirical data to back up their "clinical

observations" that alienated children are significantly undermined in their emotional and psychological development. In fact, Johnston and Kelly (2004b) forthrightly state that "there are no systematic long-term data on the adjustment and well-being of alienated compared to non-alienated children so that long-term prognostications are merely speculative" (p. 84). And, contrary to the common assertions of evaluators and alienation theorists that alienation is a devastating form of emotional abuse of children, Judith Wallerstein, the groundbreaking researcher of divorce who first pointed out the problem of children's sometimes pathological alignment with the custodial parent after divorce, found in her follow-up study that children's hostility toward the other parent after divorce was in every case temporary, and resolved of its own accord, mostly within one or two years (Bruch, 2001; Wallerstein et al., 2000).

Links between PA and Domestic Violence – Reversing the PA Paradigm

Johnston and Kelly's (2004b) research also reveals some interesting evidence about the relationship of domestic violence to alienation:

> While a history of domestic violence did not predict children's rejection of a parent directly . . . [m]en who engaged in alienating behaviors (i.e., demeaning a child's mother) were more likely to have perpetrated domestic violence against their spouses, indicating that this kind of psychological control of their child could be viewed as an extension of their physically abusive and controlling behavior (p. 81).

Coming from researchers who specialize in alienation, this empirical statement – that men who batter are often also men who intentionally demean the mother and teach the children not to respect her – is powerful confirmation of the experiences of many battered women and their advocates. Perhaps just one example from the author's caseload will suffice: In this case, the batterer would call the children out of their rooms where they were cowering, to make them watch him beat their mother while telling them he had to do this because she was a "whore" and a "slut." Other custody experts and researchers have also suggested that batterers are in fact the most expert "alienators" of children from their other parent (Bancroft & Silverman, 2002). The dilemma that this creates for battered women and their advocates with respect to the use of parental alienation as a claim is discussed in the section on "Strategy Issues" below.

Qualitative critique – PA denies abuse and is used, like PAS, in conclusory fashion. By recognizing the many reasons and ways children can become alienated from a parent, the new "alienation" theory is, in principle, more reasonable and realistic than the old PAS theory. Nonetheless, given the shared belief at the root of both theories – that abuse allegations are often merely indicators of an aligned parent's campaign of alienation – the differences between "alienation" and PAS are, at best, unclear to many lawyers, courts, and evaluators.[4] Indeed, this author was involved in a case in which the court's forensic expert, over time, substituted the label "parental alienation" for her earlier suggestion of PAS, without changing anything else about her analysis. When queried about the differences between PA and PAS, she had little to say. It is not surprising, then, that even while trying to explicitly shift the focus from PAS to PA, proponents of the "new" PA continue to rely on PAS materials (Bruch, 2001; Steinberger, 2006).

Perhaps the most disturbing misuse of PA is seen when PA adherents fail to distinguish between children who are estranged from a non-custodial parent due to abuse or other negative behavior from children who have been wrongly influenced by their favored parent to hate or fear the other. Thus, leading adherents to PA theory sometimes describe litigant children's symptoms and psychological harms and attribute them to "alienation," while simultaneously acknowledging that their research shows that "alienated" children include those who are *justifiably* estranged due to the disfavored parent's conduct. Cases worked on by this author have shown that abused children display many of the symptoms

that are frequently attributed to "alienation" in this literature (Compare Johnston, Walters, & Olesen, 2005; Johnston & Kelly, 2004b with Kathleen C. Faller, 1999; Righthand, 2003). Therefore, such discussions attribute to alienation harms which, in fact, may well be due to the disfavored parent's own behaviors (Meier, 2010).

This failure to distinguish between whether harm to children – or their hostility to their father – is caused by alienation or abuse sets up a paradoxically disastrous dynamic: So long as an abuser can convince a court that the children's attitudes can be labeled "alienation," he can *benefit* from the very impact of his abuse. In *Jordan v. Jordan*, the trial court found (based on two alienation psychologists' testimony) that the older of two children was severely alienated from her father, who had been found to have twice committed intrafamily offenses against the mother. Therefore, the court ruled that the legislative presumption against joint custody to a batterer was rebutted – by the child's alienation, which, the court stated, would cause her emotional damage, and which it was presumed could best be cured by more time with her father (who she adamantly refused to see). The problem with this analysis was that neither the experts nor the judge considered the possibility that the child's "alienation" may have been at least in part a reaction to the father's violence toward the mother and in front of the child and his known manhandling of the child herself. As a result, the father won joint (and eventually, sole) custody, even though the possibility that the child's hostility was a function of *his own abusive behaviors* was *never ruled out* (Jordan, 2010). When this argument was put before the Court of Appeals, that Court also ignored the fact that such reasoning makes *battering a sure path to an award of custody* – so long as the children become alienated as a result. The Court simply affirmed that the alienation label is sufficient grounds to rebut the presumption against custody to batterers, without regard to whether it is the batterer's own abuse which may have caused the child's "alienation" (Jordan, 2011).

It should be noted that, while alienation researchers do not discuss child witnessing of adult domestic violence as a form of emotional child abuse, research has unequivocally found that child witnesses to adult abuse can be profoundly negatively affected even if they are not themselves the direct target of physical or sexual violence (Lewis-O'Connor, Sharps, Humphreys, Gary, & Campbell, 2006; Bancroft & Silverman, 2012). Therefore, even where children have not been directly abused themselves, their fear or hostility toward the batterer of their mother may be entirely expected.

The fact that courts are not nuanced in applying alienation theory would not in itself be sufficient to indict the theory itself. However, discussions of PA within the scholarly literature supporting the concept demonstrate that these applications of the theory are consistent with the way it is understood by its researchers and theorists. For instance, while on the one hand conveying a more reasonable awareness of the many factors that contribute to a child's alienation from a parent, Johnston and collaborators continue to pathologize mothers whose children are hostile or afraid of their fathers. In some of their earlier work they even go so far as to pathologize the "aligned" parent who "often fervently believes that the rejected parent is dangerous to the child in some way(s): violent, physically or sexually abusive, or neglectful" (p. 258). They go on to describe the pursuit of legal protections and other means of assuring safety as a "campaign to protect the child from the presumed danger [which] is mounted on multiple fronts [including] restraining orders…" (p. 258). Finally, like Gardner, these purported rejectors of PAS continue to assert that a parent can "unconsciously" denigrate the other parent to the child "as a consequence of their own deep psychological issues" which cause them to "harbor deep distrust and fear of the ex-spouse…" (p. 257; see also Meier, 2010). The willingness to pathologize capable mothers even extends to mothers' "warm, involved" parenting – which they assert can powerfully fuel alienation in a child (Johnston et al., 2005, p. 208; Kelly and Johnston, 2001). Such discussions are more than sufficient to ensure that

whenever a mother and child have ambivalence about the children's father, and certainly in most cases where mothers allege abuse, virtually any loving parenting by the mother can be labeled a form of "alienation."

In short, parental alienation as a theory has been built – not by scientific or empirical research, but by repeated assertions – at first more extreme assertions by Gardner, and now less extreme but still distorted assertions by more sophisticated psychological professionals. Unfortunately it has been used virtually identically to PAS in family courts, to simply turn abuse allegations back against the protective parent and children (Meier, 2010). Anecdotal experience is now being confirmed by cutting edge research into "turned around" cases, i.e., those in which a court initially disbelieves a father is dangerous and, after some harm to the children, a second court corrects the error. Preliminary results of this research have identified PA labeling as one of three primary factors leading to erroneous denials of an accused abuser (usually a father)'s dangerousness, and orders subjecting children to ongoing abuse (Silberg, 2013). These preliminary results indicate 45% (14 out of 31) of the initial case errors were specifically attributable to PA labeling. If an additional 5 cases in which the protective parent (usually a mother) was pathologized in similar manner (without the PA label) are included, that percentage becomes 61%. Other key factors leading to erroneous denials of abuse identified in this research to date are (i) failure of child welfare agencies to protect the child and (ii) misleading neutral custody evaluations (Silberg, 2013).

PA and PAS Labeling by Child Protection Agencies

Despite the stated priority of child welfare agencies on child safety, many such agencies appear to have adopted PAS/PA reasoning. Anecdotal reports from the field suggest that many child welfare agencies are highly skeptical of any abuse claims raised within the context of custody litigations, and discount their credibility.[5] Although Gardner repeatedly asserted that sexual abuse claims raised in the custody litigation context are mostly false, as noted above, the empirical research has found the opposite. Nonetheless, the widespread acceptance of PAS and PA theory has legitimized many child welfare agencies' skepticism toward such allegations when made by mothers in custody or visitation litigation (Lesher & Neustein, 2005; Neustein, A., & Goetting, A., 1999). In fact, in some jurisdictions, the same custody evaluators propounding PAS and PA are working with the child welfare agency.[6] This author has been involved in and learned of numerous cases in which the child welfare agency has refused to believe or even seriously investigate allegations of a father's abuse, when the case was in custody litigation. It seems that some trainings delivered to caseworkers focus on identifying and weeding out false allegations as much or more than understanding the dynamics of child abuse in the family. In one highly regarded instruction manual, the process of custody litigation and the accused's denial of the abuse were two factors listed as helpful in identifying false allegations (Pennsylvania Child Welfare Resource Center, 2011).

PA and PAS Labeling by Custody Evaluators

The NCJFCJ states:

> In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS." Under relevant evidentiary standards, the court should not accept this testimony. . . (Dalton et al., 2006, p. 24).

In one case with which the author is familiar, the court's forensic evaluator posited alienation as an explanation for the mother's and child's sexual abuse allegations, after observing a single brief visit in the court supervised visitation center, in which the father and child were observed to be warm and enthusiastic.

This evaluator, who was highly regarded by the court as an expert, did not believe that such affectionate interactions would occur if the sexual abuse allegations were true. However, expert research into child sexual abuse indicates the opposite: One cannot assess the veracity of such allegations by observing the parties' interactions. Most abused children continue to love their abusive parents, and crave loving attention from them. Particularly when they know they are in a safe setting, their affection for their parent and the parent for them, may be evident (Anderson, 2005; Bancroft & Silverman, 2002).

Recent major research has now confirmed that many neutral custody evaluators actually lack meaningful knowledge or expertise in domestic violence and abuse (Saunders, Faller & Tolman, 2011). In particular, many (especially private) custody evaluators do not understand the risks to adults and children *after* separation from the abuser, do not use an objective screening instrument and do not apply knowledge from the domestic violence field about assessing dangerousness. Those lacking this information tend also to believe: "(1) DV victims alienate children from the other parent; (2) DV allegations are typically false; (3) DV victims hurt children if they resist co-parenting; (4) DV is not important in custody decisions; and (5) coercive-controlling violence in the vignette was not a factor to explore" (Saunders, Faller & Tolman, 2011). These same evaluators were found to hold "patriarchal" norms (Saunders, Faller & Tolman, 2011). Both this study and other smaller ones have consistently found that custody evaluators fall into two groups: those who understand domestic violence and abuse and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations and believe they are evidence of alienation (Saunders, Faller & Tolman, 2011; Haselschwerdt and Hardesty, 2010; O'Sullivan, 2011; Erickson and O'Sullivan, 2010). The fallability of custody evaluators is perhaps best summed up by one of these researchers: "The study showed that what the evaluator brings to the case has more influence on the family's fate than the facts of the case" (O'Sullivan, 2011). Particularly if actual physical violence was not extreme, many such evaluators (and judges) conclude that the perpetrator is not particularly dangerous and that women's and children's fears are overstated or simply fueled by vengeance.

These gaps in evaluators' and judges' appreciation of abuse dynamics and risks are reinforced by the strong emphasis in family courts and mental health training on the importance of children retaining robust relationships with their noncustodial parents after divorce. This leads to a dominant emphasis on "co-parenting" as the prime characteristic upon which custody litigants are judged. Thus, the National Council of Juvenile & Family Court Judges in its guide for judges on custody evaluations states, "[e]valuators may … wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence…" (Dalton et al., 2006, p. 25). Alienation theory perfectly reinforces this emphasis on litigants agreeing to "share" parenting rather than restricting the other parent.

Strategy Issues for Litigants

In Specific Cases

The ideal strategy for combating PAS/PA claims leveled against an abuse survivor requires producing an expert to testify that PAS is not valid "science" and explicating the limited science surrounding PA. Such an expert should also explain how PAS and PA are widely used to distract from and undermine an objective assessment of past abuse and future risk. Such expert testimony may be effective in persuading the trial judge to discount PAS or PA claims where there is evidence of abuse. The expert can also help the court understand the dynamics of the particular abuse alleged in the case, including the counter-intuitive aspects of child sexual abuse, or the controlling and coercive tactics used by abusers, which may help a court understand why a lack of severe overt violence does not make abuse allegations fraudulent. However, even if expert

testimony does not result in success at trial, the creation of a strong scientifically based record at trial will increase the chances that a PAS or PA-based ruling can be overturned on appeal.[7] Litigants and their advocates and experts should argue that PA be treated – at most – as merely a behavior that does not by itself indicate anything other than the need for an individualized assessment of each child, their attitudes toward their parents, and the reasons therefor. Abuse allegations must be thoroughly and independently assessed, regardless of alienation claims (Drozd & Olesen, 2004; Meier, 2010). Ideally, alienation claims should be excluded unless and until abuse is *ruled out*. Otherwise, the alienation label is too easily used to cut short any serious consideration of abuse, and to re-frame true abuse as alienation, a dangerous error as recent research indicates. For this reason, a popular "decision tree"[8] by leading scholars and forensic psychologists, which invites evaluators to assess *both abuse and alienation* simultaneously, is likely to simply continue the same problems already seen with the misuse of alienation (Meier, 2010).

However, it is the rare custody litigant who can locate and afford to pay a genuine expert on these subjects. Moreover, not all courts are persuaded by such testimony, and PAS and PA claims in custody litigation can be particularly tenacious and difficult to refute. Because PAS theory is so circular – deeming all claims, evidence and corroboration of abuse allegations merely to be further evidence of the "syndrome" – direct rebuttal is virtually impossible. Advocates and survivors in such situations have sometimes concluded that backing off of abuse allegations may be the only way to reduce the courts' focus on purported alienation by the mother. A troubling number of mothers have lost custody and even all contact with their children as a result of seeking to protect them from their fathers' abuse (Lesher &Neustein, 2005; Petition in Accordance, 2006). In this context, painfully tolerating unsupervised visitation or even joint custody with an unsafe father may be seen as the lesser of two evils. However such a resolution may not be permanent, as many abusive parents keep returning to court until they can wrest custody from the protective parent.

Alienation by Batterers

Another strategic dilemma arises for victims of domestic violence (typically women) who have observed their abuser (typically men) to be actively alienating the children from their victim-parent. This is most common where the abusive parent is awarded full custody; however, it can also happen to a lesser extent whenever an abuser has unsupervised access to the children. As most advocates for abuse survivors know, alienation is indeed a common behavior perpetrated by abusers (Bancroft & Silverman, 2002; Johnston, 2005). In such cases, the survivor and her advocate must decide whether to invoke an alienation claim against the perpetrator. To do so would be to validate a concept of dubious validity which has been widely misused against female victims of abuse, and which has been vigorously opposed by domestic violence experts and advocates. One advocate has coined the term "maternal alienation" to distinguish batterer-perpetrated alienation from the much maligned "parental alienation" which is most often used against mothers (Morris, 2004). This term has yet to catch on in the field, and the author fears this phrase could also easily be misconstrued as describing mothers who alienate their children. Given many courts' hostility to alleged alienation, as well as the genuine harm that abusers' combination of intimidation and terror with alienating conduct can engender by undermining children's safe relationship with their protective parent, the decision as to whether to allege alienation against an abusive father is not easily made. An alternative term that advocates for abuse victims may wish to use is "Domestic Violence by Proxy," a phrase which captures the way adult batterers may abuse children as an extension of their desire to hurt the children's mother (Leadership Council, 2009).

An Abuse-Sensitive Approach to Parental Alienation Allegations

Given the inherent problems with even the reformulated concept of parental alienation, and given also the facts that (1) alienating behavior is indeed a factual reality, most often inflicted by abusive fathers, and (2) courts and evaluators are unlikely to abandon the concept, this paper seeks to provide an approach to alienation that, if implemented conscientiously, would cabin alienation's use to those few cases where it is a legitimate issue.[9] Such a proposal should most obviously be adopted by forensic evaluators and Guardians Ad Litem, but ideally it should become judicial practice to require that abuse be ruled out before alienation is considered. This approach could be adopted through state legislation, court policy, or individual judicial practice.

1. **Assess abuse first.** Abuse should always be assessed – first – whenever there are allegations of abuse. If abuse claims are verified, or substantial risk exists, the remainder of the evaluation should be guided by safety and protection as the dominant concerns, with relationship preservation as only a secondary concern.

2. **Require evaluators to have genuine expertise in both child abuse and domestic violence.** Evaluators who lack such expertise should be required (as is implied by the APA's ethical custody evaluation guidelines, 1994, 2009) to bring in an outside expert. Real "expertise" requires more than one or two continuing education seminars. It requires in-depth training in abuse and/or in working with abused children or adults. The new and extensive research consistently shows that evaluators' opinions and recommendations are largely determined by their pre-existing beliefs and biases: in particular, those lacking meaningful domestic violence knowledge cannot be trusted to accurately assess abuse allegations and their implications for child well-being. Rather, the research proves that these evaluators bring inaccurate presumptions to these cases, including an assumption that women's abuse allegations are often false and merely a form of alienation, and a lack of appreciation for realistic danger assessment. Precisely because assessments of abuse are empirically demonstrated to be dependent on the assessor's predispositions to believe or not believe such claims, actual training and *experience working with abused populations* is a necessary pre-requisite for a valid assessment.

3. **Once abuse is found, alienation claims by the accused abuser should not be considered.** Virtually every article about alienation and abuse – including Gardner's – gives lip service to the principle that if abuse is real, then alienation is not. However, the current trend propounded by both Johnston and Kelly (2004a, 2004b) and Drozd and Olesen (2004) toward a "multivariate" approach, which evaluates abuse and alienation simultaneously, unavoidably gives too much weight to alienation claims in a manner which inevitably undermines accurate assessment of the validity and impact of real abuse claims (Meier, 2010). Alienating conduct bound up with a batterer's pattern of abuse should be identified as part of the abuse.

4. **A finding of alienation should not be based on unconfirmed abuse allegations or protective measures by the favored parent.** Consider a small thought experiment: When fathers allege that mothers or their new partners are abusing the child, and courts do not confirm the allegation, would it be normal to treat the father as a pernicious alienator from whom the child must be protected? In this author's experience, it is unlikely that experienced family lawyers or evaluators would expect – or advocate for – such treatment. The same standard should hold true for mothers alleging the father is an abuser. In short, alienation should not be linked to abuse allegations at all. If alienation is a serious concern, then it must be one independent of abuse allegations. To treat abuse allegations

as the hallmark of alienation, as is normally done in courts today, is simply to fall into the trap illuminated above – of misusing a claim of alienation to defeat, neutralize, or undermine the seriousness or validity of allegations of abuse. The two concerns should stand or fall – if at all – on their own.

5. **Alienation claims should be considered only under two conditions: If (i) other developmental or understandable causes of the child's hostility are ruled out, and (ii) there is specific concrete behavior by the favored parent which was intended to cause the child to dislike his/her father.** The alienation researchers consistently acknowledge that children may be alienated from a parent for a multiplicity of reasons, almost always including the disfavored parent's own behavior. Therefore it is critical to avoid leaping to the "alienation" label, as a claim attributing blame to the mother, unless and until other explanations for a child's hostility are ruled out. This approach excludes cases where the parent is engaged in some degree of alienating conduct (e.g., remarks) but the child is not in fact alienated (the vast majority of children, according to Johnston's research). It excludes cases where the preferred parent is hostile to the other parent but does not intentionally and concretely seek to alienate the child. It also excludes cases where the child is unreasonably hostile but the preferred parent is not the cause. Finally, it excludes cases where the child's hostility is understandable in light of his or her experiences with the disliked parent. These exclusions follow logically if we are to eliminate the misuse of alienation theory to blame protective parents and/or silence abused children. In short, as noted above, true "alienation" – in the sense of a child's estrangement malevolently or pathologically cultivated by the preferred parent – is at issue in only a tiny fraction of cases, some fraction of the only 6% of severely alienated children in divorcing/separating families.

   In these rare cases, if a child is determined to be unreasonably hostile to the other parent (i.e., the child refuses to visit or is incorrigibly resistant when visiting), the evaluation must seek to determine a cause for the unreasonable hostility. In addition to the above potential reasons (abuse, neglect, batterer-instigated alienation), developmental and situational causes, i.e., divorce itself, must be considered. In seeking to identify parentally-caused estrangement/alienation, evaluators should be precluded from giving weight to protective measures such as filing court protective petitions or going to child protection. Otherwise, the alienation label becomes once again nothing more than a penalty for disbelieved abuse allegations.

6. **A parent may be called an alienator only where the parent consciously intends the alienation and specific behaviors can be identified.** In one case described earlier, the court explicitly found that the mother was not coaching the child, but posited that her own personal hostility to the father (due to his abuse) was unconsciously causing the child to invent sexual abuse scenarios (W v F, 2007). (Of course, this theory is sufficient to negate all children's reports of abuse – since inter-parental hostility can be inferred in most custody battles.) Such unfounded judicial or evaluator theorizing has been legitimized by the widespread acceptance of the pop psychology attached to the PAS theory and propounded by Gardner and other PAS proponents. The best cure is a clean one: Psychoanalyzing should be prohibited; only identifiable behaviors should be considered in assessing for alienation.

7. **Remedies for confirmed alienation are limited to healing the child's relationship with the estranged parent.** Under this proposal, in the rare cases where problematic alienation is found (again, after neglect, abuse, and batterer-instigated alienation are ruled out), evaluators should not seek to undercut the child's relationship with the preferred parent,

but rather, to strengthen the child's relationship with the parent from whom s/he is estranged. Thus, family therapy between the child and the estranged parent, therapy for the child, and/or therapy for the preferred parent, might be appropriate. Orders to both parents to cease any derogatory discussion of the other parent may be appropriate. Forced change of custody is not appropriate, unless the child's relationship with the estranged parent is sufficiently healed to make the child comfortable with such a prospect (Johnston, 2004b, 86-87).

Despite the problems in some of Johnston's writings, her research confirms what many in the field already knew: Children are resilient, and they are not easily brainwashed into rejecting another parent, at least not without active abuse, coercion and terrorizing. Courts and evaluators should operate from a healthy appreciation for the range of imperfect parenting that children everywhere survive, and for the strength of children's hard-wired love for both parents. They should ensure that safe and loving relationships are made available and invited to flourish, and should trust that children will discern the truth about their loving parents so long as they are able to experience them directly.

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Endnotes

1. Gardner was "an unpaid volunteer" who taught at times in the Columbia Medical School's division of child and adolescent psychiatry. The New York Times (June 14, 2003, correction), http://query.nytimes.com/gst/fullpage.html?res=9F05E0DB1539F93AA35755C0A9659C8B63

2. Over time, Gardner expanded the theory to address any case where a child has been "programmed" by one parent to be "alienated from the other parent" – and even stated that sexual abuse claims arise in only a minority of PAS cases (Gardner, 2002, p. 106).

3. Gardner's mental instability was tragically revealed when he committed suicide in 2003 by stabbing himself to death. The New York Times (June 14, 2003) http://query.nytimes.com/gst/fullpage.html?res=9F05E0DB1539F93AA35755C0A9659C8B63; http://en.wikipedia.org/wiki/Richard_A._Gardner

4. One lawyer's website says "PAS--sometimes called Parental Alienation (PA)—is a disorder that arises primarily in the context of child-custody disputes." (The Custody Center, n.d., line 1-2). Gardner himself acknowledged that many evaluators use "parental alienation" in court to avoid the evidentiary attacks that use of "PAS" would invite (Gardner, 2002). In practice, then, it seems that many practitioners conflate the two concepts.

5. One agency is known to treat Sunday nights as "custody night" because of the bump up in hotline calls that are received when children return from visits with their noncustodial fathers. Child welfare agencies' discounting of child abuse claims in the context of custody litigation is hard to find in written policy documents, but it is common experience among litigants, lawyers, and child welfare workers, that the credibility of such claims are discounted and that investigations are often declined in deference to the custody court.

6. This was true in one of the author's cases: *Oates v. Oates*, 2008 (documents on file with author). No matter how many reports were made of the children's abuse, the child welfare agency consistently rebuffed them. Not until after the litigation was it discovered that the custody evaluator who had "diagnosed" PAS, was also a primary advisor to the child welfare agency.

7. Surveys have indicated that appeals in domestic violence cases are surprisingly successful: an unscientific survey by this author of appeals in custody cases where domestic violence was alleged found that 2/3 of awards to accused or adjudicated batterers were reversed on appeal (Meier, 2003). This is a staggering reversal rate, given the deference that appellate courts normally give to trial courts in custody cases.

8. This proposal is developed in greater depth in Meier (2010).

9. Access the "decision tree" in: Drozd, L.M. & Olesen, N.W. (2004). Is it abuse, alienation, and /or estrangement? A decision tree. *Journal of Child Custody, 1*(3), 65-106. Available at: http://www.drdrozd.com/articles/DrozdOlesenJCC1(3)2004.pdf

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In Brief: Parental Alienation Syndrome and Parental Alienation

Joan Meier

Parental Alienation Syndrome (PAS) and Parental Alienation (PA) are commonly raised to combat a mother's allegations that a father is abusive and that his access to the children should be restricted. While PAS and PA are sometimes used interchangeably, they have separate origins, and are pointedly distinguished by their originators. They are also not equally subject to legal challenge.

PAS was invented by Richard Gardner in the 1980's to explain what he considered to be an epidemic of child sexual abuse allegations in custody litigation. Gardner claimed, with no empirical basis, that the vast majority of such allegations are false, but were fabricated by vengeful or pathological mothers. Credible and extensive empirical research has demonstrated that the assumptions underpinning PAS, including that child sexual abuse allegations are rampant, and generally false, are themselves entirely false. Over time, the strange assumptions underlying Gardner's theory have been critiqued and the validity of a scientific "syndrome" has been roundly rejected by numerous legal and psychological professional and expert bodies and researchers. Gardner's apologist attitude toward pedophilia has contributed to the discrediting of PAS. While this has not ended reliance on PAS within courts and policymakers, it has reduced its use. To date, the only published opinions addressing the admissibility of PAS have ruled against it.

However, Parental Alienation has risen from the ashes of PAS. PA (or "child alienation") has been defined by leading well-regarded researchers, many of whom have rejected the validity of PAS, as addressing cases where a child expresses "unreasonable negative feelings and beliefs" (including fear) about a parent "that are significantly disproportionate to that child's actual experience with that parent." The key difference between this definition and the way PAS has been understood is that PA recognizes the different factors that can cause a child to be alienated from a parent. These researchers have also found that the disliked parent often contributes to a child's alienation.

In theory, this broader and more balanced approach to children's estrangement from a parent should be less likely to undermine abuse allegations and protective parents' attempts to keep their children safe. In practice, however, PA has been used in court in largely identical fashion to PAS: to penalize mothers who allege that the father is unsafe for the children, and to label them "alienators." While the research demonstrates no correlation between alienating conduct and being a victim of battering, these writers and many evaluators still often treat battered mothers as alienators who allege that a father is unsafe.

Helpful New Research

Recent federally funded research has demonstrated that custody evaluators tend to fall into two categories: those who know about domestic violence and consider it important in custody litigation, and those who do not. This research confirms that those who do not have an in-depth understanding of domestic violence also tend to label abuse allegations "alienation" and rarely identify abuse as a serious concern. Sadly, alienation labeling has also entered child welfare agency practices, who frequently discount and sometimes even turn against mothers who report child abuse by a father, particularly in context of custody or visitation litigation. Consistent with these findings, preliminary results of very new research into "turned-around" cases (i.e., those in which a first court fails to believe abuse and protect a child, and a second court recognizes abuse and protects the child) is demonstrating that alienation labeling plays a substantial role in courts' refusals to believe abuse and protect children.

For all these reasons, once the alienation label is applied either in a court or child welfare proceeding , it is extremely difficult to achieve safety for at-risk children and the risk of mothers losing custody increases.

An Abuse-Sensitive Approach to Parental Alienation

The full paper lays out a seven-step approach to addressing PA allegations in a case where abuse is also alleged. The core premise is that abuse must be fully adjudicated or evaluated before alienation theory may be considered. If followed faithfully, this approach would exclude PA labeling from all valid abuse cases, except insofar as alienation is a part of a batterer's abusive pattern.

Strategic Considerations

It is critically important for litigants to make an explicit record challenging the scientific validity of PAS as a theory, and of PA where it is applied to deny abuse allegations. This will normally require an expert witness with background in domestic violence, child abuse, and parental alienation theory. While such testimony may not succeed at trial, it may help make a record that could support a reversal on appeal. And while such experts can be costly, occasionally a pro bono expert can be found with the help of national organizations with this expertise.

A second strategy consideration concerns the fact that many batterers are themselves alienators of the children from their mother. It is difficult for domestic violence advocates, lawyers, and litigants to adopt this concept even where it might help their case, given that it is used to deny abuse most of the time. However, it is to be hoped that courts will take alienation at least as seriously when an abuser commits it, as they have been shown to do when a mother alleging abuse is viewed as an alienator. Individual litigants must come to terms with their own comfort level on this issue. However, an alternative term, "domestic violence by proxy" may be useful for some.

See the full Applied Research paper: Meier, J. (2013, September). *Parental Alienation Syndrome and Parental Alienation.* Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence. Available at: http://www.vawnet.org

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Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation

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Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*

Joan S. Meier† and Sean Dickson††

Introduction

Catharine A. MacKinnon's genius has been in, among other things, rendering the invisible visible. In *Toward a Feminist Theory of the State*,[1] by identifying the subtle and implicit ways that gendered assumptions drive law and culture, MacKinnon awakened millions to the fundamental gender inequality at the foundations of our legal system and culture.

MacKinnon's insight is profoundly applicable to today's state family courts—civil courts adjudicating child custody. Where MacKinnon pointed out the male-gendered assumptions often hidden within law and culture, an extensive scholarly literature and thousands of reports from the field suggest that men's violence in the family is often rendered invisible by family court practices.

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*. Portions of this Article, specifically Part II, have already been reported in Joan S. Meier, Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations, (2014), http://www.ncdsv.org/GWU_Child-Custody-Outcomes-in-Cases-Involving-Parental-Alientation-and-Abuse-Allegations_4-25-2014.pdf.

†. Professor of Clinical Law at George Washington University Law School; Founder and Legal Director of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP). My deepest thanks go to my co-author, Sean Dickson, for his superb work in both completing and systematizing the research underlying this study and computing and interpreting the statistical results. Without him, this study would not have seen the light of day. I also wish to thank Rosie Griffin, Esq., who, as a 2L and intern, did the first round of research that launched the study. Finally, I thank my colleagues at the American Association of Law Schools who encouraged me to publish this "pilot" data, and the many law professors, judges, and others who have discussed these results with me during presentations. This Article is dedicated to Catharine A. MacKinnon, whose ground-breaking and paradigm-shifting work provides a north star which guides our work toward gender equality.

††. Senior Manager of Health Systems Integration at the National Alliance of State and Territorial AIDS Directors. Sean's work addresses systematic discrimination across sectors, with a focus on discriminatory benefit design and pharmaceutical coverage within private and public insurance systems. Sean received his J.D. and M.P.H. from the University of Michigan and his B.A. in Public Policy Studies from the University of Chicago. In 2016, Sean was recognized as one of the 30 Top Thinkers Under 30 by Pacific Standard magazine.

1. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

This Article provides a brief literature survey, focusing on the theory of "parental alienation" which operates as a primary vehicle for making abuse invisible in custody litigation. This Article reports on the co-authors' pilot study, which begins empirically mapping family courts' uses of this theory. These pilot results provide preliminary empirical support for the critiques from the field.

I. Invisibilizing Abuse in Family Courts

Although it is common for people to assume that victims of domestic violence are, in the new millennium, well-protected by the courts, the increased awareness and understanding of domestic violence which has triggered positive changes in criminal and some civil courts has never in fact truly been integrated into family courts.[2] Scholarly and practitioner critiques of courts' treatment of women and children alleging abuse by fathers are legion. Expert commentators assert that family courts are awarding unfettered access or custody to abusive fathers,[3] and increasingly cutting children completely off from their protective mothers.[4] This has been observed especially where mothers allege child sexual abuse.[5]

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2. *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 668–71 (2003).

3. SALLY F. GOLDFARB, THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN IN THE UNITED STATES OF AMERICA: RECENT REFORMS AND CONTINUING CHALLENGE , UNITED NATIONS 9 (2008), http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf ("[I]t remains extremely rare for a court to deny a father access to his children, even when he has committed domestic violence."); LUNDY BANCROFT ET AL., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 189–90 (2nd ed. 2012); Sharon K. Araji & Rebecca L. Bosek, *Domestic Violence, Contested Child Custody and the Courts: Findings from Five Studies, in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 6-2–6-31 (Mo Therese Hannah & Barry Goldstein eds., 2010); Evan Stark, *Rethinking Custody Evaluations in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 296–99 (2009).

4. *See* AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY WOMEN ARE RUNNING FROM THE FAMILY COURTS AND WHAT CAN BE DONE ABOUT IT (2005); Inter-American Comm'n on Human Rights, *Petition in Accordance with Inter-American Commission on Human Rights*, http://www.protectiveparents.com/Petition-on-Human-Rights.pdf;, ¶¶ 6–33, 444 (May 11, 2007); Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 228–29 (2010) (describing five cases from different states in which mothers' and children's reports of abuse were rejected and penalized by courts, including removal of children from mother in three cases).

5. *See* NEUSTEIN & LESHER, *supra* note 4*;* Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1, 2 (1995) (finding that courts were half as likely to validate child sexual abuse as clinicians, and approximately 20% of parents were sanctioned for raising it)); Nancy M. Steubner, Custody Outcomes for Protective Parents in Cases with Child Sexual

Experts and litigants alike report that custody courts commonly do not recognize domestic violence and child abuse,[6] fail to understand their implications for children and parenting,[7] and turn against mothers and children who insist on pressing claims of abuse by a father in custody litigation.[8]

Simultaneously, domestic violence organizations such as DV LEAP[9] are being flooded with pleas for help from battered women litigating custody, reporting that court-appointed custody evaluators and judges do not credit their claims of abuse and instead seek to maximize fathers' access to children.[10] Service providers and advocacy organizations specializing in domestic violence report what appears to be a trend toward reversal of custody from protective mothers to allegedly abusive fathers, which has been estimated to occur in up to 58,000 cases per year.[11] The

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Abuse 73 (Sept. 2011) (unpublished M.A. thesis, California State University, San Bernardino), *http://protectiveparents.com/Nancy_Steubner_Thesis_Custody_Outcomes_for_Protective_Parents_in_Cases_with_Child_Sexual_Abuse.pdf* (finding that "when mothers reported the presence of child sexual abuse, there was a strong tendency for fathers to be awarded custody").

6. Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. Ct. J. 57, 62 (2003) (finding that domestic violence is often overlooked by family courts in the decision-making process); Stark, *supra* note 3, at 290 (stating that courts and evaluators have been reluctant to support abuse claims even in cases "where partner violence is dramatic, children are exposed, and police have corroborated a victim's claims").

7. Stark, *supra* note 3 at 312 ("children's exposure in abusive families is multifaceted and continuous"); Jaffe et al., *supra* note 6, at 60 (finding that "[c]hildren exposed to domestic violence may suffer from significant emotional and behavior problems related to this traumatic experience").

8. NEUSTEIN & LESHER, *supra* note 4, at xiii–xix*;* Stahly, *supra* note 5; Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 244 (2009). A growing body of journalism is beginning to document these problems. *See e.g.*, Laurie Udesky, *Custody in Crisis: How Family Courts Nationwide Put Children in Danger,* 100REPORTERS (Dec. 1, 2016), https://100r.org/2016/12/custody-2/ (detailing three cases from different states in which, despite strong evidence of child sexual abuse and child abuse, the mothers lost custody to the abusers); Joaquin Sapien, *For New York Families in Custody Fights a 'Black Hole' of Oversight*, PROPUBLICA (Mar. 17, 2017), https://www.propublica.org/article/for-new-york-families-in-custody-fights-a-black-hole-of-oversight; Joaquin Sapien, *Call in Congress for Family Court Reform*, PROPUBLICA (Sept. 13, 2016), https://www.propublica.org/article/call-in-congress-for-family-court-reform; Jennifer Baker, *The Strange Advocacy for "Parental Alienation Syndrome"*, PSYCH. TODAY (Dec. 17, 2015) https://www.psychologytoday.com/blog/the-love-wisdom/201512/the-strange-advocacy-parental-alienation-syndrome.

9. Joan S. Meier founded and is now the Legal Director of the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP). DV LEAP's mission is to provide appellate advocacy in cases involving domestic violence or family abuse or of importance to those constituencies. To learn more about DV LEAP's work, including briefs in numerous custody and abuse appeals, visit www.dvleap.org.

10. Meier, *Getting Real About Abuse and Alienation*, *supra* note 4, at 242–43.

11. *How Many Children are Court-Ordered into Unsupervised Contact with an*

result for children can include ongoing abuse, loss of a secure maternal-child relationship, and at worst, death at their fathers' hands.[12] Although litigants often speculate that this problem is particular to one jurisdiction or another, it has been observed nationwide[13] and globally.[14] In response, an independent and decentralized movement of "protective parent" advocates and mother-survivors has become increasingly active both locally and nationally.[15]

Despite thousands of anecdotal reports, *empirical* support for these reports has been sparse, probably because empirical study of individual courts is extremely time-intensive and requires expertise in both law and empirical research. Most significantly, normal empirical methods, such as reviewing individual case files, are not adaptable to a national study. Therefore, most existing empirical research focuses on particular jurisdictions or courts. These empirical studies have confirmed the foregoing reports in various respects. First, the studies have identified a trend toward favoring fathers, in contrast to widespread assumptions that mothers are favored in custody litigation.[16] More recent studies have elaborated

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Abusive Parent After Divorce?, LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (Sept. 22, 2008), http://www.leadershipcouncil.org/1/med/PR3.html; Geraldine Butts Stahly, *Protective Parents Survey*, CAL. PROTECTIVE PARENTS ASS'N, http://protectiveparents.com/research.html (last visited Apr. 28, 2017) (describing survey of sixty-six mothers and one father, self-selected as "protective parents," in which 98% felt discredited for trying to protect their children; 67% lost custody in ex parte proceeding; and 59% lost custody in proceedings with no court reporter).

12. *See Child Murder Data, Filicide in U.S. Family Courts: A Snapshot*, CTR. FOR JUDICIAL EXCELLENCE, http://www.centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data/ (last visited Apr. 26, 2017); see also Press Release, Center for Judicial Excellence, 58 Children Murdered By A Parent Who Could Have Been Saved (Dec. 5, 2016), http://www.centerforjudicialexcellence.org/wp-content/uploads/2016/12/12516-Child-Murder-Release-for-website.pdf; R. Dianne Bartlow, *Judicial Response to Court-Assisted Child Murders, in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 12-1–12-42 (Mo Therese Hannah & Barry Goldstein eds., 2016); Barry Goldstein, *What Can Be Learned From Court-Assisted Murder Cases?*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 369, 370 (2013).

13. Jaffe et al., *supra* note 6, at 57–58.

14. *See, e.g.,* International Association of Victims of Parental Alienation, *Discussion*, FACEBOOK, https://www.facebook.com/groups/249283921943335/ (last visited Apr. 3, 2017).

15. *See* Stark, *supra* note 3, at 297–98 ("protective mothers are making attempts to call attention to partner abuse directed at themselves or their children); Lundy Bancroft, *Organizing in Defense of Protective Mothers: The Custody Rights Movement*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 17-1–17-13, (Mo Therese Hannah & Barry Goldstein eds., 2010).

16. Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 748, 825 (1990) (finding that

on a pattern of family court failures to consider evidence of intimate partner violence, disrespectful treatment of battered women, gender biased treatment of mothers, and granting of physical custody to perpetrators of intimate partner violence.[17] Another empirical study found that court preferences for joint custody and the "friendly parent" principle outweighed judicial consideration of abuse claims.[18] More in-depth empirical research has examined the lack of expertise in domestic violence and child abuse—particularly child sexual abuse—among forensic custody evaluators, who are relied on heavily by the courts.[19]

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despite the pervasive belief that mothers are favored in custody disputes, "[f]athers who actively seek custody obtain either primary or joint *physical* custody over 70% of the time.") (emphasis in original); WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 3 (2002) (reporting that fathers who seek custody are favored over women because "mothers are held to a different and higher standard than fathers."); Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 1017 (2005).

17. Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1368–69 (2005); Michelle Bemiller, *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts*, 5 J. CHILD CUSTODY, 228 (2008); Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 662.

18. Allison C. Morrill et al, *Child Custody and Visitation Decisions When the Father has Perpetrated Violence against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1092, 1101 (Aug. 2005) (noting that in study of six states' applications of presumption against custody to batterers, in state which also had a presumption in favor of the "friendly parent," the latter presumption generally trumped). .

19. A number of studies have empirically analyzed custody evaluation practices in cases involving domestic violence or child abuse allegations. These studies confirm that many custody evaluators actually lack meaningful expertise in domestic violence and child abuse, and often make recommendations that do not take abuse into account. *See* DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 116–25 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf; MICHAEL S. DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 84–85 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf; ELLEN PENCE ET AL., BATTERED WOMEN'S JUSTICE PROJECT, MIND THE GAP: ACCOUNTING FOR DOMESTIC ABUSE IN CHILD CUSTODY EVALUATIONS 37 (2012), http://www.bwjp.org/resource-center/resource-results/mind-the-gap-accounting-for-domestic-abuse-in-child-custody-evaluations.html. Several other studies have also found that custody evaluators tend to fall into two distinct groups: those who understand domestic violence and believe it is important in the custody context, and those who lack such understanding, are skeptical of abuse allegations, and believe the allegations are evidence of alienation. *See* Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERSONAL VIOLENCE 1694, 1695–97 (2010); Nancy S. Erickson & Chris S. O'Sullivan, *Doing Our Best for New York's Children: Custody*

II. Parental Alienation Theory as a Key Factor in the Discrediting of Abuse Claims

A primary mechanism giving evaluators and courts a quasi-scientific rationale for rejecting or ignoring abuse allegations is the theory of "parental alienation (PA)," originally called "parental alienation syndrome (PAS)," and also called "child alienation," or simply "alienation."[20] PAS is a construct invented and promoted by Richard Gardner to describe a "syndrome" whereby vengeful mothers employed child abuse allegations in litigation as a powerful weapon to punish ex-husbands and ensure custody to themselves.[21] Gardner claimed that child sexual abuse allegations were rampant in custody litigation, and that the vast majority of such claims are false, designed by the mother to "alienate" the child from the father and drive him out of the child's life.[22] Gardner also characterized PAS as profoundly destructive to children's mental health and as risking their relationships with their (purportedly falsely accused) fathers for life.[23] Recommended remedies to PAS were often draconian, including a complete cutoff from the mother in order to "deprogram" the child.[24] PAS quickly became widely incorporated into custody litigation when any abuse—not just child sexual abuse—was alleged.[25]

Evaluations When Domestic Violence is Alleged, 23 NYS PSYCHOLOGIST 9, 10–11 (2011). Evaluators in the latter category tend to have "patriarchal" beliefs, which dictate their interpretations of the information they acquire. SAUNDERS ET AL., *supra*, at 11. A New York study found that most custody evaluators' recommendations in cases with domestic violence were unsafe – in most of these cases the abuse was substantiated. DAVIS ET AL., *supra*, at 5.

20. Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: A Research Review*, NAT'L ONLINE RESOURCE CTR. FOR VIOLENCE AGAINST WOMEN 6 (2013); JOYANNA SILBERG ET AL., CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES 14–15 (2013), http://www.protectiveparents.com/crisis-fam-court-lessons-turned-around-cases.pdf; Nancy S. Erickson, *Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 20-1–20-38 (Mo Therese Hannah & Barry Goldstein eds., 2010).

21. RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 59–60 (1992) (describing "parental alienation syndrome" as a disorder arising "primarily in children who had been involved in protracted custody litigation.") [hereinafter THE PARENTAL ALIENATION SYNDROME: A GUIDE].

22. RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE 69–70 (1987).

23. THE PARENTAL ALIENATION SYNDROME: A GUIDE, *supra* note 21, at 63–82.

24. *Id.* at 225–30, 240–42.

25. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 240–50.

PAS was explicitly invented by Gardner as a rationale for denying child sexual abuse reported by mothers; he explained it in part by gender stereotypes such as "hell hath no fury like a woman scorned."[26] As a "syndrome," PAS lacked any scientific or empirical foundation, and has today been largely—although by no means completely—rejected by experts and scholars, and to a lesser degree, courts.[27] Gardner himself committed suicide in 2003.[28]

However, the discrediting of PAS has not ended courts' reliance on its concept. Scholars and forensic evaluators continue to give substantial attention to "parental alienation" (PA), which many contend is distinct from PAS.[29] Whether PA is really different from PAS, particularly in how it is used in court, is highly contested.[30] However, there is not much doubt that parental alienation[31] remains a dominant issue in many, if not most, custody cases in which a mother has alleged that a father was abusive.[32]

PA's role in custody and abuse cases has been widely decried by the domestic violence field. By re-framing a mother who seeks to protect her child from abuse as a pathological or vengeful liar who is severely "emotionally abusing" her children by falsely teaching them to hate and fear their father, PA theory makes a self-described

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26. THE PARENTAL ALIENATION SYNDROME: A GUIDE, *supra* note 21, at 86–87.

27. For a list of authorities rejecting PAS, see Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 239–40. *See also* Joan Meier & Andrew Hudson, *Case Studies of PAS in Court*, DV LEAP (2009), http://www.dvleap.org/Programs/CustodyAbuseProject/PASCaseOverview.aspx.

28. Stuart Lavietes, *Richard Gardner, 72, Dies; Cast Doubt on Abuse Claims*, N.Y. TIMES (June 9, 2003), http://www.nytimes.com/2003/06/09/nyregion/richard-gardner-72-dies-cast-doubt-on-abuse-claims.html.

29. Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6. For evidence of the continued attention given to PA as distinct from PAS, see Barbara Jo Fidler & Nicholas Bala, *Guest Editors' Introduction to Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts*, 48 FAM. CT. REV. 6 (2010); Janet R. Johnston & Joan B. Kelly, *Rejoinder to Gardner's "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'"*, 42 FAM. CT. REV. 622, 626 (2004) ("PAS does not meet the American Psychiatric Association's . . . criteria for a syndrome.").

30. Erickson, *supra* note 20, at 10; Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6.

31. Parental alienation is also spoken of as "child alienation" and "alienation" or "parental alienation disorder"; in referring to "PA" the authors intend to capture all references to "alienation" of a child from a parent in custody and visitation litigation. *See* Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20, at 6.

32. *See* Robert Geffner, *Editor's Note About the Special Section*, 13 J. CHILD CUSTODY 111, 111–12 (2016) (explaining the editors' decision to devote two recent issues of the journal to PAS/PAD because, despite the scientific consensus that it does not exist, courts continue to utilize it under one label or another).

"protective parent" *persona non grata*.[33] The PA label diverts courts' attention away from the question of whether a father is abusive and replaces it with a focus on a supposedly lying or deluded mother or child.[34] Anecdotally, evaluators' characterizations of mothers as "alienators" appear to have a significant impact on courts, leading them to deny mothers' allegations of abuse, even when the abuse has never been ruled out.[35] In some cases, even expert validations of child abuse[36] and comprehensive guardian *ad litem* confirmations of the validity of the abuse claims[37] have been insufficient to overcome the seemingly irrebuttable presumption of falsity that flows from the label "alienator." For all these reasons, leading experts have called the use of "parental alienation" claims against mothers in custody litigation "a national crisis."[38]

With minimal exceptions, the above critiques of PA have been experiential and anecdotal—not empirical. The exceptions include one small study of eighteen published and unpublished Minnesota parental alienation cases; the author concluded that these courts appear to "exhibit anti-mother gender bias," that the use of alienation has had an unfair impact on women, and that many of the cases involved switches of custody to the father.[39] Another ongoing study holds promise as providing empirical support for the domestic violence field's claims about parental alienation. Joyanna Silberg and Stephanie Dallam have been analyzing "turned around" cases, that is, cases in which a first court refused to believe alleged abuse and sent a child into unprotected care of an abuser, and a second court subsequently corrected that ruling and validated the abuse.[40] Silberg's research to date has indicated that parental alienation labeling plays a significant role in the erroneous and harmful first outcomes in the study.[41]

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33. BANCROFT ET AL., *supra* note 3, at 169–70; Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 689–90, n.108.

34. Meier, *Getting Real About Abuse and Alienation*, *supra* note 4, at 227–30.

35. Meier, *supra* note 19, at 10–11.

36. Brief for Defendant-Appellant at 5–6, Bhatia v. Debek, A.C. 27995 (Conn. App. Ct. Jan. 25, 2007), http://www.dvleap.org/Programs/CustodyAbuseProject/Cases.aspx

37. Brief in Support of Defendant-Appellant (2010) (sealed case) (on file with author Joan S. Meier).

38. BANCROFT ET AL., *supra* note 3, at 168.

39. Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 LAW & INEQ. 5, 24–25 (2011).

40. SILBERG ET AL., *supra* note 20, at 4.

41. *Id.* at 39.

While some advocates—and the first author—have sought to challenge courts' misuses of parental alienation theory on appeal, these challenges have yet to be successful.[42] Ironically, in criminal and civil courts—but not in family courts—PAS has long been ruled inadmissible and unscientific.[43] However, the admissibility of PA—as distinct from PAS—has never been adjudicated in any case known to the authors, although its scientific basis is widely challenged.[44] One reason PA is difficult to challenge in court is that there is fairly wide acceptance of family courts' use of looser evidentiary standards.[45] Another is that parental alienation is treated by courts as though it is fact-based and gender-neutral, while also being seen as objective and scientific. Without a principled objective or scientific basis for invalidating the concept altogether—or at least invalidating its application to abuse claims—advocates, scholars, and lawyers have found it difficult to persuade evaluators or courts that using parental alienation to deny valid abuse claims is unlawful.[46] Rather, claims that PA is misused to mask abuse can seem to court personnel to be nothing more than a complaint that a judge chose not to believe allegations of abuse—a choice judges are free to make.

III. Gulf Between Domestic Violence and Family Court Constituencies

The domestic violence community's alarms about the failure of family courts to appropriately adjudicate abuse—including

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42. *See* Brief of Appellant, Jordan v. Jordan, 14 A.3d 1136 (D.C. 2011) (No. 10-FM-0375; renumbered No. 09-FM-1152), http://www.dvleap.org/Resources/BriefsCourtOpinions.aspx (under "E.J. v. D.J."); Brief for Defendant-Appellant at 5–6, Bhatia v. Debek, No. A.C. 27995 (Conn. App. Ct. Jan. 29, 2007), http://www.dvleap.org/Programs/CustodyAbuseProject/Cases.aspx

43. *See* Snyder v. Cedar, No. NNHCV010454296, 2006 WL 539130, at *8 (Conn. Super. Ct. Feb. 16, 2006) ("The court finds that 'parental alienation syndrome' has no scientific validity at this time."); People v. Fortin, 735 N.Y.S.2d 819, 819 (N.Y. App. Div. 2001) (affirming the finding in a criminal case that defendant had not met his burden of showing that PAS is generally accepted by relevant scholars).

44. Erickson, *supra* note 20, at 20-2–20-22; Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8; Meier, *Parental Alienation Syndrome and Parental Alienation*, *supra* note 20.

45. *See* Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 893 (2010) (discussing the rise of "problem-solving" family courts); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. REV. 1081, 1131 (2001) (discussing the "evidentiary obstacles" that may actively discredit complaints of domestic violence).

46. *See* Jordan v. Jordan, 14 A.3d 1136 (D.C. 2011); Brief of Appellant, Jordan v. Jordan, 14 A.3d 1136 (D.C. 2011) (No. 10-FM-0375; renumbered No. 09-FM-1152), , http://www.dvleap.org/Resources/BriefsCourtOpinions.aspx (under "E.J. v. D.J.")

substantiated allegations—appear to have had minimal impact on typical family court and evaluator practices.[47] Many mainstream family court practitioners, including leading forensic experts, judges, and private lawyers, do not accept abuse advocates' and scholars' views of parental alienation or custody and abuse adjudications as gender-biased or failing to recognize the realities of abuse.[48] The two professional spheres—domestic violence and protective parent experts and advocates on the one hand, and family court researchers and practitioners on the other—remain largely distinct, and disinclined to trust each other's perspectives.[49] Consequently, domestic violence and child abuse concerns remain only minimally integrated into standard family court practices.[50]

a. The Pilot Study

Troubled by the apparent stand-off between those who work with abuse survivors and family courts, the first author decided that empirical data was needed to prove (or refute) the critiques of

47. *See generally* DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, CASE LAW ADDRESSING PARENTAL ALIENATION SYNDROME (2012) http://www.dvleap.org/LinkClick.aspx?fileticket=vCU_jqwlgAI%3d&tabid=935.

48. *See* Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact With a Parent: Concepts, Controversies, and Conundrums,* 48 FAM. CT. REV. 10, 10–11 (2010).

49. Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437, 440–42 (2008).

50. *Id*. at 442; Meier, *Domestic Violence, Child Custody, and Child Protection*, *supra* note 2, at 664. The main exception to this generalization can be found in the collaborative work of the Battered Women's Justice Project (BWJP) and the Association of Family and Conciliation Courts (AFCC). The two organizations have jointly produced a number of products such as guidelines and training documents to assist courts in identifying, assessing, and accounting for intimate partner violence in custody cases, etc. *See* Nancy Ver Steegh & Clare Dalton, *Report From the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008); GABRIELLE DAVIS ET AL., BATTERED WOMEN'S JUSTICE PROJECT, PRACTICE GUIDES FOR FAMILY COURT DECISION-MAKING IN DOMESTIC ABUSE RELATED CHILD CUSTODY MATTERS (2015), http://www.bwjp.org/resource-center/resource-results/practice-guides-for-family-court-decision-making-in-domestic-abuse-related-child-custody-matters.html. In addition, the federal government's Office on Violence Against Women has launched a "Family Court Enhancement Project" which encourages courts to work with domestic violence experts (including BWJP) to improve their responses to the issue. Press release, Dep't of Justice, Office of Violence Against Women, Justice Department Selects Four Courts to Identify Promising Practices in Custody and Visitation Decisions in Domestic Violence Cases (Sept. 24, 2014), https://www.justice.gov/opa/pr/justice-department-selects-four-courts-identify-promising-practices-custody-and-visitation. It is not clear to what extent any of these initiatives—which are titled in terms of partner abuse—include close attention to *child* abuse as distinct from partner violence. The data reported in the remainder of this article suggest that this may be essential to any meaningful reforms.

PA as a gender-biased vehicle for negating legitimate abuse claims. The remainder of this paper describes the pilot study—so named because, as a result of these preliminary findings, the authors and a team of colleagues received a grant from the National Institute of Justice to expand, deepen, and strengthen the statistical inquiry.[51] This three-year study is expected to be completed by the end of 2017.

The pilot study sought to examine whether custody cases involving allegations of parental alienation (with or without allegations of abuse) had gendered outcomes. It further sought to develop an objective, empirical measure of whether and to what extent parental alienation was impacting outcomes in custody cases involving abuse claims.

b. Method

The pilot study was led by the co-authors, a law professor and a law graduate with a master of public health degree and background in empirical social science research. The authors set out to collect and objectively analyze as many published online opinions about custody, abuse, and alienation as could be identified between 2002 and 2013. The second co-author[52] fed key search terms ("parent," "alienation," etc) into two legal databases (Google Scholar and Westlaw), which identified approximately 588 potentially relevant cases from all states and the District of Columbia. Review of these cases resulted in a database of 238 published opinions which met the criteria for inclusion in the study.[53] The majority of the included opinions were published appellate opinions; forty-six were trial court opinions reviewing magistrate or lower court decisions; twelve were unpublished (but electronically available) trial court opinions.

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51. National Institute of Justice Award, Child Custody Outcomes in Cases Involving Abuse Allegations and Parental Alienation, No. 2014-MU-CX-0859, https://www.nij.gov/funding/awards/Pages/2014.aspx#. The three-year study examines child custody cases containing abuse or alienation allegations by one parent against the other. By expanding beyond only cases containing alienation claims, the study will, among other things, be able to compare outcomes where alienation is brought to bear, and where it is not. The study will be completed in December 2017 and results will be published and circulated soon thereafter.

52. We thank Rosie Griffin, Esq., a then-law student and DV LEAP intern, who started the research and the coding, which was then revised and expanded by the second co-author.

53. The study focused on cases involving intra-parental custody litigation in which alienation was claimed. Cases where alienation was just a passing reference but not a subject of litigation, contempt cases, child support cases, and actions by the State or non-parent litigants, were excluded. Three cases were excluded because they involved lesbian partners in a custody dispute and were not suited to this gender analysis.

Each case was coded by the researcher for twenty-six items, including custody status at the outset, which parent alleged alienation and/or abuse, type of alleged abuse, experts' and guardians' opinions, and the court's decision on custody and access. The inquiry sought simply to identify objective facts about the cases, such as what the parties alleged, whether there were experts or guardians *ad litem*, their opinions, what the courts themselves found to be true, and the custody/visitation outcomes they ordered. Importantly, the study was designed to provide a completely objective analysis, in that it *did not question the courts' factual findings,* despite the possibility that, as the critical literature asserts, many courts minimize or reject credible claims of abuse.[54] The approach of the study was to *accept* courts' own factual findings and analyze their orders given those findings.

The database was created and the analysis performed in Excel. As is explicated further below, the key analyses looked at rates of "win" by each gender and rates at which custody was switched from one parent (usually a mother) to the other (usually a father).[55] "Winning" was defined as obtaining all or part of the relief requested or rebutting the other party's request, without necessarily obtaining a custody switch.[56] Finally, we assessed the rates at which courts validated different types of abuse claims and alienation allegations for each gender, and the correlation between different types of abuse allegations and outcomes.

The core statistical tool used was the "odds ratio"—a tool used to assess the relative difference in outcome between two groups. Odds ratios are often used in medical studies to compare the effect of a treatment compared to a placebo. Here, odds ratios were used to compare judicial outcomes for certain types of claims relative to others, e.g., comparing the odds of mothers with the odds of fathers receiving the desired outcome; or comparing the odds of an outcome with different types of abuse allegations (or none).[57] Critically, odds

54. *See supra* notes 15—19 and accompanying text.

55. For this analysis, the custody switches to fathers that were taken into account consisted of situations in which a father took physical custody of the children from a mother who previously had sole custody; cases in which the father initially had custody or the parents initially shared joint physical custody were excluded. Our assessment of "win" rates, in contrast, includes cases in which joint custody was changed to sole custody, and other victories.

56. For example, if a father moved to switch primary custody from the mother, but was awarded only increased visitation (against the mother's opposition), this would be coded as a "win" because he received part of the requested relief and the mother's position lost.

57. For each odds ratio, the comparison event was labeled and 95% confidence intervals (CI) were calculated to assess statistical significance. An odds ratio was

ratios do not indicate how likely an event is to happen generally; instead, they demonstrate whether the event is more likely to happen in one group than another. The comparative nature of odds ratios facilitates the analysis of gendered differences in court decisions.

c. Results

At the broadest level, the study found, unsurprisingly, that 82% (194) of the alienation claims in the study were brought by fathers. This was consistent with the fact that the majority of parents starting with primary custody (75%) were mothers; it was also consistent with the understanding of alienation as a theory that is primarily—albeit not only—used to refute abuse claims. (Fathers' claims of maternal abuse of children or themselves were miniscule in this database (3%)).

(i) Gender Bias in Alienation Cases

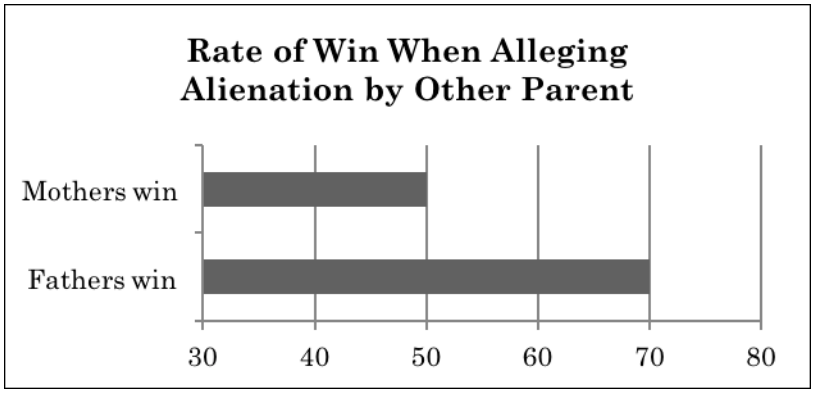
Interestingly, both mothers and fathers' alienation claims were each credited at a rate of 57%. This appears to be a departure from the early days of parental alienation litigation, during which at least one study found that mothers were considered alienating at twice the rate of fathers.[58]

statistically significant at the .05 level (i.e., the results would not have happened by chance more than 20% of the time) if the confidence interval did not include 1; an odds ratio of 1 indicates that each event was equally likely to happen.

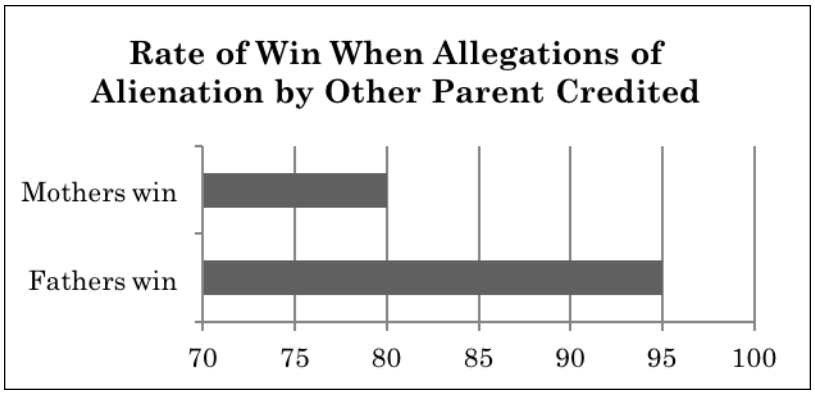
58. Leona M. Kopetski et al., *Incidence, Gender, and False Allegations of Child Abuse: Data on 84 Parental Alienation Syndrome Cases, in* THE INTERNATIONAL HANDBOOK OF PARENTAL ALIENATION SYNDROME: CONCEPTUAL, CLINICAL AND LEGAL CONSIDERATIONS 65–70 (Richard A. Gardner et al. eds., 2006). Note that in this article, alienation was treated as equivalent to false allegations of child abuse. While this remains the dominant use of parental alienation, alienation is also used to attack other behaviors which purportedly undermine the children's relationship with the other parent, especially when it is claimed by mothers against fathers.

(ii) Win Rates by Gender

The gender parity evaporated, however, when analyzing the impact of alienation claims on outcomes. First, fathers were more than twice as likely as mothers to win the case when claiming alienation. This represents a statistically significant bias in favor of fathers; a father merely alleging parental alienation was 2.3 times as likely as an alleging mother to receive a favorable decision.[59]

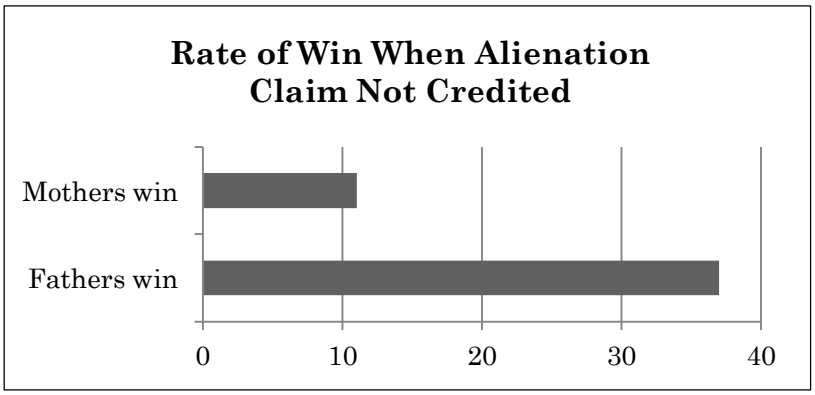


Bias toward fathers was even more evident when alienation was credited. In these cases, fathers won almost every time (95%), while mothers whose alienation claims were credited won only 80% of the time. This was a statistically significant benefit to fathers—they were 4.3 times as likely to win as mothers.



59. CI 1.2–4.5.

Perhaps most striking was fathers' success *even when their alienation claim was rejected by the court*. In these cases, in which the court either found no alienation or chose not to resolve the claim, fathers won 37% of the time, while mothers in comparable situations won only 11% of the time. This again represents a statistically significant benefit for fathers: when the fathers' alienation claims were not credited, they were still nearly five times as likely to win as mothers whose claims were not credited.



(iii) Custody Switches by Gender

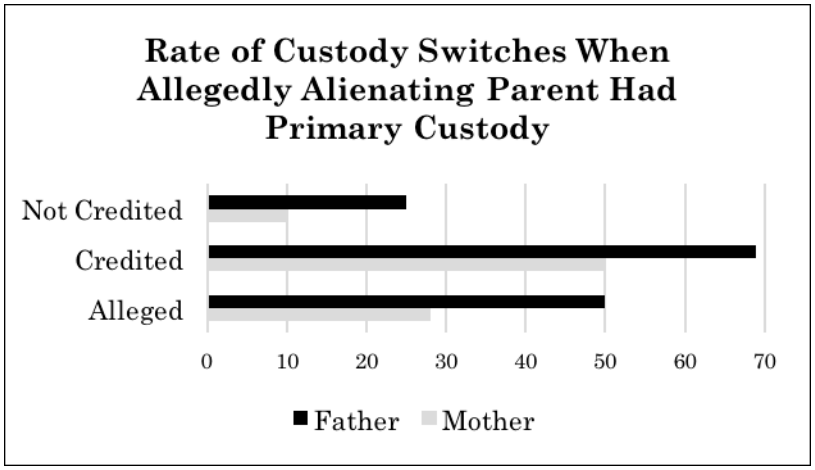
Parental alienation theory encourages courts to impose the dramatic step of removing children from a parent to whom they are bonded, but who has been found to be alienating. While the "win" analysis above includes custody switches from joint custody to primary physical custody with one parent, this section focuses only on the more radical full custody switches from one parent to another. Our findings suggest a gender bias in these custody reversals.

In this database of alienation cases, when fathers merely accused mothers of alienating the children, children were switched from mothers to fathers 50% of the time. Maternal allegations of alienation, in contrast, only resulted in custody switches 28% of the time, meaning that fathers were 2.6 times as likely to receive a custody switch when alleging alienation.[60] If the father's alienation

60. CI 0.9–7.6; this is not statistically significant because of the small number of cases (18) in which fathers start with primary custody and mothers allege alienation. However, the lower bound of the CI is close to 1 (the threshold for significance) while the upper bound is substantially higher than 1, indicating that a significant difference may be observed in a large sample of cases.

claim was credited, custody switches increased to 69%; when the mother's alienation claim was credited, she received a custody switch 50% of the time.[61]

Uncredited alienation claims resulted in custody switches in fathers' favor more frequently than mothers. When fathers' alienation allegations were not credited, mothers still lost custody 25% of the time. When mothers' allegations were not credited, fathers lost custody only 10% of the time.



Notably, when mothers had primary custody and raised an alienation claim that was not credited by the court, they were ordered to give up primary custody of the child to the father 80% of the time. While this was a limited sample of only five cases, the outcomes may reflect a punitive response to mothers who raised false alienation claims, construing these claims as a form of alienation itself. There was only one case in which the father had primary custody and his alienation claim was not credited; custody was also transferred to the mother in this case.

61. There were only eight cases in which fathers had initial custody and mothers' alienation claims were credited; four of these cases transferred custody to mothers (50%, compared to 69% for fathers). This suggests that fathers were 2.25 times more likely than mothers to receive a custody switch when alienation is credited, but this result is not statistically significant because of the small number of relevant cases (CI 0.5–9.6).

(iv) Responses to Abuse Allegations:

Rates of crediting of different types of abuse

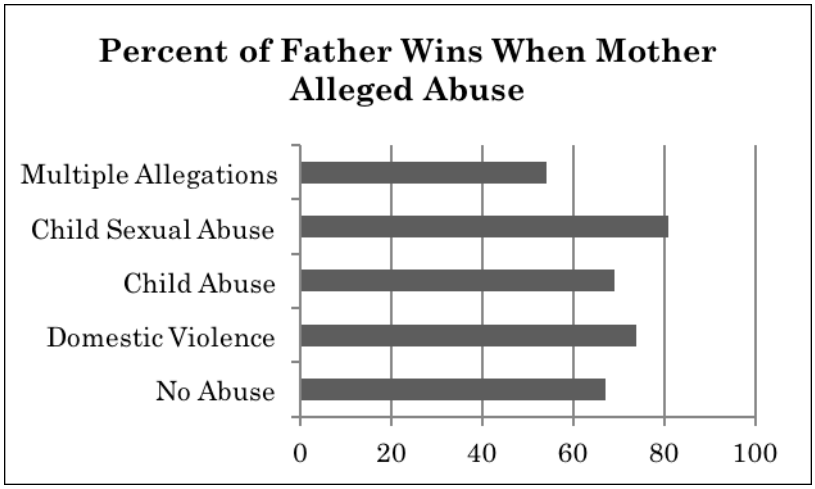
Overall, abuse claims by mothers alleged to be alienating were credited only 25% of the time. Breaking this down by type of abuse claim, domestic violence claims were credited 59% of the time, child abuse 19%, and child sexual abuse only 6%.[62] Claims of mixed domestic violence and physical child abuse were credited 50% of the time.

When the mother alleged the father to be alienating as well as abusive, courts appeared more receptive. Overall, these claims were credited 85% of the time, with domestic violence credited 88% of the time and physical child abuse 67%. Of the two mixed cases of domestic violence and child abuse, both were credited; there were no child sexual abuse allegations accompanying an alienation claim against a father.

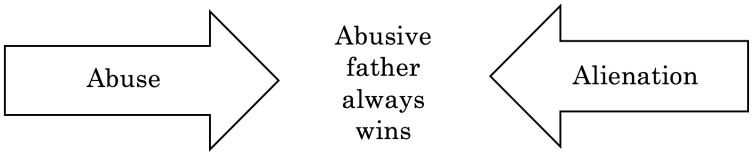
62. When discussing different types of abuse, each category represents cases in which that type alone was alleged; cases with mixed types of abuse are specified.

Win rates when abuse was claimed

Overall, fathers who were accused of abuse and who accused the mother of alienation won their cases 72% of the time; slightly *more* than when they were *not* accused of abuse (67%). When mothers alleged domestic violence, fathers won 73% of the time; when child abuse was alleged, fathers won 69% of the time. Child sexual abuse allegations *increased* fathers' likelihood of winning to 81%. When there were mixed abuse allegations, fathers won 54% of the time.



Win rates when abuse was validated



There were twenty-six cases in which abuse was credited and the mother was alleged to be alienating; fathers won ten of these cases (38%). However, in all seven cases of validated abuse in which alienation was credited, the father won—credited alienation trumped abuse. Seven cases met these criteria (five domestic violence-only, one child abuse-only, and one mixed domestic violence and child abuse). In the nineteen cases in which the court credited the abuse but not the father's cross-claim of alienation, fathers won only three (16%). To summarize, in most cases in which abuse is credited, the court believed the mother and her allegation

of abuse, and she won the case. However, when the court believed the abuse *and* the father's claim of alienation, the alienation trumped. As a result, even perpetrators of child abuse won 14% of the time.[63]

Impact of abuse claims on custody switches—child sexual abuse penalty

The impact of abuse allegations becomes more significant in custody switches.[64] First, it may surprise some readers to learn that there was little difference in the rate at which mothers lost custody when they alleged paternal abuse (52%) and when they did not (48%). In other words, women lost custody approximately half the time in these alienation cases, *whether or not they alleged the father was abusive.*

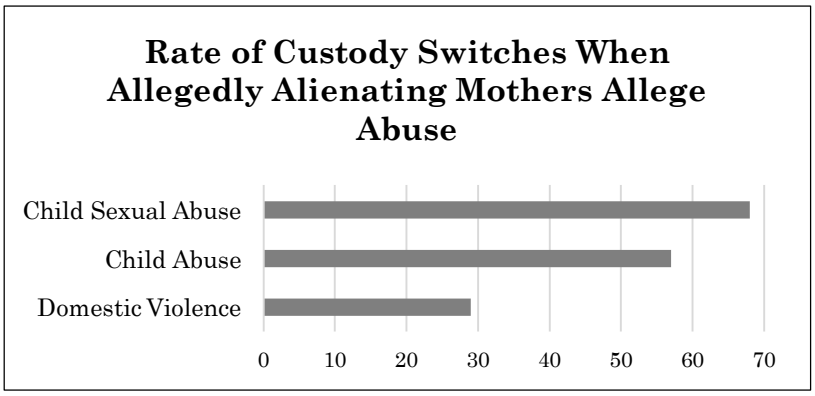
Even more striking are courts' differential responses to different types of abuse allegations. While these differences have been reported anecdotally, the authors did not anticipate finding such clear statistical evidence that alleging child sexual abuse was so high-risk for mothers. The study found that when domestic violence alone was alleged, mothers lost custody 29% of the time. However, courts regularly removed mothers' custody when they made a child sexual abuse allegation—fathers received a custody switch in 68% of these cases. When child abuse alone was alleged by the mother, the children were switched from mother to father 57% of the time. The bias here is statistically significant: fathers were 5.3 times as likely to take custody away from the mother when she alleged child sexual abuse than when she alleged domestic violence.[65] Custody switches were 3.3 times as likely when mothers alleged child abuse, although this finding was not statistically significant.[66]

63. In the two cases in which child sexual abuse was substantiated, the father lost and the mother either maintained sole custody or the father's visitation was terminated.

64. See *supra* note 55, for a discussion on the study's definition of "custody switch."

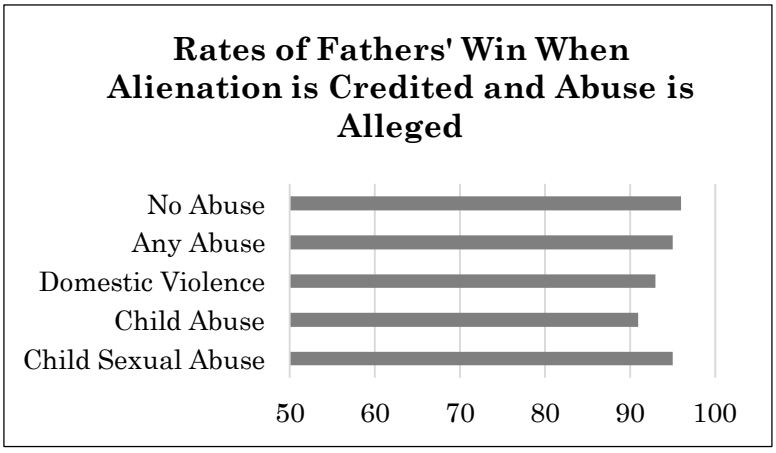
65. CI 1.3–21.5.

66. CI 0.8–12.8. In the smaller population in which abuse was validated and mothers started with primary custody, two out of twenty (10%) resulted in a custody switch. Both of these cases involved domestic violence claims, meaning that fathers received a custody switch 25% of the time when domestic violence was credited (total of eight).



Alienation findings drive fathers' wins

Overall, when courts credited that a mother had committed alienation, fathers won almost every time, regardless of whether the mother reported abuse (95%) or not (96%). Fathers won *every case* in which mixed forms of abuse were alleged and the mother was found to be an alienator. When the mother alleged child sexual abuse alone, fathers won 95% of cases; domestic violence allegations alone produced a 93% win rate for fathers; child abuse allegations alone resulted in fathers winning 91% of the time. Most stunningly, as mentioned above, even *proving abuse* did little to help a protective mother; alienation findings trumped in each of these seven cases (five domestic violence, one child abuse, and one mixed; no child sexual abuse).



(v) Brief Discussion

In summary, this pilot study lends empirical support to the reports of advocates and scholars about family courts' negative responses to mothers and children reporting paternal abuse when fathers accuse the mother of alienation. Not only did fathers alleging alienation manage to negate abuse reports from mothers and children in the majority (72%) of cases, they did so in every case but two (36 of 38) when mothers alleged child sexual abuse (in the two cases where fathers lost, the court validated child sexual abuse). Even more unsettling, when courts believed mothers were alienating, they switched custody to the father 69% of the time; and even when the alienation claim was rejected or not decided, they transferred custody of the children to an allegedly abusive father 25–50% of the time. Indeed, it should be noted this study found that in cases with an alienation claim, women *lost their children* half of the time *regardless* of abuse claims. In short, the risk to any mother in family court of losing custody (if the father claims alienation) may be far worse than is well known.

Consideration of whether courts' lack of belief in the truth or significance of mothers' and children's abuse claims indicates gender bias deserves attention, but will not be developed here.[67] However, overt gender bias was evident in the impact of parental alienation claims: fathers who alleged alienation were more than twice as likely to receive a custody outcome in their favor as mothers who alleged alienation, a statistically significant result. Even when mothers' claims of paternal alienation were substantiated by courts, they won far less often than fathers whose claims of maternal alienation were substantiated. It should not be surprising that a construct designed specifically to protect fathers from assertions of child sexual abuse by mothers has a gendered impact. However, parental alienation in its more recent incarnation is presumed to be gender neutral.[68] This study indicates that—unsurprisingly—it is not. The original concept of alienation is based on an image of a

67. For a discussion of gender bias in courts, see Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Women and Their Children, in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 5-2, 5-8–5-15 (Mo Therese Hannah & Barry Goldstein eds., 2010). Given the critical literature, it is possible that courts' validation of only twenty-six percent of all abuse claims signifies denial of substantial amounts of true abuse. This question, however, is outside the scope of this paper.

68. *See, e.g.*, Fidler & Bala, *supra* note 48 (asserting that both fathers' rights and feminist gendered critiques of family courts and alienation proffer relatively simplistic narratives of alienation that do not reflect the highly complex realities of these cases).

vengeful ex-wife who is overly involved with her children. While the idea of a vengeful ex-*husband* also fits perfectly what is known about batterers[69]—and abusive ex-husbands routinely try to turn the children against their mother[70]—the forensic and legal worlds are not well-informed by this reality because the dynamics and realities of abuse are only minimally integrated into those worlds. Hence, the alienating mother is an image which courts accept with little question; the alienating/abusive father has yet to be fully recognized.

In short, this study provides preliminary empirical support for the longstanding critique by advocates, survivors, and scholars that family courts are biased against women who report abuse. It also supports the growing recognition within the domestic violence field and among survivors of abuse that family courts are hostile venues for mothers alleging abuse and that mothers are at significant risk of losing custody. It also generates new information suggesting that courts are especially punitive toward women and children who raise child sexual abuse claims. Apart from the obvious concern this raises about justice and safety for children,[71] this is critical information for prospective litigants, who must now weigh the risks of losing their children to the abuser (if they litigate the abuse) against the ongoing risks to the children from regular contact with a sexually abusive parent (if they do not).

(vi) Limitations

The primary limitations of this study are twofold: first, the search and coding used broad terms and were completed by a single researcher. The federally funded expanded study which is now ongoing employs more granular search terms and substantially more coded variables, analyzes thousands of cases, and cases are partially double-coded by two researchers. While the overall results of the pilot did not surprise the authors, these results should be considered preliminary indications that will be confirmed or refuted with a larger set of cases.

Second, because trial court opinions are usually not published online, the majority of the online opinions analyzed were appeals – although it should be emphasized that it was the *trial court* decisions (as described in the appellate opinion) that were being

69. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, *supra* note 8, at 232–35.

70. Meier, *Domestic Violence, Child Custody, and Child Protection, supra* note 2, at 706; BANCROFT ET AL., *supra* note 3, at 80–91.

71. SILBERG ET AL., *supra* note 20, at 20.

coded. This raises the question of whether trial court decisions which are appealed are systematically different from trial court opinions which are not, in a way that might bias the analysis. That is, there may be systematic differences between appealed cases and not appealed cases, but critical question is how—if at all—the analysis of mostly appeals cases might impact the database with regard to abuse and alienation findings and custody/visitation outcomes at the trial level. The larger study includes a larger set of unpublished trial opinions that will provide insight into whether non-appealed cases differ significantly from appealed cases.

One possible bias might be that only more well-funded litigants can afford to take appeals. Since fathers typically are economically better off than mothers after divorce or separation it is possible that more fathers than mothers take appeals.[72] However, a father-heavy appellant database would presumably be populated by cases in which fathers lost. Given that in our database fathers *won* far more than mothers, if this population is in fact father-heavy, it would indicate only that the broader reality in custody courts is *even more favorable for fathers*. Such a "bias" would reinforce—rather than undermine—the gender analysis of this study.[73]

Finally, one criticism we have heard during presentations of this data has been that, because appeals are so rare, they are simply not representative of what judges are doing across the board. This may be true with regard to individual judges; but we believe that compiling hundreds (or soon, thousands) of results from courts all over the country and finding patterns in those results provides important and legitimate insights into family court practices generally—even if they are not proof of any one judge's or court's practices.

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72. The pilot study did not identify which party filed the appeal. Cross-appeals were filed in many of the cases.

73. Another possibility is that in lower-income or poor populations, trial court results differ systematically from outcomes among populations who can afford to take appeals. When one considers potential racial and class biases that are known to operate culturally as well as legally, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias,* 5 U.C. IRVINE L. REV. 843, 861 (2015), it is conceivable that poor women of color might actually obtain less destructive results in custody cases because courts may find it easier to believe poor men of color are actually abusers. However, it is also possible that racial and class biases merely reinforce gender biases. A separate examination of this population would be valuable.

Conclusion

Soon, a much larger and more intensive study of thousands of cases across the country will enable us to assess whether these pilot results provide an accurate reflection of the nation's family court practices. The authors hope that such comprehensive, credible, objective data will disprove the troubling findings from the pilot, or, if not, will encourage courts, practitioners, and survivors to come together to work to improve courts' practices so as to protect the safety and welfare of child and adult survivors of abuse.

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Testimony of Amy Tielemans
On Behalf of
The Pennsylvania Association for Marriage and Family Therapists

Presented to the House Democratic Policy Committee
Langhorne, Pennsylvania
September 17, 2018
2:00 PM

Good Afternoon Representative Davis, Chairman Sturla, esteemed members of the House Democratic Policy Committee and staff. I appreciate the opportunity to testify before you with regards to legislation (HB2058) introduced by Representative Rozzi, which would address health and safety issues associated with visitation adjudications in instances of family violence and (HB956) introduced by Representative Davis, which would update court procedures for child custody cases when there are allegations of family violence.

My name is Amy Tielemans, and I am the President of the Pennsylvania Association of Marriage and Family Therapists otherwise referred to as PAMFT. By way of background, PAMFT is the professional association for the field of marriage and family therapy (MFT), which represents the interests of licensed marriage and family therapists and students of marriage and family therapy within the Commonwealth. Marriage and family therapists are recognized as a "core" mental health profession, along with psychiatry, psychology, social work and psychiatric nursing. MFTs work in private practice, courts, private schools, health intuitions, child protective services, mental health treatment centers, research centers, businesses and other organizations to assess and improve mental and emotional disorders within the context of family or larger social systems.

MFTs are licensed by the State of Pennsylvania under the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors. We must undergo extensive education, training, clinical fieldwork and pass a rigorous exam to demonstrate professional competency and meet the highest ethical standards of the profession. MFTs are licensed

to independently diagnose and treat mental health, emotional and behavior issues and are experts in relationship dynamics for individuals, couples and families. We are specifically trained in a systems model, which addresses all of these issues within the context of the client's relationships, with their family, community, workplace and all other aspects of their life. Our specialized mental health profession is committed to long-term sustainable change for individuals and their families.

Marriage and Family therapists are faced with issues of family violence with clients on a regular basis. MFTs are uniquely trained to identify the complexities of relationships and recognize how domestic abuse, which includes physical, sexual, psychological and emotional abuse patterns, impacts the entire family system as well as the community system.

MFTs recognize that domestic violence negatively impacts the well being of individuals, couples, children and families and the long lasting, negative emotional and behavioral consequences to the victims, including those witnesses of abuse, for current and future generations of the family. Like you, we are frustrated with the inconsistencies in court decisions of protection of abuse cases and child custody cases. Continued education training for those involved in making the decisions for families is imperative and we wholeheartedly agree that Domestic Violence Experts must be consulted with to evaluate each situation independently.

While a child's safety, emotional and psychological wellbeing need to come first in addressing parenting plans and custody arrangements, it is important that all aspects of the family dynamics be identified by licensed mental health professionals, including marriage and family therapists, social workers, professional counselors and psychologists with specific training in domestic violence in order not to further damage parent and child relationships where permanent separation is unwarranted.

PAMFT encourages the amendment of language in HB 2058 to recognize that it is important that *both parents*, the "accused" and the "safe" are evaluated by a licensed mental health provider and/or domestic violence professional so reasonable safety measures can be put in place to protect the child from emotional, psychological and/or physical harm that may include domestic violence and child abuse.

As a licensed MFT, in my professional opinion, I believe that in abusive situations, both parents require evaluation to rule out incidents of parental conflict in which the child is being used against the other. Any attempt of one parent to turn a child against the other parent ultimately puts the child in a negative position and could end up with the child defending the abuser or ending up in the permanent care of the abuser. There is no reason for the safe parent to support the abusing parent, but should not be encouraged to turn the child against the other parent.

PAMFT supports HB956 as it relates to mandated training of members of the judiciary and attorneys who are responsible for the outcomes of cases concerning domestic violence and child custody. We encourage regular continued education to maintain awareness of timely issues and research. However, we recommend that the bill be amended to require all domestic violence professionals consulted with by the courts, be licensed mental health professionals including, LMFTs, LCSWs, LPCs and Licensed Psychologists that have specific training in domestic violence, including physical, sexual, emotional and psychological abuse. We likewise recommend that all non-licensed domestic violence experts be certified in specific nationally accredited programs approved by the Commonwealth to ensure consistency with evaluations and recommendations. Agreeably, Domestic Violence Professionals must be capable of acknowledging that when working with families and relationships, that each case is unique and needs to be treated independently.

Further, we request that the Commonwealth take appropriate measures to ensure that licensed mental health professionals must be appointed to work with all parties impacted by domestic violence. Mental health issues such as depression, anger, anxiety, personality disorders, intermittent explosive disorder as well as substance abuse are all issues involved in domestic violence situations. The DSM5 (Diagnostic Statistical Manual for Mental Health Disorders) identifies coding for both adult and child physical, sexual, and psychological abuse.

While cases of sexual and physical abuse are especially critical, we ask that the Commonwealth pay significant attention to emotional and psychological abuse of children and adolescents. These are some of the most difficult to identify and treat, but most prevalent in our offices. Parenting education and therapy would go a long way in preventing further abuse and fostering parent child relationships for the future.

PAMFT appreciates and respects the committee for addressing both issues impacting child custody cases that involve domestic violence. As the Pennsylvania General Assembly continues to examine these issues and other important statutory updates, including inadequate mental health services in Commonwealth schools, PAMFT respectfully requests that policymakers recognize that MFTs are at the forefront of mental health issues and are often the ones called upon to address very painful issues like the one we are speaking of today and will be addressing in the future. As important policy initiatives get introduced and/or advanced to update outdated and ineffective statutes, rules and regulations in the current or future legislative sessions, it is imperative that MFTs be included in the list of mental health care providers qualified to provide critical behavioral and mental health services to the residents of this Commonwealth.

Thank you for the opportunity to share our views. We would be happy to meet and answer questions or have further discussion.

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HOUSE OF PENNSYLVANIA
DEMOCRATIC POLICY COMMITTEE

September 15, 2018

CHILD CUSTODY LAW
H.B. 956 (Printer No. 1115)
H.B. 2058 (Printer No. 2989)

Testimony of
Frank P. Cervone, Esq., Executive Director
Support Center for Child Advocates

The Support Center for Child Advocates is Philadelphia's lawyer pro bono program for abused and neglected children. We offer the skills and dedication of lawyer-social worker teams, and we represent more than 1,100 children each year. *Child Advocates'* legal and social services are offered to child victims through **Direct Representation Services** and **Child Advocacy Leadership and Training**. For more than 40 years, we have served as a resource to this Legislature and its staff, and I thank you for the invitation to serve in this role once again. When asked, we attempt to offer to you a balanced, candid and constructive assessment of what our children need and how we are all doing for our kids.

Today we consider two bills that seek to improve the practice of the Domestic Relations Courts and their decisions that affect the care and custody of children. House Bill 956, with lead sponsor Rep. Tina Davis, addresses Domestic Violence cases. House Bill 2058, by lead sponsor Rep. Mark Rozzi, proposes amendments to the factors to be considered by courts when awarding custody. Both bills point in the right direction, to make the courts more responsive to the needs of children and more sensitive to the traumatic experiences that children may suffer inside their own family systems. We are pleased to offer technical analysis and constructive criticism of both bills.

* * * * *

The impact of domestic violence on children has been a concern of advocates for children for more than 25 years. The effect of domestic violence on children is a particularly serious social issue that affects all communities and cuts across racial, ethnic, religious, and economic lines. In the early 2000s our office worked closely with two domestic violence agencies in a three-year study to build understanding and common ground between child advocates and domestic violence advocates. So some of the concerns expressed in House Bill 956 find historical support. However, considering the statutory intentions that are stated in §5352, it is entirely unclear what "common practices … have been shown to work poorly for children".

There is scant little data collected on custody cases, so we might consider what more there is to know about what works or does not work. We would like to know how many custody cases have allegations of domestic violence, and how many of those have children involved either themselves struck in a physical manner or victimized by the exposure to the conflict. We would like to know how many Protection from Abuse Cases brought on behalf of children are actually awarded, and whether PFA courts are actually acting as they are empowered to do,

to order protection and temporary custody. We would like some way to ascertain the number of PFA and custody cases that are now having GALs and counsel appointed for children, and how these lawyers are practicing. We would like to see some appraisal of high-conflict custody cases, which are a subset of the tens of thousands of cases coming before PA courts.

The Findings section of the bill, at §5351, is quite problematic.

As for House Bill 2058, the bill seeks to amend the factors in Section 5328 of the Custody statute. These 16 factors were added in well-intentioned, thoughtful reform initiative that started more than a decade ago. There is no indication that courts are failing to comply wioth the law, which requires explicit on-the-record findings on all the factors – is this accurate in practice? At least five of the factors already address violence or other detrimental effects on the child. The bill goes further, to tie the hands of courts, by creating presumptions and bars, to both custodial and visitation opportunities.

We support the proposed subsection that adds "substantial allegations" of d.v. to the type of case in which a GAL or counsel will be appointed if needed.

We support the direction of increased training opportunities for judges who are involved in these cases.

The necessary reliance on a domestic violence expert to determine if allegations are valid seems to remove from the Court this important decision. We are led to infer that the several texts intend to bar expert testimony from persons without sufficient knowledge or training, by creating some minimum level of training and experience. But where is this a problem? And will this gambit turn into a bar against necessary and valid testimony, or a new set of battles about qualifications? Instructions for the courts to use "current, valid scientific research" and "avoid theories ... that have been rejected" seem better suited for a judicial training session than for legislation.

We are glad to assist the members of the General Assembly in this important work.

* * * * *

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Testimony of Anonymous Mother

House Democratic Policy Hearing
September 17, 2018

I am here to share the story of my 3 girls, ten year old twins and a 13 year old. I separated from their father when my eldest was just five years old. It was a terrifying time for all of us. He has an awful temper and I spent my days listening to him tell me how he would kill me. Where he would bury. How he wished I was alive when Hitler was because "Hitler would have loved to kill me." He would tell me that the girls would be happier if I was dead, and that still continues… When he wasn't telling me how he would kill me, he obsessed about his own death. Every day he was dying. His parents sought help for him and paid for his to see several different psychiatrists. His parents made him let me come along. He was diagnosed with severe OCD, hypochondria and a "reality disorder," which the doctor said must be followed up on. Of course, he would leave these sessions angry and calling the doctors every negative name he could come up with. I knew he had a license to carry weapons. He knew how I opposed I was and told him I never wanted any guns in our house. He told me he didn't have any and I believed him. There were several nights when he was in a complete rage over something, with 3 young children in our home, where he became too violent and I would always call his parents to help. He told me if I ever called the police on him, that would be the end of me and I believed him. His parents would come over and physically pull him out of the house and bring him back to their house until he cooled off. When he came home, he would apologize and cry to me how sorry he is and that it would never happen again. One day, I decided to take his car to the car wash for him. As I was waiting in line, I decided to clear off the papers on his seat and put them in the glovebox. When I opened the glovebox, there was a gun. Nothing was locked and all I could think about was what if one of the girls opened it like I did and found the gun? They were babies and a toddler at the time. I called his parents who immediately met me at home and his mom took the gun from him and said she was going to buy a safe and keep it at her house, if he insisted on keeping the gun. We had an argument about him lying to me about having guns and it ended with me having to call the police. After they calmed him down, they searched his car and found a rifle in his trunk. They stayed with him for a few moments as he packed some stuff and told him to go to his parents and suggested he not come back until we sought counseling. Counseling didn't work, and I filed for separation in 2010. He refused to move out of the house, so the girls and I went to live with my parents. The four of us shared one bedroom while he stayed in our four bedroom house where the twins cribs were. He closed all the bank accounts we had and left me with toddlers in diapers and a 5 year old with no money. Thankfully, I have parents who were able to help support us. We went to court and I got primary physical custody, but they still have unsupervised visitation with him. In our child custody agreement, it is stated that he may not have guns in his house or his car, but the children say he has them again and they are terrified.

Fast forward 8 years, and my parents bought the girls a puppy. This is something they have been begging for years, but this angered their father. The girls are told over and over again that dad is going to die because of the puppy (dad is allergic) and they had a choice to make. Get rid of the dog or kill daddy. They are also told that "mommy is going to be sent to jail for murder and daddy is going to be dead." The new rules at their father's house are that the girls have to get entirely naked at the front door upon arrival and in front of all the adults. They have to put their "dog clothes" in a trash bag and shower and wash their hair and put on "safe clothes". The girls

were already fearful and exhibiting major signs of anxiety when they had to go to dads. They often have panic attacks, severe headaches and stomachaches and the twins often throw up from fear when at their dads. He is terrorizing them. He told the girls he is buying them guns and teaching them how to shoot them. He told them they are safer in his house than mine because he has guns in the basement and I don't. This scared them to their core. On the days of the horrendous school shootings when the girls were already upset, he would call them and tell them they aren't safe unless they have a gun. They found gun safes in his basement. They beg me not to send them to his house but I cannot disobey the court order saying that they must spend weekends with him and see him mid-week. They call me panicked when they are there because they are so afraid of him.

The girls were seeing a psychologist and the psychologist reported his behavior to Children and Youth. C and Y investigated and found the claim credible. But since this is emotional trauma, essentially with no visible proof, C and Y told me I need to bring the children back to their psychologist and if the psychologist felt the children were in danger of "severe mental harm," they can continue the case at C and Y. Once Dad understood this he immediately used his parental right to rescind permission for them to see the psychologist, so the girls could no longer be seen or supported. Through our attorneys, several new psychologists were named and CCES was recommended. He turned it all down. He was given the opportunity to choose any psychologist he wants for the girls, and he refuses. He is withholding all mental health care when the girls are in dire need of therapy and support. C and Y dropped the case because the girls did not have the dx they needed. Legally, I am not allowed to take them to any mental health specialist without his approval. We met with a Master and he was told how the girls are having nightmares, how they get so panicked they throw up when they must visit their father, that they will no longer sleep in their own beds, how they must always be with me, how they cry and cry out of so much fear when its time for them to go to him. The father still denies them professional therapy, but he tells the girls they can talk to him instead. How is it allowed that the person causing the girls such severe emotional trauma has the right to refuse treatment for the girls? How is it okay for him to be allowed to traumatize them, force them to undress upon arrival, terrorize them with guns, but I can't do anything to help them?

PCADV
PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

MEMORANDUM

Testimony to the House Democratic Policy Committee
From: Lindsay Scott, Sr. Government Relations Specialist, PCADV
Date: Monday, September 17, 2018

The Pennsylvania Coalition Against Domestic Violence (PCADV) appreciates the opportunity to submit written testimony pertaining to child custody and domestic violence. We thank Representative Tina Davis and Representative Mark Rozzi for their efforts to address and explore this extremely complex and important issue.

Studies suggest that 15.5 million children in the U.S. witness domestic violence annually.[1] By age 17, over one-third of America's children will have been exposed to domestic violence. [2]

Domestic violence carries with it lifelong impacts on children. Children don't even have to witness or hear domestic violence to know that it is occurring. Childhood survivors of domestic violence are at a greater risk for substance abuse, juvenile pregnancy and criminal behavior than their peers who are raised in homes without violence.[3]

Children who are court-ordered into joint custody schedules in high-conflict families and families experiencing domestic violence are negatively affected and are more likely to suffer mental and physical health problems. Witnessing domestic violence affects children emotionally, behaviorally, academically and socially. Perhaps even more disturbing- a child does not need to witness or hear domestic violence in order to feel these effects. Domestic violence abusers create a culture of normalized violence in the home which poses a significant risk for the children of the home to become either a perpetrator or a victim of domestic violence later in life.

Studies show that just because an abusive spouse is not abusive to the child does not mean that there is no risk of physical harm to that child in the future. However, children exposed to domestic violence may show comparable levels of emotional and behavioral problems to children who were the direct victims of physical or sexual abuse.[4] Some authors also suggest that instruments used to assess the level of danger for a woman can also be used to assess danger for her children. They go on to propose that an abused woman is the best predictor of how dangerous a violent partner is. They suggest that the Court should give great weight to safety concerns expressed by a battered woman for both herself and her children.[5] Unfortunately, the opposite occurs too often in courtrooms across the Commonwealth.

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[1] Whitfield, C.L., Anda, R.F., Dube, S.R., & Felittle, V.J. (2003). Violent childhood experiences and the risk of intimate partner violence in adults: assessment in a large health maintenance organization. Journal of Interpersonal Violence. 18(2), 166-185.

[2] Finkelhor, D., Turner, H., Ormrod, R., & Hamby, S.L. (2009). Violence, abuse, and crime exposure in a national sample of children and youth. Pediatrics, 124 (5), 1411-1423.

[3] Behind Closed Doors The Impact of Domestic Violence on Children, UNICEF, Child Protection Section, Programme Division, 2006.; Fellitti, V.J. et al, 'The Relationship of Adult Health Status to Childhood Abuse and Household Dysfunction', American Journal of Preventative Medicine, Vol.14 1998, pp. 245-25; James, M., Domestic Violence as a Form of Child Abuse: Identification and Prevention, Issues in Child Abuse Prevention, 1994; Herrera, V. McCloskey, L. Gender Differentials in the Risk for Delinquency among Youth Exposed to Family Violence, Child Abuse and Neglect, Vol 24, no.8, 2001 pp. 1037-1051; Anda, R.F., Fellitti, V.J. et al. Abused Boys, Battered Mothers, and Male Involvement in Teen Pregnancy, Pediatrics, Vol 107, no. 2, 2001, pp. 19-27

[4] Jaffe, Wolfe & Wilson, Children of Battered Women (1990).

[5] Jennifer L. Hardesty & Jacquelyn C. Campbell, Safety Planning for Abused Women and Their Children, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 89 (Peter G. Jaffe et al. eds., Guilford Press 2004).

According to a study entitled, "Children in the cross-fire: Child custody determinations among couples with a history of intimate partner violence," it was discovered that even if domestic violence is a criterion for awarding custody, it does not seem to change court outcomes. Court records failed to identify documented domestic violence in half of the cases. [6] Furthermore, it is well documented that abusive parents are more likely to seek sole custody than nonviolent ones.[7] Shockingly, they are successful about 70% of the time.[8]

With that in mind, we support and applaud the training requirements outlined in both bills. Domestic violence education and training for judges at all levels, and relevant court personnel are crucial to ensuring that the Courts fully understand the risks for children exposed to domestic violence and also know how to appropriately respond to allegations of domestic violence in child custody cases. The Pennsylvania Coalition Against Domestic Violence cannot emphasize enough the need for frequent and continuing domestic violence training at set intervals. We feel strongly that this is the single most important thing the legislature can do to protect children exposed to domestic violence in custody cases.

PCADV respectfully suggests that this Committee examine other state procedures where domestic violence training is required at regular intervals for judges and court personnel, and the positive outcomes for children and families as a result.

Again, we appreciate the opportunity to provide testimony on this vitally important topic and hope we can be a resource as these topics continue to be explored and evaluated.

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[6] Kernic, M.A., Monary-Erensdorff, D.J., Koepsell, J.K., & Holt, V.L. (2005). Children in the cross fire: Child custody determinations among couples with a history of intimate partner violence. Violence Against Women, 11, 991-1021.

[7] American Psychological Association, Violence And The Family: Report Of The American Psychological Association Presidential Task Force On Violence And The Family, (1996), available at http://www.apa.org/pi/viol&fam.html

[8] American Judges Foundation, Domestic Violence and the Court House: Understanding the Problem...Knowing the Victim, available at http://aja.ncsc.dni.us/domviol/page5.html

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STATEMENT ON PROBLEMS IN PENNSYLVANIA CHILD CUSTODY LAWS APPLIED TO CHILD ABUSE AND DOMESTIC VIOLENCE CASES, AND THE REMEDIES PROPOSED IN HOUSE BILLS 956 AND 2058

PRESENTED TO HOUSE DEMOCRATIC POLICY COMMITTEE
SEPTEMBER 17, 2018, LANGHORNE, PENNSYLVANIA

I am honored to offer my assistance to the Pennsylvania General Assembly in your efforts to fix the very serious and profound systematic failures of our family courts in custody cases involving child abuse and other forms of family violence. I attach several law review articles, my own LL.M. thesis, and the 2018 reform legislation we successfully drafted for passage in Louisiana for your consideration as important resources. As my *curriculum vitae* shows, my 40-year legal career in trial courts, appellate courts, and state legislatures across the country gives me, I believe, a specialized and thorough perspective to suggest solutions to those problems of which parents, children, professional agencies and organizations, and advocates have complained for many years. Representatives Davis, Rozzi, and their co-sponsors, deserve much credit and appreciation for House Bills 956 and 2058, which are excellent starting points for a comprehensive overhaul of the family court process. We must be careful, however, to avoid creating new troubles while trying to fix old flaws. In that regard, I am very willing to personally work in depth with the sponsoring legislators and their staffs to draft, evaluate, tweak, and otherwise improve the proposals already introduced.

In my view, there are three basic causes for the mishandling of these abuse cases by our family courts. First, very many, if not most, family court judges and the other court professionals, including the child protection agency workers, wrongfully assume that any allegation of domestic violence, child abuse, or sexual abuse is the malicious ploy of one parent- particularly the mothers—to vindictively smear the other parent and to gain some sort of advantage in the child custody case. This entrenched and dangerous bias enables the

judges to overlook, minimize, misconstrue, and simply disregard true and competent evidence of abuse which would be properly accepted and considered by judges in criminal court cases, civil tort trials, and juvenile delinquency adjudications. Overall, the family courts are much more concerned about "conflict" than they are about "facts." Protective parents rightfully obliged to demand their children's safety are falsely decried and punished as "alienators"- a family court label much more detrimental in these judges' eyes than wife-beater, rapist, or child molester. Second, the ability of family court judges to accurately determine "factual" questions, *i.e. did this parent commit domestic violence, child abuse, or sexual abuse?,* has been critically impaired, primarily because these courts rely on entities wholly ill-equipped and incompetent to correctly make these determinations. I am solidly convinced that the biggest obstacles to the protection of abused women and children in family court cases are guardians *ad litem* and court appointed custody evaluators. They not equipped to competently determine the core factual questions regarding abuse, and the delegation of that responsibility to those entities by judges is immeasurably disastrous and would not be tolerated in any other sort of litigation. Their participation usurps the role of the judge, and undermines the long-standing process of fact-finding based on admissible evidence. Therefore, any legislation countenancing the involvement of guardians *ad litem* and court appointed custody evaluators, even when well-intentioned and purporting to "improve" the performance of their roles, is a very big mistake, further entrenching in the system an unfixable and central flaw.

Finally, even when there is a finding of abuse or domestic violence, the family court judges typically do not appreciate the significance of such, and do not fashion custody judgments which address the impact of the abuse and protect the victims from the physical, emotional, and financial consequences of the violence and the family court proceedings, which nonetheless continue for years.

I look forward to working closely with all of you to make Pennsylvania a leader in this reform movement, and to make our family courts true beacons of safety and shelter for the most vulnerable in our Commonwealth. Thank you for your time and attention.

Very truly yours,

Richard Ducote

Attorney & Counselor at Law
rd:ms/
Attachments

Richard Ducote, an attorney licensed in Louisiana (1978) and Pennsylvania (2009), has been one of the nation's leading child abuse/domestic violence litigators and law reformers for 40 years. He received a B.S. in psychology from Tulane in 1974. Immediately following his law school graduation from Loyola in New Orleans in 1978, which he earned while serving as a juvenile probation officer in the Jefferson Parish Juvenile Court, he created a specialized program to provide and train attorneys for abused and neglected children. That project, which developed the Tulane University School of Law Juvenile Law Clinic, was one of only four in the country nationally recognized by the federal government for its innovative court improvements.

In Louisiana during the early 1980's, as an appointed special district attorney in 19 parishes, he tried child abuse/ termination of parental rights cases in 40 courts. Through his efforts in the courtroom, social service agency offices, and the legislature, the Louisiana foster care system for the first time moved hundreds of forgotten children into adoptive homes. In 1984, he began his nationwide focus on complex child custody cases involving domestic violence and child abuse. In 1991, he drafted for successful enactment the Louisiana Post-Separation Family Violence Relief Act (La. R.S. 9:361-369), the first state law barring abusive parents from serving as custodians, and forcing them to pay all costs and attorney's fees. This law, which has been called model legislation by the Harvard Law Review, has been replicated in many states and foreign countries. He has written over a dozen other child welfare /child custody statutes passed in Louisiana and other states, and was one of three attorneys responsible for Act 412 of the 2018 Louisiana legislature which overhauled Louisiana's child custody laws.

Mr. Ducote has been an ardent critic of due process flaws in family courts, the inappropriate delegation of authority to guardians *ad litem*, and incompetent mental health evaluators and discredited theories in custody cases. He was appointed to the clinical psychiatry faculty at LSU Medical Center in New Orleans,

and regularly conducts mandated certification training for California custody evaluators. He has served as an invited trainer and presenter at many national, state, and local programs sponsored by the American Bar Association, the U.S. Department of Justice, the National Council of Juvenile and Family Court Judges, the Institute on Violence, Abuse & Trauma, state and national domestic violence coalitions, child welfare agencies, and law schools. His work has resulted in honors and awards from Justice for Children, The Northern Plains Tribal Institute, The National Association of Social Workers, the Young Lawyers Division of the ABA, The LSU School of Social Work, the Louisiana Foster Parent Association, and the California Protective Parents Association. In 2012, he received the Sol Gothard Lifetime Achievement Award from the National Organization of Forensic Social Work. Mr. Ducote was featured in the 2005 PBS Documentary *Breaking the Silence: Children's Stories,* and in *Small Justice: Little Justice in America's Family Courts*. Articles in *Newsweek, Oprah Magazine*, *Parade Magazine, Money Magazine* and many newspapers around the country have quoted him. *New Orleans Magazine* named him on of the top lawyers in the city.

As a Martindale-Hubbell "A-V" attorney since his first rating in 1988, he is also admitted to the bars of the U.S. Supreme Court; the U.S. Third, Fourth, Fifth and Ninth Circuit Courts of Appeals; and the U.S. District Court for the Eastern, Middle and Western Districts of Louisiana, the Northern and Eastern Districts of Texas, the Northern District of Ohio, the District of Colorado, and the Western District of Pennsylvania. In January, 2011, he received his LL.M. degree from Loyola Chicago School of Law in child and family law, where he taught a course on advanced issues in domestic relations law addressing child abuse, domestic violence, and family court flaws. His successes include a 1992 victory in the U.S. Supreme Court on behalf of two sexually abused children. His work has taken him to courtrooms in forty-four states, and over more than 2 million miles. His offices are in Covington, Louisiana, and Pittsburgh, Pennsylvania.

In August, 2014, he was invited by the U.S. Department of Justice and the National Council of Juvenile and Family Court Judges to serve on a national roundtable of judges, lawyers, law professors, and mental health professionals to address the problems caused by the use of "custody evaluators" in domestic violence cases. In November, 2014, he was awarded the Judge Richard Ware Memorial Award by the Louisiana Children's Trust Fund for his years of work in child abuse prevention.

FACT BASED CUSTODY DETERMINATIONS: A CALL FOR FAMILY COURT JUDGES TO RECLAIM THEIR BASIC ADJUDICATORY ROLE

LL.M. Thesis
Loyola Chicago School of Law
Richard Ducote
June, 2010

I. INTRODUCTION

Child custody adjudications generally fall into two categories. First, where rather equally competent, safe, and caring parents fail or refuse to agree on the terms of a post-divorce custody plan, a family court judge is required to decree the division of parenting time and authority. In those instances (called here "regular" cases), the court's decision itself is unlikely to cause any significant harm to the parties' children over and above that inherently generated by the family's breakup, absent some extreme or bizarre deviation from the typical parenting plans.

In the second class of cases (called here "endangerment" cases), one or both parents engage in family violence, physical or sexual abuse, child neglect, or alcohol or drug excesses. Mental illness or some other persistent condition might also impact a parent's ability to function as a capable parent. In this second group, the stakes for the children are very high since they are dependent for their short and long term physical and emotional protection on a correct factual and legal custody adjudication. Otherwise, where the children are juridically entrusted to the care

and control of an abusive, neglectful, controlling, intoxicated, or otherwise dangerous parent, the negative consequences are legion.

This article focuses on the "factual" aspects of endangerment cases. While the general inquiry in regular case litigation addresses whether, for the purpose of the child's best interest, "*this plan is better than that plan*", in endangerment cases the questions to be answered include, "*Did the parent abuse this child?*", "*Has this parent committed family violence?*", "*Is this parent often intoxicated?*", etc. The affirmative resolution of such factual questions should then dictate the custody judgment, either by operation of law or through the application of reason and common sense.

Unfortunately, the current culture of many domestic relations courts is antithetical to accurate fact finding on the question of whether certain events directly affecting the welfare and safety of children did or did not occur.[1] While adjudicating civil or criminal cases, a judge will enforce the rules of evidence and will listen to witnesses who claim to have witnessed or been victimized by an event, will weigh competing presentations of physical and circumstantial evidence, will use logical inference to fill in evidentiary gaps, and will process the totality of the case in the context of his or her witness credibility calls. From this standard

[1] Regarding the variety of problems encountered in domestic violence custody cases, see, generally, Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women,* 17 Am. U.J. Gender Soc. Pol'y & L. 163 (2009); Jay G. Silverman, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings,* 24 Pace L. Rev. 231 (Fall 2003).

judicial exercise comes the answer on the central factual issue: "*Did the defendant commit the crime alleged*?" or "*Is the defendant liable for the accident?*" No jurisdiction would condone a criminal trial in which the court resolves the party's guilt or innocence by appointing a psychologist to determine if the defendant is the type of person to commit such a crime, and to administer tests to the alleged victim to see if she is a fabricator. Nor would any judge likely remain on the bench after approaching every criminal or civil case with abundant outcome determinant skepticism that indictments and tort suits are simply "conflicts" between the prosecutor and the arrestee, or the motorist and the injured pedestrian, and the proper role of the court in such instances is to do everything possible to "reduce the conflict" by avoiding any determination of responsibility for inappropriate conduct and by disfavoring the party who insists that the court act otherwise.

Yet, many family court judges, emboldened by some professional associations, legal scholars, and mental health practitioners, in endangerment cases focused on reports of child abuse, family violence, and destructive intoxications routinely abdicate the critical fact finding role regarding these issues to people and processes incapable of, legally prohibited from, and ethically barred from doing so.

This article posits that family court judges should not ask, nor expect, mental health professionals, guardians *ad litem*, court investigators, and other such professionals to opine or "inform" the court whether or not a parent 1) has abused a

child, 2) is credible, 3) is violent, 4) or is a substance abuser. Of course, there may be direct or other admissible evidence in the form of personal observation or parental admissions which may be relevant and material to the court's fact finding task. This bright line is necessary because such a delegation, particularly where the context is a "custody evaluation" or psychological testing, generally violates evidentiary rules and is exceptionally unreliable. Accordingly, custody rulings premised on wrong factual determinations logically disserve the children whose welfare the system is designed to promote.

Domestic relations courts are urged here to reclaim their basic adjudicatory role in fact based custody determinations by doing the same things civil and criminal court judges do in deciding whether or not some specific conduct happened. First, they are challenged to shed the "high-conflict" custody case bias and consider the evidence with an open mind. Second, the rules of evidence should be enforced. Third, mental health professionals and other such investigators and "experts" cannot be designated as fact-finders. And fourth, where children are victims of, or witnesses to, the detrimental parental conduct at issue, the children's testimony should be heard as that of any other fact witness, with the attendant safeguards for comfort and security provided, when that testimony is necessary to establish proof of the relevant conduct.

II. DETERMINATIONS IN CUSTODY CASES:"FACTORS" VS. FACTS"

The modern approach to child custody determinations is summarized by the observation that:[2]

> In disputed custody cases between parents, the best interest standard encompasses numerous factors which may be relevant in a particular case. Many states have enacted statutes setting forth the factors to be considered in determining the child's best interests. In other jurisdictions, specific factors are not enumerated, but a compilation of relevant factors can be gleaned from decisional law.
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> No single factor is determinative in deciding custody. The court is usually instructed to consider all relevant factors, and the court's decision is usually based on an aggregate of factors rather than any one factor. Furthermore, even where the factors are set forth in a statutory provision, the court is not limited to a consideration of these factors, but may also consider many other factors that are relevant, and almost anything affecting the child is considered relevant to the child's welfare.

Certain "best interest factors" are commonly found in most state custody laws:[3]

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[2] Katheryn D. Katz, *Child Custody and Visitation: Law and Practice*, §1.05[3][b], 143 (S. Little ed., 1993).

[3] Ann M. Haralambie,, *Handling Child Custody, Abuse and Adoption Cases*, § 4.06, 231-232 (West, 1993). State statutes and codes have adopted various combinations of these factors, which are reflected in the Uniform Marriage and Divorce Act, § 402. See, ALA. CODE § 30-2-40(e) ; ALASKA STAT. § 25.24.150(c) ; ARIZ. REV. STAT. ANN. § 25-403 ; ARIZ. CODE ANN. § 9-13-101; CAL. FAM. CODE § 3040 ; COLO. REV. STAT. ANN. § 14-10-124; CONN. GEN. STAT. ANN. § 46b-56 ; DEL. CODE ANN. tit. 13, § 722 ; D.C. CODE § 16-914 ; FLA. STAT. ANN. § 61.13(1)(a) ; GA. CODE ANN. § 19-9-1 ; HAW. REV. STAT. ANN. § 571-46 ; IDAHO CODE § 32-717 ; 750 ILL. COMP. STAT. ANN. 5/602(a) ; IND. CODE ANN. § 31-17-2-8 ; IOWA CODE ANN. § 598.41(1)(a); KAN. STAT. ANN. § 60-1610(a)(3) ; KY. REV. STAT. ANN. § 403.270(2) ; LA. Civ. CODE ANN. arts. 132, 134; ME. REV. STAT. ANN. tit. 19A, § 1653(3); MD. CODE ANN., FAM. LAW § 9-105; MASS. GEN. LAWS ANN. ch. 208, § 28 ; MICH. COMP. LAWS ANN. § 722.23-24 ; MINN. STAT. ANN. §§ 257.025(a), 518.17(1)(a); MISS. CODE ANN. § 93-5-24(1); MO. ANN. STAT. § 452.375(2); MONT. CODE ANN. § 40-4-212(1); NEB. REV. STAT. § 42-364(1); NEV. REV. STAT. § 125.480(1) ; N.H. REV. STAT. ANN. § 458:17(1); N.J. STAT. ANN. § 9:2-3 ; N.M. STAT. ANN. § 40-4-9(A) ; N.Y. DOM. REL. LAW § 240(1); N.C. GEN. STAT. § 50-13.2(a) ; N.D. CENT. CODE §§ 14-09-06.1 to .2; OHIO REV. CODE ANN. § 3109.04 ;OKLA.STAT.ANN. tit. 10, § 21.1 ; OR. REV. STAT. § 107.137(1) ; 23 PA. CONS. STAT. ANN. § 5303(a)(1) ; R.I. GEN. LAWS § 15-5-16(d)(2) ; S.C. CODE ANN. § 20-3-160 ; S.D. CODIFIED LAWS § 25-4-45 ; TENN. CODE ANN. § 36-6-101(a)(1) ; TEX. FAM. CODE ANN. § 153.002 ; UTAH CODE ANN. § 30-3-10-10.2 ; VT. STAT. ANN. tit. 15, § 665 ; VA. CODE ANN. § 20-124.3 ; WASH. REV. CODE ANN. § 26.09.184; W. VA. CODE § 48-9-101;WIS. STAT. ANN. § 767.24 ; WYO. STAT. ANN. § 20-2-201.

> These factors may include the parent's wishes, the wishes of the child, the love and affection or intimacy between the child and each parent, the interaction and interrelationship between the parent, child, siblings, and other significant persons, the benefit of continuity of environment, the child's adjustment to home, school, and community, the health, safety, and welfare of the child, and the mental and physical health of all individuals involved. Some states provide that the court should consider the parent's ability to provide love, affection, guidance, and education for the child, or to provide food, clothing and medical care for the child. Courts may consider which parent has more time to spend with the child, is better able to help the child with school, or to meet the child's health needs, and which parent is more likely to encourage a close relationship between the child and the other parent.
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> * * *
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> Abuse or neglect of the child is obviously relevant, and some states explicitly consider a parent's alcohol or other substance abuse. There is an emerging trend towards including domestic violence, whether or not directed towards the child or in the child's presence, as being a factor to be considered or to be weighed against the abusive parent, in some cases even constituting a presumption against custody in that parent [citations omitted][4].

It is important to distinguish the terms "factors" and "facts." Generally, a "fact" is "*a thing that is definitely known to be true,"*[5] or *"something known to exist or to have happened*."[6] For litigation purposes, most importantly a "fact" is, as defined by Black's, "*An actual and absolute reality, as opposed to a mere*

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[4] Forty-four (44) states (including D.C.) include domestic violence as one of the mandatory considerations in deciding the child's best interest. Twenty-five (25) (including D.C.) states explicitly create a rebuttable presumption against the granting of any custody to a violent parent. See, American Bar Association Commission on Domestic Violence, *Child Custody and Domestic Violence by State*, www.abanet.org/domviol/docs/Custody.pdf (last visited June 30, 2010). The ABA's chart is attached here as an appendix.

[5] *Compact Oxford English Dictionary 356 (2005).*

[6] Random House Webster's Unabridged Dictionary 691 (2d Ed. 2001).

supposition or opinion…reality of events or things the actual occurrence or existence of which is to be determined by evidence."[7] The common general definition of a "factor", on the other hand, is a "*circumstance, fact, or influence that contributes to a result*"[8] or "*one of the elements contributing to a particular result or situation.*"[9] Similarly, Black's provides that a "factor" is "*any circumstance or influence which brings about or contributes to a result…*"[10] Thus, the determination of a "factor" need not, by definition, be premised on the certainty of facts established by evidence. This is not a trivial distinction.

Parent-child love and affection, the child's wishes, continuity of environment, sibling interaction, and everyone's relative mental health can be treated and determined for the most part as "conditions," rather than as concrete events which did or did not occur. Acts of violence, molestation, or excessive alcohol or illicit drug use, as actual events or "facts," can be proved in family court litigation to the same extent that such would be established in a criminal or civil tort trial. The endangering facts, including exposure to violence and direct abuse,

[7] Black's Law Dictionary 531-532(5th Ed.1979).

[8] Compact Oxford English Dictionary 356 (2005).

[9] Random House Webster's Unabridged Dictionary 691 (2d Ed. 2001).

[10] Black's Law Dictionary 532 (5th Ed.1979).

demonstratively have a more lasting negative impact on a child than the broader best interest "factors."[11]

Therefore, it is critical for family court judges, as fact-finders, to be as correct as possible when confronted with endangerment allegations, or in these situations the custody decision will be directly adverse to the child's best interest. Accordingly, the data or evidence upon which the court relies must be admissible, reliable, and valid. Unfortunately, the family court gestalt in many jurisdictions militates toward the wrong outcomes.[12] Two prominent psychologists have noted:

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[11] Generally, child sexual abuse has been shown to cause affective problems (guilt, shame, anxiety, fear, depression, anger), physical effects (genital trauma, somatic complaints, sexually transmitted diseases, eating disorders, sleep problems), behavioral problems ("acting out", withdrawal, aggression, substance abuse, repetition of abusive relationships), self-destructive behaviors, psychopathology, and destructive traumatic sexualized conduct. National Institute of Justice, U.S. Dept. of Justice, *When the Child is a Victim* 18-24 (2d Ed. 1992); Erna Olafson & Barbara Boat, *Long-term Management of the Sexually Abused Child: Considerations and Challenges*, in Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals 14-35 (Robert M. Reece, M.D. ed., 2000). Physical abuse often results in long term posttraumatic stress disorder, low self-esteem, depression, poor social competence, cognitive and neurological damage, relationship difficulty, in addition to the obvious possibility of death, disfigurement, and other serious bodily injury. See, Robert H. Wharton, et al., *Long-Term Medical Consequences of Physical Abuse*, and Cynthia Cupit Swenson & David J. Kolko, *Long-term Management of the Developmental Consequences of Child Physical Abuse* in Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals 117-134, 135-154 (Robert M. Reece, M.D. ed., 2000). Even children who only witness domestic violence in their homes experience can suffer permanent emotional and cognitive scars, and grow up to emulate in their own interpersonal relationships the learned abusive power and control, thus contributing to the intergenerational cycle of violence. See, B.B. Robbie Rossman, *Descartes's Error and Posttraumatic Stress Disorder: Cognition and Emotion in Children Who are Exposed to Parental Violence* and Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals* in Children Exposed to Marital Violence: Theory, Research and Applied Issues 223-256, 371-408 (George W. Holden, et al. eds., 1998); Christopher Shu-Bin Woo*, Familial Violence and the American Criminal Justice System*, 20 Haw. L. Rev. 375, 388-392 (1998).

[12] See, e.g., Melinda L. Moseley, Civil *Contempt and Child Sexual Abuse Allegations: A Modern Solomon's Choice?,* 40 Emory L.J. 203 (1991); Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 Am. U.L. Rev. 491, 496 (1989) ["The most obvious problem of proof is that the sexual abuse of children, like rape, is a crime that is done privately, often in the home where there are few, if any, witnesses. The victim is the *only* witness. Adult women have suffered through decades of being unable to prove that they have been raped because no one else had seen it happen; until recently, the law itself demanded corroborating evidence to secure a conviction. In both cases, the problem has been the same' albeit for different reasons; women are suspected of 'consent,' while children are suspected of 'fabricating.' Children are often accused of lying about sexual abuse, whether for reasons

> Many clinicians have had the frustrating experience of seeing the courts return a child to caretakers whom the clinician believes to be dangerous or abusive. Faller has shown in her sample of separated parents that even after sexual abuse has been clinically substantiated, over one-third of children continued to have unsupervised contact with their alleged parental abuser.[13] In some of the cases, judges refused even to hear the clinical evidence of sexual abuse, and one judge threw the clinical reports to the courtroom floor unread.[14]

The causes of and solutions to this paradox are described here.

III. POISONING THE WELL: THE "HIGH-CONFLICT" CASE LABEL

It is first necessary to describe the contextual mindset that surrounds many family court judges as they daily approach the bench. Essentially, they are discouraged by their peers and professional associations from acting like judges.[15] The Association of Family and Conciliation Courts (AFCC) most hardily fosters

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of their own or because they are suspected of being brainwashed by adults. Our culture is one that simply does not find children credible. The notion that children cannot be believed is entrenched in our legal system as well as the larger culture." (internal footnotes omitted)]; David Peterson, *Judicial Discretion is Insufficient: Minors' Due Process Right to Participate With Counsel When Divorces Custody Disputes Involve Allegations of Child Abuse*, 25 Golden Gate U.L.Rev. 513 (1995); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand.L.Rev. 1041 (1991).

[13] Kathleen Faller, *Allegations of Sexual Abuse in Divorce*, 4 J. of Child Sexual Abuse 1-25 (1995).

[14] Erna Olafson & Barbara Boat, *Long-term Management of the Sexually Abused Child: Considerations and Challenges*, in Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals 19 (Robert M. Reece, M.D. ed., 2000).

[15] One prominent California Family Court judge wrote, "Trials may be a good mechanism for deciding the guilt or innocence of an accused murderer. They may be a good way to decide the damages to be awarded to a person injured in an automobile accident. They certainly are an acceptable way of dividing the property of a couple that has been married for years and acquired houses, pensions, and investments. But they are a just plain silly way to decide with which parent a child should live." Roderic Duncan, *Trial of Custody Cases As Viewed By a Judge,* in Child Custody & Visitation Law and Practice §27.09 [4] (Sandra Morgan Little ed., 1999). The quote intractably and incorrectly assumes that there are no factual determinations upon which the custody decision will turn.

the siren luring family court judges away from judging.[16] Professor Andrew Schepard, a leading AFCC scholar, has proposed cutting-edge role re-definition for the courts.[17] An important problematic development driving the situation is the bar and bench's philosophy regarding what has come to be known as "high conflict" custody cases. Again, definitions are important. "Conflict" is defined as "a *serious disagreement or argument*"[18] and "*a fight, battle, or struggle, esp. a long struggle; strife.*"[19] Again, most importantly, Black's does not define "conflict," but does define "conflicting evidence" as "*evidence offered by plaintiff or defendant, or prosecutor and defendant which is inconsistent and cannot be reconciled*."[20]

In 2000, the American Bar Association sponsored the major conference (The Wingspread Conference) addressing the problem of these "high-conflict" custody cases, which are defined as arising:

> when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional

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[16] The primary organ of AFCC is the Family Court Review. See, e.g., Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System,* 42 Fam.Ct.Rev. 203 (2004); Christine A. Coates, et al., *Parenting Coordination for High-Conflict Families*, 42 Fam.Ct.Rev. 246 (2004); Jana B. Singer, *Dispute Resolution and the Postdivorce Family, Implications of a Paradigm Shift*, 47 Fam.Ct.Rev.363 (July, 2009); Amy Holtzworth-Munroe, et al., *Family Dispute Resolution: Charting a Course for the Future*, 47 Fam. Ct.Rev. 493 (July, 2009).

[17] See, e.g. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management,* 22 U. Ark.Little Rock L.Rev. 395 (2000); Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Prospective*, 32 Fam. L.Q. 95 (1998).

[18] Compact Oxford English Dictionary 204 (2005).

[19] Random House Webster's Unabridged Dictionary 428 (2d Ed. 2001).

[20] Black's Law Dictionary 271(5th Ed.1979).

> relationship, have mental disorders, or engaged in criminal or quasi-criminal conduct, substance abuse, or there are allegations of domestic violence, or child abuse or neglect.[21]

The "Basic Principle" suggested for lawyers in the Wingspread Conference is that, "*Lawyers should take a proactive role in reducing conflict between disputing parents and promote collaborative problem solving with parents, mental health professionals and the courts*."[22] Furthermore, the report urges that "*the ethical rules should be revised to develop separate rules specific to the context of family law, particularly to include rules which promote achievement of the collaborative, cooperative principles…*"[23]

A more recent discussion of "high-conflict" custody cases reiterates the same context for analysis, lumping together as "conflict" true domestic violence and child abuse with allegations of domestic violence and child abuse.[24] That is, for one parent to claim that abuse is happening in the family is deemed, in terms of detriment to the children, the equivalent of perpetrating the domestic violence. In other words, the facts are not important, just the resulting "conflict" matters and

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[21] *High-Conflict Custody Cases: Reforming the System for Children-Conference Report and Action Plan*, 34 Fam.L.Q. 589, 590 (2001).

[22] *Id*. at 595.

[23] *Id*. at 596.

[24] Linda D. Elrod and Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance,* 42 Fam. L. Q. 381, 387-390 (2008).

the parent fighting to protect the child from the abusive parent is as guilty as the parent abusing the child.[25]

The troubled state of the family court system in this regard is abundantly illustrated by another article appearing in the same Family Law Quarterly Golden Anniversary issue cited in the paragraph above. In an article specifically addressing family violence problems in custody cases, the author writes:

> Even where there is a change of law "on the books," there has not been a change in the application of law "on the ground." Custody decisions in cases involving domestic violence are an example of the uneven nature of the change. Custody is an area where there has been a considerable degree of statutory reform and revision respecting domestic violence. The classic "best interests of the child" standard allows for judicial discretion, including, in some states, taking a history of violence into consideration. Some jurisdictions have now made presumptions against custody to batterers explicit in their custody laws. Yet even with these presumptions, it appears that many abusers are awarded custody, even where they have allegedly been responsible for the mother's death. Judges often do not recognize or acknowledge abuse or tend to minimize it. Even though there may be a statutory bar, judges do not take claims of abuse seriously when they are presented, or even see them when they are subtle, and so they do not factor abuse into custody determinations [citations omitted].[26]

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[25] The Pennsylvania Coalition Against Domestic Violence has warned that because of the confusion between domestic violence cases and "high conflict cases", parenting coordinators are inappropriately used in true abuse situations. *Domestic Violence and Parent Coordination*, The Jurist (April 2009),1. See also, Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W.Va.L.Rev. 237 (1999).

[26] Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam.L.Q.353, 360 (2008).

Returning to Professor Elrod's article, *supra*, a partial explanation is provided for this conundrum in the "friendly parent" best interest factor rewarding the parent more likely to encourage the relationship between the child and the other parent:

> When broadly construed, friendly parent provisions can profoundly impact cases by becoming the lens through which everything is viewed. In the visitation context, such provisions can function as two-sided shields. On one side they simultaneously protect against unwarranted withholding of parenting time and frivolous allegations of abuse or unfit parenting, while on the other side they may hinder reasonable inquiry into inappropriate or questionable parenting practices if such inquiries are labeled "unfriendly." The two types of problems most directly impacted by the provision- domestic violence and parental alienation- involve difficult-to-prove allegations and counter-allegations. They illustrate how the friendly parent provision is all too often a double-edged sword for parents and children caught in the middle of conflicts.[27]

Why are domestic violence allegations considered difficult to prove by only a preponderance of evidence in custody cases?[28] Defendants are regularly convicted beyond a reasonable doubt in criminal court on basic testimonial evidence, which, when contested, is resolved by the fact finder. For example, in

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[27] Elrod, *supra* at fn.24, 394.

[28] Professor Fineman warns that, "*Judges must confront the possibility that the very judicial system in which they make their family decisions can become weapons of further abuse. The nature of domestic violence as well as the ways it can interact with and distort the family law system must be kept in mind as courts attempt to determine custody of children. Judges should be encouraged to treat violence as a serious matter and attach appropriate consequences to it in domestic cases. Unfortunately, all too often a claim of spousal abuse at divorce is greeted with suspicion, and the system plays itself out according to old, worn stereotypes in an ancient battle of the sexes in which the interest of children are sacrificed*." Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 Fam. L. Q. 211, 214 (2002).

Brooks v. State,[29] the appellate court described the matter as "*a straightforward swearing contest. Brooks had his version, and the victim had hers. As succinctly put by the Solicitor during closing argument, 'One person says it happened; one person says it didn't happen. Y'all are going to have to decide…' The jury decided.*" The testimony of solely the victim supported the harassment conviction in *State v. Traxler*.[30]

This thesis contends that the "conflict elimination" mentality on the bench, combined with the "friendly parent" factor and the misuse of mental health professionals and guardians *ad litem,* have caused the fact-finding role of the family court judges to atrophy. Instead, circularity results: abuse causes "allegations of abuse", which equals "conflict", which results in an "unfriendly parent" whose reports of abuse cannot be believed because she is an "unfriendly parent" increasing "conflict."

In this same vein, some radically argue that courts should simply assume new roles and behave themselves as therapists and conflict managers.[31] Professor Prescott has articulated an intricate philosophical justification for the Unified Family Court's role as a forum for the integration of psychology and judicial fact-

[29] 532 S.E.2d 763, 768 (Ga.Ct.App.2000).

[30] 2001 Haw.App. LEXIS 2001 (Feb.8, 2001).

[31] See, e.g., Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 Cornell J. L. & Pub. Pol'y 1 (Fall 1996); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Managemen*t, 22 U.Ark.Little Rock L.Rev. 395 (2000).

finding.[32] In 2006, Washington State Supreme Court Justice Bridge proposed even going beyond the Uniform Family Court to the "problem solving court":

> They have an interdisciplinary approach emphasizing the emotional health of the parties. They strive to achieve healthy outcomes, resulting in a permanent resolution to historically intractable problems flooding courts with excessive litigation. The drug diversion and mental health courts of criminal and child welfare law and the unified family courts all fit the new paradigm. All have in common an approach which is largely nonadversarial. They are designed to change behavior, encourage compliance with court-ordered services or plans, and end the conflict by solving the problem, not just by making a decision.[33]

While the goals expressed by Justice Bridge are certainly laudable, this thesis will assert that it is the failure of the courts to first make factual decisions based on evidentiary determinations which promotes and encourages the seemingly endless litigation in custody cases. Dr. Kathleen Faller, one of the country's leading child abuse experts, sarcastically states that the real concern of the family court is that if it "*were to take seriously and explore thoroughly an allegation of parental sexual abuse or drunken endangering of a child, this would enflame*

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[32] Dana E. Prescott, *Unified Family Courts and the Modern Judiciary as a "Street-Level Bureaucracy": To What End for the "Mythical" Role of Judges in a Democracy*, 27 Quinnipiac L.R. 55 (2009).

[33] Hon. Bobbe J. Bridge, *Solving the Family Court Puzzle: Integrating Research, Policy, and Practice: Opening Remarks to the 42nd Annual Conference of the Association of Family and Conciliation Courts*, 44 Fam.Ct.Rev. 190, 196-197 (April 2006).

rather than assuage parental conflict."[34] Accordingly, Professor Freedman writes that true fact-finding is essential for abuse victims.[35]

IV. INAPPROPRIATE DELEGATION OF FACT-FINIDNG RESPONSIBILITY TO MENTAL HEALTH PROFESSIONALS

Some of the most direct criticism of the role of mental health professionals in child custody cases comes from within the psychology field. Two psychology professors have studied the mental health practitioner's role in addressing the best interest standard in custody cases and have concluded that there is an inadequate justification for such professionals to make custodial recommendations for specific children.[36] Legal scholars have joined in the fray.[37] Professor Bowermaster has effectively argued that mental health professionals allow judges to in essence circumvent legal requirements in custody cases.[38] Professor Shuman has penned one of the more scathing critiques of the mental health professionals' role in child

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[34] *Kathleen C. Faller, Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. Ark.Little Rock L.Rev. 429, 431 (Spring 2000).

[35] Ann E. Freedman, Symposium, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 Am. U .J. Gender Soc. Pol'y & L. 567 (2003).

[36] Daniel A. Krauss and Bruce D. Sales, *Legal Standards, Expertise and Experts in the Resolution of Contested Child Custody Cases*, 6 Psych. Pub.Pol and L. 843 (2000).

[37] Perhaps the most essential and authoritative guide on this topic is Clare Dalton, et al, *Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge's Guide* (National Council of Juvenile and Family Court Judges, State Justice Institute 2004, 2006).

[38] Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 Duq. L. Rev. 265 (2002).

custody cases, arguing that their techniques lack sufficient validity and reliability to merit their use[39] and that they have been delegated judicial power without legislative approval.[40] His conclusion is concordant with the theme of this thesis:

> If society wishes to use mental health practitioners as experts in child custody cases, then law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change in the process for resolving child custody cases. The stakes are too important to fail to speak openly about the transformation of the role of experts in custody litigation.[41]

One Florida appellate judge lamented the "*proliferating and extensive use of psychologists in these family law cases and the extreme reliance trial courts appear to place on their opinions*."[42] He decried that, "*These experts conduct interviews, sometimes do tests and then are allowed to render opinions on an*

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[39] Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment,* 36 Fam. L. Q. 135 (2002).

[40] *Id* at. 160-161.

[41] *Id*. at 162. Professor Shuman suggests, probably accurately, that family court attorneys have allowed this problem to exist as a result of the lawyers' issue conflicts of interest, *i.e.* they do not want to challenge today on behalf of one client what they will likely want to take advantage of tomorrow on behalf of another client. *Id*. at 155. One such conflict was detected by the concurring judge in *Keesee v. Keesee*, 675 So. 2d 655, 659 (Fl. Dist. Ct. App. 1996) (Griffin, J. concurring), where a lawyer was sponsoring the testimony of a psychologist to minimize his client's addiction, when in an earlier case for another client the same lawyer attacked the same psychologist as being unqualified to opine on addiction issues due to the expert's own addiction history.

[42] *Keesee v. Keesee*, 675 So. 2d 655, 659 (Fl. Dist. Ct. App. 1996) (Griffin, J. concurring), cited in Jane H. Aiken & Jane C. Murphy, *Dealing With Complex Evidence of Domestic Violence: A Primer for the Civil Bench,* 39 Court Rev. 12, 15 (Summer 2002).

extraordinary range of subjects…whether someone is prone to domestic violence, who is telling the truth, and who is in 'denial.' Yet, no one seems to be able to muster any measure of the competence or reliability of these opinions... These psychological evaluations in many cases amount to no more than an exercise in human lie detection." [43] One seasoned Illinois psychologist/custody evaluator somewhat reluctantly admitted that regarding parent-child observations sessions, one of the evaluators' favorite tools:

> there appear to be no empirical data on observing parents and children specifically in custody evaluations…At some point in the future, it may be feasible to create a methodology for observing parent-child interactions that is both forensically useful and includes adequately high levels of statistical reliability and validity. Clearly, the custody field, by being in early stages of development, is far from that point right now.[44]

A variety of views on these questions was exchanged between lawyers and psychologists in the April, 2005, symposium issue on child custody evaluations of the Family Court Review.[45]

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[43] *Id.* Support for the judge's views is found in Steven K. Erickson, et al., *Psychological Testing and Child Custody Evaluations in Family Court:: A Dialogue: A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 Fam.Ct.Rev. 157 (April 2007).

[44] Daniel J. Hynan, *Parent-Child Observations in Custody Evaluations*, 41 Fam.Ct. Rev. 214, 221 (April 2003).

[45] Timothy M. Tippins and Jeffrey P. Wittmann, *Empirical and Ethical Problems With Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 193 (April 2005); Thomas Grisso, *Commentary to Tippins and Wittmann: What Now*?, 43 Fam. Ct. 223 (April 2005); Joan B. Kelly and Janet R. Johnston, *Commentary To Tippins and Wittmann*, 43 Fam.Ct. Rev. 233 (April 2005).

In one of the more extreme contrary perspectives, one prominent psychologist flatly posits that in the desired multi-disciplinary approach to custody cases, judges should have no primary responsibility—it should all be left up to the mental health professionals.[46] She arrogates to the "qualified mental health professional" "*fact-finding…and a written report with recommendations presented to the court*."[47] One mental health practitioner arrogantly urged the creation of "a behavioral psychologist judge" position to adjudicate child custody cases and, thus, eliminating the need for other expert testimony.[48]

One authority claims that the "*neutral mental health evaluators in custody disputes is thus, in some ways, a healthy social development*" because they are a "*symbol that something more is at stake in a custody dispute than the grievances of one party against the other—the welfare of the child*."[49] This reflects the flawed

[46] Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help*?, 22 U. Ark. Little Rock L.Rev. 453 (2000).

[47] *Id*. at 472.

[48] Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 Hofstra L. Rev. 115. 126 (1986).

[49] Andrew Schepard, *Mental Health Evaluations in Child Custody Disputes*, 43 Fam.Ct.Rev. 187 (April 2005). Two other psychologists suggest their professional field should dominate the "high-conflict" custody cases, because "*the adversarial nature of the legal system plays right into the self-righteous, blaming, punishing, and ego-centric attitudes of high conflict litigants. Their traits are amplified by the fact that a fault model, in contradistinction to the conceptual thrust of divorce resolution, lies at the core of child custody resolution. Even though the legal system speaks of the 'best-interests' standard, a 'parental fitness' paradigm is operationally at the center of legal child custody dispute resolution, reinforcing the already rabid zeal of high conflict litigants to prove that their adversaries are 'unfit*.'" Barry Bricklin and Gail Elliot, *Qualifications and Techniques to Be Used by Judges, Attorneys, and Mental health Professionals Who deal With Children in High Conflict Divorce Cases*, 22 U. of Ark.Little Rock L.Rev. 501, 508-509 (2000). These authors' attitude, with its resulting hostility to recognition of the fact that some parents are indeed dangerous and abusive and

general assumption in the "conflict"/ "friendly parent" model that a parent's "grievance" is presumed to have nothing to do in reality with the child's best interest. One New York clinical law professor found this reliance on custody investigators to be terribly flawed, biased, and archaic.[50] Still another law professor argues that custody evaluations are an overly costly and unwarranted invasion of privacy void of documented benefits.[51]

In the Louisiana child custody case of *Still v. Bourque*, [52] the appellate court commended the trial judge for "*retaining the responsibility to evaluate the case himself, based on the evidence presented to him rather than turning it over to an independent evaluator.*" On the other hand, in the unreported Minnesota case of *In*

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to the efforts of the non-abusive parents to provide the evidence of such necessary to protect their children, can be primarily explained by their embrace of the vastly discredited Richard Gardner and his rejected "parental alienation syndrome." *Id*. at 517-519. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Fam. L. Q. 527 (2001); *Jennifer Hoult, The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy,* 26 Children's Legal Rights J. 1 (2006); Clare Dalton, et al, Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge's Guide 24 (National Council of Juvenile and Family Court Judges, State Justice Institute 2004, 2006) [parental alienation "discredited by the scientific community." "*Any testimony that a party to a custody case suffers from the syndrome or 'parental alienation' should therefore be ruled inadmissible and/or stricken from the evaluation report…*"]. In *Schmitz v. Schmitz*, 890 So.2d 1248 (Ct.App.Fl. 2005), the court vacated a custody transfer to a father against whom a domestic violence restraining order was pending, where the change was based on a last-minute custody evaluation "finding" severe parental alienation. In a well-reasoned factual analysis, the court rejected the opinions of Dr. Gardner himself, and found that the daughter was molested by her father in *Ford v. Ford*, 2000 Del.Fam.Ct. LEXIS 104 (Dec. 19, 2000).

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Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of The Court Ordered Investigation*, 40 Colum. J.L.& Soc. Probs. 527 (2007). For example, there should be no assumption that sexual abuse allegations are likely to be false in custody cases. See, e.g., Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 Court Rev. 12 (Spring 1988).

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Mary E. O'Connell, *Child Custody Evaluations: Social Science and Public Policy: Mandated Custody Evaluations and the Limits of Judicial Power*, 47 Fam Ct. Rev. 304 (April 2009).

52 870 So.2d 1088, 1091 (La.Ct.App.2004).

re the Child of R.G.Y. of S.P.V.C.,[53] the trial court indeed abdicated its authority and used very weak, contradictory, and inappropriate custody evaluator testimony in a domestic violence case to override direct victim testimony, and to ultimately reply on the "friendly parent" factor in granting sole legal and physical custody to the father accused of, *inter alia*, choking his wife:

> [The mother] testified about a choking incident, an incident in which respondent punched the wall next to [her], and an incident in which [the father] held [the mother's] head over the toilet demanding that she get her pregnancy sickness over with so she could fix dinner…The incidents were never reported to the police. [The father] denied [the mother's] claims and testified about his own version of events.
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> When asked about investigating the abuse claims, the custody evaluator testified she had very little to go on because there were no police reports[54] and it was essentially a matter of "he said, she said."[55] The district court did not explicitly state that it found either party's testimony regarding the alleged domestic-abuse incidents to be credible, but the court's finding that "there were no findings of abuse

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[53] *2004 Minn.App. LEXIS 1374 (Dec.7, 2004).*

[54] This statement suggests that the custody evaluator knew little about domestic violence, since perhaps half of all victims do not call the police. John E.B. Myers, Myers on Evidence in Child, Domestic and Elder Abuse Cases § 9.02 (2005). Recent studies indicate that mandatory arrest policies actually deter victims from calling the police. Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 Santa Clara L. Rev. 1201, 1222 (2009) ["Calling the police is also not an attractive option for a woman who knows arrest will result and her abuser may react with retaliatory violence"].

[55] In *Douglas v. Douglas*, 2009 Ky.App.Unpub.LEXIS 948 (Nov.6, 2009), where no expert testimony was presented, the court specifically rejected the argument that "he said, she said" evidence was insufficient as a matter of law to support a domestic violence order of protection. The resolution of conflicting witness testimony requiring credibility determinations is a matter of weight, not sufficiency, in a so-called "he said, she said" case. *State v. Gullette*, 975 So.2d 753, 759-760 (La.Ct.App. 2008). See also, *State v. Johnson*, 944 A.2d 416 (App.Ct.Conn.2008), where the court rejected a proposed jury instruction attacking the credibility of a child sexual abuse victim in a so-called "he said, she said" case.

> at trial" indicates that the court did not find the evidence sufficient to support a finding that the abuse occurred.
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> * * *
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> The child-custody evaluator testified that she believed [the father] would be more likely to include [the mother] in [the child's] life than [the mother] would be to include [the father]. She also testified, however, that regarding this point, she "was a little concerned that [the father]'s actions didn't always equate with his statements. I think that when push comes to shove [the father] likes things his way."[56]

Judges (the finder of fact in a bench trial), not mental health practitioners,[57] determine credibility. The law is clear in this regard, and if attorneys would simply object to these credibility opinions, and if the judges were to rule correctly, the problem would mostly be solved.[58] In *Capell v. Capell*,[59] the appellate court

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[56] *Id*. at *16-17.

[57] Some prominent custody evaluators take the position that they, themselves, should determine credibility, or as they call it, "*opinions with regard to historical truth and validity of the psychological aspects of a party's claims. Unlike therapy, in which information is often based on what is provided by the patient and therefore may be somewhat incomplete, grossly biased, or honestly misperceived, a competent custody evaluation includes an examination of the accuracy of each party's story in addition to other informational sources*." Jonathan W. Gould & Phillip M. Stahl, *The Art and Science of Child Custody Evaluations: Integrating Clinical and Forensic Mental Health Models*, 38 Fam. & Concil. Cts. Rev. 392, 399 (2000). Facts do not seem to matter, as the authors suggest that the focus be "*on the children and the family dynamics rather than taking sides in the family dispute. In writing the report, the evaluator may need to describe each parent's concern and how that parent has engaged in tribal warfare against the other parent*." *Id*. at 408. Furthermore, they write, "*Rather than being a technician who gathers data and reports on it, the artful custody evaluator will be mindful of the family and encourage resolution of conflict, minimize unnecessary negatives, and ultimately refocus parents on their children*." *Id*. at 409. Abused women and children arguably stand little chance of belief and protection when facing such a mindset. Dr. Gould later contributed to another related article. Mary Johanna McCurley, et al., *Protecting Children From Incompetent Forensic Evaluations and Expert Testimony*, 19 J. Am. Acad. Matrimonial Law. 277 (2005). Assuming a "strategic incentive for both sides to distort historical events" in family violence cases, another psychologist explains credibility determinations though the usual "high-conflict" lens in custody evaluations. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Custody Case,* 38 Fam. & Concil. Cts. Rev. 462 (Oct.2000).

[58] See, e.g., *State v. Caudill*, 2008 Ohio 1557 (Ohio Ct.App.2008) [Although an expert can testify to explain a victim's behavior, he or she cannot opine that the victim was indeed abused, that the alleged abuser is guilty, and cannot comment on credibility]; *Gonzalez v. State*, 2009 Tex.App. LEXIS 8878 (Ct.App.Tex. 2009); *Bly v. State*, 660 S.E.2d 713

condemned a trial court's abdication of its factual determination in a domestic violence case to a "polygraph expert," despite the coerced consent of the parties to the plan. Whether an act of abuse or violence occurred is most appropriately adjudicated by listening to the parties' versions of the events in their direct testimony, and any available corroboration, even in so-called "he said, she said" situations. A pure instance of such a trial is found in *E.O. v. K.H.*,[60] a harassment restraining order case, where the only witnesses were the *pro se* husband and wife, but which provided sufficient evidence for the granting of the order. As the Montana Supreme Court explained in another domestic violence order of protection "he said, she said" case with no "expert" testimony, the trial court must base its decision "*on the relative credibility of the witnesses and strength of the evidence presented*."[61] There, the court reproduced the following excerpt from the trial court record, which is compelling in its simplicity:

> *The Court*: So, I have conflicting testimony before me and have to decide who to believe. That's my job.

(Ga.2008); *State v. Hudson*, 208 P.3d 1236 (Ct.App.Wash. 2009); *Long v. State*, 2008 Tex.App. LEXIS 8885 (Ct.App. Tex 2008) (unpublished); *People v. Sandoval*, 79 Cal.Rptr. 3d 634 (Ct.App.Cal. 2008); State v. Winterich, 2008 Ohio 1813 (Ct.App.Ohio 2008); *Kansas v. Reed*, 191 P.3d 341 (Ct.App.Kan. 2008) [distinguishing exert testimony explaining dynamics of victim recantation from expert credibility opinions]; *State v. Vidrine*, 9 So.3d 1095 (Ct.App. La. 2009).

[59]

817 A.2d 337 (Sup.Ct. N.J. App.Div. 2003). After the polygraph plan was abandoned in the trial court, the trial judge based his abuse findings on the actual trial testimony.

[60] 2009 N.J. Super. Unpub. LEXIS 2963 (Dec. 7, 2009).

[61] *Williams v. Williams*, 2006 Mont. LEXIS 683 (Dec.27, 2006).

Counsel: That's true, but we do get to a "he said she said" situation unfortunately.

The Court: That's correct. And I have to decide who to believe. I'm about to do that.

Counsel: Okay.

The Court: The temporary order of protection issued by the justice court August 19, 2005, is made permanent…[62]

An interesting example of a judge applying his own lay psychological analysis to resolve conflicting testimony in a "he said, she said" domestic violence case is found in *Iellimo v. Iellimo.*[63] The court, who found the wife petitioner credible and granted the order of protection, determined, with no expert assistance, that the defendant had deluded himself into believing that the abusive conduct did not occur, or occurred because his marriage to the victim entitled him to behave that way.[64] The Pennsylvania case of *Kline v. Kline*[65] illustrates the common flawed custody evaluator's approach to facts, where the court disregarded the custody evaluator's "glowing recommendation" that the father, who has a domestic violence adjudication against him, be awarded the children's custody. The judge summarized his rejection of the custody evaluator's opinions, and instead based his ruling, as a judge should do, on the real factual evidence he heard in open court:

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[62] *Id*.at **3-5.

[63] *2009 N.J.Super Unpub. LEXIS 226 (SupCt.App.Div.Feb.18, 2009).*

[64] *Id*. at *6-7.

[65] *2006 Pa. Dist & Cnty.Dec. LEXIS 557, 83 Pa. D.& C. 4th 424 (Com.Pl. Ct. Jun.19, 2006).*

> Father's main evidence to support his request for a change is the custody evaluator's opinion. This Court was extremely interested in what the evaluator had to report and studied the evaluates [sic] report and testimony carefully. The evaluator was extremely positive about Father, and extremely negative about Mother….
>
> The evaluator portrayed Father as pro-active, patient, caring, and responsible. The evaluator portrayed Mother as angry, manipulative, self-centered, and fraudulent. If this Court had seen evidence to support the evaluator's conclusions, this custody decision would have been straightforward. But, that evidence was simply not there. This Court is at a loss to reconcile the evaluator's portrayals of the parents with the evidence in the record and with the evidence that came out at trial.[66]

Guardians *ad litem*, or attorneys supposedly appointed to represent the best interests of children in custody cases, have also been criticized for usurping judicial fact finding, with the blessing of the court itself.[67]

Perhaps the most improper attempted use of these evaluators is to expect them to determine if an accused parent "fits the profile" of an abuser, or committed the act in question. Quite simply- and it cannot be overstated- there is no such profile, and no mental health evaluation or psychological/physiological testing

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[66] *Id*. at 428-430.

[67] See, eg., ABA, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 Fam. L.Q. 131 (2003); Raven C. Lidman & Betsy Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 Geo. Mason L.Rev. 255 (1998).; Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy.J.of Pub.Int. L. 106 (2002); *Weisgarber v. Weisgarber*, 2009 Ohio 20 (Ct.App.Ohio 2009); *Bencomo v. Bencomo*, 147 P.3d 67 (Ct.App.Haw. 2006); *In Matter of M.H.B.*, 664 S.E.2d 583 (Ct.App. N.C. 2008); *In Matter of A.S.*, 661 S.E.2d 313 (Ct.App. N.C. 2008). In New York, "law guardians" are appointed to represent children's interests in custody cases, and they are often inappropriately viewed by attorneys and judges as "an assistant to the judge." Nancy S. Erickson, *The Role of The Law Guardian in a Custody Case Involving Domestic Violence*, 27 Fordham Urb. L. J. 817, 818 (2000).

(including the ABEL test of sexual arousal) can determine if an accused parent did or did not abuse a spouse or child, unless the accused admits the act in the process. Any such proffered testimony is inadmissible.[68]

V. EXCLUDING THE TESTIMONY OF CHILD VICTIMS AND WITNESSES: PROTECTED FROM WHAT AND AT WHAT COST?

A parent who suggests that her child testify in a custody trial is frequently *ipso facto* immediately viewed by the court as placing her interests and wants above the child's welfare, and may risk a fatal setback in her efforts to maintain custody. Obviously, children should not be paraded willy-nilly up and down the witness stand to "take sides" or to be "put in the middle" in their parents' "battles." But, when parents beat or molest their children, or attack the child's other parent, the child victim or witness may be the only witness,[69] or an essential

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See, e.g., *State v. Miller*, 709 P.2d 350 (Utah 1985); *State v. Kallin*, 877 P.2d 138 (Utah 1994); *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000); *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995); *U.S. v. Birdsbill*, 243 F.Supp. 2d 1128 (D.Mont. 2003); *State v. Austin*, 727 N.W.2d 790 (N.D.2007); *U.S. v. Banks*, 36 M.J. 150 (C.M.A. 1992); *R.D. v. State*, 706 So.2d 770 (Ala.Ct.Crim.App. 1997); *U.S. v. White Horse*, 117 F.Supp.2d 973, *aff'd* 316 F.3d 769 (8th Cir. 2003), *cert den*. 124 S.Ct. 116 (2003); *Gentry v. State*, 443 S.E.2d 667 (Ga.Ct.App. 1994); *In re A.V.*, 849 S.W.2d 393 (Tex.Ct.App. 1993); *U.S.v. Gillespie*, 852 F.2d 475 (9th Cir. 1988). See, also, Annotation, *Admissibility of Expert Testimony as to Criminal Defendant's Propensity Toward Sexual Deviation*, 42 A.L.R.4th 937 (1985); John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §§6.31-6.32 (2005).

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In *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), the Supreme Court said, "Child abuse is one of the most difficult crimes to detect and prosecute because there are often no witnesses except the victim." This observation is frequently noted by courts nationwide. John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* § 6.01 (2005).

corroborator.[70] Professor John E.B. Myers cogently observes, "*All in all, testifying is difficult for children. Yet without children's testimony, the legal system would be unable to protect them. Thus, children's testimony is essential.*"[71] Even though expert testimony concerning typical behaviors of sexually abused children may be admissible, the case law is settled that the child's credibility is not for the expert to determine, but for the fact-finder, in custody cases the judge, to decide.[72] Therefore, the child's credibility is best ascertained by testimony in the judge's presence. To condemn a parent who, under such circumstances, must present a child's factual testimony in order to safeguard the child she is required by law to

[70] Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 New Eng. L. Rev. 1415, 1428-1429 (1991) ["Because there are usually no witnesses to the incident, and the perpetrator rarely confesses, in most cases, the determination that sexual abuse has occurred is based on the testimony of the child. Whether the perpetrator is being criminally charged, the child's testimony is very important in proceedings in the family and juvenile courts."]

[71] John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* 134 (2005).

[72] See, e.g., *Bell v. Commonwealth*, 245 S.W.3d 744 (Ky.2008); *Al-Attaway v. State*, 657 S.E.2d 552, 554-555 (Ga.Ct.App. 2008); *State v. D.W.N.,* 290 S.W.3d 814 (Ct.App.Mo. 2009); *State v. Foster*, 244 S.W.3d 800 (Ct.App.Mo. 2008); *State v. Moran* 728 P.2d 248, 255 (Ariz.1986). For an excellent collection of the case law, see John E.B. Myers*, Myers on Evidence in Child, Domestic and Elder Abuse Cases* §§ 6-24-6.25 (2005).

protect[73] is to cynically undermine the purported universal judicial embrace of the child's "best interest."

Perhaps the best and most candid report of the range of judicial attitudes regarding child witnesses in custody cases comes from a 1999 survey of Michigan judges responding to the question, "What should the trial advocate understand about children as witnesses?" The replies indicate the various levels of understanding of the difference between the child as fact witness vs. the child simply being "put in the middle" (each statement is that of an individual judge):[74]

> -It is both unfair to the children and unwise for the advocate to compel them to testify. Furthermore, I don't allow it.
>
> -The child's version will probably not conform with their client's.
>
> -Children do not want to be caught in the middle of which parent is better or preferred. Children are quite capable of figuring out why a question is being asked and will normally give a neutral answer to avoid taking sides. When a child does take sides, it is important to show that it is for a balanced reason and not because one side is influencing or conditioning the child. Unfortunately some children will prefer a parent for the wrong reasons such as

[73] A parent who knowingly allows the other parent to abuse her child, or who refuses to acknowledge that the abuse is occurring, is subject to permanent parental rights termination. See, e.g., In the *Matter of Haven A.B*. 2010 WL 17129 (Tenn. Court of Appeals 4/28/10); *In Re the Adoption of B.D.W*., 185 S.W.3d 727 (Mo.Ct.App.2006); *In Re: Tyler D*., 578 S.E.2d 343 (W.Va. 2003); *In re S.S*., 748 N.E.2d 729 (Ill.App.Ct. 2001); *In the Matter of Vivian OO,* 826 N.Y.S.2d 763 (N.Y.App.Div.2006); *In re Jason L*., 810 A.2d 765 (R.I. 2002). See also Elizabeth Trainor, Annotation, *Sufficiency of Evidence to Establish Parent's Knowledge or Allowance of Child's Sexual Abuse by Another Under Statute Permitting Termination of Parental Rights for "Allowing" or "Knowingly Allowing" Such Abuse to Occur,* 53 A.L.R.5th 499 (2010). Accordingly, mothers are often in a "damned if you do, damned if you don't" dilemma when their children are sexually abused by the fathers.

[74] David C. Sarnacki, *Family Law: Effective Advocacy in Divorce Trials*, 78 Mich. Bar. J. 20, 24 (January 1999).

which parent lets the son or daughter stay out later, drive the car, or run with which friends. Some children will not admit such reasons. In other words, it is important to be aware of potential motives characteristic of children.

-I would say be careful and use them sparingly, if at all. Most judges do not like children being used as witnesses in divorce trials, myself included.

-Children who are "coached" are obvious to a judge. Also, advocates rely too much on the "preference" of a child. These "preferences" are not always as the advocate indicates they will be.

-They HATE being caught in the middle.

-Keep them out of the litigation. If necessary, create a nonadversarial setting.

-They should not be placed or allowed to be placed in a position where they are forced to choose between parents or become an advocate for one parent.

-They should be there only in the best interests of the entire family and should not be asked questions to which the answers are hurtful to one of the parents unless absolutely necessary to the best interests of the family as a whole.

-Most judges don't like to see the children called as witnesses except in the most unusual circumstances.

-In a custody dispute, many trial judges abhor the prospect of a child being called to the stand and being examined and cross-examined by counsel for his or her parents. Absent some unique circumstances (*e.g.*, physical or sexual abuse) children should be interviewed by the judge in chambers and should not be forced to testify regarding a preference in the presence of a parent or be subjected to cross-examination. Often, I find that the child has told both parents that he or she prefers them. This revelation is best received in chambers. I generally ask a parent who wishes to have a child testify against another parent if they have considered that I may

view this effort as evidence of their unwillingness to foster a strong parent-child bond with that other parent. Counsel who proposes to call a child as a witness should carefully examine why the child is being called and what other evidentiary sources there are to make the same points in the court.

-Children should only be called as a last resort. When called, a child advocate should understand the child's developmental state and question accordingly.

-Use in open court only if no other alternative exists and their testimony is absolutely necessary.

-Children of the relationship should be drawn into adult disputes only as a last resort, and then, only on a limited basis.

-Most judges are reluctant to base a decision on the testimony of a child. The credibility of a parent will not be enhanced by a child's testimony offered in substantiation. A child's testimony is given weight in situations where: the evidence concerns an abuse that the child has been subjected to; and where the mature child more objectively testifies to facts than do the parents.

A 1988 survey of eighty-eight Virginia judges yielded related observations in suggesting the use of the short "judicial interview" of the child to determine his or her preferences in custody cases.[75] Regarding the "fact" v. "factor" value of the "interview", the article noted:

> Judges described the most important purposes of the interview as getting an <u>impression</u> of the child to compare with other evidence and learning the child's wishes regarding custody. Some judges also acknowledged that, through the interview, they <u>hoped</u> to learn about

[75] Elizabeth S. Scott, et al., *Parents, Children, and the Courts: Children's Preferences in Adjudicated Custody Decisions,* 22 Ga. L. Rev. 1035 (1988).

> the parents' behavior and activities and to confirm the veracity of the parents' evidence [footnotes omitted, emphasis added].[76]

The terms "hoped" and "impression" do not suggest a fact driven inquiry, and may be partially explained by the blanket discouragement of any attorney involvement and the typical fifteen minute interview duration of the judge controlled interview.[77] Since the judge is operating without the benefit of all of the facts available to the trial attorney developing a case through the orderly presentation of evidence, is trained to evaluate evidence and not to elicit it, and is discouraged as a neutral adjudicator from pursuing a line of questioning designed to "prove" anything, the value of such an "interview" in the resolution of contested facts is highly questionable. This is further confirmed by additional responses to the survey:

> Judges varied in their concern about the impact of evidence regarding the parents offered by the child in a confidential interview. When asked what their response would be to a damaging new disclosure about a parent, some judges said they would stop the interview; others would confront the parent; other responses included initiating a social service investigation, directing the guardian *ad litem* to look into the matter, and ignoring the disclosure.[78]

[76] *Id*. at 1048.

[77] *Id*. at 1048.

[78] *Id*. at 1049.

These survey results clearly underscore the discomfort many judges have with actual direct evidence of parental misconduct provided by a child in the best position to provide it, even to the extraordinary point of admittedly ignoring it.[79]

Instead of the judicial "interview"[80], the traditional alternative method of presenting a child's evidence is the actual testimony elicited by attorney questioning and cross-examination, an exercise universally embraced as critical to accurate fact-finding in every other courtroom setting. The Virginia judges surveyed assumed this practice would harm the child and were strongly against it, even admitting to successfully pressuring attorneys, who did not want to antagonize the judge, to abandon the idea.[81] So, if the child's testimony is necessary to protect her from further abuse, she is failed by a court system more concerned about harming her in the process of protecting her. This perhaps well-meaning, but misguided presumption is further addressed below. In addition, there are preparation and accommodation tools that an attorney using a child witness can utilize to minimize any trauma.[82]

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[79] This is noted elsewhere. When a judge interviews a child, he "might disregard an accurate statement rather than try to verify it." Lisa Carol Rogers, *Child Custody: The Judicial Interview of the Child*, 47 La.L.Rev. 559, 573 (1987).

[80] See generally, Barbara A. Atwood, *The Children's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Ariz.L.Rev. 629 (2003).

[81] *Id.* at 1051-1052.

[82] Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N. Dak. L. Rev. 939, 971-978 (1995); Chris A. Messerly, *The Child Witness in Tort Cases: The Trials and Tribulations of Representing Children*, 24 Wm. Mitchell L. Rev. 169 (1998); John E.B. Myers, Myers on Evidence in Child, Domestic and

One Texas family court judge discussed the "*most commonly-accepted methods for involving a child in the divorcing process…during the adversarial phase, when attention centers on the child's ability to contribute to the fact-finding process, rather than on the child's need to be empowered.*"[83] She further explained that, "*A distinction exists between involving a child in the adversarial phase of the lawsuit in order to facilitate the fact-finding process and giving a child the opportunity to participate in the process of developing a parenting plan that will govern his or her life.*"[84] She explained that involving children in the fact-finding phase often results in "family dysfunction" and that in "high-conflict" cases "*the child's ability to objectively contribute to the fact-finding process is questionable.*"[85] This illogical perspective is extremely troubling in several respects. First, in endangerment cases, the child's ability to assist in his or her own protection <u>is</u> empowering. Second, the fact-finding process is essential to developing a safe parenting plan that will best govern the child's life. Third, the family is already dysfunctional from the underlying abusive parental conduct- not from "conflict."

Elder Abuse Cases §3.02 (2005).

[83] Debra H. Lehrmann, *The Child's Voice: An Analysis of the Methodology Used to involve Children in Custody Litigation*, 65 Tex. B.J. 882 (2002).

[84] *Id*. at 885-886.

[85] *Id*. at 886.

Live testimony by a child especially concerns family court judges, because the emotional trauma of cross-examination and "siding" against a parent is considered too great.[86] One judge writes that his judicial peers, "*will be found to be almost unanimous n condemning any party who seeks to put a child on the stand*."[87] One Florida family lawyer vehemently criticized such attitudes:

> "Testifying in a dissolution of marriage case is stressful, so lets' not allow the parties to testify." Sounds bizarre?
>
> How about, "We know that appearing in court causes stress to attorneys so we are going to have the attorneys appear via social works who will present the attorneys' arguments for them." Sound absurd?
>
> Then how about a judge saying, "I never allow children to testify in family court because it is stressful for them." I attended a family law seminar in October 1997 at which a panel of six judges and general masters appeared. Two of the six proudly made this statement…this judicial view means the exclusion of the testimony of those most affected by the family court decisions. Yet this judicial view is growing.[88]

This Florida lawyer went on to describe several of his cases in which the vocal seminar judges refused to allow a) a very willing 10 year old child witness to testify that her father smoked crack cocaine and that she had no food to eat; b) a 16 year old to testify about problems in her father's home during visitation; and c) a 10 and 14 year old to testify that their father's domestic violence allegations

[86] *Id.* at 887.,

[87] Roderic Duncan, *Trial of Custody Cases As Viewed By a Judge,* in Child Custody & Visitation Law and Practice §27.09 [4] (Sandra Morgan Little ed., 1999).

[88] William D. Slicker, *Child Testimony*, 72 Fla.Bar J. 46 (Nov.1998).

against their mother were false.[89] The children were angry for being left out of the decision making process, which was likely more stressful than would have been the excluded testimony.[90] Of course, any child witness must first be competent to testify.[91]

With a healthy blend of humor and outrage, the author concluded:[92]

> And so it is with the new theory that "it is never in the best interest of children to testify in family matters." Poppycock. It's another theory, creeping in on cat feet, that undermines the main purpose of our judicial system. "Although minimizing trauma for child witnesses is an important social objective, the paramount purpose of a trial is to discover the truth about some event or transaction."[93] However, this theory not only contradicts common sense (are we to cancel school testing and dentist appointments for children because they cause stress?) but it also flies in the face of the social sciences research. Someone needs to stand up and say, "The judges, like the emperor, have no clothes."

A recent Louisiana case supports these observations. In *Bandy v. Bandy*,[94] a twelve year old testified in the custody modification trial that he observed drugs in his father's truck, and accordingly feared his father due to this and other incidents

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[89] *Id*.

[90] *Id.*, citing Note, *Lawyering for the Child, Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 Yale L.J. 1126, 1163-1164 (1978).

[91] John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, §§2.01-2.19 (2005).

[92] *Id.*

[93] Citing Lucy McGough, *Child Witnesses: Fragile Voices in the American Legal System* 17 (1994).

[94] 971 So.2d 456 (La.Ct.App. 2007).

involving drug chaos in his father's home. The appellate court reversed the trial court's refusal to limit the child's visitation with his father.[95]

There is ample documentation that it is in the best interest of the children victimized in endangerment cases to have an effective, empowered voice in their own protection, and that their testimony is not presumptively damaging.[96] One major study of criminal cases by Dr. Gail Goodman confirmed that most children are able to testify in a traditional manner when prepared and supported, and that the child witnesses had good post-trial reports about the experience. Many of those who did not testify were disappointed.[97]

To appreciate the over-reactive nature of the abhorrence of the child as fact witness in family court custody cases, it is helpful to examine the role of child witnesses in other, more difficult contexts. In *Snell v. State*,[98] a fifteen year old

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[95] *Id*. at 461-466.

[96] Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W.Va.L.Rev. 237, 321-322 (1999); John E.B. Myers, Myers on Evidence in Child, Domestic and Elder Abuse Cases §301 (2005), citing many psychological and medical studies.

[97] Gail S. Goodman, et al., *Testifying in Criminal Court*, 57 Monographs of the Society for Research in Child Development 1-141, at 121 (1992), cited in Myers, *supra*, § 301 at 140. The follow-up study 13 years later on the same children reported that both testifying and not testifying could have both positive and negative consequences, depending on the circumstances. Jodi A. Quas, et al., *Childhood Sexual Assault Victims: Long –term Outcomes After Testifying in Criminal Court*, 70 Monographs of the Society for Research in Child Development 1-45 (2005). In family court cases, unlike criminal cases, if a child is not protected because she did not testify, she may be subjected to more ongoing abuse during continued visitation with the abusive parent, which would undoubtedly exacerbate the negative consequences.

[98] 677 So.2d 786 (Ct.Crim.App.Ala. 1995). A similar delayed report of sexual abuse was adequately explained by the child victim's testimony in *State v. Paulson*, 2007 Iowa App. LEXIS (Ct.App. Feb. 14, 2007).

testified extensively about her sexual abuse by a neighbor three years earlier, and adequately explained to the jury her delayed reporting of the crimes. In *State v. Mitchell*, a ten year old girl convincingly testified to her stepfather's vicious and bloody attack on her mother, despite his threat to the child at the time that "*If you try to call the police, I'm gonna snap your neck.*" Her seven year old sister also testified. The defendant was sentenced to thirty-seven years.[99] In *Commonwealth v. Parmelee,*[100] a stepfather was sentenced to 105-210 years in the state prison after his conviction for 61 sexual offences, including rape and incest, against his three young stepdaughters. Despite several years of penile and digital vaginal, oral, and anal penetration, which left intensive scarring, and the abuser's death threats to keep them from revealing his crimes, all three victims testified in the jury trial. In *State v. Jones*[101], a nine year child and his ten year old sister testified against their father, who stabbed and slashed their mother with a butcher knife in the children's presence, then threw her down the stairs where she bled to death. The conviction resulted in a life sentence. Both children were described by the sheriff who found them as "basket cases" covered in their mother's blood.[102]

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[99] 2006 Tenn.Crim.App. LEXIS 426 (Jun.1, 2006).

[100] *74 Pa.D.& C. 4th 62 (Com.Pl.Ct.2005); aff'd* at 829 A.2d 363 (Pa.Sup.Ct. 2003); subsequent habeas relief denied in *Parmalee v. Piazza*, 622 F.Supp.2d 212 (M.D.Pa.2008).

[101] *2002 Ohio 2791 (Ct.App.Ohio 2002).*

[102] *Id.* at *P87.

In *In Matter of K.R.J.B.*,[103] a juvenile court termination of parental rights trial, an eight year old boy testified that he hoped his grandparents would "really" be his "mom and dad" and wanted his birth mother to be his "x-mom" because she "does not take care of [him] right." He recalled being left alone at night by his birth mother, and that he was scared. The child also testified to hard spankings with a belt from his mother's boyfriend, with whom she fought "a million times" when they would "hit and cuss" at each other. In *State v. Armstrong,*[104] a fifteen year old girl described to a jury digital and penile penetration at age thirteen by her neighbor, who first undressed her and then was "moving up and down" and "breathing hard."

In *Bourdon v. State*,[105] four children (ages 4, 6, 7, and 10) testified before a jury in the conviction of their uncle that he touched them anally and genitally. In *McCloud v. U.S.*,[106] another criminal jury trial, three children (ages 11, 7, and 6 years old at trial) "testified in a reasonably consistent fashion" about the physical abuse inflicted by their mother and her husband. In the juvenile court

[103] 228 S.W.3d 611, 616 (Ct.App.Mo.2007).

[104] *2005 Tenn. Crim. App. LEXIS 768 (July 22, 2005).*

[105] 2002 Alas.App. LEXIS 245 (Dec.11,2002).Similar child testimony was presented in *State v. Reiter*, 2003 Wash.App.LEXIS 62 (Jan.17, 2003).

[106] 781 A.2d 744, 746 (D.C.Ct.App.2001). Some of the counts were remanded for a hearing concerning one of the adult witnesses, which was unconnected to the children's testimony. *Id.* at 754. Similar physical abuse testimony was presented against the child victims' father in *State v. Cabinatan*, 2005 Haw.App. LEXIS 104 (Mar.8, 2005).

dependency trial of *In re Veronica G.*[107], twelve and ten year old siblings testified to a pattern of physical abuse by their mother, including burns from a cigarette lighter, and extensive domestic violence.

Finally, in *Whitham v. Arkansas Dept. of Human Services*,[108] a seven year old was able to testify in the juvenile court adjudicatory hearing that her father took off her clothes, touched her "potty spot", and made her drink his semen from a cup ("yellow stuff that came out of his body front").

It is not suggested here that live testimony from children is the only way for their statements detailing their experience or observations of abuse to be admitted into evidence. In very many cases, the traditional non-hearsay extrajudicial statements and hearsay exceptions, such as verbal assertions, non-verbal assertions, state of mind reports, present sense impressions, excited utterances, statements for the purpose of diagnosis and treatment, fresh complaints of rape or sexual abuse, and residual exceptions come into the record as substantive evidence.[109]

VI. CONCLUSION

When a family court judge confronts an endangerment case where facts, as both a matter of law and in the child's best interest, are key to a safe custody

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[107] 68 Cal.Rptr. 465, 470 (Ct.App.Cal. 2007).

[108] *Id*. at *2-12.

[109] Unquestionably, the most authoritative treatise here is John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, §§ 7.01-7.25 (2005).

outcome, the pursuit of truth and accurate fact finding is best ensured by a return to the basic judicial role of listening to witnesses, examining any corroborative evidence, and using logical inferences to fill in the gaps. Delegation of that fact-finding role to mental health evaluators and guardians *ad litem* defeats that task. Finally, if a child victim or witness is offered to prove or corroborate an important fact, the trial judge should attend to such testimony carefully, and without any castigation of the party calling the child to the stand.

West's Louisiana Statutes Annotated
Louisiana Civil Code (Refs & Annos)
Book I. Of Persons
Title V. Divorce (Refs & Annos)
Chapter 2. Provisional and Incidental Proceedings (Refs & Annos)
Section 3. Child Custody (Refs & Annos)

LSA-C.C. Art. 132

Art. 132. Award of custody to parents

Effective: May 23, 2018
Currentness

If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the provisions of R.S. 9:364 apply or the best interest of the child requires a different award. Subject to the provisions of R.S. 9:364, in the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.

Credits

Acts 1993, No. 261, § 1, eff. Jan. 1, 1994. Amended by Acts 2018, No. 412, § 1, eff. May 23, 2018.

LSA-C.C. Art. 132, LA C.C. Art. 132

Titles 6 to 10, 15 and 25 of the Revised Statutes and the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Code are current through the 2018 Regular Session, for all laws effective through December 31, 2018. All other statutes and codes are current through the 2018 First Extraordinary Session.

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APPENDIX 25.0 B CONSENT JUDGMENT

CERTIFICATE

(prior findings by a Court of violence/abuse)

By signing and submitting the attached Consent Judgment to the Court, the parties hereby certify that:

1. One or more of the parties awarded custody or unsupervised visitation herein has a history of perpetrating family violence, domestic abuse, or sexual abuse as defined by La. R.S. 9:364 (A). The history is listed below and all judgments or orders which are not contained in this record, are attached hereto.

_____

_____

_____

_____

2. Since the last incidence of abuse, all three of the following conditions apply:

(A) The perpetrator has successfully completed a court-monitored domestic abuse intervention program as defined in La.R.S. 9:362 or a treatment program designed for sexual abuse. A certificate of completion is attached hereto.

and

(B) The perpetrating parent is not abusing alcohol or using illegal substances scheduled in La.R.S. 40:964.

and

(C) The best interest of the child or children, considering the factors listed in C.C. art. 134, requires the perpetrating parent's participation as a custodial parent because of the other parent's absence, mental illness, substance abuse, or other circumstance negatively affecting the child or children.

3. The parties specifically waive a hearing herein. They acknowledge that the court may set the matter for hearing before approval of their consent agreement.

Dated and signed this _____

day of _____, 20____

_____

Petitioner

Dated and signed this _____

day of _____, 20___

_____

Defendant

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APPENDIX 25.0 A: CONSENT JUDGMENT

CERTIFICATE

(no prior finding by a Court of violence/abuse)

The parties hereto have signed and submit the attached Consent Judgment to the Court for approval and signature and certify to the court that no party awarded custody or unsupervised visitation of a child herein has a history of perpetrating family violence, domestic abuse, or sexual abuse as defined by La. R.S. 9:364(A).

Dated and signed this _____

day of _____, 20____

_____

Petitioner

Dated and signed this _____

day of _____, 20____

_____

Defendant

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Title V. Divorce (Refs & Annos)
Chapter 2. Provisional and Incidental Proceedings (Refs & Annos)
Section 3. Child Custody (Refs & Annos)

LSA-C.C. Art. 134

Art. 134. Factors in determining child's best interest

Effective: May 23, 2018
Currentness

A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including:

(1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration.

(2) The love, affection, and other emotional ties between each party and the child.

(3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

(4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

(5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

(6) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(7) The moral fitness of each party, insofar as it affects the welfare of the child.

(8) The history of substance abuse, violence, or criminal activity of any party.

(9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.

(10) The home, school, and community history of the child.

(11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party.

(13) The distance between the respective residences of the parties.

(14) The responsibility for the care and rearing of the child previously exercised by each party.

B. In cases involving a history of committing family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, including sexual abuse, as defined in R.S. 14:403(A)(4)(b), whether or not a party has sought relief under any applicable law, the court shall determine an award of custody or visitation in accordance with R.S. 9:341 and 364. The court may only find a history of committing family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence.

Credits

Acts 1993, No. 261, § 1, eff. Jan. 1, 1994. Amended by Acts 2018, No. 412, § 1, eff. May 23, 2018.

LSA-C.C. Art. 134, LA C.C. Art. 134

Titles 6 to 10, 15 and 25 of the Revised Statutes and the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Code are current through the 2018 Regular Session, for all laws effective through December 31, 2018. All other statutes and codes are current through the 2018 First Extraordinary Session.

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Louisiana Revised Statutes (Refs & Annos)
Title 9. Civil Code Ancillaries (Refs & Annos)
Code Book I. Of Persons (Refs & Annos)
Code Title V. Divorce (Refs & Annos)
Chapter 1. Divorce (Refs & Annos)
Part III. Child Custody (Refs & Annos)
Subpart C. Protective and Remedial Provisions

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LSA-R.S. 9:341

§ 341. Restriction on visitation

Effective: May 23, 2018
Currentness

A. Whenever the court finds by a preponderance of the evidence that a parent has subjected any of his or her children or stepchildren to family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, has subjected any other household member, as defined in R.S. 46:2132, to a history of family violence as defined in R.S. 9:364(A), or has willingly permitted such abuse to any of his or her children or stepchildren despite having the ability to prevent it, the court shall allow only supervised visitation between the abusive parent and the abused child or children until such parent proves by a preponderance of the evidence at a contradictory hearing that the abusive parent has successfully completed a court monitored domestic abuse intervention program, as defined in R.S. 9:362(3), since the last incident of domestic violence or family abuse. At the hearing, the court shall consider evidence of the abusive parent's current mental health condition and the possibility the abusive parent will again subject his children. stepchildren, or other household member to family violence or domestic abuse, or willingly permit such abuse to any of his or her children or stepchildren despite having the ability to prevent it. The court shall order visitation only if the abusive parent proves by a preponderance of the evidence that visitation would be in the best interest of the child, considering the factors in Civil Code Article 134, and would not cause physical, emotional, or psychological damage to the child. Should visitation be allowed, the court shall order such restrictions, conditions, and safeguards necessary to minimize any risk of harm to the child, including continued supervision. All costs incurred in compliance with the provisions of this Section shall be borne by the abusive parent.

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B. Whenever the court finds by clear and convincing evidence that a parent has subjected any of his children, stepchildren, or any household member as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403(A)(4)(b), or has willingly permitted such abuse to any of his or her children, stepchildren, or a household member, despite having the ability to prevent the abuse, the court shall prohibit all visitation and contact between the abusive parent and the children until such parent proves by a preponderance of the evidence at a contradictory hearing that he has successfully completed a treatment program designed for such sexual abusers. At the hearing, the court shall consider evidence of the abusive parent's current mental health condition and the possibility the abusive parent will repeat such conduct in the future. The court and shall order visitation only if the abusive parent proves by a preponderance of the evidence that visitation would be in the best interest of the child, and that visitation would not cause physical, emotional, or psychological damage to the child. Should visitation be allowed, the court shall order such restrictions, conditions, and safeguards necessary to minimize any risk of harm to the child, including supervision of the visitation. All costs incurred in compliance with the provisions of this Section shall be the responsibility of the abusive parent.

C. When visitation has been restricted or prohibited by the court pursuant to Subsections A or B of this Section, and the court subsequently authorizes further restricted visitation, the parent whose visitation has been restricted shall not remove the child from the jurisdiction of the court except for good cause shown and with the prior approval of the court.

Credits

Acts 1993, No. 261, § 5, eff. Jan. 1, 1994. Amended by Acts 2018, No. 412, § 2, eff. May 23, 2018.

LSA-R.S. 9:341, LA R.S. 9:341

Titles 6 to 10, 15 and 25 of the Revised Statutes and the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Code are current through the 2018 Regular Session, for all laws effective through December 31, 2018. All other statutes and codes are current through the 2018 First Extraordinary Session.

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Louisiana Revised Statutes (Refs & Annos)
Title 9. Civil Code Ancillaries (Refs & Annos)
Code Book I. Of Persons (Refs & Annos)
Code Title V. Divorce (Refs & Annos)
Chapter 1. Divorce (Refs & Annos)
Part IV. Post-Separation Family Violence Relief Act

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LSA-R.S. 9:364

§ 364. Child custody; visitation

Effective: May 23, 2018
Currentness

A. There is created a presumption that no parent who has a history of perpetrating family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403(A)(4)(b), or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence.

B. The presumption shall be overcome only if the court finds all of the following by a preponderance of the evidence:

(1) The perpetrating parent has successfully completed a court-monitored domestic abuse intervention program as defined in R.S. 9:362, or a treatment program designed for sexual abusers, after the last instance of abuse.

(2) The perpetrating parent is not abusing alcohol or using illegal substances scheduled in R.S. 40:964.

(3) The best interest of the child or children, considering the factors listed in Civil Code Article 134, requires the perpetrating parent's participation as a custodial parent because of the other parent's absence, mental illness, substance abuse, or other circumstance negatively affecting the child or children.

C. The fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody

D. If the court finds that both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence. In such a case, the court shall mandate completion of a court-monitored domestic abuse intervention program by the custodial parent. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person pursuant to Civil Code Article 133, provided that the person would not allow access to a violent parent except as ordered by the court.

E. If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent pursuant to R.S. 9:341.

F. If any court finds, by clear and convincing evidence, that a parent has sexually abused his or her child or children, the court shall prohibit all visitation and contact between the abusive parent and the children pursuant to R.S. 9:341.

Credits

Added by Acts 1992, No. 1091, § 1. Amended by Acts 1995, No. 888, § 1; Acts 2014, No. 194, § 1; Acts 2018, No. 412, § 2, eff. May 23, 2018.

LSA-R.S. 9:364, LA R.S. 9:364

Titles 6 to 10, 15 and 25 of the Revised Statutes and the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Code are current through the 2018 Regular Session, for all laws effective through December 31, 2018. All other statutes and codes are current through the 2018 First Extraordinary Session.

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Loyola Journal of Public Interest Law

Spring 2002

Article

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

Richard **Ducote** [FNa1] [FNaa1]

I. Introduction

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

> ***107** Hundreds of years of legal history have lead the United States to implement a system that ensures that every party in a legal proceeding gets a voice. We rest assured that, unlike in other nations, we cannot be incarcerated, so well thought out: God Bless America.
>
> But there is a forgotten minority that is not afforded those basic rights. They are not criminals or foreign aliens. In contrast, they are a group we hold dear- one innocent and well meaning, with no hidden agendas or twisted motives- children.
>
> Instead of being actually represented, children get their 'best interests' represented by adults. We children have no choice and no recourse when those adults have their own agendas. A case in point? Mine. [FN2]

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

> The lawyer appointed to represent my 'best interests' . . . ***108** spent her allotted time with me parroting my father's words, attempting to convince me that I really wanted to live with him. She ignored my reports of abuse. . . .
>
> I wrote the judge letters, called her office and did everything I could to make myself heard. She ignored my pleas. I had no rights. I couldn't replace my lawyer with one who would speak for me nor could I speak for myself in court. I couldn't cross-examine the court evaluators or therapists and their claims were thus untouchable. I felt like I was witnessing the proceedings from the wrong side of soundproof glass. [FN6]

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

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

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

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

II. History And Background

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

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

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

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

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

> There are no laws governing guardians ad litem, yet the legal go-betweens continue to make decisions in South Carolina's courtrooms that affect children throughout the state.
>
> Often those decisions are to the detriment of the children, according to a task force of approximately 40 people who gathered Thursday night in Aiken County to discuss a domestic court reform movement . . .
>
> Cases involving divorce, child custody and child support are handled by . . . guardians ad litem- who must be paid for their services. No laws or office governs them, and no training course is required . . .
>
> [I]t is the guardian ad litem that has parents and grandparents concerned.
>
> Many of the parents and grandparents at the meeting complained that paid guardians ad litem showed no concern for the cases they handled and made poor decisions that were not in the children's best interests. [FN21]

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

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

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

> Many concerns have been raised about the use of guardians ad litem. Most complaints have centered on guardian actions in family court cases, primarily in contested divorce actions. Complaints have focused on guardian bias, lack of oversight and accountability, inadequate training, and inappropriate communications between guardians and judges. Parents have also complained that there is no relief if they have a problem with a guardian.
>
> * * *
>
> [T]he guardians are not effective. Judges differ in how they use guardians ad litem. In some cases, guardians simply gather information and present recommendations to the court. In other cases, guardians may act as custody evaluators, or visitation expediters. [FN27] Judges, court ***113** administrators, and guardians do not always agree on what constitutes the guardians' responsibilities. Judges also differ in their expectations of guardians for communicating and reporting. People told us the multiplicity of the guardian roles can be confusing, especially to parents who may not always understand why guardians were appointed. [FN28]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> ***118** Unfortunately, few jurisdictions currently have clear standards to tell parents and lawyers when or why an independent representative for a child should be appointed or precisely what the representative should do. All too often, appointments are made without necessary guidance to ensure that the representative's duties are defined and fulfilled satisfactorily.
>
> Partly because of this lack of clarity and definition, too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or the representatives themselves understand children's representatives' roles, duties and powers. Judges and representatives have been targets of litigant's resentments, public criticism, and even pro se legal actions. Meanwhile, children's court appointed representatives have struggled with the very real contradiction between this perceived role as lawyer, protector, investigator, and substitute judge.
>
> * * *
>
> As for the role of Guardian ad litem specifically, these standards do not purport to resolve or eliminate all of the inherent theoretical and practical contradictions that arise from such appointments nor to provide a complete substitute code of ethics for them; but, they do impose substantial requirements for qualify control, professionalism, clarity, certainty, uniformity, and predictability in how individual Guardians ad litem, judges and court systems will act. [FN46]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> What is more difficult to assess is whether the lay opinion testimony of the guardian ad litem on the ultimate issues in the case was enhanced in the eyes of the district judge because she had served as an advocate for the children's best interests. Indeed, the district judge specifically found that the testimony of the guardian ad litem in every instance, was more credible than that of the Mother. Our review is further complicated by the fact that the tapes conversations, evidence which the district judge found 'shocking,' were admitted though this witness . [footnote omitted]
>
> After careful review of the record, and eliminating from consideration the opinions of the guardian ad litem and the contents of the tape recordings, we find that the record clearly supports the district court's determination that the best interests of the children were served by the Father's continuing custody. [FN105]

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

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

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

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

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

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

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

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

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

> There is a dearth of caselaw in this state regarding the proper role of a guardian ad litem report in a custody case . . . We recognize the concern of the mother that a family court may give undue weight to the recommendations contained in the guardian ad litem's report. However, we do not think such concern should annul the long practice in this state of ***131** permitting guardians ad litem to make written reports to the court as long as the parties' right to confrontation are protected. As stated in [a prior decision] this may be accomplished by affording to the parties the right of cross-examination of the guardian ad litem and all other persons the guardian may have talked to whose testimony formed the basis of his recommendations. [footnote omitted]
>
> We reject the mother's somewhat novel argument that guardians ad litem should be precluded altogether from giving opinions regarding custody. We think much of the criticism of guardians ad litem stems from the failure of the bar to recognize the proper function of a guardian ad litem. A guardian ad litem is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person . . .
>
> The requirement that the children have independent legal representation does not in any way suggest that the parents or the trial court were unmindful of the children's welfare. Rather, it reflects the conviction that the children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. Properly understood, therefore, the guardian ad litem does not usurp the judge's function; he aids it . . . [footnoted omitted]
>
> We hold the extent to which a guardian ad litem is permitted to testify and give an opinion or recommendation in a child custody case is left to the sound discretion of the trial judge. However, judges should be mindful of the duty of the guardian ad litem to advocate and fully protect the interests of his ward. Any exercise of discretion by the court which unreasonably interferes with the performance of that duty amounts to an abuse of discretion. [FN118]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A very recent American Bar Association guide for judges warns:

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

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

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

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

VI. Rules? We Don't Need No Stinkin Rules! [FN164]

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

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

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

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

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

> The major source to be avoided is the trial judge. As early as the time of appointment, the judge may attempt to fill in the attorney-guardian ad litem on what has transpired so far, and express her preliminary thoughts on the matter. In doing this, the judge may communicate her expectations to the attorney guardian ad litem, or share a view of the parties, ex parte. Unless the attorney-guardian ad litem is working in a state where his role has been defined as assisting the court as an aide-de-camp for a specific piece of legislation, ex parte communications with the judge should be avoided. If the attorney-guardian ad litem is to advocate an arrangement in ***145** the best interests of the child, and the judge is to impose it, they may be seen as more of a team than the traditional lawyer/judge relationship. Entering the case without an identified adversary gives an illusion of neutrality that invites private dialogue between judge and attorney. But the attorney- guardian ad litem is, in many jurisdictions, merely another voice, representing another interested party, and should take pains to discourage any off-the-record dialogue with the bench.
>
> Asking the judge not to talk about a case off the record can be awkward at best. The most expeditious way to sidestep this quagmire may be to say matter-of- factly, 'Excuse me for one moment, your Honor, while I get other counsel to join us,' and leave the room and summon the other attorneys. If the judge persists in conveying his views, the attorney-guardian ad litem should indicate that she is concerned about committing an ethical breach with respect to ex parte communications, as it is likely that the court simply has not considered the conversation in that light. [FN173]

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

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

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

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

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

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

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

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

VII. Fees: There Goes The College Tuition

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

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

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

VIII. Conclusion: It's A Jungle Out There

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

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

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

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

[FN2]. Id.

[FN3]. Id.

[FN4]. Id.

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

[FN6]. Krause, supra note 3.

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

[FN8]. Id.

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

[FN10]. Krause, supra note 3.

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

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

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

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

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

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

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

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

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

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

[FN20]. Id. at 301.

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

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

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

[FN24]. Id.

[FN25]. Id. at 2.

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

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

[FN28]. Id. at 1-2.

[FN29]. Id. at 2-5.

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

[FN31]. Id.

[FN32]. Minn. Stat. § 518.165 (2001).

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

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

[FN35]. Id. at *4.

[FN36]. Id.

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

[FN38]. Id.

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

[FN40]. Id.

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

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

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

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

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

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

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

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

[FN49]. Wis. Stat. § 48.415 (2000)

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

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

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

[FN53]. Id. at 1383.

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

[FN55]. Id. at 393.

[FN56]. Id. [emphasis added].

[FN57]. Id. at 394.

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

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

[FN60]. Id. at 394.

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

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

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

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

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

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

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

[FN68]. Id. at 395.

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

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

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

[FN72]. Id. at 396.

[FN73]. Id. at 396-97.

[FN74]. Id. at 397.

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

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

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

[FN78]. Id. at 140.

[FN79]. Id. at 137.

[FN80]. Id.

[FN81]. Id.

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

[FN83]. Id. at 138.

[FN84]. Id. at 139.

[FN85]. Id. at 141.

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

[FN87]. Id. at 140.

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

[FN89]. Id. at 456.

[FN90]. Id.

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

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

[FN93]. Id.

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

[FN95]. Id. at 148-150.

[FN96]. Id. at 149.

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

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

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

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

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

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

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

[FN104]. Id.

[FN105]. Id. at 155.

[FN106]. Id.

[FN107]. Id. at 148

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

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

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

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

[FN112]. Id. at 442.

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

[FN114]. Id.

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

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

[FN117]. Id.

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

[FN119]. Id. at 442.

[FN120]. Id. at 458.

[FN121]. Id. at 444.

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

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

[FN124]. Id. at 240.

[FN125]. Id.

[FN126]. Id. at 243, 245.

[FN127]. Id. at 241.

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

[FN129]. Id.

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

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

[FN132]. Id. at 248.

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

[FN134]. Id. at 2.

[FN135]. Id. at 11-12

[FN136]. Id.

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

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

[FN139]. Id.

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

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

[FN142]. Id. at 748.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN157]. See infra note 163.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN172]. Id. at 307.

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

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

[FN175]. Id. at 263-264.

[FN176]. Id. at 264.

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

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

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

[FN180]. Id. at 92, 99.

[FN181]. Id. at 95, 99.

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

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

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

[FN185]. Id. at 1225

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

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

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

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

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

[FN191]. Id. at 283.

[FN192]. Id.

[FN193]. Id. at 284

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

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

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

[FN196]. Id. at 551.

[FN197]. Id. at 553.

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

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

[FN200]. Id.

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

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

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

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

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

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Beliefs and Recommendations Regarding Child Custody and Visitation in Cases Involving Domestic Violence: A Comparison of Professionals in Different Roles

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Abstract

Research is lacking on differing perspectives regarding custody cases involving domestic violence (DV). In a survey of judges, legal aid attorneys, private attorneys, DV program workers, and child custody evaluators (n = 1,187), judges, private attorneys, and evaluators were more likely to believe that mothers make false DV allegations and alienate their children. In response to a vignette, evaluators and private attorneys were most likely to recommend joint custody and least likely to recommend sole custody to the survivor. Legal aid attorneys and DV workers were similar on many variables. Gender, DV knowledge, and knowing victims explained many group differences.

Keywords

child custody, professional differences, domestic violence, intimate partner violence

Professionals involved in determining the best interests of the child in custody and visitation disputes are often at odds over perceptions of family dynamics and the weight various factors should be given. This seems especially true in cases involving domestic violence (DV). Professionals often differ over whether all DV is the same

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and whether mediation and shared parenting should be allowed in some cases (Salem & Dunford-Jackson, 2008). A debate continues over the extent to which DV is best described as predominantly violence against women or as "bidirectional." For some, evidence that different patterns of DV (bidirectional vs. male-to-female violence) exist in different types of samples (Johnson, 2008) has resolved this question. Others insist that when evaluators are taught that women are the primary victims, they may produce biased evaluation outcomes (Dutton, 2006). There is evidence that practitioners who work directly with violent men are more open to maintaining the father–child relationship than those who work with victims, and misperceptions about the roles of other practitioners often impede collaboration (Lessard et al., 2010). Research on differing perspectives and their underlying causes may foster understanding among professionals and build the consensus needed for improved decision-making.

Care in decision-making is crucial because outcomes in DV cases can be extremely harmful. For example, sole or joint custody of children may be granted to an abusive parent, endangering children through violence directly or through violence exposure (Neustein & Lesher, 2005; Radford & Hester, 2006; Saunders, 2007). Moreover, lack of custody to an offender does not ensure safety as parent–child visitation arrangements may not be safe for children or parents (Jaffe & Crooks, 2007). The purpose of this study is to further our understanding of the beliefs and recommendations of various professional groups regarding custody and visitation in cases of DV and to uncover the reasons for any differences. Knowing group differences and the reasons for them can lead to improved selection and training of the professionals involved in these custody–visitation determinations.

Among concerns raised by past research are that professionals often fail to detect DV (e.g., Araji & Bosek, 2010; Davis, O'Sullivan, Fields, & Susser, 2010; Johnson, Saccuzzo, & Koen, 2005; Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). Also, several studies show little or no difference between DV and non-DV cases in custody and visitation outcomes (Kernic et al., 2005; Logan, Walker, Jordan, & Horvath, 2002; O'Sullivan, 2000; O'Sullivan, King, Levin-Russell, & Horowitz, 2006; Pranzo, 2013). Professionals may simply be unaware of indicators of actual or potential harm. For example, they may be unaware that half of men who batter also physically abuse their children (Straus, 1983) and that stalking, harassment, and emotional abuse often continue and may increase after separation (e.g., Bachman & Saltzman, 1995; DeKeseredy & Schwartz, 2009; Tjaden & Thoennes, 2000; Watson & Ancis, 2013).

Some forms of bias may also explain professionals' behavior. Gender bias is frequently shown to exist in custody disputes (Dragiewicz, 2010; Rosen & Etlin, 1996). This bias is tied to mistrust of women, in particular to the belief that they often make false allegations of child abuse and DV. Studies show that rates of false allegations of child abuse are quite low in divorce cases (e.g., Faller, 2005; Trocme & Bala, 2005), yet in a 1997 study, nearly half of the abuse allegations (physical, sexual, emotional abuse of any family member) were viewed by evaluators as false or inflated (LaFortune & Carpenter, 1998). Male evaluators believed allegations to be false to a greater extent than female evaluators (57% and 34%, respectively). The actual rate of false allegations of DV has not been studied, but two studies show that mothers are *more* likely

than fathers to have their abuse allegations substantiated (Davis, O'Sullivan, Fields, & Susser, 2010; Johnston, Lee, Olesen, & Walters, 2005). In general, women are less likely than men to blame victims of DV and sexual assault for their victimization (e.g., Saunders, Lynch, Grayson, & Linz, 1987). Female family court judges in one study showed more knowledge of DV and greater support for victim protections (Morrill, Dai, Dunn, Sung, & Smith, 2005). In another study, women evaluators were more likely to believe DV arose from "power and control" by the offender, as opposed to holding a "family systems" perspective in which both partners are believed to contribute to the violence. Those with a "power and control" orientation in turn were more likely to recommend parenting plans with higher levels of safety (Davis et al., 2010). Other traits and background factors may also be related to beliefs and behaviors. For example, a professional with a history of being abused may be more supportive of victims (Yoshihama & Mills, 2003) and personally knowing a survivor can be related to an increased likelihood of uncovering abuse (Saunders & Kindy, 1993).

The belief that parents in custody disputes, especially mothers, commonly make false allegations of DV and child abuse is related to the use of "parent-alienation syndrome" (PAS; Gardner, 1998) or "parental-alienation disorder" (Bernet, 2008). The original formulation of the syndrome assumes that such allegations are intended to alienate children from the other parent (Brown, Frederico, Hewitt, & Sheehan, 2001; Meier, 2009). Battered mothers are vulnerable to these labels when they raise concerns about the possible abuse of the children by an ex-partner (Meier, 2009; Meier, 2013; Pranzo, 2013). Many child abuse professionals believe that mothers coach their children to make false allegations in contested custody disputes (Faller, 2007). However, research indicates that, although false allegations may occur more frequently in divorce-access disputes, the non-custodial parent (usually the father), not the custodial parent (usually the mother), tends to make more false reports (Trocme & Bala, 2005). The "friendly parent" legal factor for determining the child's best interests is also likely to place battered parents in a no-win situation (Zorza, 2007). Although survivors have a reasonable reluctance to co-parent out of fear of harm (Hardesty & Ganong, 2006), they are still expected to facilitate a good relationship between the child and the other parent. Survivors may end up being labeled "unfriendly" or "uncooperative," thereby increasing the risk of losing their children (American Psychological Association, 1996).

Evaluators appear to have become somewhat more cognizant of the importance of abuse and violence over time. In a 1996 survey, Ackerman and Ackerman (1996) found that 38% of psychologists who conducted child custody evaluations listed evidence of physical or sexual abuse as a major reason for sole custody, compared with 64% in 2008 (Ackerman & Pritzl, 2011). In a 2001 survey of psychologist evaluators, the three most important criteria for custody recommendations were parent–child emotional ties, willingness and ability of parents to encourage a close relationship with the other parent, and DV (Bow & Quinnell, 2001; 8.1-8.4 on a 9-point scale with 9 = *extremely important*). In 2003, Bow and Boxer reported that nearly all evaluators had some DV knowledge acquisition (median of 4 seminars and 18 books/articles) and appeared to follow established standards for custody evaluations when evaluating DV

cases. For many, a history of DV weighed heavily in their recommendations: 76% listed it as "greatly" or "extremely" important.

Increased training is likely to be associated with the increased focus on DV. In a study of judges, those with DV education were more likely to grant sole custody to abused mothers (Morrill et al., 2005). In another evaluation of judicial DV training, most of the judges saw specific behavior changes in their focus on victim safety, batterer accountability, and judicial leadership 6 months after the training (Jaffe, 2010). In a qualitative study of evaluators, DV training was related to (a) use of a power-and-control conceptualization of DV, (b) the belief that DV is highly relevant in custody evaluation, (c) the belief that false allegations are rare, and (d) the belief that recommendations should emphasize safety rather than co-parenting (Haselschwerdt, Hardesty, & Hans, 2011). In a survey of 465 evaluators, we found that acquisition of DV knowledge, in particular workshops and lectures on post-separation violence and DV screening, was related to attitudes supporting victims and the recommendation that a victim mother receive custody in a case vignette (Saunders, Tolman, & Faller, 2013). Despite increased education to help distinguish types of violence (conflict-based vs. control-based), another study found evaluators' recommendations for a DV vignette did not result in differential outcomes and most evaluators recommended joint custody (Hans, Hardesty, Haselschwerdt, & Frey, 2014).

In this study, we explored differences in beliefs and custody–visitation recommendations across five professional groups: custody evaluators, private attorneys, legal aid attorneys, judges, and DV program workers. We expected the DV workers to differ the most from the other groups. We predicted that some variables would help to explain group differences, specifically gender, knowing DV victims, and knowledge of DV.

Method[1]

Recruitment Procedures and Response to Invitations

Prior to participant recruitment, the study's human subjects procedures were approved by a university's Institutional Review Board.

Evaluators. We generated invitation lists from several sources: (a) members of the Association of Family and Conciliation Courts (AFCC) who were psychologists, because they are likely to conduct custody evaluations; (b) web searches for evaluators; (c) a list from another researcher based primarily on web searches; and (d) email and telephone contact with the directors of court-based custody evaluation units. Our final sample included 54% who worked in private settings, 29% in court settings, and 14% in both. A small percentage (3%) worked in other settings.[2]

We sent 4,017 email invitations after removing from the list 7 of our project consultants or potential consultants and 5 staff of an organization we knew were not evaluators. The email invitations were sent in 35 separate waves from May 31, 2009, through March 29, 2010. There were 302 emails with "undeliverable" notices sent back to us: 196 who reported they were not custody evaluators, and 24 who said they did not want to participate. We suspect there were many more non-evaluators on the invitation list

who did not contact us to say they were not evaluators. We sent 1,665 invitation letters to people with no email addresses on our list.[3] We used a modified Dillman (2005) procedure, sending an initial letter with a link to the web survey, followed by a copy of the survey in the mail 7-10 days later and then a postcard reminder 10 days after that. There were 196 undeliverable mailings with no forwarding address. We forwarded any mail that had a forwarding address. Two incentives were offered for completion: a US$5 donation on their behalf to one of four child abuse/child trauma organizations and a chance to win a US$100 Amazon gift card.[4]

Judges. Several organization lists and listservs were used for recruiting judges: (a) the National Council of Juvenile and Family Court Judges (NCJFCJ) sent an email invitation to its 15-member Family Violence Committee (14 judges and 1 judicial educator) with a request to forward the invitation to their colleagues. (b) The NCJFCJ Family Violence Department sent an email invitation to 522 judges who had received training through their National Judicial Institute on Domestic Violence. (c) Web searches for evaluators located 98 judges. (d) The list of AFCC members who were judges, and (e) State judicial education program directors in Texas, Georgia, and Michigan sent emails to their lists. (f) The National Coalition Against Domestic Violence (NCADV) posted an invitation for several months on its home web page. (g) The Juvenile and Family Law Department of NCJFCJ sent an email invitation; 1,443 of its members received the email (328 were not judges).[5]

Legal aid and private attorneys. We developed invitation lists from web searches and the membership list of AFCC and sent 895 invitation emails from these lists. In addition, the state training coordinators for legal aid attorneys in Ohio and Michigan sent an email invitation to their listservs. Finally, the NCADV posted an invitation on its website for several months and included a notice in its email newsletter. Twelve private attorneys and 7 legal aid attorneys responded to the NCADV invitation. A total of 366 attorneys responded to all of the invitations.

DV program workers. Most of the DV program workers (159 out of 193) were recruited from an invitation posted on the website of NCADV from December 2009 until May 2010 and from a notice in the monthly NCADV email newsletter sent to approximately 11,000 individuals. These DV workers included advocates, counselors, crisis workers, and other frontline workers; attorneys who worked at DV programs; the directors of local programs; and state coalition directors and resource coordinators.[6] No letters or surveys were sent by mail to judges, attorneys, or DV workers. Judges and attorneys were offered the opportunity at the end of the survey to send a message and a link to the survey to their colleagues.

Sample Characteristics

There were 1,246 professionals who responded to either the web-based or mailed survey, and 1,187 had enough responses to be included in analyses: 465 evaluators, 200 judges, 131 legal aid attorneys, 119 private attorneys, and 193 DV survivor program workers.

These five groups were used in the analyses. Other respondents not included in the analysis were: 4 attorney educators, 12 attorneys who could not be classified, 28 from other professions (e.g., law enforcement, probation, therapist, mediator, rehabilitation counselor, abuser intervention worker), and 34 with professional role information missing.

Almost all of the DV program workers were women (97%), as were the majority of custody evaluators and attorneys (60-75%); 43% of the judges were women. The majority of judges, evaluators, and private attorneys were above 50 years old. All professionals had advanced degrees except for 5% of the evaluators and 52% of the DV program workers. Among those with advanced degrees, half of the DV workers had master's degrees as the highest degree (52%), compared with 42% of the evaluators; 6% of the DV workers with an advanced degree had a doctorate compared with 40% of the evaluators with PhDs, 6% with PsyDs, 1% with MDs, and fewer than 1% with JDs. Evaluators were further categorized by their professional affiliation: 52% were psychologists, 24% social workers, 7% counselors, 6% marriage and family therapists, 3% lawyers, 2% psychiatrists, and 6% "other or multiple" (e.g., criminal justice, human development, divinity, education, public administration).

The judges had the most experience with custody cases, with 69% having more than 500 cases. They were followed by the two attorney groups (28-35%), then by the evaluators (20%), with the DV program workers having the least amount of experience (13%). However, in the past year, the evaluators and DV workers did not differ in the number of cases with which they were involved. Overall, the two attorney groups showed the most similarity, with no significant differences on gender, education, type of advanced degree, and the total number of custody case involvement.

Measures

Beliefs about family violence, custody, and visitation. Some of these items were taken or modified from other studies (Morrill et al., 2005; our pilot study of supervised visitation programs). Five subscales were formed based on the results of principal components factor analysis (varimax rotation, with eigenvalues greater than 1): (a) DV Survivors Make False DV Allegations (three-item scale with alpha internal reliability coefficient of .80). A factor score was used to standardize the items because they used different response options. (b) DV Survivors Alienate Child (four-item scale with alpha internal reliability coefficient of .75), (c) DV Offenders Make False DV and Child Abuse Allegations (two-item scale with alpha internal reliability coefficient of .79), (d) DV Survivors' Resistance to Co-Parenting Hurts Child (two-item scale with alpha internal reliability coefficient of .70; victims of DV "are often reluctant to share parenting roles with ex-partners because they fear further abuse" and victims "who are reluctant to work out ways to co-parent with their ex-partners are hurting their children"), (e) DV Not Relevant in Custody–Visitation Decisions (two-item scale with alpha internal reliability coefficient of .70).

Background and practice measures. Questions similar to those used in other studies of custody evaluators asked about the approximate number of custody evaluations

conducted over entire careers and the past year, the setting in which they practiced, and gender, age, educational level, and type of advanced degree (Bow & Boxer, 2003; LaFortune, 1997). A question from Bow and Boxer's study (2003) asked respondents to "estimate the percentage of your child custody cases that involve allegations of domestic violence." Questions modified from their study asked for estimates of the percentage of the alleged DV cases in which the allegations by the father and mother were false and for estimates of the percentage of cases in which both fathers and mothers were domestically violent ("not in self-defense") and the percentage of cases in which only the father and only the mother were violent.

Knowledge acquired on DV. Respondents were asked the approximate number of times they used various sources to acquire knowledge about DV: workshops, lectures, consultations, articles, books, videos, radio, and web pages.[7]

Areas of knowledge acquired. Respondents checked whether they had acquired knowledge of the (a) prevalence of DV, (b) causes of DV, (c) types of perpetrators, (d) post-separation violence, (e) screening for DV, (f) assessing dangerousness in DV cases, and (g) children's exposure to DV.

Knowledge of victims. We used a checklist for respondents to indicate whether they had personally known a victim of DV: "father," "mother," "sibling," "other relative," "friend," "coworker," "acquaintance," or "neighbor." There was also an option to check "myself."

Vignette responses. A vignette modified from one published by Dalton, Carbon, and Olsen (2003) assessed respondents' propensity for making various recommendations for custody and visitation, as well as views about the parents (included in Appendix A in Saunders, Faller, & Tolman, 2011). It included incidents of severe violence, reports of controlling behavior, and psychological test results for each parent. A set of questions asked the likelihood, from 0-100%, that either parent would cause psychological harm to the child in the future, the mother was exaggerating, the father was minimizing, mediation would be beneficial, and various custody and visitation arrangements would be in the best interest of the child. Five response options were presented: sole legal/physical custody to mother; sole legal/physical custody to father; joint legal and physical custody (shared parenting) in every area; joint legal custody, primary physical custody to mother; and joint legal custody, primary physical custody to father. These five items were made into a weighted scale based on the assumption that custody awarded to the father was the most negative outcome for the mother. It was assigned a weight of 5, whereas custody to the mother was assigned a weight of −5. Intermediate weights were 2 for joint legal custody with primary physical custody to the mother, 3 for joint legal and physical custody, and 4 for joint legal custody with primary physical custody to the father. The main options of recommending complete custody to the mother, to the father, and to both parents corresponded to the loadings on a factor analysis (−.66, .50, and .22, respectively; principal component). Respondents were then asked to assume the mother had custody and asked the likelihood they would recommend no supervision of visits, supervision by a friend or

relative, and supervision by a professional or paraprofessional at a program. A weighted scale assigned 3 for no supervision, −2 for supervision by a friend/relative, and −3 for supervision by a professional/paraprofessional. Factor loadings (principal component) corresponded proportionately to a large degree to the three options (.86, −.40, and −.90, respectively).[8] A single item measured the propensity to use mediation: "What do you think is the likelihood that the parties would benefit from mediation or another form of alternative dispute resolution?" (from 0-100%). The measures and more information on the methods are available in Saunders et al. (2011).

Analysis

Chi-square and one-way ANOVA were used to compare the five groups. Pair-wise chi-square tests and Tukey post hoc analyses were used to obtain more detailed comparisons between groups. ANCOVA was used to attempt to explain group differences, using several control variables: gender, age, knowledge of DV (frequency of methods and number of areas), and knowing DV victims. An outlier analysis resulted in the removal of one case. A multivariate statistical power analysis revealed that the sample size was more than adequate for the analyses.

Results

Personal and Professional Knowledge of DV

More than 90% in each group reported they had acquired knowledge on children's exposure to DV (see Table 1). In addition, approximately 90% in most groups had acquired knowledge on the prevalence and causes of DV. Most groups had lower rates of knowledge of post-separation violence, screening, and assessing dangerousness, in particular judges and private attorneys (62-77%, respectively). Ninety percent or more of DV workers reported acquiring every area of knowledge, significantly higher than all other groups for "assessing dangerousness" and significantly higher than three of the groups for "prevalence" and "screening." DV workers' total number of areas (M = 6.6; SD = 0.8) was significantly higher than all other groups. Custody evaluators and legal aid attorneys did not differ from each other (M = 6.1 each; SD = 1.6 and 1.5, respectively), but they differed from judges and private attorneys (who did not differ from each other: M = 5.6, SD = 1.6 and M = 5.5, SD = 1.9, respectively; one-way ANOVA, Tukey post hoc comparisons, F = 48.7).

Regarding the frequency of using different methods to acquire DV knowledge, DV workers used all of the methods significantly more often than the other groups (see Table 2). Across the other four groups, there were no differences in the frequency of acquiring knowledge through radio programs, workshops, or lectures. Custody evaluators were significantly more likely than attorneys and judges to use books, more likely than the attorneys to use films/videos, and more likely than judges to use articles, professional consultations, and websites.

Groups differed significantly on whether someone they knew had been victimized by DV, with one exception: Groups reported no significant differences for the

Table 1. Areas of DV Knowledge Acquired by Professional Role.

	Professional role					
Area of knowledge	Judges (n = 200)	Legal aid attorneys (n = 131)	Private attorneys (n = 119)	DV workers (n = 193)	Custody evaluators (n = 457)	χ^2
Prevalence of domestic violence	$87.5\%_{a}$	$90.1\%_{ab}$	$77.3\%_{a}$	$96.9\%_{b}$	$86.2\%_{a}$	28.9***
Causes of domestic violence	$90.5\%_{ab}$	$89.3\%_{ab}$	$84.9\%_{b}$	$96.9\%_{a}$	$91.0\%_{ab}$	14.3**
Types of perpetrators	$84.5\%_{a}$	$82.4\%_{a}$	$79.8\%_{a}$	$89.6\%_{a}$	$88.0\%_{a}$	9.1*
Post-separation violence	$75.0\%_{a}$	$87.8\%_{bc}$	$73.9\%_{ac}$	$90.7\%_{b}$	$83.8\%_{abc}$	26.1***
Screening for domestic violence	$62.0\%_{a}$	$87.8\%_{bcd}$	$77.3\%_{d}$	$94.8\%_{c}$	$84.2\%_{bd}$	81.0***
Assessing dangerousness in DV cases	$73.0\%_{abc}$	$84.7\%_{c}$	$66.4\%_{b}$	$96.4\%_{d}$	$78.8\%_{ac}$	54.9***
Children's exposure to DV	$92.0\%_{a}$	$91.6\%_{a}$	$91.6\%_{a}$	$96.4\%_{a}$	$94.5\%_{a}$	5.7

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. DV = domestic violence.
*$p < .05$. **$p < .01$. ***$p < .001$.

percentage of fathers who were victims (4-6% in each group; see Table 3). Nearly half of the DV workers knew a relative who had been victimized. They had higher rates than judges and evaluators of having mothers who had been DV victims, and they also had higher rates than judges, legal aid attorneys, and evaluators of having siblings who had been victims. On average, DV workers knew 1.1 family members as victims (SD = 1.1), compared with a significantly lower 0.6-0.7 for the other groups (SD = 0.9-1.0; $F = 11.9$; $p < .001$; Tukey post hoc test). DV workers knew non-family member victims (friends, acquaintances, coworkers, neighbors) at significantly higher rates than the other groups ($M = 2.6$, [$SD = 1.3$] vs. 1.5-1.7 [$SD = 1.3$]; $F = 24.0$, $p < .001$). They also reported a significantly higher rate of being a victim/survivor of DV than the other groups (44% vs. 18% across the other groups).

Domestic Violence in Professionals' Custody Cases

Judges and private attorneys estimated that 29-32% of their custody cases involved DV allegations, lower than the 40% estimated by custody evaluators, and much lower than the estimates by legal aid attorneys and DV workers (81-87%; see Table 4). DV

Table 2. Methods of DV Knowledge Acquisition by Professional Group: Means and (Standard Deviations).

Method of knowledge acquisition	Professional role					
	Judges (n = 200)	Legal aid attorneys (n = 131)	Private attorneys (n = 119)	DV workers (n = 193)	Custody evaluators (n = 457)	F test
Books†	2.9 $(1.2)_a$	2.9 $(1.2)_a$	3.1 $(1.3)_a$	4.1 $(1.2)_b$	3.6 $(1.3)_c$	28.5***
Radio programs†	1.5 $(0.9)_a$	1.5 $(0.8)_a$	1.7 $(1.0)_a$	2.3 1.8_b	1.8 $(1.1)_a$	14.0***
Films or videos†	2.4 $(1.0)_{ab}$	2.2 $(1.0)_a$	2.2 $(1.0)_a$	3.7 $(1.3)_c$	2.6 $(1.2)_b$	47.9***
Workshops†	3.6 $(1.1)_{ab}$	3.7 $(1.1)_b$	3.4 $(1.2)_a$	4.4 $(1.0)_c$	3.6) $(1.1)_{ab}$	20.9***
Articles††	3.4 $(1.3)_a$	3.7 $(1.3)_{ab}$	3.5 $(1.3)_{ab}$	4.7 $(1.4)_c$	3.9 $(1.3)_b$	27.0***
Lectures††	3.3 $(1.2)_a$	3.2 $(1.2)_a$	3.1 $(1.3)_a$	4.0 $(1.4)_b$	3.3 $(1.2)_a$	15.7***
Professional consultations††	2.5 $(1.4)_a$	3.1 $(1.6)_b$	2.9 $(1.3)_{ab}$	3.9 $(1.4)_c$	3.2 $(1.4)_b$	22.5***
Websites read††	2.3 $(1.2)_a$	3.0 $(1.4)_b$	2.8 $(1.4)_b$	4.4 $(1.5)_c$	2.9 $(1.4)_b$	58.6***
Average frequency of all methods	2.8_a (0.9)	3.0_{ab} (0.8)	2.8_a (0.9)	3.9_c (1.1)	3.1_b (0.9)	48.7***

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. Tukey post hoc comparisons. DV = domestic violence.
Response options: †1 = 0, 2 = 1-5, 3 = 6-10, 4 = 11-20, 5 = over 20. ††1 = 0, 2 = 1-10, 3 = 11-25, 4 = 26-50, 5 = 51-100, 6 = over 100.
***$p < .001$.

workers gave the highest estimates of false DV allegations by fathers in their caseloads (47%), followed by legal aid attorneys (25%), private attorneys and custody evaluators (15-17%), and judges (9%). Custody evaluators gave the highest estimates of false DV allegations by mothers (22%), followed by judges and private attorneys (13-16%), and then legal aid attorneys and DV workers (7-8%). Groups also differed significantly in their estimates of the use of non-defensive DV by fathers, mothers, or both parents. DV workers gave the highest estimates of "father only" DV (88%) followed by legal aid attorneys (79%), with judges, private attorneys, and evaluators giving much lower rates (40-50%). DV workers and evaluators were furthest apart on estimates of "mother only" DV (5% vs. 13%, respectively) and estimates of both parents being violent (10% vs. 28%, respectively). The other groups were between these two.

Table 3. Personal Knowledge of Victims/Survivors of DV by Professional Role.

	Primary role					
Variable	Judges (n = 200)	Legal aid attorneys (n = 131)	Private attorneys (n = 119)	DV program workers (n = 193)	Custody evaluators (n = 457)	χ^2
Father	5.0%$_a$	3.8%$_a$	5.0%$_a$	5.7%$_a$	4.6%$_a$	0.1
Mother	15.0%$_a$	16.8%$_{ab}$	16.8%$_{ab}$	28.0%$_b$	11.2%$_a$	28.7***
Sibling	12.5%$_a$	14.5%$_a$	16.8%$_{ab}$	30.6%$_b$	15.8%$_a$	27.9***
Other relative	31.5%$_a$	29.0%$_a$	28.6%$_a$	49.2%$_b$	28.9%$_a$	28.7***
Friend	51.5%$_a$	68.7%$_{bc}$	53.8%$_{ac}$	81.3%$_b$	52.7%$_a$	58.4***
Acquaintance	50.0%$_a$	45.0%$_a$	49.6%$_a$	67.4%$_b$	52.3%$_a$	20.6***
Coworker	37.5%$_a$	41.2%$_a$	27.7%$_a$	73.1%$_b$	35.4%$_a$	95.9***
Neighbor	21.5%$_a$	20.6%$_a$	22.7%$_a$	42.5%$_b$	22.1%$_a$	35.9***
Myself	6.5%$_a$	16.0%$_{ab}$	17.6%$_b$	44.0%$_c$	13.8%$_{ab}$	110.1***

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. DV = domestic violence.
***$p < .001$.

Beliefs About DV and Custody Visitation

Groups differed significantly regarding their beliefs about DV and custody visitation. For all groups combined, the estimated rate of false DV allegations (in general, not in their caseloads) by mothers was 18%. Groups differed significantly from a high of 23-26% for private attorneys and custody evaluators to a low of 9-10% for legal aid attorneys and DV workers (see Table 5). On the factor score scale of mothers' false DV allegations, custody evaluators and private attorneys were highest, followed by judges, and then by legal aid attorneys and DV workers. Simultaneously controlling for gender, age, DV knowledge, and knowing victims resulted in greater similarity between judges and DV workers in estimates of false allegations. For the belief in false DV allegations by fathers, DV program workers and legal aid attorneys gave the highest estimates (54-59%), and they differed significantly from judges, evaluators, and private attorneys, who ranged in their estimates from 29-37%. On the multi-item scale of beliefs in false allegations by fathers, DV workers and legal aid attorneys were the highest, followed by private attorneys and evaluators and then by judges and evaluators. On general estimates of the percentage of survivors who try to alienate the child from the other parent, judges, evaluators, and private attorneys gave the highest (29-36%), and DV workers and legal aid attorneys gave the lowest (19-20%). The pattern of significant differences was identical using the multi-item scale of parental alienation by the mother. When statistically controlling for gender, DV knowledge, and knowing victims, the judges moved closer to the legal aid attorneys in their estimates, resulting in no significant difference.

For parental alienation by DV perpetrators, DV workers and legal aid attorneys gave the highest estimates (70-76%), followed by private attorneys (58%), and then by

Table 4. Estimated DV in Professionals' Practice.

	M (*SD*)					
	Judges	Legal aid attorneys	Private attorneys	Domestic violence workers	Custody evaluators	
	n = 181-195	*n* = 120-130	*n* = 105-117	*n* = 59-60	*n* = 466-479	*F* test
Estimated % of custody cases involving allegations of DV	28.6_{a} (20.1)	80.5_{b} (24.9)	31.8_{a} (24.9)	86.6_{b} (22.6)	39.9_{c} (22.9)	170.4***
Of alleged DV cases, estimated % of false DV allegations by father	9.0_{a} (14.0)	24.6_{b} (26.6)	15.5_{c} (23.2)	46.8_{d} (31.3)	17.0_{c} (20.0)	39.3***
Of alleged DV cases, estimated % of false DV allegations by mother	13.3_{ab} (13.7)	8.0_{b} (9.6)	16.2_{ac} (16.1)	7.1_{b} (8.6)	22.0_{c} (21.2)	25.1***
Of alleged DV cases, estimated % only father used DV	50.3_{a} (30.9)	78.9_{b} (22.0)	45.4_{ac} (32.8)	87.6_{d} (14.7)	39.9_{c} (28.2)	77.1***
Of alleged DV cases, estimated % only mother used DV	8.8_{ab} (7.6)	6.1_{ab} (9.1)	10.6_{ac} (13.8)	5.3_{b} (6.8)	12.8_{ac} (13.5)	12.6***
Of alleged DV cases, estimated % both used DV	20.6_{a} (16.7)	14.6_{ab} (16.7)	20.5_{a} (20.6)	9.9_{b} (14.0)	28.9_{c} (23.0)	22.1***

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. Tukey post hoc comparisons. Sample size for DV workers is lower in this table because they were asked not to complete this section. Sample sizes ranged in size due to some missing values in the practice history variables. DV = domestic violence.
*$p < .05$. **$p < .01$. ***$p < .001$.

judges and evaluators (49-51%). On the scale reflecting the belief that DV is not important in custody decisions, judges, private attorneys, and evaluators scored the highest and DV workers the lowest, with legal aid attorneys in between. After controlling for age and number of victims known, differences no longer existed between legal aid attorneys and private attorneys and evaluators. Legal aid attorneys' difference with DV workers disappeared after controlling for DV knowledge; the difference between judges and DV workers disappeared with all covariates entered.

For the belief that DV victims hurt the child if they are reluctant to co-parent, judges, private attorneys, and evaluators were significantly higher than DV workers and legal aid attorneys on this scale. Similarly, evaluators, judges, and private attorneys believed more strongly than legal aid attorneys and DV workers that "It is a myth

Table 5. Comparison of Professional Role Groups on Beliefs About DV and Custody.

	M (*SD*)					
	Judges	Legal aid attorneys	Private attorneys	DV program worker	Custody evaluators	
	n = 179-200	*n* = 121-131	*n* = 98-119	*n* = 178-193	*n* = 368-459	*F* test
Estimated % of mothers make false DV allegation	15.2_{a} 11.1	10.4_{b} 7.5	22.6_{c} 16.6	9.5_{b} 8.4	25.6_{c} 17.0	63.1***
False domestic violence allegations by mother (3-item factor score scale)	-0.1_{a} 0.8	-0.6_{b} 0.7	0.3_{c} 1.0	-0.7_{b} 0.6	0.5_{c} 1.0	87.9***
Estimated % of fathers make false DV allegations	29.3_{a} 27.1	54.1_{b} 32.3	36.7_{c} 30.4	59.1_{b} 32.3	31.2_{a} 24.1	45.8***
Belief in false DV and child physical abuse allegations by father	6.5_{a} 4.5	10.5_{b} 5.7	8.0_{c} 5.1	11.6_{b} 6.0	6.9_{ac} 4.1	42.6***
Estimated % DV survivors try to alienate the child	29.4_{a} 23.4	19.1_{b} 20.0	32.8_{a} 24.7	20.3_{b} 22.9	35.9_{a} 25.4	20.6***
Parental alienation by mother (4-item scale)	3.9_{a} 1.7	2.7_{b} 1.5	4.1_{a} 2.0	2.6_{b} 1.5	4.3_{a} 1.9	45.4***
Estimated % DV perpetrators try to alienate the child	49.1_{a} 26.5	70.2_{b} 25.3	57.7_{c} 26.5	76.2_{b} 23.2	50.9_{ac} 25.2	45.1***
DV not important in custody	5.7_{ab} 2.4	5.2_{b} 2.6	6.1_{a} 2.5	4.0_{c} 2.0	5.9_{a} 2.6	23.9***
Victim hurts child when reluctant to co-parent (scale)	7.3_{a} 3.3	5.0_{b} 2.7	7.2_{a} 3.2	4.7_{b} 2.8	7.3_{a} 3.2	34.8***
Myth that women are less violent than men	3.4_{a} 1.7	2.4_{b} 1.6	3.4_{ac} 1.8	2.7_{b} 2.1	3.9_{c} 1.8	25.0***

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. Tukey post hoc comparisons. Sample sizes ranged in size due to some missing values in the belief variables. DV = domestic violence.
***$p < .001$.

that women are less violent than men." Controlling for other variables did not change these results.

Responses to DV Case Vignette

Custody evaluators and private attorneys were the most likely to believe that the mother in the vignette was exaggerating the extent of violence, followed in order by judges, legal aid attorneys, and DV program workers (see Table 6). The belief the

Table 6. Comparison of Professional Role Groups on DV Vignette Responses.

	M (*SD*)					
	Judges	Legal aid attorneys	Private attorneys	DV program workers	Custody evaluators	
	n = 184-191	*n* = 123-129	*n* = 100-115	*n* = 182-188	*n* = 383-426	*F* test
Likelihood mother is exaggerating extent of violence	23.0_{a} (21.3)	13.8_{b} (18.1)	30.1_{c} (25.2)	7.2_{d} (10.9)	33.1_{c} (22.9)	61.1***
Likelihood father is minimizing extent of violence	71.1_{a} (23.3)	86.6_{a} (16.7)	68.7_{a} (23.4)	89.4_{b} (16.2)	65.0_{a} (22.4)	57.9***
Likelihood parties would benefit from mediation (ADR)	42.8_{a} (32.7)	23.1_{b} (28.6)	52.8_{c} (35.1)	15.6_{b} (24.6)	41.0_{a} (30.9)	40.1***
Sole legal/physical custody to mother	49.4_{a} (35.7)	65.3_{b} (32.6)	39.6_{a} (34.5)	73.4_{b} (31.3)	39.5_{a} (32.8)	41.0***
Sole legal/physical custody to father	12.0_{ac} (14.1)	7.0_{b} (10.5)	11.3_{ab} (14.3)	9.2_{bc} (13.8)	13.7_{a} (16.5)	6.3***
Joint legal custody, primary physical custody to mother	54.6_{a} (32.7)	57.1_{a} (32.8)	56.1_{a} (28.2)	55.8_{a} (34.5)	46.1_{b} (26.8)	6.0***
Joint legal custody, primary physical custody to father	17.1_{a} (19.4)	9.2_{b} (12.7)	20.8_{a} (21.4)	11.4_{b} (16.7)	20.9_{a} (19.9)	15.0***
Joint legal and physical custody	18.7_{a} (26.4)	13.1_{a} (21.6)	28.6_{b} (30.7)	15.4_{a} (22.9)	29.4_{b} (29.3)	15.1***
Composite weighted custody scale	17.9_{a} (61.4)	-12.5_{b} (54.0)	34.9_{a} (60.4)	-15.1_{b} (54.7)	35.0_{a} (60.4)	32.0***
No supervision of the visits	54.8_{a} (33.6)	52.9_{a} (33.1)	67.6_{b} (30.6)	23.6_{c} (28.9)	47.3_{a} (32.4)	40.4***
Visits supervised by a friend or relative	33.5_{a} (28.6)	37.1_{a} (28.3)	23.4_{b} (25.0)	34.3_{a} (29.0)	34.4_{a} (24.9)	4.5***
Visits supervised by a professional or paraprofessional	36.4_{a} (35.2)	43.9_{a} (35.2)	21.5_{b} (25.9)	70.9_{c} (30.8)	38.6_{a} (32.6)	50.2***
Composite weighted visitation scale	-4.0_{a} (42.7)	-11.0_{a} (41.8)	16.3_{b} (34.2)	-44.5_{c} (31.6)	-10.3_{a} (37.8)	51.3***

Note. When there are different subscripts, the groups with different subscripts are significantly different from each other. Tukey post hoc comparisons. Sample sizes ranged in size due to some missing values in the variables. DV = domestic violence. ADR = alternative dispute resolution.
***$p < .001$.

father in the vignette was minimizing his violence was stronger for DV workers and legal aid attorneys compared with the other three groups. There were significant group differences regarding recommendations for custody. Custody evaluators, judges, and private attorneys were the least likely to report that sole legal and physical custody to

the mother would be best, with legal aid attorneys and DV workers much more likely to recommend it. Adding belief variables or DV knowledge as covariates made the difference between judges and legal aid attorneys disappear.

Custody evaluators, judges, and private attorneys were more likely than the other groups to believe that sole legal and physical custody should be with the father. For the belief that the couple should have joint legal custody, with primary physical custody going to the mother, custody evaluators were less likely than the other groups to hold this belief. For the belief that it would be best for the couple to have joint legal custody, with primary physical custody going to the father, legal aid attorneys and DV workers were less likely than the other three groups to hold this belief. Finally, for the belief that both legal and physical custody should be shared by the parents, custody evaluators and private attorneys were most likely to hold this belief. Differences in age and beliefs explained the difference between judges and private attorneys, and all of the demographic and DV knowledge covariates explained the difference between judges and evaluators. On the composite scale with a high score indicating sole/joint custody for the father, private attorneys and evaluators were the highest, followed in order by judges, and then legal aid attorneys and DV workers.

Respondents were asked to imagine that the mother in the vignette was awarded custody, with visitation awarded to the father. DV workers were more likely than the other groups to believe the best interests of the child and family safety would be served through professionally supervised visits. Private attorneys were the least likely to choose visits supervised by professionals/paraprofessionals or friends/relatives. The above findings did not change when controlling for other variables. On the composite scale of "unsafe supervision," private attorneys were highest, followed by judges, legal aid attorneys, and evaluators, and then by DV workers.

Private attorneys were the most likely to believe that the parties would benefit from mediation or another form of alternative dispute resolution, followed by evaluators and judges and then by legal aid attorneys and DV workers. The difference between legal aid attorneys and DV workers did not exist after controlling statistically for age, DV knowledge and knowing DV victims. The difference between judges and legal aid attorneys disappeared when controlling for beliefs about false allegations, the importance of DV, alienation by the mother, and co-parenting.

Discussion

A high proportion of professionals reported knowledge on a variety of DV topics (80-93%), similar to the findings of Bow and Boxer (2003) for evaluators. Children's exposure to DV and the prevalence of DV were the most common areas. The least common areas, especially among judges and private attorneys, were post-separation violence, screening, and assessing dangerousness (although the majority nonetheless reported knowledge in these areas). A greater variety of DV knowledge topics acquired and the frequency of knowledge acquisition helped explain 6 of 10 group differences in beliefs. These variables also helped explain 3 of 5 group differences in vignette custody recommendations.

Professionals often knew a friend, acquaintance, or coworker who had been victimized, a rate especially high for DV workers. Nearly half the DV workers knew a relative who had been victimized, and 44% had been victimized themselves. The number of victims known helped explain 6 of 10 group differences in beliefs and 3 of 5 differences in vignette custody recommendations. Other research shows that firsthand acquaintance with survivors can increase DV detection rates (Saunders & Kindy, 1993) and implies that trainings using firsthand accounts of survivors might increase sensitivity to victims.

The differences found across groups in caseload estimates of false DV allegations and sources of perpetration (mother, father or both) might be explained partly by setting, given that DV workers and perhaps legal aid attorneys tend to work with different types of abuse cases. However, differences among judges, private attorneys, and evaluators seem less likely due to setting. It is difficult to explain, for example, evaluators' higher estimated rates of false allegations by mothers and violence by both parents, compared with judges and private attorneys. Their estimates of violence rates by mothers, fathers, and both parents appear similar to those of evaluators studied by Bow and Boxer (2003), although their study used somewhat different categories.

The above caseload estimates were similar to estimates on general, single items and to the multi-item scales for false allegations and alienation. On the general items of false allegations, respondents were more likely to estimate that fathers' allegations of DV were false compared with those of mothers (35% vs. 18%). However, differences existed depending on professional role. Custody evaluators, sometimes in alignment with judges and private attorneys, tended to view mothers as most likely to make false allegations and alienate the children, and fathers least likely to do so. DV workers, often in alignment with legal aid attorneys, tended to hold the opposite views. Legal aid attorneys and DV workers were also more likely to believe that a reluctance to coparent does not hurt the child and that DV is important in custody determinations. Gender, age, DV knowledge, and knowing victims were significant factors in explaining group differences in the importance of DV for custody decisions, false allegations, and alienation. Such beliefs seem important in explaining custody–visitation recommendations as well. Findings from a separate analysis of the judges and evaluators showed that several beliefs — that victims try to alienate the child, make false DV allegations and similar beliefs — were strongly related to the recommendation of sole or joint custody to the perpetrator in the vignette (Saunders et al., 2011; Saunders et al., 2013).

Major differences found across the five groups in response to the vignette were similar to the above findings. Evaluators and private attorneys were most likely to believe the mother survivor was exaggerating her reports of violence and least likely to believe the father was minimizing. In turn, these two groups were least likely to recommend sole legal and physical custody to the victim and most likely to recommend joint custody. Although recommending physical custody to the perpetrator was recommended least, judges, private attorneys, and evaluators recommended this option with an average likelihood of 17-21%, a cause for concern. Also of concern was that all groups gave a fairly high likelihood (46-57%) they would recommend joint

legal custody, with physical custody to the victim. Many abusers will use this arrangement to continue their harassment and manipulation of the child and ex-partner, including abuse through litigation (Bancroft & Silverman, 2002; Elizabeth, Gavey & Tolmie, 2012; Hayes, 2012, 2015; Watson & Ancis, 2013; Zorza, 2010). Recommending mediation for the couple ranged from a high 53% likelihood by private attorneys, to a low of 16% likelihood by DV workers. Several group differences on the above recommendations did not exist after controlling for gender, age, DV knowledge, knowing victims, and beliefs; thus, personal factors played a part in explaining differences. Evidence for more victim-supportive attitudes and recommendations by women is consistent with gender bias findings reviewed in the introduction. Considering all of the belief and vignette variables, the most similar groupings were (a) private attorneys and evaluators, (b) judges and evaluators, and (c) DV workers and legal aid attorneys. Greater similarity occurred between judges and legal aid attorneys and between DV workers and legal aid attorneys when adding the control variables.

When interpreting the results of this study, several limitations need to be kept in mind: (a) It is not known how well respondents in each professional group represent their group as there are no representative lists available for any groups and invitations were sent to both eligible and ineligible professionals (e.g., psychologists who never conducted a custody evaluation). (b) Reports of beliefs about controversial topics, even on anonymous surveys, may be influenced by social desirability response bias or demand characteristics. The construct and concurrent validity found in the results attest to the variability in responses and may indicate that response bias was not a significant factor. (c) Although measures created for this study showed good construct validity, some of the internal reliabilities were at the low end of acceptability and thus may have produced some null findings. (d) Some aspects of the study focused on all forms of DV to build on prior research. However, evaluators' responses are likely to vary depending on the type and severity of DV. (e) The design was cross-sectional, thus making it impossible to state whether one variable preceded another. Future research can strive to overcome these weaknesses and use the recommendations of other custody researchers (Bow, 2006; Hardesty & Chung, 2006).

Despite the above limitations, this study has important implications for practice. Although the majority of professionals reported knowing about post-separation violence, screening, and assessing dangerousness, judges and private attorneys reported the lowest rates of such knowledge. More training on these specific topics is especially desirable because this knowledge is related to a decreased tendency for evaluators to believe that victims make false allegations or alienate the children (Saunders et al., 2013).[9] Increasingly, states require initial and/or continuing DV education for judges, attorneys, mediators, and custody evaluators. Recent trainings apply research findings on different types of DV, leading to more individualized guidelines for custody, mediation, and visitation (e.g., Jaffe & Crooks, 2007. Saunders, 2015; see also special issues of *Family Court Review*, Issue 3, Vol. 46, 2008 and *Journal of Child Custody*, Issue 3, Vol. 6, 2009).

Practice can also be improved through the application of standards and guidelines (e.g., AFCC, 2006; for a review see Saunders, 2015). The American Law Institute offers

a guide for judges and advocates to bring greater justice to DV cases (Sussman, 2010). Guidebooks of the National Council of Family and Conciliation Courts emphasize that extensive training and experience in DV are essential because DV is its own specialty (Bowles, Christian, Drew, & Yetter, 2008; Dalton, Drozd, & Wong, 2006). These guidebooks also emphasize the limits of psychological testing and the reasons that "Parental Alienation Syndrome" should not be used. States have increasingly adopted factors for considering the best interests of the child that give extra weight to DV and give exemptions in DV cases to the "friendly parent" standard. Some states also stipulate that if parents make allegations of DV or child abuse in good faith, such allegations cannot be used against them in custody decisions. Further implementation of such guidelines, policies, and training, along with research to refine them, is likely to lead to custody–visitation determinations that will prevent further harm to family members.

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Notes

1. We conducted a pilot study to test survey implementation and conduct psychometric analyses of measures. Through our analysis of 62 surveys, we substantially reduced the number of survey items by eliminating those that did not add to scale reliability.
2. Some of those reporting both "private" and "court" settings might have meant they worked privately but received court referrals, because it is unlikely someone could be employed by county government while in private practice. The question was, "In what settings do you conduct evaluations?" rather than asking the source of employment.
3. We used both email and mail invitations because some sampling bias can occur if only one method is used (Dillman, 2005). Those who responded by mail were significantly older, had conducted custody evaluations for a greater number of years, and had less DV knowledge than those who responded by email.
4. We obtained some information on likely non-responders by comparing characteristics of those who completed a small portion of the survey with those who completed all or almost all of the survey. Non-completers reported a significantly lower percentage of DV cases in their caseload, indicating that non-completers viewed the survey as less relevant.
5. This department uses software that can track responses to emails. Only 24% opened the email, and only one third of those opening it clicked on the link to look at the survey. Thus, only 8% of those who were sent emails opened the survey.
6. Some of the program workers completed surveys after receiving invitations that were sent primarily to judge ($n = 2$) and attorney groups ($n = 32$). This was not a problem because the survey forms were identical except for one question about their primary role. Some domestic violence (DV) program workers who were not attorneys ($n = 31$) completed the form

meant for attorneys after the link for the attorney version was circulated on an advocacy listserv.

7. The frequency options for four of the knowledge acquisition activities (books, radio programs, films and videos, workshops: 0, 1-5, 6-10, 11-20, over 20 times) differed from the other four options (articles, lectures, professional consultations, websites read: 0, 1-10, 11-25, 26-50, 50-100, over 100 times) based on frequencies found in the pilot study.
8. Validity evidence for these measures is shown because evaluators' actual recommendations and the vignette custody recommendations correlated (r) across the same items from .22-.52 and averaged .36. Two weighted scales for actual and vignette custody recommendations had a correlation of .52. The correlations for actual and vignette visitation recommendations averaged .40, and the two weighted scales correlated .50 with each other.
9. Among DV workshops and institutes are those offered by the National Judicial Institute on Domestic Violence (http://www.njidv.org); National Judicial Education Program of Legal Momentum (http://www.legalmomentum.org/our-work/vaw/njep.html); Association of Family and Conciliation Courts; and the Affiliated Trainings of the Institute on Violence, Abuse and Trauma.

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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 Cases[1]

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:

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[2] Written by Daniel McNeely and Jiayan Chen (DV LEAP interns under the supervision of Joan Meier, Executive Director) and updated by Michael Bassett & Elizabeth Liu (DV LEAP attorneys).

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

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[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 stories[17] 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.

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[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 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.

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- 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.

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- *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 andagainst 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 withthe 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).

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- 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.

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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.

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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.

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- *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.

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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, unequivocable 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.

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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.

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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 though 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.

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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.

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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]

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[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]

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[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 graining 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 children[41]. 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:

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[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]

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[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-examination[58]. 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

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[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 children[65]: 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 position[66] 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

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[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.

Evaluating the Evaluators:

Research-based Guidance for Attorneys Regarding Custody Evaluations in Cases Involving Domestic Abuse

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Among the most consequential decisions in family law are those involving child custody and parenting time in cases of intimate partner violence (IPV). Decision-makers are increasingly aware that serious harm can result if sole or joint physical custody is awarded to a violent parent, or if children's visits with that parent are poorly supervised (American Psychological Association, 1996; Hayes 2012; Neustein and Lesher 2005; Radford and Hester 2006; Saunders 2015). In both scenarios, children may be re-exposed to IPV or abused physically and psychologically (Hardesty and Chung 2006; Jaffe and Crooks 2007; Saunders 2007). Shared physical custody arrangements and pressures to co-parent also present risks to the non-abusive parent. Harassment, threats, and stalking are common after separation and the risk of homicide increases. Additionally, joint legal custody can be harmful to children and IPV victims even when sole physical custody is awarded to the victim. One scientific review concludes that "Not only are batterers poor decision makers, they also tend to use the power of joint parenting to exert control over the other parent" (Conner 2011, 260). Many abusers use joint legal custody to continue harassment and manipulation through legal channels (Bancroft and Silverman 2002; Hayes 2012; Jaffe, Lemon, and Poisson 2003; Zorza 2010). They can insist on joint attendance at school events or medical appointments, and interfere with a child's counseling sessions, medical procedures, and extra-curricular school events.

Custody evaluations that attend to the effects of IPV on the safety and well-being of both children and parents can be valuable resources for courts in making custody and parenting time determinations in the best interests of children. This article is meant to help attorneys understand the qualifications required of custody evaluators in IPV cases and to assess the quality of evaluation reports. It provides research-based guidance for judging the qualifications of custody evaluators and their reports, including evaluators' assessment methods, education, means of bias reduction, and professional back-grounds. Improving the quality of custody evaluations in IPV cases is likely to lead to increased safety and well-being for all family members.[1]

Evaluation Guidelines

Attorneys need to understand that courts and evaluators must set out clear expectations for the form and content of reports, as well as for the processes and methods to be used in preparing an evaluation report. Several professional organizations provide guidelines for evaluators and supervised visitation programs. These are "aspirational" rather than mandatory standards. However, evaluators may be reported to licensing boards for failure to follow ethical standards, including practicing outside their areas of expertise (Keilitz et al. 1997; American Psychological Association 2010; Supervised Visitation Network 2006; Luftman et al. 2005). One agency, Child Abuse Solutions, provides templates that can guide evaluators (*http://www.childabusesolutions.com/*). California statutory and administrative code provisions (California Judicial Branch 2014) require court-based evaluators to provide safety planning, including planning for all family members in the home and workplace. The Association of Family and Conciliation Courts (2016) recently published its guidelines for custody evaluators in IPV cases. The Guidelines emphasize that

- a victim may respond in ways unexpected by the evaluator, but normal in certain contexts;
- coercive behaviors deserve careful assessment and may exist in the absence of physical abuse; and
- children may deny or minimize violence.

The American Professional Society on the Abuse of Children (APSAC 2016) cautions that even with thorough evaluations, the substantiation of child abuse may not be possible:

> Professionals need to be mindful that failure to prove interpersonal violence does not prove that violence has not occurred nor (sic) that the child has been indoctrinated by the non-accused parent (9).

"Corroboration" of IPV through official reports can also be extremely difficult, since the majority of victims do not report to the police or health professionals (Barrett and St. Pierre 2011); Tjaden and Thoennes 2000; Kantor and Straus 1990). APSAC further cautions that parental alienation needs to be

defined and assessed carefully. Some ways in which "parental alienation" is misapplied will be addressed in more detail later in this article.

Evaluator Qualifications

In some jurisdictions, attorneys may have input on the selection of custody evaluators. For example, some counties establish approved lists of evaluators from which to choose. The extent of IPV training and relative lack of bias are important considerations in evaluator selection (Keilitz et al. 1997).

It is essential that evaluators have solid training in IPV, since IPV knowledge acquisition is associated with believing that

- IPV is an important consideration in custody evaluations;
- false allegations are rare (which aligns with empirical studies);
- safety must be emphasized over co-parenting; and
- a focus on coercive-controlling violence is important (Haselschwerdt et al. 2011; Saunders, Faller, and Tolman 2011).

Training on post-separation violence and danger assessment is especially important (Saunders, Faller, and Tolman 2011). A guidebook from the National Council of Juvenile and Family Court Judges emphasizes:

> Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are now requiring custody evaluators to take a minimum amount of training in domestic violence, that "basic training" by itself is unlikely to qualify an evaluator as an expert, or even assure basic competence, in such cases. (Dalton, Drozd, and Wong 2006, 17).

Another focus of training can involve overcoming negative stereotypes of victims. This may be accomplished by making emotional connections with victims that parallel the beliefs and responses of evaluators who have relatives who are survivors (Saunders, Faller, and Tolman 2011; Saunders and Oglesby 2016). Evaluators with IPV survivors in their families are more likely to believe that IPV is important in custody-visitation determinations and that mothers do not often make false IPV allegations (Saunders, Faller, and Tolman 2011). Hearing from survivors during evaluator training can be done through interactive theater, speaker panels, and documentaries (Saunders and Oglesby 2016). Although it is vital that evaluators understand the impact of IPV on children, it is equally important that they understand the economic and psychological traps that hold survivors in or pull them back into abusive relationships. Otherwise, they may tend to blame survivors for harming the child by staying in the relationship. Evaluators need to understand that survivors may also stay because they

- are concerned for the children's safety if they leave;
- fear financial loss;
- believe the children need their father;
- fear losing custody to a potential child abuser;
- fear harm to themselves and the children from stalking, abuse and/or physical assault; and
- are subject to family pressures (Hardesty and Chung 2006; Hardesty and Ganong 2006).

With increased recognition of different types of IPV, some evaluators are receiving training in differential assessments on which to base their recommendations (See Jaffe and Crooks 2007; Jaffe et al. 2008; special issue of Family Court Review: Olson and Ver Steegh 2008; and Journal of Child Custody, 2009, Vol. 6). For example, in some cases, IPV appears to be part of pattern of severe coercion-control and severe violence, almost always perpetrated by men, while in other cases, it seems to arise from conflict between the partners and is less severe. The latter type has been labeled "situational couple violence." It is initiated more equally by women and men, although gender differences in power are still likely to exist. It is also important for evaluators to understand that the coercive-controlling type of abuser consists of two very distinct types (Holtzworth-Munroe et al. 2000): an anti-social type who is likely to have a long criminal history, who is able to let go of his partner at separation; and a borderline type not likely to have an extensive criminal history, but who fears abandonment and seems most at risk to kill his partner (Saunders and Browne 2000).

The National Center for State Courts (NCSC) (Keilitz et al. 1997) further suggests that any roster of court-approved evaluators should reflect the cultural composition of the community and that evaluators should be assessed for misconceptions or biases about IPV. Evaluators can be asked about the methods they use to counter bias and about any trainings on bias reduction they might have attended. Bias reduction training can involve exploration of core values and awareness of implicit bias. Evaluators might be asked whether they follow the recommendations of NCSC, for example to "identify sources of ambiguity and impose greater structure in the decision-making context" and "institute feedback mechanisms" (p. 15). Custody evaluators should also be alert to the common phenomenon of "confirmatory bias" i.e., beginning with a hypothesis and finding facts that fit with it (Gould and Martindale 2007). Other forms of bias can be assessed as well (Drozd, Oleson, and Saini 2013), such as gender bias and uncritical use of parental alienation theories.

Gender bias is of special concern in custody evaluations (Rosen and Etlin 1996) (For a review of gender bias reports see Dragiewicz 2010). This bias is manifest as mistrust of women, including beliefs that they have a propensity to make false allegations of child abuse and domestic violence, which is tied strongly to the belief they try to alienate the children from their father (Saunders, Tolman, and Faller 2013). Sometimes mothers are punished for reporting abuse, given unfair financial settlements, and held to a higher standard than fathers.

Another type of bias is evaluators' uncritical use of parental alienation theories. Erroneous assumptions may be made that allegations, especially from mothers, are likely false and do not need to be investigated, or that parents' motives and mental states can be determined from observations of the children. (For examples of such assumptions in evaluation reports, see Pence et al. 2012). Family violence appears to be much more prevalent in custody cases than parental alienation and offers an alternative explanation for the reluctance of children to visit or live with a parent (Saunders and Faller 2016). Not only are sexist beliefs tied to the tendency to believe that survivor-mothers make false allegations and alienate the children, these beliefs are also related to recommendations that abusive fathers be given sole or joint custody or unsupervised visits (Saunders, Faller, and Tolman 2011).

The National Council of Juvenile and Family Court Judges' guidebook cautions:

> In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS." Under relevant evidentiary standards, the court should not accept this testimony. The theory positing the existence of "PAS" has been discredited by the scientific community. If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable. Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimizes the impact on children of violence against a parent or pathologizes the abused parent's responses to the violence. (Dalton, Drozd, and Wong 2006, 24–25).

A final consideration in evaluator selection is professional background. Compared with psychologists and other professionals, social workers may bring a broader, systems framework to evaluations that focuses more on family interactions and community supports (e.g., Lewis 2009). In one study, social workers were more likely than psychologists to make home visits (Horvath, Logan, and Walker 2002). In other studies, social workers were more likely than psychologists to recommend custody to survivors (Hardesty et al. 2015; Saunders, Faller, and Tolman 2011). In one of the studies, social workers were more likely than psychologists to recommend supervised visits for the abusive father in an IPV case vignette and had attitudes more supportive of survivors (Saunders, Faller, and Tolman 2011).

Assessment Of Abuse

Evaluators and their reports can also be evaluated based on the assessment instruments they use. For assessing lethality risk, the Danger Assessment index (Campbell 2003) is the most rigorously validated. Other measures have been developed to assess the risk of repeated severe or non-severe violence (e.g. Ontario Domestic Assault Risk Assessment, Hilton and Harris 2008; and the Spousal Assault Risk Assessment, Kropp 2009 are well validated) (For reviews of measures and protocols see Geffner et al. 2009; Gould and Martindale 2007; Hardesty and Chung 2006). Recently, measures of coercive-controlling behavior have been developed. Problems with evaluation reports occur when they focus on separate incidents of physical abuse without looking for patterns of controlling and coercive behavior, which can cause serious harm even if violence is not present (Beck and Raghavan 2010; Pence et al. 2012). One instrument, "The Mediator's Assessment of Safety Issues and Concerns" (MASIC) (Holtzworth-Munroe, Beck, and Applegate 2010), includes a Coercive Control Subscale, which seems suitable for use in a variety of settings. Evaluators who assess for this behavior tend to create parenting plans with higher levels of safety (Davis et al. 2011); they are also more likely to recommend custody for survivor-mothers (Saunders, Faller, and Tolman 2011). A focus on coercive violence is linked with IPV workshop attendance (Saunders, Faller, and Tolman 2011) and more extensive IPV training (Haselschwerdt, Hardesty, and Hans 2011).

Another key area for assessment is the motive for violence. Survivors seeking help are more likely to use violence in self-defense than for other reasons (Bair-Merritt et al. 2010). However, in custody determinations, a single act of self-defense on the survivor's part might frame the problem as "mutual combat."' In cases labeled "mutual combat," violence by either party tends to be minimized or ignored (Pranzo 2013). To determine whether one of the parties is the primary aggressor, each partner needs to be asked about fear levels when subjected to force and to be assessed for post-traumatic stress disorder (PTSD). Many clinical studies show more fear and PTSD in women than men when both have experienced force in the relationship (Hamberger 2005; Hamberger and Larsen 2015).

Despite recommendations that evaluations need to use a variety of methods—interviews, observations, information from collaterals, and official records—some evaluators rely too heavily on psychological testing. In one study, 16% of evaluators relied on a general measure of personality/psychopathology and did not use IPV screening and assessment tools (Saunders et al., 2011). These evaluators were more likely to believe that mothers make false allegations and, in one case vignette, tended to award sole or joint custody to the father. Caution is especially needed when interpreting test scores and survivors' behavior (Dalton, Drozd, and Wong 2006; Dutton 1992; Rosewater 1988) (see, for example, Pence et al. 2012). The National Council of Juvenile and Family Court Judges (Dalton, Drozd, and Wong 2006) cautions:

> Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated (21).

Survivors' symptoms of depression and anxiety need to be interpreted through the lens of their trauma histories, specifically as reactions to violence and controlling behavior. The possibility of losing child custody to a known abuser can intensify stress and produce even greater psychological symptoms (Erickson 2006). Evaluators need to be adept at evaluating complex forms of PTSD that include

- difficulty regulating emotion;
- suicidal thoughts;
- explosive anger or inhibited anger;
- variations in consciousness, for example, forgetting trauma and episodes of dissociation (i.e., feeling detached from mind or body);
- negative self-perception such as shame, guilt, stigma, sense of being different;
- perception of the perpetrator as having total power;
- alterations in relations with others, including isolation and distrust; and
- loss of or changes in one's sense of meaning, such as loss of faith and sense of hopelessness and despair (Courtois 2004; Herman 1997).

These symptoms may mimic those of some personality disorders such as borderline and paranoid personality disorders. Evaluation reports indicate that some survivors' fears underlie their guarded and negative behavior, which may be interpreted as personality flaws (Pranzo 2013). With increased safety, the symptoms of PTSD and depression normally decrease (Erickson 2006).

About the Author

Daniel Saunders, *Ph.D., Professor at the University of Michigan School of Social Work, focuses his research, service, training of professionals, and graduate student teaching on the problems of dating and domestic violence. He has authored or co-authored over 80 publications on these topics. His research has been supported with major grants from the National Institute of Mental Health, U.S. Department of Justice, and the Centers for Disease Control. Professor Saunders has also testified as an expert witness in cases of intimate partner homicide and child custody.*

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Endnote

1 This article focuses primarily on male-to-female violence because of the evidence on gender bias and because:

- women use violence in self-defense more often than men, especially in lethal situations,
- women are more severely injured physically and psychologically than men as a result of violent incidents,
- women are sexually assaulted and stalked at much higher rates than men, and
- women have more difficulty leaving violent relationships than men.

(Hamberger and Larsen 2015; Kimmel 2002; Saunders 2002). In addition, the most rigorous studies show gender disparities (Tjaden and Thoennes 2000). Custody evaluators in one study reported their cases as: 51% male instigator; 17% bidirectional mostly male; 14% bidirectional mutual (both male and female instigators); 11% female instigator; and 7% bidirectional mostly female (Bow and Boxer 2003). See also Pranzo 2013.