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# THE GUARDIAN AD LITEM IN CUSTODY AND CONFLICT CASES: INVESTIGATOR, CHAMPION, AND REFEREE?

Dana E. Prescott, J.D.\*

## I. INTRODUCTION OF A FUTURIST

The topic of this portion of the Symposium relates to the role of the guardian ad litem in highly conflicted custody cases. A dry analysis of the current state of the law concerning guardians ad litem did not seem terribly interesting nor does it help evolve creative solutions for the future.<sup>1</sup> As professionals of every category, we can surmise, based upon experience and study, that a system of family patterns is common to embattled families. The need to recognize and organize those patterns is driven today by the sheer volume and intensity of conflict among modern parenting relationships.<sup>2</sup> Unlike twenty years ago, much of this conflict is no longer buried within the privacy of the family structure but, in thousand of cases throughout the country, occurs within the

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1. An interesting article that summarizes the development of the law is Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *FORDHAM L. REV.* 1785 (1996).

2. See Andrew Shepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 *FAM. L.Q.* 95, 95-98 (1998). Professor Shepard cogently states:

Twenty-first century family courts need better ways to help divorcing and separating parents minimize the impact of conflict on their children. Social attitudes towards marriage, divorce, and separation have changed radically in the last half-century. What were once comparatively rare, fault-based events discouraged by convention are today predictable stages in the life cycle of an American child. Family court caseloads arising from divorce and separation spiral ever upward with no stopping point in sight. Evidence continues to accumulate that a child's future welfare depends on her parents' ability to help her navigate the experience without lasting scars caused by parental bickering and instability. Traditionally, family courts take the view that their responsibility is to decide specific disputes between parents after an adversary hearing. Evidence continues to accumulate, however, that this traditional adversarial approach to divorce and separation drives parents further apart, rather than encouraging them to work together for the benefit of their child. Overall, adversary procedure usually does children more harm than good . . . . This tidal wave of conflict which brings itself to family courts can usefully be thought of as a disease with predictable symptoms and courses of treatment. The symptoms of the disease are revealed in statistics reflecting both public and private consequences: (1) the increasing and more troubling caseloads of family courts attributable to parental divorce and separation; and (2) the adverse emotional impact that continuing conflict can have on parents and children.

*Id.*

public boundaries of a judicial system that must protect and secure the best interests of children by rendering a legal allocation of parental rights and responsibilities. Because the protection of children in modern custody litigation frequently involves the appointment of a guardian ad litem to represent the best interests of a child, it seems more productive to try and predict the future by casting an eye on those patterns (at least as this speaker identifies them) in the context of this question: Will the guardian ad litem be Investigator, *and* Champion, *and* Referee for children?<sup>3</sup>

In his famous book *Future Shock*,<sup>4</sup> Alvin Toffler offered a futurist's appraisal of war and peace, family and foe, social growth and cultural stress. Unlike a fortune teller who only needs the spirits in the room to make a prediction, a futurist by definition gathers contemporaneous scientific, economic, technological, philosophical, religious, and cultural data to formulate patterns from which to predict the "adaptive range" of a system: whether political, societal, or corporate.

This search for the future (shock) by Toffler paralleled the interest of physical scientists in a quest for patterns in nature as a means of prediction. The interdisciplinary study of chaos theory and the search for a mathematical proof of complex behaviors<sup>5</sup> now underlies a whole field of study devoted to the "totality of social structures."<sup>6</sup> The object of this "social investigation is to discover elements of a given system of action which does not appear to observation until the completion of the given interaction."<sup>7</sup> Even within the primitive state of my analysis, the

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3. See *Clark v. Alexander*, 953 P.2d 145, 152 (Wyo. 1998) (the guardian ad litem's role "has been characterized as investigator, monitor, and champion for the child").

4. ALVIN TOFFLER, *FUTURE SHOCK* (1971).

5. See M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* 11-13, 131-32 (1992). In physics, the modern distinction is between complicated systems, "like computer chips or snowflakes," and complex systems that "are more spontaneous, more disorderly, more alone than that" and the adaptability of "chaos" theory that explains spontaneous, self-organizing dynamics of the world. *Id.* For a brief but enlightening discussion of the science of chaos and complexity theory, see IAN STEWART, *NATURE'S NUMBERS: THE UNREAL REALITY OF MATHEMATICAL IMAGINATION* 120 (1995) ("Chaos contains its own brand of new universal patterns."). See generally PAUL DAVIES & JOHN GRIBBIN, *THE MATTER MYTH: DRAMATIC DISCOVERIES THAT CHALLENGE OUR UNDERSTANDING OF PHYSICAL REALITY* (1992).

6. See STANLEY ARNOWITZ, *SCIENCE AS POWER: DISCOURSE AND IDEOLOGY IN MODERN SOCIETY* 275 (1988).

7. See *id.* Applying the standards of scientific methodology from the natural and physical sciences to the social and behavioral sciences is a topic of some sensitivity in the literature but "we would probably all be equally as willing to admit that the phenomena with which the human sciences are forced to deal simply do not admit as

dynamics of a family system theory should begin with the model of inter-disciplinary study undertaken by the physical sciences when engaging in a quest for scientific development of chaos and complexity theories.

Borrowing from many fields of study, therefore, our Futurist begins by observing the contemporary environment in which family systems, through parents, conduct combat—the judicial system<sup>8</sup>—for the specific purpose of predicting the role of the guardian ad litem in the courts of the future. Defining a multi-disciplinary family system theory for the courts, that recognizes patterns within embattled families, is not limited to just mom and dad as variables. In contemporary life, the variables include boyfriends, girlfriends, grandma and grandpa, and their new spouses on both sides, friends, and other family members. The management of these modern “families” requires a paradigm shift that emphasizes identification and interdiction to protect children within an embattled family system. Such a shift can only occur if patterns that predict the need for interdiction or treatment are based upon a conjunction of scientific and legal experience. Whatever bumbling occurs, law and science share a touchstone for children’s needs that requires less excuse-making and better solutions.

Toffler admonishes us, of course, to exercise care when embarking on a path that tries to predict “facts” in a time of the “greatly accelerated rate of change in society.”<sup>9</sup> “In dealing with the future, at least for the purpose at hand, it is more important to be imaginative and insightful

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fully to controlled experimentation as did the subjects dealt with by classical physics.” JOHN W. SUTHERLAND, *A GENERAL SYSTEMS PHILOSOPHY FOR THE SOCIAL AND BEHAVIORAL SCIENCES* 93 (1973). One of the reasons that behavioral sciences are facing a backlash in the courts is because data, and the conclusions derived from data, can be argued as more politically-based than a function of the traditional scientific method found in the physical sciences. See, e.g., Louise Silverstein & Carl Auerbach, *Deconstructing The Essential Father*, 54 *AM. PSYCHOL.* 6 (1999). As one writer summarized about this particular article: “It isn’t an especially impressive article. Its prose is dry, its arguments are shallow, its conclusions are disproved by a mass of scientific evidence, and its political bias is blatant—the authors end by calling for a ‘large-scale’ expansion of welfare and electing more women to government.” Jeff Jacoby, *Attack on Fatherhood a Political Screen Masquerading as Science*, *BOSTON GLOBE*, July 26, 1999, at A15.

8. Our Futurist would also cast an eye backward so as to understand that divorce has deep cultural and historical roots in the United States that have brought us to the point in the enmeshing of families and the courts in the daily lives of many Americans. See generally GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* (1991). Guardians ad litem and judges always do well to remember the Heisenberg Indeterminacy Principle: “The instrument of observation must be taken into account in the measurement of the object as well as in the determination of its position . . . .” See ARNOWITZ, *supra* note 6, at 330.

9. TOFFLER, *supra* note 4, at 11.

than to be one hundred percent 'right.' Theories do not have to be 'right' to be enormously useful. Even error has its uses."<sup>10</sup> So what patterns are visible to the Futurist when observing embattled custody cases and its relationship to judicial intervention?

First, serial marriage,<sup>11</sup> non-marriage, divorce, separation, child protective proceedings, juvenile criminal proceedings, domestic violence, and the general dislocation of children for economic, familial, or cultural reasons will remain unabated for the foreseeable future.<sup>12</sup> As Toffler wrote thirty years ago: "The family has been called the 'giant shock absorber' of society—the place to which the bruised and battered individual returns after doing battle with the world, the one stable point in an increasingly flux-filled environment. As the super-industrial revolution unfolds, this 'shock absorber' will come in for some shocks of its own."<sup>13</sup> The continuation of this familial shock, and the ensuing chaos, thereby impacts rates of psychotherapy and medical treatment, academic and employment failure, a lack of commitment to the existing political structure, and, more profoundly, the relationship between generations that traditionally transmitted the moral and ethical core of any successful society.<sup>14</sup>

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10. TOFFLER, *supra* note 4, at 6.

11. Thirty years ago, Toffler wrote that "[s]erial marriage—a pattern of successive temporary marriages—is cut to order for the Age of Transience in which all man's relationships, all his ties with the environment, shrink in duration." TOFFLER, *supra* note 4, at 252.

12. See generally *Parenting Our Children: In The Best Interest of the Nation*, A Report to the President and Congress Submitted by the U.S. Commission on Child and Family Welfare 11 (1996) ("High rates of separation and divorce, as well as births to unmarried parents, have led to over a quarter of the Nation's children living with only one parent."); *America's Children at Risk: A National Agenda for Legal Action*, A Report of the American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families (1993) ("The crisis of America's children is not limited to the poor, to racial minorities, or to inner cities. Children of all ages and socio-economic groups suffer from inadequate child care, lack of health insurance, the high cost of housing, family breakdown and declining school quality. The majority of American children will find themselves part of a poor or single-parent family at some point during their childhood, and recent studies suggest that these children need even more help." (internal citations omitted)).

13. TOFFLER, *supra* note 4, at 238.

14. Dr. Schacht makes the point that "[h]igh-conflict divorce is a major social, economic, and public health problem. It is also source of potentially overwhelming legal and interpersonal woe." Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 563 (2000). An intriguing point is that the increase in the number of lawyers and mental health professionals yields strangers who find the "ambiguity of anonymity" an easy means to attack character and motive. See *id.*

Second, courts will continue to be the vessel into which all this chaos is poured.<sup>15</sup> By necessity, therefore, courts will evolve as more of a social service agency than a separate constitutional branch of government charged with the issuance of judgments within the traditional boundaries of the "Law."<sup>16</sup> Despite the claim that courts of equity have the flexibility to create unique, individualized "justice," judges often decide cases within what feminist scholars term a dialectic or binary logic: good/bad, best interests/detrimental interests, cooperation/interference, abuse/non-abuse, or other pairings of this sort.<sup>17</sup>

Third, the movement to make the courts "user friendly" may have the corrective effect of convincing consumers that lawyers make "it" worse (whatever "it" may be).<sup>18</sup> Usually, however, this institutional

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15. See Mark P. Gergen, *A Priest Responds to the Bean Counters: Leo Katz on Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law*, 22 L. & SOC. INQUIRY 879 (1997) ("Consequentialists, or bean counters, believe that the law should maximize human happiness, human welfare, or wealth."). Although the "lofty, theoretical, and jurisprudential" dialogue is interesting, the legal system benefits when it deals with the chaos by avoiding the appearance of arbitrariness and is responsive to solutions to real problems. See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 33 REV. JUR. U.I.P.R. 311, 312 (1999).

16. A parallel evolution may be occurring in public school systems which are forced to act as *parens patriae* for the volume of children constructively abandoned by biological parents. See Linda D. Elrod, *Restructuring Schools as Families: Report of a Conference*, 28 FAM. L.Q. 347 (1994). This trend finds its best reflection in the impressive debate over the creation of unified family courts. See Jay Folberg, *Family Courts: Assessing the Trade-Offs*, 37 FAM. & CONCILIATION CTS. REV. 448 (1999) ("Consolidated family courts using judicial specialists dealing with multiple interrelated parties and integrating an array of social services appears to offer a better approach to related party cases."); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998) (organizing in detail a model for "therapeutic jurisprudence").

17. See JAMES A. WINDERS, *GENDER, THEORY, AND THE CANON* 44-47 (1991).

18. Ignoring the gender specific, the Maine Supreme Judicial Court's reasoning concerning the role of lawyers is no less meritorious today than a hundred years ago:

An order of men, honorable, enlightened, learned in the law, and skilled in legal procedure, is essential to the beneficent administration of justice. The aid of such men is now practically indispensable to the orderly, accurate, and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts without fear that his statements may be possibly used against him. For these reasons the rule above stated should be construed liberally in favor of those seeking legal advice. It does not apply, of course, where it is sought

narcissism is driven by administrators at the appellate level and not trial judges who must cope daily with the onslaught of highly emotional case loads, most especially the explosion of private protection from abuse and harassment cases between private individuals. Consequently, the percentage of *pro se* litigants on one or both sides of a family law case is increasing and the advent of forms, the Internet, and the abrogation of rules prohibiting the unauthorized practice of law, means this trend is likely to continue.<sup>19</sup>

In the absence of lawyers, judges will need more access to parenting education courses, mediators, guardians ad litem, therapists, and social workers within the court system.<sup>20</sup> In practice, this reorganization of the courts to directly deliver social services to consumers, rather than judgments based upon actual evidence, increases the need for more sensitive consideration of how the courts are going to facilitate these services, especially the protection of victims of domestic abuse/violence<sup>21</sup> and the treatment of addiction disorders. Even if budget limitations and political conflicts are ignored, successful "delivery" assumes a generation of professional service providers who can master the techniques of handling conflicts between parents without sufficient emotional, intellectual, and ethical/moral moorings to make non-selfish decisions for their child. Judges cannot waive a wand that will suddenly imbue parents with a sense of honor, dignity, tact, cooperation, understanding, and other traits that seemingly played a role in the negotiation and cooperation (it used to be called courtship)

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to find a way to violate some law.

Wade v. Ridley, 32 A. 975, 976 (Me. 1895).

19. The statistical data is compiled in Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407 (1994). The juvenile justice system itself may be defined as a "complex web of individuals bound together by esoteric laws and mind-boggling funding structures." JOHN HUBNER & JILL WOLFSON, *SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES* vii (1996).

20. Some of these issues are discussed in Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994).

21. A fascinating article on this topic is Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1254 (1996) ("To address the emotional and doctrinal complexities and demands of particularized justice, some feminist theorists have proposed an agenda which adopts so-called relational notions of justice, that is, systems which recognize social interaction and intimate relations as their cornerstone.").

necessary to conceive a child.<sup>22</sup> In words three decades old and eerily accurate:

As the present system cracks and the super-industrial revolution rolls over us, as the armies of juvenile delinquents swell, as hundreds of thousands of youngsters flee their homes, and students rampage at universities in all the techno-societies, we can expect vociferous demands for an end to parental dilettantism.<sup>23</sup>

As widely accepted among all professionals, the presence of one or two chaotic parents fosters longer, more risky dissolution proceedings and a greater potential for post-judgment conflict for children.<sup>24</sup> The conundrum for the courts is what to do with those private decision makers (the lawful parents) who abdicate, by malfeasance or nonfeasance, the privilege to exercise parental authority by engaging in a level of chronic conflict that damages children from generation to generation.<sup>25</sup> This rather bleak picture is not helped by a court system which is ill-equipped to perform such a function because it lacks the resources and funding to be social service agency and its constitutional and statutory traditions place ethical and legal limitations on its ability to make judgments that micro-manage parents' lives.

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22. In her recent book, Barbara Dafoe Whitehead reviews the change from an ethic of duty to children to right to individual fulfillment irrespective of consequences. See BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 10-11 (1997) ("To put it plainly, many of the ideas we have come to believe and vigorously defend about adult prerogatives and freedoms in family life are undermining the foundations of altruism and support for children."). On the issue of this absence of a child-centered ethic and the "contractual" approach to parental rights and responsibilities, she notes the erosion by divorce of parental independence and child-centeredness when "the focus of attention shifts to the quarreling between divorced parents." *Id.* at 166.

23. See TOFFLER, *supra* note 4, at 243.

24. See 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. 451 (2000) ("The family environments of chronic custody disputes are characterized by the parents' mutual distrust, fear, anger, projection of blame onto the ex-partner, refusal to cooperate and communicate, allegations of abuse, and sabotage of each other's parenting and time with the child.").

25. See II THE HANDBOOK OF FAMILY PSYCHOLOGY AND THERAPY 910-28 (Luciano L'Abate ed., 1985). The notion of multi-generational patterns of child abuse is somewhat controversial but even assessing factors like poverty and stress, it is difficult not to accept the notion that "certain constellations of family and/or personality variables" increases the probability of parenting failure. *Id.* See also Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y. 221, 231 (1994) ("[t]he tendency of child witnesses to model violent behavior is well established").



A fourth element for our Futurist arrives from the American Bar Association's most recent efforts to alter the legal profession as a profession by recommending the eradication of the rule that bars lawyers and non-lawyers from splitting fees and practicing together.<sup>26</sup> The rather unfulfilling debate concerning the "unauthorized practice of law" in many states<sup>27</sup> is already a losing proposition even as the floodgates open. If the American Bar Association becomes the Anyone Bar Association, ethical dilemmas will be eliminated and lawyers will not have to be licensed advocates. As Toffler intimated in the context of technology, this "high velocity of change"<sup>28</sup> may be found in modern courtrooms where domestic violence advocates, government social workers, and others appear in "trial" roles and prosecute or assist pro se litigants so as to balance, with some legitimacy given the history of ignoring such power imbalances, the scales of advocacy. Justice will be administered without the nuisance of advocacy by lawyers.<sup>29</sup> When these developments are complete, and the court system is a social

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26. See John Gibeaut, *Practice Debate Heats Up*, 85 A.B.A. J. 14 (1999); James Podgere, *Ethics in 2000 and Beyond*, 85 A.B.A. J. 96 (1999); Ronald A. Landen, Comment, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 EMORY INT'L L. REV. 763 (1999).

27. For purposes of consumer protection, the most difficult task confronting legislatures and bar associations nationwide is defining non-lawyer practices and the tiers of services that could be provided to consumers by non-lawyers without the risk of unethical, negligent, or fraudulent representation. In several recent cases, courts have defined the unauthorized practice of law within the boundary of the ethical and legal duties of the professionally trained lawyer and the obligations of trust and confidentiality owed the consumer. See *Statewide Grievance Comm. v. Patton*, 683 A.2d 1359, 1361 (Conn. 1996) (A business known as Doc-u-prep of New England was practicing law. The practical approach is to consider each set of facts and determine whether it falls within the fair intendment of the term that requires in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations: "It is of importance to the welfare of the public that these manifold customary functions [of practicing law] be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys."); *Attorney Grievance Comm'n v. Hallmon*, 681 A.2d 510, 514 (Md. 1996) ("This Court has always found it difficult to craft an all encompassing definition of the practice of law," but the focus of the inquiry should be "on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.").

28. TOFFLER, *supra* note 4, at 428. Despite ongoing government and corporate efforts, the Internet and its world-wide capacity to share information (and much misinformation) makes it doubtful that lawyers and judges can prevent the dilution of the legal profession; especially if the guild decides to dismantle itself. See *id.*

29. A discussion of the traditional roles of lawyers, including contested litigation, may be found in MITCHELL S. G. KLEIN, *LAW, COURTS, AND POLICY* 72-77 (1984).

service agency, some assume that representation of clients at the courthouse will fall to the more genteel tactics of non-lawyers.<sup>30</sup>

The fifth element challenges the traditional role of the guardian ad litem when providing services to the court in private litigation. Over the decades, states have permitted guardians ad litem in private custody cases to be attorneys, therapists, or other professionals or volunteers, with the duties ranging from advocates to investigators.<sup>31</sup> Under the court order appointing the guardian ad litem, she is empowered with the right, obligation, and duty to make recommendations to the court concerning the best interests of the children.<sup>32</sup> This delegation is for the

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30. There are undoubtedly those within the legal profession who will argue that this is a good thing and that lawyers simply clutter up the pristine delivery of justice at the courthouse. This is not usually the view of trial judges who have to walk through the morass of angry folks bounding into the courthouse for a solution to their family conflicts. See Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. at 435 ("The legal and procedural barriers to pro se representation have been compounded by attitudes of both bench and bar."). Appellate courts often write opinions stating that pro se litigants are to be treated the same as a party represented by a lawyer. See *Richards v. Bruce*, 691 A.2d 1223, 1225 (Me. 1997) ("We have long recognized the principle that pro se litigants are held to the same standards as represented litigants . . . . Neither civil nor criminal litigants are afforded any special consideration because of their pro se status.").

31. In an important case, the Maine Supreme Court held that a guardian ad litem who was sued was entitled to indemnification for attorneys' fees as a government employee under Maine's Tort Claim Act. See *Kennedy v. Maine*, 730 A.2d 1252 (Me. 1999). An excellent summary of the historical role may be found in ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES 1-14* (1993). The skill to advocate for children is not a function of a particular license or education though licensing is a legitimate check on unethical behaviors and education is a legitimate tool for acquiring insight and recognizing biases. See *id.*

32. Addressing the right to independent counsel, the court in *Miller v. Miller*, 677 A.2d 64 (Me. 1996), held that:

Although the law imposes procedural limitations on children, it does so to protect their interests. In the realm of divorce and other family litigation, this protective purpose finds expression in the best interests standard. In Maine, as in the multitude of other states which have adopted the best interest standard, courts faced with the task of rearranging parental rights and responsibilities must strive for an outcome that will maximize the best interest of children . . . . This standard protects children who lack the ability because of youth, inexperience, and immaturity to protect themselves. The protective purpose of this standard is also important in analyzing the constitutional claim of the Miller children.

*Miller*, 677 A.2d at 68. As the court succinctly held:

[E]xclusion of children as parties in the divorce of their parents, and the related possibility that there will be no forceful advocacy for the custodial preference of the children, does not increase the risk of erroneous custody determinations that disserve the best interest of children. The guardian ad litem is already an advocate for the best interests of the children in all of its

purpose of assisting the court to act in the best interests of the child as a "wise, affectionate, and careful parent."<sup>33</sup> The trial court should clearly define the duties of the guardian ad litem at the time of appointment so as to minimize confusion as to whether that duty is "pure representation, pure investigation, or a combination."<sup>34</sup> Once the investigation is completed and the guardian ad litem issues her report, a hearing is necessary because the trial court is entitled to accept or reject the findings and conclusions after reviewing the qualifications, intelligence, scope of investigation, and validity of the conclusions.<sup>35</sup>

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complex dimensions. The narrow focus of an attorney for the children, who would be obligated to carry out their preferences regardless of the wisdom of such a course, might well increase the likelihood of a custody determination that is not in the best interest of the children.

*Id.* at 70. Similarly, the Connecticut Supreme Court has held that:

Affording the minor children in a dissolution action an unrestricted right to appeal orders regarding their support carries with it significant risks of widening the fissures in an already sorely tried family, and of imposing burdens on the non-custodial parent and the legal system that may well outweigh the potential benefits . . . . Treating the children as parties might well force them to choose sides and thus threaten to exacerbate their already heavy emotional burden, and would add a level of participation—even if only symbolic in most cases—that is inconsistent with a wise attempt to shield them as much as reasonably possible from the legal aspects of their parents' conflicts.

*Newman v. Newman*, 663 A.2d 980, 987 (Conn. 1995).

33. *Cyr v. Cyr*, 432 A.2d 793, 796 (Me. 1981) ("To choose the greater of two goods is admittedly no easier than to identify the lesser of two evils.").

34. *See, e.g., Leary v. Leary*, 627 A.2d 30, 36-37 (Md. App. 1993).

35. *See Doubleday v. Doubleday*, 551 A.2d 525, 526-27 (N.H. 1988). In *Van Schaik v. Van Schaik*, the child's counsel tried to delete sections of the report in order to protect the child and yet testify to conclusions and recommendations at the hearing. The court held (quite properly) that this was a violation of due process for the parent:

[T]hese reports consist largely of hearsay declarations—often double—or triple-level hearsay—as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers, and the like, which may or may not have a reasonable basis. Statements contained in a custody investigation report have no special indicia of reliability. They are generally not under oath and often emanate from people having overt or covert bias. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empiric data. Their usefulness to the court is only as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence . . . . "Due process" encompasses that principle and requires that if a court bases its custody decision, even in part, on an independent report, the parties—or their attorneys—must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain. However sensitive the material may be, a party has a right to know what evidence is being considered by the

Ignoring specific titles such as attorney ad litem<sup>36</sup> or guardian ad litem, judges appoint some form of representation (protection) for the child. Because there is no other alternative to the parental choice of chaos, attendant ethical dilemmas will yield to necessity.<sup>37</sup>

What is our Futurist's conclusion from the mixture of these elements when there is embattled chaos between parents? In the future, titles and professions will not matter; only the status as a court appointed officer of the court. The guardian ad litem will act as an investigator and prepare a report for the parents, the court, and her child-client. If the parties cannot settle, the guardian ad litem, who is *the* advocate for the child,<sup>38</sup> will then serve as a referee whose job it is to render binding decisions *for the child in lieu of the parents' decision making*

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court in judging his cause. A custody case can no more be tried and decided upon secret ex parte evidence than any other proceeding."

603 A.2d 908, 914 (Md. App. 1992) (quoting *Denningham v. Denningham*, 431 A.2d 755 (Md. 1981)).

36. See, e.g., *Newman v. Newman*, 663 A.2d 980 (Conn. 1995); *Dawson v. Garcia*, 666 S.W.2d 254 (Tex. App. 1989).

37. See *Schult v. Schult*, 699 A.2d 134 (Conn. 1997) (attorney for child may advocate different position than that recommended by guardian ad litem). See generally Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the "Legal Ethics" Perspective*, 73 IND. L.J. 665 (1998). A compendium of the ethical standards as they now exist may be found in *Representing Children: Standards for Guardians Ad Litem in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. L. 1 (1995); *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995). "The purpose of appointing counsel for a minor child in a dissolution action is to insure independent representation of the child's interest and such representation must be entrusted to the professional judgment of appointed counsel within the usual constraints applicable to such representation." *Knock v. Knock*, 621 A.2d 267, 275-76 (Conn. 1993). For an applicable discussion, see Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U.L. REV. 57 (1998). For another view, see Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998).

38. See *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998). Here, the Connecticut Supreme Court emphasized that the child's attorney is an attorney, advocating on behalf of a client; and is not to be a witness. See *id.* at 688. Justice Katz concluded by stating:

An attorney for the child should not express to the court, in advance of trial, his or her opinion as to the best interests of the child, particularly when that opinion is at the heart of the ultimate issue in the case. An attorney for the child should participate in legal proceedings by submitting trial briefs, questioning witnesses, giving oral argument, and, generally, by functioning in a manner similar to an attorney for an unimpaired adult. The proper forum and method for communication of his or her opinion is during final argument.

*Id.* at 689.

*authority*.<sup>39</sup> The guardian ad litem's duty will run to the court and the needs of the child *and* the court will define the scope of the duties based upon a factual matrix necessitated by the scope of the parental (mis)conduct.<sup>40</sup> In those circumstances when there is a possibility of a parental learning curve that indicates a potential to modify behavior necessary to protect the child, then that is all for the better. In circumstances when that capacity is minimal then the parents decision making authority will be curbed or abrogated.<sup>41</sup> Although each parent may have a constitutional and statutory right to *participate* in raising their children, biology does not create a circumstance in which a right to adult conflict is a moral imperative that debases the rights of the child.<sup>42</sup> The new millennium's guardian ad litem will wear both the role of moral agent for the family and the robe of judicial authority, and in those roles will constitute the font of decision making for this group of parents. Thus, the evolution of the guardian ad litem's duty will be from investigator to champion to referee. It is the role of

39. At least one author might find our Futurist misguided. See Raven C. Lidman, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998).

40. See *Gerber v. Peters*, 584 A.2d 605, 607 (Me. 1990).

41. For an analysis of this argument, see Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785 (1986). A guardian is:

a person lawfully invested with the power, and charged with the duty of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs . . . . A guardian ad litem is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.

*Id.* at 1785 (quoting Black's Law Dictionary 706 (6th ed. 1990)).

42. Interesting arguments that track this analysis may be found in Hildy Mauzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291 (1997) (evaluating child psychology and child development research and recommends protocol for judges, which includes providing judges access to mental health professionals, training judges, parents, and family law practitioners in fundamentals of child development, guidelines for determining custody and visitation in violent parent cases); James A. Twaite & Anya K. Luchow, *Custodial Arrangements and Parental Conflict Following Divorce: The Impact on Children's Adjustment*, 24 J. PSYCHIATRY & L. 53 (1996) (research regarding impact of various post-divorce custodial arrangements on children and concludes that level of parental conflict rather than custodial arrangement is more significant factor).

referee, however, that will fundamentally alter the landscape of the judicial system's response to the embattled family system.<sup>43</sup>

## II. WHAT IF THE FUTURIST IS WRONG?

It is best to begin with self-criticism so that the flaws in our Futurist's reasoning are exposed early. An evolving body of literature by feminist scholars concerning post-modernism and deconstruction<sup>44</sup> as it relates to history, philosophy, religion, and especially law (as defined by the making of judgments within the judicial system), leads to the uncomfortable notion that my arguments are built on fallacies as a function of my ignorance of that field of study. I am also troubled by a category of study that may make these predictions stereotypical, or stated another way, ignores a method of examining family decision making structures and traditions that are unrepresentative of a large (and growing) portion of American society.<sup>45</sup> My recent readings have created a rumbling dissonance with the positions I have advocated in the past concerning methods for protecting the rights of children, including the role of the guardian ad litem as advocate. More annoying, the criteria for identifying cases that require judicial triage may be accurate but the solution, always in the nature of the exercise of power dominated by "patriarchal thought"<sup>46</sup> may miss something more fundamental or unique as a means of protecting children.<sup>47</sup>

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43. *But see In re Marriage of Lloyd*, 64 Cal. Rptr. 2d 37 (Cal. App. 1997) (holding that the court lacked authority to appoint guardian ad litem to represent children in hearings and to make orders in post-dissolution proceeding to modify custody absent parties' consent to reference).

44. I profess no expertise concerning the writings of Michael Foucault but his work does seem to merge the issue for debate. *See* LOIS MCNAY, *FOUCAULT FEMINISM* 1 (1992) ("Firstly, where does the poststructuralist deconstruction of unified subjectivity into fragmented subject positions lead in terms of an understanding of individuals as active agents capable of intervening in and transforming their social environment?"). For a more detailed discussion, see *id.* at 118-26.

45. Sensitive discussions may be found in Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405 (1998); Larry Cata Backer, *Culturally Significant Speech: Law, Courts, Society, and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845 (1999).

46. *See* WINDERS, *supra* note 17, at 146.

47. There are many available articles and books on family law in particular, but at the risk of selective citation, I will acknowledge a few that have influenced this article. *See* Nancy A. Weston, *The Fate, Violence, and Rhetoric of Contemporary Legal Thought: Reflections on the Amherst Series, the Loss of Truth, and Law*, 22 L. & SOC. INQUIRY. 733 (1997); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996); Anne M. Coughlin, *Excusing Women*,

Family dislocation and its management may be a function of some dialectic more comprehensive and insightful than has been written. My concern is that the traditional view of litigation and the role of guardians ad litem in the context of high conflict cases may be read solely in the masculine context of conflict and its form of resolution.<sup>48</sup> Thus, as our Futurist constructs a judicial system for children, there is a place for criticism of a binary logic of individual/society, inside/outside and the impact (not just on Marxist theory) of the relationship between the judicial system and “public/private dichotomies that provide the focus of much recent feminist social theory.”<sup>49</sup>

A second area of concern that coexists with feminist critical theory is that the aura of science has permeated the judicial system, and has inevitably influenced the role of the guardian ad litem in private custody cases. The United States Supreme Court has struggled with the admissibility of expert testimony at trial in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*<sup>50</sup> and *Kumho Tire Co. Ltd. v. Carmichael*.<sup>51</sup> In both cases, the issue is what constitutes an expert witness and then what constitutes science (or what constitutes science and then what constitutes an expert witness though two different things). With this “gatekeeping role,” trial judges now must assess the methodology and reliability of expert witnesses by first determining if it is science that the law will recognize.

In family law, the difficulties are not so much with medical testimony but the behavioral science professions and the relationship between such a “science,” and its relevancy to the best interests of

82 CAL. L. REV.1 (1994).

48. A favorite example concerns the relationship between judges in appellate courts:

[a] Justice who is willing to make all the modifications suggested by his colleagues is liable to find he has fathered an amorphous mass of doughy sentences rather than a strong statement of law. Holmes once complained to Sir Frederick Pollack about his fellow Justices, that “the boys generally cut one of the genitals” out of opinions he circulated.

WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 24 (1964).

49. WINDERS, *supra* note 17, at 68. See also KAREN GREEN, THE WOMAN OF REASON: FEMINISM, HUMANISM AND POLITICAL THOUGHT 107-08 (1995) (discussing the relationship of Marx and Freud); Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475 (1999) (“Feminism’s principal contribution to the law of the family in the United States has been to open up that institution to lateral scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others.”).

50. 509 U.S. 579 (1993).

51. 526 U.S. 137 (1999).

children and custody decision making.<sup>52</sup> Whatever the profession of the guardian ad litem, when a final *opinion of outcome* is to be given based upon behavioral sciences, recent literature notes the absence of “empirical research performed to guide mental health professionals in the evaluation process”:

Common sense demands judicial scrutiny of all experts’ professional status and expertise. Whether assessing the admissibility or the weight of a mental health professional’s proffered expert testimony about the best interests of the child or any other expert testimony, it is sensible to consider conjunctively both the qualifications of the expert and the validity of the methods and procedures underlying the expert’s opinions. Standing alone, neither assures that the resulting testimony is worthy of belief.<sup>53</sup>

Behavioral or human sciences may provide data and context for behaviors and family patterns that may assist entry of an appropriate and ethical judgment in a family case.<sup>54</sup> Science in the form of psychoanaly

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52. Dr. Halon’s paper on this topic is a fair and concise statement of this conundrum and its consequences. See Robert L. Halon, *The Comprehensive Child Custody Evaluation—Ten Years Later*, 22 U. ARK. LITTLE ROCK L. REV. 479 (2000) (“Deciding or establishing value is precisely what science and medicine do not do. Science and medicine speak of ‘significance’ (comparisons), not of ‘importance’ (norms, value), . . . the closer the mental health evaluators’ premises and conclusions are to reflections of value, the easier and more appropriate it is for others to take rightful issue with their so-called ‘expert opinions.’”).

53. Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About “The Best Interests of the Child”?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 552 (1997). The increase in custody litigation has created an increase in lawsuits that have evolved a body of immunity law. See, e.g., *Chambers v. Stern*, 338 Ark. 332, 994 S.W.2d 463 (1999) (holding that a therapist appointed by a court to evaluate and provide treatment to a family during a custody case may be liable for malpractice if he operates outside the scope of a court’s order); *Fleming v. Asbill*, 483 S.E.2d 751 (S.C. 1997) (holding that guardian ad litem in private custody proceeding is not acting on behalf of the court and is therefore not a state employee entitled to governmental immunity but is entitled to common law immunity for acts performed within the scope of the appointment to protect the guardian from disgruntled parents); *Delcourt v. Silverman*, 919 S.W.2d 777 (Tex. App. 1996) (psychologist and guardian ad litem is integral part of the judicial system and entitled to absolute judicial immunity for acts performed within the bounds of the court appointment); *Berndt v. Molepske*, 565 N.W.2d 549 (Wis. Ct. App. 1997) (guardian ad litem is entitled to quasi-judicial immunity as acts are intimately tied to the judicial process). See generally Holly Marie McIntyre, Note, *Fleming v. Asbill*, *South Carolina Guardian Ad Litem not Immune from Civil Liability*, 29 CREIGHTON L. REV. 1711 (1996).

54. See Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 FAM. L.Q. 565 (1996). The authors note the development of ethical guidelines for the conduct of child custody evaluations. See American Psychological Association, *Guidelines for Child Custody Evaluation in Divorce*



sis or psychology as a “field” is “thoroughly interdisciplinary, regardless of territorial imperatives of either psychology or psychiatry, which latter institution has kept psychoanalysis well domesticated in the United States.”<sup>55</sup> The mental health opinion, by statute or common law, is not necessary to the *fact-finding* itself. Instead, it serves a psychological (or perception) purpose for the public and parents because, as often happens in the crucible of the courtroom, a judge’s judgment is “legal” but a psychologist’s opinion is scientific—even if the words are identical. The science of human behavior is intended to study and analyze patterns that may allow prediction of future conduct. But the *value* decision, as to the importance of each fact within that pattern then applied to the best interests of a child, is laden with the law because the law must enforce and sanction the behavior it orders.

In this sense, I am struck with the possibility that the conventions that govern our interpretation of science and the law, and the mixed role of guardians ad litem who recommend or render judgments based upon facts as applied to the “science of behavior,” may miss an opportunity to expand and open the historical and intellectual analysis from a male-centered dialectic of conflict resolution/advocacy to a broader paradigm. For lack of a more creative solution (and more knowledge on my part), however, the Futurist ducks discovery of the answer to this brief foray and examines more conventional future shock unblemished by intellectual dissonance.

### III. THE FUTURIST IS RIGHT—THE GUARDIAN AD LITEM AS REFEREE

The future role of the guardian ad litem as the empowered decision maker must be understood in the context of current traditions of judicial decision making in family law matters.<sup>56</sup> The most significant obligation facing the legal system at the turn of the century is the preservation of this current generation of children in the context (and chaos) of a parental choice to cause litigation. Whether a child protective proceeding, protection from abuse or harassment action, or divorce or unmarried allocation of parental rights and responsibilities, the obligation to render

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*Proceedings*, 49 AM. PSYCHOL. 677 (1994); Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*, 32 FAM. & CONCILIATION CTS. REV. 504 (1994).

55. WINDERS, *supra* note 17, at 97. See generally EVELYN FOX KELLER, REFLECTIONS ON GENDER IN SCIENCE (1985).

56. A truncated version of Part III appears in Dana E. Prescott, *Parental Conflict and the Appointment of Referees in Child Custody Cases*, 15 ME. BAR J.44 (2000).

a judgment concerning children is placed before a judge. The preservation of this category of children by the judicial system presents the troubling, and often irreconcilable, process of *identifying* the parent who has a capacity to acquire and maintain parenting skills within a referent time frame and imposition of a *consequence* that is protective of the best interests of children when such skills are lacking.

There is no “science” that can provide an answer for judges. The process of judging will always be one of personal character and honor, common sense and intuition, and statutory pronouncements framed by constitutional duty.<sup>57</sup> Even if judges accept that there is a science for the interpretation of human behavior at the particular moment of observation, there is yet no science of human behavior that can predict future behavior toward children. At best, past behavior (historical facts) disclose a range of possible future paths from which a judge selects the more probable outcome.<sup>58</sup> This leaves the “Law”, in the guise of a judge, to make a “judgment” (legal determination) as to the “best interests of a child” based upon selective historical events proffered through the perception of parents feuding in court.

In every state, such a judgment requires an allocation of parental rights and responsibilities defined by a litany of factors common to most jurisdictions: age, intellectual talents or special needs of a child, duration and adequacy of parenting arrangements, stability of future living arrangements, a child’s adjustment to home, school, and community, and the existence of domestic violence.<sup>59</sup> Applying these factors as imposed by common law or legislature, a judge assesses the facts and renders a judgment in the form of a court order. Traditionally, however, there is no mechanism, in actions involving private parties, for

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57. Among the most famous descriptions of this process is BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), which remains a worthwhile read because it frames the contours for an understanding of the exercise of judicial authority.

58. This statement greatly oversimplifies a fundamental debate “about whether man should be studied in the same way as other natural phenomena—whether, in short, history is a science.” JOHN TOSH, *THE PURSUIT OF HISTORY: AIMS, METHODS, AND NEW DIRECTIONS IN THE STUDY OF MODERN HISTORY* 109 (1984). The scholarly development of history as a science, however, has application to the manner in which future courts will need to correlate data (“factual knowledge”) about family systems: “In Karl Popper’s influential view, scientific knowledge consists not of laws but the best available hypotheses; it is provisional rather than certain knowledge.” *Id.* at 115. The same, I believe, is true about the judicial response to family chaos and conflict.

59. The list of factors that eventually became Maine’s definition of best interests under Maine Revised Statutes Annotated is common to many states. See ME. REV. STAT. ANN. tit. 19-A § 1653 (West 1999); *Costigan v. Costigan*, 418 A.2d 1144, 1146 (Me. 1980).

ongoing observation and decision making to secure the best interests of a child when a judge determines that the parents are collectively incapable (intellectually, emotionally, psychologically) of parenting.<sup>60</sup>

The imposition of governmental supervision over private parenting decisions after entry of a judgment raises the legitimate specter of a potential abuse of power to the detriment children and parental authority. Nevertheless, when the judicial authority to allocate rights and responsibilities is invoked by feuding parents, the court must impose an ongoing and enforceable standard of parental responsibility because the state (government) is acting as an arbiter (*parens patriae*) for children. The recurring danger to children over the past few decades is the *mantra* that any parent is curable of any irrational or characterological impairments. Upon the invocation of a parental choice to litigate, a finding of the inability to provide safe and stable care for a child should not be rewarded by an absence of legal accountability.<sup>61</sup> The conundrum known to any judge is that a judgment in equity that maintains and orders existing relationships, whether business injunctions or parental rights orders, is futile without the capacity to enforce that judgment.<sup>62</sup> The repeatedly recalcitrant will defy any remedy that is not swift of consequence.

Parental rights and responsibilities determinations are serious enough to afford *an* opportunity to be a successful parent. But if education or time cannot graft conscience or character then a child's right to security must be given *legal* primacy when parents select the court to make such a judgment. If chronic conflict between parents, or the ongoing emotional or psychological disability of a parent, is a

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60. In child protective proceedings brought by the state, the court must hold a judicial review until termination of parental rights occurs. See, e.g., *In re Alexander D.*, 716 A.2d 222 (Me. 1998).

61. The distinction between the role of science in determining legal culpability and the law's invocation of punishment irrespective of "mental soundness" has a long history. See R. ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS, ch. 4 (1981).

Medicine says a man may be insane and irresponsible, and yet know right and wrong; law says a knowledge of right and wrong is the test of both soundness of mind and responsibility to the law. Medicine says, restrain and cure the insane and imbecile offender against the law; law says, hang, imprison, whip, hunger him, and treats medical art with contempt . . . .  
*Id.* at 106 (quoting T. Laycock, *On Law and Medicine in Insanity: An Introductory Lecture*, 7 EDINBURGH MED. J. 1132 (1862)).

62. As Justice Holmes commented: "In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." *Giles v. Harris*, 189 U.S. 475, 487 (1903). For a valuable discussion of judicial power and strategy for decision making see MURPHY, *supra* note 45.

function of behaviors that are incurable within a period of time defined by the ability of the child to survive that conflict, how is the court to impose a judgment concerning "best interests" that fulfills its duty to the child if the court finds that the parents' behaviors are, more probably than not, going to continue? It is again important to expose and reject the giddy optimism of the modern false science<sup>63</sup> that requires the judiciary to act as a cuckold for a mixture of law and science that assumes that *if* anything positive can occur, given an infinite range of possibilities, only the most overt cruelty warrants the loss of parental rights and responsibilities.

Post-conception responsibility for parental chaos, and its affect upon the best interests of a child, requires development of a paradigm that allows the court to frame a judgment by applying legal factors common to every case but flexible enough to consider the unique factual variables of each family pattern. There are two specific features that are linked: level of parental achievement (L) and time (Tx).<sup>64</sup> "L" is defined by the list of best interests factors applied by courts to the facts. A judge must evaluate "Tx" on a case-by-case basis because parents enter the judicial system at various stages of stress, chaos, and characterological disorders. "P" is defined as the point when "L" and "Tx" intersect. Each curve on the graph can then be defined by the coordinates of "L" and "Tx" and the resulting categories of "Flatliners," "Tweeners," "Advanced Learning Curvers," and "Learners."<sup>65</sup>

For "Flatliners," (Category A), hopelessness is a prevailing concept irrespective of Tx. Not everyone can be rescued within the childhood of a child. The capacity of a child to be healthy is a closed period of a few years when the incentive to work, the moral spirit to connect with the community, and the desire for intellectual and vocational achievement can be instilled. Flatliners will essentially fail even the lowest rung: a lack of empathy for the child's pain or discomfort, whether

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63. These elements of "science" are discussed in DANA E. PRESCOTT, *THE HYDRA HYPOTHESIS: THE MINEFIELD OF ALLEGATIONS OF ABUSE, CHRONIC INTERFERENCE, AND THE NEEDS OF CHILDREN* (1997). My use of features, some to point out the absurdity of oversimplification (such as "mother-dominated" for those falsely accused of abuse) argues for an outcome-based analysis of children's needs within the judicial system. In time, the term "hypothesis" (or "syndrome" for that matter) is probably better replaced by the term "paradigm" when describing the judicial process.

64. See Appendix I.

65. These terms are not mine. Several years ago at a Resources for Divorced Families retreat in Bethel, Maine, a speaker used these phrases and the terms stuck with me. I cannot, however, attribute the phrases to any individual after this many years.

emotional, physical or psychological, and chronic lifestyle disarray often coupled with substance abuse.

Category B are the “Tweeners:” the parents whose capacity to learn (L) reflects incremental improvements in parenting skills (cooperation, responsibility, safety, non-violence) if and when there is the spotlight of supervision or sanction. This parent may not improve for a sustained period of time (*i.e.*, irrespective of Tx) but may regress to Flatliner status once the spotlight or spigot of resources is turned off. The dilemma is whether the community is willing to donate sufficient resources because this parent is salvageable only with ongoing supervision.

Category C is the “Advanced Learning Curver.” This parent learns faster than Category B but the potential for a flatlining fallback is less. For example, work ethic, counseling, and voluntary participation in mediation or parenting workshops may indicate an objective capacity to alter past behaviors and to sustain that improvement over time.

Category D are the “Learners:” the parent who often finds him or herself with little confidence or role models but possesses the integrity and insight sufficient to subsume selfish needs, withdraw from personal combat that imperils a child, and seek educational and therapeutic resources. These parents are educable; knowledge will matter; their lives will adapt and organize and, thereby, hold the potential to dissolve turbulence.

This paradigm provides a very limited framework for plotting the most complex of human relationships. There is no parental perfection. It is the willingness to learn and adapt, applied to time in the context of a child’s needs and welfare, that defines success for a parent-child relationship in any category. Science cannot predict the impact of trauma or behavioral changes, or the sheer chance that random molecules of the mind will coalesce into parenting skills without the benefit of a hospitable environment.<sup>66</sup> There is always the chance that a Flatliner can get it right: much like there is always a chance that a rabbit typing on a keyboard will produce Judge Frank’s *Law and The Modern Mind*. The most subjective and fungible variable is “Time”—which is a euphemism for opportunity. In a private custody case, how long is a

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66. The nature versus nurture debate has a raft of literature. Clarence Darrow argued decades ago that “[e]ndless discussions have been devoted to the relative importance of heredity and environment in human conduct. This is a fruitless task. In a sense, each one is of supreme importance in the outcome of a life.” CLARENCE DARROW, *CRIME: ITS CAUSE AND TREATMENT* 38-39 (1922).

parent willing to put a child at risk for his or her own self-interest?<sup>67</sup> How long will it take a parent to resolve conflicts or overcome a psychological or characterological disorder? Any paradigm may oversimplify the answer to these questions because a parent may shed characteristics of selfishness and rage that harm children and substitute the qualities of empathy and self-awareness that give a child a chance of future success. Parental choice, however, inevitably leads to a higher potential for children with psychological, intellectual, and moral dysfunctions to the detriment of themselves and the community.

Everything about the allocation of parental rights and responsibilities within the judicial system is about the process of merging hundreds of available facts against the stitching of the law to yield such a judgment.<sup>68</sup> What professionals do know is that children cannot survive an onslaught that is perpetual. The military learned long ago that adults can only survive the mental stress of combat for a few months at a time. Yet in custody cases children, not adults, are required to delay or defer the possibility of a healthy childhood for years on the *hope* that one or both parents are educable.

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67. I profess no expertise in the mathematics of game theory, but it is another field of study that may have application to the assessment of individuals within a family system. See JOHN C. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS 10 (1977):

In contrast to individual decision theory, both game theory and ethics deal with rational behavior in a social setting. But *game theory* deals with individuals who rationally pursue their *own* self-interest (as well as all values, both selfish and unselfish, to which their own utility function assigns positive utility) against *other* individuals who just as rationally pursue *their* own self-interest (as well as all their other values included in their own utility functions).

*Id.*

68. Parents do not lose responsibility for their children by the filing of a divorce action, but choices may abdicate that responsibility to the court. The problem is that there is a sizable portion of the population that can only privately order their rights with the threat of consequences, *i.e.*, litigation. If you remove those consequences you will find the meaning of real chaos for children. But for state intervention these parents would exercise the "traditional authority" to abuse and neglect children. See Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765 (1999) (reviewing the state of the federal child protection laws). Anyway, divorce is only a small part of family law conflict today as described by Professor Glendon in her seminal work THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989). For a couple of interesting articles on this topic, see Barbara Holland, *The Long Good-Bye: In Which It Is Argued That a Look at the History of Divorce May Make You Feel Better About Our Own Scandalous Ways*, SMITHSONIAN, Mar. 1, 1998, at 87; Francine Russo, *Can the Government Prevent Divorce?*, THE ATLANTIC MONTHLY, Oct. 1997, at 28.

For the judicial system, the management of parental chaos collides with what Judge Jerome Frank in his seminal work, *Law and The Modern Mind*, describes as the “childish desire”<sup>69</sup> to find the “Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds.”<sup>70</sup> This “childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable.”<sup>71</sup> To reduce the myth that there is judge-made process that can provide a cure for parental chaos, the legal system must abandon the conspiracy of “stork-fibs about how law is born and cease even hinting that perhaps there is some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes.”<sup>72</sup>

An excellent example of parental chaos, and the parameters of judicial discretion to resolve parental disputes about children, may be found in *Rodrigue v. Brewer*.<sup>73</sup> In *Rodrigue*, two parents: (1) had a baby after a brief “courtship” and marriage,<sup>74</sup> (2) could not “separate themselves from their marital conflicts,”<sup>75</sup> (3) decided to separate, with one parent in Quebec City, Quebec and the other in Belfast, Maine,<sup>76</sup> and (4) were still found by the testimony of professionals to be “caring, loving, and capable people who desire to parent” but “the intense conflict between them substantially impairs their ability to cooperate in that parenting.”<sup>77</sup> It is this type of excuse-making for parents that makes

69. JEROME FRANK, *LAW AND THE MODERN MIND* 19 (1930).

70. *Id.* Judge Frank was writing in the early stages of the development of child psychology so his Father-Judge metaphor is out-dated and oversimplified. Nevertheless, his argument that there is a paradox when demanding more “cosmic certainty” from law than biology, is still a fair analysis of this “childish” quest for an omnipotent ruler over chaos. *Id.* at 14-23.

71. *Id.* at 18.

72. This Peter Pan metaphor extends, most dangerously, to those who search, in the name of efficiency and statistical joy, for a mechanism that will remove family chaos from the courts without any other alternative for protecting children. There is a public relations advantage to this tactic because lawyers are an easy target for blame but it is sadly lacking in the mature judgment of professionals who should know better. A famous physicist reflecting on his childhood was reminded by his mother (a lawyer in post-World War I England) of a quotation from the play *The Self-Tormentor* by the African Slave Terintius: “‘*Homo sum: humani nil a me alienum puto*’. ‘I am human and I let nothing human be alien to me.’” FREEMAN DYSON, *DISTURBING THE UNIVERSE* 15 (1979).

73. 667 A.2d 605 (Me. 1995).

74. *See id.* at 606.

75. *Id.*

76. *See id.* at 607.

77. *Id.*

it easy for judges to disregard conclusions by other professions. Shoving aside the bunk that these are “caring and loving” parents is easy enough. There is no historical fact, described within the *Rodrigue* decision, that shows any parental capacity *in the future* to separate selfish needs from the child’s right to be free from conflict.

The majority affirmed the trial court’s allocation of parental rights and responsibilities on an alternating four week schedule. Justice Rudman’s dissent superbly captures the essence of the boundaries for judicial discretion in child custody cases. Justice Rudman began with the premise that in the words of Justice Cardozo the court is not a “mere arbiter between two adult adversaries, simply reacting to the evidence that they may see fit to adduce in support of their respective positions.”<sup>78</sup> This means that even if the trial court has authority to impose a judgment, the exercise of discretion is not proper if there is no evidentiary basis for doing so *or* the judgment is contrary to the evidence. The only evidence common to all the expert witnesses in *Rodrigue* was that the parents’ behavior during the divorce proved, more probably than not, that there would be no cooperation in the future. *One* of the psychologists is cited as having actually asserted that there “must be no shared responsibility, she said, but neither should either parent be given ‘most’ authority.”<sup>79</sup>

Neatly fitting within the topic of this paper, however, an expert in *Rodrigue* suggested that in the short run the ultimate parenting power should not reside with either parent but with a “guardianship of some sort or some third party.”<sup>80</sup> One parent actually appealed the denial of that suggestion, to which the Court held that: “[e]ven assuming that the court had the authority to suspend parental rights,<sup>81</sup> neither parent was economically able to afford the services of a ‘third parent.’”<sup>82</sup>

Ordinarily, a trial court cannot micro-manage the future decision making process in the absence of jeopardy. For example, the mere allocation in *Rodrigue* by the trial court of authority to decide education to one parent and religious decisions to the other parent does little to resolve the conflict. Allocation of a power to one parent is not

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78. *Id.* at 608 (Rudman, J., dissenting) (quoting *Ziehm v. Ziehm*, 433 A.2d 725, 728 (1981)).

79. *See Rodrigue*, 667 A.2d at 610 (Rudman, J., dissenting).

80. *See id.* at 607.

81. Maine Revised Statutes Annotated title 19, section 752(6) is now Maine Revised Statutes Annotated title 19-A, section 953(2)(C). The statute grants the trial court authority to award custody to a third party when there is jeopardy. *See* ME. REV. STAT. ANN. tit. 19-A § 953(2)(c) (West 1999).

82. *See Rodrigue*, 667 A.2d at 607.



concomitant with a termination of the power to object to the other parent. Such an allocation may create a presumption of authority and shift the burden to the parent without the power to prove an abuse of that authority but it is not an absolute grant of authority to act unreasonably or in the extreme. As Justice Rudman concluded: "The court's strain to effect a kind of legal equipoise is palpable,"<sup>83</sup> but by such a judgment the parents "who universally have been determined to be incapable of resolving their conflicts" are impelled "into certain conflict."<sup>84</sup>

The question presented, therefore, is what remedies are appropriately available, within constitutional proscriptions, for the preservation of the needs of the best interests of children when parents are "impelled" into certain and chronic conflict and the delay and expense of litigation is potentially harmful to a child? The practical answer to this question is that the guardian ad litem may be an unnecessary middle step for managing these families. The legal answer to this question depends upon the extent to which a legislature may delegate to the judiciary, as a co-equal branch of government, the authority to appoint a non-constitutional judicial officer to exercise judicial authority to order parental rights and responsibilities.<sup>85</sup>

#### IV. GUARDIAN AD LITEM AS A REFEREE IN CHRONIC CONFLICT CASES: WHEN AND HOW?

In 1995, the Maine Legislature adopted Maine Revised Statutes Annotated, title 19-A, section 252, which represents a fairly simple statutory means for conferring express authority upon a court to appoint a referee in family law matters:

1. Appointment of Referee. The court may appoint a referee in any proceeding for paternity, divorce, judicial separation or modification of existing judgments brought under this Title:

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83. *Id.* at 610 (Rudman, J., dissenting).

84. *Id.* at 610-11 (Rudman, J., dissenting).

85. See *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766 (Cal. Ct. App. 1993) (holding that the court's delegation of authority must be grounded in statutory and constitutional authority); *Baril v. Baril*, 354 A.2d 392, 395 (Me. 1976) ("it is well settled in Maine that the jurisdiction and authority of the divorce court in matters of divorce and incidental relief such as orders for custody, support and counsel fees, are exclusively derived from the provisions of the statute. Jurisdiction over divorce is purely statutory and every power exercised by the court with reference to it must be found in the statutes or it does not exist.").

- A. When the parties agree the case may be tried before a referee;  
or
  - B. Upon motion demonstrating exceptional circumstances that  
require a referee.
2. Payment for Service. Payment for the services of the referees is the responsibility of the parties, as ordered by the court. If the court finds that either or both of the parties are indigent, the court may pay the reasonable costs and expenses of the referee.
  3. Referee's report. If all parties waive the right to object to acceptance of the referee's report, the court shall immediately enter judgment on the referee's report without a further hearing.<sup>86</sup>

The enactment of section 252 is similar to efforts in many other states to provide flexible alternative methods of dispute resolution for families.<sup>87</sup> Under section 252(1), the court may refer interim issues, or a piece of an entire case, with the trial court reserving jurisdiction over the remainder of the case. In some states, however, there are strict limitations on the authority to refer matters related to the custody of children.<sup>88</sup> The consensual use of a referee/arbitrator is self-explanatory. There have already been various experiments of this kind in Maine and elsewhere employing lawyers and other professionals as referees to allocate parental rights and responsibilities.<sup>89</sup> If, however, one or both

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86. ME. REV. STAT. ANN. tit. 19-A § 252 (West 1999).

87. For example, Wisconsin allows parties to choose a variety of creative methods of ADR, from mediation to arbitration. See WIS. STAT. § 802.12 (1999). The preference for mediation as a means for "[m]utually agreed solutions, rather than the public acrimony of an adversarial legal proceeding, are viewed as less destructive to family relationships, particularly parent-child ties." Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993). With the positive endorsement of the courts and lawyers, use of dispute resolution techniques other than trial will continue to grow. See DONALD G. GIFFORD, LEGAL NEGOTIATIONS: THEORY AND APPLICATIONS 201-19 (1989).

88. See *Van Dine v. Gyuriska*, 713 A.2d 1104, 1105 (Pa. 1998) (holding that the father was entitled to de novo hearing before judge on custody as civil procedure rule did not allow appointment of master to hear final custody case but only partial custody or visitation); *Bell v. Bell*, 307 So. 2d 911 (Fla. Dist. Ct. App. 1975) (holding that the court had no authority to refer custody matter).

89. Even when parties consent to custody arbitration, appellate courts in other states have struggled to encourage the parental choice to arbitrate as against the court's traditional responsibility to protect the best interests of children. See, e.g., *Dick v. Dick*, 534 N.W. 2d 185 (Mich. Ct. App. 1995) (holding that an arbitration decision regarding child custody may not be overturned without fraud, duress or procedural defect); *M.F.M. v. J.O.M.*, 889 S.W.2d 944 (Mo. Ct. App. 1995) (holding that only a judge may hear issues regarding child custody); *Glauber v. Glauber*, 192 A.D.2d 94 (N.Y. App. Div. 1993) (holding that child custody arbitration agreements should not be enforced). See generally Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody*, 14 J. AM. ACAD. MATRIM. LAW. 419 (1997).

parties refuse to consent, the court may still appoint a referee upon a finding of "exceptional circumstances." Although without definition in the statute, the term "exceptional circumstances" probably requires technical, complex, and difficult factual or legal issues.<sup>90</sup>

It is the nexus between the best interests of children and the inability of parents to separate themselves from conflict that provides the technical, complex, and difficult circumstances for appointment of a guardian ad litem as a referee in family law matters. The flexibility to appoint professionals with special expertise to conduct trials regarding parental rights and responsibilities may be defined by a cluster of events commonly seen in family law litigation:

1. The need for ongoing and swift supervision and decision making when the conflict is escalating or continuous.<sup>91</sup>
2. Stability for the school year is at risk because of the filing of a late motion or a lack of available trial time.
3. Modification of an existing order to protect a child from a residence that is harmful.<sup>92</sup>
4. Relocation cases in which the move (or moves) are without adequate notice and opportunity for study or court hearings.
5. The child has an independent right to a hearing on a unique medical, educational, or psychological issue.<sup>93</sup>

There is valid hesitation concerning the broad use of referees if only because private judging could subsume the constitutional and statutory responsibility of appointed judges. The statutory authority to appoint a referee is, however, qualitatively different than the creation of a court-system-within-a-court-system. The referee is a case specific exercise of

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90. See, e.g., *Carlson v. Carlson*, 497 P.2d 1006 (Colo. 1972) ("[M]asters should not be appointed as a routine matter in divorce cases where the issues are not complex and the facts are not complicated.").

91. See *M.F.M.*, 889 S.W.2d at 950-51. (finding it was error to refer father's motion to modify custody to master where exceptional condition alleged was calendar congestion but refusal to reverse because parties in turmoil for two years).

92. Cf. *Mary D. v Watt*, 438 S.E.2d 521, 525-26 (W.Va. 1992) (finding grounds for "expeditious hearing" and referral to family law master may include allegations of sexual abuse).

93. Parental authority to make medical decisions for children, particularly given the propensity of modern parents to give legal but toxic drugs to their children to control behavior, raises profound questions about a child's right to privacy. Although such medical care is truly necessary in many cases, there is much doubt as to so much. See Julie Holland, *Should Parents Be Permitted to Authorize Genetic Testing for Their Children?*, 31 *FAM. L.Q.* 321 (1997) (discussing the rights of children to privacy).

an exceptional statutory power to protect children who are at risk from parents who, for a cluster of factors, are incapable of making any rational decision jointly or in which a particular area of expertise makes a referee appropriate and necessary.<sup>94</sup> Thus, the selective appointment of a referee for “exceptional circumstances” is not the unfettered delegation of constitutional authority invoking the constitutional problem of separation-of-powers.<sup>95</sup> Indeed, the need for specificity in an order vesting judicial authority in anyone is particularly important because the court should define the “exceptional circumstances” that give rise to the reference, the scope of the fact-finding and the area for decision, and what issues the court is retaining jurisdiction to decide after reference. The purpose of the order is to appoint the referee to exercise “intelligent discretion in framing just relief.”<sup>96</sup>

Moreover, finances should not be a bar to this remedy when “exceptional circumstances” exist. If a party is indigent, the court can pay the costs of the referee.<sup>97</sup> The father in *Rodrigue*, for example, had

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94. See, e.g., *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 771-72 (Cal. Ct. App. 1997)

In family law matters, especially where the parties are unable to curb their animosity toward each other, the trial court may well find it advantageous to designate a separate forum to resolve the parties' differences. However, the authority of the trial court to do so is constrained by the basic constitutional principle that judicial power may not be delegated. The trial court has no authority to assign matters to a referee or special master for decision without express statutory authorization.

*Id.* (internal citation omitted).

95. See *State v. Boynton*, 379 A.2d 994 (Me. 1977). The “non-delegation doctrine” holds that a legislature cannot confer upon another branch of government (or administrative body) legislative power absent meaningful standards; though “the line of demarcation between a legitimate and an illegitimate delegation of legislative power is often quite dim.” *Id.* at 995.

[When it is not] feasible to supply precise standards without frustrating the purposes of the particular legislation . . . the presence of adequate procedural safeguards to protect against [an] abuse of discretion by those to whom the power is delegated compensates substantially for the want of precise guidelines and may be properly considered in resolving the constitutionality of the delegation of power.

*Id.*

96. *Adams v. Alley*, 340 A.2d 201, 206 (Me. 1975).

97. The impact of public funding for referees in Maine has yet to find a reported decision. The Maine Legislature, however, quite properly recognized its duty to make services in the courts available to everyone without economic discrimination. See *Harrington v. Harrington*, 269 A.2d 310 (Me. 1970):

Court procedures, at the trial level or in appellate review, even though the result of statutory requirement, which in and of themselves invidiously discriminate between rich and poor, impair guarantees of equal justice which the Constitution was designed to protect. This is equally so in civil litigation as in criminal prosecutions. An indigent litigant may have more at stake in

enough resources to pursue two Ph.D.s rather than get a job. There is no indication that either of the parents could not work a second job during the off-month to afford protection for a child that their own behavior puts at risk. Any sympathy for the parents' economic constraints was unnecessary because the parents' willingness to expend resources on themselves, litigation, and multiple experts at the expense of their child's future interests should abrogate that sympathy. In short, the trial judge has authority to compel priority for the child's interests over the parents' choice to torment that child in selfish conflict.

The availability of a guardian ad litem is helpful (and important), but the availability of a referee to parents of all economic strata is a better form of protection for children caught in conflict without recourse. Thus, a referee with special expertise in matters of parent/child relationships may ameliorate the harm that ongoing indecision or conflict can cause children. The delegated authority to render judgment immediately and to direct its implementation (and in emergencies, to request contempt enforcement by the supervising court) provides children with an ongoing degree of protection otherwise unavailable through ordinary court processes.

The availability of such services has, in my experience, the added advantage of meaningful resolution of disputes by agreement because there is no forum shopping, judgments are likely to have a consistency of theory and sanction, and knowledge of predictable and immediate results will yield a greater willingness to compromise and reform behavior. Stated another way, the appropriate delegation of authority to a referee makes it more difficult to engage in conflict without the consequence of a loss of access or decision making authority. Although far from a perfect foil, children will benefit more from the availability of a resource that *includes* the flexible involvement of therapists, guardians ad litem and educators who can assist the decision making process *but* confers decision-making authority on a professional who can act in lieu of parental mischief.

## V. THE RIGHTS OF CHILDREN WITHIN THE CONSTITUTION

Assuming the court's authority to delegate power to a referee/master/guardian ad litem, the right to representation and a timely

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a civil case than in a criminal case. Furthermore, equal access to the civil courts was among the Fourteenth Amendment's primary objectives.

*Id.* at 314.

(speedy) hearing for children caught in chronic conflict raises a critical issue that bears attention.<sup>98</sup> Today the guardian ad litem serves at the statutory or common law discretion of the judge to play an intermediate (and often indeterminate) role by ferreting out information, gathering evidence, and making recommendations that are intended to protect and foster the best interest of the children.<sup>99</sup> The duty of any advocate for children has its greatest aegis in preventing delay when there is chronic conflict between the parents, and this duty should extend to the court (and those entities that fund the courts):

One issue which counsel for the children must closely watch is the matter of delay in the resolution of custody. While substantive protection is important, so detrimental is delay in the disposition of the child that counsel must vigorously press the court in order to avoid it. This is at least equal in importance to the right of a "speedy trial" guaranteed in criminal procedures, for time is often even of more critical importance to children than it is for adults. Vigorous counsel and an alert judge must see that it is not lost.<sup>100</sup>

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98. This section is a shortened version of arguments that appear in DANA E. PRESCOTT, *THE HYDRA HYPOTHESIS: THE MINEFIELD OF ALLEGATIONS OF ABUSE, CHRONIC INTERFERENCE, AND THE NEEDS OF CHILDREN*, Chs. X-XII (1997), and Dana E. Prescott, *The Liability of Lawyers as Guardians Ad Litem: The Best Defense Is a Good Offense*, 11 J. AM. ACAD. MATRIM. LAW 65 (1993).

99. See Short *ex rel.* Oosterhous v. Short, 730 F. Supp. 1037, 1039 (D.Colo. 1990):

Indeed, the need for an independent guardian ad litem is particularly compelling in custody disputes. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict. To safeguard the best interests of the children, however, the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents.

*Id.* See Gerber v. Peters, 584 A.2d 605, 607 (Me. 1990):

An attorney-client relationship between the appointed guardian ad litem and a parent is not created by the court's appointment or by a provision that the parents be responsible for the payment of the guardian's fees. In a divorce action the court has the sole and continuing authority to determine parental rights and responsibilities with respect to a minor child of the parties, and is invested with broad discretion in making this determination. The duty of a court appointed guardian ad litem of a minor child in a divorce case is to the court, and the scope of that duty lies within the parameters of the order of appointment.

*Id.* (internal citations omitted).

100. Andrew S. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 56 (1969). See also Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757, 772 (1990) ("The appointment of a guardian ad litem, pragmatically speaking, is a response by the court to its perception that the

Over the years, I have argued in court (and elsewhere) that the extension of "personhood" under the Fourteenth Amendment ("no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") to children in school, juvenile, and abortion cases deflated any arguments that the impact of custody warfare on children is entitled to less constitutional protection.

Regrettably, any concern with the intrusion of government in family matters as a matter of constitutional propriety cannot obscure the fact that the volume and depth of family law litigation today encourages such government intrusion into any case involving a decision related to the custody of children.<sup>101</sup> In that sense, the necessity for government interference in the family occurs only because of the abdication of individual responsibility. While the parents can choose representation and a right to due process in custody cases, children are subject to the choices of everyone but their own champion in this sad combat. The protection of children upon the choice of litigation requires recognition of a due process right in civil family law matters: *when the court finds that there is risk that the child's relationship to a parent will be unjustifiably harmed or that the child's present and future safety and well-being are jeopardized by conflict, there is a constitutional due process right to independent protection for the child.*

A basis for each test may be found in *Ingraham v. Wright*,<sup>102</sup> in which the United States Supreme Court concluded that:

In any deliberate infliction of corporal punishment on a child who is restrained for that purpose, there is some risk that the intrusion on the child's liberty will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards

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child's due process rights need to be protected by independent representation."); Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 638 (1990) ("The most frequent characterizations of the role of a guardian ad litem are that of investigator, champion, and monitor.").

101. The definition of these rights for parents has historically given priority to biological parents over third parties in custody cases. In an important decision, a majority of the Pennsylvania Supreme Court rejected such a presumption; though "biological ties" are of great importance, such "ties" do not trump the child's best interests. See *Charles v. Stehlik*, 744 A.2d 1255, 1258-59 (Pa. 2000). This decision will likely resonate.

102. 430 U.S. 651 (1977).

that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification.<sup>103</sup>

In custody litigation, the utter absence of procedural safeguards for the child, unlike the principal's office after *Ingraham*, means that children often risk much more of their future than "wrongful punishment." The point is not the quality of due process for children but its availability at all as a minimum constitutional safeguard in custody cases run amuck. In *Ingraham*, and other cases, the Court has held that due process is a "flexible" concept tailored to the specifics of each circumstance, with the only clear mandate the right to be heard at a meaningful time and in a meaningful manner.<sup>104</sup>

In juvenile proceedings involving potential criminal sanctions, the Supreme Court, in its seminal decision in *In re Gault*<sup>105</sup> refused to afford juveniles all the procedural guarantees granted adults but concluded that juvenile delinquency hearings must measure up to the essentials of due process and fair treatment, including the right to counsel (court-appointed or privately retained) and to participate in the trial process. In this fashion, *In re Gault*<sup>106</sup> and later *In re Winship*<sup>107</sup> recognized the fundamental interests of a child to his or her liberty: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>108</sup> Although concerning itself only with criminal cases, the Court used strong language to extend due process rights to minors: "It would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."<sup>109</sup> Justice Fortas in *In re Gault* based his decision partly on *Haley v. Ohio*,<sup>110</sup> a criminal case involving the admissibility of a confession by a fifteen-year-old boy in which the Court held that "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."<sup>111</sup>

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103. *Id.* at 676.

104. *See also* *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Goss v. Lopez*, 419 U.S. 565, 578-79 (1975).

105. 387 U.S. 1 (1967).

106. *Id.*

107. 397 U.S. 358 (1970).

108. *In re Gault*, 387 U.S. 1, 13 (1967). *See also* *Wisconsin v. Yoder*, 406 U.S. 205, 243-45 (1972) (Douglas, J. dissenting) (collecting cases).

109. *In re Gault*, 387 U.S. at 27-28.

110. 332 U.S. 596 (1948).

111. *Id.* at 601.



From the school punishment to juvenile court to the law of abortion, a majority of the Court has consistently professed little reluctance to sever the rights of minors from the traditional decision making rights of parents. In *Planned Parenthood of Central Missouri v. Danforth*,<sup>112</sup> which concerned whether minors must receive consent from parents before obtaining an abortion, the Supreme Court accorded the constitutional right of privacy to minors with strong words: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>113</sup>

Nonetheless, on a case-by-case (or situation-by-situation) basis, it is difficult to recognize a consistent theme in the area of procedural due process (or substantive due process for that matter) when applied to children. Some would argue that *Danforth*, and the latter case of *Bellotti v. Baird (Bellotti III)*,<sup>114</sup> merely suggests the "proposition that the privacy right of children includes the right to make independent decisions or, alternatively, the right to have decisions made in their best interests."<sup>115</sup>

There is no logical reason to confer a right to due process for minors (of whatever quality) in every other fateful event in life except the trauma of a custody case.<sup>116</sup> The question is the application of *Haley, Santosky, In re Gault, Danforth*, and their progeny to a child's "right," in the chronic conflict case, to independent advocacy in the form of a guardian ad litem or, as asserted in this article, the appointment of a referee so as to give children a voice in their futures. However depressing, American society cannot ignore the overwhelming failure of parental responsibility the last two decades, nor should courts ignore decades of constitutional precedent applicable to the rights and needs of children in all other areas of the courts.

A fundamental and reoccurring problem is the ethical conflicts that continue to arise in the representation of children by the use of guard-

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112. 428 U.S. 52 (1976).

113. *Id.* at 74.

114. 443 U.S. 622 (1979).

115. Harvey Wingo & Sharon N. Freytag, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401, 431-32 (1982). This article addressed many of the Supreme Court's decisions that I do not discuss. For example, in *Parham v. J.R.*, 442 U.S. 584 (1979), the Court held that the parental right to commit a child to a mental hospital did not require an advocacy hearing either before or after commitment. The Court's assessment of when parental judgment is less risky to a child reveals an interesting set of values.

116. See *Miller v. Miller*, 677 A.2d 64 (Me. 1996) (holding that a child, as a minor, has no right to hire an attorney without court approval, but the right to a guardian ad litem may have constitutional implications).

ians ad litem, who frequently must represent multiple children while coping with parental complaints and threats.<sup>117</sup> A referee or a “judge” has no such conflicts as she renders decisions based on evidence offered in summary or trial fashion, but always with notice and an opportunity for hearing. Future litigation will undoubtedly raise these arguments and request the courts to explain the right to due process, procedural or substantive, for children in every other context of potential harm but the denial of that right when parents have elected litigation over their children’s best interests.

## VI. AFTERMATH

The sheer volume of chronic conflict cases over the past twenty years is depressing. Traditionally, most reported decisions are found in

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117. See, e.g., *Auclair v. Auclair*, 730 A.2d 1260, 1267-68 (Md. Ct. App. 1999) (“the [child’s] guardian ad litem . . . function[s] as an agent or arm of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client.”). The *Auclair* case did raise the interesting issue of whether the private attorney who was contacted by the children breached the rules of professional conduct by communicating with the guardian ad litem’s “clients.” The court held that in those circumstances she did not because the children were intelligent, mature being just shy of young adulthood and the function of private counsel was solely to disseminate information to the children; however, this would be a close call on other circumstances for private counsel embarking on such a path if contacted by one of the parents. See *Auclair*, 730 A.2d at 1275-77. See also *Newman v. Newman*, 663 A.2d 980, 987-88 (1995). The *Newman* court was concerned about creating conflict in the attorney’s role by confusing the role of counsel for a child with the role of a guardian ad litem or next friend. The child’s attorney is an advocate for the child, the guardian ad litem is a representative of the child’s best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal if a child is old enough to express a reasonable preference; the attorney might decide that, despite such a child’s present wishes, the contrary course of action would be in the child’s long-term best interests, psychologically or financially. In Vermont, the court has held that the guardian ad litem is an independent parental advisor or advocate “whose goals should be shaped by the child’s best interests” and “the guardian acts as a buffer between the child and the adversarial nature of our judicial process.” See *Gilbert v. Gilbert*, 664 A.2d 239, 241 (Vt. 1995). Under current ethical rules, a lawyer may assume a certain level of competency by the child to make the expression of those wishes clear and rational. See, e.g., *Joshua K. v. Nancy K.*, 549 N.W.2d 494 (Wis. Ct. App. 1996). Of course, the more modern role of the guardian ad litem has also evolved into an expectation by parties frequently (as well as lawyers and the judges) that the guardian ad litem will also serve a role as mediator and try to bring about a resolution that does not require the writing of a report or litigation. See generally Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 FAM. L.Q. 679, 718 (1996) (stating that the mediator should “strive to integrate the best interest of the child with the parents’ circumstances, rights, and responsibilities. The mediator should use his or her best effort to assist the parents in reaching a sound agreement.”).

the appellate courts and those cases represent only a fractional portion of the 1-2% of all civil filings that actually go to trial for judgment. If the appellate decisions nationally are representative of the willingness of thousands of parents to engage in the emotional and financial expense of protracted litigation, what is the situation in the home for children under such compression? The facts in many of these cases certainly reflect an unfortunate and detrimental level of conflict.

And these reported decisions still do not reflect what many of us know is the energy and expertise required by professionals from many disciplines beyond lawyers to limit the conflict and prevent trial by combat in thousand more cases.<sup>118</sup> But the creative solutions of the past few years have not slowed the rate of custody litigation. There are those who will attribute higher levels of conflict to more joint custody awards or the more active involvement of fathers than in the past (or stated another way—fewer fathers walking away, willingly or not, from parental responsibility). Toffler is probably more correct in that the loss of stability for individuals within the family as the “great shock absorber” of society combined with serial relationships, increases the sheer volume of players in a child’s life and with that volume conflict is more probable.

As physical scientists explore the realms of chaos and complexity theory, it may find a home in family law. The “transcience” of relationships means that parents are introducing many more emotional, psychological, sexual, moral, behavioral, and cultural variables into the daily matrix of a child’s life. Even if conflict between those variables is inevitable, a parent’s inability or unwillingness to act as a “shock absorber” for his or her will yield more litigation. Selfishness and narcissism are not pretty traits and when confronted in a swirling mass it is difficult to educate parents while protecting children within the current ethical, financial and constitutional limitations of the judicial system.

Thus, our Futurist finds noticeable and remarkable patterns which yield a paradigmatic shift in the role of the guardian ad litem for the future. When parental conflict is unyielding, a guardian ad litem will be appointed for the family with the authority to investigate, champion, and

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118. As Professor Cantor has written, “the great difference between the law and the other prominent learned professions, medicine and academia, is that the law is intertwined with the exercise of state power and for the most part cannot be resisted by private persons.” NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 237 (1997).

referee.<sup>119</sup> What this means for a presumption of privacy within the family and how the evolution of due process rights for children in custody cases will impact historical parent-child relationships which traditionally empowered parents to act for their children remains to be seen. But there is a cost: as parents forfeit authority, its dispersion to third parties and their children will profoundly influence a pattern of family life that has remained consistent over hundreds of years.

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119. There will be a right to appeal but the right to appeal arbitration or references is much narrower than the right to appeal in a non-jury trial. *See, e.g., Swentor v. Swentor*, 520 S.E.2d 330, 333-34 (S.C. App. 1999) (stating that where husband and wife agreed to arbitrate financial issues, family court cannot review for "fairness").

APPENDIX I

