

Guardians Ad Litem and the Cycle of Domestic Violence: How the Recommendations Turn

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work of the staff of Advocates for Family Peace and Legal Aid of
Grand Rapids, Minnesota.

“Happy families are all alike; every unhappy family is unhappy in
its own way.”

—Anna Karenina, Leo Tolstoy (1876).

Introduction

A guardian ad litem (GAL)¹ serves as a family court judge’s eyes and ears within the most contentious legal context in which children are involved—the custody battle.² The GAL’s role is especially difficult when a GAL functions in cases where there has been domestic abuse. While judicial officials applaud the work done by guardians ad litem, many parents and lawyers view guardians as biased spies who selectively report their findings for rubber-stamping by an overworked judiciary.³

Guardians ad litem, though required to have only minimal training,⁴ have wide-reaching investigative power that is largely

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1. Throughout this Article, the terms guardian ad litem, GAL, and guardian will be used interchangeably.

2. Guardians ad litem are also used to represent juveniles, the elderly, and incapacitated persons in the courts. This Article will only discuss guardians ad litem in the context of custody evaluation cases.

3. See, e.g., PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, GUARDIANS AD LITEM (1995) [hereinafter PROGRAM EVALUATION DIV.].

4. See *infra* Part I.C (discussing the qualifications, training, and recruitment of

unchecked by current rules and procedures in the guardian ad litem system.⁵ Appointed as advocates for the best interests of the children in divorce and child custody cases, guardians perform multiple roles that often make them the most powerful person in a custody determination.⁶ When the court relies so greatly on the GAL's opinion, the GAL wields a power that is a usurpation of judicial power and an invasion of family privacy. The protections for the family are further weakened by statutes that give too much power to the abuser.

This Article will argue that the current GAL program in Minnesota needs to be reformed; because a GAL performs so many roles, has so much power, and is inadequately trained, the best interests of the child are sacrificed.⁷ Additionally, the Minnesota Legislature must implement a more open mechanism to review complaints against GALs.⁸ Because of the importance of their work, GALs must be scrutinized as closely as the families they investigate. Finally, the Legislature must amend the child custody determination statute to create a statutory presumption against awarding custody to adjudicated batterers to emphasize that any domestic violence is a poor reflection on batterers' parenting skills.⁹

This Article will examine the historical and current use of the guardian ad litem within the family court system of the State of Minnesota. Part I will cover the historical use of guardians ad litem in the Minnesota family court system.¹⁰ Subpart A describes the federal mandate that shaped the guardian ad litem system in Minnesota.¹¹ The remaining subparts will discuss the appointment of guardians in contested family court cases, the inadequacies of guardian ad litem training and qualifications, and GALs' statutory responsibilities.¹² Part II will examine the nature of domestic violence and how GALs are inadequately trained to evaluate its impact on families.¹³ This section will also show that

guardians).

5. See MINN. STAT. ANN. General Rules of Practice for the District Courts R. 901-13 (West Supp. 1999).

6. See *infra* Part I.D (discussing the responsibilities, rights, and powers of the guardian ad litem); *infra* Part V (discussing the constitutional conflicts arising from the multiple roles of the guardian ad litem).

7. See *infra* Part VI (suggesting reforms to the GAL program).

8. See *infra* Part VI.

9. See *infra* Part VI.

10. See *infra* notes 21-97 and accompanying text.

11. See *infra* notes 21-38 and accompanying text.

12. See *infra* notes 45-97 and accompanying text.

13. See *infra* notes 98-127 and accompanying text.

specific statutes governing domestic abuse and child custody ignore the full impact of domestic violence on children and families.¹⁴ Part III is an example of a case involving domestic violence and shows how a guardian's recommendation may be based on inappropriate factors.¹⁵ Part IV provides further support for the need to amend the GAL program and argues that the concentration of diverse roles and the usurpation of judicial jurisdiction violate the Minnesota Constitution.¹⁶ Subpart A focuses on a study of the guardian ad litem system in Washington State which concluded that the state's GAL program violated its constitution by giving too much power to the guardian.¹⁷ Subpart B argues that Minnesota's GAL program may violate the Minnesota Constitution, which does not authorize the many roles guardians perform.¹⁸ Part V scrutinizes Minnesota domestic violence statutes and reveals them as a shield enabling batterers to hide their violence from court evaluations.¹⁹ Part VI provides suggestions to improve the guardian ad litem program and domestic abuse statutes to serve the best interests of battered women and children.²⁰

I. Guardians Ad Litem Up to the Present

A. *Brief Historical Summary of the Guardian Ad Litem program in Minnesota*

In 1974, the federal government passed the Child Abuse Prevention and Treatment Act (CAPTA).²¹ CAPTA mandates that states assign guardians ad litem in proceedings involving child abuse or neglect in order to qualify for federal money for child protective services.²² Minnesota delegated the task to the counties rather than organize a new state-wide administrative body.²³ This

14. See *infra* notes 102-127 and accompanying text.

15. See *infra* notes 128-130 and accompanying text.

16. See *infra* notes 131-178 and accompanying text.

17. See *infra* Part IV.A.

18. See *infra* Part III.B.

19. See *infra* notes 179-220 and accompanying text.

20. See *infra* notes 221-231 and accompanying text.

21. See, e.g., PROGRAM EVALUATION DIV., *supra* note 3, at 6; MINN. SUPREME COURT ADVISORY TASK FORCE ON THE GUARDIAN AD LITEM SYSTEM, FINAL REPORT 12 (1996) [hereinafter FINAL REPORT]. See also Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-06 (1978).

22. See 42 U.S.C. § 5106a(b)(6) (1996). See also PROGRAM EVALUATION DIV., *supra* note 3, at 6.

23. PROGRAM EVALUATION DIV., *supra* note 3, at 7; FINAL REPORT, *supra* note 21, at 13. Most states delegated administration of the guardian ad litem system to

resulted in a decentralized system in which each county had different procedures and requirements for the use of the guardian ad litem.²⁴

Counties were free to develop their own schemes for guardian management.²⁵ They developed management structures to administer the guardian ad litem program that included management by court services or court administration, or by contract with for-profit or not-for-profit organizations within the county.²⁶ Requirements have varied greatly as counties have used volunteers from the community, volunteer attorneys, paid attorneys, and paid workers to be guardians ad litem.²⁷

Complaints about guardians ad litem, especially in family court cases, began to surface.²⁸ As a result, the Legislative Audit Commission authorized the Legislative Auditor in mid-1994 to conduct a study of the guardian ad litem program within the state.²⁹ In the Legislative Auditor's report, supporters of the current guardian ad litem program emphasized the critical role that guardians play in one of the most contentious litigations in the court system: the contested custody battle.³⁰ Critics of the guardian ad litem system complained of "guardian bias, lack of oversight and accountability, [and] inadequate training."³¹ Additionally, parents interviewed in the study wanted a forum to address grievances about individual guardians ad litem.³²

Somewhat surprisingly, the Legislative Auditor did not recommend a centralized, state-wide system as a cure for the guardian ad litem program.³³ Rather the Legislative Auditor only

county government. *Id.*

24. PROGRAM EVALUATION DIV., *supra* note 3, at 7; FINAL REPORT, *supra* note 21, at 13.

25. PROGRAM EVALUATION DIV., *supra* note 3, at 7; FINAL REPORT, *supra* note 21, at 13.

26. FINAL REPORT, *supra* note 21, at 14.

27. *See* PROGRAM EVALUATION DIV., *supra* note 3, at 7, 25.

28. PROGRAM EVALUATION DIV., *supra* note 3, at 28. Parents and lawyers complained about biases of individual guardians, lack of knowledge of legal procedure, and lack of complete investigation. *Id.* Some reports focused on guardians engrossed in the power they held. *Id.*

29. PROGRAM EVALUATION DIV., *supra* note 3, at 1; FINAL REPORT, *supra* note 21, at 17.

30. PROGRAM EVALUATION DIV., *supra* note 3, at 1; FINAL REPORT, *supra* note 21, at 14.

31. PROGRAM EVALUATION DIV., *supra* note 3, at ix; FINAL REPORT, *supra* note 21, at 17.

32. PROGRAM EVALUATION DIV., *supra* note 3, at 56, 58; FINAL REPORT, *supra* note 21, at 17.

33. PROGRAM EVALUATION DIV., *supra* note 3, at xii-xiii; FINAL REPORT, *supra*

recommended more guidance from the Legislature and Minnesota Supreme Court as to the proper role and function of the guardian ad litem.³⁴ The Legislature responded by amending the Minnesota Guardians for Minor Children statute to define the proper roles and responsibilities of the guardian ad litem.³⁵ The Minnesota Supreme Court established the Advisory Task Force on the Guardian Ad Litem System.³⁶ In 1999, the Legislature finally authorized the take-over of the GAL program by the State³⁷ because of the continuing inadequacies of the decentralized system. The county programs were brought under state control in phases; the last counties were subsumed on July 1, 2001.³⁸

Minnesota has attempted to bring fifty-six different programs in line with one uniform state-wide system.³⁹ The state hoped to achieve wage parity among all guardians and ensure that guardians were appointed in every case where they are mandated.⁴⁰ The guardian ad litem program is now funded through the state judiciary's budget, but during this current fiscal crisis, the guardian ad litem program has been temporarily placed on the back burner.⁴¹ Because of scant resources in the judiciary's

note 21, at 19.

34. PROGRAM EVALUATION DIV., *supra* note 3, at xii, 1; FINAL REPORT, *supra* note 21, at 19. The Legislative Auditor specifically named the judiciary as the proper branch to resolve problems with the guardian ad litem system as guardians ad litem primarily serve as a part of the judicial branch. PROGRAM EVALUATION DIV., *supra* note 3, at xii. The report noted that the Legislature should adopt more articulate language as to the roles of the guardians ad litem. The Supreme Court was advised to update and adopt the 1986 *Guidelines for Guardians Ad Litem*. *Id.* at xiii. The Legislative Auditor provided thirteen suggestions to modify the 1986 *Guidelines for Guardians Ad Litem*. FINAL REPORT, *supra* note 21, at 19-20. The third suggestion recommended development of "procedures to govern the working relationship between guardians ad litem and parents who have orders for protection." *Id.* at 19. This demonstrates the priority the Legislative Auditor placed on custody determinations when allegations of domestic abuse were involved. *Id.* Other recommendations were to define roles and responsibilities; distinguish guardians from custody evaluators; develop removal, evaluation, and hiring standards; adopt minimum hourly pre-service training requirements and continuing education requirements; and establish an oversight board in each judicial district to resolve complaints regarding guardians ad litem and provide a forum for review. *Id.*

35. See MINN. STAT. § 518.165(2a). See also FINAL REPORT, *supra* note 21, at 20-21; *infra* Part I.D.1 (discussing the responsibility of guardians).

36. FINAL REPORT, *supra* note 21, at 22.

37. 1999 Minn. Laws, ch. 216, art. 7, sec. 46, subd. 3.

38. MINN. STAT. § 480.182(a)(2) (2000); 1999 Minn. Laws, ch. 216, art. 7, sec. 46, subd. 3.

39. Amy Becker, *State Offer Upsets Kids' Guardians*, ST. PAUL PIONEER PRESS, Aug. 11, 2003, at A1.

40. *Id.*

41. Ember Reichgott Junge, *A Closer Look at the Legislature's Final Judiciary*

truncated budget, guardian appointments, even when mandated, will be drastically reduced. Guardians warn that removing them from the process will actually decrease court efficiency and exacerbate the demand on court resources by increasing the number of cases that go to trial.⁴² The current budget crisis presents a fine opportunity to evaluate the worth of the guardian ad litem system in family law. This Article will show the import of a guardian's recommendation on family law cases. Because of the weight a judge places on the guardian's recommendation, the recommendation truly can expedite the settlement process for these cases.⁴³ However, the guardian ad litem system is not without serious flaws.⁴⁴ This dormant period in guardian activity should also be a time of reflection and reform of the guardian ad litem system to improve it for the children and families the system serves.

B. When Do GALs Enter the Proceedings? The Statutory Appointment of Guardians Ad Litem in Minnesota

A judge may appoint a guardian ad litem in any dissolution or child custody proceeding when parenting time or custody is contested.⁴⁵ Permissive appointment is totally at the discretion of the trial judge.⁴⁶ Usually a judge will appoint a guardian ad litem during highly contentious dissolutions or custody battles.⁴⁷ The judge's decision not to appoint a guardian ad litem is reviewable

Funding Deal, MINN. LAWYER, June 2, 2003, at 1. The final budget bill that was passed by both houses of the Legislature eliminates guardians ad litem in runaway and truancy cases. *Id.* The budget bill also waives the requirement of an appointment of a guardian ad litem in abuse and neglect cases and in terminations of parental rights, although these laws still remain on the books. *Id.*

42. Becker, *supra* note 39. Long-time Washington County guardian Dana Ahlness commented on the effects of eliminating guardian appointments in family law cases: "You're going to see a lot more cases going to trial and you're going to see the system get a lot more jammed up . . . They'll cut their costs in the short run, but it's going to come back on them tenfold in the long run." *Id.*

43. *See id.*

44. *See infra* Part IV.

45. MINN. STAT. § 518.165, subd.1 (2000).

46. *Cf. id.* *See also* Abbott v. Abbott, 481 N.W.2d 864, 870 (Minn. Ct. App. 1992). In *Abbott*, the father appealed denial of his motion for an evidentiary hearing on modification of custodian and the court's failure to appoint a guardian ad litem. *Id.* at 866. The appellate court reversed the denial of an evidentiary hearing as the appellant had established a prima facie case for modification, but affirmed the denial of appointment of a guardian ad litem to the case. *Id.* at 871. Although the appellate court noted a guardian ad litem's involvement might be "beneficial," it held that given the lack of evidence of abuse or neglect, the appointment was properly committed to the trial court's judicial discretion. *Id.* at 870.

47. *See* PROGRAM EVALUATION DIV., *supra* note 3, at 1.

only to determine whether a mandatory appointment should have been made.⁴⁸

Appointment is mandatory when a trial court has “reason to believe” that neglect or abuse of a child occurred,⁴⁹ or when custody or parenting time is contested.⁵⁰ Mere allegations of abuse are not sufficient to require a judge to appoint a guardian ad litem.⁵¹ For the judge to make an appointment, the party alleging neglect or abuse must substantiate the claim with factual evidence for which the alleged abuser has no reasonable explanation.⁵² If any evidence in the record gives a court “reason to believe” that abuse is occurring, appointment of a guardian ad litem is necessary.⁵³

C. Qualifications, Training, and Recruitment of Guardians Ad Litem

Despite the GAL’s critical role, qualification and training rules for GALs are minimal. The Minnesota Rules of Guardian Ad Litem Procedure⁵⁴ state that guardians should have an interest in children;⁵⁵ communication skills sufficient to conduct interviews, prepare reports, and make oral presentations;⁵⁶ and knowledge and appreciation of the ethnic, cultural, and socio-economic backgrounds of the served population.⁵⁷ Guardians must also

48. See *Abbott*, 481 N.W.2d at 864, 870.

49. See *id.*

50. MINN. STAT. § 518.165, subd. 2 (2000). The definitions of neglect and abuse under this provision are found in MINNESOTA STATUTES sections 260C.007 and 626.556.

51. See *Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. Ct. App. 1991). The petitioner, a mother, appealed denial of a custody study for modification and alternatively argued for the appointment of a guardian ad litem, based on allegations against the respondent of abuse and neglect. *Id.* The trial court found that the respondent had been cleared of the abuse allegation after the county investigated it, and that the respondent had an explanation for not having taken the child to the doctor on another occasion. *Id.* On review, the appellate court affirmed the trial court’s finding that no sufficient evidence existed to mandate a custody study or the appointment of a guardian ad litem. *Id.*

52. See *id.*

53. See *J.A.S. v. R.J.S.*, 524 N.W.2d 24, 27 (Minn. Ct. App. 1994). After a step-daughter alleged sexual abuse by her step-father, the trial court was mandated to appoint a guardian ad litem because evidence in the record showed that the step-daughter exhibited fear when questioned about the abuse, and inferences could be drawn from her allegations. *Id.* at 26-27.

54. See MINN. STAT. ANN. General Rules of Practice for the District Courts R. 901-13 (West Supp. 2000). The Guardian Ad Litem Rules were adopted on August 27, 1997, and became effective January 1, 1999. *Id.*

55. *Id.* R. 902(a).

56. *Id.* R. 902(b).

57. *Id.* R. 902(d).

maintain professional standards.⁵⁸ Educational background is not a qualifying factor.⁵⁹

Training for GALs is minimal. New GALs must attend only a forty-hour training course and an additional course if they intend to serve in family or juvenile court.⁶⁰ The program coordinator may even waive training requirements for current guardians ad litem.⁶¹ After this minimal training, guardians ad litem are trusted with investigating and making custody recommendations and are expected to effectively advocate for the best interests of the child.⁶² New family court guardians must also attend one of several types of custody proceedings to observe an experienced GAL.⁶³ These proceedings may include a temporary relief hearing, a child custody hearing, or a domestic abuse hearing.⁶⁴ The newly trained GAL may also intern on two family court cases with an experienced guardian ad litem.⁶⁵

While socio-economic and racial diversity is among the goals of the guardian ad litem program,⁶⁶ most counties do not have a GAL panel that reflects the county's diversity.⁶⁷ Rule 903.01 only requires that a "reasonable, good faith effort" be made to solicit diverse applicants that reflect the population served.⁶⁸ For example, public announcements must be directed to the tribal or community organizations that serve ethnic and cultural communities within each county.⁶⁹ However, no specific outcomes are required.⁷⁰ In addition, many potential GALs from lower income levels may be deterred from service due to low or non-existent financial compensation.⁷¹

58. *Id.* R. 902(f).

59. *Id.* R. 902.

60. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 910.01 (West Supp. 2000).

61. *Id.* R. 910.02(b).

62. *Id.* R. 910.02(a).

63. *Id.* R. 910.0C(e).

64. *Id.*

65. *Id.* R. 910.03(f).

66. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 903.01 (West Supp. 2000).

67. See PROGRAM EVALUATION DIV., *supra* note 3, at 24. Guardians are typically women from middle-class socio-economic groups. *Id.*

68. R. 903.01.

69. *Id.*

70. See *id.*

71. The Legislative Auditor examined the Minnesota guardian ad litem system during 1993-1994. PROGRAM EVALUATION DIV., *supra* note 3, at 1. Counties used volunteer attorneys and non-attorneys, and paid attorneys and non-attorneys. *Id.* at 7. The average hourly wage for paid non-attorney guardians ad litem varied

D. Statutory Responsibilities, Rights, and Powers of the Guardian Ad Litem

1. Responsibilities of Guardians Ad Litem

The Minnesota Legislature has provided some guidelines for guardians ad litem in the Guardians for Minor Children statute,⁷² but GAL responsibilities and powers are spelled out more completely in the Rules of Guardian Ad Litem Procedure.⁷³ The Rules state certain job responsibilities, including: advocacy for the child;⁷⁴ exercise of independent judgment;⁷⁵ information gathering;⁷⁶ negotiation skills;⁷⁷ knowledge of community resources;⁷⁸ case consultation with other guardians if necessary;⁷⁹ and mandated reporting in cases of abuse or neglect.⁸⁰ Guardians must be able to maintain professional standards, including: confidentiality;⁸¹ respect for the contesting parties and the children;⁸² knowledge and appreciation of the child's background and heritage;⁸³ sensitivity to cultural and socio-economic diversity;⁸⁴ use of prevailing social and cultural standards for any community governed by the Indian Child Welfare Act⁸⁵ or the Minnesota Indian Heritage Preservation Act;⁸⁶ and avoidance of

from \$8 to \$40 an hour. The average hourly wage for paid attorneys varied from \$50 to \$55 an hour. *Id.* at 25. Anecdotal knowledge seems to indicate that the wide variance in guardian pay continued until the state took over the programs beginning in 2001.

72. MINN. STAT. § 518.165, subd. 2a (2000). Subdivision 2a lists the following responsibilities of a guardian ad litem: to conduct an independent investigation to determine relevant facts; to ascertain the child's wishes; to advocate for the child's best interests; to maintain confidentiality of information related to the case, with the exception of sharing information as permitted by law to "promote cooperative solutions;" to monitor the child's best interests; and to present written conclusions and recommendations in the child's best interests based upon relevant facts. *Id.*

73. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 908.01, 909.01 (West Supp. 2000).

74. *Id.* R. 908.01(a).

75. *Id.* R. 908.01(b).

76. *Id.*

77. *Id.*

78. *Id.* R. 908.01(e).

79. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 908.01(h) (West Supp. 2000).

80. *Id.* R. 908.01(l).

81. *Id.* R. 908.01(g).

82. *Id.* R. 908.01(i).

83. *Id.* R. 908.01(j).

84. *Id.*

85. 25 U.S.C. §§ 1901-63 (2000).

86. MINN. STAT. §§ 260.751-.91 (2000); MINN. STAT. ANN. General Rules of

any impropriety or appearance of impropriety.⁸⁷

Some roles should not be performed by a guardian ad litem.⁸⁸ A guardian ad litem may not perform the role of a mediator or visitation expeditor as those terms are defined by relevant statute.⁸⁹ Nor may a guardian ad litem conduct a custody or visitation evaluation without explicit court findings that no other person usually responsible for performing that role is available, and with the limitation that the guardian must be properly trained to conduct those evaluations.⁹⁰

2. Rights and Powers of Guardians Ad Litem

GALs have extensive rights and powers in the custody proceeding. The guardian ad litem has access to the child and all information related to the child.⁹¹ The guardian, like opposing counsel and the court, receives copies of all pleadings, documents, and reports submitted by the parties to the court.⁹² The guardian receives notice of all proceedings,⁹³ and has the right to testify as a witness in all proceedings by submitting written and oral reports.⁹⁴ The guardian may examine any record relating to the custody proceeding without the consent of either parent.⁹⁵

These rights only begin to show the many roles a GAL performs in a custody proceeding. A guardian's function within

Practice for the District Courts R. 908.01(j) (West Supp. 2000).

87. *Id.* R. 908.01(k).

88. *Id.* R. 908.02. Rule 904.04 states:

A guardian ad litem shall not be appointed or serve except upon written order of the court. The order shall set forth the role of a guardian ad litem; the specific duties to be performed by the guardian ad litem in the case; establish, to the extent appropriate, deadlines for the completion of the duties set forth; and the duration of the appointment.

R. 904.04.

89. The qualifications for a "mediator" are listed in Minnesota Statutes section 518.619, subdivision 4 and Rule 310 of the Minnesota Rules of Family Court Procedure. The role of "parenting time expeditor" is defined in Minnesota Statutes section 518.1751. However, the Legislative Auditor's report notes that some GALs are performing the role of visitation expeditor due to confusion about the expectations for guardians. PROGRAM EVALUATION DIV., *supra* note 3, at xi.

90. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 908.02 (West Supp. 2000).

91. *Id.* R. 909.01(a).

92. *Id.* R. 909.01(b).

93. *Id.* R. 909.01(c).

94. *Id.* R. 909.01(d).

95. *Id.* R. 909.01(e). The guardian has the power to examine any record, relating to the proceeding, of any of the following agencies or individuals: hospitals, schools, the department of health and welfare, doctors, health care providers, mental health providers, chemical health programs, psychologists, psychiatrists, and police departments. *Id.*

the court system requires her or him to be an advocate, a fact-finder, an expert witness, a lawyer, an observer, a reporter, a negotiator, a moderator, a recorder, a mandated reporter of child abuse, a consultant, and an authority on racial and ethnic cultures, socio-economic backgrounds, and life experiences.⁹⁶ GALs can easily have more power than any other person in a custody proceeding, including the judge.⁹⁷ For parents, lawyers, and battered women's advocates, this accumulation of power, unchecked by an open review mechanism, is daunting, if not terrifying.

II. Minnesota Statutes are an Incomplete Guide When Domestic Violence is Involved

The minimal training that GALs receive does not prepare them to understand the complicated circumstances of many custody proceedings, or to make the necessary recommendations.⁹⁸ In particular, guardians ad litem encounter some degree of domestic violence in many of the cases on which they serve.⁹⁹ The guardians' scant training on domestic abuse¹⁰⁰ inadequately prepares them to comprehend its impact on family relationships.¹⁰¹ Guardians must understand the nature of domestic violence, how to identify it, and how it affects each family and household member.

Further difficulty arises from the numerous definitions of "domestic violence."¹⁰² One definition, supplied by the National

96. See *supra* notes 74-87 and accompanying text (discussing the responsibilities of guardians).

97. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 909 (West Supp. 2000). Rule 909 gives guardians broad power to investigate a child's situation without regard for privilege or evidentiary rules, to act as a party by submitting documents to the court, to request hearings, to introduce exhibits, to conduct direct and cross examinations of witnesses, to appeal the court's decision, and to fully participate in the proceedings through oral arguments and written submissions. *Id.* These powers give guardians a role that encompasses and surpasses the individual roles of judge, attorney, party, and investigator.

98. PROGRAM EVALUATION DIV., *supra* note 3, at 38, fn. 11, 75. In the Legislative Auditor's evaluation of the guardian ad litem program, many family law practitioners and public defenders disagreed with judges that guardians were well trained in legal issues. *Id.*

99. See *id.* at 79.

100. See *id.*

101. See *id.*

102. For the purposes of this Article, "domestic violence" will be defined as any discrete act that can be used to perpetuate physical and emotional violence and neglect upon a family or household member. ADVOCATES FOR FAMILY PEACE, ADVOCATE MANUAL II:L (Marilyn Rossman ed., 2001). The terms "cycle of domestic violence" and "battering" will be used interchangeably, and a "batterer" will be

Center for State Courts, is “the occurrence of violence, coercion, or intimidation by a family or household member against another family or household member.”¹⁰³ Acts of violence can include: attempting to inflict or inflicting physical harm; placing a person in fear of physical harm; causing psychological or emotional distress; and depriving a family member of access to family funds.¹⁰⁴ Battered women’s advocates define “domestic violence” even more broadly. To these acts of violence, they add: forced sexual contact or rape; destruction of property; injury or killing of pets; and control of money, transportation, activities, and social contacts.¹⁰⁵

GALs’ abilities to appropriately evaluate domestic violence are further hindered by their potential misunderstanding of the nature of domestic violence and batterers. Domestic violence can occur at any time during what Lenore Walker has termed “the battering cycle.”¹⁰⁶ Walker describes a three-phase cycle of

defined as one who abuses according to a pattern of violent, coercive, and threatening behavior to achieve power and control. *Id.* A “battered woman” or “battered spouse” will be defined as one who has entered into a co-dependent violent relationship with a batterer. *See id.*

103. NAT’L CTR. FOR STATE COURTS, DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 2 (1997).

104. *Id.* at 2-3.

105. Women’s Advocates, Inc., *Domestic Violence Fact Sheet*, at <http://www.wadvocates.org/factsheet.htm> (last visited Nov. 2, 2003).

106. In her classic but controversial book, *THE BATTERED WOMAN*, Lenore Walker describes three distinct phases of the battering cycle. LENORE WALKER, *THE BATTERED WOMAN* 55 (1979). First is the tension-building phase, during which minor battering incidents may occur. *Id.* at 56. In this phase, the experienced battered woman knows that battering will escalate to a culminating incident. *Id.* at 57. The tension-building phase may last a long time and the battered woman may attempt to prolong it by covering up for the batterer, pacifying him, and attempting to control external factors in order to avoid another incident. *Id.* at 58. During this period, battered women may isolate themselves from family and friends out of shame and fear that they or their loved ones may be harmed by the batterer. *Id.*

The tension-building phase culminates in an acute battering incident. *Id.* at 59. This second phase is distinguished by the batterer’s apparent lack of control and level of destructiveness. *Id.* Some battered women may provoke the acute battering incident because they cannot manage their fear of the batterer any longer. *Id.* at 60. Anticipation of the acute battering incident can cause the battered woman to manifest psycho-physiological symptoms such as anxiety, depression, over- or under-eating, headaches, sleeplessness, allergies, stomach complaints, high blood pressure, and other symptoms of stress. *Id.* at 61. This acute battering stage is where the most severe injuries usually occur. The batterer may not stop abusing the battered woman until he is exhausted, no matter the extent of her injuries. *Id.* at 61.

After the acute battering incident, the couple enters a honeymoon stage of kindness and contrition. *Id.* at 65. The tension between the couple is released during the acute battering incident phase and the batterer attempts to make up for

domestic violence that starts with a tension-building phase.¹⁰⁷ The tension accumulates until an acute battering incident occurs, after which the batterer and battered spouse enter a honeymoon stage.¹⁰⁸ The batterer becomes apologetic and promises never to hurt the battered woman again.¹⁰⁹ However, the cycle will eventually repeat itself as tension builds again.¹¹⁰ At this point, a batterer and a battered partner have a co-dependent relationship, which both members find difficult to leave.¹¹¹ Most outsiders have difficulty understanding this cycle and why a battering victim would stay in the relationship.¹¹²

Outsiders often are also confused by the very charming nature of many batterers.¹¹³ Seeing only the charm, many people would never suspect or believe that a batterer could be capable of battering. In most cases, only those who know the batterer well know the violence of which the batterer is capable.¹¹⁴ One child of a batterer described her father:

He's like Jekyll and Hyde. He can be so great, then turn. . . . Words that describe my father are "transcendence", "mystical", "magical", "captivating". When you are with him, he takes 100 percent of your attention. You forget about the rest of the world, about what is going on in the world, about the bad times. Everybody who meets him thinks this about him. He has real animal magnetism.¹¹⁵

Batterers are manipulative and convincing and may further control a battered woman by making her look mentally ill, incompetent, or worse.¹¹⁶ Children of batterers may adore or fear

his abuse by wooing the battered woman with loving and contrite behavior. *Id.* at 65. The batterer believes he will never abuse the battered woman again and that she will never again act in a provoking manner so he must teach her a lesson. *Id.* at 65-66. Most battered women wish to believe that their batterer is demonstrating his true self during this phase. *Id.* at 68. The couple cements themselves as a "symbiotic pair"—over-dependent and over-reliant upon the other. *Id.* at 68-69. The length of this phase is indeterminate and soon small battering incidents begin occurring again and the couple starts the cycle of violence over. *Id.* at 69.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* A woman may choose to remain with her batterer because she loves him, fears the consequences of leaving her batterer, or for some other reasons known only to that woman. *See also* Rossman, *supra* note 102, at II:N.

113. *See* Rossman, *supra* note 102, at II:M2.

114. *Id.* at II:M3.

115. DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 74 (1996).

116. *See, e.g., id.* at 66. During and after a battering relationship, a battered woman is prone to suffer many ailments including: anxiety, depression, drug and

the batterer, or both.¹¹⁷ Even if they have only witnessed battering, children may suffer many deleterious effects.¹¹⁸ Guardians working with batterers and battered partners need to understand the situation and the cycle of violence in order to accurately assess what is really happening during the custody battle.

A. The Minnesota Domestic Abuse Act Only Provides a Narrow Definition of Abuse

A judge will appoint a guardian to the custody proceeding if he or she “has reason to believe” that a child is being abused,¹¹⁹ but another tip-off for guardians and judges in custody cases should be whether one or both of the parties has violated the Domestic Abuse Act.¹²⁰ The Minnesota Legislature has defined which instances of domestic violence are crimes.¹²¹ The following acts, committed against a family or household member by a family or household member are domestic abuse under the statute: physical harm, injury, or assault; infliction of fear of imminent physical harm; terroristic threats; criminal sexual conduct; or

alcohol dependence, panic attacks, chronic pain, dehydration, emotional “overreactions” to stimuli, malnutrition, poverty, self neglect, sexual dysfunction, sleep disorders, strained familial relationships, inability to respond to the needs of their children, and even death. See C.J. Newton, *Domestic Violence: an Overview*, THERAPISTFINDER.NET MENTAL HEALTH J. ¶1 (Feb. 2001), at <http://www.therapistfinder.net/Domestic-Violence/Domestic-Violence-Effects.html> (last visited Nov. 2, 2003).

117. See Rossman, *supra* note 102, at II:LL1-LL2.

118. Child witnesses of domestic violence have been shown to have severe long-term and short-term effects. Some commonly manifested behaviors include: lying, willingness to participate in conspiracy, ability to suspend fulfillment of needs rather than risk confrontation, shyness, depression, anxiety, low self-esteem, and feelings of shame, guilt, and confusion. See Molly A. Brown, *Child Custody in Cases Involving Domestic Violence: Is it Really in the “Best Interests” of Children to Have Unrestricted Contact With Their Mothers’ Abusers?*, 57 J. MO. B. 302, 305 (2001). Another result of witnessing domestic violence is the greater potential that children will grow up to be batterers or battered spouses. See *id.* at 306.

119. MINN. STAT. § 518B.01, subd. 2(a) (2000).

120. MINN. STAT. § 518B.01.

121. See *id.* subd. 2(a). The statute also authorizes a proceeding in which petitioners may seek relief through ex parte orders and permanent orders for protection if they have suffered abuse as defined under the Domestic Abuse Act. See *id.* at subds. 4, 7. Once the petitioner petitions for an order for protection (OFP), the respondent has three options: the respondent may admit all the allegations in the petition and allow the OFP; the respondent may deny the allegations in the petition but allow the OFP to be issued (in which case, no findings or evidentiary hearing are necessary); or the respondent may deny the allegations and deny that an OFP is necessary, thus triggering an evidentiary hearing on the merits of the petition for the OFP. See Rossman, *supra* note 102, at III:L2.

interference with an emergency call.¹²² However, these acts are only a subset of the conduct that could constitute domestic violence, making the Domestic Abuse Act, even when followed, an incomplete tool for judges and guardians.¹²³

B. The "Best Interests of the Child" Factors Ignore the Broad Impact of Domestic Abuse

Once appointed, the GAL follows section 518.17 of Minnesota Statutes, which lists the factors required to evaluate custody for both parties.¹²⁴ This statute emphasizes the relation of each parent to the child and excludes all other considerations as not

122. MINN. STAT. § 518B.01, subd. 2(A).

123. See *supra* note 105 and accompanying text (discussing the broader definition of "domestic violence" used by battered woman's advocates). See also *infra* Part V.A (proposing that the Domestic Abuse Act is of limited use to protect some battered woman and children).

124. Minnesota Statutes section 518.17 reads in part:

Subdivision 1. The best interests of the child. (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including: (1) the wishes of the child's parent or parents as to custody; (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; (3) the child's primary caretaker; (4) the intimacy of the relationship between each parent and the child; (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests; (6) the child's adjustment to home, school, and community; (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) the permanence, as a family unit, of the existing or proposed custodial home; (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any; (11) the child's cultural background; (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child. The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child. (b) The court shall not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child.

MINN. STAT. ANN. § 518.17 (2000).

relevant to the best interests of the child.¹²⁵ Thirteen factors include the children's relationship to the primary parent; continuity of care and household; preference of the child; and adjustment to home, school, and community.¹²⁶ Because they must give equal weight to each of factors, many guardians and courts appear to tally the factors to produce a "winner" of custody.¹²⁷ The system is not set up to handle the complexities of family relationships as judges and GALs rely on shortcuts in their determinations.

III. Guardians Ad Litem in Practice

A. *A Case Study: The Guardian's Recommendation as Potential Spoiler*

Because judges cannot devote sufficient time to evaluating each family, a guardian's report can make or break a case. After a summer spent in a legal aid office primarily helping low-income battered women seeking Orders for Protection for themselves and their children, or marital dissolutions to leave their abuser, I can personally verify that the guardian's report was the ace in the hole for many cases.¹²⁸ My clerkship mentors warned me throughout the summer that strange things could happen when a guardian ad litem issued a report. I witnessed one such occurrence in a custody proceeding at the end of a long afternoon in court.¹²⁹

P.J. and N.D. began dating sometime in 1998. Shortly thereafter, P.J. discovered she was pregnant. Though P.J. alleges

125. MINN. STAT. § 518.17(b) (2000). *See also infra* Part V.B.

126. *See* MINN. STAT. § 518.17, subd. 1(a) (2000).

127. *See, e.g.,* *Nicholson v. Nicholson*, No. C8-00-946, 2001 WL 118567, at *5-*6 (Minn. Ct. App. Feb. 13, 2001) (holding that the district court's failure to explain its child court determination by not making findings on each best interests factor was an abuse of discretion); *See also In re Marriage of Friese*, No. C4-98-1719, 1999 WL 243426, at *3 (Minn. Ct. App. Apr. 27, 1999) (holding that the district court's findings on the best interest factors contained some error, but that the district court's determination was supported by the record, and thus was not clearly erroneous).

128. Legal Aid Services of Northeastern Minnesota has suffered major funding cuts in the past few years. As a result, Legal Aid Grand Rapids prioritized cases involving abuse because they qualified for funding under a grant received by the agency. This is why a great many of the cases handled by Legal Aid Grand Rapids involved domestic abuse. If Legal Aid Services of Northeastern Minnesota had adequate funding, it would handle a greater number and variety of cases and also not resort to freezes on acceptance of new cases.—Author's note.

129. Names and identifying details have been modified to protect any information that is subject to attorney-client privilege and that was not revealed in the case record.—Author's note.

that N.D. urged her to get an abortion or to place the baby up for adoption, she eventually moved with her two teenaged sons from a previous marriage into N.D.'s home. Friction quickly developed between N.D. and P.J.'s two sons. P.J. had a baby girl, M.D., in the spring of 1999. During the summer of 1999, tension continued to escalate between N.D. and P.J.'s sons. This tension reached its culmination when N.D. allegedly ordered both sons off his property with a shotgun. P.J. left with her three children the next day and moved into her sister's home.

P.J. is Native American and has a large, close family. She lived with her sister's family for approximately a year. However, because P.J.'s sister had a husband and two children of her own, the home was crowded; P.J.'s sons moved to live with their father, with whom P.J. had an amicable relationship. So that N.D. could visit M.D., P.J. and N.D. arranged visitations for short periods of time. The exchanges were through the police department or occurred in a public area because of P.J.'s continued fear of N.D. after he allegedly told one of P.J.'s family members that he would kill P.J. The parties attempted to exchange notes through a notebook to communicate about child care issues.

P.J. eventually moved into her own apartment and lived there with all of her children for the next year and a half. N.D. also made a room for M.D. in his home and had regular monthly overnight visits with M.D. For reasons unknown to P.J., M.D. began to express fear when she went on visits with her father. M.D. refused some visits with her father. P.J. also canceled some visits because M.D. was sick with chronic upper-respiratory problems. P.J. changed jobs and moved into her parents' home after the death of one of her parents.

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

On the day of trial, upon examination by P.J.'s attorney, the guardian ad litem stated that she was reversing her custody

recommendation in favor of N.D. The guardian ad litem stated that N.D. was "charming" and the friendlier of the two parties and he always offered her coffee when she came to visit. P.J., by contrast, seemed distant to the guardian and never offered her coffee. Also, P.J. could not provide the economic security that N.D. could provide. N.D. had lived in the same home for many years. By contrast, P.J. had moved twice in the year and a half since leaving N.D.'s home. The guardian also countered M.D.'s refusals of visitation and alleged fears of her father by relating an excited reunion between father and daughter during the visitation exchange at which the guardian was present. Finally, the guardian agreed with testimony presented by N.D. that P.J.'s smoking was the cause of M.D.'s upper-respiratory infections.

The guardian minimized P.J.'s allegations of abuse and threats from N.D. although Orders for Protection had been issued against him restraining him from contact with P.J. and her sons. The guardian ad litem also minimized M.D.'s attachment to her older brothers and the role of P.J.'s extended family in M.D.'s life. The guardian ad litem made no reference to cultural differences regarding P.J.'s Native American heritage and the effect this had on the lives of M.D. and P.J. The guardian also disregarded P.J.'s status as primary caregiver of a three-year-old child.

The guardian's recommendation came as a shock to P.J. and her counsel. Counsel suggested in an aside that the guardian might have informed him of her reversal of recommendation three days prior when he specifically asked her about her recommendation. Believing the recommendation reversal to be critical to P.J.'s case, her counsel asked for a continuance in order to depose the guardian ad litem regarding numerous issues in her testimony. P.J. and her family were understandably upset and worried that N.D. might gain custody of M.D. because of the guardian's recommendation. Thankfully, after protests by P.J.'s counsel that the guardian acted improperly, the judge looked more closely into the case and later that year issued a custody determination in favor of P.J. In this situation, the judge properly reviewed a poorly considered GAL opinion. However, many parents and children are not so fortunate¹³⁰ because many judges

130. The GAL opinion is not published. See PROGRAM EVALUATION DIV., *supra* note 3, at 43 n.15. Because the GAL opinion is subsumed into the judge's decision, examples of the GAL's decisions are difficult to find publicly and nearly impossible to quantify. However, limits on judicial resources make "rubber-stamping" of the GAL's recommendation a common occurrence. See *id.* at 44. Parents and attorneys also complain that the GAL appears to have a special status or relationship with the judge. See *id.* at 42.

rely on GAL recommendations without further inquiry.

IV. Accumulation of Power Without Checking Mechanism: Two Examples of the Unconstitutionality of GAL Systems Currently in Place in the States of Minnesota and Washington

A. Concentration of Diverse Roles Allows Violation of Due Process and Family Privacy—The Washington Example

In *Rethinking the Roles of Guardians ad Litem in Dissolutions: Are We Seeking Magicians?*, Raven Lidman and Betsy Hollingsworth critique the guardian ad litem system in the State of Washington.¹³¹ They describe a general confusion among court administration and the Washington Bar about the exact role definition and functions of a guardian ad litem.¹³² The Washington Legislature has not clarified the situation, but has instead allocated numerous responsibilities to guardians ad litem.¹³³

Lidman and Hollingsworth note several violations of the Washington State Constitution with Washington's current GAL scheme which appoints guardians with powers in a scope similar to Minnesota's scheme.¹³⁴ First, the Washington Legislature has abrogated the rules of evidence by allowing the guardian ad litem to testify in court as an expert witness even though GALs do not meet the traditional definition of expert witness.¹³⁵ Second, the multiple roles of expert, lawyer, witness, party, and fact-finder constitutionally conflict with one another when performed by one person.¹³⁶ To resolve the confusion and possible violation of due

131. Raven Lidman & Betsy Hollingsworth, *Rethinking the Roles of Guardians Ad Litem in Dissolutions: Are We Seeking Magicians?*, WASH. ST. B. NEWS 22 (Dec. 1998), available at <http://www.wsba.org/media/publications/barnews/archives/dec-98-rethinking.htm> (last visited Nov. 2, 2003).

132. See *id.* at 22. Guardians ad litem have been variously defined as investigators, expert witnesses, lawyers, lay advocates for children, lay advocates for children's best interests, mediators, negotiators, supervisors, monitors, friends of the court, arms of the court, recommenders, fact finders, and de facto decision makers. *Id.*

133. See *id.*

134. See *id.* at 22-23; see also WASH. REV. CODE § 26.09.220 (1997).

135. See Lidman & Hollingsworth, *supra* note 131, at 23. Lidman and Hollingsworth note that typically a court will only hear an expert if the subject matter is outside the expertise of common knowledge and in that case, the expert must be qualified through some type of training or special experience. See *id.* at 26 n.13.

136. See *id.* at 25 n.4. The authors also argue that guardians ad litem engage in the unlicensed practice of law since the Washington State Legislature, like

process, the authors suggest that the role of guardian ad litem be broken down into separate individual roles that already exist in the legal system.¹³⁷ Use of discrete roles when appointing the GAL will constrain the appointee's powers within the law.¹³⁸

Lidman and Hollingsworth expand on their theory in a second article¹³⁹ in which they contend that state legislatures, the Washington Legislature in particular, have failed to define the guardian ad litem under a role traditionally found in the court system, "thus permitting the performance of a function not appropriate to the role."¹⁴⁰ The authors criticize this failure to define the GAL role as a potential due process violation and a burdensome invasion of family privacy.¹⁴¹ Finally, they argue that two competent adversarial parties and the judge in open court would better perform the multiple roles of the guardian ad litem.¹⁴² By allowing the parties to fully litigate the issues and requiring the judge to sift through the evidence presented in court by the parties, due process would remain intact.¹⁴³

B. Constitutional Bar to Multiple Roles of Guardian Ad Litem—The Minnesota Example

Minnesota's GAL program may also violate the Minnesota Constitution. *Holmberg v. Holmberg*¹⁴⁴ dealt with a statutory scheme that conferred part of the district court's original jurisdiction to administrative law judges (ALJs) to make child support determinations.¹⁴⁵ ALJs had power to make findings of

Minnesota, authorizes guardians ad litem to file pleadings, conduct discovery, note motions, subpoena and examine witnesses, appeal decisions, and make oral arguments. *See id.* at 24.

137. *See id.* at 25.

138. *See id.*

139. Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998).

140. *Id.* at 258.

141. *Id.* at 259.

142. *See generally id.* at 261. The authors' argument is based on the assumption that two parties will litigate the issues with equal resources and bargaining power for settlement. This assumption may fairly be questioned in cases where a pattern of domestic abuse exists between the parties. *Id.*

143. *See In re Welfare of Akers*, 592 P.2d 647, 651 (Wash. Ct. App. 1979) (holding that a mother had the right to have parental termination proceedings conducted in open court per the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the Washington Constitution).

144. 588 N.W.2d 720 (Minn. 1999).

145. *Holmberg*, 588 N.W.2d at 722. In *Holmberg*, the Minnesota Supreme Court invalidated the child support scheme mandated by the State Legislature by applying the separation of powers provision. The Court held that the scheme

fact, conclusions, and recommendations.¹⁴⁶ A second issue involved county employees, designated child support officers (CSOs), who had authority to “prepare, sign, serve, and file motions for obtaining, modifying, or enforcing child [support orders].”¹⁴⁷ The CSOs also appeared at hearings and participated in proceedings before an ALJ.¹⁴⁸

Beginning in 1990, decisions made by ALJs were final and reviewable by the Court of Appeals, thus bypassing the district courts.¹⁴⁹ The Minnesota Supreme Court ultimately held that the scheme violated separation of powers for three reasons: (1) the scheme infringed on district courts’ original jurisdiction, (2) the ALJs did not have inferior jurisdiction but in some instances had superior jurisdiction to the district courts as they could modify district court decisions, and (3) the scheme empowered non-attorneys to engage in the practice of law, thus infringing on the district court’s exclusive power to supervise the practice of law.¹⁵⁰

Though similar, the case against the guardian ad litem provisions is distinguishable from the child support legislative scheme in *Holmberg* because GALs’ recommendations are technically not binding on a district court judge and GALs cannot modify court orders.¹⁵¹ However, strong language from the Minnesota Supreme Court indicates a very fine line when taking away from the original jurisdiction of the district courts: “Family dissolution remedies . . . rely on the district court’s inherent equitable powers. Thus, cases involving family law fall within the district court’s original jurisdiction.”¹⁵² Although guardian ad litem recommendations are not final or binding upon the district courts, binding precedent from the Minnesota Court of Appeals holds that when district courts reject guardian ad litem recommendations, the courts must make specific findings on the same issues addressed by the guardians’ ad litem recommendations.¹⁵³ This indicates that judicial actions can be

unconstitutionally delegated the district court’s jurisdiction, derived from the Minnesota Constitution Article VI, Section 1, to an executive agency. *See id.* at 726.

146. *Id.* at 722.

147. *Id.* (quoting MINN. STAT. § 518.551, subd. 10 (Supp. 1987)).

148. *Id.* at 722.

149. The decisions made by the ALJ shall be final and reviewable in the same manner as a decision of the district court. MINN. STAT. § 518.551, subd. 10 (1990), repealed by 1994 Minn. Laws ch. 630 art. 10 sec. 3.

150. *Holmberg v. Holmberg*, 588 N.W.2d 720, 726 (Minn. 1999).

151. *See supra* Part I.D (discussing guardian ad litem powers).

152. *Holmberg*, 588 N.W.2d at 724.

153. *See infra* note 162 and accompanying text (discussing a Minnesota Court of

controlled to some extent by guardian recommendations. Removal power over the GAL is also indicative of where actual authority lies. Guardians ad litem are ultimately removable from the case and the panel by the presiding judge for cause, but the normal procedure is to charge the program coordinator with review and removal if necessary.¹⁵⁴ Again, the judge's power is usurped without statutory authorization.

Given the language the court used in *Holmberg* to limit the power of CSOs to participate in child support hearings, the Minnesota Supreme Court may eventually take issue with the broad powers that have been extended to guardians ad litem to make and advocate for legal conclusions based on the best interests of the child. Three sections of the Minnesota Constitution are relevant for showing that the GAL program usurps judicial power. Article VI, section 1 of the Minnesota Constitution states: "[t]he judicial power of the state is vested in a supreme court, a court of appeals, if established by the legislature, a district court and such other courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish."¹⁵⁵ Article VI, section 3 establishes jurisdiction of the district courts: "[t]he district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law."¹⁵⁶

Article VI, section 5 defines the qualifications for judges and judicial officers: "[J]udges of the supreme court, the court of appeals and the district court shall be learned in the law. The qualifications of all other judges and judicial officers shall be prescribed by law."¹⁵⁷ Article VI, section 5, does not include any requirement that guardians ad litem be "learned in the law" as is required of judges in the Minnesota Constitution. GAL qualifications are prescribed by the Minnesota Supreme Court in the General Rules of Practice for the District Courts.¹⁵⁸

In order to act in a judicial capacity, guardians ad litem

Appeals holding that the trial court is required to either express its reasons for rejecting a custody recommendation, or provide detailed findings that examine the same factors the custody study raised).

154. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 906.03, 907.02 (West Supp. 2000).

155. MINN. CONST. art. VI, § 1.

156. MINN. CONST. art. VI, § 3.

157. *Id.* at § 5. Some examples of judicial powers are: fact-finding, making recommendations that are binding unless a judge makes specific contrary findings after *de novo* review, and weighing of a child's best interests. See *supra* Part I.D.2.

158. MINN. STAT. ANN. General Rules of Practice for the District Courts R. 902 (West Supp. 2000).

would therefore need to be considered “other judges” or “judicial officers.”¹⁵⁹ Black’s Law Dictionary defines “judge” as “[a] public official appointed or elected to hear and decide legal matters in court.”¹⁶⁰ A guardian ad litem is appointed to represent a child’s best interests.¹⁶¹ However, a guardian ad litem makes decisions *outside* of a court of law. Although the finality of a guardian ad litem’s decision is debatable,¹⁶² the GAL’s report functions as a critical factor in the record presented in a court of law, and not as the judicial result of the record of the “legal matter” presented in the court of law.¹⁶³ For these reasons, the guardian ad litem cannot be considered a “judge” under the Minnesota Constitution.

A guardian ad litem could be considered a “judicial officer” following some of the requirements under Article VI, section 5 of the Minnesota Constitution.¹⁶⁴ Black’s Law Dictionary defines “judicial officer” as “1. A judge or magistrate. 2. Any officer of the court, such as a bailiff or court reporter.”¹⁶⁵ “Magistrate” is defined as “2. A local official who possesses whatever power is specified in the appointment or statutory grant of authority.”¹⁶⁶ A guardian ad litem, who is restricted by the Minnesota Supreme Court to the powers and responsibilities set out in Rules 908.01 and 909.01 and to the scope of the appointment under Rule 904.04, may have the limited grant of authority of a “magistrate.”¹⁶⁷

Even as judicial officers, GAL’s would not have authority over a district court judge. Article VI, section 3 of the Minnesota Constitution, confers district courts with original jurisdiction in *all*

159. MINN. CONST. art. VI, § 5. *See also* PROGRAM EVALUATION DIV., *supra* note 3, at 6 (explaining that guardians are appointed by the judge and serve as an officer of the court).

160. BLACK’S LAW DICTIONARY 844 (7th ed. 1999).

161. *See* MINN. STAT. ANN. General Rules of Practice for the District Courts R. 908.01 (West Supp. 2000).

162. In *Sharbono v. Sharbono*, No. C5-99-1903, 2000 WL 520514, at *3 (Minn. Ct. App. May 2, 2003), the court of appeals noted that the trial court has discretion not to follow the child custody evaluator’s report if the court believes it is outweighed by the evidence. *Id.* However, the court is required to either express its reasons for rejecting the custody recommendation, or provide detailed findings that examine the same factors the custody study raised. *Id.* (citing *Rutanen v. Oldson*, 475 N.W.2d 100, 104 (Minn. Ct. App. 1991); *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. Ct. App. 1993)).

163. *See supra* notes 72, 93-94 and accompanying text (discussing the responsibilities, rights, and powers of guardians).

164. MINN. CONST. art. VI, § 5. *See also* PROGRAM EVALUATION DIV., *supra* note 3, at 6 (referring to Guardian as a court officer).

165. BLACK’S LAW DICTIONARY 851 (7th ed. 1999).

166. *Id.* at 962.

167. *See id.* *See also supra* notes 72-97 and accompanying text (outlining the responsibilities, rights, and powers of GAL as defined by statutes).

civil and criminal cases and appellate jurisdiction “as prescribed by law.”¹⁶⁸ District courts’ appellate jurisdiction to hear appeals from cases other than criminal or civil matters may be conferred or reduced by statute—but the grant of original jurisdiction may not be abrogated.¹⁶⁹

However, GAL’s are not even judicial officers under the Minnesota Constitution because the state legislature did not give them judicial authority. Article VI, section 1 vests the “judicial power of the state” in a supreme court and “judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.”¹⁷⁰ If guardians ad litem, acting as judicial officers of the court, exercise the judicial power of the state, the State Legislature must statutorily confer jurisdiction on them.¹⁷¹ In all of the statutory provisions concerning guardians ad litem, the Legislature has not conferred jurisdiction to guardians ad litem to exercise the judicial power of the state.¹⁷² Minnesota Statute section 518.165 authorizes a *court* to appoint a guardian ad litem, and also authorizes the responsibilities of the guardian ad litem, but confers no jurisdiction to the guardian ad litem to exercise “judicial power of the state.”¹⁷³ Therefore, a guardian ad litem is not authorized to perform any acts that constitute part of the judicial power of the State of Minnesota.

If each of the GAL’s duties are taken separately, a guardian’s duties do not require exercise of the judicial power. However, a guardian’s duties are not taken separately.¹⁷⁴ A guardian has the power to advocate for the child’s best interests based on the relevant facts.¹⁷⁵ A guardian is not barred by rules of discovery or privilege from investigating every nook and cranny of a child’s life.¹⁷⁶ Guardians also have a right to determine what relevant facts should be entered into the record, or at the least to provide

168. MINN. CONST. art. VI, § 3 (emphasis added).

169. *Id.*

170. MINN. CONST. art. VI, § 1.

171. *See id.* *See also* Holmberg v. Holmberg, 588 N.W.2d 720, 724 (Minn. 1999) (stating that “the Legislature’s delegation of an area of the district court’s original jurisdiction calls for this court’s close scrutiny”).

172. *See supra* notes 72-97 and accompanying text (outlining the legislative statutes that have conferred GAL’s their powers).

173. MINN. STAT. § 518.165, subds. 2, 2a.

174. *See* PROGRAM EVALUATION DIV., *supra* note 3, at 5 (discussing various roles of GALs and how they vary from case to case).

175. *Id.*

176. *See* MINN. STAT. ANN. General Rules of Practice for the District Courts R. 909.01(a), 909.01(e) (West Supp. 2000). *See also* MINN. STAT. § 518.165.

more credibility to one side's presentation of the facts.¹⁷⁷ GAL's wide de facto power allows them broad discretion akin to a judge's exercise of judicial power. Since guardians ad litem lack a statutory grant of jurisdiction, the combination of these three roles outside of the position of district court judge is a far broader use of power than has been granted to GALs under the Minnesota Constitution or other statutes. With limited judicial resources, GAL opinions often go unchecked and no independent review board exists to oversee GALs.¹⁷⁸

V. Minnesota Laws Perpetuate Injustice for Battered Women and Their Children

Judicial reliance on GAL opinions is particularly problematic when domestic violence has occurred. While many laws criminalize some types of domestic violence, some battered women and their children are forced to remain in contact with a battering spouse even after a marital dissolution.¹⁷⁹ Contact allows a potentially dangerous or lethal relationship to continue. As continued harassment is the exact objective of the typical batterer, enforcement of a battering relationship by the justice system is a travesty of justice. The laws of the state as enforced by the judiciary should not permit this to occur. However, the particular nature of the cycle of domestic violence makes it difficult for a traditional criminal code to target and capture all the acts that constitute domestic violence,¹⁸⁰ and judges and GALs are not equipped to bridge the gap.

A. *The Domestic Abuse Act is of Limited Use to Protect Some Battered Women and Children*

The Domestic Abuse Act¹⁸¹ fails to capture the nature of domestic violence because it isolates actions of the abuser while failing to take into account the comprehensive and cumulative effect of the cycle of violence on a battered woman and her

177. See PROGRAM EVALUATION DIV., *supra* note 3, at 4 (reporting that judges accept guardian's recommendations over eighty percent of the time); *see also supra* notes 128-130 and accompanying text (giving a real life example of a guardian's influence).

178. See *supra* notes 31-32, 130 and accompanying text.

179. See PROGRAM EVALUATION DIV., *supra* note 3, at 38 (stating that numerous sources have expressed concern about GALs' failing to respect existing orders for protection).

180. See *supra* notes 102-106 and accompanying text.

181. MINN. STAT. § 518.01B (2000).

family.¹⁸² The Act criminalizes events that most likely will only take place during an acute battering incident.¹⁸³ However, domestic violence is not just characterized by physical violence but also by coercive behavior designed to lull the victim and by increased tension within the household marked by vocal outbursts, threats, or sullen silence.¹⁸⁴

Another of the practical difficulties in statutorily defining domestic violence is that the violence perpetrated by a batterer covers a wide range of criminal behavior, such as murder, assault, rape, incest, criminal property damage, terroristic threats, harassment, trespass, coercion, theft, and disorderly conduct.¹⁸⁵ Unfortunately, practical difficulties in statutory definition lead to real problems for criminal prosecution and civil adjudications.¹⁸⁶

Criminal laws only target some of the actions that constitute the cycle of violence.¹⁸⁷ Households can be in a cycle of domestic violence for years without a violent outburst occurring that would constitute a crime under the Domestic Abuse Act, but the victims may live in great fear. For this reason, a judge may have no basis for a finding of abuse when a battered woman and her batterer appear in family court to terminate their marriage or determine child custody.

Another reason for the lack of abuse findings in battering relationships is that many women never report to authorities when battering incidents occur.¹⁸⁸ This failure to report may be

182. See *supra* notes 106-111 and accompanying text (discussing the nature of domestic violence).

183. See *supra* note 106 (describing the battering cycle).

184. See *supra* note 106.

185. See MINN. STAT. §§ 609.185-.21 (criminalizing murder); MINN. STAT. §§ 609.221-.222 (criminalizing assault); MINN. STAT. §§ 609.342-.345 (criminalizing forced sexual conduct); MINN. STAT. § 609.595 (criminalizing damage to property); MINN. STAT. § 609.52 (criminalizing theft); MINN. STAT. § 609.749 (criminalizing harassment); MINN. STAT. § 609.605 (criminalizing trespass); MINN. STAT. § 609.713 (criminalizing terroristic threats); MINN. STAT. § 609.72 (criminalizing disorderly conduct).

186. See *What Exactly is Domestic Violence*, ADVOCAT (Advocates for Family Peace, Grand Rapids, MN), Summer 2003, at 1. "There is often no criminal charge of 'domestic violence'." *Id.*

187. See Rossman, *supra* note 102, at II:A, F, K; compare MINN. STAT. §§ 609.185-.21 (criminalizing murder); MINN. STAT. §§ 609.221-.222 (criminalizing assault); MINN. STAT. §§ 609.342-.345 (criminalizing forced sexual conduct); MINN. STAT. § 609.595 (criminalizing damage to property); MINN. STAT. § 609.52 (criminalizing theft); MINN. STAT. § 609.749 (criminalizing harassment); MINN. STAT. § 609.605 (criminalizing trespass); MINN. STAT. § 609.713 (criminalizing terroristic threats); MINN. STAT. § 609.72 (criminalizing disorderly conduct).

188. See, e.g., *Bell v. Marvin*, No. C6-02-366, 2002 WL 31455286 at *2 (Minn. Ct. App. Nov. 5, 2002) (abuse victim testified that she did not report various incidents

due to fear, love of the batterer, shame, or other reasons.¹⁸⁹ Sometimes women report battering incidents, but then wish to protect their batterers and subsequently retract their statements.¹⁹⁰ Sometimes women report to authorities, but they are not believed or they are not helped because of ignorance by officers on how to remedy the situation.¹⁹¹ Police, along with other court officials, sometimes blame the victim for her co-dependent relationship with a batterer.¹⁹²

Despite some training, judicial officials and law enforcement officers do not seem to acknowledge the devastating effects of domestic violence on women.¹⁹³ The batterer can use these effects as ammunition against the battered woman to prove that she is unfit or is a poorer candidate for custody.¹⁹⁴ The abuser may cause the trauma resulting in her unfitness and then leave her with consequences, from which she may be unable to recover.¹⁹⁵ A court should not prefer a batterer over a battered woman except in cases where a child will probably be endangered or subject to neglect or abuse.¹⁹⁶ If courts do consider the quality of parenting that a

of abuse to police because she was afraid of her abuser).

189. *See id.*; *see also* DOWNS, *supra* note 115, at 74.

190. *See, e.g.*, *Diesen v. Hessburg*, 455 N.W.2d 446, 449-50, 465-66 (Minn. 1990) (noting the reasons given by a prosecutor as to why he failed to prosecute a battering incident as a felony included the victim's "prior inconsistent statements" and the responding officer's testimony that the couple involved in the domestic assault "had been involved in domestics many, many times; [sic] and...[the victim] never ever, ever followed through"). The underlying facts of *Diesen* actually involved a suit for libel filed by the Carlton County, Minnesota prosecutor, after the Duluth News-Tribune published an article attacking the prosecutor's failure to go after batterers by charging them with felonies. The article that is the basis of the suit apparently suggests that the prosecutor failed to even file charges against batterers, dismissed some charges, and plea-bargained other charges down to misdemeanors with no jail time. *Id.* at 454. After appealing all the way to the Supreme Court, the prosecutor ultimately failed to prove his case for libel. *Id.* at 453-54.

191. *See id.* at 465-66.

192. *Id.* at 466.

193. *See supra* note 116 (describing the possible effects of domestic violence on battered women).

194. *See* MINN. STAT. § 518.17 (2000). The best interests standards take into account the mental health of the parties, the permanence of the family home, and continuity of care. For an extensive discussion on the best interest standards, *see infra* Part IV.B.

195. *See, e.g.*, *Tabery v. Hofmann*, No. C5-99-2114, 2000 WL 1052018 at *1 (Minn. Ct. App. Aug. 1, 2000). After ending a relationship with her batterer ten years previously, the mother continued to enter abusive relationships, abuse alcohol, and physically endanger her children while the father reformed his abusive behavior, entered a stable relationship, and refrained from alcohol, so custody was granted to the father upon his motion for modification. *Id.*

196. *See id.*

batterer would provide, they should not award him any type of unsupervised parenting rights until he proves that he has rehabilitated his pattern of violent and coercive behavior. This restriction would benefit the battered woman and, in the long-term, her children.

B. The "Best Interests of the Child" Standards Actually Undermine the Long-Term Interests of Children of Batterers

Although the Minnesota Legislature has acknowledged that domestic abuse may have harmful effects on children, Minnesota Statute section 518.17, under which the "best interests" standards for determining child custody are set out, does not deny custody to batterers who have not battered their children and who have committed domestic abuse defined under section 518B.01, even if the children witnessed battering of the other parent in the home. Several of the best interest factors may allow an abuser to gain custody or extensive parenting time with his children, permitting him to continue deleterious contact with the children and the battered woman.¹⁹⁷

1. The "Best Interests of the Child" Standards Actually Include a Forgiveness Clause for Batterers

Minnesota Statute section 518.17, subdivision 1(b)¹⁹⁸ bars the court from considering any actions of either parent that do not directly affect the parent-child relationship.¹⁹⁹ The judge, therefore, may divorce the actions of an abuser from his conduct as parent. The argument is that while he may not be a good husband, a batterer can still be a good parent if he has not physically abused the child. This line of thinking is absurd in light of Naomi Cahn's illumination of why a narrow focus on the child without consideration of past domestic violence can actually harm the child in the long-term:²⁰⁰

Domestic violence reveals information about parenting skills. It shows that at least one parent has taken actions which are diametrically opposed to the best interest of the child. Instead of segregating abuse from custody, there must be systematic

197. See *infra* notes 210-213 and accompanying text (discussing the situational factors of leaving a battering relationship that may result in a woman's fitness for custody being called into question).

198. MINN. STAT. § 518.17, subd. 1(b) (2000).

199. *Id.*

200. See *supra* note 118 (discussing the long-term effects on child witnesses to domestic violence).

recognition that violence is bad for the family. A narrow focus on actions that directly affect the child prevents courts from considering abuse between parents unless it is directed at a child. Because domestic violence has identifiable and deleterious effects on children, there must be a shift in the custodial standard to include this aspect of the parents' relationship.²⁰¹

To fully account for the real impact on the children, the statute must be modified to allow judges to consider the broader problems of domestic violence's impact on children and all relevant evidence of both direct and indirect harm to the child.

2. The Twelfth "Best Interests of the Child" Factor is to Batterers What Sieves are to Water

The ability to consider the wide impact of domestic violence is further limited by the twelfth factor in the "best interests of the child" standard, which forces a battered woman to jump through hoops to make guardians and courts take her batterer's conduct into account.²⁰² The only actions that this standard allows to be considered are those defined as abuse under the Domestic Abuse Act,²⁰³ which, as noted previously, fails to criminalize all aspects and behaviors of domestic violence.²⁰⁴ For example, a batterer who isolated his victim so that she could not leave the house without his permission under the threat that he would not pay their joint credit card bills would not be committing domestic abuse under section 518B.01.²⁰⁵ In a custody battle, the court could not weigh this hypothetical batterer's threats and control as abuse under section 518.17, subdivision 1(a)(12),²⁰⁶ even though these behaviors often progress to physical violence toward the mother even after the relationship is "over."

Second, even if a court has issued a finding of abuse against a batterer under section 518B.01, this finding does not preclude a batterer from receiving custody.²⁰⁷ Molly Brown postulates that "[i]nclusion of domestic violence as just one factor to be considered

201. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1096-97 (1991).

202. For domestic violence by the batterer against the battered spouse to be taken into account under the best interests factors of Minnesota Statutes section 518.17, subd. 1(a), a judge must first issue a finding of domestic abuse under Minnesota Statutes section 518B.01.

203. MINN. STAT. § 518.17, subd. 1(a)(12).

204. See *supra* Part II.A.

205. See MINN. STAT. § 518B.01; see also Rossman, *supra* note 102, at II.A.

206. See MINN. STAT. § 518B.01; MINN. STAT. § 518.17, subd. 1(a)(12).

207. MINN. STAT. § 518.17, subs. 1(a)(12), 1(b).

in custody decisions is not adequate to protect victims of domestic violence."²⁰⁸ This is true of section 518.17, subdivision 1(a)(12) since it only requires a court to consider the direct effects of the abuse on the child. A judge may permissibly read the language of the statute to allow an abuser to obtain custody if the judge determines that the abuser's actions had no effect on the child.²⁰⁹

The other factors under Minnesota Statute section 518.17 can put a battered woman at a disadvantage especially if she is being evaluated by a GAL or a judge who does not understand or acknowledge the effects of domestic violence on a battered woman. When a woman leaves a battering situation, her children will definitely be impacted and perhaps uprooted. Her mental health,²¹⁰ continuity of living arrangements,²¹¹ permanency of the family unit,²¹² and willingness to maintain contact with her batterer can all be called into question.²¹³ In this way, section 518.17 structures and reinforces domestic violence, allowing the batterer to slip through the holes in the statute as water through a sieve.

When judges and GALs treat domestic violence as just another factor to be weighed under section 518.17, and in some instances disregarding domestic violence if no judicial finding of such violence has been made, they are not determining what is in the child's long-term best interests. Parents who batter, and have battered, demonstrate a lack of parenting skills.²¹⁴ GALs must consider the real impact of domestic violence within the family in a child custody proceeding and its negative and enduring impact upon the child's safety, emotional health, and physical health.²¹⁵

C. The Case Study: How Did the Guardian's Recommendation Nearly Turn This Case?

Many of these problems arose in M.D.'s case with the poorly informed recommendation of the guardian ad litem, the fact that no finding of abuse under section 518B.01 existed in the record, and the fact that even if domestic abuse occurred between the

208. Brown, *supra* note 118, at 305.

209. MINN. STAT. § 518.17, subd. 1(b).

210. *Id.* § 518.17, subd. 1(a)(9).

211. *Id.* § 518.17, subd. 1(a)(7).

212. *Id.* § 518.17, subd. 1(a)(8).

213. *Id.* § 518.17, subd. 1(a)(13).

214. See *supra* note 201 and accompanying text (discussing the relationship between domestic violence and parenting skills).

215. See *supra* note 118 (listing the effects on child of witnesses to domestic violence).

parents, it was only one factor of many to weigh under section 518.17.²¹⁶

First, the guardian believed the father. He was “charming” and clean-cut. He was White and had a steady, well-paying job (which was an accomplishment in an area with a depressed job market). With his charming behavior, N.D. convinced the guardian to look past the abuse allegations regarding M.D., P.J.’s sons, and verbal threats to kill P.J. In comparison, the GAL interpreted P.J.’s protective behavior as attempting to take N.D.’s child from him. P.J. moved from home to home and had just started a new job. She was Native American and was not thrilled about letting the guardian into her home. The guardian was charmed by N.D. and ultimately recommended that he be granted sole physical custody, believing that P.J. was unreasonably denying N.D. visitation.

Second, no finding of domestic abuse existed in the record. Although P.J. had current Orders for Protection against N.D. for her sons and herself, the court made no finding of abuse because N.D. chose not to contest the Orders for Protection when P.J. petitioned for them. The judge is not required to make findings of abuse when the accused batterer does not contest the Order for Protection.²¹⁷

Third, even if the court hearing the petition for modification of visitation had found that abuse occurred under section 518.17, it would have been only one factor to weigh.²¹⁸ Factors against P.J. included N.D.’s allegations that P.J. failed to provide M.D. with continuity of care, that P.J.’s smoking endangered M.D.’s health, that P.J. inappropriately disciplined M.D., and that P.J. intentionally interfered with N.D.’s visitation rights on numerous occasions by canceling scheduled visits. N.D. would have had a good case for modification of custody if he had proven all that he alleged. The guardian’s recommendation further improved his position with the court.

While the judge could have taken the guardian’s recommendation at face value, the judge took the time to look more closely at the facts and rejected modification of custody. However, too many judges rely on the recommendations of guardians ad litem when they make their decisions regarding

216. See MINN. STAT. § 518.17, subd. 1 (2000).

217. See *supra* note 121 and accompanying text (discussing the respondent’s possible responses to a petition for an order for protection and the potential results of each option).

218. See MINN. STAT. § 518.17, subd. 1.

custody.²¹⁹ This may be because they lack time and resources to give each case proper attention. Not all cases will turn out so well for a battered woman on the losing end of a guardian's recommendation.²²⁰

VI. Suggested Reforms for the Guardian Ad Litem Program

The current custody system often fails children hurt by domestic violence. GALs and courts have neither the training nor the resources to understand the complexities involved with domestic abuse. Problems are exacerbated when judges give up their power to GALs who have only minimal training and qualifications. The first necessary reform to the guardian ad litem program is division of the responsibilities and powers with which guardians are currently entrusted. While combining many duties in one person is undoubtedly efficient, the current concentration of powers and duties in the Minnesota guardian ad litem system is both contradictory and unconstitutional.²²¹ One possible division of duties and powers would be to have a court-appointed lawyer advocate for the best interests of the child and a separate court-appointed observer observe, investigate, monitor, and report to the judge on any matters relating to the contested custody. Any written or oral facts added to the record by this observer would be subject to cross-examination in open court by any of the parties present, including the child.

A second major change needed in the guardian ad litem system is the addition of an outside review panel. This review mechanism would allow interested parties to attend and testify at panel proceedings. Parents have repeatedly called for some type of grievance process for the review of guardians.²²² Given the power that guardians hold over their lives and the lives of their children,²²³ parents have a right to this review. While this panel

219. See PROGRAM EVAL. DIV., *supra* note 3, at 37. Guardians reported that judges accepted their recommendations, on average, over eighty percent of the time. While a vast majority of judges (eighty-eight percent) reported that these recommendation reports were reasonably complete, less than half of family practice lawyers and public defenders agreed. *Id.* at 44.

220. See *id.* at 37, 44.

221. See *supra* notes 145-176 and accompanying text (discussing Minnesota's possible constitutional bar to the multiple roles of a guardian ad litem).

222. See *supra* note 32 and accompanying text (noting that parents interviewed wanted a forum to address grievances about individual guardians ad litem).

223. See *supra* notes 91-97 and accompanying text (discussing the extensive rights and powers held by guardians ad litem).

would not review guardians' decisions *per se*, because judges retain ultimate authority over the decision, a guardian's conduct during a case should be subject to some kind of check. The review panel should also review training, investigate processes, and be available to mediate complaints against GALs.

Third, a rewrite of Minnesota Statutes is necessary to acknowledge the complex and problematic nature of domestic violence. First on the chopping block should be the best interests standards in Minnesota Statute section 518.17.²²⁴ In cases where a court has issued a finding of domestic abuse, subsequent courts should find a presumption against a batterer receiving sole or joint physical or legal custody of a child. While the court could still consider the abuse, the presumption could be overcome by evidence that the batterer has successfully completed individual or group therapy. Next, the definition of abuse under section 518B.01 should be expanded to include more of the behaviors associated with battering so that the reality of domestic violence's impact on children is more accurately reflected.²²⁵ People who batter as a method of control over family or household members have not demonstrated good parenting skills²²⁶ and the courts and guardians should acknowledge this as a lack of necessary parenting skills.

Additionally, guardians need more training, as well as continuing training.²²⁷ Forty hours of training and some court observation is inadequate to prepare GALs to properly evaluate the parties involved in the custody process.²²⁸ The first year of a guardian's service should be limited to intensive formal and informal instruction. Training should cover issues that guardians, families, and children encounter prior to, during, and after a contested custody hearing. These issues should include battering and domestic violence, family and group dynamics, health care, child development, mental health, and abuse of or dependency on alcohol or drugs. More time and financial resources should be spent in developing competent guardians to perform the difficult

224. See *supra* Part V.A, B (discussing the effects of the "best interests of the child" standard in Minnesota).

225. See *supra* notes 181-187 and accompanying text (discussing how the Domestic Abuse Act fails to criminalize many aspects of domestic violence).

226. See *supra* notes 117-118 and accompanying text (discussing the effects on child of witnesses to domestic violence).

227. See *supra* notes 97-101 and accompanying text (discussing the minimal training guardians ad litem receive on domestic violence and its effects on family members).

228. See *supra* notes 97-101 and accompanying text.

and delicate task of working with a family unit in crisis.²²⁹ After this initial training, guardians should also be required to fulfill yearly continuing education requirements. Guardians ad litem should also be fairly compensated for the hard work they do.²³⁰ The role of guardian should progress to the level of a profession, with a wage that is commensurate.

Finally, a serious effort should be made to increase diversity among guardians. Increased pay may help to increase diversity as the position of guardian becomes more financially attractive to underrepresented groups.²³¹ A focused effort should be made to recruit guardians ad litem from more diverse racial and socio-economic backgrounds. Parties may relate better to people who understand who they are and where they come from, especially during a difficult and contentious time.

Conclusion

Batterers have it too easy in Minnesota. As long as they have not abused their children physically, batterers may still receive extensive parenting rights, including sole physical and legal custody. While this result is not in the best interests of children, it is currently possible under Minnesota Statute. At the front line, guardians ad litem have the potential to dramatically impact the situation. In fact, guardians wield so much power that their duties may extend impermissibly into the exercise of judicial power, which they lack any jurisdictional grant to exercise. The broad powers of guardians ad litem combined with Minnesota's minimal training have potentially harmful consequences for children. Finally, parents have no open forum in which to air grievances against individual guardians.

Guardians are also mandated to make their recommendations pursuant to statutes that fail to take into account the complexities of domestic violence in a custody battle. Whether a guardian decides for or against a battered woman, that battered woman already has the statutes working against her.

Reform would improve the guardian ad litem program and benefit battered women and their children. The roles of guardians ad litem should be divided between advocates and objective fact-finders. Open review by an outside body should be instituted to

229. See *supra* notes 60-71 and accompanying text (discussing the inadequate qualifications, recruitment, and training of guardians ad litem).

230. See *supra* note 71 and accompanying text (noting that financial compensation for GALs is low or non-existent).

231. See *supra* note 71 and accompanying text.

hear parental grievances against individual guardians. Statutory reform should expand the definition of domestic abuse and create presumptions against custody for those who batter. More extensive training, greater financial compensation, redefining the job as a profession, and greater diversity within guardian panels will create a corps of guardians who understand for what and whom they are advocating: the children.

