

# What's a GAL to do? The Proper Role of Guardians *Ad Litem* in Disputed Custody and Visitation Proceedings

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## I. Introduction

Often during divorce proceedings courts make decisions regarding child custody and visitation arrangements. These decisions are governed by the "best interests of the child" standard. Generally, courts assume that parents, as the child's natural guardians, will inform the court as to the child's best interests. However, in contested custody and visitation cases (CCVs) the courts often lose confidence that the parents are able to represent the child's best interests. In part, the courts have doubts because where custody is contested, the parents disagree as to the best interests of the child. But also, parents enmeshed in conflict may be unwilling or unable to consider the child's best interests. In these cases, the court will sometimes appoint a guardian *ad litem* (GAL) for the child.<sup>1</sup> In many states, the appointed GAL is also a lawyer.

The court practice of assigning a guardian to advocate a child's interests originates from the ancient doctrine *parens patriae*. This doctrine, established by King Edward in the early 1300's, protected children's property and landholdings against adverse claims,<sup>2</sup> whereas now the doctrine is invoked to assign a GAL to determine which custody arrangements are in a child's best interest. Notably, the early guardian's determination that protecting a child's wealth was in his best interests was self evident. In contrast, the modern GAL's difficulty in deciding whether it is in a child's best interests to award custody to one fit parent over another fit parent cannot be overstated. Originally, *parens patriae* was intended to be exercised by the *state* or *government* generally, not by the judiciary, specifically.<sup>3</sup> Nevertheless, from these inauspicious beginnings grew an extensive body of *judicial* authority.

Initially a GAL's role seems clear. Deeper reflection, however, reveals uncertainty and inconsistency surrounding our assumptions and

perceptions about a GAL's duties. Confusion and debate besiege the GAL's role: should a GAL be an advocate for the child's wishes, a champion for the child's best interests, or a neutral factfinder for the court? This uncertainty regarding the role of the GAL fuels a number of related questions. What does the *court* want the GAL to do? How are our expectations altered when the client is a very young child; because of the nature of the proceeding;<sup>4</sup> or because the *child* is not a party to the action?<sup>5</sup> These questions have been answered variously by different states, individual trial courts, and sometimes even by the GALs themselves.

GAL roles generally fall into one of three main categories: advocate for the child's wishes (advocate), champion for the child's best interests (champion), or factfinder for the court (factfinder). Each of the three major roles has a unique function. In addition to serving as an advocate, champion, or factfinder, GALs have regularly been assigned these additional functions: facilitator, negotiator, mediator, law guardian, litigation monitor, social worker, legal advocate, surrogate parent, and educator. The three GAL roles, in their purest states, are impractical tools for the courts' task of creating a final order governed by the child's best interests. The rigid structure of each model does not permit the flexibility required to respond to the needs of the court, the GAL, or the child. Consequently, courts will request that the guardian play a dual role of say, advocate-champion or advocate-factfinder.<sup>6</sup> However, a representative attempting to play more than one role finds herself in an ethical conundrum. Although the three major roles are rarely assigned singly, they do serve as touchstones for thinking about GAL functions as well as conceptual building blocks for fabricating a useful GAL model. Ambiguity regarding the role of the GAL can result in the GAL performing one role while the court assumes that she is performing another—leading to misunderstandings, ineffectiveness, delays, and harm to the child.

Although most states have GAL statutes, many are skeletal or provide minimum guidance.<sup>7</sup> An example among those offering little help is Idaho's statute:

When an infant or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian *ad litem* may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him.<sup>8</sup>

The significance of custody or visitation litigation and the implications of the final order,<sup>9</sup> as well as the state's obligation to protect children, require that GALs be provided with substantial guidance. GAL functions must be clear and specific so that the GAL knows what is expected of her and so that the court knows what services it is receiving from her.

Following a survey of the state's GAL provisions, sections III through V of this article will examine, in their purest states, the three major GAL roles: advocate for the child's wishes, champion for the child's best interests, and neutral factfinder for the court. Section VI will then explore the difficulties encountered in attempts to manipulate and blend these roles. By grouping together the indispensable functions of the three distinct models, we will arrive at a fully functional and effective GAL in the substitute parent model in section VII. The substitute parent model is the most advantageous model for arriving at a final custody or visitation order that is in the child's best interest.<sup>10</sup> After thorough examination of the various GAL functions in detail, sections VIII and IX of this article will explore possible statutory responses to alleviate confusion and provide guidance to the court, the GAL, the parents and the child.

## II. Survey of Current Statutory Guidance

The first hurdle to clear in surveying the state's GAL statutes is to find them. The term, GAL, means different things to different people. What we might call a GAL is labeled and defined variously by different courts. The GAL can be referred to as: guardian, law guardian, friend of the court, special master, representative, counsel, attorney, advocate, champion, attorney *ad litem*, public advocate, custody evaluator, or parenting coordinator. Statutes authorizing the appointment of a GAL are most often located in a subset of probate, domestic relations, child protection, juvenile proceedings or within the state or local court rules and procedures. A few GAL statutes may have a heading all their own: guardians, or appointment of guardians generally.

Finding the statutory authority to *appoint* a GAL is far easier than discovering just what this appointed GAL is supposed to do. For definition of the GAL's role researchers may have to resort to the state's code of professional responsibilities, committee reports, and executive or agency guidance. In several cases, there exists little or no description of the GAL's duties and responsibilities.

Once unearthed, my attempt to discover some uniformity among or to impose some structure on the various statutes proved futile. I share this research experience to illustrate that disarray is the pervasive theme when studying any aspect of GALs. What follows is a close look at a few narrowly-defined variables.

### A. Statutes that Do Not Specifically Contemplate the Use of GALs in CCV's

One fifth of states do not provide statutes that specifically contemplate the use of a GAL in CCVs.<sup>11</sup> Courts without a specific authorization from the legislature can appoint a special master or expert under Rule 53 who may perform some of what we think of as traditional GAL duties.<sup>12</sup> The role of the special master is generally equivalent to the factfinder GAL and is subject to its attendant debilitating limitations.<sup>13</sup> The special master is an arm of the court and has no guidance specific to CCV cases other than the direction, if any, offered by the appointing court.<sup>14</sup>

All states have statutes contemplating the roles and responsibilities of GALs in situations other than CCVs. But in the ten states that do not have a GAL dedicated to CCV cases, the GAL provisions are inapplicable because the guiding statutes do not anticipate the issues that arise in CCV proceedings. These statutes are drafted within another context, such as: abuse and neglect proceedings, probate, juvenile disciplinary actions, or other cases where the child is a party to the proceedings. They include no individualized provisions designed with the specialized context of custody visitation conflicts. Such statutes make little sense when applied in a CCV setting.

Although neither the state's GAL statutes nor the special master rule address custody cases in particular, the appointing court can instruct the GAL according to each case. In this way, the GAL and the special master duties can be tailored to CCV actions at the discretion of the judge on an ad hoc case-by-case basis.<sup>15</sup> In fact, even some statutes that expressly provide for GALs in CCV's allow for the court to further adapt the GAL's activities and duties depending on the individual circumstances of the case.<sup>16</sup>

### B. Statutes that Specifically Contemplate the Use of GALs in CCV's

The remaining majority of the states, forty in all, specifically contemplate the use of GALs in CCVs. However, there is considerable deviation in the nature and extent of the guidance available to these GALs. Of these forty, over half (twenty-five states) offer little direction as to the GAL's responsibilities. In other words, the legislature expressly grants authority to the courts to appoint a GAL in CCV cases but provides little or no guidance as to what the GAL should do in her capacity as such.<sup>17</sup>

Other states have obviously considered and acknowledged the importance of defining the GAL's role and made a good first effort at delineating the duties attendant to the appointment of a GAL. Although incomplete, these states are well on their way to crafting comprehensive guidance to assist GALs in their charge: Colorado, Illinois, Indiana, Kentucky, Minnesota, North Dakota, Texas and Wisconsin. However, where there is room for interpretation,

the GAL's role may vary greatly from case to case as courts attempt to interpret unclear GAL statutes.<sup>18</sup> Also, a statute can appear on its face to have a particular purpose, but the courts will interpret it to manifest more of what the court thinks a GAL should be. Besides resulting in less than effective GAL's, this uncertainty contributes to the general aura of melee surrounding CCVs.<sup>19</sup>

States can avoid this confusion by drafting clear, concise statutes that painstakingly outline the GAL's duties and responsibilities. Four states in particular have lead the way in defining, describing and guiding GALs with detailed, comprehensive guidance. California, Maine, Michigan and Missouri each offer extensive resources, guidance and support to the GALs appointed in CCV cases. Regardless of the extent of guidance, the defining documents may be in the statutes themselves or in separate handbooks or may be embedded in the court rules.<sup>20</sup>

### C. Courts Defining the GAL's Role

Many statutes specifically authorize the appointing court to augment or limit the GAL's role at its discretion. Other courts find this power inherent under the general authority of the court. Where courts exercise discretion over the GALs duties, there exists a wide variety of GAL roles and uses depending on the state, jurisdiction, court and/or judge. These variations exacerbate the preexisting instability and uncertainty around the GAL's proper function.

Some states specifically state that the GAL's appointment ends with the final order,<sup>21</sup> others instruct the opposite.<sup>22</sup> Although this article is primarily concerned with GALs who protect the child's interests *during* litigation, some states appoint GAL-like types who, among other things, protect the child's best interests only after the final order.<sup>23</sup> Other states permit the GAL to represent the child throughout the litigation and beyond.<sup>24</sup> Extensive study exposes an egregious lack of coherence among the state's approaches to GAL representation. For our own understanding of the different functions of GALs we distill from this quagmire three types of GALs. Although none of the states desires a GAL who fits entirely within one of the three main types, the categories serve as framework from which we can begin to build a more practical GAL model.

### III. The Guardian *Ad Litem* as Traditional Advocate for the Client's Wishes

The traditional advocate asserting a client's expressed objectives is by far the most familiar and natural role for lawyers.<sup>25</sup> Lawyers are trained to zealously advocate for their clients within an adversarial system. They are accustomed to and are governed by the American Bar Association Model Rules of Professional Conduct (Model Rules) and the American Bar Association Model Code of Professional Responsibility (Model Code).<sup>26</sup> Through training and practice, lawyers have gained expertise in their advocacy roles as regulated by these rules, as well as proficiency in legal analysis, court procedure, and discovery. The traditional lawyer-client relationship facilitates and nurtures trust by way of the lawyer-client privilege and protects confidential information as guaranteed by Model Rule 1.6.<sup>27</sup> When the court appoints counsel to represent a client's wishes, the lawyer is on familiar ground.

However, the court rarely desires such straightforward, simplistic representation.<sup>28</sup> Usually, the court directs the lawyer to assert the child's best interests over his wishes. Some courts will proffer the nature of custody and visitation proceedings to justify this departure from the usual course of advocacy.<sup>29</sup> Others will construe their GAL statutes to compel the champion result.<sup>30</sup> Still other states have interpreted their statutes variously from case to case to result in the GAL abandoning the pure advocacy approach.<sup>31</sup> From the courts' perspective, because the final award order must be governed by the best interests of the child, presentation of the child's wishes alone would not do much to assist the court in its charge. Consequently, the state, the court or the GAL herself often unilaterally alters the advocate role in order to advance the child's best interests.<sup>32</sup> And it is the court's goal to craft a final order that preserves those best interests. Even where the court or the state intends to appoint a pure advocate, the lawyer may be compelled to assert the child's best interests in accordance with the Model Rules and Model Code.

The Model Rules also anticipate that the client will direct the lawyer or at least manifest consent to the lawyer's direction of his case.<sup>33</sup> These pervasive assumptions are challenged when the client is a child.

#### A. Capacitated Child

If the child is capable of considered judgment, the relationship between the lawyer and the child-client should be the same as between the lawyer and an adult-client.<sup>34</sup> The lawyer's duty is simply to advance the child's objectives. The Model Rules and the Model Code govern the lawyer's behavior and define the relationship between the lawyer and the client. The lawyer is bound to pursue the child's expressed objectives regardless of whether those objectives are in the child's best interests.<sup>35</sup>

The traditional advocate GAL and her client enjoy an attorney-client privilege which prohibits the GAL from disclosing confidential information revealed to her in the course of representation. This privilege may seem like less of a good idea where the GAL is appointed in a CCV case. For example, imagine that the child tells his lawyer in confidence that he has been physically abused by one parent. Unlike other professionals who are required by law to report such credible allegations, the traditional advocate is required *not* to disclose such information without a client waiver. One can easily imagine less provocative factual scenarios where the advocate's privilege would run contrary to our perceptions of what a GAL should do.

Although quite clear, the straightforward advocate role obviously shortchanges the child's best interests as well as our understanding of the purpose behind appointing GALs in CCVs. In practice, the court often incorporated some championing of the child's best interests into the advocates rule. However, when an advocate is required to assert a child's best interests (see below), she becomes caught in a whirlwind of conflicting directives.

#### B. Precapacitated Verbal Child Clients

Even when a child can express his wishes, it may not be proper for an advocate to advance those wishes. Applying the Model Rules and Model Code to a precapacitated verbal client

implicates a profound ethical quandary for the advocate. Model Rule 1.14 provides that the lawyer must attempt to maintain a normal lawyer-client relationship regardless of the client's minority: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of *minority*, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."<sup>36</sup> It strains the imagination to find any aspect of normalcy in a lawyer-client relationship where the client lacks the capacity to make considered decisions. This inability to form considered objectives indicates that the child is precapacitated.<sup>37</sup> And a precapacitated client cannot enjoy the relationship contemplated by Model Rule 1.14 because a definitive aspect of the normal lawyer-client relationship is the client's capacity to make considered decisions. A client who cannot form considered decisions necessarily cannot act in his own self interest.

Paradoxically, the Model Rules advise that, if the lawyer ascertains that the client cannot act in his own self interest, the lawyer may seek appointment of a guardian under Rule 1.14(b): "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."<sup>38</sup>

In addition to the circular nature of the Model Rule guidance, the combination of these provisions confers unacceptably wide discretion to the lawyer in four ways. First, the language allows the *lawyer* to determine when a "client's ability to make adequately considered decisions . . . is impaired." In other words, the lawyer makes the call as to whether the child has capacity. Judging a child's capacity can be extremely difficult in any case and is nearly impossible where the evaluator is a stranger to the child. The task becomes harder still when the child has some cognitive or emotional disability or aberration.

Second, part b directs the *lawyer* to establish whether a "client cannot adequately act in the client's own interest." Neither the determination of whether a child can make considered decisions, nor whether a child can act in his own best

interests, is within the purview of legal analysis for which the lawyer is trained.

Third, provision 1.14(b) allows, *but does not command*, that the lawyer take protective action or seek appointment of a guardian when a client cannot act in his own best interest. The discouraging syntax of the language—the lawyer "*may*" do this "*only*" when that—implies that the option of protective action is an uncommon last resort and that it should be avoided. Under circumstances where a minor client cannot act in his own interests it is appropriate to mandate, rather than merely to allow, a guardian to be appointed.

Fourth, Comment 2 of Model Rule 1.14 implies further that the lawyer herself should act as the protector: "If the person has no guardian or legal representative, the lawyer often must act as *de facto* guardian."<sup>39</sup> Because a guardian for a precapacitated client has a duty to determine his best interests, this provision implies that the advocate herself should make that determination. "A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred. An attorney who has been appointed by the court has to be ever mindful of the Rules of Professional Conduct."<sup>40</sup> Besides suggesting that a lawyer make a specialized determination in an unfamiliar field, Comment 2 places the lawyer in an ethically precarious position. As a *de facto* guardian, the lawyer must make decisions for her client<sup>41</sup> that require an expertise untraditional to lawyers.<sup>42</sup> It is unclear whether the lawyer—acting as *de facto* guardian—should not only determine the best interests, but then also should promote them to the exclusion of the client's wishes.<sup>43</sup>

The lawyer promoting a position on behalf of her client that is adverse to her client's expressed wishes, is a lawyer embroiled in a severe ethical dilemma. Such advocacy directly opposes Model Rule 1.2(a) providing that: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."<sup>44</sup> Similarly, Ethical Consideration 7-7 of the Model Code provides: "[T]he authority to make decisions is exclusively that of the client and . . . such decisions are binding on his lawyer."<sup>45</sup>

Summarizing and distilling the irreconcilable direction from the Model Rules and the Model Code, the implicit and consistent presumptions of both embody substantial overreaching by the lawyer—not only does the appointed lawyer determine the child's best interests but she also makes the threshold determination of whether or not the child has capacity.<sup>46</sup>

This is a disturbing development. The ability to practice law and the ability to discern the best interests of a precapacitated child-client require vastly different schooling and expertise. The *first* Model Rule "reminds attorneys not to take on tasks which they are not competent to perform."<sup>47</sup> Nothing in a lawyer's training gives her the ability to determine the best interests of a precapacitated child. I cannot overemphasize the dissimilarity of abilities between an early childhood development professional and a practicing lawyer. Without appropriate training, the lawyer must resort to using her personal experience to make the judgment.<sup>48</sup> The irrational assumption that a legal professional is capable of discerning a client's best interests—apart from his legal interests—is a common strand of misconception weaving through all of the GAL models currently available. This presumption is categorically unsupportable.<sup>49</sup>

### C. Preverbal, Precapacitated Clients: Newborns to Toddlers

Preverbal children simply cannot express their wishes in order to have them advanced. The law presumes that a preverbal, precapacitated client's wishes are represented by his best interests. Therefore, the traditional advocate representing a preverbal, precapacitated client *must* act as a champion and further, not the child's wishes, which are unknown and unknowable, but the child's best interests.

Who will ascertain this child's best interests? You guessed it, as it is for the verbal, precapacitated client, it is for the preverbal, precapacitated client, the lawyer decides. Although a dramatic departure from the usual role of the lawyer, this determination has often been delegated to or voluntarily assumed by the appointed lawyer. Comment 2 following Model Rule 1.14 implies that the lawyer is entitled to act as a child's guardian.<sup>50</sup> This guardian role

necessarily entails determining her client's best interests.<sup>51</sup>

However objectionable assertion of a child's wishes over his best interests may appear, certain functions of the traditional advocate are advantageous. In particular, it is desirable to retain traditional attorney-client confidentiality privilege because it fosters trust; legal proficiency because it engenders zealous advocacy; and due respect for the child's voice. The basic assumption and strength of the adversarial system is that a lawyer performing her role as an advocate ensures that a client's voice will be heard.<sup>52</sup> Appointment of an advocate placates society's appetite for hearing the child's perceptions of current and potential custody and visitation arrangements. However, the GAL, advancing her client's wishes may do so at the expense of his best interests. The pure advocate role ensures that the child's voice will be heard and places it in the forefront. In fact, the compelling drive to give voice to the child's wishes fuels many GAL appointments. However, the argument to highlight the child's voice is less persuasive in the visitation and custody context as compared to an adversarial proceeding where the child is an adverse party in the action.

By forcing the child to accept only the limited services that an advocate can ethically provide, we have put the cart before the horse. We are defining what the child can have by what the lawyer can give. Rather, the inquiry might more properly begin by asking what the child needs and tailoring the GAL's role to meet those needs.

With its rigid rules and its disregard for the child's best interests, the traditional advocate does not fulfill our expectations of a GAL. A GAL is generally understood to represent the best interests of the child.<sup>53</sup> The next section will focus on the strengths and weaknesses of best interests champion in detail.

## IV. The Guardian *Ad Litem* as a Champion for the Child's Best Interests

Using a GAL to champion the child's best interests makes sense against the backdrop of the court's ultimate goal to create a custody and visitation order according to that standard. But

the "best interests of a child" is a vague concept subject to a broad range of interpretation.<sup>54</sup>

The court, GAL, client, and parents all need to understand not only the role a GAL will play, but the factors that will be used to make the best interest determination. In jurisdictions appointing lawyers as GALs, understanding how "best interests" is defined and determined unearths new sources of ethical uncertainty for the lawyer and pays credence to the suggestion that GALs (whether lawyers or not) need extensive training.<sup>55</sup> "[T]he 'child's best interests' is a vague and ambiguous standard which is defined differently by scholars, courts and guardians *ad litem*."<sup>56</sup> The process of determining a child's best interest is often subjective and arbitrary. Washington's GAL statute offers this broad definition: "[T]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"<sup>57</sup>

Some states define the concept by reference to criteria to be considered in the best interests determination, including: the parent's wishes, the relationship between the parents and the child, the child's adjustment to home, school and community, the character and circumstances of all involved, the need for continuity and stability for the child, the existence of domestic violence, and the child's wishes.<sup>58</sup> Although not dispositive, often the champion GAL uses the child's wishes as a factor in determining his best interests.<sup>59</sup>

Washington's statute indicates the potential for vast scope and intricate detail in its overarching inquiry for determining a child's best interest:

[T]he investigator may consult any person who may have information about the child and the potential parenting or custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if the

child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent.<sup>60</sup>

The pure champion model raises uncertainty surrounding the relationship between the parents and the GAL. What are the permissible boundaries of the investigations? When the GAL is interviewing a parent, must the parent's lawyer be present? Should the other parent have access to the interview? If not, can the GAL keep confidences of one parent from the other? Can she keep such confidences from the other parent's lawyer? Does this investigative role interfere unreasonably with the parent's privacy rights? These are some of the many complex issues facing jurisdictions employing GALs as champions.<sup>61</sup>

The role of the champion in court is as an active participant calling witnesses and cross-examining the parent's witnesses. The GAL's involvement in court proceedings heightens the adversarial atmosphere between the parents and the champion and consequently may harm the child. If the champion is not also a lawyer, the child will suffer a severe disadvantage in court. Legal expertise is essential to effective representation for the child. It does not matter how proficient the champion is at determining the child's best interests. If she is ineffective or incompetent in the courtroom, the child's interests will be impaired.

Many courts require the GAL to act as a witness in the CCV case. This highly questionable duty compromises the child's interests.<sup>62</sup> Whether or not the champion is a lawyer, the combined roles of witness and advocate erode the trust between the child and the GAL because the child's confidences are subject to disclosure on the witness stand. Even mildly vigorous questioning of the GAL can severely impair effective representation for the child when that GAL is simultaneously acting as a witness and an active participant in the same proceeding.

Opponents to the champion model also complain that the GAL enjoys an inordinate influence over the court.<sup>63</sup> Because the final ruling must be in the child's best interests and the champion offers just such a determination to the court, the court's obligation becomes moot. It

can simply accept the GAL's findings and make a final order accordingly.

To this objection I would reply, "so what." The concern that the champion improperly usurps the court's role is unconvincing. As long as the best interest of determination is reliable—and this reliability is apparent to the court—the court is well within its authority to rule on that evidence. The assessment of the child's best interests is more appropriately assumed by professionals in the fields of sociology, psychiatry, counseling and child development.<sup>64</sup> I propose that the court should grant substantial deference to the testimony and evidence brought by such professionals and limit itself to its gatekeeper function ensuring testimonial quality. The prudent court avoids making the highly technical and specialized determination of best interests. Given the dubious underpinnings of the court's role,<sup>65</sup> it is wise to defer to an expert on the best interest determination and is well within its authority.

One trait lacking from the champion role is protection for the child *outside* of the courtroom. Although the champion must assert the child's best interests in court there is no such protection throughout the determination process.<sup>66</sup> This separate security is often incorporated into the champion role, but is distinct and deserves special attention and exploration. It will be addressed further in the substitute parent section.<sup>67</sup>

Nevertheless, appointing a champion produces many desirable results. The court acquires the information it needs to make an effective order, the child's "voice" is heard, and—if the champion is an active and effective participant in the proceedings—the child's best interests are zealously advocated.

Sometimes the court views its proper role as making the best interests determination itself, solely. In that case, it will appoint a GAL to obtain and provide to the court all of the information relevant to that evaluation. The GAL, who will appear as a witness, and from whom the court requests only facts—no legal conclusions—is called a factfinder.

## V. The Guardian *Ad Litem* as a Factfinder for the Court

Because the court doubts the parents' ability to offer evidence of factors affecting their child's best interest, it may appoint its own investigator.<sup>68</sup> Of the three dominant forms of GALs this one is the least defensible. Although the factfinder function is important, it falls short of our expectations of a GAL as a child's protector because the factfinder owes no allegiance to the child. The factfinder is an arm of the court.<sup>69</sup> The job of the factfinder is to supply the court with the information it needs to determine the child's best interests.<sup>70</sup> The factfinder should not offer her own speculation or judgment. Unlike the advocate or champion, she must remain neutral and offer only facts, not legal conclusions, like the determination of the child's best interest.<sup>71</sup> One court found that a GAL's proper role was to remain a "neutral assistant of the court."<sup>72</sup> The GAL's duty is simply to supply facts to "assist the court in achieving a proper disposition."<sup>73</sup>

As an agent of the court, the factfinder can testify as a witness—expert or otherwise—subject to cross-examination. She can interview and observe the parties. Since the GAL is not representing a client, she does not face any conflicts of interest in complying with the Model Rules and Model Code. The factfinder does not speculate as to the child's interests, nor does she make decisions for her client. The court is her client.

Endorsing this form of court-ordered discovery is troubling. Independent investigations by the court have long been considered anomalous to American jurisprudence. Our judges are to be arbiters of cases and controversies, and are to base their decisions on the arguments brought through the zealous advocacy of the parties. Although an inquisitorial style of proceedings finds favor in some countries, our nation has explicitly rejected it. Unlike our European counterparts, we caution our courts against acting as investigators to uncover facts not brought before the court.<sup>74</sup>

Additionally, the presumption that the court is receiving pure unbiased fact belies common sense. The factfinder's broad discretion to shape her investigation necessarily reflects personal

