

INTRODUCTION: CUSTODY THROUGH THE EYES OF THE CHILD

*Pamela Laufer-Ukeles*¹

The Honorable James G. Gilvary Symposium on Law, Religion, and Social Justice titled, *Custody Through the Eyes of the Child* (the “Symposium”), was held on January 20–21, 2011, at the University of Dayton School of Law. The Symposium brought together scholars and practitioners from around the nation to consider custody from the perspective of children. This focal point was broken into three subparts. First, the Symposium explored the use of guardians ad litem (“GALs”) in obtaining optimal custodial outcomes for children. Second, the Symposium explored the use of mediation and other forms of alternative dispute resolution in pursuing the interests of children. Third, the Symposium explored conflicts between interests of children and other policy and constitutional concerns, such as parental rights and institutional concerns in the context of adoption, foster care, and immigration.

The goal of the Symposium was to consider custody from the perspective of children in more concrete terms than oblique references to the ambiguous notions of the best interests of the child.² Determining best interests has evolved into the standard for custodial decisions in most situations: custody as between unmarried parents, at the time of divorce, as well as foster and adoptive placements.³ While abuse and neglect cases

¹ Associate Professor of Law, University of Dayton School of Law. J.D., Harvard Law School; B.A., Columbia College, Columbia University. Thanks to Dean Lori Shaw and Professor Victoria VanZandt for working with me to make the Gilvary Symposium come to fruition. Thanks also to the Editors of the University of Dayton Law Review for putting together this Symposium issue and supporting the Symposium, especially Charles Rittenhouse who was instrumental in helping to create the vision for the Symposium.

² See, e.g., Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 15-16 (2002); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-57 (1979); *In the Matter of Michael B.*, 604 N.E.2d 122, 131 (1992) (describing the best interests of the child standard as ambiguous and malleable, subject to the court’s review of the total circumstances and discretion on a case-by-case basis).

³ Bartlett, *supra* note 2, at 15-16 (noting the primacy of the best interests standard in custody disputes despite the fact that it is more aspirational than practical); see JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT SOLNIT & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986); JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1998); MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 6 (1994); Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children’s Long-Term Well-Being*, 9 VA. J. SOC. POL’Y & L. 71, 92-94 (2001); Lauren Barth, *Consultant Conduct in Anticipation of a Child Custody Evaluation: Ethical and Social Dilemmas and the Need for Neutral Parent Education*, 49 FAM. CT. REV. 155, 157-59 (2011); see also Fla. Dep’t of Children & Families v. Adoption of B.G.J., 819 So.2d 984 (Fla. 4th Dist. Ct. App. 2002); MODEL MARRIAGE AND DIVORCE ACT § 402 (2003).

remove children from parental care only through a finding of parental unfitness, a child's best interests are often the focus of attention in these cases for two reasons: (1) unfitness is often used as a proxy for determining when it is in a child's best interests to terminate parental rights; and (2) the best interests standard is used to determine custody once abandonment is established.⁴ As opposed to older, more rigid standards that prefer mothers to fathers or fathers to mothers and distribute custodial rights to adults as a matter of entitlement, the best interests standard is both progressive and inspiring in its focus on children. On the other hand, due to the malleability and ambiguity of the standard, determining best interests has proved to be dependent on factors other than a child's needs: biases of judges;⁵ preconceptions regarding socio-economic class, gender and race;⁶ financial resources to produce reputable psychologists and experts;⁷ and resentments and acrimony between spouses or parents,⁸ among others. While the best interests standard is intended to achieve that which is best for the child concerned, it is also a broad and ambiguous concept subject to manipulation and an unlimited number of interpretations.

Some have looked to resolve the indeterminacy of the best interests standard through more concrete and definable standards, such as the ALI Principles of the Law of Family Dissolution ("Principles"), which offers a

⁴ *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (to overcome the presumption that parents act in the best interests of their children, the state must show that the parents are unfit to act as guardians for their children); *Petit v. Holifield*, 443 So.2d 874, 877 (Miss. 1984) (providing that once abandonment, desertion, or unfitness is established, best interests of the child may be considered); *In re B.H.M.*, 799 P.2d 1090, 1095 (Mont. 1990) (noting the best interests test is proper after initial finding of dependency, abuse, or neglect).

⁵ See, e.g., *Hollon v. Hollon*, 784 So.2d 943 (Miss. 2001) (placing weight on parents' failure to go to church regularly and mother's lack of religious practice).

⁶ See Nancy D. Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determination*, 7 WOMEN'S RTS. L. REP. 235, 236; Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 192 (1990); Katharine Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 880-81 (2000); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 139, 203 (1992); STATE BAR OF MICH., THE FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 69 (1989), available at <http://www.michbar.org/publications/msword/REG-Rpt2.doc> (finding that sex stereotypes influence judges to the disadvantage of women seeking custody of their children, often granting custody to minimally interested fathers even when the mother has been the primary caregiver for years, perceiving mothers who focus on their careers as less fit parents than fathers who do the same and evaluate women's social interests and finances more critically than they do men); Susan Beth Jacobs, *The Hidden Gender Bias Behind The Best Interest of the Child Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849-50 (1997) ("Many judges consider present income, future earning potential, housing, maintenance of the family home, and other marital advantages in making custody determinations. This has had a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of focus on raising children instead of advancing career opportunities."); *Jones v. Jones*, 542 N.W.2d 119 (S.D. 1996). But see *Palmore v. Sidoti*, 466 U.S. 429 (1984).

⁷ See GOLDSTEIN, FREUD, SOLNIT & GOLDSTEIN, *supra* note 3, at 23-26; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody and Decisionmaking*, 101 HARV. L. REV. 727, 728, 768-69 (1988).

⁸ Sandra Keen McGlothlin, *No More "Rag Dolls in the Corner": A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 J.L. & FAM. STUD. 67, 84-89 (2008).

more tangible standard for determining best interests.⁹ The Principles presume that a child's best interests are met by retaining, to the greatest extent possible, the same breakdown of parenting time with the child as was maintained during the marriage.¹⁰ No doubt this comes from beliefs about the importance of continuity for children and influential psychological studies regarding the importance of children's attachment to nurturing adults.¹¹ Professor Katharine Bartlett, co-author of the second section of the Principles, which set out the proposals for improving custody decisions, shared her perspective on this "approximation standard" during her keynote address at the Gilvary Symposium and defended it as against common critiques, such as the impracticality of continuing to split children's times between two separate households under different conditions where parental availability may change, the parent-centered nature of the standard, and conflation of quantity and quality of care. One state has adopted this approximation standard¹² and it has been influential in quite a number of court cases.¹³

Others have sought to quell concerns about the indeterminacy of best interests through alternative presumptions that restrain the open-ended best interests standard: joint custody and the primary caretaker presumption being the most widely advocated.¹⁴ One looks for fairness in outcome and the other a fair reflection of past behavior coupled with a nod toward stability and autonomy for the primary caregiver.

⁹ See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002); see also Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 473-74 (1999) (citing Ronald K. Henry, 'Primary Caretaker': Is it a Ruse?, 17 FAM. ADVOC. 53 (1994)).

¹⁰ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002).

¹¹ Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 884 (1992) (custodial parents should be allowed to relocate with their child in good faith); AM. LAW INST., *supra* note 9, at § 2.17 cmt. a. (the best interests of the child are more closely tied to the interests and quality of life of the primary caretaker); see *Veselsky v. Veselsky*, 113 P.3d 629 (Alaska 2005) (stability is often a function of parental attitude, not geography). See generally GOLDSTEIN, FREUD, SOLNIT & GOLDSTEIN, *supra* note 3; *In re Marriage of Burgess*, 913 P.2d 473, 478-79 (Cal. 1996).

¹² See Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 548 (1999) (pointing out that only eight states adopted the Uniform Marriage and Divorce Act's ("UMDA's") divorce provisions more or less intact. West Virginia adopted an earlier draft of chapter two when it abandoned the primary caretaker presumption and has since enacted a slightly reworded version of the American Law Institute's list of caretaking functions that became effective Sept. 1, 2001); W. VA. CODE § 48-1-210 (2005).

¹³ See, e.g., WASH. REV. CODE § 26.09.187(3)(a)(i) (2011) (requiring courts to make "residential provisions" for children of divorce to give "greatest weight" to "[t]he relative strength, nature, and stability of the child's relationship with each parent . . . including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child."); *Young v. Hector*, 740 So.2d 1153 (Fla. 3rd Dist. Ct. App. 1999) (Schwartz, C.J. dissenting). For the names of states in which the ALI standard has gained influence, see Bartlett, *supra* note 2, at 16-17.

¹⁴ See, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981); Fineman, *supra* note 7, at 770-74; Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS. L. REV. 739, 748-49 (1983).

During this Symposium we sought to look deeper into the ways in which custody decisions can and should reflect and incorporate a child's perspective. Of course, particularly for older children, a child's stated preference does have weight in a custody proceeding as part of the best interests standard.¹⁵ But, a child's perspective both for young children and for older children runs deeper than being given the opportunity to state a preference, which may alienate beloved parents and be difficult for both younger and older children. In abuse and neglect proceedings, children's wishes and opinions may never even be sought. Seeking a view into a child's perspective is not just asking them what they want or having a GAL meet with them before a court proceeding at which they are not present, but ensuring a judicial system that seeks out their voices and ensures that their voices are heard and their needs are clarified and considered.

In custody decisions, GALs are appointed by the court to report on the best interests of children. GALs often do the leg work of investigating the child's circumstances and needs in a manner that a judge cannot—visiting homes, meeting with parents and children, and researching background information.¹⁶ While the use of GALs has developed in an informal manner, many states, including Ohio, have recently passed legislation formalizing and standardizing the use of GALs.¹⁷ Helen Jones Kelly, who served on the Ohio Committee that drafted this legislation, spoke at the Gilvary Symposium to lay out the reasons for and goals of this legislation. She highlighted the educational training GALs were required to have under the new legislation and the important services they provide for the sake of children in many custodial proceedings. She also emphasized the high demand for GALs in the judicial system and the need for additional GALs to be brought into the system.

There is, however, a potential dark side to the use of GALs. As they are appointed to determine the best interests of children, their work potentially reflects the same drawbacks as the standard itself. The other two speakers on the Symposium's panel addressing GALs took up the more problematic aspects of the common and influential use of GALs in custody cases—custody disputes between parents and in abuse and neglect cases. GALs act as liaisons to the court and provide their perspective on the best

¹⁵ *McMillen v. McMillen*, 602 A.2d 845 (1992); Cathy Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43, 50-58 (1984); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

¹⁶ See Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379, 422 (1996) (describing the role of the GAL); see also Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53 (1992).

¹⁷ See 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2006) (mandating that a GAL "receive[] training appropriate to the role," but failing to provide any further clarification); OHIO REV. CODE § 2151.281 (2009); Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine Guardians ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103, 2113 (2010) (comparing state statutes that regulate GALs).

interests of the child, but do not represent the wishes of the child per se. Indeed, in most states they need not even communicate to the court the child's own stated interests.¹⁸ There are many reasons to question a child's own perspective—immaturity, susceptibility to pressure—but, on the other hand, it can be deeply problematic to drown-out a child's wishes entirely.

Professor Barbara Glesner Fines makes the case that teen mothers trying to retain custody of their children in abuse and neglect proceedings should not be subjected to the potentially judgmental imposition of a GAL's opinion regarding her best interests. She notes that teen parents are likely to be subjected to “higher standards than that of their adult counterparts,”¹⁹ and that their age alone may cause social workers to label them as “at risk.”²⁰ Already usually disadvantaged by age, poverty, and race, Glesner Fines argues that teen mothers need a child-centered advocate that focuses on their wishes, and not a third-party to determine their best interests. Even in termination cases, a teen mother is not necessarily guaranteed a legal advocate, therefore, the ambiguous role of GALs as both advocate and social worker who acts as the “eyes and ears of the court” may prove to confuse rather than strengthen the outcome of the case and compromise the interests of the teen mother. She argues that this conflict is particularly upsetting for teen mothers, as a GAL accustomed to representing the interests of children may have trouble focusing her representation on the mother as opposed to the baby. Accordingly, she argues that what teen mothers need is not a GAL, but an advocate that will directly serve their interests and that other players in the system will readily fill the gap of judging the teen mother's actions vis-à-vis a best interests standard.

Professor Katherine Hunt Federle takes Professor Glesner Fines's argument even further. She argues that GALs have no place in abuse and neglect proceedings at all despite federal regulation that requires a GAL or other representative of the child, with most states choosing GALs as opposed to attorneys.²¹ The inquiry in abuse and neglect cases is, therefore, one of determining the best interests of the child as opposed to advocating on behalf of that child. Professor Hunt Federle argues that children need advocates for their wishes in abuse and neglect cases and not liaisons to the court who advocate for their best interests. Beginning by exploring the legal history of GALs, she questions the very nature of GALs in our adversarial system and argues that the use of GALs does not act from the perspective of children and is insufficiently child-centered. Rather, she describes the

¹⁸ See Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 U. DAYTON L. REV. 307, 315 (2011).

¹⁹ See *id.* at 311.

²⁰ *Id.*

²¹ Federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a(b) (2003); see Katherine Hunt Federle & Danielle Gadomski, *The Curious Case of the Guardian ad Litem*, 36 U. DAYTON L. REV. 337 (2011).

system of GALs as promoting “racist, classist, and paternalistic approaches to the problems of the poor.”²² She argues that it is strong advocacy of the child’s stated wishes that best serves children’s interests and is consistent with the adversarial model of the judiciary upon which our justice system is based. Accordingly, both Professors Glesner Fines and Hunt Federle question the use of the best interests standard as the goal of courts as paternalistic, arguing instead that children need advocacy of their stated interests through traditional lawyer advocates as opposed to GALs.

Having argued the benefits and potential problems of the use of GALs, the Symposium next addressed the use of mediation, collaborative lawyering, and alternate dispute resolution in child custody cases. Professor Andrew Shephard and Dr. JoAnne Pedro-Carroll highlighted the need to look beyond strong advocacy models when considering the needs and perspectives of children, particularly upon divorce. On the other hand, Professor Jane Murphy raised certain limitations to the alternative dispute path and argued that there are benefits to the full advocacy model, which should be utilized in some situations.²³

Professor Cassandra Adams specifically argues that mediation is an appropriate and beneficial means of addressing and listening to the voices of children. While still advocating for a child-centered approach to custody, in a manner similar to Professors Glesner Fines and Hunt Federle, Professor Adams considers how best to figure out what it is that children want. Borrowing from her own personal experiences, she views mediation as an invitation to the table, a process to help children voice their preferences and concerns. She argues that a holistic mediation process that includes the voices of parents and children will promote the integration of interests.²⁴ She recommends specific child-oriented education and training for mediators who handle family court issues.

The third panel concerned policy or constitutional issues that may come into conflict with popularly deemed understandings of best interests of the children. But, consistent with the previous panels, what we learned is that best interests are not so easy to identify and children’s perspectives matter. Annette Appell and I discussed kinship care and the important role non-parental figures play in the lives of children. Although it is commonly considered in a child’s best interests to have all parenthood rights concentrated in two parties, these presentations urged broader consideration of how children are raised in fact and who fulfills the needs of children. Professor Appell focused on the benefits of open adoption while I focused

²² *Id.* at 339.

²³ See Jane C. Murphy, *Revitalizing the Advocacy System in Family Law*, 78 U. CIN. L. REV. 891 (2010).

²⁴ Cassandra W. Adams, *Children’s Interest—Lost in Translation: Making the Case for Involving Children in Mediation of Child Custody Cases*, 36 U. DAYTON L. REV. 353, 354-55 (2011).

on the different but important role played by functional, de facto parents as opposed to formal biological parents. Lashanda Taylor discussed the role of natural parents post-adoption and argued for more open policies with regard to the ties between children and these parties even after parental rights are terminated. Finally, Marcia Zug discussed the way in which courts deal with best interests in custody decisions for immigrant families and urged more balance and thoughtful consideration of children's interests beyond immigration policy.

There are a few notable themes emanating from the Symposium that address the central question posed: How do we consider custody from the perspective of the child? First, the Symposium produced a clear call for child-centered advocacy focused on a child's express wishes as opposed to ambiguous constructions of a child's best interests. This theme is central to all three articles published in this Symposium issue and was also reflected in the feature presentation given by Judge Glenda Hatchett, in which she urged advocacy on behalf of children in foster care. A second theme was the tension between cut-throat style advocacy and gentler forms of dispute resolution as discussed in the second panel. On the one hand, there is concern that high conflict harms children. On the other hand, concern was expressed that minimizing conflict in favor of a more gentle and less adversarial process focused on agreeing on a child's best interests can paternalistically suppress children's voices and wishes. While alternate forms of dispute resolution may be useful for many cases, caution and balance were urged as was continuous vigilance in ensuring the presence of children's perspective at the table. In addition, the discussion reflected a third theme: the need for flexible guidelines in determining custodial rights in a manner that can best reflect individual children's wishes and needs. Openness to solutions that do not fit into traditional norms of parental rights was urged and a willingness to consider the possibility that a children's interests do not conform with well-entrenched national policies that disfavor illegal immigration and favor adoption. These themes reflect two overriding tensions: (1) the tension between pursuing adult understanding of a child's best interests and direct child-advocacy; and (2) traditional notions of parental rights and alternative forms of achieving children's interests. We could not, of course, resolve these tensions during the Symposium. But, these themes and tensions provide helpful guidance to practitioners, judges, and academics, as well as to our law students, who will continue to struggle with issues of child advocacy in the future. Keeping in mind these tensions and themes, as well as the speakers' proposed solutions, can help those who deal with issues of child custody achieve a more nuanced and child-centered approach to their work.

The issues surrounding custody are constantly evolving as society's ideas about children and parental rights change. Children's voices are

notoriously weak. The underage are deemed incapable of acting on their own behalves and have parents, guardians or the state to represent their interests. And children do not always know what is best for themselves, nor should they be given unlimited choice regarding their own futures. Still, in our modern and normatively enlightened age, it is our obligation to hear the voices of the unheard and attempt, to the greatest extent possible, to allow their perspective to enter the often dark and dangerous arena of custody battles. Too much substitution and delegation away from children alienates the process from those who should be the core concern of the process—the children whose lives are most at stake in custody battles and proceedings.