STUDENT NOTE: Respecting Uncustomary Family Traditions: Reforming the Role of Guardians Ad Litem

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I. Introduction

Asal main baat yeh hai kay yeh System hi kharab hai. Aur yeh log samajhtay hain kay in ki duniya kay ilawa aur koi duniya hai hi nahin. [1]

"The Ahmeds in America," a three-part series featured on The New Inquiry, detailed the experience of an expert witness testifying in a criminal neglect trial. [2] The defendant, Husna Ahmed, is the mother of the alleged victim of the case and is a resident of California originally from a village town near Rawalpindi, Pakistan. [3] Husna went to the bathroom while she was boiling water on the stove. [4] During this brief absence her youngest child, a two-year-old boy named Chotu, put his hand in the boiling water, injuring himself. [5] Husna does not speak much English and felt unsafe leaving her home without her husband, Jalal, also a native of rural Pakistan. [6] Jalal was working the day of Chotu's injury, so Chotu did not go to the hospital until the next day. [7] Language barriers at the hospital caused the hospital staff to suspect that Chotu's injuries were the result of abuse. [8] The hospital alerted **[*198]** Child Protective Services (CPS). Chotu and his two older sisters, ages four and six, were all taken into protective custody

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[1] Actually, the crux of the matter is that the System itself is rotten. And these people think that there is no world other than their own." Jungli Pudina, The Ahmeds in America, Part Three, New Inquiry (Sept. 7, 2012), http://thenewinquiry.com/blogs/zunguzungu/the-ahmeds-in-america-part-three/ [hereinafter Pudina, Part Three].

[2] Jungli Pudina, The Ahmeds in America, Part One, New Inquiry (Sept. 3, 2012), http://thenewinquiry.com/blogs/zunguzungu/the-ahmeds-in-america-part-one/ [hereinafter Pudina, Part One]; Jungli Pudina, The Ahmeds in America, Part Two, The New Inquiry (Sept. 5, 2012), http://thenewinquiry.com/blogs/zunguzungu/the-ahmeds-in-america-part-two/ [hereinafter Pudina, Part Two]; Pudina, Part Three, supra note 1.

[3] Pudina, Part Two, supra note 2.

[4] Pudina, Part One, supra note 2.

[5] Id.

[6] Id.

[7] Id.

[8] Id.

and kept in foster homes for six months. [9] Husna was charged with criminal child neglect for failure to treat her son's injuries promptly and spent three days in jail during the proceedings. [10]

Husna's trial focused almost entirely on whether Chotu's injury was accidental or caused by abuse. [11] Jungli Pudina, the expert witness called to testify regarding cross-cultural understanding of parenting practices between Pakistan and the United States, was alarmed that the trial focused almost exclusively on medical testimony. [12] In contrast to the scientific evidence, Ms. Pudina's written testimony explained to the court that it is customary to treat burns at home in Pakistan. [13] In the process of preparing for Husna's trial, Ms. Pudina discovered a pattern of what she perceived as legalized abduction of Muslim children justified by deeply-rooted Islamophobia in the United States. [14] In the end, Husna was found not guilty in large part due to the testimony of the plastic surgeon expert witness who determined that the physical pattern of the boy's injury did not suggest abuse. [15] However, in the final pronouncement at the mother's trial, the judge stated that "she believed Husna was innocent, but that Jalal was the Culprit and like a typical Muslim woman, Husna was covering up his crime!" [16]

This Note will examine the necessity of reforming family law guidelines to decrease the potential for cultural discrimination. This Note will analyze the use of court-appointed representatives for children in child welfare proceedings, including abuse and neglect dependency hearings. Specifically, this Note will explore the contours of the debate surrounding the discretionary nature of child welfare proceedings by examining guardians ad litem (GALs) in the United States. [17]

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II. Background

The background is divided into four major sections. The first section examines cultural theories; the second section defines the GAL role; the third section explores the best interest standard; and the fourth section focuses on GAL reforms. The background begins by identifying relevant cultural theories and examining the presence of Muslim-American discrimination in the United States. The background then provides a common GAL definition and examples from the states. As family law is practiced differently in each state, the Background will include specific examples from Illinois, California, and Minnesota. [18] These states were selected due to their high Muslim-American populations and divergent approaches to resolving child-welfare cases. [19] The background then explores the use

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[9] Id.

[10] Pudina, Part One, supra note 2.

[11] Pudina, Part Three, supra note 1.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id. (emphasis in original).

[17] Hollis R. Peterson, In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation, *13 Geo. Mason L. Rev. 1083, 1095 (2006).*

[18] Cynthia G. Hastings, Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence In Child Custody Disputes, *24 B.C. Third World L.J. 283, 292 (2004).*

[19] Jahnabi Barooh, Most and Least Muslim States in America (PHOTOS), HuffPost Religion, Huffington Post (June 27, 2012, 6:44 AM), *http://www.huffingtonpost.com/2012/06/27/most-and-least-muslim-states_n_1626144.html* (reporting Illinois as having 2,800 Muslims per 100,000 people, Michigan as having 1,218 Muslims per 100,000 people, and California as having 732 Muslims per 100,000 people).

of the best interests standard in family law generally and explains how this standard is used by GALs in the three selected states. The Background also examines child welfare representation from a national perspective using the American Bar Association Standards of Practice for representing children and relevant uniform laws. Finally, the background examines the potential areas for GAL reform, including professional responsibility and pre-appointment training reform.

A. Cultural Theories

In order to discuss the relationship between culture and child welfare, this Note will begin with an overview of theoretical considerations of culture. Legal theorists define culture as ""the configuration of learned behavior and results of behavior whose components and elements are shared and transmitted by the members of a particular society.'" [20] More concretely, culture consists of human groups' "distinctive achievements … artifacts … traditional ideas … [and] values." [21] Cultural theorists generally approach culture from one of two perspectives: cultural universalism and cultural **[*200]** pluralism. Broadly, the theory of universalism argues that humanity shares common truths across all cultures. [22] In direct opposition to universalism, pluralism rejects the idea that humanity is composed of singular truths, instead encouraging the view that society is composed of diverse cultures with different values. [23] Cultural relativism, a sociological principle related to pluralism, argues that "all rules and values are relative to something." [24] Cultural relativism opposes identifying shared values across cultures, or privileging specific cultures at the expense of other cultures, an idea referred to as ethnocentrism. [25] Instead, cultural relativism attempts to erase the problems of ethnocentrism by evaluating the individual's culture under the guise of that individual's culture, not the evaluator's own culture. [26]

This Note will evaluate the role of culture in child welfare proceedings through the dichotomous lenses of universalism versus pluralism. This Section will examine two examples of legal accommodation of culture in the history of the Indian Child Welfare Act (ICWA) and Allison Rentlen's account of the legal consequences of non-majoritarian parenting practices as described in Rentlen's book The Cultural Defense. Finally, this section will briefly examine discrimination against Muslim-Americans in the post-9/11 United States to acknowledge current cultural developments.

1. The Indian Child Welfare Act

In 1978, Congress passed ICWA in response to startling Native American adoption statistics throughout the United States. [27] Prior to ICWA, Native American children in South Dakota were sixteen times more likely to be put into foster care than other children. [28] The purpose of ICWA is to reduce the removal of Native American children from

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[20] Cynthia R. Mabry, The Browning of America-Multicultural and Bicultural Families in Conflict: Making Culture A Customary Factor for Consideration in Child Custody Disputes, 16 Wash. & Lee J. Civil Rts. & Soc. Just. 413, 416 (2010) (quoting Laurie L. Wilson & Sandra M. Stith, Culturally Sensitive Therapy with Black Clients, in Counseling American Minorities: A Cross-Cultural Perspective 5 (Donald R. Atkinson et al. eds., 4th ed. 1993)).

[21] Id.

[22] Timothy P. Jackson, Universalism and Relativism: Some Lessons from Gandhi, in Universalism vs. Relativism: Making Moral Judgments in a Changing, Pluralistic, and Threatening World 138 (Don Browning ed., 2006).

[23] Ann Laquer Estin, Embracing Tradition: Pluralism in American Family Law, *63 Md. L. Rev. 540, 541 (2004).*

[24] P.H. Nowell-Smith, Cultural Relativism, 1 Phil. Soc. Sci. 1, 2 (1971).

[25] Id. at 1-2.

[26] Id.

[27] Amanda B. Westphal, An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota, *49 S.D. L. Rev. 107, 112 (2003).*

[28] Id.

Native American custodians. [29] The Senate found that this disparity resulted from the states' **[*201]** failure to recognize the differing values of Native American culture. [30] The Senate also discovered that some Native American children experienced "untold social and psychological consequences" from the cultural shock of being placed in a home outside their native culture. [31]

The primary difference between ICWA and non-ICWA child welfare proceedings is the burden of proof necessary to initially place children in foster care. [32] Under ICWA, Native American children cannot be removed from their homes unless the court finds by clear and convincing evidence, including expert witness testimony, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." [33] Thus, the ICWA standard for removing Native American children from their homes is stricter than ordinary foster care cases, typically governed by least-restrictive alternative analysis or probable cause. [34]

In Cook County, Illinois, children are initially removed from their homes and taken into protective custody if the court finds that there is an "urgent and immediate necessity" to remove the child. [35] The court appoints the Department of Children and Family Services (DCFS) as the child's temporary guardian or an adult that has a relationship with the child, if they are a suitable temporary guardian. [36] The child's case then proceeds to trial, or adjudication, where the state must prove the child is a victim of abuse or neglect under a probable cause inquiry. [37] If no probable cause is found to prove the charge, the case is dismissed. [38] If the child is found to be abused or neglected, the case proceeds to a dispositional hearing where a permanent guardian is appointed for the child if the court finds the child's parents are "unable, unwilling, or unfit" to care for their child. [39] Permanency hearings are held every six months thereafter to investigate the child's wellbeing and **[*202]** see what can be done to help the child and the child's family. [40] Following a finding of the parent's unfitness, the Court may find it is in the child's best interest to change the permanency goal to termination of parental rights. [41] At this point, a termination proceeding is held, and the state must prove that the parent's rights should be terminated by a preponderance of the evidence. [42]

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[29] Id.

[30] Jeanne Louise Carriere, Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act, *79 Iowa L. Rev. 585, 647 (1994).*

[31] Westphal, supra note 27.

[32] Westphal, supra note 27, at 117.

[33] Westphal, supra note 27, at 116 (quoting *25 U.S.C. § 1912*(e) (2000)).

[34] Id.

[35] Child Protection Court Process, Off. of the Cook County Pub. Guardian, *http://www.publicguardian.org/juvenile/about/child-protection/* (last visited Oct. 2, 2013).

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] *In re D.T., 818 N.E.2d 1214, 1227 (Ill. 2004).*

[42] *Id. at 1218.*

In comparison, during pending welfare proceedings for Native American children, the child's tribe can petition the state court to transfer the child's case to a tribal court, and the child's tribe has a right to intervene at any stage of the state court proceeding. [43] If the Native American child is removed from their home, preference is given to Native American foster homes and Native American institutions. The Native American child's parents' rights cannot be terminated without a showing beyond a reasonable doubt that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." [44] The beyond a reasonable doubt standard is typically reserved for criminal proceedings. [45] The state is required to prove criminal defendants guilty beyond a reasonable doubt, because "the private interests of the defendant are of such magnitude that society imposes the risk of error almost entirely on itself by requiring the State to prove the defendant's guilt." [46] However, in non-ICWA proceedings, the Illinois Supreme Court determined that children's interests would best be met under the much lower standard of preponderance of the evidence, because "imposition of a preponderance standard … would distribute the risk of error relatively equally, reflecting the roughly equal interest the parents, the State, and the child have in the outcome of the proceeding." [47] Thus, a lower burden favors the ability of the state to intervene in a child's home to protect the child's welfare, while a higher burden strictly preferences maintaining the familial ties between a child and their parents. [48]

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2. The Cultural Defense

One argument as to why culture is often ignored in the court room, even to the point of systematic abuse like that which prompted ICWA, is the "presumption of assimilation," a concept Allison Renteln develops in her book The Cultural Defense. [49] The presumption of assimilation is a critical view of the concept of universalism as applied to legal proceedings. [50] Renteln defines this presumption as "the attitude on the part of judges that individuals from other cultures should conform to a single national standard." [51]

In her book, Rentlen utilizes State v. Kargar to represent the rare case where a defendant successfully argued a cultural defense. [52] The Maine Supreme Judicial Court reversed the conviction of Mohammed Kargar, a Muslim-Afghani refugee, for two counts of gross sexual assault in Maine. [53] The trial court sentenced Kargar for kissing his youngest son's penis. [54] Kargar submitted cultural evidence demonstrating that his act "was considered neither

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[43] *25 U.S.C. § 1911*(b)(c) (2000).

[44] *25 U.S.C. § 1912* (f) (2000).

[45] *In re D.T., 818 N.E.2d at 1225.*

[46] Id.

[47] *Id. at 1227.*

[48] See generally id.

[49] Alison D. Renteln, The Cultural Defense 6 (2004).

[50] Id.

[51] Id.

[52] Id. at 59.

[53] *State v. Kargar, 679 A.2d 81, 86 (Me. 1996).*

[54] *Id. at 83.*

wrong nor sexual under Islamic law and that Kargar did not know his action was illegal under Maine law." [55] In reversing his conviction, the court found that:

All of the evidence presented at the de minimis hearing supports the conclusion that there was nothing "sexual" about Kargar's conduct. There is no real dispute that what Kargar did is accepted practice in his culture. The testimony of every witness at the de minimis hearing confirmed that kissing a young son on every part of his body is considered a sign only of love and affection for the child. This is true whether the parent kisses, or as the trial court found, "engulfs" a son's penis. There is nothing sexual about this practice. [56]

In this case, the GAL and other child health officials appointed to the case found that if the Kargar children were harmed, it was by the trial proceedings and concomitant separation from their father, rather than by **[*204]** their father's conduct. [57]

3. Discrimination Against Muslim-Americans

In the post-9/11 United States, religious discrimination against Muslim Americans, like that experienced by the Ahmed and Kargar families, is commonplace. [58] The term "Islamophobia" labels the systematic abuse and discrimination Muslims face living in the United States. [59] Recent media reports demonstrate this resurgence of anti-Muslim sentiment. One such report cites an increasing number of federal discrimination cases where zoning boards prevented mosques from being built in their communities. [60] A 2009 poll by the Pew Forum on Religion and Public Life found that fifty-eight percent of adult Americans believe that Muslims are "subject to a lot of discrimination," more than any other religious group. [61] Although "Islam is one of the fastest growing religions in America" many Americans still hold prejudicial views about Muslims regardless of whether they are citizens or non-citizens. [62] For instance, a 2009 study found that "forty-four percent of Americans say Muslims are too extreme in their religious beliefs and less than half believe that U.S. Muslims are loyal to the United States." [63] Although Americans' perceptions of a tie between violence and Islam have fluctuated since 9/11, in 2009, thirty-eight percent of Americans as a whole believed that "Islam does encourage violence more than other religions"; fifty-five percent of conservative Republicans felt that Islam encouraged violence. [64]

B. Defining the Role of a Guardian Ad Litem

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[55] Nancy A. Wanderer & Catherine R. Connors, Culture and Crime: Kargar and the Existing Framework for a Cultural Defense, *47 Buff. L. Rev. 829, 838 (1999).*

[56] *Kargar, 679 A.2d at 85.*

[57] Wanderer & Conners, supra note 55, at 839.

[58] See Warren D. Camp, Child Custody Disputes in Families of Muslim Tradition, *49 Fam. Ct. Rev. 582, 582 (2011).*

[59] Id.

[60] Muslim Discrimination Cases Disproportionately High in the U.S., Huffington Post, (Mar. 29, 2011, 6:12 AM), *http://www.huffingtonpost.com/2011/03/29/muslim-discrimination-cas_n_842076.html*.

[61] Pew Forum on Religion & Pub. Life, Pew Research Ctr. For the People & The Press, Views of Religious Similarities and Differences: Muslims Widely Seen as Facing Discrimination 1 (2009), available at *http://www.pewforum.org/files/2009/09/survey09091.pdf*.

[62] Camp, supra note 58.

[63] Id.

[64] Pew Forum on Religion & Pub. Life, supra note 61, at 7.

In child welfare cases, cultural discrimination surfaces in the role of GALs. Although the actual duties of a GAL vary widely from state to **[*205]** state, [65] generally a GAL "is a legal representative appointed by the court to protect a child's best interests in litigation before the court." [66] In some states GALs must be attorneys; in others, trained professionals or even lay volunteers serve as GALs. [67] State statutes generally dictate which professionals may act as a GAL; however, some states rely only on judicial discretion to assign these positions. [68]

Many states do not explicitly define the required duties and responsibilities of a GAL; as a result, "the duties performed by GALs are likely to vary, not only from state to state, but often even from court to court." [69] However, the overarching obligation of a GAL in any jurisdiction is to advocate for what they determine to be the best interests of their child-client. [70] To evaluate the best interests of their child-client, the GAL usually meets with both the child and the people who interact with the child on a regular basis. [71] To understand a child's best interests, GALs must also understand their child-client's stage of cognitive and psychological development. [72] After conducting an impartial investigation, the GAL presents the court with an independent report that is often highly influential. [73]

1. Historical Development of the GAL

The routine use of a GAL in family law proceedings is a relatively new phenomenon. [74] Attorneys first began representing children in juvenile delinquency proceedings. [75] In 1967, in In re Gault, the United States Supreme Court determined that minors facing a loss of liberty had constitutional due process rights, including the right to an attorney. [76] In **[*206]** 1971, Wisconsin became the first state to mandate the use of GALs in child welfare cases. [77] Only a few years later in 1974, the United States Congress endorsed using GALs to represent children in child welfare proceedings by passing the Child Abuse Prevention and Treatment Act (CAPTA). [78] Under CAPTA, in order to receive federal grants for child abuse and neglect programs states had to mandate the use of GALs in "all child abuse and neglect proceedings," along with other requirements. [79] In the 1980s, Congress strengthened the use of GALs in foster care cases by passing the Adoption Assistance and Child Welfare Act. [80] Today, courts

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[65] Hastings, supra note 18, at 287.

[66] Id. at 293.

[67] Id. at 294.

[68] Id. at 29-95.

[69] Id. at 296.

[70] See Peterson, supra note 17.

[71] Id. at 1094.

[72] Id. at 1105-06.

[73] Id. at 1094.

[74] Hastings, supra note 18, at 291.

[75] Gail Chang Bohr, Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings, *32 Wm. Mitchell L. Rev. 989, 989 (2006)* (citing *In Re Gault, 387 U.S. 1, 36-37 (1967)).*

[76] Id.

[77] Hastings, supra note 18, at 291-92.

[78] Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions 33 (3d ed. 2007).

[79] Id.

[80] See Tara L. Muhlhauser, From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem, 66 N.D. L. Rev. 633, 635-36 (1990).

routinely appoint GALs in child welfare cases involving criminal child sexual abuse and civil domestic protection orders. [81]

2. Illinois Statutory Definition of GAL

As the role and regulation of GALs varies from state to state, this Note will specifically examine three states' statutory constructions of GALs as exemplars of common trends: Illinois, California, and Minnesota. First, Illinois follows a hybrid approach to child representation. [82] In Illinois child welfare proceedings, the judge has discretion to appoint any of three possible types of child representatives: a GAL, a child representative, or an attorney for the child. [83] The legislature revised the statutory definitions for child representation in 2007 to clarify the differences between these three positions. [84] Typically Illinois judges appoint GALs to advocate for young children, child representatives for middle-aged children, and child attorneys for children who are mature enough to understand the judicial proceedings. [85] In Illinois the GAL advocates for the best interest of the child and must **[*207]** submit a report of their investigation to the court. [86] Importantly, courts may call on GALs as witnesses and cross-examine them regarding their findings. [87] On the other hand, a child's attorney has the same confidential attorney-client relationship with their child client as the attorney would with an adult client. [88] A child's representative combines elements of the GAL and an attorney; child representatives have the same rights as an attorney and "possess all the powers of investigation as … a guardian ad litem." [89] However, as opposed to the GAL, the child representative "shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments." [90] Unlike a child's attorney, the child's representative is not legally bound by the child's wishes. [91] The child representative can consider the child's expressed preferences but does not have to report the child's communications unless the Rules of Professional Conduct requires the representative to. [92]

3. California Statutory Definition of GAL

California does not mirror Illinois's hybrid approach to child representation. [93] Instead, California primarily utilizes GALs in conjunction with other types of representatives like Court Appointed Special Advocate (CASA) trained lay

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[81] Id. at 633.

[82] See First Star, Children's Advocacy Inst., A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children 56-57 (2d ed. 2009), available at http://www.caichildlaw.org/misc/final_rtc_2nd_ edition_lr.pdf.

[83] See id.

[84] *750 Ill. Comp. Stat. Ann. 5/506* (West 2007).

[85] Interview with Judge La Quietta Hardy-Campbell, Judge for the Circuit Court of Cook Cnty, Domestic Relations Div., in Chi., Ill. (July 2012) (on file with the author).

[86] *750 Ill. Comp. Stat. Ann. 5/506* (West 2007).

[87] Id.

[88] Id.

[89] Id.

[90] Id.

[91] Id.

[92] *750 Ill. Comp. Stat. Ann. 5/506* (West 2007).

[93] See First Star, supra note 82, at 34-35.

volunteers. [94] Courts may exercise discretion when appointing a GAL versus another type of representative. [95] However, the court is mandated to appoint some type of representation for children in child welfare cases to comply with CAPTA. [96] If the court finds that the child would not benefit from legal counsel because the child can adequately understand the gravity of judicial proceedings, the court will appoint a CASA volunteer to comply with CAPTA. [97]

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4. Minnesota Statutory Definition of GAL

The state of Minnesota clearly delineates the roles of GALs and children's attorneys. If an attorney represents a child in Minnesota, the attorney must advocate for the child's expressed preferences, not their best interests. [98] Minnesota courts are also required to appoint GALs in child welfare cases where there are allegations of child abuse or neglect. [99] Similar to Illinois and California, GALs represent the best interests of the child-client and provide recommendations to the court regarding child custody. [100]

5. Professional Responsibility

In 1996, in response to federal child welfare legislation and divergent state approaches, the American Bar Association (ABA) issued standards of practice for attorneys that represent children in abuse and neglect cases. [101] However, unlike the federal legislation, the ABA did not endorse the appointment of attorneys as GALs. [102] The ABA recommended that child welfare attorneys use "client-directed advocacy based on the attorney's traditional ethical duty to zealously advocate the client's interests" in abuse and neglect cases. [103] However, in 2003, the ABA issued standards of practice for attorneys that represent children in custody cases. [104] Although these standards are related to the earlier abuse and neglect standards of practice, the custody standards of practice recognize that courts can appoint attorneys as a "Child's Attorney" or a "Best Interests Attorney." [105] Significantly, the custody standards of practice became the foundation for the uniform law for representing children in custody cases drafted by the Uniform Law Commission in 2007, The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (Uniform Act). [106] The Uniform Act also calls for two separate approaches to representing children in custody cases and rejects hybrid attorney/GAL models, like that **[*209]** used in Illinois, out of professional responsibility concerns. [107]

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[94] See id.

[95] *Cal. Welf. & Inst. Code § 317* (West 2013).

[96] Id.

[97] First Star, supra note 78, at 76-77.

[98] *Minn. Stat. § 260C.163* (2012); First Star, supra note 83, at 76.

[99] *Minn. Stat. § 518.165* (2012).

[100] Id.

[101] Janet G. Sherwood, Representing the Child in Abuse & Neglect Cases, Fam. Advoc., Winter 2009, at 28.

[102] Id.

[103] Id.

[104] Id. at 29.

[105] Id.

[106] Id. at 30.

[107] Sherwood, supra note 101, at 30; *750 Ill. Comp. Stat. Ann. 5/506* (West 2009).

Some academics and legal professionals further criticized the GAL position from a professional responsibility standpoint. If the GAL is an attorney, the attorney is subject to the Model Rules and Code of Professional Conduct, which dictate that children should be represented by counsel in the same manner that clients with a disability or otherwise diminished capacity receive representation. [108] The Model Rules direct attorneys "as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client," a responsibility which can conflict with GAL statutes. [109] Additionally, in many jurisdictions, like Illinois, courts may call GALs as witnesses to testify regarding their investigation of the child. [110] As the GAL has performed an independent assessment of the child for the court, it logically follows standard evidentiary procedures to subject the person offering the report to cross examination in order to evaluate the credibility of the report. [111] Since in most jurisdictions policies prohibit attorneys from being called as a witness, [112] attorneys that serve as GALs may experience duties that conflict with their normal obligations as an attorney. [113]

C.

"Best Interests of the Child" Standard

A fundamental component of all family law cases dealing with children in the United States involves considering the best interests of the child. [114] The Uniform Marriage and Divorce Act (UMDA) provides a model best interest standard, which is reflected in statutes throughout the United States:

UMDA § 402. Best Interest of the Child

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

the wishes of the child's parent or parents as to his custody;

the wishes of the child as to his custodian;

the interaction and interrelationship of the child with his parent or **[*210]** parents, his siblings, and any other person who may significantly affect the child's best interest;

the child's adjustment to his home, school, and community; and

the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. [115]

Court officials consider the best interests of the child during "the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect

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[108] Peters, supra note 78, at 112.

[109] Model Rules of Prof'l Conduct R. 1.14 (1983).

[110] Peters, supra note 78, at 112.

[111] See id. (explaining that using the GAL as a witness would lead to cross-examination in some cases).

[112] Id.

[113] Id.

[114] See generally Lynne Marie Kohm, Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence, *10 J.L. & Fam. Stud. 337 (2008).*

[115] Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282 (1974).

proceedings, crime, economics, and all forms of child protective services." [116] This standard generally dictates the resolution of every proceeding for the GAL. [117] Although determining what is in each child's best interest is an individualized process, most states direct GALs to consider similar factors for each child. [118]

1. Illinois Best Interests Standard

Illinois adopts all five provisions of the model UDMA standard but also considers "physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person." [119] Illinois courts presume that it is in the best interests of the child to have both parents maximally involved in the child's life, so courts evaluate "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." [120] Finally, the Illinois statute takes into account if one of the parents is a registered sex offender and whether a military family-care plan must be completed. [121]

2. California Best Interests Standard

The California best interests statute deviates from the UDMA model. [122] **[*211]** The California statute directs court officials to consider any and all factors they might find relevant. [123] To supplement this general guidance, the statute articulates two specific factors that court officials should consider when determining the child's best interest: first, the "health, safety, and welfare of the child," [124] and second, whether any of the parties seeking custody has a history of abuse against any child that the party "had a caretaking relationship [with], no matter how temporary." [125] Court officials must also consider whether the child's parents abuse alcohol or drugs. [126]

3. Minnesota Best Interests Standard

The general Minnesota best interests standard only guides court officials to consider "all relevant factors" to determine a child's best interests. [127] However, Minnesota specifies many best interest factors for child custody proceedings where two or more parties are seeking the custody of the child. [128] The child custody best interest statute incorporates many provisions similar to the UDMA model, but also goes beyond this model by directing court officials to consider "the child's cultural background." [129]

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[116] Kohm, supra note 114.

[117] Katherine Hunt Federle & Danielle Gadomski, The Curious Case of the Guardian Ad Litem, *36 U. Dayton L. Rev. 337, 348 (2011).*

[118] See infra Part II.C.1-3.

[119] *750 Ill. Comp. Stat. Ann. 5/602* (West 2009).

[120] Id.

[121] Id.

[122] See *Cal. Fam. Code § 3011* (West 2004).

[123] Id.

[124] Id.

[125] 2012 Cal. Legis. Serv. 3173 (West).

[126] Id.

[127] *Minn. Stat. § 257C.04* (2012).

[128] Id.

[129] Id.

D. GAL Reform

Several aspects of the GAL role remain subject to criticism and reform. [130] One dimension of GAL reform advocates often focus on is the general lack of training for GALs. [131] Some states require GALs to perform hours of training before they are appointed to represent children, but other states have no training requirements. [132] Judges may appoint GALs that have specialized knowledge regarding the issues their minor client might face, but this is generally not required. [133] Minnesota is one of the few states to require GALs to complete extensive training in areas like child protection, child **[*212]** development, and cultural sensitivity before they are appointed. [134]

On the federal level, Congress amended CAPTA in 2003 through the Keeping Children and Families Safe Act to require training for CAPTA-funded GALs. [135] Thus, to be eligible for federal child welfare funding under CAPTA, states must train GALs in representing abused or neglected children. [136] The 2003 Act also specified that the GAL "may be an attorney or a court appointed special advocate [CASA] who has received training appropriate to that role (or both) … ." [137] A congressional study comparing the effectiveness of privately appointed and court appointed GALs to the effectiveness of CASA volunteers specially trained to advocate for children found that the volunteer model "clearly excelled as a method of guardian ad litem representation and produced the greatest number of outcomes in their child client's best interests." [138] However, funding constraints prevent the use of CASA volunteers in every federal district. [139]

In accordance with federal trends, in 2011, the Uniform Law Commission updated the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (Uniform Act). [140] This reform included a discussion regarding training for child welfare representatives, including both traditional child's attorneys and best interests attorneys. [141] The Commission recommended that states train child welfare representatives in "child development and child psychology, the dynamics of child abuse or neglect, the impact of domestic violence, the long-term consequences of separation from primary caregivers and placement in temporary care, and the central role of culture and ethnicity in family relations and children's identities." [142] The Commission also recommended that states train child representatives periodically regarding both state and federal laws relating to child health. [143]

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[130] See Hastings, supra note 18, at 296.

[131] Id.

[132] Id. at 295.

[133] Id. at 294-95.

[134] Office of the State Court Adm'r, Minnesota Judicial Branch Policy and Procedures: Guardian Ad Litem System Program Standards 6 (2007), available at http://www.mncourts.gov/documents/0/Public/Guardian_Ad _Litem/SCAO_Policy_6_03_GAL_Program_Standards.pdf.

[135] Peters, supra note 78, at 35 (quoting *42 U.S.C § 5106a*(b)(2)(A)(xiii)).

[136] Id.

[137] Id.

[138] Peterson, supra note 17, at 1100 (citations omitted) (internal quotation marks omitted).

[139] Id. at 1103.

[140] Unif. Representation Children in Abuse Neglect Custody Proceedings Act § 7 (amended 2011), 9C U.L.A. 66 (Supp. 2013).

[141] Id.

[142] Id.

[143] Id.

III. Analysis

Child welfare cases necessitate an examination of a child's culture. [144] Whether this cultural inquiry is implicit in a court's decision or explicitly noted in the custody investigation, determining what is in the best interests of a child inevitably involves an assessment of a child's family life and thus a child's culture. [145] Unfortunately, the flexibility and discretion allowed court officials by the best interests standard can produce "results that ignore notions of identity, religion, belonging, and group affiliation[]" for members of marginalized communities. [146] The result of this inquiry may lead minority families to experience discrimination at the hands of state actors. [147] When GALs and other family law officials investigate uncustomary parenting practices (like treating significant medical injuries at home) the increasing discrimination toward Muslim-Americans in the United States means that Muslim-American culture will likely not be considered in the determination of the best interests of Muslim-American children. [148] Nevertheless, allowing state actors to exercise discretion to resolve family law cases is valuable.

The alternative to relying on discretion in family law proceedings involves basing decisions on universalist statutory guidelines. [149] Opponents of universalism and proponents of family law reform argue that "[a] powerful myth of law is that it stands outside the social context and operates in a neutral, universal, and objective manner." [150] These academics argue that such a universalist approach to law hinders the practice of family law. [151] Increasing objective regulation in family law proceedings constrains the ability of state actors to take into account families' unique circumstances. Finding an appropriate balance between family law guidelines that allow state actors to exercise an appropriate degree of discretion but do not tolerate cultural discrimination seems almost impossible. However, states and the federal government have drafted laws that require consideration of a child's culture (ICWA and the Minnesota **[*214]** custody statute are instructive). [152] Further, parents like Mohammed Kargar have successfully defended child maltreatment prosecutions by relying on a cultural defense. [153] These examples demonstrate the law's ability to accommodate non-majoritarian parenting practices.

A. Indian Child Welfare Act

The systematic discrimination against Native American children in the foster care system that prompted Congress to pass the ICWA illustrates how a lack of consideration for cultural issues can result in serious consequences for children of marginalized cultures. [154] ICWA exemplifies a federal law drafted in accordance with the principles of pluralism and cultural relativism. [155] Although ICWA has been criticized for not giving enough deference to tribal courts, ICWA at least attempts to oppose the "Euro-American image of the Native American as an object" and

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[144] See Pascale Fournier, The Erasure of Islamic Difference in Canadian and American Family Law Adjudication, 10 J.L. & Pol'y 51, 72 (2001).

[145] Id.

[146] Id. at 72.

[147] Pudina, Part One, supra note 2.

[148] Pew Forum on Religion & Pub. Life, supra note 61, at 1.

[149] Fournier, supra note 144, at 90.

[150] Id.

[151] Id.

[152] See Carriere, supra note 30, at 647; *Minn. Stat. § 257C.04(1)(a)(11)* (2012).

[153] *State v. Kargar, 679 A.2d 81, 85 (Me. 1996).*

[154] Westphal, supra note 27.

[155] Id.

reduce the unnecessary state interventions into Native American families that have resulted from that image. [156] This Note finds value in ICWA, not in its higher burden of proof requirement, but instead in the way it encourages courts to defer to expert cultural witnesses and its emphasis on keeping minority children in their home, surrounded by their minority culture.

B. The Cultural Defense

In The Cultural Defense, Allison Renteln examines cases involving non-majoritarian parenting practices. [157] Renteln illustrates how problematic it can be when courts punish parents for child care the parents genuinely believed were in their child's best interest:

The outcomes of such cases invariably turn on the questions of the degree of harm and the reasonableness of the parent's belief that the action would be beneficial for the child. Deciding these kinds of questions is rarely easy. It becomes particularly problematic when the parents involved belong to a cultural or religious minority group, because different peoples have such vastly different conceptions of what constitutes acceptable child-rearing **[*215]** practices. [158]

As with the Ahmeds' case, Renteln explains the legal consequences parents can face if they rely on non-Western style medical treatments to care for their child's non-life-threatening condition, especially when the parents are part of a religious or cultural minority. [159] The repercussions can range from "dependency proceedings to remove the child from the home on a temporary or permanent basis … to criminal prosecution of the parents." [160] Renteln argues that in these cases legal proceedings are unnecessary if the decision to pursue unconventional medical treatment does not cause permanent harm to the child. [161] Renteln clearly identifies the problems stemming from the failure to acknowledge culture in child welfare proceedings; addressing these problems, however, requires not just more culturally conscious legal professionals but concrete legislative changes.

C. Best Interests Reform - Model Proposal

Even though it is impossible to completely articulate what should be incorporated in a best interests inquiry, the model statutes and state laws should be amended to incorporate cultural considerations. These cultural revisions should reflect the theory of pluralism rather than universalism. Most best interest statutes are composed of a list of considerations. [162] For instance, the UMDA Best Interests of the Child Act directs courts to consider a child's wishes; the child's custodian's wishes; the quality of the child's interactions with their family, school, and community; and the child's mental and physical health. [163] Adding a sixth consideration directing court officials to consider a child's culture would not be overly burdensome. Explicitly clarifying that it is important to consider a child's culture when determining the child's best interests would, at a minimum, express the value of pluralistic approaches in child welfare cases. Ideally, adding a cultural provision would encourage states to mandate periodic cultural sensitivity training for GALs.

1. GAL Reform

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[156] Carriere, supra note 30.

[157] Renteln, supra note 49, at 48.

[158] Id.

[159] Id. at 61.

[160] Id.

[161] Id. at 72.

[162] Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282 (1974).

[163] Id.

The current GAL system is the epitome of family law proceedings out **[*216]** of balance. The lack of statutory role explanation for GALs, who are guided by the inherently subjective best interests standard, allows GALs to interpret what is best for the child based on their own cultural views. [164] At its most basic interpretation, the best interest standard encourages GALs and court officials to substitute their judgment for the views of minors, who are viewed by the state as incapable of determining their own best interests. However, solving the problem of cultural discrimination in child welfare proceedings cannot involve the eradication of the best interest standard. Instead, it is imperative that the adjudication of a child's welfare involves appointing a representative who examines the individual child's life in a manner that honestly exposes the child's best interests.

Although GALs increasingly play a more significant role in family law proceedings, legal scholars harshly criticize the GAL position. [165] Some reformers call for the development of explicit standards for GALs. [166] Academics critique the GAL's consideration of the child's best interest because they view the inquiry as too discretionary:

Because state statutes typically provide little guidance as to the meaning or content of best interests, and the child's express preferences are not binding or controlling, the guardian ad litem and the judge … are free to determine best interests without meaningful constraints… . This leaves considerable room for bias - personal and social, conscious and unconscious… . Because guardians ad litem are predominately white and middle class, what they know and value are middle class values, and a standard of living that is neither accessible to everyone nor necessarily the optimal way to rear children. [167]

However, for the same discretionary reasons, others advocate for the use of the best interests standard. [168] These academics stress that a subjective standard is necessary because family law, child welfare proceedings in particular, are best resolved without adherence to strict guidelines that may not reflect the needs of a particular family. [169]

Proponents of the best interest standard champion its ability to allow for "individualized adjudication" in family law cases that "are uncommonly complex and deal with some of the most emotion-laden and irrational parts **[*217]** of people's lives." [170] Although the best interest standard is unclear and subjective, replacing this standard with more explicit guidelines would result in even worse consequences for children. [171] This standard, though problematic, is best left to minimal clarification. [172] The life of a child cannot be sufficiently protected through the implementation of a meticulously revised statutory code. Although discretion can lead to discrimination, discretion is essential in family law proceedings. [173]

2. Professional Responsibility Reforms

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[164] Federle & Gadomski, supra note 117, at 349-50.

[165] Peterson, supra note 17, at 1097-1101.

[166] Id.

[167] Federle & Gadomski, supra note 117, at 349-50 (footnotes omitted).

[168] Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard, *89 Mich. L. Rev. 2215, 2262 (1991).*

[169] *Id. at 2261-62.*

[170] Id.

[171] See *id. at 2298.*

[172] Id.

[173] Id.

To find the balance between the perils of discretion and discrimination on the one hand and constraining statutory directives on the other, states must look beyond binary constructions and find alternative solutions. When differences arise between what the GAL determines are the child's best interests and what the child actually wants, combined with a lack of statutory explanation of their role, the GAL can be confronted with significant issues of professional responsibility. [174] If state statutes do not explicitly clarify the duty of the GAL, attorney GALs "may feel torn between [their] duty to assess a child's best interests and provide all relevant information to the court and [their] duty to keep the confidential information learned in the course of his representation." [175] As a result, GAL reformers often call for statutory clarification between a GAL, who advocates for a child's best interest; an attorney for the child, who solely represents the child's wishes; and between hybrids of these positions that exist. [176] If no such statutes exist, states should draft statutes explicitly delineating the duties of a GAL from to the duties of an attorney or other family law official. [177]

The most problematic aspect of the GAL position arises from their "dichotomous role as a champion of the child's best interests and of the child's wishes." [178] GALs are legally obligated to act for the best interests of **[*218]** the child. [179] Failing to reassess the GAL's position in situations where the child and the GAL are in conflict could undercut the child's desire for representation of their own personal views. [180] Reappointing the GAL to a position like a child's attorney, where the attorney solely advocates for the child's wishes and can keep the child's statements confidential, could resolve the professional conflict for GALs who realize what they perceive as their child-client's best interests are different from those expressed by the child. In most attorney-client relationships, the attorney must strictly adhere to the duty to keep their client's communication confidential. [181] However, most GALs do not have any duty to keep their child-clients' communication confidential. [182]

Generally, if GALs discover a conflict, GALs can inform the court of the disagreement between themselves and the child and can ask the court to appoint a child's attorney to advocate for the child's wishes. [183] If a court is faced with conflicting views between the GAL and the child and does not reappoint the GAL to a more appropriate role, then professional responsibility dictates that the GAL should base their report on the child's best interest but should also inform the court of the child's views and instruct the court that "not all children are competent to determine what is in their own best interests." [184] Clarifying the GAL's role in a situation where the GAL and the child disagree about the child's best interest is important because GALs are usually ethically obligated to report all their findings to the court. [185] However, reporting all this information about the child could violate the child's wishes for confidentiality [186] and the child's trust in the GAL. [187] To effectively represent their child-client, GALs must develop

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[174] Carl W. Gilmore, The Child's Attorney, Fam. Advoc., Summer 2012 at 28, 28-29.

[175] Peters, supra note 78, at 112.

[176] Barbara Ann Atwood, Representing Children: The Ongoing Search for Clear and Workable Standards. *19 J. Am. Acad. Matrimonial L. 183, 222 (2005);* Alberto Bernabe, The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians, *43 Loy. U. Chi. L.J. 833, 836-37 (2012).*

[177] Hastings, supra note 18, at 294.

[178] Peterson, supra note 17, at 1096.

[179] See id.

[180] Atwood, supra note 176, at 183-87.

[181] Peters, supra note 78, at 112.

[182] Id.

[183] Peterson, supra note 17, at 1096.

[184] Id.

[185] Id. at 1096-97.

[186] Id.

a trusting, open relationship with the child. [188] If their child-client discloses private information that the GAL later reports in open court, and the child is not warned beforehand or does not understand that they do not have a confidential relationship with their GAL, "there is a risk of psychological damage to the child from the violation of trust that could have lasting **[*219]** effects … ." [189]

In order to resolve this ambiguity and potential confusion, an essential component of statutory reform should be eliminating positions that are hybrids between GALs and child's attorneys. These hybrid positions create too many conflicts within professional responsibility. For instance, Illinois child representatives can act as a traditional attorney and have the investigative powers of a GAL. [190] Thus, Illinois child representatives can investigate the child's best interests but cannot be called as a witness. [191] Although Illinois child representatives do not submit a report to the court, and instead offer their arguments in the traditional evidence-based format, [192] their hybrid position still generates problematic constitutional concerns for the parents' due process rights. Although the due process rights of parents are unclear in regards to custody hearings, in Goldberg v. Kelly, the Court recognized a right to challenge adverse witnesses as an element of fair trials. [193] Although "most state supreme courts recognize the right to cross-examine adverse witnesses as extending to custody proceedings… . it is unclear whether this right of cross-examination extends to GALs in custody cases." [194] GALs may not be subject to cross-examination if the court views the GAL as fulfilling the role of an attorney, as opposed to the role of a witness. [195]

3. Training Reform

After revising statutes addressing the best interest standard and professional responsibility, GAL reform should focus on improving training for GALs. [196] Although GALs may be competent in their individual professions, child welfare cases present unique issues that require an ability to understand the social complexities of family life. [197] For instance, many GALs may not be trained in how to handle cases where domestic violence is involved, leading some to argue that "GALs often minimize or ignore **[*220]** evidence of abuse in their assigned cases." [198] GALs must be educated on the potential for their own bias to negatively color their investigation and assessment of what is in the best interests of the child. [199] If training is not required for GALs, this must be the first step for state reform. This training must not only instruct GALs on child development, domestic abuse, and case management techniques, but must also incorporate cultural sensitivity training. Although culture can be difficult to identify, GAL training should at least bring attention to the ability of ethno-centrism to impair the representation of children in child welfare cases. To reduce ethno-centrism, GALs should be encouraged to research the parenting practices of

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[187] Id. at 1109.

[188] Id. at 1108.

[189] Peterson, supra note 17, at 1109.

[190] *750 Ill. Comp. Stat. Ann. 5/506* (West 2007).

[191] Id.

[192] Id.

[193] ***Goldberg v. Kelly, 397 U.S. 1014, 1016 (1970).***

[194] 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, 2111 (2010).*

[195] *Id. at 2112.*

[196] See Hastings, supra note 18, at 296.

[197] Peterson, supra note 17, at 1105-06.

[198] Hastings, supra note 18, at 300.

[199] Cf. Hastings, supra note 18, at 296 (calling for implementation of standard practices for GALs).

divergent cultures. Minnesota's standards, which mandate for GALs training in "cultural diversity and sensitivity, with special emphasis on the specific population that a GAL may potentially be working with," can be used as a starting point. [200]

IV. Conclusion

States must reform the roles of GALs to reduce the risk of discriminatory discretion. This reform must first address issues surrounding statutory clarification of the GAL duties to eliminate professional responsibility conflicts. Reform then must focus on improving GAL pre-appointment training to educate GALs about cultural concerns and uncustomary parenting practices. However, this reform should not involve eliminating the best interest standard. Instead, states and national family law commissions should revise the model best interest standards to include provisions considering the child's cultural background. At a minimum, revision of the best interest standard should signal a national preference for pluralistic approaches to child welfare representation and family law generally.

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[200] Office of the State Court Adm'r, supra note 134.