INDIAN CHILDREN AND THEIR GUARDIANS AD LITEM

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One of the primary goals of the Indian Child Welfare Act (ICWA) is to limit the influence or bias of state workers in decisions placing American Indian children out of their home and community.[1] While this focus usually concerns state social workers, the officials who most often seek removal of a child, or the courts, the body that issues the orders and opinions, guardians ad litem (GALs) receive less attention.[2] Despite this lack of attention, GALs exert a similar level of influence as state social workers. In *Adoptive Couple v. Baby Girl*,[3] the role of the GAL was unusual but critical – the GAL, while officially appointed by the court, was handpicked by the adoptive parents.[4] The role of the GAL remains understudied in the ICWA literature, though GALs continue to exert enormous influence in the courts. Unfortunately, many GALs throughout the nation subvert the national policy embodied by the ICWA by advocating against the implementation of the statute in case after case.[5]

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[1] 25 U.S.C. § 1901(4) (2012) ("[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . .").

[2] *See* Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131, 145 (2012) (failing to include GALs in a list of those responsible for "ad hoc decision-making" but including "judges, court officials, lawyers, and social workers").

[3] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

[4] Brief for Respondent Birth Father at 11-12, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), 2013 WL 1191183 ("Although appointed by the Family Court, that court noted that the GAL and her attorney both 'were unilaterally selected by [petitioners'] counsel;' the GAL had a continuing business relationship with petitioners' attorney, with whom she had worked frequently in the past and who had already referred her multiple cases in 2009." (citations omitted)). In South Carolina, a GAL may not include a recommendation of whom to award custody in her final written report and can only offer a recommendation as to custody at the merits hearing upon request of the court. S.C. CODE ANN. § 63-3-830(A)(6) (2008). Due to the respondent's concerns over the GAL's ability to be neutral in *Adoptive Couple*, petitioners agreed that the court would consider neither the GAL's conclusions about the child's best interests nor the GAL's custody recommendation. Brief in Opposition at 10 n.5, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399).

[5] The Authors have conducted a study of GAL actions; the dataset for this study is available at http://www.bu.edu/bulawreview/files/2013/11/ICWA-Transfer-Cases.xlsx.

While each state has slightly different requirements of GALs, a GAL is usually appointed as an officer of the court.[6] The GAL may act as an expert witness, conduct independent investigations, and make recommendations concerning the disposition of a minor's case.[7] The court may consider the GAL report when making a disposition in a case or terminating parental rights.[8] This level of authority within an ICWA case is not significantly different than that of a state social worker, who may also make recommendations, testify in front of the court, and have his report considered by the court.

Depending on the state, a GAL might or might not have legal training.[9] In states where they do, they are considered legal guardians ad litem (LGALs). An LGAL is sometimes called a "best interests attorney," because she advocates not for the child's expressed wishes, but for the best interest for the child.[10] Due to this directive, the role of the LGAL is different from that of a customary lawyer. "The dichotomous role of the [GAL] as a champion both of the child's best interests and the child's wishes is widely recognized."[11] Determining what those best interests are for an American Indian child can be a daunting task, and an LGAL needs to be especially sensitive to these issues.

In other contexts, scholars recognize that GALs have enormous potential to influence best-interest determinations with the imposition of personal biases, as in the case of queer youth.[12] GALs often represent American Indian children with equally damaging biases:

The need for representatives to be sensitive to their clients' cultural backgrounds is axiomatic, but that principle is particularly relevant to ICWA cases. Some children may be fully integrated into tribal culture, and if the representative is not a member of the child's tribe, cultural differences and language barriers may intensify the challenges that already exist in adult-child communication. Cultural understanding is especially challenging because of the enormous diversity among tribes and Indian communities, both urban and rural.[13]

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[6] *See Court Allows Suit Against Guardian*, A.B.A. J., Aug. 1998, at 41, 41 ("Generally, courts hold that guardians ad litem have immunity for actions with this scope of their duties as officers of the court . . . .").

[7] *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.13(6) (2002).

[8] *See* S.C. CODE ANN. § 63-3-830(A)(6).

[9] *See* AM. LAW INST., *supra* note 7, § 2.13(3).

[10] Kasey L. Wassenaar, Comment, *Defenseless Children: Achieving Competent Representation for Children in Abuse and Neglect Proceedings Through Statutory Reform in South Dakota*, 56 S.D. L. REV. 182, 188 (2011).

[11] Tara Lea Muhlhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian ad Litem*, 66 N.D. L. REV. 633, 637 (1990).

[12] Sarah Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773, 779-87 (2010).

[13] Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 150-51 (2008). Some states

The GAL in *Adoptive Couple*, selected by the adoptive couple, made strikingly negative and downright ignorant representations about Cherokee Nation citizenship[14] that sadly illustrate the anti-American Indian biases that concerned Congress when it originally enacted the ICWA.[15] Among other things, "[t]he GAL's initial report did not note Baby Girl's Native American heritage because the GAL thought that was 'not something *** the courts need to take into consideration.'"[16] She asserted that the benefits of being Native American "include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances."[17] The GAL even refused to visit the home of the birth father until his attorney made repeated requests.[18] Moreover, the GAL criticized the birth father for living with his parents during the periods he was not deployed by the military.[19] The GAL's belittling of tribal citizenship took place in a bias-ridden context – she "had a continuing business relationship with [the adoptive couple's] attorney."[20]

By the time the case was heard at the Supreme Court, the GAL, represented by a prominent member of the Supreme Court bar,[21] directly attacked the constitutional basis of the ICWA.[22] In effect, the GAL's role changed from one of an advocate for the American Indian child into an advocate against the sole party judged to be the most suitable parent by the lower court.[23] As discussed in the Hamline University School of Law Child Advocacy Clinic's amicus brief, the GAL (actively) "ignored" and "overlooked" the argument that Baby Girl had "best interests *as an Indian child*."[24]

address this in their GAL statutes. For example, in Minnesota, a court is required to consider the cultural heritage of the GAL before appointing him to the American Indian child. *See* Brief of the Hamline University School of Law Child Advocacy Clinic as Amicus Curiae in Support of Respondents Birth Father and the Cherokee Nation at 13, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No.12-299) [hereinafter Brief of the Hamline University School of Law].

[14] Brief for Respondent Birth Father, *supra* note 4, at 12-13.

[15] *See* 25 U.S.C. § 1901(5) (2012) ("[State judicial bodies] have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 44-45 (1989).

[16] Brief for Respondent Birth Father, *supra* note 4, at 12.

[17] *Id.* at 13 (alteration in original).

[18] *Id.* at 12.

[19] Brief of the Hamline University School of Law, *supra* note 13, at 14.

[20] Brief for Respondent Birth Father, *supra* note 4, at 11.

[21] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2556 (2013) (listing Paul Clement as the attorney for the GAL).

[22] Brief for Guardian ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 48-58, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399).

[23] Brief for Respondent Birth Father, *supra* note 4, at 14.

[24] Brief of the Hamline University School of Law, *supra* note 13, at 13.

Adoptive Couple prominently highlighted the negative and inaccurate biases a GAL can bring to a case, but there are many other ICWA cases nationwide where the GAL opposes the very premise of the ICWA. One area where this arises is in transfer jurisdiction cases. In an ICWA case, the parent or tribe has the right to request the case in state court be transferred to tribal court, and "absent good cause" or "objection by either parent," the state court "shall transfer" the proceeding.[25] This concurrent "transfer" jurisdiction, along with the right of the tribe to intervene in a case,[26] is fundamental to the operation of the ICWA. While the state has the responsibility to follow the requirements of the ICWA, the presence of a tribal attorney greatly increases the likelihood the court will do so. Embedded in the ICWA is the belief that the increased presence of the tribe in the case is inherently in the American Indian child's best interest. The case law, however, shows a number of times where the GAL opposes transfer to tribal court.[27]

In a preliminary study of the 125 transfer cases in state appeals courts since the passage of the ICWA conducted by Professor Fort, the position of the GAL in opposing or confirming transfer appears to hold sway with the court.[28] Of those cases, GALs were an active presence in fifty-six of them. While it is likely that the children received a GAL in the other cases, their presence is not indicated in the opinion or in the header of the case. In thirty-four of those, or sixty-one percent of the time, the GAL opposed the transfer of the case to tribal court. In one case a father opposed transfer, and, in another, the tribal court opposed transfer. Of the thirty-three cases remaining, the court denied transfer to tribal court twenty times. Nine of those times, or forty-five percent of the time, an appellate court overturned the lower court's denial of a transfer. In only three cases is it obvious from the opinion that the GAL supported the transfer of the case. Why do so many GALs oppose transfer to tribal court if congressional public policy supports transfer? In *Adoptive Couple*, the fix was in. But, this appears to be the rule rather than the exception in too many other cases, state courts allow GALs to give legal effect to cultural and political biases against American Indian people and the ICWA.[29]

Addressing the potential, and recurring, conflicts between a GAL and the best interests of an American Indian child is vital for addressing the problems still inherent in ICWA cases. A GAL's argument that the ICWA is unconstitutional or not in the best interests of the American Indian child runs contrary to the stated goals of the ICWA, years of case law, and the best practices

[25] 25 U.S.C. § 1911(b) (2012).

[26] *Id.* § 1911(c).

[27] *See supra* note 5.

[28] *Id.*

[29] *See* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 549-50 (2012) (detailing the efforts by GALs to undermine state American Indian family preservation statutes in Minnesota and Iowa).

of state-appointed GALs. While an objection to the transfer to tribal court is one way to measure the work of the GAL, the GAL might also lodge reports with the court as to the placement preferences of the child (as in *Adoptive Couple*), the benefits of reunification with the biological family, or other areas where inherent biases against American Indian families could lead to negative outcomes for the child. The laws and rules governing GALs vary by state, but given that the application of the ICWA is in the American Indian child's best interest, and GALs are to represent the child's best interest, it might be time for courts or states to limit a GAL's discretion in arguing against the ICWA. GALs, after all, are officers of the court, not advocates for politicized law reform. Yet since the data shows that GALs continue to thwart the purposes of the ICWA, courts should consider sanctioning a GAL when she argues against the ICWA's constitutionality. *Adoptive Couple* highlighted the role of the GAL, and now it is time to address these issues in the day-today ICWA cases in state court.