

When Family Courts Shun Adversarialism

GLENN A GOLDIS*

Abstract

This article uses case studies to challenge the stigma attached to adversarialism in child custody disputes. It shows that the real-world alternative to adversarialism is freestyle judging, with little of the structure that normally helps courts sift fact from fiction and real danger from fear-mongering. Freestyle judges indulge bogus claims for months or even years, wreaking havoc on families. Poor parents and parents facing abusive opposing parties are especially vulnerable to these practices. To protect their children, courts must follow rigid adversarial procedures—even if that means more complexity for everyone else.

* Staff Attorney, Northeast Justice Center (Massachusetts); J.D. 2008, New York University School of Law. Thanks to Riley Albair, Carol Coyne, Noah Feldman, Audrey Patten, and Zona Sharfman.

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I. Introduction

Imagine a woman who is worried about her grandson. The boy's mother used cocaine in the past, bounces from one minimum wage job to another, and asks the grandmother to babysit on nights when she has dates. The grandmother petitions for guardianship of the child, stating that she suspects the mother is using drugs. At court, she and the mother sit down with a "probation officer" (a social worker/mediator), who encourages the mother to agree to a temporary guardianship. The mother refuses. The judge talks with the parties for fifteen minutes. He orders a 90-day temporary guardianship and hair follicle drug testing of the mother in the interim (at her expense).¹

Now imagine the drug test results are clean. In court, the grandmother says the mother is homeless. The mother protests that the grandmother lied. The judge rebukes the mother and says she is lucky that the grandmother was willing to "step up"; without her, the child might be in foster care. Months later the judge finally returns the child to the mother. Nothing has changed except that the case was assigned to a different probation officer, who recommended that the judge return the child.

This story is a composite of several guardianship cases that Merrimack Valley-North Shore Legal Services ("MVLS") handled in the suburbs of Boston between 2011 and 2013.

Nothing that the story describes is atypical or unlawful, except arguably as a violation of due process. Massachusetts judges sometimes transfer custody based on inflammatory accusations at an informal hearing, and then extend the orders over and over without meaningful review. Why does this happen?

Family law has been driven in recent decades by a movement that demonizes "adversarialism." Adversarialism is thought to encourage conflict between litigants, which in turn hurts children.² Massachusetts' trial-averse, pro-cooperation guardianship practice is virtually the movement's apotheosis.

¹ Guardianship is a legal status granted by the court that gives custody of a child to someone other than the child's parents.

² E.g., Linda Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501 (2001); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 88 (1997).

Despite their nationwide popularity,³ most specific non-adversarial practices have not been seriously studied.⁴ Proponents call the new style of justice “therapeutic”⁵ or “problem-solving.”⁶ But in practice, the new format replaces the rigors of adversarialism with the judge’s freestyle improvisations. This change most likely harms two types of parties: those who pique judges’ suspicion (such as young, low-income parents), and those facing parties who are willing to lie.

Part II identifies what family law reformers mean by adversarialism and what reforms are put in place to minimize the need for law. Part III describes Massachusetts’ guardianship-of-a-minor law and practice, using four actual cases as touchstones. In three of the cases, custody first went to a guardian but switched back to the parent after lengthy litigation, even though the facts had not changed materially. The fourth case is pending at the time of writing. Part IV analyzes how the cases progressed, identifying flaws in the process that would not exist in a traditional adversary system. Part V argues that the lessons of Massachusetts guardianship apply to other custody disputes as well, such as in divorce. Part VI considers arguments in favor of freestyle judging.

The article concludes that freestyle judging inflicts capricious custody orders on children, without keeping them safe. Therefore courts and legislatures should reintroduce adversarialism to family law.

³ Herbert J. Belgrad, *The American Bar Association and Unified Family Courts*, 42 FAM. CT. REV. 10, 10-11 (2004)(describing the American Bar Association’s longstanding support of non-traditional uniform family courts, or UFCs); Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice Systems*, 46 FAM. CT. REV. 230, 232 (2008) (rapid expansion of UFCs in recent decades); Pauline Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 96 (2008) (popularity of collaborative law with experienced family law attorneys who are “flocking” to practice it rather than traditional, adversary methods).

⁴ Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 897 (2010); Andrew Shepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on A Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 350-51 (2003).

⁵ See, e.g., Shepard & Bozzomo, *supra* note 4; Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

⁶ See generally Richard Boldt & Jana Sanger, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 84-91 (2006).

II. The Demise of Adversarialism in Family Law

Adversarialism is unpopular among family law scholars. Even its defenders make clear that they do not support it wholeheartedly.⁷ When family law reform is discussed, the practice to be reformed is adversarialism.⁸ Reformers are not monolithic, and the alternative models they espouse go by a number of names: collaborative⁹, interdisciplinary¹⁰, therapeutic¹¹, reparative¹², and problem-solving.¹³ What they have in common is a fear that adversarialism turns child custody dispute resolution into a bloodsport.¹⁴

A. What is Adversarialism?

“Adversarialism” refers to a set of legal procedures that developed in the English-speaking world. It has often been contrasted with inquisitorialism, the model that developed in continental Europe and is considered the world’s other major legal tradition.¹⁵ Family lawyers also seem to use “adversarialism” loosely to refer to especially oppositional

⁷ Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 729 (Feb. 1988)(describing the “problems associated with the adversarial model” as “undeniable”); Murphy, *supra* note 4, at 894.

⁸ Murphy, *supra* note 4, at 894; *See also*, Babb, *supra* note 5, at 803; Boldt & Sanger, *supra* note 6, at 86 & 93; Linda Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501 (2001); *See generally*, Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 88, 160 (1997).

⁹ *E.g.* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004).

¹⁰ Babb, *supra* note 5.

¹¹ *See, e.g.*, Schepard & Bozzomo, *supra* note 5; Babb, *supra* note 5.

¹² *See generally*, Clare Huntinton, *Repairing Family Law*, 57 DUKE L.J. 1245 (Mar. 2008).

¹³ *See generally*, Boldt & Sanger, *supra* note 6, at 84-91.

¹⁴ Murphy, *supra* note 4, at 897; *See, e.g.*, Elrod, *supra* note 8, at 503 and 537 (both times quoting comparisons of adversarialism to combat); Weinstein, *supra* note 8, at 147 (comparing adversarialism to “win/lose combat”).

¹⁵ *See, e.g.*, John Henry Merryman, THE CIVIL LAW TRADITION 1-6 (Stanford University Press, 2d ed. 1985); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1053 (May 1975). *See also*, Mirjan Damaska, FACES OF JUSTICE AND STATE CONTROL 3 (Yale U. Press 1991)(protesting the dichotomizing of the two systems because they are in reality “clusters of traits in shifting combinations.” He suggests conceptualizing the relationship as that between different architectural styles).

and structured modes of conflict resolution.¹⁶ Surveying both related usages, several key characteristics of adversarialism emerge. For each, I will describe the general characteristic and show how it connects to the family law context in particular:

1. Passive judges.

In adversary systems, the judge's role during the proceedings is narrow and technical. She focuses on protecting the parties' procedural rights, ensuring that they have an even playing field on which to present whatever they want to present but doing little else.¹⁷ In non-adversary systems, the judge is more active. She seeks out information and directs discovery.¹⁸ In contrast, judges in non-adversary systems focus on substance as well. Some family law reformers seek roles for judges beyond mere arbiters of procedure,¹⁹ which represents a pulling away from adversarialism.

2. Rigid rules of evidence.

Any factual information that the trier of fact relies on to decide a case is evidence. Highly technical rules govern the admissibility of evidence in adversary systems.²⁰ As a result, oral testimony by witnesses is a major component of adversary systems.²¹ Even when an objective-seeming exhibit contains the key information, oral testimony by a witness is often required to authenticate or explain it. The trier-of-fact decides how much to credit witness testimony by hearing cross-examination and by

¹⁶ Weinstein, *supra* note 8, at 98 (“The traditional adversary process, bound by definitions of legal causes of action, remedies and relevance, is limited in its ability to examine problems contextually.”); Murphy, *supra* note 4, at 892 (referring to “structured procedures of the adversary system”).

¹⁷ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 563-64 (Jan. 1973). *See also*, Weinstein, *supra* note 8, at 88 and 160 (criticizing the narrowness of the judge's role in adversary proceedings).

¹⁸ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

¹⁹ Babb, *supra* note 3, at 232. Other writers merely imply judges should have an active role, for example by arguing they should have dual degrees in a mental health field (Weinstein, *supra* note 8, at 156) or be chosen for their interest in children and paid more than other types of judges (Schepard & Bozzomo, *supra* note 4, at 344).

²⁰ Damaska, *supra* note 17, at 564.

²¹ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 534-36 (Dec. 2012).

observing the witness's demeanor.²² The presence of rigid rules creates the possibility of parties winning or losing because of these rules, rather than the merits. Family law reformers criticize the adversary system's rigid rules of evidence and procedure (which include, in large part, rules about oral testimony) by emphasizing the possibility of winning by "technicality."²³

3. The Day in Court.

Adversary systems focus on trials. Parties prepare single-mindedly for trial, and judges decide a case based only on what was presented at trial. After trial, there are limited grounds on which parties may try to change the result.²⁴ The stress put on a single event can make trials seem dramatic. By contrast, inquisitory judges hold a series of hearings, ending when they have collected all the information they want. Every hearing may matter to the outcome, but there is no formal "trial."²⁵ After a decision is made, the system provides generous opportunities for dissatisfied parties to try to change the outcome.²⁶ Many family law reforms, such as mediation programs, are aimed at avoiding trial altogether.²⁷

²² E.g. Mass. R. Abuse Prev. Rule 5:04 ("In considering the risk of future abuse should the existing order expire, the factors that the judge should examine include, but are not limited to: '[...] the parties' demeanor in court[.]'"(quoting *Iamele v. Asselin*, 444 Mass. 734, 740 (2005)).

²³ Drew A. Swank, *In Defense of Rules and Roles*, 54 AM. U. L. REV. 1537, 1561 n. 185 (Aug. 2005). For a view outside family law, see Damaska, *supra* note 15, at 581.

²⁴ Generally appellants must show that the lower court made a mistake. E.g., Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.")

²⁵ John Henry Merryman, *THE CIVIL LAW TRADITION* 111-12 (Stan. Univ. Press, 2d ed. 1985).

²⁶ *Id.* at 120 (noting that the right of appeal in civil jurisdictions includes review of fact questions, and may even allow introduction of new evidence); See also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 857 (1985)(describing right of *de novo* review in Germany).

²⁷ Murphy, *supra* note 4, at 905.

4. Rights.

Adversary systems aim for fairness above all else. “Distrust of the state” is said to underlie adversary systems.²⁸ Without that distrust, “the concern for ascertaining the facts of the case is much more central [than ensuring fairness].”²⁹ Adversary systems, with their fixation on fairness and rights, are criticized for sacrificing truth.³⁰ Family law reformers argue that focusing on rights means losing sight of outcomes.³¹

B. Reforms are Happening

In practice, reducing adversarialism in child custody commonly involves forming “Uniform Family Courts” that incorporate mental health and alternate dispute resolution services.³² UFC’s are oriented around outcome rather than process.³³ In the words of one proponent, a “UFC has an additional and vital goal beyond simple, efficient umpiring: to make the emotional life of families and children better.”³⁴

The move toward UFC’s has significant establishment support. The American Bar Association has formally supported them since 1994.³⁵ By 2006, thirty-eight states had implemented UFC’s in some form or were planning to.³⁶

The implementation of UFC’s in particular states illustrates the extent to which they are a departure from adversarialism.

A 2006 commission established by New York’s chief judge recommended that the state’s family court system become less adversarial in several ways. First, it recommended a “judge-centered approach” to family law, where “tools that would be added to the judge’s toolbox [...] include parent education programs, mediation, case conferencing, issue-

²⁸ Damaska, *supra* note 17, at 565. See also Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure*, 90 CORNELL L. REV. 1181, 1211-13 (July 2005).

²⁹ Damaska, *supra* note 17, at 582.

³⁰ See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (May 1975); Weinstein, *supra* note 8, at 93-97.

³¹ Elrod, *supra* note 8, at 499; Jay Folberg, *Family Courts: Assessing the Trade-Offs*, 37 FAM. & CONCILIATION CTS REV. 448, 449 (1999).

³² Belgrad, *supra* note 3, at 10-11; Elrod, *supra* note 8, at 519.

³³ Boldt, *supra* note 6, at 95.

³⁴ Schepard & Bozzomo, *supra* note 4, at 339.

³⁵ Belgrad, *supra* note 3, at 10-11.

³⁶ Babb, *supra* note 3, at 231.

focused and comprehensive evaluations[.]”³⁷ Second, the commission favored expanding use of alternative dispute resolution.³⁸

Massachusetts requires attorneys to advise clients about alternate dispute resolution³⁹ and encourages parties to resolve disputes with the help of probation officers (state employees with social work backgrounds) or volunteer attorneys acting as conciliators. The latter is routinely ordered by judges but not required by law. While Massachusetts litigants retain the right to a trial on the merits, mediators and conciliators may pressure parties to come to an agreement by holding out scary worst-case scenarios.⁴⁰ The same practice has also been observed in other jurisdictions,⁴¹ and even proponents of UFC’s have acknowledged the potential for abuse.⁴²

In Maryland, the Baltimore court’s family division trumpets that its “emphasis on early alternative dispute resolution (‘ADR’) programs has allowed families the opportunity to resolve their own disputes, as early as possible, and without additional emotional trauma. Early ADR programs have reduced the need for more costly, more time consuming and more stressful hearings and trials.”⁴³

Until 2010, California’s family court system was the least adversarial in the country. The rules of evidence and procedure in some local courts were fundamentally different, with “trials” mainly involving the submission of written reports.⁴⁴ In 2007, the California Supreme Court ruled that these practices violated litigants’ right to due process and that family court litigation must proceed under the same rules as other matters.⁴⁵ This move has been described as “a clear break from a decades-

³⁷ Matrimonial Commission, *Report to the Chief Judge*, 21 (Feb. 2006), available at <http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf>.

³⁸ *Id.* at 27.

³⁹ Mass. Gen. Laws, S.J.C. Rule 1:18.

⁴⁰ One conciliator, after expelling the parties from the room, told the author and her opposing counsel exactly what to say to our respective clients to make them want to settle.

⁴¹ Murphy, *supra* note 4, at 918-19.

⁴² Schepard & Bozzomo, *supra* note 4, at 339.

⁴³ Circuit Court for Baltimore County, *Family Division Annual Report Fiscal Year 2012*, 3, available at <http://resources.baltimorecountymd.gov/Documents/Circuit/fy2012familydivisionreport12.pdf>.

⁴⁴ Steven K. Berenson, *The Elkins Legislation: Will California Change Family Law Again?*, 15 CHAP. L. REV. 443, 451-52 (2012).

⁴⁵ *Elkins v. Superior Court*, 163 P.3d 160, 177-78 (Cal. 2007).

long trend in family law.”⁴⁶ But the break was not complete. At least one California county still requires parties contesting custody to attend mediation without lawyers present before being heard by a judge.⁴⁷

Family law may also have become less adversarial in recent decades with the increasing deference to mental health professionals.⁴⁸ While some of that has been legislated or ordered from the bench, it has arguably also been pushed by attorneys eager to define themselves as lordly mediators rather than as sharks.⁴⁹

C. Arguments for Reform, and Some Responses

Family law reformers argue that child custody is especially ill-suited to adversary adjudication.⁵⁰ This distinction is due mainly to the involvement of children.⁵¹ (It is debatable whether this problem is unique to family law, as practically all litigation has externalities.) Proponents of reform argue that non-adversary procedures would produce better outcomes for children by preserving the relationship of the parties⁵², resolving conflicts faster⁵³, and serving the family’s psychosocial needs (and not just their legal needs).⁵⁴

The seemingly most prevalent complaint about adversarial custody disputes is that they require a type of strategy that exacerbates the conflict

⁴⁶ Berenson, *supra* note 44, at 444.

⁴⁷ Modoc County Trial Courts, Local Rules of Court, Rules 13.05(A)(1)(requiring mediation) and 13.05(A)(5)(b)(banning lawyers).

⁴⁸ See Fineman, *supra* note 7; Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 351-55 (1999)(in the child welfare context, where the state is seeking custody of a child rather than a private party).

⁴⁹ Fineman, *supra* note 7, at 759-60; Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 318 (2004)(“[M]any family lawyers suffer considerable professional angst as a consequence of their awareness that family law courts are neither safe nor effective places for clients to resolve divorce-related disputes.”).

⁵⁰ Weinstein, *supra* note 8, at 86-90.

⁵¹ Elrod, *supra* note 8, at 539. “Zealous representation of a client in a custody dispute is complicated by the fact that the end result (residential placement) will have profound consequences on a third party--the child.”

⁵² Weinstein, *supra* note 8, at 122.

⁵³ Elrod, *supra* note 8, at 504 (“Legal scholars and critics of the adversary system contend that the divorce process is time-consuming and expensive.”); Weinstein, *supra* note 8, at 123-24 (“Zealous advocacy, as it has been practiced, focusing on rights and strategy, heightens and prolongs conflict.”); Babb, *supra* note 5, at 801.

⁵⁴ Babb, *supra* note 3, at 232 (proposing that judges should consider nonlegal needs); Weinstein, *supra* note 8, at 156 (suggesting that judges should have dual degrees).

between the parties.⁵⁵ In the words of Linda Elrod, former chair of the ABA family law section:

[t]he win/lose framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child. In addition, the lawyer arguing for the client's position may espouse a position that could harm the child. When an attorney increases hostility between parents, their parenting ability often decreases. For example, advising clients not to talk to the other spouse, filing for protective orders to get a person out of the house when safety is not an issue and making extreme demands to increase the bargaining advantage only escalate conflict.⁵⁶

Reformers' frustration with the game-like mentality of family law is understandable, but they do not offer convincing counter-models.⁵⁷ Implied in Elrod's critique, as well as others, is the idea that the lawyer is the root of the problem, so the lawyer's role should be limited or radically changed.⁵⁸ But lawyers can be sanctioned for trying frivolous or dishonest claims.⁵⁹ Even assuming that lawyers prevent some settlements from happening, those rejected settlements might not have served children's best interests. In disputes between unrepresented parties, a settlement is likely to favor the desires of the more powerful, manipulative, or strategic

⁵⁵ Weinstein, *supra* note 8, at 133; Elrod, *supra* note 8, at 501.

⁵⁶ Elrod, *supra* note 8, at 501.

⁵⁷ Mediation has been offered, but that is something that precedes trial rather than replaces it, as this article will discuss below).

⁵⁸ Weinstein, *supra* note 8, at 163-64 ("The attorneys' first job would be to set a tone of 'care' for the process. Because people are so accustomed to lawyers playing the adversarial role and to courts being the arena where the win/lose game is played, attorneys will need to educate their clients about the nature of this system with its emphasis on problem solving and assisting families and children. Clients will need to learn that their attorneys will not conceal damaging information on their behalf or assist them in making an argument that is clearly contrary to the best interests of the child. Rather, the attorney will counsel the client to engage in the process and take whatever steps may be necessary to put the family into a workable situation. Of course, the client will not be prevented from speaking up on her own behalf where she disagrees with her lawyer's advice. In some situations, attorneys would participate in group meetings with their clients and ensure that the client's voice is being heard. Preferably, this would occur by empowering the client to speak for herself. Where the client is unable to do so, the lawyer can express the client's concerns.").

⁵⁹ Fed. R. Civ. P. Rule 11; Mass. R. Civ. P. Rule 11.

party.⁶⁰ But there is no reason to believe that powerful, manipulative, or strategic parties are more likely to serve the best interests of the children.

Adversary systems seem game-like because their rules are explicit instead of implicit. For example, there is a rule against hearsay under the federal rules of evidence.⁶¹ So during trial in a federal district court a party says “objection, hearsay” when the other party repeats a rumor. The judge says “sustained” or “overruled” and it looks like one side scored a point. In a less adversarial proceeding the aggrieved party might begin by saying “excuse me,” instead of “objection,” and proceed to state her objection in a more detailed way. The decision maker might begin her response with, “I hear your concerns.” The style is more conciliatory, but the substance is the same. The question, then, is whether a change in style (but not substance) preserves parties’ relationships.

A practice known as “collaborative law” has developed in some areas where lawyers agree ahead of time to quit if the case goes to litigation. This does not affect the parties’ rights, as they may always hire another lawyer.⁶² The practice might shift incentives toward cooperation and away from stubbornness insofar as hiring another lawyer is an obstacle.

Adversarialism’s detractors often imply or assume that adversary procedures waste resources.⁶³ The assertions linking adversarialism and expense are poorly sourced and unintuitive.⁶⁴ Many of the anti-adversarial

⁶⁰ The risks to parties who are in some way weaker has been studied especially in terms of gender dynamics. See e.g. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1556 (1991).

⁶¹ Fed. R. Evid. 802.

⁶² John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss*, 42 FAM. CT. REV. 280, 282-85 (Apr. 2004).

⁶³ Elrod, *supra* note 8, at 504 (“Legal scholars and critics of the adversary system contend that the divorce process is time-consuming and expensive.”); Weinstein, *supra* note 8, at 123-24 (“Zealous advocacy, as it has been practiced, focusing on rights and strategy, heightens and prolongs conflict.”) Tesler, *supra* note 3, at 317 (quoting a judge: “I believe that my job—the job of all judicial officers in family and juvenile law—is to serve children and families, and a community in which people cannot afford to spend their whole family estate on attorneys. So I favor any system that best serves families and children, and, from everything I’ve seen so far, the collaborative law approach is THE best, and the least litigious. The least litigious alternative is always going to be better for families.”) Babb, *supra* note 5, at 801 (“the traditional advocacy model of adjudication [is] a system that can further splinter already fragmented family relationships due to the adversarial and protracted nature of many court proceedings.”)

⁶⁴ Elrod, *id.*, does not cite a source. Weinstein, *id.*, does not cite a source; earlier in the passage, she supports the idea that adversarialism “exacerbates existing controversy” by

reforms are themselves expensive. They include better-paid judges,⁶⁵ better-credentialed judges,⁶⁶ specially trained attorneys,⁶⁷ teams of legal, mental health, and financial professionals,⁶⁸ parent education courses,⁶⁹ and collaboration between courts and social services agencies.⁷⁰ While it might be argued that the state should pay for these reforms, some costs are bound to fall on litigants.⁷¹ Non-adversary proceedings may also take longer than adversary proceedings because judges require “review dates” after parents have used the services, and judges generally view their involvement as long-term instead of one-time.⁷² The enthusiasm that non-adversary reforms inspire in attorneys⁷³ and their professional trade organizations⁷⁴ also raises suspicions about their cost-efficiency—if one believes that attorneys (and, by extension, their trade organization) are rational actors motivated by financial self-interest.

One recurring theme in the reformist literature is that adversarialism privileges parents’ interests over childrens’. Specifically, reformers argue that parents’ rights to a fair procedure prolong litigation and suppress facts,⁷⁵ and thus are at odds with children’s interests in a good outcome.⁷⁶ But parents’ procedural rights are fundamentally about the right to be heard, which is needed in order for the court to understand a

citing a conclusory statement (Solove) and a statement locating the problem with adversary adjudication in “await[ing] resolution,” (Catania) a condition which is not unique to adversarialism. Tesler, *id.*, merely appeals to authority. Babb, *id.*, does not cite a source. See also Drew A. Swank, *In Defense of Rules and Roles*, 54 AM. U. L. REV. 1537, 1573-74 (Aug. 2005) (attacking the argument that the cost of family law litigation prevents large numbers of litigants from being able to hire representation).

⁶⁵ Schepard, *supra* note 4, at 344.

⁶⁶ Weinstein, *supra* note 8, at 156.

⁶⁷ *Id.* at 155.

⁶⁸ See generally, Tesler, *supra* note 3, at 83.

⁶⁹ Schepard, *supra* note 4, at 349. Also see Mass. R. Prob. And Fam. Ct. Order 2-08.

⁷⁰ Babb, *supra* note 5, at 805.

⁷¹ Schepard, *supra* note 4, at 349.

⁷² Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365 (2009); Babb, *supra* note 5, at 801-807 (not explicitly stating that judges hear the same case over and over, but proposing to require judges to understand litigants more deeply; presumably the litigants would have to spend more time with the judges).

⁷³ Tesler, *supra* note 3, at 96.

⁷⁴ Belgrad, *supra* note 3, at 10.

⁷⁵ Weinstein, *supra* note 8, at notes 59 and 25.

⁷⁶ Elrod, *supra* note 8, at 499 (“The welfare of the children, rather than the ‘rights’ of parents, should be the top priority in any parenting arrangement.”); Weinstein, *supra* note 8, at 88 (“The adversary system tends to camouflage issues of concern to the child by directing the discussion at the rights of the parents.”).

situation within a limited timeline without also compromising accuracy. As for suppressing facts, this comes back to the question of whether parties who disagree can be expected, under any procedure (or lack of one) to act against their own self-interest. It seems that the striking rhetoric—children’s substantive rights vs. parents’ procedural rights—is doing most of the work.⁷⁷

The final major argument in favor of reforming adversarialism is that the reformed practices better serve families’ psychosocial needs.⁷⁸ But many psycho-socially oriented reforms, while backed by those who happen to dislike adversarialism, are not themselves incompatible with adversary procedure—they merely precede or supplement it. While generally opposed to rigidity⁷⁹, anti-adversary scholarship tends not to dwell on the actual rules of evidence and procedure that guide judging. Instead it promotes various services that induce parents to agree without the intervention of a judge.⁸⁰ Funding more services is a defensible goal, but achieving it would not address the problems of parties who for whatever reason lack the potential to reach an agreement that is in the best interests of their child—the people who most need the court’s help.

Many of the arguments against adversarialism are not primarily about law, but instead about how to minimize the need for law. Perhaps as a result, black-letter procedure and evidence have survived the “paradigm shift” of recent decades relatively unscathed, even as reforms chip away at the adversary spirit of proceedings. If parties reach the stage of seeking a long-term order from a judge, that stage will look a lot like it did fifty

⁷⁷ For an exploration of the myriad ways that the term “children’s rights” has been employed cynically, see Martin Guggenheim, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* (Harvard University Press 2005). Consider also the surprisingly pro-child attitudes of conservative Supreme Court justices. In *Turner v. Rogers*, Antonin Scalia and Clarence Thomas decided that trial courts must provide procedural safeguards to parents facing jail over non-payment of child support. Thomas (joined in this part by Scalia) dissented: “[T]here is yet another reason not to undertake the *Mathews v. Eldridge* balancing test here. That test weighs an individual’s interest against that of the Government. It does not account for the interests of the child[.]” *Turner v. Rogers*, 131 S. Ct. 2507, 2525, 180 L. Ed. 2d 452 (U.S.S.C. 2011) (Thomas dissenting) (citations omitted).

⁷⁸ Weinstein, *supra* note 8 at 133; Elrod, *supra* note 8, at 501.

⁷⁹ Swank, *supra* note 23, at 1561; Damaska, *supra* note 17, at 581.

⁸⁰ This category would include mediation, parent education, counseling, and collaboration with non-legal professionals.

years ago: a party-driven trial governed by strict adversary rules of procedure and evidence.⁸¹ An exception can be found in Massachusetts.

III. Massachusetts' Guardianship Law: How Anti-Adversarial Reform Results in Freestyle Judging

Reform is coming to family law. Reformers present specific visions about what it *should* look like, but what does it actually look like? One example can be found in Massachusetts. While guardianship petitions may in theory be adjudicated by an adversary trial, they can and do languish at the temporary stage indefinitely. Temporary guardianship hearings are non-adversarial: hearings are informal, the judge actively participates, there are practically no rules of evidence, and rights are de-emphasized. Additionally, reformist elements like mediation and social services play large roles in temporary guardianship proceedings.

The way Massachusetts courts handle contested guardianship petitions is a model of reform. This section will describe the relevant law. It will also provide the facts and procedural history of four actual cases in order to demonstrate what a contested guardianship action looks like in Massachusetts. It will then describe how the law is practiced and applied, using the cases as touchstones. Finally, it will summarize the scheme's characteristics, showing that it is a reformist ideal in theory and is freestyle judging in practice.

A. Law

Guardianship is the legal vehicle by which a legal stranger to the child obtains custodial rights to him.⁸² Guardianship does not terminate the child's parents' rights. Parents take the status of non-custodial parents, and their rights and obligations are detailed within the guardianship order or decree.⁸³ There are no standing requirements: anyone may seek guardianship of anyone else's children.

To obtain a 90-day "temporary guardianship," the petitioner must show "likelihood of substantial harm to the child"⁸⁴ absent an order. To

⁸¹ Until the Elkins legislation, this was not true in California. But it has been noted that California pre-Elkins was at the vanguard of anti-adversary reforms. Berenson, *supra* note 44, at 444.

⁸² MASS. GEN. LAWS ch. 190B, § 5-209 (2009).

⁸³ The guardianship statute does not provide for terminating parental rights. To seek that, a private party must file an action under MASS. GEN. LAWS ch. 210 § 3.

⁸⁴ MASS. GEN. LAWS ch. 190B, § 5-204(b) (2012).

obtain a more permanent decree of guardianship, the petitioner must show by clear and convincing evidence⁸⁵ that both of the child's parents are "unfit."⁸⁶ These standards are very different.

"Likelihood of substantial harm" is not defined in the case law, possibly due to the difficulty of winning an appeal of a temporary order. Harm to a child has been interpreted mainly in the context of parents' religious conflicts and grandparent visitation. Harm to a child from "conflicting religious instructions or practices [...] should not be simply assumed or surmised; it must be demonstrated in detail."⁸⁷ That level of detail exists where the court finds that a parent teaches his devoutly Jewish son that he and his mother are "damned to go to hell" and the child experiences anxiety as a result.⁸⁸ "A sense of disfavor" by a grandparent is not "significant harm."⁸⁹ Where a grandparent sees a child several times per month, "significant [sic] harm" may not be "inferred from disruption alone" of that relationship.⁹⁰ Harm to children therefore may not be inferred from adult behavior. The effect on the child must also be demonstrated.

There is no requirement that the court hold an evidentiary hearing (i.e., a hearing governed by formal rules of evidence, rather than offers of proof by counsel) to find likelihood of substantial harm. Therefore there is no requirement that the court hold an evidentiary hearing to grant temporary guardianship.

"Unfitness," the standard for obtaining permanent guardianship, is clearly delineated by statute and by caselaw in both the guardianship and adoption contexts. It is the same in both.⁹¹ Unfitness must be shown by clear and convincing evidence.⁹² "In order to be clear and convincing, the evidence must be sufficient to convey a high degree of probability that the proposition is true. [...] The requisite proof must be strong and positive; it must be full, clear and decisive."⁹³ The evidence also must not be stale; it

⁸⁵ R.D. v. A.H., 454 Mass. 706, 712 (2009).

⁸⁶ Other grounds include death and incapacitation, but those categories tend to be relevant only in uncontested guardianships, which are not the subject of this article. MASS. GEN. LAWS ch. 190B, § 5-204(a) (2012).

⁸⁷ Felton v. Felton, 383 Mass. 232, 233-34 (1981).

⁸⁸ Kendall v. Kendall, 426 Mass. 238 (1997).

⁸⁹ Macedo v. Demers, No. 01-P-1049 (Mass.App.Ct., Feb. 20, 2004).

⁹⁰ Dearborn v. Deausault, 61 Mass.App.Ct. 234, 238 (2004).

⁹¹ *In re* Guardianship of Estelle, 70 Mass. App. Ct. 575, 580 n. 5 (2007).

⁹² Care & Protection of Stephen, 401 Mass. 144, 150-51 (1987).

⁹³ *In re* Adoption of Zoltan, 71 Mass. App. Ct. 185, 188 (2008) (citations omitted).

must show that the parents are *currently* unfit.⁹⁴ Where the facts are disputed, the court may not find unfitness based on offers of proof; it must hold an evidentiary hearing.⁹⁵

In finding unfitness there are 14 statutory factors that courts may consider, “without limitation.”⁹⁶ All fourteen describe a person who is either unable or unwilling to meet a child’s basic needs. Abuse is only grounds for an unfitness finding if it is “severe or repetitive,” or if the abusive parent was offered services and failed to change. Neither drug addiction nor mental illness is a factor on its own; it must be paired with a finding that it renders the parent “unlikely to provide minimally acceptable care of the child.” Failure to visit a child must be “willful.”⁹⁷

Case law clarifies the boundaries of unfitness. In one case, a “child suffered a serious head injury, the cause of which was not adequately explained” while in his mother’s care.⁹⁸ The appeals court overturned a “determination of parental unfitness [which] was based on the child’s head injury, the mother’s admitted prior marijuana and alcohol use, her alleged anger management issues, and her failure to complete all tasks required by her service plan.”⁹⁹

In another case, a child was born with cocaine in her system. Her parents admitted to using cocaine regularly. They were offered services to help them quit, but declined. An appeals court overruled a finding of unfitness, stating that “in the absence of a history of unacceptable care of testimony from an expert that child abuse and neglect is the inevitable end result of a cocaine habit, the prediction that such will occur is impermissible speculation.”¹⁰⁰

In a third case, a child suffered burns from a cigarette while in the mother’s care. Her pediatrician testified that he believed the burns to be inflicted. The mother was a recovering cocaine addict who had relapsed twice. The trial court’s finding of unfitness was overturned.¹⁰¹

In sum, unfitness is a high bar for petitioners to meet. They must link the parent’s behavior to actual harm to the child, and vice versa. The

⁹⁴ *In re Adoption of Linus*, 73 Mass. App. Ct. 815, 820-21 (2009).

⁹⁵ *In re Adoption of Parker*, 77 Mass. App. Ct. 819 (2010).

⁹⁶ MASS. GEN. LAWS ch. 210, § 3(c)(2012).

⁹⁷ *Id.*

⁹⁸ *Zoltan*, 71 Mass. App. Ct. at 189.

⁹⁹ *Id.*

¹⁰⁰ *In re Adoption of Katharine*, 42 Mass. App. Ct. 25, 31 (1997).

¹⁰¹ *In re Adoption of Rhona*, 57 Mass. App. Ct. 479, 484 (2003).

link may not be constructed out of guesses and inference, but rather proved by clear and convincing evidence.

There is one caveat. The fitness standard does not only involve assessment of the parents. The court may also consider the child's bond with the non-parent who cared for him during the guardianship proceedings, and the harm that would come from disrupting it.¹⁰²

Temporary guardianships may only be obtained after filing for permanent guardianship, but the law does not prompt the petitioner from the temporary stage to the permanent; the temporary orders may be extended every 90 days upon "good cause shown" while the permanent guardianship petition lies open.¹⁰³

The extension clause is an interesting feature. The Model Uniform Probate Code (MUPC), from which Massachusetts' statute is adapted, allows for a longer temporary guardianship (6 months) but does not allow for extensions.¹⁰⁴ A temporary guardian would have to obtain a permanent guardianship before the first temporary order expired or else the petition would be dismissed.

The statute requires that "good cause [be] shown" before a court extends a temporary guardianship past the initial 90 days.¹⁰⁵ Good cause is not further defined, but must mean that petitioners must meet the substantial-harm standard again. This is because parents have a fundamental liberty interest in rearing their children under the federal Constitution.¹⁰⁶ Massachusetts articulated the federal standard's most

¹⁰² MASS. GEN. LAWS ch. 210, § 3(c)(2012) (parent may be found unfit if "because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal"); *C.P. v. R.S.*, 81 Mass. App. Ct. 223, 228 (2012), *rev. denied*, 461 Mass. 1110 (2012); *Guardianship of Clyde*, 44 Mass.App.Ct. 767, 772-775 (1998).

¹⁰³ MASS. GEN. LAWS ch. 190B, § 5-204(b)(2012).

¹⁰⁴ UNIF. PROBATE CODE § 5-204(d)(2010). The sentence reads, "Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months." So there is ambiguity as to whether the first part ("except as otherwise ordered") applies to the last ("duration... may not exceed"). In any case, there at least is a default presumption that the guardianship will not exceed six months, and there is no express extension provision.

¹⁰⁵ MASS. GEN. LAWS ch. 190B, § 5-204(b)(2012).

¹⁰⁶ *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000)(extensive precedent is summarized at 65-66).

recent iteration in the context of grandparent visitation: “due process [...] requires that a parental decision [...] be given presumptive validity.”¹⁰⁷ To rebut the presumption, the moving party must “allege and prove that the failure to grant [the petition] will cause the child significant harm by adversely affecting the child's health, safety, or welfare[.]”¹⁰⁸ That is essentially the standard required by part (b) of the statute at the initial appointment stage. If “good cause” for extension meant anything less, the statute would be unconstitutional.

When the concept of “good cause” is looked at in the context of the Constitution and the rest of the guardianship statute, it seems logical that it should refer to a process issue. If not, then there is a process-related hole in the statute, as there are no durational limits on temporary guardianships.¹⁰⁹ For example, the statute does not limit the number of times that a temporary guardianship may be extended (as the model code does), or require that an evidentiary hearing be held within a certain amount of time. If the “good cause” provision is interpreted literally, then once entered, a temporary guardianship can be extended every 90 days for the rest of the child’s minority based on proffer.¹¹⁰

Massachusetts’ law enables interlocutory appeals¹¹¹ but disfavors them.¹¹² This policy discourages “wast[ing] judicial effort in deciding questions that will turn out to be unimportant.”¹¹³ “On petition for relief from interlocutory order, considerable deference is required on the part of [the appellate judge] to determinations by the trial judge, especially where those determinations involve an exercise of discretion.”¹¹⁴ Custody determinations tend to be highly fact-based. Therefore judges have wide discretion and are granted substantial deference by higher courts even in appeals of final judgments.¹¹⁵ There is also always another hearing on the custody issue scheduled within 90 days (less by the time an appeal petition

¹⁰⁷ *Blixt v. Blixt*, 437 Mass. 649, 657-58 (2002).

¹⁰⁸ *Id.* at 658.

¹⁰⁹ MASS. GEN. LAWS ch. 190B, § 5-204(b)(2012).

¹¹⁰ There is an expectation that guardianship petitions will be disposed of in less than 8 months, but there is no penalty or recourse when the action takes longer. Mass. R. Prob. And Fam. Ct. Order 1-06.

¹¹¹ MASS. GEN. LAWS ch. 231, § 118 (2012).

¹¹² *CUNA Mut. Ins. Soc. v. Attorney General*, 380 Mass. 539, 541 (1980).

¹¹³ *Ruggiero v. Giamarco*, 73 Mass.App.Ct. 743, 746 (2009), *rev. denied*, 905 N.E.2d 568, 453 Mass. 1111 (2009).

¹¹⁴ *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381 (2004).

¹¹⁵ *In re Adoption of Hugo*, 428 Mass. 219, 225 (1998) (“[O]ur attitude toward a trial judge’s decision in a custody appeal is one of substantial deference.”).

is reviewed). Therefore the nature of temporary guardianships—their status as temporary orders instead of final judgments, the dominance of fact issues over law, and the frequent review dates—makes them practically immune to appeal.

The guardianship statute allows courts to appoint attorneys for children.¹¹⁶ When the child is indigent, counsel is appointed from a list of attorneys certified by the Corporation for Public Counsel Services (CPCS). CPCS issues ethical guidelines that its children’s attorneys must follow.¹¹⁷ They require children’s attorneys to represent the child’s expressed preferences.¹¹⁸ If the child cannot verbalize a preference, counsel “shall make a good faith effort to determine” it or seek appointment of someone to direct litigation on the child’s behalf.¹¹⁹ If counsel determines that the child “is not able to make an adequately considered decision” and that “pursuing his expressed preferences would place the child at risk of substantial harm,” counsel may substitute her own judgment—but in all cases counsel must inform the court of the child’s preference.¹²⁰

The statute is silent as to parental visitation: it does not direct the court to order parental visitation or to make findings regarding it. By contrast, when parents divorce, the non-custodial parent is entitled by statute to “reasonable visitation [...] unless the court determines that such visitation would not be in the best interest of the child.”¹²¹ Visitation may also be ordered after a parent’s rights have been terminated and after a child has been adopted.¹²² The law grants judges wide discretion in deciding issues of child custody, including visitation.¹²³

Guardians are entitled to seek financial support on behalf of the child, including child support from the parents and welfare from the

¹¹⁶ MASS. GEN. LAWS ch. 190B, § 5-106(a)(2012).

¹¹⁷ C.P.C.S., Performance Standards Governing the Representation of Children and Parents in Child-Welfare Cases, *available at* http://www.publiccounsel.net/Private_Counsel_Manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil_trial_panel_standards.pdf.

¹¹⁸ *Id.* § 1.6(b).

¹¹⁹ *Id.* § 1.6(c).

¹²⁰ *Id.* § 1.6(d).

¹²¹ MASS. GEN. LAWS ch. 208, § 31(1998).

¹²² *In re* Adoption of Vito, 431 Mass. 550 (2000).

¹²³ *In re* Adoption of Hugo, 428 Mass. 219, 225, (1998).

state.¹²⁴ Guardians' income is not considered in determining welfare¹²⁵ or child support.¹²⁶ When the guardian receives welfare on behalf of the child through the state's Department of Transitional Assistance, then the Massachusetts Department of Revenue may seek reimbursement from the parents by suing them in the Probate and Family Court.¹²⁷ The Department of Revenue is required by state and federal law to provide services to "children and families" legally entitled to child support and must prioritize those families receiving welfare.¹²⁸ These provisions do not distinguish between temporary guardians and permanent guardians.

After losing a guardianship action, there are two ways that the former guardian can retain legal rights to the child. If the ex-guardian is the child's grandparent and the child's parents are not married, then the ex-guardian may seek "reasonable visitation rights."¹²⁹ To prevail, the ex-guardian must show "likelihood of significant harm" to the child if the petition is denied.¹³⁰ Alternatively, any ex-guardian may seek a determination that she is a "de facto parent."¹³¹ However, the ex-guardian's claim might be undercut if the parents did not consent to the guardianship.¹³² In that case, the ex-guardian may obtain visitation under the same standard as the grandparent.¹³³ It stands to reason that the longer the ex-guardian cared for the child, the stronger her argument would be that denying her visits would cause significant harm to the child.

¹²⁴ MASS. GEN. LAWS ch. 190B, § 5-209(c)(1)(2009) This article uses the term "welfare" to refer to cash benefits from the state, including Temporary Aid to Needy Families and "guardianship stipends."

¹²⁵ 106 Code Mass. Rules § 204.320.

¹²⁶ MASS. CHILD SUPPORT GUIDELINES § I. F (2013) available at <http://www.mass.gov/courts/childsupport/2013-child-support-guidelines.pdf>.

¹²⁷ MASS. GEN. LAWS ch. 119A, § 3 (2012).

¹²⁸ MASS. GEN. LAWS ch. 119A, § 2 (2008).

¹²⁹ MASS. GEN. LAWS ch. 119, § 39D (1998).

¹³⁰ *Blixt v. Blixt*, 437 Mass. 649, 657-58 (2002).

¹³¹ "A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (1999)(citations omitted). De facto parent status has also been awarded to an ex-guardian where the parent consented to the guardianship. *Youmans v. Ramos*, 429 Mass. 774, 782 (1999).

¹³² *Eccleston v. Bankosky*, 438 Mass. 428, 439 n. 17 (2003).

¹³³ *Blixt*, 437 Mass. 649 at 657-58.

The parallel legal structure available when someone fears that a child's parents are unfit is the child welfare system. These disputes are known as care and protection cases. Anyone, such as a potential guardian, can ask the court to place a child in the custody of the Department of Children and Families ("DCF").¹³⁴ If granted, DCF determines where the child will live: with the parent, with a family member, or in a foster home.¹³⁵ The court must immediately appoint attorneys for the parents and children¹³⁶ and hold a hearing within 72 hours.¹³⁷ As long as DCF retains custody, it controls visitation¹³⁸ and is obligated to help parents maintain "meaningful contact" with the children.¹³⁹ DCF also must vet caregivers¹⁴⁰ and is obligated to help the parents reunify with the children.¹⁴¹

B. Cases

The following four cases were handled by MVLS (a nonprofit that provides free legal services to low income people) between 2011 and 2013. In each case MVLS represented the child's mother. Each case was heard in front of a different judge in either Middlesex or Essex County (just outside Boston). Except where otherwise noted, the same judge presided at each hearing of the same case. While the facts are colorful, the practices followed were typical of contested guardianships handled by MVLS and attorneys from other parts of the state, and they conformed with statutory law. The focus on low-income litigants should not skew the sample because there is reason to believe that the vast majority of parents facing guardianship petitions have low incomes.¹⁴² The author personally

¹³⁴ MASS. GEN. LAWS ch. 119, § 24(2008).

¹³⁵ MASS. GEN. LAWS ch. 119, § 23(a)(3)(2011).

¹³⁶ MASS. GEN. LAWS ch. 119, § 29(2011).

¹³⁷ MASS. GEN. LAWS ch. 119, § 24(2008).

¹³⁸ MASS. GEN. LAWS ch. 119, § 23(a)(3)(2011).

¹³⁹ 110 Code Mass. Rules § 1.02(5). *See also* 110 Code Mass. Rules § 7.128.

¹⁴⁰ 110 Code Mass. Rules § 7.108.

¹⁴¹ 110 Code Mass. Rules § 1.02(4) and 1.03 ("the Department's goal is to alleviate or mitigate the causes necessitating placement"). Also, the court must certify initially and annually that DCF has made reasonable efforts to reunify the child with the parents. MASS. GEN. LAWS ch. 119, § 29(c)(2011).

¹⁴² In 2006 less than 2% of mothers were represented in guardianship proceedings. Virginia G. Weisz & Barbara Kaban, *Protecting Children: A Study of the Nature and Management of Guardianship of Minor Cases in Massachusetts Probate and Family Court 17* (Children's Law Center of Massachusetts, 2008). While in 8% of cases petitioners claim that the mother had abandoned the child (*id.* at 21), that leaves 90% of mothers who were involved in their child's life and yet unrepresented in cases where they could lose custody and visitation rights; presumably they would have hired counsel if

witnessed most of the proceedings described below. Where she did not, she either listened to recordings of them or she indicates in the text that the report came from the client.

1. Case A

Mother A was a recovering heroin addict. She lived with her two children and their father (“Father A”). When Father A’s stepmother (“Guardian A”) suspected that Mother A had relapsed, she filed for guardianship of the children. She won temporary guardianship, with the parents having visits at her discretion. At a review date two months later, the parents produced urinalysis screens showing that Mother A was clean and Father A had used marijuana.

In the 21 months after the petition was filed, the court held 18 hearings. Father A’s urinalysis showed that he had quit smoking marijuana after the first review, and the parents worked their way from effectively no visitation to supervised visitation (at their expense) to overnight visitation. In addition to the regular urinalysis, Mother A produced a clean hair follicle test and Father A produced a clean blood test.

Some storylines evolved from hearing to hearing. Guardian A’s counsel accused the parents of being late to visits; Mother’s counsel accused Guardian A of interfering with visits. Guardian A’s counsel said Mother A was drunk the week before; Mother’s counsel said Guardian A’s husband was arrested for driving a snow plow drunk. Guardian A’s counsel accused the parents of causing diaper rash; Mother’s counsel accused Guardian A of causing diaper rash. Guardian A’s counsel said her client suspected Mother A was using drugs; Mother’s counsel argued Guardian A’s home was unsafe because two of her three teenage sons had been arrested multiple times. About a year after the petition was filed, an attorney for the children was appointed. She argued for extension of the temporary guardianships. The hearings were all informal, meaning that formal evidence was not heard. The judge would give everyone a turn to talk and then rule on the spot.

MVLS asked for a formal evidentiary hearing after the case had been in court for 11 months. The judge agreed to put the case on track for trial, but at subsequent hearings he kept putting off scheduling a trial.

they could afford to. Thus it appears that mothers facing guardianship petitions are an overwhelmingly low-income, low-resource population.

Once the trial date finally arrived, he ordered the parties to come back in two months because he was busy. Twenty-one months after the petition was filed, the parties appeared on a day when the regular judge was on vacation. The substitute judge dismissed the petition, telling Guardian A's counsel that her case was based on hearsay.

2. Case B

After leaving her son's physically abusive father, Mother B took the father's stepmother (Guardian B) up on her offer to shelter the baby while Mother B looked for an apartment. Over the next few weeks Guardian B began denying Mother B access to the child. The day after Mother B told her she had found an apartment and a job, Guardian B filed for guardianship, arguing that Mother B was homeless and used drugs. She won a temporary guardianship, with Mother B receiving no visitation rights. At a review hearing the next month, Mother B produced a lease and clean hair follicle test results. The judge ordered a DCF representative to appear. The representative—an agency attorney not personally familiar with the case—stated that DCF did not have concerns about Guardian B's household, even though it had supported charges of sexual abuse against her husband ten years earlier. The judge extended the temporary guardianship; Mother B's attorney persuaded Guardian B to sign an agreement allowing Mother B visitation every weekend.

After that hearing, MVLS had to stop representing Mother B because her income exceeded its income guidelines. The judge extended the guardianship at each of the next two hearings. Mother B reported to the author that nothing changed from hearing to hearing: she held the same full time job, lived in the same apartment, and was drug-free. She said she brought her therapist and landlord to court, but the court would not hear their testimony.

Mother B reported to the author that during that time, Guardian B's dog bit the child's face. Mother B heard about it the next day from the child's Early Intervention case worker. The hospital would not allow Mother B to visit the child because Guardian B forbade it.

At the first two hearings where Mother B represented herself, she said she felt like the probation officers were not listening to her and were constantly telling her to be more respectful. At the third hearing – almost a year after the petition was filed – she got a different probation officer. Mother B said he acted “confused” as to why the guardianship was in place, and reported to the court that it was inappropriate. The court then dismissed it.

3. Case C

While Mother C was in rehab for alcohol abuse, her 1-year old son's father's sister took care of him. Mother C's two older children (the 1-year old's half-siblings) stayed with their father. Mother C completed rehab a week later and took the older children back. But the 1-year old's aunt (Guardian C) refused to return him. After weeks of negotiating for time with her son, Mother C called the police to force a return.

Guardian C filed for guardianship. The court granted temporary guardianship and filed a report with DCF. DCF conducted a thorough investigation of Mother C's household, including unannounced visits and interviews with the older children, the children's doctors, and the children's teachers. DCF found "no/minimal concern," reported positive observations about the family, and closed the case. The judge read DCF's report at the next hearing and ordered drug testing of all parties. Mother C tested positive for marijuana. The judge extended the guardianship and declined to order visitation, but scheduled a trial date at Mother C's counsel's request. Mother C appealed the decision to extend the guardianship and was denied a hearing on the dual grounds that the matter was scheduled for trial and that the trial judge was in a better position to assess Mother C's drug use than the appeals court. After trial, the judge dismissed the petition but noted his discomfort for the record, telling the courtroom that if the legal standard were "best interests of the child," he would have ruled for Guardian C.

4. Case D

Mother D was a teenager when her grandmother, Guardian D, filed for guardianship of her child. Guardian D alleged that Mother D was homeless and using drugs. Mother D volunteered to take a drug test, but the judge did not respond and did not order drug testing. The judge ordered temporary guardianship to Guardian D on an emergency basis, and then extended it for 90 days at the second hearing. Mother D and the child's paternal grandparents testified at the second temporary orders hearing that Guardian D smoked marijuana. The judge noted that Guardian D had a multi-page criminal record, including an arrest a few years prior at the scene of an accident for driving under the influence of drugs. Guardian D admitted that she had committed perjury in the past in order to obtain a restraining order against her husband. Mother D was unrepresented.

Mother D said that the day of the third hearing, Guardian D's attorney told her that if the case went to trial then her parental rights would likely be terminated. This is not a possible outcome of a guardianship petition. The attorney said that if Mother D consented to guardianship, her parental rights would not be terminated, and she would be able to see her child right away. Mother D recalls that they had this conversation in front of a probation officer, but that the probation officer did not correct Counsel D's misrepresentation of the law. Mother D signed an agreement that stated her parental rights "shall not be terminated." At the hearing, Guardian D's attorney told the judge that Mother D was in the hallway, but that Mother D understood what she signed. The judge extended the temporary guardianship and set a trial date at the request of the child's father. In the interim, Mother D signed a notarized consent to guardianship. At the next hearing the judge entered the permanent guardianship. Visitation was to be "WITH THE PERMISSION OF THE GUARDIAN AND UNDER THE GUARDIAN'S DIRECT SUPERVISION." Mother D was not present. The judge never determined whether her consent was knowing and voluntary.

Over the next few months, Guardian D stopped allowing Mother D to see her child. Mother D obtained representation through MVLS, who filed a petition to remove the guardian. The petition is pending.

C. Practice

Cases are assigned to a judge when they are filed, with the expectation that the same judge will preside over all hearings of the matter.¹⁴³ For the most part, every time a case is scheduled for hearing, the parties must go to "probation" first. Probation officers—state employees, many with social work backgrounds—pull the parties' criminal records, calculate child support when relevant, mediate the dispute, summarize the situation for the judge, and perform other functions requested by the judge.¹⁴⁴ In at least one county, probation officers do not mediate when all parties are represented by counsel.

Massachusetts judges interpret "likelihood of substantial harm" loosely. While the statute requires them to "find" it, judges do not make particularized written findings. Instead, the pre-fabricated temporary guardianship order merely states that the "[t]he Court finds" it. When

¹⁴³ Babb, *supra* note 3, at 254.

¹⁴⁴ For examples of the probation department's responsibilities, see Mass. R. Prob. And Fam. Ct. Orders 2-98, 1-10, 1-11, and 2-11.

judges sign extensions, the form they sign says the extension is “for good cause shown.” When Mother C appealed an extension on the ground that good cause had not been shown, the appeals judge did not address her argument.

Judges do not hold evidentiary hearings before ordering temporary guardianship. Instead, they hear offers of proof. In other words, parties or their counsel take turns speaking against one another, with no interruption allowed. The judge halts the hearing when he is satisfied. At the initial hearing, the petitioner must submit a signed affidavit. At subsequent hearings, no written material is required, although counsel sometimes submits memoranda or suggestive motions. In none of the three completed cases described here did petitioners formally move for the extensions they received. There seems to be a general assumption that temporary orders will be extended: probation officers say “that’s not on for today” when parties say they want the guardianship to expire, even though the orders in fact expire that day.

The practice of allowing counsel to summarize their cases without presenting evidence assumes that counsel are honest and possess reliable memories of what witnesses have told them. As a practical matter, one might wonder whether all attorneys fit these specifications. Guardian D’s attorney, for example, had lost her license to practice law from 2002 to 2011 due to unethical conduct. She testified extensively about Mother D. Her testimony was not subject to cross-examination.¹⁴⁵ Her synopsis of the case flowed into the record, and perhaps the judge’s psyche, with the status of credible evidence.

Exhibits may be submitted if all parties agree. Parties might agree because there is a risk of negative inference if a party does not agree. DCF workers appear to be always welcome. Others may be allowed to speak, such as the relatives in Case D. Judges may also refuse to hear witnesses, as happened in Case A and (reportedly) Case B. Overall, these hearings are firmly controlled by judges yet feel hopelessly out-of-control to the attorney hearing a litany of objectionable allegations against her client for the first time.

Judges do not allow interruption (e.g., “objection”), do not make credibility determinations, and do not make findings regarding petitioners’

¹⁴⁵ To be fair, the author does not know of any case where someone sought to cross-examine a testifying attorney. But she has observed that judges react with hostility to statements that challenge counsel’s honesty. In any case, judges have significant leeway because of the weak rights to appellate review of interlocutory orders. *See* Part III.A.

suitability to care for children. Neither credibility nor guardians' suitability seem to be important factors at temporary guardianship hearings. For example, Guardian A repeatedly prevailed even though she had three troubled children of her own, including two with delinquency records, a husband who was convicted of driving a snow plow drunk, an open file with DCF, a Svengali-like therapist who came with her to court and appeared to be stalking Mother A, a warbly voice that appeared to be affected by medication, and she frequently denied visits to the parents in violation of the court order, including on both children's birthdays. Guardian B's husband had been credibly accused of physically assaulting his son and sexually assaulting his daughter. Guardian C was a single parent of three other young children, and she co-petitioned with her mother, who shared a household with a man who had several open charges for violent behavior. Guardian D admitted driving under the influence a few years earlier, abusing drugs, and perjuring herself to obtain a restraining order against her husband. The court had this information in each case. Credibility was not any of the guardians' strong suits, but it also apparently was never taken into account. Suitability was addressed, but judges appeared to hold guardians to a low standard and did not make findings about it.

At the temporary orders hearing, judges do not simply hear presentations by the party. They also conduct their own inquiries. They ask the parties questions about how they are doing and how the visits have been. They ask underlings to access and review the parties' court activity record. They order parties to take drug tests.

There are different kinds of drug test orders. The judge can order parties to undergo urinalysis that day in the courthouse, before he rules, as in Case C. He can also order parties to take drug tests outside the court in order to inform his next ruling. In Case A, the judge ordered the parents to take a hair follicle test (considered more reliable than urinalysis) through an agency that charged \$120 each. Mother A took the test. Mother C was ordered to undergo random drug testing. That meant she had to call the testing center every single morning. Roughly every few weeks, the center would tell her to come in and take a test. Each test cost her \$50 and interfered with her work schedule. In Case D, after filing to remove the guardian, Mother D was ordered to take a \$120 hair follicle test even though there was no evidence of her ever having used drugs besides Guardian D's conjecture. The results were clean. About two months after Mother D passing the test, the judge ruled against her having unsupervised visits, stating that she was concerned about drug use. These experiences

show that judges impose costs on low-income parents without a showing that the costs are necessary, then disregard results that favor the parents.

Judges also order non-parties to appear—usually representatives of DCF. This happened at least once each in Cases A and B. In Case C, the court triggered DCF involvement by filing a report of suspected neglect, but it was Mother’s counsel who subpoenaed DCF to the next hearing. In Case A, the social worker insisted she was unable to opine about which party should have custody, but described the parents as compliant with their DCF service plan. When the judge ordered a report, the social worker described the parents’ compliance and positive interactions with the children, but also cited “rumors in the community.” According to the social worker, the rumors were added by her manager, who had consulted with Guardian A’s counsel and “family therapist” but had not met the parents. DCF cancelled services to Mother A, stating in the court report that “the community has unrealistic expectations of DCF role and what we can and can not do.” In Case B the DCF attorney told the court he was unfamiliar with the case, including his agency’s report about it,¹⁴⁶ but that DCF did not object to Guardian B having custody.

Judges may also appoint attorneys for the children. As discussed above, these attorneys are supposed to represent what the children want, but they have ethical leeway to substitute their own judgment.

Martin Guggenheim has written extensively on the tendency of judges in New York to use children’s attorneys as fact-finders or minions and to over-value their presentations, as well as to pressure them to embrace this role.¹⁴⁷ A judge in Virginia also asserts that children’s attorneys serve a fact-finding and recommending function, although she takes a more positive view.¹⁴⁸ This was standard practice California until recently, when the legislature de-authorized courts from ordering investigative reports and recommendations from children’s attorneys.¹⁴⁹

¹⁴⁶ Recording of hearing on file with the author.

¹⁴⁷ Martin Guggenheim, *A LAW GUARDIAN BY ANY OTHER NAME: A CRITIQUE OF THE REPORT OF THE MATRIMONIAL COMMISSION*, 27 Pace L. Rev. 785, 808-20 (2007); Martin Guggenheim, *HOW CHILDREN’S LAWYERS SERVE STATE INTERESTS*, 6 Nev. L.J. 805, 819-822 (2006) (relating the story of an appellate court removing the child’s lawyer after the lawyer sought for the parents to retain custody).

¹⁴⁸ Amy M. Pellman, Robert N. Jacobs & Dara K. Reiner, *A CHILD CENTERED RESPONSE TO THE ELKINS FAMILY LAW TASK FORCE*, 20 Wm. & Mary Bill Rts. J. 81, 104 (Oct. 2011). Also see *id.* at 111-12 (“A child’s lawyer is often a combination of attorney, counselor, and mediator... Without children’s lawyers, the court is often flying blind”).

¹⁴⁹ *Id.* at 115-16.

Children's attorneys in Massachusetts often appear in front of the same judges repeatedly.¹⁵⁰ In Case A, the children's attorney hailed from the same coastal town as the parties and Guardian A's counsel. Both counsel admitted during negotiations not to knowing key provisions of the guardianship statute. The children's attorney's clients were adamant that they wanted to return to their parents. The attorney told the court that it was difficult to understand what the 8-year-old wanted because he was prone to throwing tantrums. While she did not argue the law and did not overtly advocate much, she was thorough in conducting factual investigation. She frequently contacted service providers and schools.

The children's attorney also faithfully reported her impressions to the judge. For example: "I can genuinely say to the court that I really believe [the parents] are trying." She seemed to see herself as an authority figure more than as an advocate. In arguing for an extension of the temporary guardianships, she allowed, "there are some things that are going right. The parents have always made themselves available to me to come visit."¹⁵¹ The judge's view of her matched her own. He described her as "one of the best attorneys that comes into this court and she's willing to facilitate and try to mediate."¹⁵²

In Case C, the children's attorney performed a similar role. She did not overtly advocate for one position or another on the record (her client was pre-verbal, so she had nothing to report about his actual position). This pose persisted even at the trial, although she did treat Mother C as a hostile witness and met with Guardian C during the lunch break. She told me (Mother C's counsel) that she wished DCF had remained involved so that it could give Mother C tasks to complete, and then she could use that as a gauge of Mother C's fitness. This view confirms that she saw herself not as an advocate, but as a fact-finder with motion-filing superpowers.

¹⁵⁰ For example, take Essex County in the northeastern corner of the state. Its family court has two courthouses and five full-time sitting judges. For the most part, all cases are scheduled to be heard first thing in the morning, and parties are liable to wait all day to be called. During that time attorneys may work on other cases within the building. Many attorneys who practice there (including the Case A attorneys) live much closer to the Essex Probate & Family Court sessions than to the next-nearest Massachusetts family courts in Boston and Cambridge, which in addition to being far away are blockaded by horrific traffic. Therefore it is rational for attorneys to focus their practice on the one small county they live in, and in fact they seem to: after practicing just a year, the courthouse seems full of friendly faces.

¹⁵¹ Recording on file with the author.

¹⁵² Recording on file with the author.

In Case C, the child's attorney received her appointment less than a week before a scheduled hearing. In Case A, the children's attorney's first hearing was not scheduled far in advance. In both cases, the attorneys told the court that they had not had time to develop a position. They said that they had concerns about the parents based on what they had heard so far and they wanted the orders continued so they could have more time to investigate. In other words, while refusing to state a position, they argued in favor of temporary guardianship.

In a case where MVLS represented a mother involved in a care and protection case, the children's attorney did not conduct any discovery or produce memoranda as ordered. Informally, she opposed Mother's counsel's efforts to conduct discovery into the father's drug use and DCF's actions in the case, even though there was no logical reason for the children to oppose discovery requests. Her clients were both under the age of five and therefore too young to assess her performance.

If judges want someone to investigate the family and report back, they have the option of appointing a guardian ad litem (GAL). The GAL would have to write a report according to certain standards and would be subject to cross-examination. In that case, GALs would be performing the fact-finding role that children's attorneys do, but in a more formal and accountable way. For some reason, judges rarely appoint GALs in guardianships. Perhaps this is because the guardianship statute reminds them of their discretionary power to appoint counsel to children but is silent as to GALs.

The probate and family courts rely on in-house "probation" departments. Probation officers pull criminal records¹⁵³, interview parties and counsel, administer drug tests, mediate, and make recommendations to the judge. Clerks routinely send parties to probation before allowing them to be heard by the judge. In Case A, probation officers tended to encourage more visitation by the parents. They also tended to lecture the parents about whatever interested them, from being on time to visits to working more hours at their jobs. In Case B, Mother B credits a probation officer with persuading the judge to dismiss the guardianship. At the previous hearings where the judge did not dismiss, the probation officer was not recommending dismissal.

In Case D, the probation officer at one of the hearings reported to the judge that parties argued about visitation and "ARGUMENTS

¹⁵³ Mass. R. Prob. And Fam. Ct. Order 2-11.

INCREASED AFTER COUNSEL'S BRIEF SUMMARY WHICH WAS PROFESSIONAL. THE MATERNAL GRANDFATHER RAISED HIS VOICE, THEN SWORE MORE THAN ONCE." Having heard many of that counsel's brief summaries herself, the author can report that they often seemed calculated to enrage her opposing party.

When the guardian receives welfare on behalf of the child, it takes about a year before the state sues the parents for child support as reimbursement. Then the state seeks it retroactive to the day when the benefits began issuing. These cases are docketed separately from the guardianship and are not assigned to the same judge (unless by coincidence). In Case A, Mother's counsel asked the Department of Revenue (DOR) to agree to continuances several times until the guardianship ended, at which time the DOR agreed to drop the complaint. Another client of MVLS, who represented herself for the first year and a half after the guardianship began, paid most or all of every paycheck to the state as child support for months.

In the course of the temporary guardianship hearings, judges often speak directly to litigants in order to advise, encourage, or admonish them. In Case A, the judge frequently praised the parents on their sobriety and "progress" while nonetheless extending the temporary guardianship. This ambivalence appeared to frustrate the parents. The judge also lectured Guardian A, admonishing her that her home should not be more chaotic than the home of the parents whose children she'd taken guardianship of. In Case C, the judge said to Mother C, "you have a choice: smoke pot or be a parent."

It often seems that the judge has developed feelings about a case and is genuinely anxious about returning the children to the parents. In Case A, the parties' fortunes changed radically when Judge A went on vacation.

Because temporary guardianships may be extended indefinitely without evidence, the stricter "fitness standard" required for obtaining permanent guardianship is practically irrelevant. The only reason for a guardian to press for permanent guardianship (or not to obstruct a press for trial) is to end the necessity of returning to court every 90 days. But that is no real incentive, because a parent can petition to terminate a guardianship at any time—thus bringing the parties back to court.¹⁵⁴

¹⁵⁴ See *infra* Part VI.

Judges might set trial dates when pressed, but they have many tools at their disposal for postponing them. When Mother's counsel asked for a trial in Case A, the judge set a pre-trial date but then continued the pre-trial. Later, he set a trial date, but on that date he said he was too busy and continued it for two months. During the last few hearings, there was considerable discussion by the children's attorney, the judge, and Mother's counsel about how well the parents were doing. The judge said to Mother A, "no one has talked about your conduct, your parenting, other than you've been cooperating, you've been positive." At another point during the hearing, he said, "the issue is not [one of the children] or your fitness at this point ... that's why a trial date is not inappropriate." The judge appeared to be admitting that the decision of whether to hold a trial was entirely in his discretion, and he would only hold one when he approved of what the outcome would be.

Case C was scheduled for trial after Mother's counsel asked for a trial. Case B, where the client proceeded *pro se*, was never tried. It is unclear whether judges ever *sua sponte* schedule contested guardianships for trial. One advocate who frequently represents guardians told the author by email, "We don't see judges pushing for resolution of contested cases. Those do meander and get put off every 3 months. I think that with time the less than ideal parent fails to appear and the court can enter permanent guardianship with proper notice."

Care and protection is the *bete noire* of guardianships proceedings. When judges and probation officers remind parents that they are lucky to have the guardians in their life, the officials explain that the last thing they want is for the children to end up in DCF custody. The implication is that when the DCF has custody, it places the children in horrifying foster homes. In fact, DCF has a strong preference for placing children with their family.¹⁵⁵ DCF may even let the children live with their parents, as a DCF worker involved in Case A said she would do.

Nevertheless, parents fear state custody because of the uncertainty. This was especially true in Case A, where Father A at times asked Mother's counsel not to disclose damaging information about Guardian A. In Case D, Mother D reported that Guardian D's counsel told her the last thing she wanted was for DCF to get involved. When probation officers and judges raise the specter of DCF custody, there is practically an ethical obligation for the parent's attorney to nod her head solemnly. But based on the author's mostly positive experiences with DCF social workers and

¹⁵⁵ 110 Code Mass. Rules § 7.101(2)(a).

her overwhelmingly negative experiences with guardians, she suspects that some clients would be better off dealing with the state than with their family.

Despite the procedural looseness of temporary hearings, it is still possible to play procedural tricks. For example, in her action to remove Guardian D, Mother D moved for temporary custody or, in the alternative, visits. Guardian D moved for child support and costly random alcohol screening of Mother D. After several hours in probation, Guardian D's counsel announced she had just received new information and felt compelled to advise her client to seek a restraining order against Mother D on behalf of the child. Filling out the petition delayed the motions hearing until after lunch. After hearing on the restraining order Judge D denied it, but said there was no time to hear the motions. The judge continued the hearing to another date more than a week later. On the day to which the hearing was continued, Counsel D requested a closed session, which pushed the hearing perilously late in the day. Luckily, the clerk found another judge to hear the motions, and after hearing she granted Mother D's motion for visitation and denied Guardian D's motions for child support and random alcohol screening.

Both Guardians A and C walked away with visitation rights. The judges encouraged the parties to agree to visitation when dismissing the cases. The mothers agreed, considering the possibility of successful or at least burdensome grandparent visitation petitions. Guardian A's visitation was to take place during Father A's parenting time. Guardian C's visitation was time-limited at 90 days. Both judges expressed concern that the children would suddenly be cut off from their primary caretaker. Ironically, neither of these judges granted enforceable visitation rights to the parents at the start of the guardianship.

D. Analysis

Part II identified four hallmarks of adversarialism. These hallmarks are largely absent from guardianship cases in Massachusetts.

1. Passive Judges

Judges in guardianship proceedings are very active. They conduct discovery by calling witnesses, ordering drug tests, and asking questions. They lecture litigants. They appear to remember the case from hearing to hearing and even appear to have feelings about it. These behaviors run contrary to adversarialism, as judges in adversary systems are primarily

concerned with ensuring procedural fairness. Judges in guardianships are not. While they are deeply engaged in factual inquiries, they grant cursory attention to law and procedure. Judges in guardianships tend not to make particularized findings, and instead sign pre-fabricated forms. Generally, their tone also indicates that they are more personally engaged than legally engaged.

In exalting the fact-finding ability of the trial court judge, the Case C appeal decision states that he had “observed the pattern of the mother’s behavior.” While judges in adversary proceedings are supposed to observe witnesses’ demeanor during their testimony, it appears that the appeals judge was referring to family court judges’ practice of “observing” a party over time. The appeals judge also did not address Mother C’s argument that the court could not extend temporary orders without a showing of evidence under the “good cause” standard. Therefore the appeals court condones the lower court’s practice of deciding matters according to their general sense of the parties, rather than by applying strict procedural and evidentiary rules.

Judges have almost total discretion over when to end guardianship litigation by holding a trial. In adversary systems, law determines when a trial is appropriate. Because guardianship judges direct discovery, engage with litigants, and generally concern themselves more with substantive/factual issues than procedural/legal ones, their role diminishes adversarialism.

2. Rigid Rules of Evidence

Oral testimony and strict rules mark adversary systems.¹⁵⁶ While temporary guardianship hearings proceed largely on oral presentations, the way they presented resemble written submissions in inquisitory hearings. This is because they are not subject to cross-examination and the other side cannot interrupt with objections, such as hearsay. The judge reviews evidence at temporary hearings that would not survive counsel’s objections at trial: arrest records, drug tests processed cheaply or out of state, statements that are more prejudicial than probative, and plenty of hearsay and speculation. Presumably the judge discounts suspect evidence as he sees fit; nevertheless, this laissez-faire attitude toward evidence is not adversarial.

¹⁵⁶ *Supra* section II.

Once guardianships reach the stage of deciding permanent guardianship, which is dubbed a “trial” rather than the more nebulous and informal “hearing,” the rules of evidence become rigid. But judges control when and whether this occurs.¹⁵⁷ Because the final judgment depends on the child’s relationship with the petitioner, the judgment is prejudiced by the temporary orders giving the guardian custody.¹⁵⁸ Thus, the stage where rigid evidence rules apply is not the crucial one.

3. Day in Court

Guardianship proceedings consist of a series of temporary order hearings. Cases rarely go to trial, and even if they do, it is not in a timely manner. Once they go to trial, the litigants can easily get the case back in court for a litany of reasons. For example, a petitioner who has lost can allege another emergency based on concerns of drug use; a parent who has lost can petition to remove the guardian. The new petition is supposed to be assigned to the same judge who heard the first one.¹⁵⁹ This lack of finality devalues “the day in court” so central to adversarialism.

While it is easy to get back in front of the same judge, it is difficult to get review by a different judge. Neither a temporary nor permanent guardianship order may be reviewed *de novo* by a higher court. Interlocutory custody appeals face an almost impossibly steep climb.¹⁶⁰ In this way, guardianship appears adversarial. Ironically, this one traditional adversary element is what cements the reformism of guardianship: if trial judges were liable to be second-guessed by appeals judges, they might devote a greater share of their attention to procedural rights and technical legal standards.

4. Rights

The courts’ expansive attitude toward evidence, loose approach to procedure, and the way it uses children’s attorneys indicate that they are primarily seeking “truth” rather than fairness.

This was clear in both Cases A and C, where the children’s attorneys acted as investigators rather than as spokespeople or strategists. The judges allowed and even encouraged this. The Elkins Task Force that

¹⁵⁷ *Supra* section III.C.

¹⁵⁸ *In re Adoption of Zoltan*, 71 Mass. App. Ct. 185, 188 (2008)(citations omitted).

¹⁵⁹ Babb, *supra* note 3, at 234.

¹⁶⁰ *Supra* Part III.A.

advised California to make its family law system more adversarial in its rules of evidence also recommended that “minor’s counsel . . . should not make ‘recommendations,’ file a report, testify, or present anything other than proper pleadings.”¹⁶¹ This coincidence supports the idea that investigative children’s attorneys are not a feature of adversarialism.

To treat a child’s attorney like an investigator or witness is to risk the proceeding’s integrity. A reformist judge might take that risk on the grounds that it would scare up more evidence. An adversary judge, being more focused on fairness than on maximizing evidence, would not take the risk.

5. Conclusion

On every measure except some rules of appeal and theoretical rights, Massachusetts guardianship practice is not adversarial. There is hardly any adversary influence on the system at all. It is, however, heavily influenced by reform. The cases are heard by one judge in a UFC, parties are regularly ordered to mediate and sit down with probation officers who are tasked with social work or mediator-type duties, judges encourage involvement with therapists and drug treatment programs, and the courthouse keeps in touch with social services. While the mediators could be more credentialed and the judges more psychologically astute, it is hard to imagine a real world system achieving reformers’ ideals more closely than Massachusetts’ guardianship does. Yet the system that Mothers A, B, C, and D experienced was not therapeutic, nor did it solve their families’ problems. It was just freestyle judging.

IV. Why Massachusetts Judges Fail to Detect Bogus Claims in Guardianships

In Cases A, B, and C, courts pulled children out of their homes and then put them back again many months later, even though little had changed. Why did the children have to leave their homes, and why did they have to wait so long to return?

¹⁶¹ Admin. Office of the Courts, The Elkins Family Law Task Force: Final Report and Recommendations §§ II(B)(9)(b) and II(B)(10)(a) (2010), *available at* <http://www.courts.ca.gov/xbcr/cc/elkins-finalreport.pdf>. The legislature adopted this recommendation in a simplified and arguably ambiguous form: “Counsel shall not be called as a witness in the proceeding.” Cal. Fam. Code § 3151(b).

Part II identified four key features of adversarialism. Part III showed that Massachusetts' guardianship practice exemplified none of them but did embody non-adversary reforms—a recipe that this article calls freestyle judging. Each non-adversary aspect of Massachusetts' guardianship practice contributes to capricious custody orders.

1. Passive Judges

The judges' active involvement in temporary guardianship hearings contributes to their lapses in judgment. Judges' intelligence falters during temporary guardianship hearings because the hearings are disorganized, confusing, and demanding. It is common to hear statements from judges during guardianship hearings that are logically or legally flawed. For example, in Case A, the judge favored extending the guardianship because moving the children fully back to the parents would create “a chance, a risk of a setback, and no one wants that.” This was in the same hearing that he noted there were no allegations being raised against the parents. Later in the same hearing he said, “the children will adapt very quickly if they're in a safe environment.” In Case B, the judge flatly misstated the law. Counsel pointed out that Mother B had countered all of the allegations made against her with documentary evidence. Judge B said, “I'll tell you what... if you can get discovery done to the point that you can show me clear and convincing evidence, I'm happy to accelerate [the next hearing.]” Mother A's counsel replied, “as I understand the law, the burden of proof is on [the petitioner].” “That's my order,” said Judge B. What made these two judges so sloppy? They were driving the hearings themselves, with little structure to guide them. They were making up their own arguments off the cuff instead of simply choosing between the carefully-prepared arguments of counsel. The demands of a non-adversary hearing combined with the emotionalism of child custody argument depleted the judges.

As a result of engaging in the same case over and over again, judges may become emotionally invested. The author observed one judge at a review hearing yell at the mother for failing to call her daughter consistently even though the court order allowed her to: “I gave you those phone calls!” A judge seeing the case for the first time would count the unmade phone calls as a mark against the mother. This judge, who had been monitoring the mother for months, appeared to feel furious anger toward her. It is reasonable to assume that the dispassionate judge would rule differently than the one who used the first person pronoun; indeed, the angry judge's final order a few months later could not have been more draconian.

Researchers have confirmed that judges' biases are exacerbated when they direct discovery,¹⁶² which they often do in guardianships.¹⁶³ Certain types of prejudice have been found to manifest themselves more in ADR than traditional adversary litigation.¹⁶⁴ While litigants in guardianships are often of the same racial/ethnic background as each other, the parents are typically younger than the petitioners by a generation. Since judges tend to be middle-aged or older—much closer in age to petitioners than parents—an age-related prejudice might be expected to arise against parents. Judges might also be expected to sympathize with parties who hold more prestigious jobs or completed more education. Passive judging would blunt the effects of bias.

Finally, the open-endedness of the judge's role in these proceedings leads judges to be, in a way, too nice—or at least too civilized. Rather than simply listen and rule on objections, they bring their sense of manners into the courtroom, punishing direct language and making clear they assume everyone has come to the courthouse in good faith. For example, in a divorce case the author once had an opposing party who consistently lied on his financial statements, low-balling his income by about \$1,000 per week. After she obtained the pay roll records that proved it, she described his lie as a lie. The judge pointedly told her he disagreed with her use of the word lie and declined to order retroactive child support, in effect leaving it up to negotiation—even though there was no ambiguity about what had happened. The deceptively casual tone of family court appears to lull some judges into a party-host mode, where they are more concerned about striking the right tone than reaching the right answer. It's nice, but it indulges liars.

2. Rigid Rules of Evidence

The lax rules of evidence at work in temporary guardianship hearings allow more evidence in without forcing judges to think critically about it. At temporary guardianship hearings, judges hear a lot of statements that are more prejudicial than probative. Petitioners slime parents with hearsay and speculation. Opponents of strict adversary-style rules of evidence argue that judges are intelligent enough to decide the

¹⁶² See, e.g., John Thibaut, Laurens Walker, & E. Allen Lind, *ADVERSARY PRESENTATION AND BIAS IN LEGAL DECISIONMAKING*, 86 Harv. L. Rev. 386 (Dec. 1972).

¹⁶³ See *supra* Part IV.

¹⁶⁴ Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee and David Hubbert, *FAIRNESS AND FORMALITY: MINIMIZING THE RISK OF PREJUDICE IN ALTERNATIVE DISPUTE RESOLUTION*, Wis. L. Rev. 1359 (1985).

worth of a statement on their own.¹⁶⁵ But this gives humans too much credit. In practice, people do not disregard rumor, innuendo, or slime. Our instincts tell us that “where there’s smoke, there’s fire¹⁶⁶.”

The abundance of data created by lax rules appeals to some opponents of adversarialism.¹⁶⁷ In arguing for the usefulness of children’s attorneys, one Virginia judge writes of a case where:

court-appointed counsel for two elementary school-aged children went to a parent's house and learned that the parents also had a teenaged daughter, who weighed almost 400 pounds, was not otherwise disabled, had no relationship with the other parent, was 'home schooled,' and rarely left home. Minor's counsel was able to shed light on the teen's issues, though she was not involved in the custody dispute.¹⁶⁸

The oddness of this anecdote gets to the heart of the problem with favoring more evidence over better evidence. First, couldn’t any family be hiding such a child, not just one who happens to have a case before the family court? Second, the teenage girl was not relevant to the questions before the court. If she were, at least one of the parties would have used her in an effort to prevail on the other questions. Similarly, where a guardianship petitioner genuinely believes a rumor that the parent deals drugs, she should call the police and/or DCF, or do what it takes to turn the rumor into admissible evidence. The legal system should not degrade its rules of evidence in order to accommodate her unwillingness to call the police, make a report to DCF, or bring witnesses to court herself.

¹⁶⁵ See Langbein, *supra* note 18, at 828; See also, Frankel, *supra* note 15, at 1053 (mocking the concept of ‘the virginally ignorant judge.’); See also, Folberg, *supra* note 31, at 451 (acknowledging that one’s level of concern about impartiality depends on one’s view of judges and, for the author’s part, stating, “I have much faith in the integrity of American judges.”).

¹⁶⁶ The psychologist Daniel Kahneman has written on the phenomenon of people instinctively relying on information that they know intellectually is not reliable. See Daniel Kahneman, *THINKING, FAST AND SLOW*, (Farrar, Straus and Giroux 2013) 153 (“Unless you decide immediately to reject evidence [...] your System 1 will automatically process the information available as if it were true.”).

¹⁶⁷ E.g., Weinstein, *supra* note 8, at 90-97; Frankel, *supra* note 15 at 1038.

¹⁶⁸ Pellman et al., *supra* note 150, at 110 (describing children’s attorneys as bolstering adversarialism; the argument is at least partly disingenuous, because in the same article the authors laud the tendency of children’s attorneys to act as mediators or fact-finders (*id.* at 104 and 111)).

Because of lax rules of evidence, counsel testify about their impressions. It is merely annoying when adult parties' counsel do this.¹⁶⁹ The more insidious practice is for children's attorneys to testify—not only about what their clients want, but about what the attorneys have observed and what they believe to be in the children's best interests. This is the practice that California's Elkins legislation cracked down on.¹⁷⁰

Testimony by children's attorneys is a problem because judges esteem them and understand them to be neutral.¹⁷¹ It stands to reason that the judge would view the child's attorney as his avatar. He knows that the adults' attorneys are saying what their flawed clients want them to say, while the child's attorney—a professional who was educated and socialized in a way similar to the judge—has the leeway to present her own point of view (both because the ethical standards allow her to¹⁷² and because her client is not standing next to her). Therefore the child's attorney's statements are unofficially treated like the statements of an expert witness, even though she lacks mental health training and has a financial interest in the case continuing.

3. Day in Court

Parents facing guardianship spend a lot of days in court, but they are not entitled to trial. The rambling structure of temporary guardianship proceedings limits appeal rights and imposes no deadlines on actors who have every incentive to procrastinate.

Appeals are less likely to be heard on temporary orders, especially in child custody cases.¹⁷³ This leads to an ill-defined legal standard for temporary guardianship and invincible judges. Lack of review could in theory help either side, but petitioners have a compelling emotional argument: they are telling the judge that denying their motion will result in substantial harm to the child. Fear—especially fear of hearing your name on the evening news—is a powerful motivator.

In a typical guardianship, every party has reason to delay. Petitioners want to delay because the looser standards of temporary orders hearings favor claimants. Once they obtain their first temporary

¹⁶⁹ For example, by gushing about how much they admire their clients or about the cuteness of the child in question.

¹⁷⁰ See Admin. Office of the Courts, *supra* note 164.

¹⁷¹ Guggenheim, *A Law Guardian By Any Other Name*, *supra* note 149, at 809-10.

¹⁷² C.P.C.S., *supra* note 117.

¹⁷³ *Supra* Part III.A.

guardianship, there is practically nothing to gain and everything to lose by going to trial. In a system where lawyers played an important role, petitioners would have a financial incentive to move the proceedings along instead of coming back to court every 90 days. But when winning requires you to sling mud at an opposing party and nothing else, you don't need to hire counsel.

Children's attorneys are paid by the hour, so they have a financial incentive to allow the guardianship petition to stay open rather than become permanent or be dismissed. It is also generally more difficult to prepare for a trial than for a temporary orders hearing. Children's attorneys do not need to seek extension of temporary orders explicitly. To pursue that outcome, they only need to say, "well, your honor, I do have some concerns..."

Though trials may be in parents' interests, they tend not to want them. The stakes seem much higher, even though they arguably are the same.¹⁷⁴ According to Mother D, Guardian D's attorney told her that her rights would likely be terminated at trial. Mother A, who feared trial, reported that Guardian A's counsel told Mother A's mother that Mother A would lose everything in a trial. Unrepresented parties are especially vulnerable to misinformation and scare tactics. The perceived unfairness of temporary orders hearings demoralizes parents. Basically, parents are risk-averse when it comes to their children, the guardianship process makes parents even more risk-averse, and trial seems like a risk.

Judges generally favor settlement over trial.¹⁷⁵ Those who take the family law reform literature at face value may believe settling is categorically better for children than trial. On top of that, they may think they are doing the family good by talking with the parents every 90 days.¹⁷⁶ They may also think of trial as a symbolic event, and want to delay it until they have gathered enough information to make up their mind, as when Judge A said a trial would not be inappropriate because everyone was saying positive things about the parents. Finally, judges may view trials as time- and energy-intensive. Case C's trial lasted several hours, whereas the temporary orders hearings lasted less than an hour

¹⁷⁴ See *infra* Part VI.

¹⁷⁵ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 401-02 (Dec. 1982); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 (May 1984) ("[J]udges often announce settlements not with a sense of frustration or disappointment [...] but with a sigh of relief").

¹⁷⁶ When MVLS said it was not the court's role to oversee families, Judge A told the attorney that she was wrong.

each. Judges typically write rationales for final judgments but not for temporary orders. This may be because they are more likely to be overturned on appeal of a final judgment than a temporary order.

No actor in a guardianship is eager for trial. Every party has her own reason to seek delay. Guardianship law imposes no obligation on the judge to deny requests for delay, and he may favor delay himself. Thus, dubious temporary orders are extended.

4. Rights

Judges in guardianships do not behave like protectors of rights. They lecture parents, fret about children being late to camp, seek truth, and encourage harmony. This distraction benefits parties with bogus claims.

None of the parents described in this article are perfect. Some of the petitioners' accusations against them, while not so bad as to warrant a change in custody, were true. These accusations would pique the judge's concern. Rather than tell himself, "that's too bad, but I can't fix it" he would jump right into problem-solving mode. This meant, as a threshold matter, issuing a temporary guardianship to whomever was asking for it. In the guise of being a helpful guy, the judge was letting a troublemaking petitioner through the courthouse door and into a family.

Some of the problems that petitioners described were actually precipitated by the guardianship itself. Parents were late to a visit with the child because they didn't want to skip a shift at their new job. They missed a random drug screen because they did not have the money.

The drive to preserve family harmony can help parties with bogus claims. When parties do not agree, it is a sign of their intransigence. A parent can look "unreasonable" because she will not compromise with her dolefully concerned mother-in-law.¹⁷⁷ When parties do agree, judges may not scrutinize the agreements. This was especially the case in Case D, when the unrepresented teenage mother consented to a permanent guardianship that did not allow her any enforceable right to see her child.

Guardianship has features besides non-adversarialism. The proceedings occur in Massachusetts Probate & Family Court, which is a

¹⁷⁷ See Sinden, *supra* note 48, at 352 (discussing the social pressures to settle in the family court setting); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1556 (1991).

UFC. The services performed on-site by probation—mediation, drug testing, coordination with social services—are all characteristics of the family law reform movement that supplement what happens inside the courtroom. Based on the guardianship cases described in this article, these non-procedural reforms are not directly to blame for courts indulging bogus claims. But they may have indirect consequences when judges rely on them inappropriately. A probation officer describes a party as belligerent, so the judge takes an aggressive stance with him. A drug test shows marijuana use, so the judge automatically rules against the party rather than exercising discretion. A probation officer helps draft an agreement, so the judge rubber stamps it. When combined with non-adversary courtroom procedure, supplementary reforms can be dangerous to judging.

Judges do not make any findings after the initial “emergency situation” except by signing under a pre-printed conclusory statement. Simply articulating a reason for extending a guardianship would refocus them on rights. They should also make findings of credibility whenever two witnesses contradict each other. To protect children, they should address all allegations made against the petitioner and find them either false or immaterial before granting the petitioner custody. When parents consent to guardianship, the judge should find that the consent was knowing and voluntary. All statements to the judge should be held to normal evidentiary standards, with interruption allowed for objections and rulings on those objections. If all these rules went into place, then instead of spending her time “problem-solving,” the judge would have to focus on sifting observations from guesses, and measuring evidence against legal standards. This would devastate parties peddling sensationalism.

V. The Problems in Guardianship are Generalizable to Child Custody

The problems described above are not unique to Massachusetts guardianships. Inflammatory claims are made in every type of child custody case, everywhere in the country. Fathers claim their ex-wife has a dangerous new boyfriend. Mothers claim their ex-husband drove the children home drunk during his weekend visit. The parties making these claims seek either to win custody (incidentally ending a child support obligation) or to limit the other parent’s visitation. The substantive legal standard differs, but the effect of an allegation is the same: to launch a round of litigation. An emergency hearing is held right away, and then there is a review hearing held in a freestyle manner. A trial might follow

later, or there may be more freestyle hearings until one party caves. Probation officers mediate; parenting courses are ordered.

These cases are less strikingly unfair than guardianships for several reasons. First, the standard between parents is generally “best interests of the child.” This does not demonize the losing party. Second, in a dispute between parents, the person who wins is a parent. It is not somebody who started out the litigation with no rights at all. Third, the loser in parent disputes is not such a big loser. Judges generally give the child significant time with each parent and do so in an enforceable way).¹⁷⁸ At least in MVLS’ experience in Massachusetts, they do not customarily place visitation “at the discretion” of the custodial parent.

Finally, there is more to negotiate in disputes between parents, such as decision-making power, visitation schedules, travel rights, child support, and (in the case of divorce) property and debt division. It is not an all-or-nothing contest. A party who lost at temporary orders because of a bogus claim might rationally choose to settle rather than continue to fight for years. This protects children from being yanked back and forth.

Capricious custody decisions are more obvious in the guardianship context, but they are just as liable to occur in other types of child custody disputes governed by freestyle judging.

VI. Freestyle Judging and Other Types of Cases

Freestyle judging hurts families facing bogus allegations, but what about other types of families? If freestyle judging hurts one type of family but helps all other types, then perhaps the method is worth keeping on balance. This section explores the effect of freestyle judging on other types of families.

A. When the sensational claims are true

One might argue that adversarialism is not necessary if the claims about the parents are true. The parents would likely be found unfit at a trial. Putting aside the question of how the court determines whether the claims are true, is the gentler touch and languid pace of freestyle judging helpful to struggling parents?

Once a guardianship is in place, the parent may petition to remove it at any time. The guardianship statute provides for removal of a guardian

¹⁷⁸ For the law governing these, *see supra* Part III.A.

when it is in the child's best interests¹⁷⁹, but case law clarifies, "an evaluation of the best interests of the child under the statute requires that a parental decision [...] be given presumptive validity."¹⁸⁰ The presumption may only be overridden by a showing that the parent's decision would cause the child significant harm.¹⁸¹ While a finding of fitness prejudices the parent for the near future, fitness means current unfitness.¹⁸² So when the parent re-files, she need only argue about how she is doing in the present.

Freestyle judging actually works against borderline-fit parents in several ways. First, it requires them to appear in court at least every three months, meaning a missed shift at work and the cost of parking and transportation. Second, they must follow court orders that require them, for example, to take drug tests and to attend regular parenting classes. Hair follicle tests cost around \$100; the random drug and alcohol screening arranged by the Middlesex Probate & Family Court costs \$80 every few weeks. Both take place in Boston, a traffic-clogged city with limited parking which is difficult to access from suburban and rural areas. Third, if the parents do not comply with the orders, they are liable to be held in contempt of court and their noncompliance can be used as evidence of their inability to parent.¹⁸³

Provided that the parent wins a satisfactory visitation order as part of the guardianship decree, she is better off living with that for a few years and then filing for removal of the guardian, rather than coming back to court every 90 days for review hearings.

Similar considerations apply when the dispute is between parents. Say that a father claims that a mother should not have unsupervised visitation because she is using drugs, and she is in fact using drugs. If the judge puts off trial and handles the matter in a freestyle way, the mother will have a chance to get off drugs while the case is pending. But she will also have to contend with the scrutiny and hoops described above. If the court holds a trial and she loses, she will have to show "material change of circumstances" to modify the judgment.¹⁸⁴ But getting off drugs is a

¹⁷⁹ MASS. GEN. LAWS ch. 190B, § 5-212 (2009).

¹⁸⁰ *Blixt v. Blixt*, 437 Mass. 649, 657-58 (2002) (referring to *Troxel v. Granville*, 530 U.S. 57, 69 (2000)).

¹⁸¹ *Id.* at 658.

¹⁸² *In re Adoption of Linus*, 73 Mass. App. Ct. 815, 820-21 (2009).

¹⁸³ MASS. GEN. LAWS ch. 210, § 3 (2012) (several fitness factors include as elements failure to engage in services).

¹⁸⁴ MASS. GEN. LAWS ch. 215, § 6(c)(1986).

material change, so that's not a problem. She is better off doing that on her own time without having to appear at court every few months and jump through the court's additional hoops.

Perhaps this is a cold way of viewing legal process. Can freestyle judging be therapeutic? There is reason to doubt it. First, courts are not equipped for that role. Judges hear dozens of cases a day. Most are not trained mental health professionals, and they do not necessarily have any experience (professional or personal) interacting with poor people. Second, family members help each other absent court involvement. In all of the cases described in this article, the petitioners played important roles in the children's lives before and after the court was involved. What the court did was simply shift the balance of power from the parents to the extended family. This shift of power did not promote cooperation but rather hindered it, by making the parents wary of the people who comprised their support system.

B. When no sensational claims are made

Next consider a garden-variety divorce where two parents are both seeking custody, and neither is making sensational claims against the other. Why put them through the rigors of an adversary trial when a friendly mediator might be able to cajole them toward agreement instead?

If parties want to mediate their custody disputes, they should. It is even appropriate for the state to subsidize mediation. The crucial piece is that judges should carefully review the agreements that result. MVLS has observed that judges scrutinize agreements for judgment in disputes between parents. In Case D, however, the judge did not inquire into why Mother D had given up and whether she had done so knowingly or voluntarily, except by noting the change and asking Guardian D's counsel whether the change was correct.

If the parties end up needing a trial, formal adversary procedure will not hurt them more than an informal procedure.¹⁸⁵ The more complex rules might drive them to hire counsel, thus costing money. If they represent themselves, they might fail to enter a few pieces of evidence. But they can tell their stories, minus the hearsay and speculation.

¹⁸⁵ While it is taken as an article of faith in the literature that adversarialism prolongs or exacerbates conflict, that belief is unsupported. *Supra* note 60.

C. Balancing the interests

Freestyle judging is dangerous for one set of families (those facing bogus claims) and unhelpful for another (those where one parent is seriously deficient). For another class of families, freestyle judging might produce fine outcomes, and might save money. How should judges and policymakers balance the interests?

One idea is to have two procedural tracks: one where sensational claims are being made against one of the parties, and another where the issues are mundane. Reformers have envisioned a system that directs parties to a different type of process depending on their case.¹⁸⁶ But how are the lines drawn? Judges, as we have seen, are loath to give up control in exactly the cases where they should give it up: the sensational cases. And even assuming *pro se* litigants will exercise their right to appeal if judges improperly classify their case, they are not likely to realize that adversarialism serves their interests better than freestyle judging.¹⁸⁷ So creating a two-tier system of procedure is a poor option.

Judges are decision makers of last resort. People can avoid taking their problems in front of a judge if they have resources to work it out on their own: financial resources to hire mediators, emotional resources to compromise, and intellectual resources to understand when to take a deal. If the headache of adversary trials drives people to exercise those resources, that is good for taxpayers and perhaps for the parties themselves. The people left over are a desperate group. They lack resources, or their opposing party is a liar. They are the people who need the law most. When deciding our rules of procedure, we should worry most about the needs of people in this class.

VII. Conclusion

The anti-adversarialism reform movement has succeeded in imposing a gloss of niceness on child custody proceedings. In some cases, UFCs' niceness—in the form of resources, referrals, and judicial nudging—helps parties resolve their disputes efficiently. In other cases, the sheen adds respectability to nonsense accusations, glosses over credibility issues, intensifies warped family power dynamics, distracts from legal standards, and obscures facts. Where the judge holds a baseline assumption that all concerns are valid and sincere, sleaze thrives.

¹⁸⁶ Schepard, *supra* note 4, at 346.

¹⁸⁷ *Supra* Part IV (day in court).

While it is understandable that judges want to deal with the extra-procedural problems they encounter from behind the bench, the problem is that they cannot do so meaningfully. They do not have the training nor the time to understand or treat families' dynamics. They cannot provide apartments, job skills, daycare, or cars. They end up over-exercising the few substantive powers they do have: to change child custody arrangements, and to use custody and visitation as carrots to encourage good behavior. Due process gets lost in the mix.

But it turns out that due process is not just an abstract ideal. Compromising process leads directly to bad outcomes for the most vulnerable children. It leads to children living with guardians who are less fit than their parents, children losing contact with their parents, and children being yanked back and forth between households. Family court judges have more discretion than they know what to do with. They should give some of it up and make their courtrooms more adversarial.