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Taylor Imbasciani

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Taylor Imbasciani
Professor Yaroshefsky
Criminal Ethics
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INTRODUCTION

There is an abundance of vulnerable clients within our legal world that require specialized representation for protection. Throughout history, lawyers typically represented either parental or state rights and interest, failing to provide children with a voice in disputed matters where they are often most helpless. As an awareness for the necessity of child advocacy developed, the courts began appointing guardians ad litem to protect their interests. Guardians ad litem perform vast functions as hybrid attorneys, data collectors and conclusive reporters, which has led to excessive legal and ethical confusion. The lack of guidelines and disparity in jurisdictional precedent has produced unequal case results. Still, guardians ad litem have a vital part in assisting to find a resolution in the best interest of the child.

THE PRACTICE

I. Appointing a Guardian ad Litem

A guardian ad litem (GAL) is someone appointed by the court, assigned to help those who cannot represent themselves or are unable to adequately protect their own rights and interests in a case. Because of the incompetency associated with being a minor, children often benefit from the necessary appointment of a GAL. GALs can be appointed for many diverse roles, including “fact investigator, mental health evaluator, next friend attorney, family mediator, and child’s attorney.”¹

¹ Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 262 (1998).
<https://digitalcommons.law.seattleu.edu/faculty/339>.

Regardless of their specific function, a GAL serves the court as an objective advocate for an individual's best interest.

II. Authority

Courts can appoint GALs for varying reasons, including “[when] statutorily required, upon request by parties to the matter, or *sua sponte* where a judge determines that such an appointment is in the ward's best interest.”² GALs are frequently used for children in family law matters such as custody disputes, abuse and neglect cases, and other court proceedings, including obtaining legal guardianship. Despite being vital in a majority of cases in family court, GALs have few statutory guidelines. The fundamental federal legislation, the Child Abuse Prevention and Treatment Act (CAPTA)³, highlights the importance of appointing GALs for children by requiring states to appoint them for all proceedings regarding abuse or neglect. For example, the D.C. CODE § 16-2304(b)(5)⁴ mandates a GAL be appointed in every litigated case involving a neglected or abused child. Such statutes enforce the protection of the child through requiring guardian ad litem representation for the child's best interest.

However, GALs are generally regulated by state and local law. Depending on the jurisdiction, courts may not be required to appoint a GAL. If so, a party can request one by filing a motion with the court to appoint a GAL. New York state law asserts, “The court in which an action is triable may appoint a GAL at any stage in the action upon its own initiative or upon the motion of: ... a relative, friend or a guardian, or ... any other party to the action.”⁵ A judge may also file an order appointing a GAL where they see fit. Across the nation, courts have used GALs

² Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 JOURNAL OF FAMILY LAW AND FAMILY STUDIES 43 (2011).

³ 42 U.S.C.A. §§ 5101-5108 (1988) (Westlaw).

⁴ D.C. Code Ann. § 16-2304 (2001) (Westlaw).

⁵ NY CPLR § R1202 (2012).

“as an arm of the court, appointed to investigate and present to the court all necessary and material information which might affect the court's decision.”⁶ This illustrates the significant role GALs have played in protecting children.

Additionally, depending on the jurisdiction, a state may have regulations distinguishing limited purpose, standard, and/or expanded GAL appointments. In Maine, “limited-purpose appointments” are common, asking the GAL to look into just one or two issues pertaining to the case.⁷ Some cases do not require GALs for the entire case, but solely for the investigation of one aspect of the case. If a GAL is not certain about the areas to be investigated, they must file a motion to clarify their responsibilities.⁸ Nevertheless, all States have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made regarding a child’s custody, placement, or other critical life issues.⁹ While the GAL provides the information, ultimately it is the court who reviews all elements and makes the determining decision regarding the child’s life.

While states all differ vastly in their definition of a GAL, The American Bar Association has exposed many jurisdictions for their lack in functional instruction. For example, four states define the GAL’s role as “advising the respondent of their rights,” while five states describe it as “advocating for the respondent’s best interest.”¹⁰ Another nine states state their courts utilize GALs to compile all the information into a report for the court.¹¹ However, not all states provide

⁶ S.N.C. v. J.R.D., 755 So.2d 1077, 1082 (Miss.2000).

⁷ *What is a Guardian ad Litem?*, PINE TREE LEGAL ASSISTANCE (April 14, 2020, 3:01 PM), <https://ptla.org/what-guardian-ad-litem>.

⁸ 2 MAPRAC § 31:6. Role of the investigator-guardian ad litem in proceedings relating to care, custody and maintenance of minor children, 2 Mass. Prac., Family Law and Practice § 31:6 (4th ed.)

⁹ Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN’S BUREAU (April 14, 2020, 5:01 PM), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

¹⁰ Kelly Crowe, *Statutory Provisions For Guardians ad Litem*, THE AMERICAN BAR ASSOCIATION (April 20, 2020, 10:27 PM), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-6--july-august-2018-/statutory-provisions-for-guardians-ad-litem/.

¹¹ *Id.*

explanations. A Hawaii statute declares “[t]he court shall state on the record the duties of the GAL and its reasons for appointment,”¹² but gives no guidance on what those duties entail. The ABA also states that one third of all states using GALs do not designate any duties by statute.

Lastly, jurisdictions differ not only on when to appoint GALs, but also on the their minimum qualifications, training, compensation, and duties. Because of the rising awareness, professionals such as scholars and courts continue to research, analyze and report on issues relevant to protecting the rights and interests of a child through GAL appointments and other volunteer services. For this reason, GALs are often experts and have vast experience in mental health, the law, or a combination of the two disciplines.

In 1977, Judge David W. Soukup from Seattle, Washington, created the first Court Appointed Special Advocate (CASA) program after realizing that abused and neglected children were often inadvertently re-victimized by overburdened, understaffed and under-resourced courts and public social service agencies.¹³ Now a national association in the United States, supporters across the country advocate as GALs and CASA volunteers depending on jurisdictional regulations. According to the National CASA Association, there are more than 85,000 advocates serving in nearly 1,000 state and local program offices in the United States. Each year more than a quarter of a million children are assisted through CASA services.¹⁴ Due to the various differences in local precedent and statutory rules, the quality and effectiveness of GALs can vary significantly.

¹² HI Rev Stat § 560:5-115 (2013).

¹³ *History*, INDIANA CHILD ADVOCATES: COURT APPOINTED SPECIAL ADVOCATES (April 13, 2020, 2:58 PM), <http://www.childadvocatesnetwork.org/learn-about-us/history/>.

¹⁴ National CASA/GAL Association for Children, *About Us*, Court Appointed Special Advocates Guardian ad Litem (April 15, 2020, 10:04 AM), <https://nationalcasagal.org/about-us/>.

III. Duties & Obligations

A GAL for a child is an individual appointed by the court to serve as an independent advocate who promotes the best interest of the minor. The Uniform Marriage and Divorce Act has influenced many jurisdictions with their model definition of a child's best interest. This standard is adapted and applied by family law courts across the nation, providing:

The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community; and
- (5) the mental and physical health of all individuals involved.¹⁵

Although generally accepted, this standard has provided a loose understanding for GALs in identifying the best interest of the child in various circumstances. Other state statutes include additional factors to consider, such as “the capacity and disposition of the parties involved to give the child love, affection and guidance.”¹⁶ Without clear guides for GALs, courts struggle with dubious lawsuits questioning the validity of their appointment.

A GAL is habitually viewed as an agent of the court. A GAL's primary duty is to the court and not as legal counsel to the child.¹⁷ Nevertheless, the various functions of a GAL can still range anywhere from investigating to advocating for the child's wishes. The most traditional role of a GAL is the investigator. The investigator's role of gaining a comprehensive and clear understanding of the environment and circumstances of the child is often considered the most significant role in cases where a child's future is being determined.¹⁸ A GAL is assigned by the

¹⁵ UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973). See Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U.L. REV. 499 (2009).

¹⁶ Mich. Comp. Laws Ann. § 722.23(3)(b) (West 2016).

¹⁷ State ex rel. Bird v. Weinstock, 864 S.W.2d 376 (Mo. App. E. Dist. 1993).

¹⁸ Matter of Doe, L-93-045, 1993 WL 541121 (Ohio App. 6th Dist. Dec. 30, 1993).

court to investigate and/or evaluate the child, the child’s family, and the child’s home life; and to share findings with the judge.¹⁹ GAL investigation includes the duties of:

[R]eviewing documents, reports, records and other information relevant to the case, meeting with and observing the children in appropriate settings, and interviewing the natural parents, foster parents, or kinship caregiver, healthcare providers, such as doctors, hospital personnel, therapists for both children and parents, and any other person, such as school personnel with knowledge relevant to the case.²⁰

Information from interviews with individuals familiar to the child is vital to any case. Often times these people are the closest witnesses to the main dispute(s) of a case. GALs gather this information, additional to their own observations, and present it to the court in a written report. After the investigation, regardless of the children's wishes, the GAL makes a recommendation to the court which would be in the children's best interests.

In disputes where parents assert their rights and responsibilities through child custody, a GAL investigates the operations of a family and possibly advises the court on various things including, where the child should reside, whether the child is facing any abuse or neglect, and the extent of contact a child should have with a parent. The investigating role does not advocate for the child, but remains neutral, providing the court on what they have observed.

If the court determines there are possible mental health concerns relevant, GALs with mental health expertise are often appointed to evaluate the psychology of the parties involved in the case at matter. If mental health is an aspect alleged determinative to the case by either party, a GAL must seek or, if qualified, administer proper mental assessments. Disputes may involve “issues such as child development and emotional needs, parenting behaviors or capacity,

¹⁹ COURTNEY M. HOSTETLER, ESQ. & JAMIE A. SABINO, ESQ., FAMILY LAW ADVOCACY FOR LOW AND MODERATE INCOME LITIGANTS 306 (Jacquelynn J. Bowman et al. eds., 3rd ed. 2018).

²⁰ Juvenile Court of Banks, Borrow, and Jackson Counties, State of Georgia, Piedmont Judicial Circuit Standing Order, *In Re: Attorney-Guardian ad Litem*, (Feb. 2, 2009).

psychopathology, emotional well-being, and other mental health issues that forensic mental health assessments can contribute insight to.”²¹ Functions of a mental health evaluator can overlap with the role of a guardian ad litem investigator in tasks such as, collecting data, observing parent-child interactions, facilitating interviews, and reviewing history of abuse, domestic violence and substance use. While their central purposes are similar, the two positions diverge when courts rely on specialists for certain inquiries.

In some cases, there are no mental health records of the child or the parents available to the GAL. Subsequently, if the guardian ad litem determines a possible need to evaluate mental health issues, they may recommend psychological evaluations and possibly psychological testing. However, no psychological test is designed to assess the best interests of the child or which parent is “best.”²² These tests were created to assess one’s psychology, not be predictive of their future ability to parent.

Courts may also utilize GALs as mediators to keep parties out of court. Litigation is a costly process and it congests the courts daily; therefore, private solutions are encouraged by the courts. Some jurisdictions have adopted rules requiring parties to first attempt mediation before going to trial, hoping to “reduce some of the backlogs that have been plaguing the judiciary environment up until this point.”²³ Though new to some counties, the value of meditation is clear in family law as a strategy for resolving disputes over litigation. GALs as mediators facilitate “amicable resolution[s]”²⁴ and negotiation settlements while entrusting them to prioritize the child’s best

²¹ Marcia M. Boumil et al., *supra* note 2, at 47. *See also* Randy K. Otto, John F. Edens & Elizabeth H Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. & COUNCIL. CTS. REV. 312 (2000).

²² *Id* at 70.

²³ Law and Mediation Office of Darren M. Shapiro, P.C., *What is Mandatory Presumptive Divorce Mediation?*, LONG ISLAND FAMILY LAW AND MEDIATION BLOG (April 15, 2020, 3:31 PM), <https://www.longislandfamilylawandmediation.com/what-is-mandatory-presumptive-divorce-mediation/>.

²⁴ Lidman & Hollingsworth, *supra* note 1, at 281-283.

interest. Mediators usually meet with the parents, typically, but not necessarily, without lawyers present.²⁵ In these situations, GALs as mediators can help by ensuring correct power balances between both parties and emphasizing the child's needs and interests.

Across the GAL spectrum, functions differ greatly. The next friend attorney-GAL, along with the child-attorney, functions mimic more traditional attorney roles. Because of a minor's inability to sue in their own capacity, GALs as a next friend attorney allows a child to initiate or intervene in an ongoing legal matter when the child's interests appear to diverge from that of his/her parents.²⁶ However, GALs still owe their primary duty to the court and their principal obligation is to advocate for the best interest of the child.

While all former GAL roles have emphasized their sole duty to the court, child-attorney guardians ad litem are often seen as controversial as they operate as customary attorneys and advocate towards their client's, the child's, wishes. A conflict of interest is created when attorneys perform adhering to the duty to advocate for the child's wishes contradictory with their duty to advocate in the child's best interest. If such conflict arises, another GAL can be appointed. This issue is discussed further below.

ISSUES

Without uniform regulations, this fairly new utilization of GALs to protect the nation's children is faced with numerous concerns. Several legal issues arise in the appointment of GALs and at various stages of their performance with little to no responsive analysis, proposed solutions,

²⁵ *Id.* See also Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1331 (1995).

²⁶ Marcia M. Boumil et al., *supra* note 2, at 48. See also Ann M. Haralambic, *Kids' Causes of Action*, 27 FAM. ADV. 30, 30-31 (2005).

or guidance. Widespread confusion about hybrid appointment, questionable data collection, and complex final reports to the court contributes to major ethical questioning.

I. Hybrid Appointments: Guardians ad Litem and Child-Attorneys

There are various professionals that can attribute to protecting a child's interest. Through legal representation and appointment of a GAL, the legal system has guaranteed improved safety and security of children better than ever before. However, many ethical issues occur when attorneys are directed to act concurrently as a GAL and a child's attorney. Many jurisdictions refer to such function as a hybrid attorney.²⁷

Because of the very nature of the two positions, often there is a fundamental conflict of interest that interrupts the individual's ability to do the job they were either hired or appointed. A lawyer representing a child is expected to act in the same capacity as a lawyer representing an adult client.²⁸ Unlike the child's attorney whose role is generally to represent the stated wishes of the child, the GAL is generally expected to advocate for the best interests of the child, whether or not the child is in agreement.²⁹ GAL do consider the child's expressed wishes, but only as a component of determining the child's best interest.³⁰ If both the child's desire and what is determined the best interest align, then there is no conflict. However, this is not always the case.

There are many similar functions between both roles. GALs and child-attorneys both conduct independent factual investigation, communicate with the child, interview witnesses,

²⁷ Victoria Sexton, *Wait, Who Am I Representing? The Need for States to Separate the Role of Child's Attorney and Guardian Ad Litem*, 31 GEO. J. LEG. ETHICS 831 (2018).

²⁸ MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 7 (216-19) cmt. (AM. BAR. ASS'N 2011), http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf.

²⁹ Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819. 1823 (1996).

³⁰ Marcia M. Boumil et al., *supra* note 2, at 45.

participate in court hearings and advocate for a certain position.³¹ However, dually functioning as both a child's GAL and attorney is complex and contradictory in their meanings. While the GAL is required to report information to the court, including the child's wishes, their role is not to advocate for the child as if they were a client, but to make a recommendation to the court of what arrangements will be within the best interest of the child. Since the GAL's role is to represent the best interests of the child, this may require recommendations that diverge from the child's wants.

Additionally, because GALs are not required to be lawyers, there are no clear standards such as the model rules to impose professional responsibilities. While some courts and legislatures have altered their ethical rules of professional conduct to accommodate the hybrid attorney role, there are still obstacles to lawyers advocating in cases in which they may also be called to testify.³² Unlike an attorney, a GAL is frequently called to testify about information gathered through investigation, interviews and observations. A lawyer's testimony would be too prejudicial for both the client and opposing party. Model rules were implemented so lawyers could avoid significant conflicts. A lawyer testifying would put their client at risk by offering testimony that could be impeached by the adversarial. Moreover, as a result of their hybrid role, an attorney's testimony would be given undue weight by the factfinder.³³ Their testimony would expose the opposite party to an undue prejudice.

Specific jurisdictions have held the two positions too controversial to occur simultaneously. A New Jersey court held the two roles distinctive from each other, stating "the representative attorney is a zealous advocate for the wishes of the client. The [guardian ad litem]

³¹ Barbara A. Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 199 (2005).

³² MODEL RULES OF PROF'L CONDUCT R. 3.7 (2009) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness").

³³ S.S. v. D.M., 597 A.2d 870, 877 (D.C. App. 1991).

evaluates for himself what is in the best interest of his client and represents[s] in accordance with that judgment.”³⁴ Because of the ethical challenges, many courts agree an attorney cannot fulfill both the role of attorney and GAL together.

II. Data Collection

There are many different ethical matters in the methods used to gather information relevant to each case. Through interviews and observations, GALs obtain the most vital information in order to form recommendations for the court. However, many face moral concerns trying to determine the child’s wishes, uphold confidentiality, access medical history, secure privacy and administer evaluations while facilitating their role as a GAL.

a. Interview Process

GALs administer numerous interviews. There are many different aspects that contribute to what is considered best for a child. While the best interest’s standard is extremely broad, GALs will interview a range of witnesses, including siblings, parents, relatives, teachers, doctors, neighbors, and other care providers. No information can be ruled out until explored, such as medical and academic records. Interviews are verbal investigations with people often closest to the child. A GAL can characterize the parent-child relationship through questioning, which will support their ultimate recommendation to the court.

i. The Child’s Voice

Until children can be fully heard, their voices remain absent, or at best diluted, from the very legal system intended to help them.³⁵ Child advocacy has attracted progressive attention analyzing children’s rights and justice for children by allowing their stories to be heard through

³⁴ In re M.R., 638 A.2d 1274, 1284 (N.J. 1994).

³⁵ Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INTL. & COMP. L. REV. 175 (2010).

direct recounting of their experiences, as well as indirect recitation by a GAL. However, while a child's right to be heard is fundamental and pertinent to their case, the practice is not perfect.

GALs are primarily factfinders. In their investigator roles, they must determine the wishes of a child who is sufficiently mature to be able to formulate and express a rational opinion and desire of custody. Though the child's voice is most significant, there is a moral dilemma considering the lack of standard in weighing that voice. Each GAL has subjective discretion in determining what is logical and what attributes to the child's best interest. For example, a hybrid attorney, evidentially, emphasizes the child's wishes as a factor.

In order to determine the best interests of the child, the GAL must be able to communicate with the child through establishing trust and creating a safe space where the child is comfortable. However, GALs must acknowledge the caveats in identifying reasonable desires of the child, including a child's fear in unveiling private information, a failure to disclose information with a stranger, or a child who attempts to manipulate interviews and observations to achieve a preferred calculation.

GALs must also be wary of weighing a child's wishes that has been subject to "coaching" or wrongful inducement by parents and/or family. While some examples of coaching in custody and visitation cases consist of clear instruction to the child to lie, often times it is less obvious and harder to recognize. Additionally, manipulative behavior that encourages, not necessarily instructs, a child to prefer one party over the other can constitute as coaching. Any behavior that inspires a child in the context of a custody case to reveal bad things about the opposing party or

say good things about oneself is coaching.³⁶ Frequently, a child will answer according to what they think the parent wants to hear.

Third parties, such as GALs, are essential for a neutral evaluation. Sometimes parents are not even aware they are coaching. A child could even be “echoing” a parent’s expression, which hinders establishing a child’s choice uninfluenced.³⁷ Clients who engage in coaching behavior need to be informed they are coaching, need to be educated on how their behavior is coaching, and need to be discouraged from further coaching.³⁸ GAL investigators can include these incidents in their evaluations and reports, and are continuously responsible for discussing issues in a manner that does not manipulate the child into one parent’s design. Nevertheless, it is still fundamentally important to listen to children in and out of the courtroom in order to identify what is in their best interest.

ii. Confidentiality

GALs have the responsibility to immediately inform parties that the information they provide to the guardian ad litem and discuss is not confidential. Parties must understand that GALs do not act in the capacity of doctors or therapists, with familiar extensive privileges, but instead have a duty to report to the court. Specifically, even court-ordered examinations with mental health professionals acting as guardians ad litem are not considered protected.³⁹ In order to ensure these non-confidentiality warnings are provided, many courts required the GALs to address this prior to interviewing parties in a case.⁴⁰ The GAL must explain their role and warn each individual that

³⁶ Gregory Forman, (*Unwittingly*) *Coaching the children*, GREGORY S. FORMAN, P.C. ATTORNEY AT LAW (April 17, 2020, 8:28 AM), <https://www.gregoryforman.com/blog/2016/11/unwittingly-coaching-the-children/>.

³⁷ 4 A.L.R.3d 1396 (1965).

³⁸ Forman, *supra* note 36.

³⁹ Marcia M. Boumil et al., *supra* note 2, at 55.

⁴⁰ Dana R Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD MATRIMONIAL LAW. 35, 38-39 (2002).

there are no off-the-record conversations.⁴¹ Any discussions and documents shared with the GAL will most likely be reported to their attorney, the judge, and the opposing party.

With reason, the courts do not apply the same rules of confidentiality as those between attorneys and clients to GALs. Primarily, the child-attorney and GAL roles are differentiated through their standards of confidentiality. Whereas a child's relationship with the attorney is privileged, their relationship with the GAL is not.⁴² This dual duty of confidentiality and reporting can leave the attorney in an ethical bind.⁴³ However, when a GAL is acting in their investigative role, information shared by the child is no longer privileged after submitting a report for the court with recommendations about the case. Some jurisdictions that use hybrid attorneys have altered their confidentiality and privilege rules by informing the child about the hybrid attorney's disclosure duties.⁴⁴ A child-attorney GAL must explain to the child the priority of protecting the child's best interest and that information that would have been protected by attorney-client privilege may be shared with the court.

A GAL's non-confidentiality warning is required not only for adults in custody matters, but for the children as well because they must be free to pursue the child's best interest, evening if this means using statements made by the children.⁴⁵ Unfortunately, non-confidentiality hinders the process of trust between the GAL and the child necessary to facilitate conversation about their situation. Somehow, the increasing value on the child's voice is both a blessing and curse, when the child has the ultimate discretion on what to divulge to the GAL. Despite this risk, the gamble

⁴¹ § 31:6, *supra* note 8.

⁴² Clark v. Alexander, 953 P.2d 145 (Wyo. 1998).

⁴³ Sexton, *supra* note 27 at 837.

⁴⁴ Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998).

⁴⁵ Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785 (1996).

is outweighed when considering loss of trust, potential for psychological damage, and the child's right to due process with not warning the child.

Furthermore, a GAL is ethically unguided when the child or an adult insists information disclosed remains private. Information obtained is required to be reported to the court, however, the GAL must consider whether the child would have divulged the information if they genuinely understood the warning. The GAL must also contemplate the detriment to the child's emotional and psychological well-being if the information were to be shared to other parties including the court. While some uphold confidentiality morally, others conclude that the relationship has no legal privilege.⁴⁶ Unfortunately, jurisdictions have remained inconsistent and left professionals with little judicial guidance.

b. Access to Information & Privacy Protection for the Child

Though discussions produced during a GAL's investigation are not covered by confidentiality, an individual's recorded history may be protected. The appointment of a GAL by the court is not enough on its own to grant them access to an individual's history. Statutory provisions allowing GALs to access various records are absent in a majority of states.⁴⁷ In order to obtain select records, the GAL must have consent or a court order. These records may include:

mental health counseling records; medical, health, and hospital records; DSS [Department of Social Services] records; medical, alcohol, and drug abuse counseling records; criminal records (CORI and CARI records); prior reports, such as probation or court clinic records; domestic violence or sexual assault victim-counselor records; locations of battered women's shelters and rape crisis centers; mediation records; and alternative dispute resolution records.⁴⁸

Access to this information is essential for the GAL's assessment.

⁴⁶ William G. Austin, *A Focus on Child Custody Evaluations: Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations*, 40 FAM. CT. REV. 177, 177 (2002).

⁴⁷ Dayle D. Deardurff, *Representing the Interests of the Abused and Neglected Child: The Guardian ad Litem and Access to the Confidential Information*, 11 U. DAYTON L. REV. 648, 651 (1985).

⁴⁸ Courtney M. Hostetler, Esq. & Jamie A. Sabino, Esq., *supra* note 19, at 312.

Where a child's custodial parent's consent is limited to school and pediatrician records, records such as counseling reports need more approval. Ultimately the individual, or the child's custodial parent, has the right to deny signing a consent release to the GAL. Though they have the right to withhold information from the GAL, they must explain their reason for concealment to the court for the reason that any person suppressing information hinders the GAL's investigation and evaluation process.

Review of a child's or a parent's mental health treatment is often extremely informative to the GAL's process. Mental health records are held to a higher level of privacy protection and often require permission to disclose confidential information.⁴⁹ There are various issues deriving from the courts dependency on health records to help define the case. Privacy protections raise the questions of whether GALs have access to the information and whether the justice system can consider access to the information in the best interest of the child. A second GAL may be appointed, with authority to waive the child's privilege, to investigate and determine whether the importance of the records to the investigation or evaluation outweighs the child's interests in keeping those records private.⁵⁰

Access to a mental health professional's records are highly useful in the GAL's evaluation of the child and their surrounding relationships. Gaining access to this information allows the professional to speak on behalf of the child and share the report without requiring a child be exposed to the traumatic litigation process.⁵¹ Some courts have demolished the presumption that parents have the authority to consent to access of privileged information. In some jurisdictions,

⁴⁹ Deardurff, *supra* note 47.

⁵⁰ Hostetler & Sabino, *supra* note 19.

⁵¹ Alicia Lieberman & Patricia Van Horn, *Giving Voice to the Unsayable: Repairing the Effects of Trauma in Infancy and Early Childhood*, 18(3) CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 707 (2009).

children who demonstrate maturity in understanding and articulating for themselves are given the autonomy to waive or assert privilege.⁵² Where a separate hearing may be required to determine whether the child has reached maturity, the court may appoint another GAL for a child too young to make a mature determination.

However, a child's trust in the therapeutic process can potentially be hurt if their treatment was exposed to the court, their parents, the opposing party, etc. The United States Supreme Court explained, "psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is key to successful treatment."⁵³ A waiver of privilege could damage ongoing therapeutic relationships and discourage conflicting parents from seeking therapy.⁵⁴ The psychological damage the child could be exposed to without information protected by privilege, would not be in the child's best interest.

III. The Final Report

a. Source of the Information

While a GAL relies on the parties to supply information relevant to the case, they are also dependent on third-party testimony, such as other family members and teachers. Though valuable, this information is typically considered "hearsay" since it consists of out-of-court statements that are offered as evidence of the truth of the matter asserted.⁵⁵ This evidence is generally prohibited from being admitted into evidence because of its unreliable nature and inability to cross-examine the speaker in court. However, the necessity of bringing a GAL investigator's information from

⁵² Attorney *ad litem* for D.K. v. Parents of D.K., 780 So. 2d 301, 207-308 (Fla. Dist. Ct. App. 2001)

⁵³ Jaffee v. Redmond, 518 U.S. 1 (1996) at 1355-1356.

⁵⁴ Deardurff, *supra* note 47 at 667-68.

⁵⁵ Fed. R. Evid. 801(c).

various sources generally outweighs the usual hearsay obligation⁵⁶ and under some circumstances, out-of-court statements may independently enter into evidence via exceptions to the hearsay rule.

Hearsay is objected from court because of the unreliable nature of the statements. However, a child's out-of-court statement may be more reliable than anything they could offer while testifying.⁵⁷ The statement is more reliable because the child's out-of-court statement is unrehearsed, not the result of extended questioning and free of the stress of the courtroom.⁵⁸ Testifying in court can be very emotional and traumatic for many children, enough though they have the capacity to serve as a witness. Courts have figured out how to utilize hearsay exceptions to ensure the child's voice is heard inside the courtroom without the harm of appearing. Spontaneous comments from third parties like pediatricians and schoolteachers could also be more reliable, since they rarely have an interest in the ultimate outcome of the case.⁵⁹ Guardians ad litem honor the principle of hearsay, but also acknowledge the substantial significance of outside of the court statements as their core function depends on an unbiased evaluative process of the child's best interest.

Some statutes make these reports independently admissible.⁶⁰ In *Adoption of Sean*,⁶¹ parents challenged the admissibility of a GAL's report alleging hearsay, which contained excerpts authored by mental health professionals concerning the child and parents. The court found the disputed portions of the GAL's report appropriately admitted. The excerpts were properly relied

⁵⁶ Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 297-98 (1999).

⁵⁷ Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1747-48 (1983).

⁵⁸ Goodmark, *supra* note 56 at 299.

⁵⁹ *Id.*

⁶⁰ UNIFORM MARRIAGE AND DIVORCE ACT, pt. 4, § 405(b) (amended 1973), 9A U.L.A. 604 (1987) ("If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.").

⁶¹ *Adoption of Sean*, 36 Mass. App. Ct. 261, 630 N.E.2d 604 (1994).

on because the sources were identifiable and there was a possibility of rebuttal by adverse counsel. The unavailability of the declarant is not a relevant factor if a guardian ad litem is presenting this evidence through their investigative report. Additionally, the GAL was available to testify at trial. Investigators may or may not be called to testify at trial. If they do testify, litigators assume that they will testify to the entirety of their investigation (regardless of whether or not they have personal knowledge), provide their assessment of the credibility of the information, and make recommendations (regardless of expertise). The Federal Rules of Evidence have permitted the court to consider out-of-court declarations of any witness, including a child; “under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”⁶² Guardians ad litem have also been identified as objective agents of the court, lessening the threat of untrustworthy evidence influencing the courts ultimate determination.

b. Selection of Included Information

Aside from what could be challenged by hearsay, guardians ad litem have the responsibility and discretion of what they should include in final reports to the court. Though it is often impractical and inefficient to include every detail of their investigation, it is crucial to creating a neutral report to include all significant information, including that which contradicts the guardian ad litem’s final recommendation. Before the GAL makes the determination for the child, they must make an overwhelming judgement on what to include in their report from copious amounts of data collected. In absence of other statutory guidelines, state bar associations, continuing legal education providers and professional organizations have suggest report formats.⁶³

⁶² Fed. R. Evid. 803 advisory committee notes.

⁶³ Marcia M. Boumil et al., *supra* note 2, at 64.

Nevertheless, jurisdictions have not generated uniform reporting formulas and GALs are left to rely on precedented factors of the best interests for the child.

c. The Weight of the Report

Although the court may consider the report of the GAL in regard to custodial recommendations, the ultimate responsibility to decide such matters is with the court.⁶⁴ Appellate courts have criticized trial court judges for relying too heavily on guardian ad litem reports.⁶⁵ Additionally, a state Supreme Court held that “the trial court, not the guardian ad litem, has the authority to make a child custody award” and that “the weight assigned to a GAL’s report or other independent recommendation is within the trial court’s discretion... [the trial court] should not regard a guardian ad litem’s testimony and recommendation as conclusive.”⁶⁶

CONCLUSION

Children deserve a voice in disputes that will define the rest of their lives and without the proper guidelines, the justice system fails to provide children to the full extent. Currently, the lack of instructions and overlap of roles has left the courts, attorneys and guardians ad litem confused and desperate for statutory guidelines. The great deal of uncertain standards has led to unpredictable case results in various jurisdictions. It is important the legal field continues to examine case law by jurisdiction and research the characterizations of the professional practice. Therefore, a clear, uniform understanding of the functions of these court-appointed investigators and advisers will result in the best possible solutions for children and families.

⁶⁴ Delmolino v. Nance, 14 Mass. App. Ct. 209, 212, 437 N.E.2d 578, 581 (1982). *See also*, Gilmore v. Gilmore, 369 Mass. 598, 604, 341 N.E.2d 655, 659 (1976) [judge may use guardian's report in arriving at decision].

⁶⁵ DesLauriers v. DesLauriers, 642 N.W.2d 892, 897 (N.D. 2002).

⁶⁶ *Id.*