

The Lawyer as Guardian ad Litem: Should “Status” Make Expert Opinions “All-In” and Trump “Gatekeeping” Functions by Family Courts?

by
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Introduction

To promptly answer the question in the title, federal law, state legislative enactments and state case law and rulemaking have, over the past four decades, created a unique exception to admissibility of guardian ad litem (GAL) facts and opinions in reports and testimony.¹ This extraordinary exception to the rules of evidence and a century of case law essentially waives expert

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¹ See Marcia M. Boumil, Cristina F. Freitas, & Debbie F. Freitas, *Legal and Ethical Issue Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 65-66 (2011) (“Inclusion of ‘ultimate issue’ recommendations in the GAL report is equally controversial. Ultimate issue recommendations opine on the issues awaiting resolution by the court, such as custody or visitation arrangements. Many states permit GALs to make ultimate issue recommendations in their report, and a majority of GALs do include such recommendations. Indeed, judges often request them.”); See *In re Caleb M.*, 159 A.3d 345, 348 (Me. 2017) (“The admission of GAL reports in evidence is specifically authorized by statute. 22 M.R.S. § 4005(1)(D) (2016); see also M.R. Evid. 802 (providing that hearsay is not inadmissible if a statute provides for its admissibility); *In re Chelsea C.*, 884 A.2d 97, 101 (Me. 2005) (“[T]here is no question that the Legislature may authorize court consideration of the contents of guardian ad litem reports as an exception to the hearsay rule.”). Thus, the admission of GAL reports at earlier stages in the proceedings comported with the law and allowed the court, at each stage, to rely on the report to the extent it deemed

qualifications, methodology, and reliability thresholds, applicable in all other federal and state courts across the country. As such, by legislative fiat but within constitutional proscriptions, a GAL may provide data to the court in the form of hearsay or other third-party information and then select and connect the data to an opinion on the ultimate issue in a child custody or child maltreatment case.²

In many cases involving children, the lack of familial resources, poverty, and the absence of affordable and experienced attorneys, or the need of family law courts to expeditiously process voluminous and complex cases, may limit testimony to a few hours or a day and to the parties and a few lay witnesses. What has thereby evolved in place of adequate time or resources is a powerful adjunct to the family court system and its fact finding and constitutionally-grounded judicial role: the GAL as investigator and expert on the disposition of rights and responsibilities for a family.³

appropriate in light of all of the evidence presented or the agreement of the parties.”).

² See Resa M. Gilats, *Out-of-Court Statements in Guardian ad litem Written Reports and Oral Testimony*, 33 WM. MITCHELL L. REV. 911, 930 (2006) (“In the context of the GAL role, the GAL should evaluate carefully the probative value of the oral out-of-court statements they incorporate in their written reports and oral testimony. If challenged on these statements, a GAL should be prepared to explain the importance or significance of the statement relative to any prejudice.”); *But see* Toms v. Toms, 98 S.W.3d 140, 144 (Tenn. 2003) (“We conclude that the guardian ad litem’s reports were hearsay and that the trial court erred in relying upon the reports as the basis for its custody determination.”); *In re* Guardianship of Stamm v. Crowley, 91 P.3d 126, 130 (Wash. Ct. App. 2004) (“We hold that the trial court has discretion under ER 702 to permit a [guardian ad litem] to testify to his or her opinions if the court is persuaded the testimony will be of assistance, and may state the basis for those opinions, including hearsay.”). Other sources may be found in a very helpful article, Margaret Dore, *The Stamm Case and Guardians ad Litem*, 16 ELDER L. 3 (2004).

³ For a discussion of the controversy which led to significant changes to the ethical role and legal duties of GALs in Maine, see Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 ME. L. REV. 43 (2014); Dana E. Prescott, *The New Phoenix: Maine’s Innovative Standards for Guardians ad Litem*, 69 ME. L. REV. 67 (2017). The creation of Maine’s GAL Review Board by statute, of which the authors serve as chair and vice-chair, and extensive changes in qualifications, training, and accountability of GALs as implemented by the Maine Supreme Judicial Court are illustrative of these efforts. See *Guardians ad Litem (GALs)*, MAINE.GOV

The specific definition, scope, and role of a GAL differs from state-to-state.⁴ The evolution in child protection cases arose because of the need to protect children from testifying in non-criminal proceedings and to try to protect children without exposure to adversarial and/or traumatic experiences in court.⁵ In cases between two (or more) parents, it is the adult choices (with allies and opponents) that generates the duration and intensity of parental conflict. GALs thereby become involved as adjunct to that historical *parens patriae* authority of the family court; whether arising from child maltreatment or chronic child custody conflict.⁶

This article is not about the role of a GAL in its most common form. Although courts have struggled with and imposed constraints on the hybrid role of GALs as trial attorney or witness for a child in judicial proceedings for decades, the practical reality is that these forms of advocacy are within the traditional bounds of becoming and being a lawyer.⁷ Despite many years of

http://www.courts.maine.gov/maine_courts/family/gal/index.html (last visited Dec. 7, 2017); *Maine Rules for Guardians ad Litem*, MAINE.GOV (Oct. 4, 2016), http://www.courts.maine.gov/maine_courts/family/gal/Maine%20Rules%20for%20Guardian%20ad%20Litem%202016-10-5.pdf.

⁴ See Margaret E. Sjoström, *What's a GAL to Do?: The Proper Role of Guardians Ad Litem in Disputed Custody and Visitation Proceedings*, 24 CHILD. LEGAL RTS. J. 1, 2 (2004) (“GAL roles generally fall into one of three categories: advocate for the child (advocate), champion for the child’s best interests (champion, or factfinder for the court (factfinder))”).

⁵ See generally Josephine A. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1984).

⁶ See, e.g., *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149-50 (Me. 2004) (“When exercising its *parens patriae* power, the court puts itself in the position of a ‘wise, affectionate, and careful parent’ and makes determinations for the child’s welfare, focusing on “what is best for the interest of the child” and not on the needs or desires of the parents. The now familiar ‘best interest of the child’ standard, codified in Maine beginning in 1984, stands as the cornerstone of the *parens patriae* doctrine. The standard is currently codified in section 1653(3) and is expressed as a series of separate but related factors. The standard, as codified, embodies the same *parens patriae* authority in judicial proceedings as extant under common law.”).

⁷ For a well-reasoned and thorough historical analysis, see *Morgan v. Getter*, 441 S.W.3d 94, 106 (Ky. 2014) (“We are brought thus to the GAL aspect of this case, and that aspect, too, has an historical context. While we can again do little more than touch on some of the highlights of that history, that back-

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debate, court-appointed GALs serve these roles without too much controversy, including in investigatory and advisory capacities, participation in other critical events like mediation or providing data for psychological evaluations, and collaboration with lawyers and families designing interventions intended to facilitate co-parenting plans and reduce conflict.

The scope of this article is specific to the role of lawyers, appointed as GALs, to write a report which is admissible in evidence at trial by statute or case law and which may provide an expert opinion on the ultimate issues in the case.⁸ This opinion can extend to summarizing and opining on physical and legal custody, attachments and bonding, overnights for young children, relocation and its emotional impact on a child, interpersonal violence, interpretation of mental health treatment and diagnoses, and other conclusory data about a parent, child, or family system.⁹ What is deeply troubling is the notion that the GAL may implicitly or explicitly apply targeted and curated research without understanding sampling, validity and reliability, generalizability, qualitative or quantitative, or mixed methods research, or any fundamentals that may lead to consensus in social science or child custody research.¹⁰

ground is necessary to orient our discussion. The term ‘guardian ad litem’ is very much a chameleon. According to one commentator, the term is employed in all of the United States’ fifty-six jurisdictions, but in no two of them does it have exactly the same meaning.”)

⁸ Lawyers are the focus of this discussion, but the same arguments can be extrapolated to any GAL not independently qualified to give an expert opinion under state law.

⁹ This point is not going to be repeated throughout this article, but mental health professionals are not much in agreement on prediction and reliability of data and may confuse conceptual models with reliable or generalizable research data. There is also the inevitable self-perpetuating market for experts which is based upon no more than self-published literature in journals which are self-peer reviewed. A judge may, in some courtrooms, decline to allow these opinions to be admitted even if a report is admitted. This is not about weight of evidence but admission of expert opinion-by-status alone. The authors have observed judges decline to hear such evidence even if statutorily admissible but that is hardly uniform, and many lawyers do not make appropriate and timely objections given the systems’ social norms.

¹⁰ The debate over the appropriateness of psychological testing in parenting evaluations discussed in this issue is one example.

As the saying goes, the “ship has sailed” along now for decades but that does not mean that a reconsideration of policy and practice for families should not occur through interdisciplinary discussion and re-invention of rules and court systems. This article, therefore, concerns a form of expert opinion which by statute and rule does not require more than mere status driven by a court order appointing the GAL. This is not a challenge to the need for GALs in an investigatory role, for that is a necessity given the variety of family conflict and ethical limitations on judicial roles as described below. The challenge is to require no less a standard of qualification, training, and knowledge than would be expected from any expert in any court so that families receive the same “gate-keeping” protections and reliable evidence that assist trial courts with decision making.

This article argues that while it is the GAL’s responsibility to provide the most relevant and reliable data, evidence, and research to the courts, this has become increasingly more difficult to do in today’s society. We identify the barriers to the application of the fulfillment of the GAL’s obligations, including the changing demographics of modern families, the refusal of parents to accept responsibility for their actions, the ongoing iterations of chronic conflict between parents, and the overburdened nature of the court systems resulting in potentially more reliance on credentials than objective data. It is through acquisition of interdisciplinary knowledge and finding ways through these barriers that GALs and the courts may find more effective solutions for protecting children from chronic conflict and abuse.

I. GAL as Expert by Status

In some states, GALs may be licensed social workers, psychologists, psychiatric nurse practitioners, or other professionals and not just lawyers and in other states a GAL may be a CASA volunteer or a former teacher or other role established by each state’s legislature or state rulemaking. While important distinctions arise between the ethics of these professional roles, it is the evolution of the power and authority to offer an opinion in re-

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ports and trial on the ultimate issues in a family court case that is the source of discussion.¹¹

Few would suggest that most lawyers obtain any serious social science or science training in law school or that an undergraduate degree in some social science is sufficient to interpret, transform, and explicate research to a judge in a trial under other circumstances.¹² And judges may receive even less training before becoming family court judges, since they have spent careers in many other fields of law before taking that oath. As described above, the relevance of models or conceptual frameworks as a means to frame a report is not the same as proffering a recommendation based upon a sample of children in foster care as applied to a divorce, for example.

For psychologists and social workers appointed as GALs, for example, qualification and foundation to provide expert opinion could follow ordinary rules of evidence.¹³ As scholars have

¹¹ The power of the report is, however, not at trial generally since relatively few cases proceed to final judgment. The power, not as studied as it should be, is the behavior of lawyers when settling child custody and abuse cases. See Suzanne J. Schmitz, *Guardians ad Litem Do Not Belong in Family Mediations*, 8 PEPP. DISP. RESOL. L.J. 221, 222 (2007) (“A GAL is valuable to the resolution of custody disputes because the GAL evaluates the facts concerning the dispute and recommends to the court what are the best interests of the child. Mediation is valuable because parents can determine their own decisions regarding their children. However, where appointing a GAL threatens the value of mediation, there is a risk to mediation. A simple solution to avoid this threat is to refrain from appointing a GAL until after mediation has been attempted or, if one is appointed prior to mediation, to excuse the GAL from mediation.”).

¹² See Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115 (2003) (“The overriding theme of the *Custody Standards*, as with the *Abuse and Neglect Standards*, is that a lawyer should act like a lawyer. Lawyers have attended law school, been admitted to at least one state to practice, and are bound by the profession’s ethical rules, either the ABA Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, or a state’s professional code. Lawyers are trained advocates. Nothing in a lawyer’s current training qualifies a lawyer to make decisions on behalf of a client, especially a child client.”).

¹³ For those who think that there is some agreement as to empirically supported treatment in the mental health professions, such that anyone can give an expert opinion, see Alexis Elmore, *Empirically Supported Treatments: Precept or Percept?*, 47 PROF. PSYCHOL.: RES. & PRAC. 198 (2016).

noted, qualifications and reliability of expert opinions in family court should adhere to rules of scientific methodology and evidence:

Using a Daubert analysis should likewise result in the exclusion of the expert's testimony on "best interests." A decision on the ultimate issue requires legal analysis and consideration of many factors, some of which may not be known to the expert. Because the best interest standard is admittedly indeterminate, it is not possible to critically assess the expert's predictions on which outcome would serve the child's best interests. In other words, the expert's opinion would not have scientific validity and should not be allowed under Daubert.¹⁴

These concerns have led some state courts to limit the admissibility of hearsay, but lay statements from interviews, expert opinions (irrespective of qualifications or personal observation) by professionals, medical and mental health records, and other sources of information and data may still be admissible in a trial merely by status conferred by the GAL appointment order.¹⁵ Although the response is that the output of the GAL is always subject to cross-examination as a minimal function of due process, the struggle over whether a GAL is a lawyer *qua* lawyer or witness *qua* witness is fraught with hazards.¹⁶ No matter the skill of

¹⁴ Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 22-23 (2004).

¹⁵ A discussion of this topic is beyond the scope of this paper but classic examples we talk about in professional ethics trainings is the opinion that, "Dad has a narcissistic personality disorder" or has violent and abusive tendencies with control issues" or "Mom is a great parent" or "Mom is depressed and anxious but her suicidal ideation is not a risk emotionally for the children." When conducting a forensic or GAL investigation the next question is, "Did you ever meet Dad" or "See Mom with her children"? The answer is often, "No but . . ." When uninformed GALs, however, make use of that opinion there is a powerful connection between status and outcome for a judge (and trial lawyers) who may not question the underlying qualifications and reliability of the information. From our perspective, GAL investigations should require much the same standards as the AMERICAN PSYCHOLOGICAL ASSOCIATION SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (2012), <http://www.apa.org/practice/guidelines/forensic-psychology.aspx> and <https://www.scribd.com/document/363048476/APA-2012-Specialty-Guidelines-for-Forensic-Psychology>.

¹⁶ See *In re Adoption of T.D.*, 87 A.3d 726, 731 (Me. 2014) ("Indeed, often the most effective challenge to the quality, completeness, or competence of a guardian ad litem's work will be accomplished through cross-examination of the GAL at trial."); *Morgan*, 411 S.W.3d at 112 ("By disallowing cross-exam-

the lawyer, there is no un-ringing the hearsay or opinion bell and there is great hazard to annoying the trial judge who knows the GAL from many cases and has one trial day and a full calendar.

Nevertheless, this status exception, in practice, extends far beyond investigation and weighing of evidence from various sources—all functions well within the scope of traditional or even specialized lawyer training and professional acumen. What evolved as an adjunct to the limits of courtroom proceedings is a very powerful role for lawyers as GALs: providing expert opinions for the court on legal and physical custody, relocation, evidence-based interventions, or other questions and assigned tasks.

In all child protection cases, a GAL must be a lawyer or court appointed special advocate (CASA).¹⁷ In private child custody proceedings, each state may limit GAL representation to lawyers or permit other professionals such as social workers and psychologists, for example, to act in that court-appointed capacity.¹⁸ The model of a GAL for a child or person deemed “incom-

ination of the GAL, furthermore, the trial court created a real and substantial risk that Morgan’s fundamental interests would be erroneously impaired. The GAL’s findings and recommendations were almost all adverse to Morgan. Without the vital tool of cross-examination, Morgan’s ability to challenge the GAL’s report was severely limited. We have recognized, even in civil cases, the fundamental importance of cross-examination, an aspect of the right to be heard. While it may be, as the trial court noted, that Morgan could test the accuracy of the GAL’s report by questioning the people the report referred to, without the opportunity to cross-examine the GAL himself, Morgan had no means of probing his assumptions and potential biases, a probing that could well have affected the trial court’s assessment of his recommendations.”).

¹⁷ See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2010) (“a guardian ad litem, who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”); see also *In re Josiah Z.*, 115 P.3d 1133 (Cal. 2005) (“The rules governing dependency guardians ad litem are slightly different than those applicable in civil proceedings.”); Gerard F. Glynn, *The Child’s Representation Under CAPTA: It Is Time for Enforcement*, 6 NEV. L.J. 1250 (2005). For an example, see MAINE JUDICIAL BRANCH, http://www.courts.maine.gov/maine_courts/family/casa/index.shtml (last visited Feb. 8, 2018).

¹⁸ See Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the Right Thing to Do*, 27 PACE L. REV. 869, 910 (2006) (“The entire discussion of lawyers for children could be simplified greatly if states would abolish the term

petent” by law or evaluation is quite ancient. No one could have foreseen, even among the most militant of child rights advocates, that the sheer volume of child custody litigation would become the life of children from birth to the age of majority. Currently all states have some variation on a GAL-lawyer in all manner of civil child custody cases.

In those states, that lawyer with JD in hand and a license is empowered to write reports and testify as to recommendations concerning legal and physical custody of a child, termination of parental rights, and relocation of a parent and child, and many other variations on legal and physical custody. In rare circumstances would a lawyer with only those credentials qualify under the rules of evidence in a civil or criminal case that was not in family court or, as discussed below, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹ and its progeny.

The power to give an expert opinion using social science rather than physics or chemistry to opine on primary residence or visitation or apply other social science literature is judicially and legislatively authorized.²⁰ Given that no corporation or insurance company or government entity would allow a lesser standard, nor

‘guardian ad litem’ or at the least refuse to allow lawyers to serve as guardians ad litem.”); Prescott, *The New Phoenix*, *supra* note 3, at 80 (“The Supreme Judicial Court maintains the GAL roster and determines the required GAL qualifications, but in 2015 the Legislature proscribed that GALs must hold ‘professional licenses.’”).

¹⁹ 509 U.S. 579 (1993). Not all states are *Daubert* states but there is generally some form of gate-keeping and threshold reliability test. *See, e.g.*, Commonwealth v. Hoose, 5 N.E. 3d 843 (Mass. 2014) (Particularly in the case of psychological or behavioral sciences, a lack of prevalence data alone may not be sufficient to justify a ruling that the theory is unreliable.); *In re Sarah C.*, 864 A.2d 162, 164 (Me. 2004) (“To meet the two-part standard for the admission of expert testimony, the testimony must also meet a threshold level of reliability.”). For purposes of this article, reference is not generally made to federal or state variations on the Federal Rules of Evidence 701-705. These rules do provide an anchor for policy and appellate decision-making but the case law and statutorily-created exceptions drive outcomes.

²⁰ *See* Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 869 (2004) (“Derived not from experimentation but observation, there is serious question as to whether much of this behavioral evidence can meet the *Daubert* definition of reliable science. Nonetheless, this evidence continues to be admitted routinely at trial, often with little critical analysis by the court and sometimes even after the evidence has been discredited in its own field.”).

would state and federal courts permit such a trip-wire standard, how did that transformation happen?²¹ Factored into this equation are more families engaging in protracted conflict and struggles to co-parent effectively. These families require even more judicial intervention to make basic parenting decisions for their children over the pendency of minority.²² As state and local resources are stretched thin, the solutions remain unclear.²³

II. The Western Role of Judges: Civics 101

One point of distinction, however, before moving on. The involvement of a GAL with a family is the direct consequence of family conflict entering the courthouse portal, not a cause.²⁴ And

²¹ There are many articles on this topic but one of the clearest and most valuable as an overview and critique is Victor Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 273 (2006) (“The “battle of experts” continues in full force today. The need for *Daubert* protections is as great, if not more so, as it was twenty years ago. As Justice Breyer has recognized: “[T]here is an increasingly important need for law to reflect sound science.”) (quoting Stephen Breyer, *The Interdependence of Science and Law*, 280 SCI. 537, 538 (1998)).

²² See JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 90 (2014) (“It is time to recognize that family scripts have been rewritten, and they have been rewritten along the diverging lines of gender, class, and culture. Marriage is thriving among higher-income, well-educated men and women who have become more likely to stay together; marriage is dying among lower-income, less-educated men and women, and the marriages they do enter into are more likely to end in divorce.”).

²³ As a leading scholar optimistically wrote years ago, “The child custody court has been transformed in what is, for the legal system, a comparatively short period of time—approximately forty years. The child custody court has moved permanently beyond the stage where its sole function is to award sole custody to the better parent. Today’s child custody court is a conflict manager, not a fault finder.” Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 428 (1999).

²⁴ There are many cases that could be drawn on, but this one is a sad and graphic template of culture today. See *Vose v. Iowa Dist. Ct. for Marshall Cnty.*, 786 N.W.2d 873, 873 (Iowa Ct. App. 2010) (“He told a responding officer that he received a harassing text message from Angela disapproving of haircuts he gave their children. Vose showed the officer the protective order and advised him that Angela was not supposed to contact him. At the same time, Vose admitted he posted a message on his social networking homepage, which made

this debate is one that has drawn the attention of scholars, stakeholders, and judicial authorities across the country.²⁵ In a democracy, parents have a presumptive right and the correlative freedom to act without government interference.²⁶ Child custody and protection cases represent a forfeiture of some aspects of that right and, derivatively, freedom.²⁷ Over time this is a consequence that some parents come to regret but, as the saying goes, it is what it is until parents chose otherwise.

What is misunderstood (or ignored) is that the Western tradition of an *adversarial system* does not permit a judge to do more than hear evidence in a courtroom under rules enacted generations ago. There is no authority for a judge to visit a living room, or confer privately with a therapist, or meet teachers and

reference to the dispute, and that he assumed Angela might have seen it. He also told the officer that he sent Angela an e-mail stating, 'Go get fucked you retarded bitch.' The officer arrested Vose for violation of the protective order.").

²⁵ For a sampling, see 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, 306 (1997) ("Elimination of the term and figure of the guardian ad litem will help move family law into the mainstream of legal thought and will permit better protection of the rights and interests of children and parents."); Sheila M. Murphy, *Guardians ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 287 (1998) ("The need for guardians ad litem is particularly necessary in custody, visitation, and parentage litigation.").

²⁶ See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE OF CHILDREN 23, 23 (Spring 1998) ("In the United States, independence, privacy, and parental rights are highly prized. The legal system supports the right of families to rear their children according to their own values, and requires evidence of danger or harm before the state may invade the sanctity of the home to protect children.").

²⁷ Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968-69 (2005) ("Nevertheless, the United States jurisdictions appear to be caught between two forces pulling in opposite directions: (1) a 1974 federal funding statute, the Child Abuse Prevention and Treatment Act (CAPTA) which has created an (unfunded) mandate linking funding for state child protective systems to the provision of a guardian ad litem for every child subject to child protective proceedings; and (2) a strengthening consensus among the academic and professional community that child representation should be conducted by lawyers acting in accordance with legal ethical rules and performing lawyerly functions.").

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neighbors and family members outside the courtroom without the rudiments of oath and cross-examination. Consequently, a stranger to that family, vested with constitutional authority and donning a robe, must divine a result from evidence proffered in a matter of hours amidst the rituals and constraints of a courtroom.

With that said, the tension in the child custody arena arises in three ways. First, would the GAL opinion by lawyers on ultimate issues qualify as expert opinions anywhere other than family court?²⁸ Second, when the GAL is proffering that form of expert opinion, is the GAL also acting as a “truth detector” and thereby usurping the court’s ultimate responsibility in a manner that would not be permitted in other civil or criminal proceedings?²⁹ Third, does the likelihood that GALs work in the same court and frequently with the same judges influence judgments about outcomes and the reliance or anchoring of the decision on the recommendations by a lawyer?³⁰

²⁸ See, e.g., *State v. Black*, 537 A.2d 1154, 1156 (Me. 1988) (“although the proponent need not always show general scientific acceptance, *State v. Williams*, 388 A.2d 500, 503-04 (Me. 1978), ‘in order to be admissible the proffered expert testimony must be demonstrated to have sufficient reliability to satisfy the evidentiary requirements of relevance and helpfulness, and of avoidance of prejudice to the defendant or confusion of the factfinder.’”).

²⁹ See *Black*, 537 A.2d at 1157 n.1 (“We note that a significant number of jurisdictions have recognized that although an expert may testify in order to explain inconsistent conduct or testimony of the victim, the expert cannot offer an opinion as to the truth of the victim’s story.”); see also *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986) (“We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert’s stamp of truthfulness on a witness’ story goes too far in present circumstances.”); *State v. Maday*, 892 N.W.2d 611, 619 (Wis. 2017) (“Expert testimony does not assist the fact-finder if it conveys to the jury the expert’s own beliefs as to the veracity of another witness.”).

³⁰ This is *not* a commentary on the quality of the GAL work but on the influence of the role which may offer very relevant and reliable information. See Birte English, Thomas Mussweiler, & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 198 (2006) (“Even though judges typically do not throw dice before making sentencing decisions, they are still constantly exposed to potential sentences and anchors during sentencing decisions. The mass media, visitors to the court hearings, the private opinion of the judge’s partner, family, or neighbors are all possible sources of sentencing demands that should not influence a given sentencing decision.”); Margaret Bull Kovera, Melissa B. Russano, & Bradley D. McAuliff, *Assessment*

Child protection proceedings and certain guardianship proceedings under state law require court-appointed lawyers and guardians ad litem for children. However, most private child custody litigation proceeds with parents having to pay for their own attorney and the children's representation.³¹ The point here is not to continue the debate about the appropriateness of state-funding representation or the ethics of representing children as a GAL or even the efficacy of that role in reducing contested cases. With the exception of research on efficacy, the literature on those points is vast and thoroughly debated in policy and practice.³²

of the Commonsense Psychology Underlying Daubert: Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases, 8 PSYCHOL., PUB. POL'Y & L. 180, 185 (2002) ("Based on the results of basic social psychological research on scientific reasoning ability, it is logical to expect that judges may not be able to identify flaws in expert evidence proffered in their courtrooms. It is possible, though, that judges' extensive experience in evaluating the admissibility of expert evidence will have provided them with knowledge about scientific methodology that laypeople do not possess. However, judges report relying on experts' credentials and experience rather than the content of their testimony when judging the credibility of expert testimony.").

³¹ See *Daud v. Abdullahi*, 115 A.3d 77, 80 n.2 (Me. 2015) ("To the extent that Abdullahi argues that he was denied due process and a meaningful opportunity to be heard during the hearing because he was unrepresented, we note that a defendant in a protection from abuse proceeding does not have a right to counsel, even when his parental rights may be temporarily limited."); *Poll v. Poll*, 588 N.W.2d 583, 588 (Neb. 1999) ("The instant proceeding is one brought on by an individual involving a dispute between parents. The 'weapons' of the state have not been marshalled against the father. The subject matter of the proceeding is the adjustment of visitation, not the initiation or termination of parental rights.").

³² See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255 (2005) ("Notwithstanding the initial debate, by the early 1980s a consensus seems to have evolved among academic commentators and professional leaders in the juvenile justice community regarding the appropriate role of counsel in delinquency cases."); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 22 (2000) ("In an effort to ensure that the individual needs of each child are addressed, Congress mandated that each child be provided with a representative. As will be examined next, however, the provision of representation has not always accomplished this goal.").

What matters in child protection or child custody cases is that few parents have the economic capacity to hire competing experts to provide data that supports their position. Thus, the three policy problems described above will not find an answer in adversarial combat between equally bankrolled parties with resources and lawyers.³³ The assumption in *Daubert* was one of “common sense,” but it was not one seen through the lens of privilege. This does not apply to most child custody proceedings between the state and private parties.³⁴

Family lawyers in the United States are expected to be masters of their own universe, at least when acting within the intentionally-designed adversarial judicial-system.³⁵ Conversely, parents enter that centuries-old portal in a rather diminished capacity to exercise autonomy and self-determination. The adversarial arena is the default when there is a claim of jeopardy by the state for child maltreatment or parental conflict impedes a collaborative parenting plan in a private child custody case.

Irrespective of the form of family structure or the formal legal authority which governs how children may find themselves the victims of litigation, much of the modern language by adults and institutions is in the very American guise of “rights-speak.”³⁶

³³ See Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 949 (2008) (“Under these conditions, the adversary case-by-case method, dependent on individual prosecutors, defense attorneys, judges, and juries and their ability to understand and marshal the requisite expertise in case after case, especially given the system’s many imbalances, is not a good way to address forensic sciences. The risk of error in individual cases is high.”).

³⁴ Kovera, et al., *supra* note 30, at 183 (In *Daubert*, the Court “made a number of commonsense psychological assumptions. First, they stated that judges would usually be able to differentiate flawed from valid expert evidence. They also argued that if judges mistakenly admitted unreliable evidence, standard safeguards against this type of evidence (e.g., cross-examination, opposing experts) would assist jurors in weighting the evidence appropriately.”).

³⁵ For an historical examination, see Jamil S. Zainaldin, *Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1978).

³⁶ See Margeret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute’s Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 301, 319 (2001) (“I have argued elsewhere that child flourishing depends upon parental autonomy and involvement of the community (though not as rightsholders).”). This phenomenon and its language is not just limited to the United States. See Susan B. Boyd, *Demonizing*

This evolution of rights language matters because, in the United States, the language of *rights* has eroded the language of *responsibility* or *accountability*.³⁷ Underlying this article is the assertion that courts must resolve these disputes but that adult choices generate the duration and intensity of parental conflict and child custody placement, whether with the state or a parent or third party.

In these contexts, the adversarial system requires a trial in which evidence is admitted or excluded.³⁸ In child custody cases, judges are too often left with little concrete and objective evidence about the children and must rely upon the testimony and experiences of parents and allies with much to lose or gain.³⁹ The

Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes, 6 J. MOTHERHOOD INITIATIVE FOR RES. & COMMUNITY INVOLVEMENT 52, 53 (2004) (“Fathers’ rights advocates generally endorse this traditional heterosexual form of family, asserting it as a remedy for the social ills they identify; and rarely talking about alternative family forms in any positive manner: ‘All children have two parents, not one, not three, but two.’”).

³⁷ Although beyond the scope of this paper, the implications of bias and bigotry in social welfare policy and practice is a factor which should remain in the forefront. Some families may have resources to litigate against each other or the state and others may have a very different lens. This does not mean that parents should be excused from the consequences of abuse or neglect or choices, but it does mean there are structural barriers which not all parents face equally. See Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & SOC. JUST. 233, 238 (2014) (“Together they serve as a proxy, both unconscious and conscious, for a particular type of racialized dysfunctional parent union—one that lends itself to public scorn and opprobrium under a dominant group consensus of what parenthood should look like. The widespread trope of Welfare Queens and Deadbeat Dads, rather than the actions of any given parent or even more poor parents, sets the stage for policy in the area of social welfare.”).

³⁸ See Katherine Hunt Federle & Danielle Gadowski, *The Curious Case of the Guardian ad Litem*, 36 U. DAYTON L. REV. 337, 352 (2010) (“For good or ill, we have an adversarial legal system. We strongly embrace the belief that the clashing presentation of stories from each of the parties will uncover the truth.”).

³⁹ For a social science analysis, see generally MORRIS B. HOFFMAN, *THE PUNISHER’S BRAIN: THE EVOLUTION OF JUDGE AND JURY* (2014). A recent study is worth reading as a curious example. See Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Reply to Weinshall-Margel and Shapard: Extra-neous Factors in Judicial Decisions Persist*, 108 PROC. NAT’L ACAD. SCI. E834-E834 (2011) (“We have presented evidence suggesting that when judges make repeated rulings, they show an increased tendency to rule in favor of the status

GAL role is intended by policy makers to fill this gap by acquiring information through investigation and inquiry *outside the courtroom* and then transferring that knowledge, by report and testimony, to judicial fact finding and decision making.⁴⁰

Even when information is being proffered with sincerity, the capacity of a parent to offer a cohesive story in such an unfamiliar environment may unfairly distort their presentation. And that is before the very human nature of judges and organizational demands for processing (ever-more) volume with (ever-more) limited resources impairs best intentions in fact-bound and emotion-entrenched court events. Yet there is also an obligation to explain the judicial system to the public rather than rely on middle-school civics to explain the judicial branch's role in a democracy.⁴¹

quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment"). The statistical analysis and hypotheses have been subject to challenge. See Andreas Glöckner, *The Irrational Hungry Judge Effect Revisited: Simulations Reveal that the Magnitude of the Effect Is Overestimated*, 11 JUDGMENT & DECISION MAKING 601, 601 (2016) ("According to previous findings on mental depletion, the 'irrational hungry judge effect' should at best be small in magnitude (if existing at all; see Carter & McCullough, 2013), which might render the observed extraneous influence less relevant from a practical point of view and the need for state interventions less urgent.").

⁴⁰ See Lidman & Hollingsworth, *supra* note 25, at 258 ("For example: a *guardian ad litem*-lawyer may offer to the court her own observations and personal opinions as evidence via a report and recommendation, in effect performing the testimonial function of a witness; a lay *guardian ad litem* investigator may express an opinion on who should get custody as if he were an expert witness, or may make an argument at a motion hearing, performing a function reserved to a lawyer or *pro se* party; and a lay *guardian ad litem* may tell the children their conversations will be confidential, thereby asserting a privilege limited to attorney-client relationships."); See also *Wechsler v. Simpson*, 131 A.3d 909, 913 (Me. 2016) ("During his testimony, the guardian ad litem stated that Washington's guidelines are informative on child development and are relevant in this action only to the extent that they address factors included in Maine's statute.").

⁴¹ See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1100 (2006) ("We constantly recite the deep truth that the courts depend on public confidence, but we must do more to educate the public about the role of the courts.").

III. Experts in Family Court

Centuries of tradition within the adversarial system permitted parties to offer a peculiar form of evidence: *expert opinion based upon third party data derived from research and investigation not present in the courtroom from which the expert then may opine on the ultimate issue in litigation*.⁴² What is oddly left out from a discussion of *expert opinion* involving GALs is application of any standards betwixt the then-famous *Frye v. United States*⁴³ test and the now-mythical *Daubert*⁴⁴ “gatekeeping” factors as a function of state law.

Daubert mandated that scientific evidence be subject to a “reliability test” rather than the “general acceptance test” set forth in *Frye*. Among factors (neither science nor law are static events) *Daubert* suggested: whether the theory or technique can be or has been tested; whether the theory or technique has been subjected to peer review and publication (as such review increases so does the likelihood that substantive flaws in the methodology will be detected); the known or potential rate of error; and whether the theory or technique enjoys general acceptance within the relevant scientific community.

While *Daubert* has value in terms of grounding this discussion, *General Electric Co. v. Joiner*,⁴⁵ has special relevance to GALs and expert opinions in family court:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that

⁴² See David M. Godden & Douglas Walton, *Argument from Expert Opinion as Legal Evidence: Critical Questions and Admissibility Criteria of Expert Testimony in the American Legal System*, 19 *RATIO JURIS* 261, 265-66 (2006) (“There is an important difference between the type of testimony that can be offered by an expert in contrast to a non-expert witness. Normally witnesses are quite limited in the kind of testimony they can give into evidence. While witnesses are permitted to report on those things which they directly experienced, witnessed, heard, said or did, they are denied the opportunity to give an opinion on the significance of these things, or to speculate on other related matters (such as what might be inferred from what they have experienced).”).

⁴³ 293 F. 1013 (D.C. 1923).

⁴⁴ *Daubert*, 509 U.S. 579.

⁴⁵ 522 U.S. 136 (1997).

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there is simply too great an analytical gap between the data and the opinion proffered.⁴⁶

The practical reality that Woozles are always *ipse dixit* does not resolve the conundrum across all disciplines, not just GALs.⁴⁷ Various professionals appear as experts in family court trials. Real estate appraisers, forensic accountants, business/stock appraisers, engineers, physicists, mechanics, and actuaries, and other expert opinions peculiar to the relevant facts in dispute may qualify to testify.⁴⁸ There are also psychologists, physicians,

⁴⁶ *Id.* at 146; see Sophia Adrogué & Allen Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts*, 47 S. TEX. L. REV. 881, 899-900 (2006) (“[M]ethodologies that are generally accepted in practice in the real world are not always accepted in court. Further, methodologies interchangeable in the real world are often more strictly separated by case law.”).

⁴⁷ See Linda Nielsen, *Shared Physical Custody: Does It Benefit Most Children*, 28 J. AM. ACAD. MATRIM. LAW. 79, 84 (2015) (“Before addressing these questions, it is important to understand how judges, lawyers and the mental health workers involved in custody issues are too often bamboozled or ‘woozled’ by the research in ways that lead them astray. The process of relying on faulty, limited, partial, or misinterpreted research has been referred to as ‘woozling’ and the myths and misperceptions that consequently arise are called ‘woozles.’”); Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 PSYCHOL., PUB. POL’Y & L. 164, 164 (2014) (“In the story Winnie the Pooh dupes himself and his friends into believing that they are being followed by a scary beast—a beast he calls a woozle. Although they never see the woozle, they convince themselves it exists because they see its footprints next to theirs as they walk in circles around a tree. The footprints are, of course, their own. But Pooh and his friends are confident that they are onto something really big.”).

⁴⁸ See *e.g.* *Von Hohn v. Von Hohn*, 260 S.W.3d 631, 637 (Tex. Ct. App. 2008) (“Trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion. The proponent of the testimony has the burden to show that the expert possesses special knowledge as to the very matter on which he proposes to give an opinion. Further, the expert must have knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify the expert to give an opinion on that particular subject.”); *Root v. Root*, 65 P.3d 41, 45 (Wyo. 2003) (“Although Mr. McGovern did not have a college degree, he had over fourteen years of practical experience in the acquisition and operation of medical practices and had worked in administration in the medical field since the 1970s. He also had knowledge of the medical communities in northwest Wyoming and adjacent areas of Montana. Given that evidence, we cannot conclude the trial court abused its discretion by permitting him to testify. Unless an expert witness is clearly unqualified, questions concerning the nature of his

nurses, social workers, forensic mental health professionals, and neuropsychologists who testify in child custody cases.⁴⁹

Each of these professional disciplines may qualify, by virtue of rule and case law, to provide an expert opinion. The outcome of conflict between parents is thereby subject not just to rules and rituals, but the intellectual and emotional skill and persuasiveness of lawyers and the capacity of parents to understand and survive the courtroom experience. We can think of the most prominent form of inputs as lawyers and judges structuring and receiving data in the form of testimony from parents and other lay witnesses. The testimony is no different than the person who observed an accident and testified that the car was traveling 50 mph when it ran the red light or the tenant who testifies about the intended amount of rent in an oral contract.

Thus, a lay person can testify from data directly acquired by one of the five senses but not as to conclusions (she was speeding so she was drunk) or base that testimony on what she was told (she must have been drunk because Tom told me she was drinking at a bar an hour ago).⁵⁰ In child custody, parents likewise testify from their own experiences and senses about each other

qualifications normally go to the weight accorded the witness' testimony rather than the admissibility of his testimony.”).

⁴⁹ See *e.g.* *Robb v. Robb*, 687 N.W.2d 195, 202 (Neb. 2004) (“In this appeal, Timothy does not challenge Haley’s professional qualifications or the scientific reliability of the methodology used by psychologists like Haley in conducting child custody evaluations. Rather, he argues that Haley’s opinions were inadmissible because he did not conduct a full custody evaluation or perform any of the testing that would have been included in such an evaluation.”); *In re Gina D.*, 645 A.2d 61, 65 (N.H. 1994) (“Expert testimony based on psychological evaluation or other behavioral science expertise may be helpful to the court by providing information about a child’s physical and cognitive development and behavior. In particular, such testimony may show the presence of age-inappropriate sexual behavior and knowledge, obsession with sexual abuse, and may explain behaviors that would otherwise suggest that the child lied in making allegations of abuse. In addition, we recognize that the behavioral science fields are not static and that research may produce new information and consensus in the scientific community about diagnosing symptoms in sexually abused children.”).

⁵⁰ See *ME. R. EVID.* 701 (2017); *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 992 (Me. 1983) (In general, a lay opinion does not meet the standard of Rule 701 if it is “not rationally based wholly and solely on the perceptions [the witness] acquired through his personal observations.”).

and their children.⁵¹ Judges rule on whether that evidence is relevant or properly within the scope of those personal experiences. The reasons for such rules have centuries of academic and policy argument about reliability and fairness and due process and other traditions and patterns for the delivery of courtroom justice. Rightly or not, those rules will survive and adjust to current polices but will not likely change in practice in any serious way.

Critics argue quite vigorously, and even cogently, that such an adversarial method of finding facts and applying law only increases the duration and intensity of family conflict, harms children, and only benefits the lawyers economically.⁵² That is tautologically and empirically true—in part. Lawyers are retained to represent clients as licensed professionals and, in child protection cases brought by the state, the taxpayers fund legal representation as a function of due process of law. The statement itself, however, does not answer the most complex social policy problem of what society should do when parents have a child and for quite sad and unfair reasons find themselves caught in this adversarial system?⁵³

Lawyers serve as conduits between the facts and the court by managing the structure and reliability of evidence to the advantage of the client. When lawyers proffer the testimony of forensic psychologists, psychiatrists, physicians, social workers, and other mental health professionals, the expert evidence has a powerful effect on outcomes. The expert's duty to tell the truth is more than mere forensic role-keeping in family court. Seasoned

⁵¹ Actually, and despite what we learned in second grade, there may be more than five senses. See *THE FIVE SENSES AND BEYOND: THE ENCYCLOPEDIA OF PERCEPTION: THE ENCYCLOPEDIA OF PERCEPTION* (Jennifer L. Hellier ed., 2016).

⁵² See *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that in death penalty cases, for example, the Supreme Court purports to apply “meaningful adversarial testing.”).

⁵³ See Tess Neal & Thomas Grisso, *The Cognitive Underpinnings of Bias in Forensic Mental Health Evaluations*, 20 *PSYCHOL., PUB. POL'Y & L.* 200, 209-10 (2014) (“Finally, we imagined a legal context that might change the role of forensic examiners in a way that accepts adversarial participation through expert evidence—a legal context full of practical, scientific, and ethical questions. These questions may or may not be worth trying to answer as we strive to improve the validity and reliability of forensic mental health evaluations and to foster trust in our work process and products.”).

experts in this role recognize that the courtroom environment, sadly, is not as rigorous in challenging myths (like Woozles) and are careful to provide testimony grounded in empirical science. Current practice and law, however, does not require forensic experts to affirmatively describe the reliability of the science cited as foundation, though ethical standards in certain professional disciplines do require such disclosure.⁵⁴

The reasoning from *Joiner*, as it explicates *Daubert*'s authority and the tendency of various form of bias masking facts to fit, has application to the discussion here. The most telling example is a thoughtful decision by the Mississippi Supreme Court in *S.G. v. D.C.*⁵⁵ The case was not that unusual (sadly). What was different in terms of a published decision was that the court had the opportunity (and ran with it) to observe the role of a GAL, a lawyer run amok, and to apply *Daubert* and common sense.

The facts can be briefly summarized. The GAL issued a preliminary report expressing numerous "personal opinions concerning the evaluations and psychological treatment provided by the healthcare professionals who had treated Jane."⁵⁶ In the opinion of the GAL, this "forensic interview was conducted not in search of spontaneous revelations of the child, but to confirm a previously-determined theory that sexual abuse had occurred and the Father . . . was the perpetrator."⁵⁷ The GAL then went on to write that:

information forthcoming from this child is at a minimum transferred from someone else, whether mother, grandmother, counselor, thera-

⁵⁴ Bruce Budowle, et al., *A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement*, 54 J. FORENSIC SCI. 798, 799 (2009) ("There have always been challenges to the use of science in legal proceedings. In the adversarial system the evidence is criticized in a negative, nonconstructive manner. As a result, the courtroom can pervert the evaluation of science. The same analytical methods used in other fields are used in many forensic analyses and the basic foundations of the science are the same."); Kirk Heilbrun & Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 PSYCHOL., PUB. POL'Y & L. 219, 242 (2010) ("However, there is good reason to think that poor practice of forensic psychology has the potential to harm the accuracy of legal decision making and the interests of both defense and prosecution across a range of legal decisions.").

⁵⁵ 13 So. 3d 269 (Miss. 2009).

⁵⁶ *Id.* at 274.

⁵⁷ *Id.*

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pist, friend, or combination thereof, and is at the other extreme the result of coaching or even brainwashing. Your guardian ad litem is convinced that this child is traumatized, but it does not appear to be the result of sexual abuse by the Father. It appears to be the result of an attempt to paint the Father of this child as a child molester for reasons known only to the accusers.⁵⁸

The court noted that, “glaringly absent” from the GAL’s report is any “discussion, evaluation or investigation of either the considerable physical evidence that Jane actually had been sexually abused (if not by her father, then by someone), or the identity of the perpetrator.⁵⁹ Instead, the interim “report concentrated almost exclusively on whether, in his opinion, Jane had been ‘brainwashed’ by her mother and/or her maternal grandmother.”⁶⁰

The court found that the chancellor failed to define clearly the purposes for which a GAL was appointed, and, in fact, the record revealed that, at times, the chancellor viewed the GAL as “a special master for the court, and at other times, as an attorney representing the children.”⁶¹ Multiple references to the GAL as the “children’s attorney” are at odds with the reference to the GAL’s duty to make a report to the court, other than as any other lawyer representing a client might be required to do. If “the guardian ad litem was appointed in this matter as an attorney representing the children, he owed the children all of the loyalty, duties, and confidentiality mandated by the attorney-client relationship.”⁶² If, however, as the court held, the GAL is to act as, “one who investigates and makes recommendations to the court, that role must be made clear to the parties, and particularly, to the children of suitable age and experience for whom the guardian ad litem is appointed.”⁶³

Furthermore, the court went on to write, when a GAL is appointed as an investigator for, or advisor to, the court, the GAL “should recommend a course of action to the court, but the guardian ad litem should never serve as a substitute for the court. The court is not bound by the guardian ad litem’s recommenda-

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 281.

⁶² *Id.* at 282.

⁶³ *Id.*

tion, and the court, not the guardian ad litem, is the ultimate finder of fact.”⁶⁴ Therefore, a GAL appointed to investigate and report to the court is:

obligated to investigate the allegations before the court, process the information found, report all material information to the court, and (if requested) make a recommendation. However, the guardian ad litem should make recommendations only after providing the court with all material information which weighs on the issue to be decided by the court, including information which does not support the recommendation. The court must be provided all material information the guardian ad litem reviewed in order to make the recommendation. Recommendations of a guardian ad litem must never substitute for the duty of a chancellor.⁶⁵

As the court then concluded, the GAL “was entitled to his opinion, but he should have presented at trial the allegations of abuse and both the evidence that substantiated the allegations and the evidence that did not. As previously stated, the trial court, and not the guardian ad litem, is the ultimate finder of fact.”⁶⁶ Finally, the court posited, in a telling footnote that:

The record reveals only one attempt to qualify the guardian ad litem to render such expert opinions. The only qualification stated was that the guardian ad litem had served for many years as a guardian ad litem. In other words, the first time the guardian ad litem rendered such an opinion, he was not qualified, but thereafter, he was because he had done so before. We find such meager qualifications unacceptable as a matter of law, under the principles set forth in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (adopted by this Court in *Miss. Transp. Comm’n v. McLemore*, 863 So.2d 31, 35-40 (Miss.2003)).⁶⁷

This analysis by the court is similar to the ethical requirements for forensic psychologists under the American Psychological Association Specialty Guidelines.⁶⁸ There is a duty to transparently disclose alternative hypotheses, to provide the court (and parties) with data that supports the conclusion in a report, and an ethical duty to provide informed consent and assure that children or vulnerable parties know the scope and consequences of the role. As in *Joiner*, the risk otherwise is the *ipse*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 293.

⁶⁷ *Id.* at 273 n.5.

⁶⁸ *See supra* note 15.

dixit analysis or what is otherwise termed confirmation bias.⁶⁹ Parties may not have the capacity to challenge these opinions in family court so the affirmative duty, so wisely imposed by the Mississippi Supreme Court, is a duty and standard of ethics and practice for GALs and other experts worthy of emulation in other courts.

IV. Conclusion

These issues are complex and do not lend themselves to a readily-defined conclusion. The role of GAL seemed so simple many generations ago when the death of parents or a true lack of capacity impaired the capacity of courts to protect a child. Now, advocacy and investigation and recommendations have taken on such a complex and iterative role.⁷⁰ On the one hand, a parent may believe with righteous indignation or legitimate concern that their experiences with the other parent is being shunted aside without serious analysis or respect. Alternatively, the other parent believes themselves to be the victim of a parent with superior capacity to fabricate or look better in the briefest of moments and within the artifice of litigation. And sometimes, in the context of human behavior, both are true in some proportion.

What is deeply troubling is not criticism of an adversarial system ill-fitted to protecting children but rather that many professionals (the authors among them) wish there was a chance at a do-over for these fragile families. What is lacking by many in the public is any appreciation that the adversarial system is a human system with human foibles and biases and values and ethics and

⁶⁹ There are multiple biases and heuristics revealed by reams of research in social psychology and behavioral economics. See Martine B. Powell & Sandra Lancaster, *Guidelines for Interviewing Children During Child Custody Evaluations*, 38 AUSTRALIAN PSYCHOL. 46, 49 (2003) (“The issue of confirmation bias is particularly relevant to custody decisions because these decisions are inherently subjective and value laden. For example, personal bias has been shown to predict the type of custody arrangements favored by mental health professionals with some professionals preferring to award custody to parents of one gender over the other.”).

⁷⁰ See generally Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183 (2004).

experiences and resources.⁷¹ Cynics, and those who view themselves as possessing an “immutable truth” irrespective of the facts, or who refuse to accept accountability for their own behavior, often attack court systems for failing to accept their thoughts and behaviors as canon. It is no surprise that in a human system with limited time and resources liars may prevail and good people punished. That is true because conflict itself is not a static event but occurs over time and subject to the vagaries of human behavior cognition, and memory washed through a filter of professionals and courts.

What is curious is that so many Americans believe that the free choice to have a child with a partner means that courts may unravel that truth or reduce conflict in a way that personality and character structures may not disclose in court or through a matrix of choices to litigate rather than collaborate. When does the choice to choose a parent accompany the responsibility for that choice? And how do modern courts unravel a choice and still exercise a *parens patriae* responsibility for a vulnerable child who never chose to be, as the Vermont Supreme Court stated so poignantly decades ago, “as a shuttlecock in a game of badminton”?⁷²

The reality, however, is that once the choice to litigate subsumes personal responsibility or psychopathology or choice or preference, then the court must choose. The risk is always one of biases which may distort accuracy or invalidate facts, but a decision must be made if parents do not settle over that child’s division. What matters to the legal profession, and any conception of social justice, is the need to step back and recognize that legal training or mental health training are not silos but roles in which

⁷¹ An evolving body of law is applying the constitutional standard of ineffective assistance of counsel in parental termination proceedings. See *In re M.P.*, 126 A.3d 718, 726 (Me. 2015) (“We now adopt the Strickland [v. Washington, 466 U.S. 668 (1984)] standard to govern ineffective assistance of counsel claims in termination of parental rights proceedings. Although we recognize that this standard—developed through criminal law proceedings—may have to be tailored to termination of parental rights proceedings in some respects, the deprivation of parental rights is in many ways similar to the deprivation of liberty interests at stake in criminal cases.”). Whether or not this same standard will apply to GALs in those cases remains open.

⁷² *Ohland v. Ohland*, 442 A.2d 1306, 1308 (Vt. 1982).

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interdisciplinary knowledge and ethics are paramount duties to children.

We may, as adults, wince at the behavior of clients but we cannot flinch from the responsibility conferred on the courts by constitutional doctrine, or the role of GALs as an adjunct to fact finding and decision making, to provide the best evidence and data and research to courts.⁷³ It may be time to try to find a better fit between the demographics of modern families and the capacity of court professionals to help and mitigate harm to children. If state courts are the repository of millions of parenting transactions (a trend unlikely to abate within another generation) then accepting that truth about the American family and applying research and resources to protect children is a better investment than drifting chaos.⁷⁴

⁷³ See *Miller v. Miller*, 677 A.2d 64, 70 (Me. 1996) (“[T]he use of guardians ad litem to protect the best interests of children in divorce proceedings fully satisfies any federal constitutional requirements. Accordingly, the Miller children are not entitled to intervene in the divorce action of their parents and be represented by independent legal counsel.”).

⁷⁴ In many respects, poverty, The New Jim Crow, academic failure, addiction, and mental health are inextricably linked with the need for more evidence-informed research in conjunction with family courts. See Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1257 (1964) (“We need organized legal research to examine statutes, regulations, manuals and practices to determine where changes are needed. We need institutions capable of financing both legal research and test cases to determine the extent of rights in given areas.”). The connections with some research is now becoming a source of policy development at the federal and state levels in the context of modern debtor’s prisons, child support, and its impact on child access for disadvantaged parents. See NATIONAL CONFERENCE OF STATE LEGISLATURES, CHILD SUPPORT AND INCARCERATION, <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> (last visited Nov. 21, 2017).