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THE NEW PHOENIX: MAINE’S INNOVATIVE STANDARDS FOR GUARDIANS AD LITEM

Dana E. Prescott

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THE NEW PHOENIX: MAINE'S INNOVATIVE STANDARDS FOR GUARDIANS AD LITEM

Dana E. Prescott*

I. INTRODUCTION

In a 2014 article in the *Maine Law Review*, I took the opportunity to address the historical and legal foundation for guardian ad litem (GAL) appointments in Maine.¹ The article itself was written on the heels of a tumultuous political and policy discussion over the preceding few years concerning the qualifications, role, authority, and efficacy of GALs. And this debate is not just a Maine event but one which has drawn the attention of scholars, stakeholders, and judicial authorities across the country.² A common theme in the literature is the scope, authority, and accountability of a GAL when appointed to investigate and advocate for a child's best interests—as defined by state law—when there is a claim of jeopardy by the state,³ parental conflict impedes a collaborative parenting plan in a child custody case,⁴ or the choices of the parents have implicated third party rights as biological,

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1. Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians Ad Litem for Children*, 67 ME. L. REV. 43 (2014). The original GAL Rules, effective September 1, 2015, may be found at http://www.courts.maine.gov/rules_adminorders/rules/text/mr_gal_only_2016-10-5.pdf. Following the initial draft of this article, the Maine Supreme Judicial Court, after a period for public comment, amended the GAL Rules effective October 1, 2016, http://www.courts.maine.gov/rules_adminorders/rules/amendments/2016_mr_7_gal.pdf.

2. For a sampling of philosophies, see Katherine Hunt Federle & Danielle Gadomski, *The Curious Case of the Guardian Ad Litem*, 36 U. DAYTON L. REV. 337, 352 (2010) (“The idea that a child must have a guardian ad litem is a curious one. 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.”); 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.”).

3. See 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.”).

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. 2 (2004) (“GAL roles generally

psychological, or de facto parents.⁵

But that commonality does little to answer the critical question so often asked by the public: why appoint a GAL when we have judges to decide cases after a conventional trial? The corollary heard in many lawyers' offices is that "if a judge just hears what I have to say then he or she will know the truth and I will get my way." What is misunderstood, or ignored too often even by lawyers and professionals who should know better, 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 and laws enacted many generations ago. There is no authority for a judge to visit a living room, or confer privately with a therapist, or meet teachers and neighbors and family members outside the courtroom and without the rudiments and tensions of 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 ethical constraints of a courtroom. The outcome of conflict between parents is thereby subject not just to rules and rituals, but the intellectual and emotional skill and persuasiveness of the lawyers or the parents, if self-represented.⁶

The 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. In practice, however, the same limitations are inherent. The weight of the GAL investigation and its authority are subject to the human variables of the adversarial system, including the judge's filter of experience, belief matrices, and

fall into one of three main categories: advocate for the child's wishes (advocate), champion of the child's best interests (champion), or factfinder for the court (factfinder."); see also *Miller v. Miller*, 677 A.2d 64, 70 (Me. 1996) ("In our view, the use of guardians ad litem to protect the best interests of children in divorce proceedings fully satisfies any federal constitutional requirements.").

5. As Maine was passing these new rules for GALs, a new UNIFORM PARENTAGE ACT became law, L.D. 1017 (127th Legis. 2015). Concurrently, the Maine Supreme Judicial Court, sitting as the Law Court, has had to resolve an ever-evolving and complex intersection of constitutional and statutory matrix of family relationships. See *Curtis v. Medeiros*, 2016 ME 180, ¶ 18, ___ A.3d ___ ("Consistent with the minimum procedural requirements we have announced as safeguards on the fundamental right to parent, we conclude that before a court may grant a third party contact with a child pursuant to 19-A M.R.S. § 1653(2)(B), the third party must file both a motion to intervene in the matter and his or her own motion seeking such contact."); *In re Guardianship of Hailey M.*, 2016 ME 80, ¶ 29, 140 A.3d 478 ("Based on the evidence presented, the court created a full guardianship in the child's grandparents to establish a stable living situation for a then fifteen-year-old child whose interactions with her mother exacerbated the risk that the child would injure herself or run away."); *Dorr v. Woodard*, 2016 ME 79, ¶ 28, 140 A.3d 467 ("The question is whether the State has the authority, on the facts presented by *Dorr*, to intrude on the mother's decision-making on behalf of her daughter."); *Kilborn v. Carey*, 2016 ME 78, ¶ 14, 140 A.3d 461 ("The court found, by clear and convincing evidence, that the child's life would be substantially and negatively affected by *Kilborn's* absence and that *Kilborn* had satisfied his burden of showing that he is the child's de facto parent.").

6. See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 286 (2008) ("Symbols and setting further support the character of the trial judge in the custody narrative. The judge's elevated bench, the robe, and the gavel match the role of listening, questioning, and making authoritative, objective statements. The physical location of the lawyers and litigants, on the stage but below the judge, situates them to present a contest. The courtroom itself may physically appear to be a setting of authority, reason, and truth finding.").

judgment.⁷

The failure of the legal system to explain the basic obligations and duties of the judiciary as a constitutional branch of government is most regrettable.⁸ As a consequence of decades of civic neglect, the public may become even more cynical about a trial process which resembles membership in a secret society.⁹ The breadth of that criticism, however, is not the same as ignoring that, with the freedom to choose a parent in a democracy, come the consequences of that choice. Long before the authority of the judicial system is invoked to enter judgments allocating a child between parents, these same parents have a right to create a safe home, to be kind and gracious to each other, and to give their child the benefits of sacrifice and stability.

Nevertheless, GAL roles must be organized and reformed within the traditional confines of a centuries-old adversarial system.¹⁰ This point requires *very* careful understanding because laws and rules may change GAL qualifications and accountability but *not* the rituals or core operating system of the American judicial system. Under such circumstances, the public may perceive that nothing has changed at all because the visible reality of the judicial process remains the same. As well-articulated by Judge Gerald W. Hardcastle:

In determining whether the adversarial process has any appropriate application to the modern family court, the issue previously raised is whether matters involving families ought to continue to be handled in courts at all. Presently, lawyers and judges in family courts are taking a beating. Fundamental role changes are demanded. For example, attorneys are demanded to shift their roles from zealous

7. See *In re Adoption of T.D.*, 2014 ME 36, ¶ 18, 87 A.3d 726 (“Indeed, often the most effective challenge to the quality, completeness, or competence of a GAL’s work will be accomplished through cross-examination of the GAL at trial. If a parent or other interested party has filed a motion to remove the GAL or otherwise challenging the GAL’s investigations, the court can, and should, hear the motion during the trial and allow examination of the GAL on the pertinent issues. If the court concludes that the investigation has been insufficient or that the GAL has demonstrated a bias that has made the GAL’s testimony unreliable, the court may disregard that testimony in whole or in part.”).

8. 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.”).

9. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 208 (1943) (“The question may be asked whether the lawyer can be held responsible in any significant degree for the plight in which we find ourselves. For a moralist, the question is whether the lawyer can be ‘blamed’; for a scientist, whether he is an important causal variable; for a reformer, whether he can be acted upon to produce change. The answer to all of these questions is: most assuredly, yes.”). For those who may speed read like me, look at the date of the article.

10. Commentary related to reforming the civil system and more specific criticism of the lack of a unified family court system has been the source of much literature. See Barbara A. Babb, *Where We Stand: An Analysis of America’s Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 37 (1998) (“As early as 1959, then, with the publication of the Standard Family Court Act, policymakers offered a valuable court reform proposal structured to allow one court the opportunity to consider and resolve all of a family’s related legal problems. Drafters of the Act foresaw the expertise of the judges sitting in this court, and the social services available to the families, as necessary features to improve the lives of individuals and families.”); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984) (discussing reform of the adversarial civil court system).

advocate to “counselor,” from “guard dog” to “guide dog.” In spite of the fact the vast majority of cases under the adversarial system settle, the effort is to paint attorneys as advocates who care only for the heat of the courtroom battle.¹¹

A final point before moving onto the body of this Article: although specific demographics are beyond its scope, it is critical to understand that modern family systems may be subject to even more complex forms of child custody litigation as “family scripts” rapidly divide, adapt, and re-configure throughout the life of a child. The law attempts, as best such a blunt instrument may do, to respect and balance changing societal mores and values.¹² Courts and GALs are a function of these shifts, not a cause, but—and it is a critical “but”—the “power framework” for all constitutional branches of government and family courts must eventually adjust to these societal evolutions.¹³

II. HIGH STAKES AND A BRIEF HISTORY OF MAINE FAMILY COURTS

In fairness, these cases are high stakes for parents and children. As such, in the realm of concrete rather than emotive expectations, the public is entitled to accountability in response to any policy design which delegates power to a third party to summarize someone’s life by investigating and recommending. What are the credentials, training, and ethical duties of that GAL? How will the investigative and authoritative role of that GAL influence the judge and the outcome in court? Will my concerns with violence and abuse, control and coercion, or economic and emotional dominance be heard objectively? Will my life and family be viewed with cultural and personal respect and dignity? These are legitimate and relevant questions which require a collaborative and thoughtful response from all three branches of government in conjunction with interdisciplinary professionals, stakeholders, and diverse families.

As the passage of time yielded reflection and perspective, GALs, like trial judges and magistrates, were an easily accessible target.¹⁴ Unlike other institutions which

11. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 100-01 (2005) (footnotes omitted).

12. 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.”).

13. *Id.* at 186 (“The debate over family values—and their legal expression—proceeds as though financial and child custody laws are independent of the power framework in which the rules are to be implemented. We have argued throughout this book that they are not.”). Arguing about a political or personal preference is not the same as recognizing the reality of what *is* rather than what *ought to be*. See *Pitts v. Moore*, 2014 ME 59, ¶ 10, 90 A.3d 1169 (“For some time now, we and other courts have been considering the law of parentage in light of advancements in technology, changes in social norms and family structures, and the resulting ever-expanding list of legal issues relating to children and families.”).

14. This risk was a part of the republic from its inception. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293 (2005) (“Although the Framers of the Constitution did not anticipate our modern pluralism, they appreciated the fragility of democracy when the ‘stakes’ of politics get too high. Stakes get high when the system becomes embroiled in bitter disputes that drive salient, productive groups away from engagement in pluralist politics. Groups will disengage when they believe that participation in the system

may disperse responsibility, the judiciary and GALs were easily identifiable to individuals whose frustration ranged from failure to receive legitimate and insightful advocacy for positive change to the pathologies of blame and invective. The challenge of preventing the extremes on either side from leaving families and family courts in ashes was rather daunting and, for a time, it was unclear whether anything positive could survive much less thrive.¹⁵ As we shall explore more precisely in the sections below, the Phoenix survived because honorable people, across branches of government and professions and personal experience, eventually prevailed such that innovative rules arose from innovative statutes.¹⁶

A. *The Family Court Division*

By way of a brief foray into recent history, Maine enacted its “Family Division” in 1997, effective in 1998, with the following directive:

The Family Division shall provide a system of justice that is responsive to the needs of families and the support of their children. The Maine Supreme Judicial Court may adopt administrative orders and court rules governing the practice, procedure and administration of the Family Division. These practices and procedures must include, but are not limited to, education for the parties, case management and referral services to mediation and other alternate dispute resolution technique.¹⁷

The Maine District Court is not a family court with a singular unified docket or single judge case management system in the sense that those terms are used by other state courts that only hear cases dedicated to families.¹⁸

Before and after 1998, district courts must hear and decide civil matters involving foreclosures, landlord-tenants, small claims, and all matter of other disputes.¹⁹ And the district court also must hear and decide traffic offenses, criminal

is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.”) (footnotes omitted).

15. Reid J. Meloy, *Indirect Personality Assessment of the Violent True Believer*, 82 J. PERSONALITY ASSESSMENT 138 (2004) (“Eric Hoffer (1951), who captured an essential psychodynamic of the true believer when he wrote in 1951, ‘The vanity of the selfless, even those who practice utmost humility, is boundless[.]’”).

16. The use of myth or metaphor to try and capture the influences of change in the judicial system is not new. See Linda H. Edwards, *Once upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 890 (2010) (“Myths provide ready templates for plots. Myths and narrative archetypes such as birth, death, re-birth, journey and sacrifice establish a particular view, a narrative perspective on the events of a story, creating the context in which ideas or events will be interpreted.”) (footnotes omitted).

17. 4 M.R.S.A. § 183 (2016).

18. For an extensive and insightful review of the history and policies which created multiple track systems for children in Maine, see Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 ME. L. REV. 45, 47-48 (2016) (“Maine’s split jurisdiction system, perhaps unique in the country, precludes coordination and consolidation of matters involving the same child in the Family Division of the Maine District Court and a county probate court—a judge in one court system cannot adopt, modify, or terminate an order from the other system. This common scenario leads to confusion, conflicting orders, inefficiencies, and additional stress on a child and family that are already in crisis.”) (footnotes omitted).

19. For a comprehensive and long list, see 4 M.R.S.A. § 152 (2016).

charges when imprisonment is less than a year, and all juvenile matters.²⁰ The public rarely understands that Maine's notion—and funding—of a family court system is a sub-set of much larger operational responsibilities of the Administrative Office of the Courts and the Chief Justice.

Maine did enact a family law magistrate system to help facilitate case management and interim hearings in divorce and parental rights cases.²¹ This hiring of magistrates as adjudicators is unique to Maine because the Governor does not nominate magistrates, nor does the Legislature hold hearings and consent to their appointment as is the constitutional requirement for all Maine judges.²² Instead, the Chief Judge of the District Court, with the approval of the Chief Justice of the Maine Supreme Judicial Court, shall employ the magistrates.²³ Magistrates then “serve at the pleasure of the Chief Judge of the District Court.”²⁴

Unlike magistrates appointed in the family division, the appointment of a district court judge does not require any family law practice or training of any kind, nor any expertise in the areas described below.²⁵ The Maine judiciary does provide intra-office trainings and judges frequently attend continuing education and other educational opportunities and many judges work diligently to acquire that knowledge. By comparison, the Legislature required that magistrates have experience in family law, as well as “interest, training or experience in mediation and other alternate dispute resolution techniques, domestic violence, child development, family dynamics and case management.”²⁶ Of note, GALs are required to have similar forms of experience, as well as meet continuing education and licensure requirements under the GAL Rules.²⁷

20. 4 M.R.S.A. § 165 (2016). The implementation of the Unified Criminal Docket has altered some of these roles as District Court Judges sit in Superior Court to conduct jury trials and pretrial criminal procedures, such as motions to suppress, are heard in the Superior Court.

21. See 4 M.R.S.A. § 183 (2016); Me. R. Civ. P. 100 *et seq.* (2016).

22. See Me. Const. art. V, § 8 (“The Governor shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers, except judges of probate and justices of the peace if their manner of selection is otherwise provided for by this Constitution or by law, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for.”). The exception relates to the election of Probate Judges which has had its critics and supporters for decades. See *In re Estate of McCormick*, 2001 ME 24, ¶ 16, 765 A.2d 552 (“The practice of allowing part-time probate judges to litigate cases as part-time lawyers has received widespread criticism” in various commission reports thereafter set forth.); Smith, *supra* note 18.

23. 4 M.R.S.A. § 183(1) (2016).

24. 4 M.R.S.A. § 183(1)(C) (2016).

25. See Herma Hill Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1205 (1968) (“The idea of a family court has been discussed for many years. Such a court, it is said, should have integrated jurisdiction over all legal problems that involve the members of a family; be presided over by a specialist judge assisted by a professional staff trained in the social and behavioral sciences; and employ its special resources and those of the community to intervene therapeutically in the lives of the people who come before it.”). Again, the date of this article proves a point.

26. 4 M.R.S.A. § 183(1)(A) (2016).

27. See M.R.G.A.L. 2(b)(2)(B) (“The applicant must have attended a guardian ad litem training program approved by the Chief Judge with a curriculum of at least 18 hours to be placed on the Title 18-A and/or 19-A Roster and 23 hours for the Title 22 Roster. To be approved by the Chief Judge, the training curriculum must include specified learning outcomes and activities designed to meet those outcomes, and must cover Titles 18-A, 19-A, and 22; dynamics of domestic abuse and its effect on children; dynamics of separation and divorce and their effect on children; child development; timing and

Now, to be *very* clear, this does not mean that district court judges do not perform this role with dedication and commitment to families. Many do and many who never had family law practice experience perform these complex duties with honor and integrity over long careers. What this does mean, however, is that the public expects family court judges (whether unfairly or irrationally) to possess knowledge and experience merged with an intellectual rigor, wisdom, sagacity, and temperament that few humans possess.²⁸ Judges are not alone, of course. The role of magistrates and GALs reflects a similar matrix of expectations. In too many cases, however, children have no other avenue or resources because a child's parent(s) has abdicated, by act or intent, the constitutional right to self-determination and autonomy.²⁹

B. *The Dearth of Research Informing Policy*

With that foundation, the frustration expressed about GALs reflects a broader national debate which is deeply, if subconsciously, rooted in the power and duty of "courts" in a democracy to preside over the most intimate and mundane of family behaviors.³⁰ Whether in the form of child protection or child custody litigation, variations of inter-generational meiosis and mitosis implicate the very definition

impact of court-related events from a child's perspective; the effects of abuse, neglect, and trauma on children; substance abuse; mental health; family finance and the financial impact of separation and divorce; legal issues and processes; ethics and professionalism as a guardian ad litem; the duties and obligations of the guardian ad litem as an agent of the court; and interviewing techniques.").

28. See Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 127 (2007) ("However much we may understand, on an intellectual level, that judges are mere humans, we have a tendency to believe that somehow the process of becoming a judge effects a substantial transformation, and that judges become different from the rest of us. At least implicitly, we impute near-magical properties to the acts of taking an oath and donning a black robe, as if they somehow eliminate one's susceptibility to all the foibles, biases, and petty jealousies that are the stuff of day-to-day life.") (footnote omitted).

29. See, e.g., *Guardianship of Sebastien Chamberlain*, 2015 ME 76, ¶ 33, 118 A.3d 229 ("To properly balance the constitutional rights at issue, an order appointing a guardian pursuant to section 5-204(d)—like other orders that terminate or severely constrain the fundamental right to parent—can be entered only after a court has made findings applying the standard of proof by clear and convincing evidence."); *Light v. D'Amato*, 2014 ME 134, ¶ 21, 105 A.3d 447 ("Because fundamental rights are at stake for a relocating parent, a nonrelocating parent, and a child, and because the court's determination must be focused on the child's best interest, see 19-A M.R.S. § 1653(3) (2013), a divorce judgment's effect on a parent's decision to relocate will not, per se, constitute a constitutional violation."); *Sparks v. Sparks*, 2013 ME 41, ¶ 18, 65 A.3d 1223 ("Concluding that the protection from abuse statute permits an award of temporary parental rights and responsibilities to nonparents responsible for an abused child, we review the statute to determine whether it infringes on Brant's constitutional interests protected by the Due Process Clauses of the United States and Maine Constitutions. See U.S. Const. amend. XIV, § 1; Me. Const. art. I, § 6-A.").

30. The literature is vast but for thoughtful discussion, see Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183 (2005); Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43 (2011).

of *being* a “parent”³¹ or a “family”³² which, in turn, implicates a complex matrix of socio-economic status, mental health struggles, substance abuse and addiction, personality and characterological traits, and domestic violence or neglect. As these familial mutations separate and bind during iterations of litigation, family courts are inevitably placed in the midst of intimate family relationships—often for years upon years.³³

What professionals also know is that the dearth of methodologically-sound research concerning family court interventions means that much of child custody policy is, mostly, well-meaning guesswork.³⁴ There is an historical trade-off with any governmental bureaucracy when social welfare policy is guided by good intentions, feelings, or intuition in that organizational preferences for efficiency may trump the most effective and equitable delivery of resources. Yet this adversarial system, despite decades of explication, remains bound to traditions of truth-finding-by-combat. In family court, the adversarial system has an even more peculiar existence because a judgment is always subject to post-order bargaining, threats, and

31. For purposes of this Article, the term “parent” means the legal authority to make child-related decisions or have physical custody of a child. *See Pitts v. Moore*, 2014 ME 59, ¶ 10, 90 A.3d 1169 (“For some time now, we and other courts have been considering the law of parentage in light of advancements in technology, changes in social norms and family structures, and the resulting ever-expanding list of legal issues relating to children and families.”); Andrew L. Weinstein, *The Crossroads of a Legal Fiction and the Reality of Families*, 61 ME. L. REV. 319, 319 (2009) (“As much disagreement as may exist in the academic world, things in the judicial arena are hardly better. Depending upon venue, the rules change, with at least as great a variety as will be found in the law journals. Part of that variety is due to fundamental disagreement about policy, but part of it is also due to the judges’ inevitable sensitivity to the factual harmonics of each case, as a brief tour of recent case law will show.”).

32. *See* Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE AND FAM. 403, 413-14 (2010) (“Cohabiting relationships may not have a clear beginning point. Single parents and their adolescents often disagree on whether new, seemingly cohabiting partners are part of the family. The crosshousehold ties that multiple partner fertility can create may lead to families without clear boundaries.”) (citation omitted); Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 607 (2004) (“How children are faring under the second demographic transition, which began around 1960, is less certain. The primary trends of the second transition include delays in fertility and marriage; increases in cohabitation, divorce, and nonmarital childbearing; and increases in maternal employment.”).

33. Aggregating the data for filings—and which reveals only quantity, not complexity—is a difficult task because each state counts caseloads differently and various categories of cases may overlap, such as domestic violence complaints, child protection petitions, divorce, or parental rights, and post-judgment motions. For a national description of the data, see NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Court-statistics.aspx>. The data for Maine may be found at STATE OF MAINE JUDICIAL BRANCH, http://www.courts.maine.gov/news_reference/stats/index.html.

34. *See* Neerosh Mudaly & Chris Goddard, *The Ethics of Involving Children Who Have Been Abused in Child Abuse Research*, 17 INT’L. J. CHILD. RTS. 261, 265 (2009) (“Our main intention in the research was to empower them by giving them an opportunity to have their voices heard. On the other hand, of equal importance to us, was the need to protect them from any possible risk of harm from involvement in the research.”); 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, 413 (2000) (“Opinions are plentiful, but hard data is not. A recent comprehensive study on high conflict divorce cases by the Canadian Parliament, for example, bemoans the absence of data for policymakers and asks for an immediate program of empirical research on indicia of high conflict divorce including, false allegations of abuse and neglect; parental alienation; the behaviors, patterns, and dynamics of domestic violence and parental child abduction.”).

motions for modification and contempt throughout the minority of that child.

Moreover, and unlike other practice areas, much more than half of all litigants are self-represented (as against child protection cases where there is a right to counsel paid by the state) at various times in the adversarial process.³⁵ For all the decades of discussion and demographic shifts, the traditional method of getting relevant and evidence-informed research and data to judges still requires hurdling a complex array of rules of evidence as accessible as any Georgian chant in Latin (and sometimes that is true for lawyer-speak as well).³⁶

It is fair to state openly now that not only lay persons but some lawyers, mediators, psychologists, social workers, therapists, and psychiatrists expect such mythical skills when there should be better recognition of human and institutional frailty. This does not mean that any organization should ignore the intrinsic duty to exercise the privilege of power and authority with the best ethical and scientific knowledge available. Most try to do so. The importance of meeting such a duty, however, should not obscure an unfettered truth about human nature: what is often disguised in social media and public hearings as vitriol/blame/rigid thinking is that a GAL is only appointed, and a judge only exercising that power, because parents do not settle those differences without an adversarial trial.

This polite tweak before we begin to address refinement of statutes and rules, suggests that a shift from an adversarial system to some other form of decision making is a matter of public importance; not to be trivialized.³⁷ Changing the institution of family courts in the United States may occur someday but that means a genuine paradigm shift, akin to Copernicus and Newton from Plato and Ptolemy, as to how Americans view the right to be right coupled with the gravitational collapse of personal accountability. Family courts, as an institutional remedy, are

35. See Marsha M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context*, 56 N.Y. L. SCH. L. REV. 367, 370-71 (2011) ("Over the past twenty years, the American legal system has shifted from one where litigants were predominately represented by lawyers to one where self-represented litigants are most common.") (footnotes omitted); Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2706-07 (2014) ("Challenges to lawyers' monopoly of the legal system and the U.S. Supreme Court's continuous rejection of a right to counsel in civil cases have led to the creation of many avenues for pro se legal assistance").

36. In a more scholarly manner, colleagues from Maine have made this argument for years. See John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 227 (2003) ("The illogic of this practice has been obvious to generations of scholars."). I did not originally agree with my colleagues but I have evolved a different opinion driven by the volume of pro se litigants, the unfairness of poverty and allocation of resources, the risks to another generation of children, misuse of experts and science in family courts, and the correlative need for a different means to provide data to judges with some degree of ethical balance. See Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-by-License?*, 28 J. AM. ACAD. MATR. LAW. 521 (2016).

37. See Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55, 56 (2010) ("My thesis is that the institutional culture of family courts across the nation too often stifles conversation and innovation, muffles the voices of the disenfranchised, and serves as a disincentive for zealous legal advocacy. The social psychology phenomenon known as 'groupthink' can be shown to be a contributing factor to this culture."); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1061 (2003) ("Problem solving courts represent a significant new direction for the judiciary. These judges seek to actively and holistically resolve both the judicial case and the problem that produced it.") (footnote omitted).

necessary because the alternative is a vacuum in which human nature, operating through family and group systems, may enforce the right to be right by violence, aggression, or economic oppression. Until a better alternative is implemented (not just theorized) any new laws or rules must work within a real environment in real time and not just the realm of thought experiments.

III. THE CORE OF THE RULES

For the most part, the political and policy discussion concerning GALs pertained to Title 19-A cases between private parties and, thereby, was disconnected from probate proceedings under Title 18-A or child abuse and neglect proceedings brought by the State under Title 22.³⁸ In 2013, the Legislature sought and mandated more uniformity irrespective of the jurisdictional forum for appointing a GAL.³⁹ Thus, “guardian ad litem” means “a person appointed as the court's agent to represent the best interests of one or more children pursuant to Title 18-A, section 1-112; Title 19-A, section 1507; or Title 22, section 4005” and “best interests of the child” means “an outcome that serves or otherwise furthers the health, safety, well-being, education and growth of the child.”⁴⁰

In the spring and summer of 2015, the Supreme Judicial Court began receiving public comment on proposed GAL Rules, which included a new Review Board, under the auspices of the Board of Overseers of the Bar, to oversee and adjudicate ethical complaints. Concomitantly, the Administrative Office of the Courts was developing a uniform GAL appointment order, as well as a training program for new GAL applicants which was sponsored by the Maine State Bar Association and held in October of 2015.⁴¹ Thus, all GALs must adhere to the same roster qualifications, ethical standards, and oversight under rules adopted by the Maine Supreme Judicial Court effective September 1, 2015.⁴² In conformity with 4 M.R.S.A. § 1554(3)(A)-

38. In 2016, the Legislature enacted, and the Governor signed, legislation entitled “An Act To Ensure a Continuing Home Court for Cases Involving Children,” L.D. 890 (127th Legis. 2016). This legislation substantially altered the relationship between the Probate Courts and District Courts when a case involves rights and responsibilities for a child. The unintended consequences of this legislation on existing GAL appointment orders and how district court judges construe Title 18-A of the Uniform Probate Code in District Court remains a work-in-progress.

39. See 4 M.R.S.A. § 1555(1) (2016) (In “proceedings to determine parental rights and responsibilities and guardianship of a minor under Title 18-A and in contested proceedings pursuant to Title 19-A, section 904, 1653 or 1803 in which a minor child is involved, the court may appoint a guardian ad litem for the child when the court has reason for special concern as to the welfare of the child.”); 4 M.R.S.A. § 1556(1) (2016) (“An order appointing a guardian ad litem pursuant to Title 22, section 4005 must specify the terms and conditions of the appointment as provided in Title 22, this chapter and rules adopted by the Supreme Judicial Court.”).

40. 4 M.R.S.A. §§ 1551(1), (2) (2016). Under a sunset provision, the chapter is repealed October 1, 2017, pursuant to 4 M.R.S.A. § 1558.

41. For this information, see http://www.courts.maine.gov/rules_adminorders/rules/index.shtml; http://mebaroverseers.org/regulation/gal_rules.html; FM-125, Rev. 09/15, http://www.courts.maine.gov/fees_forms/forms/index.shtml#fm.

42. See M.R.G.A.L. 1(a) (2016) (“These Rules are adopted pursuant to 4 M.R.S. §§ 1551 to 1557, 18-A M.R.S. § 1-112, 19-A M.R.S. § 1507, and 22 M.R.S. § 4005, to address practice and performance of guardians ad litem for children in the District Court, the Superior Court, and the Probate Court. They govern the qualifications for guardians ad litem, standards of conduct for guardians ad litem, appointment

(I), the court adopted M.R.G.A.L. 1 as core values for all GAL appointments:

A guardian ad litem must tailor his or her work to the particular needs and circumstances of each case as identified in the court order appointing the guardian ad litem, but, in general, a guardian ad litem shall

(1) Represent consistently the best interest of the child and provide information to the court that assists the court in determining the best interest of the child;

(2) Understand and uphold the law and court orders related to the guardian ad litem's appointment;

(3) Maintain the highest standards of professionalism, cultural sensitivity, and ethics;

(4) Recognize that timely resolution of each matter serves the best interest of the child and the child's need for stability;

(5) Within the scope of authority defined by statute or court order, plan, carry out, document, and complete thorough, appropriate, and fair investigations in a timely fashion;

(6) Communicate in a developmentally appropriate way with the child;

(7) Make well-reasoned and factually based recommendations regarding the best interest of the child as directed by the order of appointment;

(8) Pursuant to the order of appointment, include parties in the investigation, use effective communication techniques, recognize limitations that may be imposed by the financial resources of the parties as applicable, and be aware of the cultural and socioeconomic status of the parties; and

(9) Complete assignments and written reports in a timely manner, and communicate effectively with the court in motions, reports, recommendations, and testimony.⁴³

As compared with other models nationally, the development and adoption of these rules represented a novel and more precise approach to GAL qualifications, supervision, training, and oversight.⁴⁴ Common sense and years of experience with the frailties of newly designed policies suggests that what is being implemented today is subject, as it should be, to informed and intelligent evolution and amendment. Of particular importance, this approach to GALs was not just a *dirigo* pivot but responsive to intensive public input and institutional discussion.⁴⁵ Indeed,

of guardians ad litem, and placement of guardians ad litem on, and removal of guardians ad litem from, the guardian ad litem Roster.”)

43. M.R.G.A.L. 1(b) (2016).

44. For a different approach but one which is comprehensive as well, see Massachusetts Probate and Family Court Standing Order 1-08: Standards for Guardians ad Litem/Evaluator, <http://www.mass.gov/courts/case-legal-res/rules-of-court/probate/pfc-orders/1-08.html>.

45. In other countries, policy design and implementation of interventions or programs in child protection and child custody would require iterative assessment and measurement. See Eileen Munro & Alison Hubbard, *A Systems Approach to Evaluating Organisational Change in Children's Social Care*,

the inherent policy objective was not just “muddling through”⁴⁶ but the engagement of standards of practice so that parents and children receive the most equitable, efficient, and effective (not perfect) services from our family courts.

It is, however, critical to understand, at the threshold, that Maine is a state which provides *no* public funding for GALs or any other intervention, including mental health evaluations or court-appointed counsel, in private child custody cases.⁴⁷ This decades-old policy decision remains unchanged to date and it is unlikely that funding is on the horizon. This means that parents and children, and judges and magistrates deciding these cases, do not (and will not) have access to any independent professional services absent the families’ capacity to fund payment from personal or family resources.⁴⁸

The purpose of this section, therefore, is to highlight those aspects of the law and rules which are most relevant and in a manner as precise as the language of child custody law allows. As such, we begin with qualifications, scope of appointments, duty and immunity, ethical obligations, report writing, and confidentiality, and the ever-adaptive duties of a GAL as investigator, advocate, conflict-mediator, recommender, report-giver, and expert opinion-witness.

41 BRIT. J. OF SOC. WORK 726 (2011); Colleen Varcoe & Lori G. Irwin, “*If I Killed You, I’d Get the Kids*”: *Women’s Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse*, 27 QUALITATIVE SOC. 77 (2004). The judicial system in the United States is, however, rather opaque when it comes to research concerning the efficacy of GALs, psychological evaluations, parenting education, or mediation, for example. The reason this matters is that even “educated guesswork” fails to adequately explain to the public why an intervention is effective or whether it works across differences in race, social-economic status, culture, married or non-married status, or other variables: much less whether the intervention sustains positive change over the short, medium, and long runs.

46. This phrase has various complex meanings but may be traced to theories of policy analysis. See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959). When I teach graduate school programs in policy, I require students to consider two paradigms: Pareto Improvements and Rawls’ “veil of ignorance.” In my adaptive shorthand for social work, a Pareto Improvement, as developed by an Italian economist more than a century ago, is a change in policy which improves the lives of everyone but hurts no one. See Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903, 920 (1998) (“A Pareto improvement is a change that causes an increase in utility for at least one person without a decrease in the other’s utility.”). Perhaps impossible to accomplish in real life but critical to analyzing any social welfare policy. In JOHN RAWLS, *A THEORY OF JUSTICE* (1971), Rawls engaged in a thought experiment in which you consider what political system of economic and social justice you would want if you did not know whether you would be a master or slave or disabled or healthy, for example.

47. See *Meyer v. Meyer*, 414 A.2d 236, 238 (Me. 1980) (“In Karen Meyer’s proceeding for termination of his visitation rights, Mr. Meyer did not have a right to court-appointed counsel.”); *Danforth v. State Dep’t of Health & Welfare*, 303 A.2d 794, 799 (Me. 1973) (Indigent parents are entitled to appointed counsel in a neglect proceeding brought by the state because “the full panoply of the traditional weapons of the state are marshalled against the defendant parents.”); see also Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L. Q. 441, 441-42 (2000) (“Federal law requires the appointment of a *guardian ad litem* to represent the *best interests* of the child in child abuse and neglect court cases as a condition to a state’s receiving federal child welfare funds.”) (emphasis in original) (footnote omitted).

48. To know how many things may not change in policy, see Ralph J. Podell, *The “Why” Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103, 107 (1973) (“Many times the parents, rather than the public, voice objection to or criticism of a *guardian ad litem* appointment and his fee. This objection has little sound merit. The child was not brought into this world by reason of its own asking but instead by reason of the act or acts of the parents; and neither has the child created the dispute that is before the court.”).

A. *Qualifications for the Roster*

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.”⁴⁹ In 2000, the court created a roster for GALs who met certain training criteria, but no specific professional licensure, but allowed the trial court to appoint non-rostered GALs.⁵⁰ With new rules effective September 1, 2015, the court required that any GAL, rostered on or after March 1, 2000, must meet qualifications established by the court,⁵¹ including one of these licensures:

- (i) A current valid license to practice law in the State of Maine; (ii) A current valid license to practice as a Licensed Clinical Social Worker (LCSW), Licensed Professional Counselor (LPC), Licensed Clinical Professional Counselor (LCPC), Licensed Master Social Worker (LMSW), Licensed Marriage Family Therapist (LMFT), Licensed Pastoral Counselor (LPaC), psychologist, or psychiatrist in the State of Maine; or (iii) A Certification of Qualification by the Director of the CASA program, provided that a CASA Certification qualified individual may be appointed a guardian ad litem only pursuant to 22 M.R.S. § 4005.⁵²

Under this new Rule, GALs rostered after 2000 but who lacked these licenses were not grandfathered but could only complete existing appointments. Effective October 1, 2016, and following a period of public comment, the court amended this Rule effective to grandfather those GALs who were on the roster before September 1, 2015, and who were otherwise in good standing and were willing to take the training program.⁵³ The Chief Judge of the District Court may not roster any professional, except lawyers, who does not meet the licensure requirements.⁵⁴ And,

49. 4 M.R.S.A. § 1553(2)(A).

50. In Title 22 child protection cases, GALs must be lawyers or court-appointed volunteers. See 4 M.R.S.A. § 1501 (2016) (“There is established within the Administrative Office of the Courts of the Judicial Department the Court Appointed Special Advocate Program to provide volunteer lay persons to serve as court appointed special advocates or guardians ad litem under Title 22, section 4005, subsection 1, in child abuse and neglect cases.”); 22 M.R.S.A. § 4005(1) (2016) (“The following provisions shall govern guardians ad litem. The term guardian ad litem is inclusive of lay court appointed special advocates under Title 4, chapter 31.”); M.R.G.A.L. 2(a)(2) (2016) (“Guardians ad litem appointed in child protection proceedings pursuant to 22 M.R.S. § 4005 shall be either a CASA or an attorney listed on the Roster. If neither a CASA nor an attorney from the Roster is available, the court may appoint another attorney, provided that the attorney has not been removed or suspended from the Roster, and has not surrendered his or her appointment to the Roster.”). This requirement is not without criticism. See Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 *HAMLIN J. PUB. L. & POL’Y* 177, 195 (2006) (“Attorneys have the training to investigate, organize, and analyze the facts of their cases, to counsel their clients on alternatives, to think creatively about solutions, and to advocate positions on behalf of their clients But even with that training, attorneys do not have the expertise to know what is best for a given child in a given circumstance.”).

51. See 19-A M.R.S.A. § 1507(2) (2016).

52. M.R.G.A.L. 2(b)(2)(A) (2016).

53. See M.R.G.A.L. 2(b)(4)(iv) (2016) (“Have been on the GAL roster on the effective date of the implementation of these Rules (September 2015), have completed the core training required by these Rules, and if the applicant holds professional licenses, be in good standing.”).

54. See 4 M.R.S.A. § 1555(1)(A) (2016) (“A court may appoint, without any findings, any person listed on the roster. In addition, when a suitable guardian ad litem included on the roster is not available for appointment, a court may, for good cause shown and after consultation with the parties, appoint an attorney admitted to practice in this State who, after consideration by the court of all of the circumstances

unlike previous versions of the rule, an individual trial judge or magistrate may not yet appoint a non-rostered professional who possesses special skills for a particular case.

B. “Special Concerns” and “Best Interests”

Under all statutory schema, the “best interest” standard guides the core purpose of the GAL appointment:

[T]o provide information to assist the court in determining the best interests of the child involved in the determination of parental rights and responsibilities and guardianship of a minor under Title 18-A, in the determination of parental rights and responsibilities under Title 19-A, section 904 or 1653, and in the determination of contact with grandparents under Title 19-A, section 1803. The court shall appoint a guardian ad litem in a child protection case under Title 22, chapter 1071.⁵⁵

Titles 18-A and 19-A adopt a test premised on the court having “special concern as to the welfare of a child.”⁵⁶ In a Title 22 case, the appointment is automatically done as a matter of law.⁵⁷ The purpose of any GAL appointment, to assist the court in determining “the best interests of a child,”⁵⁸ is consistent with the history and role of GALs in Maine.⁵⁹

Under 4 M.R.S.A. § 1555(2) (2016), the factors listed for granting a GAL appointment under Titles 18-A and 19-A are fewer than the lengthy factors under

of the particular case, in the opinion of the appointing court has the necessary skills and experience to serve as a guardian ad litem. For the purposes of this paragraph, good cause may include the appointment of a guardian ad litem on a pro bono basis.”)

55. 4 M.R.S.A. § 1554(1) (2016); *see also id.* §§ 1555(4), 1556(3); 18-A M.R.S.A. § 1-112(a), (d) (2016) (“In any proceeding under this Title for which the court may appoint a guardian ad litem for a child involved in the proceeding, at the time of the appointment, the court shall specify the guardian ad litem’s length of appointment, duties and fee arrangements.”); 19-A M.R.S.A. § 1507(4) (2016) (“The guardian ad litem shall use the standard of the best interest of the child as set forth in section 1653, subsection 3.”); 22 M.R.S.A. § 4005(1)(A)-(B) (2016) (“The term guardian ad litem is inclusive of lay court appointed special advocates under Title 4, chapter 31 The court, in every child protection proceeding . . . shall appoint a guardian ad litem for the child The guardian ad litem shall act in pursuit of the best interests of the child.”).

56. 4 M.R.S.A. § 1555(1) (2016).

57. 22 M.R.S.A. § 4005(1)(A) (2016) (“The court, in every child protection proceeding except a request for a preliminary protection order under section 4034 or a petition for a medical treatment order under section 4071, but including hearings on those orders, shall appoint a guardian ad litem for the child. The guardian ad litem’s reasonable costs and expenses must be paid by the District Court. The appointment must be made as soon as possible after the proceeding is initiated. Guardians ad litem appointed on or after March 1, 2000 must meet the qualifications established by the Supreme Judicial Court.”).

58. *See* M.R.G.A.L. 4(b)(5) (2016) (“In performance of duties in Title 18-A and Title 19-A proceedings, the guardian ad litem shall use the standard of the best interest of the child as stated in 19-A M.R.S. § 1653(3).”); M.R.G.A.L. 4(c)(8) (2016) (“In performing the duties specified in the appointment order, the guardian ad litem shall use the standard of the best interest of the child.”).

59. *See* Miller v. Miller, 677 A.2d 64, 69 n.8 (Me. 1996) (“The responsibilities of a guardian ad litem are currently embodied in 19 M.R.S.A. § 752-A (Supp. 1995). At the time of the appointment of the guardian in this case, however, section 752-A had not been enacted. Instead, the responsibilities of guardians were elaborated in judicial opinions. According to those opinions, which formed the basis for the current statute, a guardian ad litem’s central responsibility is to assist the court in its role as *parens patriae* to determine the best interests of the child(ren).”).

19-A M.R.S.A. § 1653(3) (Supp. 2015), as amended over the past 30 years or so:⁶⁰

- (1) The wishes of the parties;
- (2) The age of the child;
- (3) The nature of the proceeding, including the contentiousness of the hearing;
- (4) The financial resources of the parties;
- (5) The extent to which a guardian ad litem may assist in providing information concerning the best interests of the child;
- (6) Whether the family has experienced a history of domestic abuse;
- (7) Abuse of the child by one of the parties; and
- (8) Other factors the court determines relevant.⁶¹

By itself, this does not mean too much but it does mean that the Legislature intended to give primacy to these factors but installed sub-paragraph H to allow trial courts the flexibility to consider any other relevant factors consistent with prior law.⁶²

In Title 22 cases, the GAL has a court-defined role which includes much more active involvement, by design, with the Department of Health and Human Services (DHHS) and third party agencies and persons.⁶³ In non-Title 22 cases, the appointment of a GAL is not automatic merely because parents are in conflict, but must follow a set of legislatively imposed factors designed to assure that the appointment is specific and targeted to the needs of that family operating within the Family Court Division. In Title 22 cases, there are few visible statutory changes, though federal and state policies concerning reunification and termination have had an ebb and flow for decades.

What does matter for all stakeholders is that the Legislature required a complaint process under all three titles and provided very specific directions to the court as to the shape and process for complaints:

1. Rules. The Supreme Judicial Court shall provide by rule for a complaint

60. For the list of factors, see 19-A M.R.S.A. § 1653(3) (Supp. 2015).

61. 4 M.R.S.A. § 1555(1)(B) (2016); *see* 19-A M.R.S.A. § 1507(1) (2012) (“The court may appoint a guardian ad litem when the court has reason for special concern as to the welfare of a minor child. In determining whether an appointment must be made, the court shall consider: A. The wishes of the parties; B. The age of the child; C. The nature of the proceeding, including the contentiousness of the hearing; D. The financial resources of the parties; E. The extent to which a guardian ad litem may assist in providing information concerning the best interest of the child; F. Whether the family has experienced a history of domestic abuse; G. Abuse of the child by one of the parties; and H. Other factors the court determines relevant.”).

62. Ironically, the short list, with due and proper regard for advances in child abuse and domestic violence as public policy and safety for parents and children, still captures the primary factors for assessing best interests in most family systems: “We recognize that the phrase ‘best interest of the child’ is abstract. Nevertheless this Court has endeavored to give that concept some measure of substantive meaning.” *Cyr v. Cyr*, 432 A.2d 793, 796 (Me. 1981).

63. *See* 4 M.R.S.A. § 1556(2)(D), (E), (F) (2016) (“The guardian ad litem must be provided access to the child by any agency or person The guardian ad litem shall file such reports, motions, responses or objections as necessary and appropriate to the stage of the case to assist the court in identifying the best interests of the child and provide copies to all parties of record The guardian ad litem shall appear at all child protection proceedings, unless previously excused by order of the court, and other proceedings as ordered by the court. The guardian ad litem may present evidence and ensure that, when appropriate, witnesses are called and examined, including, but not limited to, foster parents and psychiatric, psychological, medical or other expert witnesses.”).

process concerning guardians ad litem appointed under Title 18-A, Title 19-A and Title 22 that provides for at least the following:

- A. The ability of a party to make a complaint before the final judgment as well as after the final judgment is issued;
 - B. Written instructions on how to make a complaint;
 - C. Clear criteria for making a complaint;
 - D. Transparent policies and procedures concerning the investigation of complaints and the provision of information to complainants;
 - E. A central database to log and track complaints; and
 - F. Policies and procedures for using complaints and investigations for recommending the removal of a guardian ad litem from a particular case or other consequences or discipline.
2. Complaint process. The division shall provide written and electronic information to communicate the complaint process to the public and to all parties.
 3. Minor complaint option. The rules may provide for a minor complaint option that authorizes corrective action without the necessity of completing the full complaint and investigatory process.
 4. Motion to remove. The complaint process adopted pursuant to this section is in addition to the right of a party to file a motion to remove the guardian ad litem while the case is pending. The court shall hold a hearing on the motion at the request of the party filing the motion. The motion may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.⁶⁴

The development of rules and procedures for implementation is a work-in-progress but the statutory structure guides these future developments.

C. The Appointment Order: Type and Scope of Duties

For GALs, the historical duty was a function of an obligation to the court and the ethical and legal obligations which flowed from those activities.⁶⁵ The enactment of GAL legislation in 2013 and the court's adoption of new GAL Rules effective in 2015, may shift that duty, and its correlative ethical and legal protections, to a more confined, or at least, precise space.

By way of brief background, in *Gerber v. Peters*, the Maine Supreme Judicial Court, sitting as the Law Court, rejected any common law duty between parent and GAL on the grounds that an "attorney-client relationship between the appointed guardian ad litem and a parent is not created by the court's appointment or by a provision that the parents be responsible for the payment of the guardian's fees."⁶⁶ The Law Court then held that the duty of a GAL "in a divorce case is to the court,

64. 4 M.R.S.A § 1557 (2016).

65. For a critical analysis that is still relevant, see Lidman & Hollingsworth, *supra* note 2, at 259 ("This confusion about guardian ad litem roles is startling. It arises in the legal forum where definitions are important, precision is a virtue, and role responsibilities are highly regulated. Such precision and regulation are essential to provide the parties due process, and are particularly important where the state invades families' constitutional rights of privacy, while addressing the needs of vulnerable minors. Yet when a judge inserts the figure of a guardian ad litem into the case, no consensus as to that figure's rights and responsibilities exists.") (footnotes omitted).

66. 584 A.2d 605, 607 (Me. 1990).

and the scope of that duty lies within the parameters of the order of appointment.”⁶⁷

The Law Court subsequently held in *Kennedy v. State* that GALs were employees of the state within the meaning of the Maine Tort Claims Act because the GAL “has traditionally been viewed as functioning as an agent or arm of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client.”⁶⁸ Within these functions, a GAL

[F]ills a void inherent in the procedures required for the adjudication of custody disputes. Unhindered by the restrictions that prevent the court from conducting its own investigation of the facts, the guardian ad litem essentially functions as the court’s investigative agent, charged with the same ultimate standard that must ultimately govern the court’s decision – i.e., the “best interest of the child.”⁶⁹

Under Titles 18-A and 19-A, and in identical language for Title 22, the scope of duties is precisely limited in the negative: “The guardian ad litem has no authority to perform and may not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.”⁷⁰ The split in the form of appointment occurs because a GAL is an automatic rather than discretionary appointment in all child abuse and neglect cases under Title 22.⁷¹ In child custody cases between private parties, the Legislature and the Law Court prescribed two forms of duty: *mandatory* and *optional*.⁷² In a standard appointment

67. *Id.*

68. 1999 ME 85, ¶ 9, 730 A.2d 1252 (quotation marks omitted); *see also In re Nikolas E.*, 1998 ME 243, ¶ 10, 720 A.2d 562 (“Because the child is a minor, a guardian ad litem is appointed and either the child or the guardian can ask for an attorney to be appointed. In this case, the guardian is an attorney and acts in both capacities.”).

69. *Kennedy*, 1999 ME 85, ¶ 9, 730 A.2d 1252 (quotation and some punctuation marks omitted).

70. 4 M.R.S.A. §§ 1555(2)(B), 1556(2)(B) (2016).

71. 22 M.R.S.A. § 4005(1)(A) (2004) (“The court, in every child protection proceeding except a request for a preliminary protection order under section 4034 or a petition for a medical treatment order under section 4071, but including hearings on those orders, shall appoint a guardian ad litem for the child. The guardian ad litem’s reasonable costs and expenses must be paid by the District Court. The appointment must be made as soon as possible after the proceeding is initiated. Guardians ad litem appointed on or after March 1, 2000 must meet the qualifications established by the Supreme Judicial Court.”). The GAL Rules do include lay persons acting as CASA volunteers but that is limited to Title 22 cases so it is not discussed further. M.R.G.A.L. 1(c)(5) (“CASA and CASA Program. “CASA” means a court appointed special advocate, and “CASA Program” means the Court Appointed Special Advocate Program established in Title 4, Chapter 31.”).

72. 19-A M.R.S.A. § 1507(3)(A)(B) (2012):

A. A guardian ad litem shall: (1) Interview the child face-to-face with or without another person present; and . . . (3) Make a written report of investigations, findings and recommendations as ordered by the court, with copies of the report to each party and the court.

B. The court shall specify the optional duties of the guardian ad litem. The optional duties of the guardian ad litem may include: (1) Interviewing the parents, teachers and other people who have knowledge of the child or family; (2) Reviewing mental health, medical and school records of the child; (3) Reviewing mental health and medical records of the parents; (4) Having qualified people perform medical and mental evaluations of the child; (5) Having qualified people perform medical and mental evaluations of the parents; (6) Procuring counseling for the child; (7) Retaining an attorney to represent the guardian ad litem in the pending proceeding, with approval of the court; (8) Subpoenaing witnesses and documents and examining and cross-examining witnesses; (9) Serving as a contact person between the parents and the child; or (10) Other duties that the court determines necessary,

order (AO) there are two *mandatory* duties: (1) interview the parents and child(ren), and (2) write a report.⁷³ There are many more *optional* duties in an expanded order so as to provide the court with flexibility relative to each family's unique strengths and limitations.⁷⁴ What is critically important is that any activities outside the AO require an amended AO.⁷⁵ These very precise silos, as defined under M.R.G.A.L. 4(a), must be "checked" at the time of original appointment and then amended if the authority is not visibly present, together with the fee structure:

- (1) A limited purpose appointment order issued pursuant to Rule 4(b)(4)(D)(i), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112;⁷⁶
- (2) A standard appointment order issued pursuant to Rule 4(b)(4)(D)(ii), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112;⁷⁷
- (3) An expanded appointment order issued pursuant to Rule 4(b)(4)(D)(iii), 4 M.R.S. § 1555, and either 19-A M.R.S. § 1507 or 18-A M.R.S. § 1-112;⁷⁸ or

including, but not limited to, filing pleadings. If, in order to perform the duties, the guardian ad litem needs information concerning the child or parents, the court may order the parents to sign an authorization form allowing the release of the necessary information. The guardian ad litem must be allowed access to the child by caretakers of the child, whether the caretakers are individuals, authorized agencies or child care providers.

73. See M.R.G.A.L. 4(b)(4)(D)(ii) (2016) ("The standard appointment order shall list the duties of the guardian ad litem to be performed pursuant to the order.

(a) Those duties, in each standard appointment order, shall be:

- (1) Observing the child or children in the home or homes where the child or children regularly reside, and for each child over the age of 3, conducting a face-to-face interview with the child;
- (2) Interviewing each parent and each other adult who resides in the home or homes where the child or children regularly reside; and
- (3) Completing and filing a written report of investigation, findings, and recommendations as ordered by the court when the case is to proceed to a contested hearing, with copies of the report to each party and the court, within the time specified in the appointment order.")

74. See *id.* 4(b)(4)(D)(iii).

75. See M.R.G.A.L. 4(b)(4)(D)(iii)(b) (2016) ("If the court orders any additional duties to be performed pursuant to the original appointment order or an amendment of that order, the court may amend any provision of the prior order that is affected by the newest order.")

76. This type of *limited* appointment may involve interviewing an adolescent in a relocation case, recommending whether a child should testify and under what circumstances, or a safety assessment where there are concerns about a home environment, for example. See M.R.G.A.L. 4(b)(4)(D)(i) (2016) ("The court may appoint a guardian ad litem for a specified, limited purpose or purposes. The order must specify the duties that the guardian ad litem shall perform, the duration of the appointment, the maximum number of hours that may be spent on the case by the guardian ad litem, the hourly fee rate, and the maximum fee that may be charged by the guardian ad litem.")

77. The *standard* order under M.R.G.A.L. 4(b)(4)(D)(ii)(a)(1-3) includes these duties: (1) observing the child or children in the home or homes where the child or children regularly reside, and for each child over the age of three, conducting a face-to-face interview with the child; (2) interviewing each parent and each other adult who resides in the home or homes where the child or children regularly reside; and (3) completing and filing a written report of investigation, findings, and recommendations as ordered by the court when the case is to proceed to a contested hearing, with copies of the report to each party and the court, within the time specified in the appointment order.

78. See M.R.G.A.L. 4(b)(4)(D)(iii)(a)(1-10) (2016) ("The original appointment order or an amended appointment order may specify any additional duties of the guardian ad litem that shall be individually approved by the court."). The list is a general safety valve for judges and magistrates to tailor interventions or duties unique to a family. Nevertheless, the expanded AO may include mental health evaluations of parents and the child. See M.R.G.A.L. 4(b)(4)(D)(iii)(a)(4-5) ("Arranging for and obtaining medical,

- (4) An appointment order issued pursuant to Rule 4(c), 4 M.R.S. § 1556, and 22 M.R.S. § 4005.⁷⁹

These distinctions require some careful thought as the judicial system and GALs move forward. In the past, GAL duties were a function of the broad scope of the best interest standards and rather vague appointment orders – as noted implicitly in *Gerber*. This is no longer true. The AO not only *must* specifically define the optional duties, from speaking with therapists, teachers, or family members, but ethical and legal immunity may be defined by the scope of the AO and the performance of both mandatory and optional duties. In Title 18-A and 19-A cases, the court has adopted rules which require AOs to define the purpose and function of the appointment and the scope of duty at the time of appointment.⁸⁰ In Title 22 cases, the scope of the AO and the duties is lengthy and complex, including the development of interventions and service plans.⁸¹

The intersection of Title 4 and Rule 4 is critical because, unlike other state courts, the Law Court had not originally conferred immunity but in *Gerber* and *Kennedy* found that there was *no duty* owed to a parent.⁸² The explicit provisions of Title 4 provide that:

A person appointed by the court to serve as a guardian ad litem acts as the court's agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the guardian ad litem. As a quasi-judicial officer, the guardian ad litem shall perform the assigned duties independently and impartially in all relevant matters within the scope of the order of appointment, respecting the court's obligation to dispose of all judicial matters promptly, efficiently and fairly as provided in the Maine Code of Judicial Conduct.⁸³

educational, or mental evaluations of the child within a time and at a cost to be stated in the order; Arranging for and obtaining medical, educational, or mental evaluations of the parents within a time and at a cost to be stated in the order.”). These may be useful but Maine does not have many forensic psychologists willing—or trained—to undertake these evaluations and there is typically no private health insurance or public funding available in non-Title 22 cases. The proper use of these evaluations requires sensitivity to the ethics and science which underscore parental capacity evaluations. See Jelena Zumbach & Ute Koglin, *Psychological Evaluations in Family Law Proceedings: A Systematic Review of the Contemporary Literature*, 46 PROF. PSYCHOL.: RES. AND PRAC. 221 (2015).

79. See M.R.G.A.L. 4(c) (2016) (“The guardian ad litem has no authority to perform and shall not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.”).

80. In Title 19-A, in particular, the costs and fees are linked. See M.R.G.A.L. 4(b)(4)(A) (2016) (“The court shall specify the guardian ad litem’s length of appointment; duties, including the filing of a written report pursuant to 4 M.R.S. § 1555(6) and either 19-A M.R.S. § 1507(5) or 18-A M.R.S. § 1-112(e); and fee arrangements, including hourly rates, timing of payments to be made by the parties, and the maximum amount of fees that may be charged for the case without further order of the court. The guardian ad litem may not perform and shall not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.”).

81. See M.R.G.A.L. 4(c)(1-9) (2016).

82. For an early discussion of this topic, see Dana E. Prescott, *The Liability of Lawyers as Guardians ad Litem: The Best Defense is a Good Offense*, 11 J. AM. ACAD. MATR. L. 65 (1993).

83. 4 M.R.S. § 1554(3) (2013). It is important to read the mandatory lists of duties which coincide with immunity. See 4 M.R.S. § 1554(3)(A-I); see also 19-A M.R.S. § 1507(6) (“A person serving as a guardian ad litem under this section acts as the court’s agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the guardian ad litem.”) (emphasis added).

From an ethical perspective, Rule 3 reaffirms this proposition: “[G]uardians ad litem are entitled to quasi-judicial immunity from liability for actions undertaken pursuant to their appointments and these Rules.”⁸⁴ The point, not to be lost, is that the provisions of the new statutes and the new rules are not always consistent or easily traversed, but what is clear is that the new paradigm is defined by the scope of the AO both as sword and shield.

D. *The AO and GAL Fees*

With that caveat, the role of the GAL is defined by the limits on hours and fees in Titles 18-A and 19-A cases in very specific ways. Ordinarily, lengthy quotes are discouraged in law review articles when lawyers can read the text themselves, but this is an unusual situation – to say the least. The Legislature, the court, GALs, and the public were caught in this fray because the costs to families of a GAL in private cases was seen as a flashpoint. This is not the place to debate the myths or truths, or describe the commonality among stakeholders if some voices had been more civil and others had stopped to listen. What matters now is the legislation specifically requires that any AO must specify that payment for services is the responsibility of the parties and the precise terms of payment:

- A. The fee arrangements in the order must specify hourly rates or a flat fee, the timing of payments to be made and by whom and the maximum amount of fees that may be charged for the case without further order of the court. If the payments ordered to be made before the guardian ad litem commences the investigation, if any, are not paid as ordered, the guardian ad litem shall notify the court, and the court may vacate the appointment order or take such other action it determines appropriate under the circumstances.
- B. In determining the responsibility for payment, the court shall consider:
 - (1) The income of the parties;
 - (2) The marital and nonmarital assets of the parties;
 - (3) The division of property made or anticipated as part of the final divorce or separation;
 - (4) Which party requested appointment of a guardian ad litem; and
 - (5) Other factors considered relevant by the court, which must be stated with specificity in the appointment order.
- C. The guardian ad litem shall use standardized billing, itemization requirements and time reporting processes as established by the division. The guardian ad litem may collect fees, if a collection action is necessary, pursuant to Title 14 and may not pursue collection in the action in which the guardian ad litem is appointed.⁸⁵

Consistent with this statute, the Rules provide that in Title 18-A proceedings,

84. See M.R.G.A.L. 3; *see also* Dalton v. Dalton, 2014 ME 108, ¶9, 99 A.3d 723 (“Judicial immunity protects a GAL from civil liability for acts performed within the scope of a GAL’s official duties in the event that he or she is personally sued.”); McNally v. Mokarzel, 386 A.2d 744, 746 (Me. 1978) (“Public officials are immune from civil liability for quasi-judicial decisions within the scope of their authority without regard to bad faith, malice or other evil motives.”).

85. 4 M.R.S. § 1555(3) (2016).

the court “shall specify who is responsible for payment of the guardian ad litem’s fees.”⁸⁶ In Title 19-A cases, the AO must be specific as to all arrangements.⁸⁷ The AO must set a maximum fee and “direct that a specified sum be paid within a set time before the guardian ad litem commences the investigation and any interim payments, with the remainder to be paid within 14 days after the filing of the written report.”⁸⁸ As for expanded AOs, “the appointment order shall specify a *maximum* fee, direct that a specified sum be paid within a set time before the guardian ad litem commences the investigation, direct the payment of any interim payments, and require that the remainder be paid within 14 days after the filing of the written report.”⁸⁹

For judges and magistrates, this means that vague orders concerning role, duty, or fees not only fail to comply with statutory authority but may expose GALs to a lack of immunity. For practitioners, aggressive behaviors—or spinning for clients—concerning GALs who decline to take action that exceeds the scope of the AO is inappropriate. What remains unclear, and may for some time as the system adapts to these new standards, is the scope of any *implied* authority. A few common examples of this tension may help:

1. The AO directs the GAL to interview both parents but makes no mention of third persons like grandparents. The pleadings suggest that a third person is engaging in corporal punishment. The mother wants the GAL to interview potential witnesses and her parents during the home visit. Yes or no?
2. The AO directs the GAL to interview the children’s therapist who communicates regularly with the parents’ therapists. Father’s lawyer wants the GAL to review the therapeutic records of both parents. Mother’s lawyer agrees and the lawyers agree in emails to these interviews and records. Yes or no?
3. The AO directs the GAL to prepare an interim report for mediation but does not direct the GAL to attend mediation (or judicial settlement conference) and there are no more hours or fees left. May the GAL attend mediation as demanded by the attorneys? Yes or no?

Like most things legal, lawyers could debate each scenario by splitting intentions from common sense from the actual language of the AO. What should not be forgotten is that only the GAL has risk. The lawyers, acting as advocates may push or prod to self-protect from the demands of a client but that means much less than the consequences to GALs who tread off the AO path. What is co-extensive within each of these scenarios is the requirement in 18-A and 19-A cases that, at the time of the appointment, the court shall specify the length of appointment, duties and fee arrangements,

86. M.R.G.A.L. 4(b)(4)(C) (2016).

87. M.R.G.A.L. 4(b)(4)(A) (2016) (“The court shall specify the guardian ad litem’s length of appointment; duties, including the filing of a written report pursuant to 4 M.R.S. § 1555(6) and either 19-A M.R.S. § 1507(5) or 18-A M.R.S. § 1-112(e); and fee arrangements, including hourly rates, timing of payments to be made by the parties, and the maximum amount of fees that may be charged for the case without further order of the court. The guardian ad litem may not perform and shall not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.”).

88. M.R.G.A.L. 4(b)(4)(D)(ii)(b) (2016).

89. M.R.G.A.L. 4(b)(4)(D)(iii)(c) (2016) (emphasis added).

[H]ourly rates, timing of payments to be made by the parties, and the maximum amount of fees that may be charged for the case without further order of the court. *The guardian ad litem may not perform and shall not be expected to perform any duties beyond those specified in the appointment order, unless subsequently ordered to do so by the court.*

This is non-negotiable. During public hearings, the Legislature, and the Law Court were sensitive to complaints about the vagueness of the authority exercised by GALs, as well as the cost of GAL services.⁹⁰ As structured under the law, any work beyond the AO may be performed voluntarily, even if implied, but is unlikely to be compensated. Whether a GAL should accept appointments with the promise of future payments or with the requirement that, upon notice from the GAL, the court may order sanctions or vacate the order, is a very complex conundrum for the GAL. Payment of fees and the struggle over the perception of who pays can be perceived as bias and can harm rapport, a delicate enough balance for a GAL in many cases. Whatever that future may bring, fees and the hours are critical components of any AO under Rule 4.

E. Timing of the Appointment

In “contested proceedings under sections 904, 1653 and 1803 in which a minor child is involved, the court may appoint a guardian ad litem for the child. The appointment may be made at any time, but the court shall make every effort to make the appointment as soon as possible after the commencement of the proceeding.”⁹¹ In its adoption of Rules for non-Title 22 matters, the court specifically provided that any motion or request to the court for appointment of a guardian ad litem:

[S]hall be filed no later than the conference with the court following the first scheduled mediation session or, if mediation is waived, 60 days after the first conference with the court. A motion or request for appointment of a guardian ad litem may be considered at a later time only if the court finds that:

- (A) There is good cause for the late motion;
- (B) The reasons for the late motion could not have been anticipated at a point when a timely motion could have been filed; and
- (C) The appointment will not unreasonably delay resolution of the matter or harm the best interest of the child in achieving clarity in parental rights and responsibilities for the child.⁹²

This matrix requires that all three factors be met for late GAL appointments. Subparagraphs A and B are typical of many rules. Subparagraph C has a disjunctive

90. See *Douglas v. Douglas*, 2012 ME 67, ¶24, 43 A.3d 965 (“Although the statute, 19-A M.R.S. § 1507(7) (2011), requires that, in determining responsibility for payment of GAL fees, the court consider the parties’ income, assets, and other factors, the court’s opinion gives no indication that the court considered these statutory factors in concluding that the parties share the expenses equally. At oral argument, responding to a question from this Court, counsel for Lisa advised that, at the time the additional fees were assessed, Lisa was of limited means and receiving MaineCare assistance for her and her son.”).

91. 19-A M.R.S. § 1507(1) (2016); see also Me. R. Civ. P. 107(a)(2) (interim motion for appointment of GAL). These rules are consistent with the statute; though the GAL Rules are the more specific source in the event of a conflict as to timing.

92. M.R.G.A.L. 4(b)(2) (2016) (emphasis added).

which generates a new test in the second part: the court must find the absence of “harm” in “achieving clarity” in the parental rights and responsibilities. The origin of this phrase is unknown, but it actually frames the inverse-test for appointing a GAL rather well. As a matter of current practice, it is reasonable to anticipate that the time limits will be strictly enforced, so plan accordingly.

In fairness, it is often more difficult to predict the need for a GAL in an original proceeding (or the need may be mitigated by mediation or parent education or other intervention). Conversely, in post-judgment relocation or modification cases, where a child is older and may express a meaningful preference, or a change in primary residence or access arrangements is necessitated by substantial changes in the lives of the parents, it is easier to predict that need.⁹³ This is one of those situations which will have to await the development of practice standards which could very well vary from county to county.

F. The Preferences of a Child

What is mandatory in terms of a duty irrespective of the type of appointment under Titles 18-A or 19-A is that the GAL “shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the guardian ad litem.”⁹⁴ As an aside, and if I may be afforded a brief segue, there is an explicit provision in Rule 4(c) which I originally missed pertaining to Title 22 but which should be part of Rule 4(b)(4)(D):

Protection of Child as Witness. The guardian ad litem shall advocate for the interests of the child when the child is called to testify as a witness in any judicial proceeding relating to the case in which the guardian ad litem has been appointed. The guardian ad litem may advocate for special procedures, including, but not limited to, special procedures to protect the child witness from unnecessary psychological harm resulting from the child’s testimony.⁹⁵

In Maine, child-witnesses are technically treated like any other witness under the rules of evidence in terms of competency and admissibility in civil proceedings.⁹⁶ There is no empirical data on this point, but a pass through courthouse hallways and anecdotal discussions among bench, bar, and other interdisciplinary professionals

93. See *Jackson v. Macleod*, 2014 ME 110, ¶ 22, 100 A.3d 484 (“To determine whether a substantial change has occurred, the court must ask (1) whether there has occurred a change in circumstances that has a sufficiently substantial effect on the children’s best interests to justify a modification of the prior order, and (2) if so, how the court should modify the custody arrangement in furtherance of the children’s best interests The purpose of the substantiality requirement “is to prevent disappointed parents from bringing repeated motions to modify divorce decrees” and “‘shopping’ for a judge who will revise the order.”) (citations omitted).

94. 4 M.R.S. § 1555(5) (2013); 4 M.R.S. § 1556(4); M.R.G.A.L. 4(b)(6). In title 22 matters, there is no such explicit provision because the statutory duties are different. See M.R.G.A.L. 4(c)(1).

95. M.R.G.A.L. 4(c)(5) (2016).

96. See *State v. Roman*, 622 A.2d 96, 100 (Me. 1993) (“A child of any age is presumed competent to testify as a witness unless disqualified under [Me. R. Evid.] Rule 601(b).”); *State v. Murray*, 559 A.2d 361, 362 (Me. 1989) (in holding five-year-old sex abuse victim competent to testify, court relied on child’s statements that “she knew what lies were and that those who told them were punished”); see also *Hutchinson v. Cobb*, 2014 ME 53, ¶14, 90 A.3d 438 (“All testimonial proceedings in any family or civil matter must be recorded.”).

yields the observation that more parents are bringing children to court for family court docket calls. Given the volume of self-representation in Maine, the younger range of pre-school and elementary school children experiencing parental separation, and the duration and intensity of parental conflict over years, it is likely that judges and magistrates may have to utilize a limited appointment more often, and even on the court's own motion.⁹⁷ This is particularly true in circumstances when a child may have language barriers, disabilities, or vulnerabilities from the conflict or other traumatic events.⁹⁸ In this very way, the court is acting in the most meaningful and historical sense of its *parens patriae* obligations.

What is deeply troubling about the mandated language in Title 4 is that the language does not leave room for discretion or safety or threats of violence or oppression or duress or age or any other factors. The operative word is "shall" and the only test is that the child "has expressed them."⁹⁹ For decades, at common law and by statute, the duty to consider the "preference of the child, if old enough to express a meaningful preference" could be described both in legal language and in the language of therapists and psychologists as a function of cognitive, emotional, and environmental factors.¹⁰⁰

One concern is that good people, with the best of intentions, may not appreciate the kinds of thought-patterns which enter the minds of parents in these cases. Most lawyers, judges, therapists, and GALs have heard a parent say that the four-year-old does not want overnights, for example. Moreover, children may survive by telling each parent what he or she wants to hear, and this may influence what children reveal to GALs and judges as well.¹⁰¹ Sometimes a GAL may take that responsibility from the child by telling the child that the recommendation rests with the GAL, and the decision with the trial court. The point is that there is more subtlety and protectiveness in the "meaningful preference" language than a blunt absolute duty than may be safe and appropriate for children caught between feuding parents.

97. See, e.g., *Villa v. Smith*, 534 A.2d 1310, 1312 (Me. 1987) ("The District Court declined to exercise its power under Me. R. Evid. 706(a) to appoint an independent expert witness to make a psychological examination of the children. The advisers' note to Me. R. Evid. 706(a) declares that the trial judge's power to appoint an independent expert 'should be resorted to only in exceptional situations.' Child custody decisions are consigned to the discretion of the trial court, and the District Court did not abuse that discretion by refusing to appoint a child psychologist to interview young children concerning their attitudes toward a future move.") (citations omitted).

98. See, e.g., *State v. Marroquin-Aldana*, 2014 ME 47, ¶¶ 41-42, 89 A.3d 519 ("[I]t is an unquestioned principle that a defendant must be afforded the means to understand the proceedings against him.") (quotation marks and citation omitted); see also 5 M.R.S. § 51 (2013); M.R. Crim. P. 28; Guidelines for Determination of Eligibility for Court-Appointed Interpretation and Translation Services, Me. Admin. Order JB-06-3 (as amended by A. 7-13) (effective July 16, 2013).

99. M.G.A.L.R. 4(b)(6) (2016) ("The guardian ad litem shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the guardian ad litem.")

100. 19-A M.R.S.A. § 1653(3)(C) (Supp. 2015). The same language may be found in the Grandparents Visitation Act, 19-A M.R.S.A. § 1803(3)(C) (2012).

101. Karen Saywitz, Lorinda B. Camparo & Anna Romanoff, *Interviewing Children in Custody Cases: Implications of Research and Policy for Practice*, 28 BEHAVIORAL SCIENCES & THE LAW 542, 545 (2010) ("There is also very little scientific research on the effects of expressed preference on children's post-divorce adjustment. Clearly, further research with children is needed to understand both positive and negative effects of participation versus non-participation, participation in different types of judicial procedures, and expressed preferences on children's well-being.").

Perhaps a variation on Rule 4(c)(5) and the approach in Title 22 cases toward the use of children's voices may be applied to 18-A and 19-A cases in the future.¹⁰²

G. Submission of Reports

For many decades now, a GAL's duty to the court was to provide an objective and independent investigation of facts and a report which may include recommendations concerning the allocation of parental decision making, primary residence, or forms of visitation and access.¹⁰³ Under § 1507(5), a GAL "shall make a final written report to the parties and the court reasonably in advance of the hearing. The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party."¹⁰⁴

The Law Court has held that due process is served by the right to cross-examine the GAL, and contest the report.¹⁰⁵ As it held more than a decade ago,

We have addressed similar hearsay and due process issues in opinions approving the admission of statutorily authorized guardian ad litem or DHHS reports in divorce proceedings. Thus, there 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. The real issue is whether the court's consideration of the information in these reports violates due process rights.¹⁰⁶

The court then rejected a due process violation for reasons that apply to few other forms of evidence in the American judicial system:

The law provides other safeguards to reduce the risk of untrustworthy information affecting the court's decision. First, the guardian ad litem is a *disinterested party* and an agent of the court. 22 M.R.S.A. § 4005(1)(G). The guardian ad litem *must meet court established qualification requirements in order to serve*, 22 M.R.S.A. § 4005(1)(A), and *therefore possesses competence and experience to make reasoned judgments about the reliability of information*. Second, the guardian ad litem is

102. See *supra* notes 93, 98.

103. See *Coppersmith v. Coppersmith*, 2001 ME 165, ¶ 4, 786 A.2d 602 ("Given the extensive history of conflict between the parents and the age of Kevin (ten) and Jennifer's age (twelve), the District Court needed an objective and independent investigation into the interests and desires of the Coppersmiths' children, and did not abuse its discretion in appointing a guardian ad litem."); *Richards v. Bruce*, 1997 ME 61, ¶ 10, 691 A.2d 1223 ("The guardian serves as the court's agent and prepares a report for the court detailing his or her findings. 19 M.R.S.A. § 752-A(4) and (5). The guardian ad litem's duties can include interviewing, subpoenaing, and examining witnesses and parties, reviewing mental health and other medical records, and procuring counseling and evaluation services for the child and parents. The guardian's report offers the court a compendium of information that aids the court in determining the best interests of the child.")

104. 19-A M.R.S.A. § 1507(5) (2016).

105. See *Wechsler v. Simpson*, 2016 ME 21, ¶ 17, 131 A.3d 909 ("We have noted that '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.' Adoption of T.D., 2014 ME 36, ¶ 18, 87 A.3d 726. Here, at the hearing before the referee, Simpson had an opportunity to cross-examine the guardian ad litem on any and all aspects of his recommendations. The referee was then responsible for evaluating the guardian ad litem's testimony, which had been subject to challenge on cross-examination, to determine the weight she felt it deserved. Neither the evidentiary process nor the referee's treatment of the guardian ad litem's report and recommendations was affected by error.")

106. *In re Chelsea C.*, 2005 ME 105, ¶ 10, 884 A.2d 97 (internal citations omitted).

statutorily required to provide copies of the report and the names of sources to all parties in advance of trial. 22 M.R.S.A. § 4005(1)(D). Further, nothing precluded the mother from calling a declarant to testify, or producing a witness of her own to rebut the challenged statements.¹⁰⁷

In the enabling legislation, the timeline for the report is more precise, but there are possible inconsistencies. Under 4 M.R.S.A. § 1555(6) (2016), in title 18-A and 19-A cases, a GAL:

[S]hall provide a copy of each report ordered by the court to the parties and the court at least 14 days before each report is due. A guardian ad litem shall provide a copy of the final written report to the parties and the court at least 14 days in advance of the final hearing. Reports are admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party. Any objections to a report must be filed at least 7 days before the applicable hearing.¹⁰⁸

The Probate Code, however, provides that “[i]f required by the court, the guardian ad litem shall make a final written report to the parties and the court reasonably in advance of a hearing. The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party.”¹⁰⁹ In similar language for Title 22 cases, a GAL

[S]hall make a written report of the investigation, findings and recommendations and shall provide a copy of the report to each of the parties reasonably in advance of the hearing and to the court, except that the guardian ad litem need not provide a written report prior to a hearing on a preliminary protection order. The court may admit the written report into evidence.¹¹⁰

Although it is unwise to suggest as a matter of routine that rules trump statutes, it may be preferable to follow the rules or request a more specific date from the court. In 18-A and 19-A appointments, M.R.G.A.L. 4(b)(7) expressly provides that a GAL “shall provide a copy of any required final written report to the parties and the court at least 14 days in advance of the final hearing. The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party.”¹¹¹ In Title 22 cases, M.R.G.A.L. 4(c)(6) provides that

[F]or interim or preliminary protection hearings, the guardian ad litem should, except as otherwise required, appear in court and offer recommendations subject to questions by the court and parties or counsel. The submission of a report by the guardian ad litem and the admissibility of any such report in evidence shall be as provided by statute. The guardian ad litem may present evidence at court hearings.¹¹²

H. Rule 5 and Specific Standards of Conduct

The standards of conduct contained in M.R.G.A.L. 5(a)-(j) are much more than

107. *Id.* ¶ 14 (emphasis added).

108. 4 M.R.S.A. § 1555(6) (2016).

109. 18-A M.R.S.A. § 1-112(e) (2012).

110. 22 M.R.S.A. § 4005(1)(D) (2004).

111. M.R.G.A.L. 4(b)(7) (2016).

112. M.R.G.A.L. 4(c)(6) (2016).

just a punch list. For the practitioner or self-represented litigant, these Rules are also not merely guidelines from which someone may pick and choose. Rule 5 is intended to provide the GAL with a critical framework to serve the judicial system and families. And it is always the court which weighs the impact and weight of any testimony or report, or the ongoing role of the GAL relative to any child.¹¹³ Because these sections contain some unique differences from past practices, a brief analysis of each follows.

Performance of Duties: A GAL “must maintain independent representation of the best interest of the child and perform the guardian ad litem’s duties faithfully.” The importance of this sentence is that it does not alter the court’s holdings or the new statute which maintain a primary duty *to the court*. Nevertheless, the operative terms “independent” and “faithfully” are the touchstone for the GAL’s relationship to the child as an officer of the court. Conduct which may impede those touchstones, or requests by counsel or a parent, must be carefully guarded against.¹¹⁴ Yet these objectives need not be seen as rigid or unforgiving. The art of professional discretion and judgment, not perfection, still creates space for performance of these duties.

Agent of the Court: “As a quasi-judicial officer, the guardian ad litem shall exercise his or her independent judgment on behalf of the child in all relevant matters, respecting the court’s obligation under Canon 2.2 of the Maine Code of Judicial Conduct to ‘perform all judicial and administrative duties promptly, fairly, and competently.’”¹¹⁵ The court wisely adopted a rule which has long-standing parameters but its application to GALs will await future development.¹¹⁶

Develop Understanding of Litigation: Commencing upon appointment, a GAL

113. See *In re Adoption of T.D.*, 2014 ME 36, ¶ 18, 87 A.3d 726 (“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. If a parent or other interested party has filed a motion to remove the GAL or otherwise challenging the GAL’s investigations, the court can, and should, hear the motion during the trial and allow examination of the GAL on the pertinent issues. If the court concludes that the investigation has been insufficient or that the GAL has demonstrated a bias that has made the GAL’s testimony unreliable, the court may disregard that testimony in whole or in part.”).

114. Michael J. Beloff, *Neither Cloistered nor Virtuous? Judges and their Independence in the New Millennium*, 15 DENNING L. J. 153, 155-56 (2012) (“From the very nature of their function springs the very imperative for their independence. But we take it as axiomatic that our judiciary not only should be, but are independent – by which we mean broadly that the judges approach cases before them, untainted by any interest in their outcome, free from any outside pressure to reach a decision in a particular way, and excluding from their consideration, so far as is humanly possible, any of those prejudices which are the product of class, race, gender, or genes.”).

115. M.G.A.L.R. 5(b) (2016); see also Me. Code Jud. Conduct R. 2.2 (“A judge shall uphold and apply the law, and shall perform all judicial and administrative duties promptly, fairly, and competently. An error of law in a judicial decision, whether recognized on appeal or not, shall not constitute a violation of this Code unless the judge’s action demonstrates willful or repeated disregard of explicit requirements of the law.”).

116. See *Samsara Mem’l Trust v. Kelly, Rimmel & Zimmerman*, 2014 ME 107, ¶ 24, 102 A.3d 757 (“We take this opportunity to further define the standards for judicial recusal and disclosure in Maine, where the legal and judicial communities are small and lawyers and judges necessarily know one another and enjoy cordial and professional relationships. We also reaffirm that the responsibility to promote and preserve the integrity of the legal system is shared by members of the judiciary and the bar alike.”); *Charette v. Charette*, 2013 ME 4, ¶ 23 n.3, 60 A.3d 1264 (“Other courts have recognized that a judge’s casual acquaintances or social relationships do not result in automatic disqualification, particularly when the judge sits in a small community, as many Maine judges do.”).

should, “to the extent reasonably possible, considering the resources authorized for the guardian ad litem,” engage in the following duties:

(1) Obtain copies of all relevant pleadings and notices; (2) In Title 22 cases, unless excused by the court, and *in Title 18-A and 19-A cases, when directed by the court*, participate in depositions, negotiations, and discovery that are relevant to the child’s best interest, *and participate in all case management, pretrial or other conferences, and hearings, unless excused by the court*; (3) Confirm the appointment with the clerk’s office. The clerk shall send copies of all subsequent notices and orders to the guardian ad litem. Parties or their counsel shall send to the guardian ad litem copies of all pleadings and correspondence with the court, and the guardian ad litem shall be entitled to reasonable notification of case conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family; (4) Not cause case delays and shall attempt to reduce case delays; and (5) Include parties in the investigation, employ effective communication techniques, and be sensitive to the culture and socio-economic status of the parties.¹¹⁷

Subsections 1, 3, 4, and 5 are important aspects of conducting the GAL role with accurate information and respect for diversity in communications and investigations. Subsection 2, however, poses a dilemma. As discussed previously, Title 22 has an express provision which requires GAL attendance at critical phases of a child protection case. Thus, a judge must affirmatively excuse a GAL from participation in various phases of Title 22 litigation.¹¹⁸

Some of that, of course, is that the State, not the parties, is compensating the GAL so the judge controls the time and fees. In comparison, the second clause concerning Title 18-A and 19-A cases is written in the conjunctive: (1) only when directed by the court must a GAL attend “depositions, negotiations, and discovery that are relevant to the child’s best interest”; but (2) rather than and “participate in all case management, pretrial or other conferences, and hearings, unless excused by the court.”¹¹⁹ Despite the language of the first clause, the second clause has the same “unless excused” language as Title 22 cases.

The conundrum is that the current standard AO does not include that duty as mandatory and the extended AO only includes that duty if the judge orders the GAL to attend.¹²⁰ Once again, the specific hours and costs authorized for the GAL must be given primacy under these new rules. Under the caption (developing understanding of litigation) is not the most obvious place to put a duty that is mandatory unless excused. Another reason for a prudent pause is that the first clause uses the term “negotiation” which may mean mediation, informal settlement conferences, or judicial settlement conferences. None of these events in child custody litigation are listed in the second clause.

At this juncture in the development of these rules and procedures, it is prudent for judges and magistrates to build in hours for these costs and to be clear in AOs as

117. M.G.A.L.R. 5(c) (2016).

118. See M.G.A.L.R. 4(c)(4) (2016) (“The guardian ad litem shall appear at all child protection proceedings to represent the child’s best interest, unless previously excused by order of the court, and at other proceedings as ordered by the court.”).

119. M.R.G.A.L. 5(c)(2) (2016).

120. See 19-A M.R.S.A. §1507(3)(A)(B) (2012); M.G.A.L.R. 4(D)(iii)(a)(10) (2016) (“Other duties that the court determines necessary, including, but not limited to, filing pleadings and testifying in court.”).

to which specific events the GAL is expected to attend. For GALs, any questions should be resolved before a critical event (and that may mean what the parents think is critical, not what lawyers or GALs think they know) with a letter to the court. It is prudent for GALs not to delay asking the court to clarify the duties under Rules 4 and 5. In addition, GALs may not wish to accept the agreement of lawyers or parties (even if in writing and with the best of intentions) as the scope and duties in an AO. The duty not to cause delay in proceedings is, however, co-extensive with the duty of clerks and counsel to assure that relevant calendar notices are promptly sent to the GAL.¹²¹

Explanation of Court Process: “When appropriate, the guardian ad litem shall explain the court process and the role of the guardian ad litem to the child. When necessary, the guardian ad litem shall assure that the child is informed of the purpose of the court proceeding.”¹²² The predicates for these two sentences (when appropriate/when necessary) actually present a rather difficult preference/choice matrix for which there is little ethical or research guidance. Implicit, of course, is that this judgment requires an understanding of the developmental age and maturity of the child.¹²³ That is often rather easy to assess.

Assuming that the GAL is trained to interview a child at all, these requirements become more difficult when there is domestic violence, known or unknown trauma from abuse or neglect, emotional manipulation and pressure, or characterological or mental health deficits which may harm the child once the GAL leaves the home environment. Parents and third parties too frequently coerce the content of the interview or the questions asked by the GAL and then may blame or criticize the child for failing to follow the script. Or worse, on occasion, though it is perfectly understandable, the child tells each parent what he or she wants to hear but tells the GAL something different.

How to manage that information when parents demands that the GAL explain why the GAL is “lying” because their son/daughter said that was not what he/she said after reading the report to the child during dinner? And this ethical and legal conundrum is co-extensive with when and whether communications with a child are confidential under Rule 5(g):

The guardian shall exercise reasonable discretion about whether to disclose communications made by the child to the court, or to professionals providing services to the child or the family based on the guardian ad litem’s *evaluation* of the best interest of the child. Any decision by the guardian not to disclose such

121. See M.G.A.L.R. 5(c)(3) (2016) (“The clerk shall send copies of all subsequent notices and orders to the guardian ad litem. Parties or their counsel shall send to the guardian ad litem copies of all pleadings and correspondence with the court, and the guardian ad litem shall be entitled to reasonable notification of case conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family.”); M.G.A.L.R. 5(c)(4) (2016) (“Not cause case delays and shall attempt to reduce case delays.”).

122. M.G.A.L.R. 5(d) (2016).

123. Karen Saywitz et al., *Interviewing Children in Custody Cases: Implications of Research and Policy for Practice*, 28 BEHAV. SCI. & L. 542, 542 (2010) (“Research on child interviewing has burgeoned over the past 25 years as expectations about children’s agency, competence, and participation in society have changed. Across diverse fields of study, researchers have been investigating how best to elicit information from children about their experiences, preferences, perceptions, sensations, attributions, thoughts, and feelings[.]”).

information, however, shall be subject to review by the court following an in camera review.¹²⁴

The term “evaluation” is much more a clinical assessment than a judgment of a GAL balancing harm and benefit within the paradox of an adversarial system which places a child at the center of conflict by imposing fact-finding by trial.¹²⁵

Moreover, context matters because the cognitive development and verbal statements of a child may be quite different than observed body language, affect, or mood (e.g. anxiety expressed as hands moving or eyes flitting, stilted words that are memorized like a speech, language that is not age-appropriate to describe a parent).¹²⁶ Although there is no Confrontation Clause right in civil child custody cases, Due Process does provide parents with the right to offer testimony of material witnesses, including a child.¹²⁷ Given the stressors for children, coupled with cognitive and emotional limitations, it is likely that judges in the future will need to appoint GALs, in a limited capacity, to interview and recommend a means for child testimony and to recommend a means to hear testimony from a child with minimal trauma when the child has been forced into court by one or both parents.¹²⁸

124. M.G.A.L.R. 5(g) (2016) (emphasis added).

125. For a valuable article that makes many of these arguments, see Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 499 (2001) (“Other proposals, however, involve changes that can be made in the existing system to provide services to parents embroiled in a custody dispute. Judges, lawyers, and mental health professionals are the principal professionals with the greatest power to influence the course of a custody case. These professionals can develop new collaborative models that will more effectively identify and resolve the vast majority of high-conflict custody cases.”).

126. See BENJAMIN D. GARBER, DEVELOPMENTAL PSYCHOLOGY FOR FAMILY LAW PROFESSIONALS: THEORY, APPLICATION, AND THE BEST INTERESTS OF THE CHILD 56 (2010) (“Above and beyond understanding the typical course of language development, the family law professional must be acutely attuned to how a particular child’s language skills might facilitate or impede a genuine understanding of his or her wishes, needs, and experience with regard to the family.”); see also SUSAN R. HALL & BRUCE D. SALES, COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS 22 (2008) (“To fulfill their responsibilities, GALs have the power to investigate and present the court with recommendations regarding the child and provide support to the child throughout the legal process.”).

127. See *Jusseume v. Ducatt*, 2011 ME 43, ¶ 12, 15 A.3d 714 (“When significant rights are at stake, due process requires: notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial fact-finder. Because due process guarantees the right to respond to evidence, an adjudicator must afford a party the opportunity to rebut or challenge evidence offered against him or her.”) (internal citations omitted); *In re Priscilla S.*, 1997 ME 16, ¶ 2, 689 A.2d 593 (“The court may interview a child witness in chambers, with only the guardian ad litem and counsel present, provided that the statements made are a matter of record.”).

128. See, e.g., *In re E.A.*, 2015 ME 37, ¶¶ 13-14, 114 A.3d 207 (“The Confrontation Clause provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ This right does not extend to civil matters, however. The due process to which a parent in a child custody proceeding is entitled does not rise to the same level as that accorded the defendant in a criminal prosecution.’ Child protection proceedings, although ‘deserving of more elaborate procedural safeguards than are required for the determination of lesser civil entitlements’ due to the ‘constitutional dimension’ of the right to parent are nonetheless civil matters. The Confrontation Clause therefore does not apply in child protection proceedings.”) (internal citations omitted); *State v. Fischer*, 238 A.2d 210, 211 (Me. 1968) (“Before testimony was heard from the three complaining children the justice conducted a lengthy examination of each child to ascertain that child’s competence to testify. The justice was thorough, patient and resourceful in testing the understanding of each child.”).

What this will mean in the context of this specific *ethical* Rule remains to be seen if the appointment is more than limited and is intended to invoke all the other duties, including recommendations for primary residence and access arrangements when the child is told by both parents (at younger and younger ages) that he or she “gets to choose.”¹²⁹ These risk factors arise even more frequently in post-order motions to modify primary residence. In circumstances in which risk factors for the child are present or coaching and interrogation are plausible, it is prudent for GALs to notify the court of the decision *not* to explain the proceedings or inform the child of the specific role of the GAL. In such cases, it is also likely that the GAL may need to link that explanation to the duty to advise the court of the child’s expression of “wishes,” but in a biosocialpsycho context.¹³⁰

Advocate for Clear Court Orders: The GAL “should request orders that are clear, specific, and, where appropriate in Title 22 cases, include a time line for the assessment, implementation of services, placement, treatment, and evaluation of the child and the child’s family.”¹³¹ The GAL role is an organic process. No one will know all the facts which exist at the time of appointment, and no one will know whether an intervention like mediation or parent education will resolve what looks like a chronic conflict case. Prediction and labeling early in cases is, in fact, quite inappropriate for experts, GALs, and other professionals. These forms of confirmatory bias invade cases in ways which lead to the wrong intervention, may ignore the complex relationship of domestic violence to a child’s statements or a parent’s behavior, or distort the investigation and recommendations.¹³²

At this point in time, however, there are structural issues within the Maine judicial system which require internal change. Maine is one of the states which lacks single-judge case management in child custody cases.¹³³ Magistrates are often more available for motions or conferences than district court judges in some counties, and clerks’ offices do their best within current staffing and workloads to be responsive to GAL requests. But the lack of resources—even with skilled management by the court administrators—cannot manufacture resources or alter an eight-hour day when

129. See 19-A M.R.S.A. §1653(3)(C) (Supp. 2015) (“The preference of the child, if old enough to express a meaningful preference.”).

130. See M.R.G.A.L. 4(b)(6) (“The guardian ad litem shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the guardian ad litem.”); see generally William V. Fabricius & Linda J. Luecken, *Postdivorce Living Arrangements, Parent Conflict, and Long-term Physical Health Correlates for Children of Divorce*, 21 J. OF FAM. PSYCHOL. 195, 202 (2007) (“The divorce literature has almost exclusively focused on psychological outcomes, but modern biopsychosocial models allow us to hypothesize and explore relations to physical health.”).

131. M.G.A.L.R. 5(e) (2016).

132. See James R. Flens, *The Responsible use of Psychological Testing in Child Custody Evaluations: Selection of Tests*, 2 J. OF CHILD CUSTODY 3, 5 (2005) (“It also requires evaluators to consider sources of bias that may affect interpretation of test results, including evaluator biases such as confirmatory bias, confirmatory distortion or ‘psychotic certainty,’ and test-taker bias (e.g., response styles including impression management and self-deceptive enhancement.”)) (internal citations omitted).

133. Richard C. Boldt & Jana B. Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MARYLAND L. REV. 82, 84 (2006) (“Unified family courts, by contrast, reflect the joint efforts of state legislators, administrators, and court officials to cope with burgeoning caseloads and demands for services brought on by significant changes in family structure and in the legal doctrines applicable to divorce and parenting disputes.”).

courts are open to the public.

More than likely, the explicit demand of the Rules “to govern and define the services provided by guardians ad litem to the court and to promote the best interests of the children whose interests they are appointed to represent” and that the Rules “shall be construed to secure the just, speedy, and inexpensive determination of every action” may require the assignment of a specific judicial officer to review these requests in each county.¹³⁴ In counties in which many more litigants are self-represented, judicial oversight and case management responsive to GAL requests, consistent with Rule 1(b), are crucial because delay can increase risk of harm, and GALs can no longer act without judicial authority without risk.

Mandated Reporting: Under Maine’s GAL Rules,

Pursuant to 22 M.R.S. §4011-A, while acting in their professional capacity as guardians ad litem, guardians ad litem are mandated reporters, and if a guardian ad litem knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected, the guardian ad litem shall make an immediate report to the Department of Health and Human Services.¹³⁵

Mental health professionals are much more familiar with this duty than lawyers, but that by itself does not mean that the duty to report is not a complex analysis in many cases involving children and ongoing child custody disputes.¹³⁶

What matters is that lawyers acting as GALs are not lawyers for purposes of any privilege beyond confidentiality as proscribed by these Rules.¹³⁷ Instead of the attorney-client privilege which may insulate lawyers from mandated reporting, lawyers as court-appointed GALs must comply with this rule and statute.¹³⁸ Before leaving this section, and recognizing that GALs in Maine are multi-disciplinary, mandated reporting and role clarity arises whenever a GAL may be tempted to voluntarily help too much or become aligned with one side.¹³⁹

Confidentiality: A GAL shall:

observe all statutes, rules, and regulations concerning confidentiality. A guardian ad litem shall not disclose information or participate in the disclosure of information relating to a case to any person who is not a party to the case, except as necessary to

134. M.R.G.A.L. 1(b) (2016).

135. M.G.A.L.R. 5(f) (2016).

136. See *Seider v. Board of Examiners of Psychologists*, 2000 ME 206, ¶ 37, 762 A.2d 551 (“The Board also concluded that Seider twice violated Sections III(E)(8) and III(D)(1) of the AASPB Code. The Board first found that Seider violated these provisions by failing to report to DHS her suspicions of the sexual abuse of the children “immediately,” as prescribed by 22 M.R.S.A. § 4012. It also found that she violated the provisions by neither having a sufficient knowledge of the reporting requirements, nor of the DHS reporting procedures.”) (internal footnotes omitted).

137. See M.R.G.A.L. 5(g) (“If the guardian ad litem is an attorney, she or he shall be deemed to act as a guardian ad litem rather than as an attorney, and information he or she receives is not subject to the attorney-client privilege.”).

138. For a discussion of the evolution of these tensions, see Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L. J. 203 (1992).

139. *Seider*, 2000 ME 206, ¶ 23, 762 A.2d 551 (“By creating the 51-page explanation, in which she divulged detailed evaluations of the daughter, made clinical diagnoses regarding the mother and the son, and offered extensive recommendations regarding how DHS should proceed with its investigation, Seider went over and beyond what was asked for in the DHS subpoena.”).

perform the guardian ad litem's duties, or as may be specifically provided by law or by these Rules.¹⁴⁰

This is a very complex rule in terms of practice and policy, but it does provide more clarity for the court and for GALs than existed under prior rules or statutes. As a means to deconstruct the rule itself, albeit briefly, each sentence may be bullet pointed, as follows:

- A guardian ad litem shall observe all statutes, rules, and regulations concerning confidentiality.
- A guardian ad litem shall not disclose information or participate in the disclosure of information relating to a case to any person who is not a party to the case, except as necessary to perform the guardian ad litem's duties, or as may be specifically provided by law or by these Rules.
- Communications made to a guardian ad litem, including those made to a guardian ad litem by a child, are not privileged.
- The guardian shall exercise reasonable discretion about whether to disclose communications made by the child to the court, or to professionals providing services to the child or the family based on the guardian ad litem's evaluation of the best interest of the child.
- Any decision by the guardian not to disclose such information, however, shall be subject to review by the court following an in camera review.
- A guardian ad litem's notes and work papers are privileged and shall not be disclosed to any person, reserving to the court, however, the authority to order disclosure of such material as part of court proceedings, if the court determines that disclosure is warranted under applicable court procedures.
- If the guardian ad litem is an attorney, she or he shall be deemed to act as a guardian ad litem rather than as an attorney, and information he or she receives is not subject to the attorney-client privilege.

"Observation of all statutes, rules, and regulations concerning confidentiality" raises a variety of tensions between laws like HIPAA and the rights of children, particularly adolescents.¹⁴¹ This is not a topic which has received much discussion at GAL trainings. There are traps aplenty in this area, however, for GALs irrespective of professional licensure. This is particularly true when there are issues of substance abuse or reproductive rights because that confidentiality implicates an even more complex body of law.¹⁴²

140. M.R.G.A.L. 5(g).

141. See Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 PERSP. ON SEXUAL REPROD. HEALTH 80, 81 (2004) ("Over the past several decades, adolescents have gained many opportunities to receive confidential health care services, particularly for concerns related to sexual activity, pregnancy, HIV and other sexually transmitted diseases (STDs), substance abuse and mental health. From both a clinical and a public policy perspective, protection of confidentiality for adolescents has been based on recognition that some minors would not seek needed health care if they could not receive it confidentially, and that their forgoing care would have negative health implications for them as well as society.")

142. See Claude Schleuderer & Vicky Campagna, *Assessing Substance Abuse Questions in Child Custody Evaluations*, 42 FAM. CT. REV. 375, 376 (2004) ("However, an additional informed consent is at least potentially necessary when investigating substance abuse allegations. This is because of federal regulations and rules that preempt any state statute, specifically Title 42 of the Code of Federal Regulation (CFR) Part 2 (Statutory Authority for Confidentiality of Drug Abuse Patient Records, 2004). This regulation requires explication of different standards for informed consent. The intent of this law is to

Given that communications are not privileged when acting as a GAL, this first provision in the rule may be read in conjunction with the duty of nondisclosure to non-parties. The “exercise of reasonable discretion” as to whether to disclose communications from the child to any person or service provider may require access to the court for *in camera* review. The model that has proven effective, but which may require more judicial resources, is found in 22 M.R.S. § 4008 and its optional and mandatory disclosure requirements.¹⁴³

Given the lack of guidance in this area and the complex intersection of federal and state privacy laws,¹⁴⁴ prudence suggests that careful releases be drawn with an explanation of the scope of informed consent and the absence of confidentiality for parent or child. The records themselves (and whether to have records in the possession of the GAL at all) encourages prior judicial definition of what may be shared with lawyers or parents.¹⁴⁵ Too many clinical therapists turn over records to GALs even with releases without realizing that in a child custody case both parents may see the notes about the other or the child.¹⁴⁶

If conversations or interviews with medical or mental health providers or therapists occur, for example, then under the last sentence in Rule 5(g), the “notes and work papers are privileged and shall not be disclosed to any person, reserving to the court, however, the authority to order disclosure of such material as part of court proceedings if the court determines that disclosure is warranted under applicable court procedures.” This Rule is akin to conventional work-product protections which are not a function of privilege but the policy admonition that the thoughts and impressions of a lawyer are not subject to discovery or cross-examination.¹⁴⁷ This

provide a high level of confidentiality for clients who seek drug and alcohol treatment so that their disclosures in treatment cannot harm them.”).

143. See 22 M.R.S.A. § 4008(1) (2016) (“All department records that contain personally identifying information and are created or obtained in connection with the department’s child protective activities and activities related to a child while in the care or custody of the department, and all information contained in those records, are confidential and subject to release only under the conditions of subsections 2 and 3.”).

144. See *Bonney v. Stephens Memorial Hosp.*, 2011 ME 46, ¶ 17, 17 A.3d 123 (“Although we have not previously addressed the issue of whether HIPAA authorizes a private cause of action, all courts that have decided this question have concluded that HIPAA does not provide a private cause of action.”).

145. See *Richards v. Bruce*, 1997 ME 61, ¶¶ 4-5, 691 A.2d 1223 (“In an effort to respond to Bruce’s concerns, the court offered to review the guardian’s notes *in camera* to evaluate their relevance to the hearing. Bruce objected to such a review. The court then offered to hear the guardian’s testimony before ruling on the admissibility of his notes. The court gave Bruce ample opportunity to examine the guardian about the information he gathered for his report, including the potential bias of any witnesses with whom the guardian spoke.”) (footnote omitted).

146. For a thoughtful and thorough review of the delicate balance between privileges for therapeutic treatment and the court’s duty to children, see Amy J. Amundsen, *Balancing the Court’s Parens Patriae Obligations and the Psychologist-Patient Privilege in Custody Disputes*, 28 J. AM. ACAD. MATRIMONIAL LAW 1 (2015).

147. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988) (“Our adversarial system of justice cannot function properly unless an attorney is given a zone of privacy within which to prepare the client’s case and plan strategy, without undue interference.”); *Rancourt v. Waterville Urban Renewal Auth.*, 223 A.2d 303, 304-05 (Me. 1966) (“It forbids discovery of a written statement taken by or for an attorney in anticipation of litigation or in preparation for trial unless the court otherwise orders to prevent injustice or undue hardship. This reflects the holding of the Supreme Court of the United States in *Hickman v. Taylor* . . . but is broader than that holding.”) (internal citations omitted).

tension will, however, require judicial oversight for the foreseeable future, with the *in camera* mechanisms developed in 22 M.R.S. § 4008 providing the best guidance for GALs and lawyers.

Ex Parte Communications: This Rule shares common themes with the Judicial Canons but also recognizes the unique factors relevant to family law practice, child custody litigation, and the role of the court:

In extraordinary circumstances involving matters of child safety or similarly grave concerns, the guardian ad litem may initiate or participate in *ex parte* communications with the court about a particular case pursuant to Canon 2.9(A) of the Maine Code of Judicial Conduct. However, as a matter of due process and fundamental fairness, the guardian ad litem or the court must promptly disclose the nature of the communication to the parties or their counsel, unless such disclosure is likely to present a risk of harm to the child or a party, in which case the court shall take such steps as are necessary to alleviate the potential for harm, and when the danger of harm no longer exists, disclose the nature of the communication to the parties or their counsel.¹⁴⁸

A plausible argument could be made that judges, magistrates, and GALs have not made as much good use of this exception when appropriate. Although the phrase “extraordinary circumstances” has application to other rules and laws, its usage is intended to assure that duties to the child are the paramount consideration.¹⁴⁹ Thus, this *Rule is clear*: *ex parte* communications must promptly become a part of the

148. M.R.G.A.L. 5(h). Under Me. Code Jud. Conduct R. 2.9(A)(1-5): “A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

- (1) Where circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
 - (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and
 - (b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and gives the parties an opportunity to respond.
- (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a specific proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and the advice requested.
- (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
- (5) A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.”

149. See *Samsara Mem’l Tr. v. Kelly, Rimmel & Zimmerman*, 2014 ME 107, ¶ 34, 102 A.3d 757 (reviewing subjective and objective tests but independent of “these principles governing judicial recusal is the requirement of disclosure set out in Canon 3(E)(3), which provides as follows: Unless a judge disqualifies himself or herself under subsections (1) or (2) of this section, a judge shall promptly disclose to the parties in any proceeding any fact known to the judge that is relevant to the question of impartiality and that the judge knows or reasonably ought to know could connect the judge . . . to any of the parties, counsel, witnesses, or issues in the proceeding”).

record, with adequate notice to counsel or self-represented litigants. When the balance-of-risk test is implicated it should be sufficiently plain but documentation for the GAL is critical.

Conflicts of Interest and Mandatory Disclosures: M.R.G.A.L. 5(i), and, concomitantly, Rule 6 concerning involuntary removal are important to understand before accepting an appointment.¹⁵⁰ There are essentially six sub-categories under this Rule: *Mandatory Disqualification*, *Disclosure of Prior Acquaintances*, *Allegations of Failure to Disclose Prior Acquaintances*, *Duty to Report*, *Disclosure of Other Cases*, and *Disclosure of Financial Relationship*. In fairness, and unlike judges or magistrates in Maine, there are many more GALs on the roster than judges and magistrates (even accounting for rural parts of the state with fewer rostered GALs). As the Law Court recently held:

Applying these Canons of the Maine Code of Judicial Conduct to the present case requires an understanding of the practice of law in Maine, where the legal and judicial communities are small. It is unavoidable, and indeed desirable, that judges who serve on the bench together will necessarily develop close professional relationships. We do not expect that such cordial relationships will end if a judge leaves the bench and returns to the practice of law. We are cognizant that the party status of the law firm in this instance makes this case somewhat different from those where a former colleague is simply an advocate for a party before the court. However, it remains a "fact of litigation in small Maine communities that a judge, or members of his or her family, may know of a party, or a witness, or someone related to a party or a witness, or may even have done business with somebody whose name may come up in a case."¹⁵¹

What Rule 5(i) makes clear is that disclosure, even *in camera*, is prudent. Now this does not mean that all conflicts are foreseeable. Any GAL with experience has taken a case and then realized at a later meeting or from intake forms that a former client is now living with Parent A and is a material witness. Practicing law over an extended period of time makes it more likely that parents have relationships with former clients or adversaries from past cases in which confidential knowledge or opinions expressed were so strident or relevant as to implicate the "appearance of impropriety." Therapists, social workers, or psychologists, may discover that they conducted clinical diagnosis or assessment of a related family member, step-child, or served as an expert witness in a collateral proceeding with DHHS, for example. What the Rules do require is prompt disclosure to a judge or magistrate when the conflict may reveal itself.

An additional difficulty may arise when a GAL is asked to provide an interim report, for example, and a dissatisfied parent or lawyer then files a motion for removal or an ethical complaint with the Review Board. There is a risk that this type of motion practice becomes a strategic ploy which distracts and detracts from the merits rather than a good faith exercise of rights under these rules. Eventually, courts may have to balance such motion practice with long-standing precedent applicable

150. Under M.R.G.A.L. 6(e), the "decision whether to remove a guardian ad litem from a particular case is not subject to interlocutory review."

151. *Samsara*, 2014 ME 24, ¶¶ 35-36, 102 A.3d 757 (footnote omitted).

to other types of cases:

A motion for disqualification should come at the 'earliest moment after knowledge of the facts' that suggest recusal. When a party fails to make a timely motion for recusal before the entry of judgment, that party has forfeited its objection to the judge's qualification and cannot be heard to complain following a result alleged to be unfair. "The rationale for this rule is obvious: A party should have no incentive to roll the dice for a favorable decision and then, if the decision is unfavorable, raise grounds for recusal of which she or [her] counsel had actual knowledge prior to the decision being made."¹⁵²

For GALs, it may be prudent to decline the appointment, disclose promptly any potential conflicts to the parties and counsel in writing, and communicate any new potential conflicts which implicate Rule 5(i) to the court without delay and in writing. As a result of the potential for misuse and interference with the judicial process under Rule 5(i), effective October 1, 2016, the court clarified Rules 6(b) and 6(g) by requiring that a parent moving for removal of a GAL shall state whether a complaint was filed with the Board.¹⁵³ Concomitantly, a "complaint submitted to the Review Board by a party in an open proceeding shall not proceed until the court issues a final judgment in that case, the court enters an order allowing the Board to proceed, or the guardian ad litem is removed or discharged."¹⁵⁴

Withdrawal: A GAL may also seek to withdraw by filing a motion with the court that appointed the GAL but must continue representation until the motion is granted, or, if the order so provides, serve until some successor GAL is appointed.¹⁵⁵ This provision is self-explanatory. Any motion to withdraw should be carefully drawn so as to avoid prejudicing a parent or placing a child at risk. For example, if a fee is unpaid despite a court order or both parties or counsel have said that they do not want a GAL now because the case has settled, stating those facts is rather straightforward. In other circumstances, such as when a GAL may be threatened or a lawyer has behaved in a manner which crosses over from advocacy to bullying, a motion to withdraw may be better presented to the judge or magistrate *in camera*. This procedure has been approved by the Law Court in circumstances when the risk of public disclosure may harm a case or client.¹⁵⁶

IV. THE LAST POINT: INVESTIGATOR OR (AND) EXPERT?

What is hopefully apparent by this point is that the new statutes and GAL rules,

152. *Id.* ¶ 25 (citation omitted).

153. M.R.G.A.L. 6(b) ("Any such motion shall state whether a complaint has been filed with the Review Board pursuant to Rule 9.").

154. M.R.G.A.L. 6(g).

155. M.R.G.A.L. 5(j).

156. *See, e.g.,* *Blessing v. Dow Chem. Co.*, 521 A.2d 1176, 1180 (Me. 1987) ("Where, as here, ample notice of the intent to withdraw was given, neither the client nor opposing party objected to the withdrawal, no motions of substance were pending before the court, and no certain date for trial had been set, the court should have held an *in camera* hearing to determine the validity of the assertions if it was unable to accept the conclusory representations of the Attorneys concerning the breakdown of the attorney-client relationship. Only if the representations of counsel concerning the complete breakdown of the attorney-client relationship are not accepted by the court and upon hearing, *in camera*, are found not to be substantiated, should the motion to withdraw be denied.").

as deconstructed and heavily footnoted above, bind together to mitigate GAL role confusion. There is, however, a gap which remains a policy quasar: lots of heat, lots of blinding light, and lots of energy expended but not much of a scientific explanation as to why. Although I was not particularly prescient, in my 2014 article I wrote that if:

GALs are an integral part of providing a court with an independent *expert* opinion about children, then the next step is to develop criteria for practice and training consistent with the intertwined definitions of lay and expert opinion. The development of such standards should transparently consider the unique policy and institutional needs and burdens that govern child custody conflict. These standards should also apply across professional disciplines and licensure so that courts more precisely understand the limitations of expert prediction and opinion in this specific environment.¹⁵⁷

This article will not regurgitate that argument.¹⁵⁸ GALs wear many hats which cannot be easily reconciled by law or rules when children are vulnerable and parents in such conflict as to lose sight of their “better angels.”¹⁵⁹ What matters here is that the statutes and rules render a GAL report, even before commencement of a trial, substantive evidence without distinguishing qualifications, factual investigation, personal values, or the foundation for an expert opinion. This is not about the weight of the evidence but the admissibility of the report as policy *per se* and then testing that substantive evidence exclusively through cross-examination.¹⁶⁰

A lay person may not ordinarily give an opinion based upon hearsay or knowledge acquired other than through the five human senses.¹⁶¹ That a GAL is often called upon to make recommendations that connect a factual investigation with personal opinion which *may* link reliable and relevant evidence-informed research—or nonscientific concepts—for allocating parental rights and responsibilities is hardly

157. Prescott, *supra* note 1, at 67.

158. See Prescott, *supra* note 1, at 61-67.

A. 159. ABRAHAM LINCOLN, *FIRST INAUGURAL ADDRESS, (Monday, March 4, 1861)* (“*I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.*”).

160. Cf. *Maietta v. International Harvester Co.*, 496 A.2d 286, 293 (Me. 1985) (“Ternent relied upon the testimony of the drivers and Densmore, as well as, his own knowledge of air brakes and computerized anti-locking devices. His testimony was admissible at trial.”); *In re American Board of Com'rs for Foreign Missions*, 66 A. 215, 231, 102 Me. 72 (1906) (“We should hesitate, however, to say that this defect in the chirography of the testator was evidence of any greater decay than that which may be attributed, in many instances, to the weakness incident to approaching old age. It needs no expert to inform us that the hand may tremble and the sight may fail long before the mind is deprived of its mental grasp.”); *Woodman v. Dana*, 52 Me. 9, 13 (1860) (“Whether a witness is or is not an expert is a question to be settled, in the first instance, by the Court, on a preliminary examination for that purpose. The value or weight of his testimony may be tested, after he is admitted, by an examination into the grounds or reasons for any opinion which he may express.”).

161. See Me. R. Evid. 701; *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.”).

news in any jurisdiction.¹⁶² Much of that data, of course, which connects the GAL investigation to the recommendations, are drawn from third party statements (hearsay), child custody or psychological evaluations, therapists, mental health, school, or medical records, and the statements of lay persons or professionals.¹⁶³

The reason for this grounding at the end of this article is that, unlike other standards for expert testimony, the GAL report and its contents, as a matter of statute and rule, not the court as gatekeeper, determines threshold “reliability.”¹⁶⁴ The “reliability” test, enunciated by the Law Court in *State v. Williams*¹⁶⁵ and explicated upon in *Tolliver v. Dep’t of Transp.*,¹⁶⁶ holds that:

To be admissible, the expert must be able to provide some insight beyond the kind of judgment an ordinarily intelligent juror can exert. The qualification of an expert witness and the scope of his opinion testimony are matters within the discretion of the trial court. We have established a two-part test, originally articulated in *State v. Williams*, 388 A.2d 500, 504 (Me. 1978), for determining when expert testimony is admissible: A proponent of expert testimony must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the evidence or determining a fact in issue. Further, to meet the two-part test, the testimony must also meet a threshold level of reliability. . . . [B]ecause if an expert’s methodology or science is unreliable, then the expert’s opinion has no probative value.¹⁶⁷

Thus, the opinion of GALs on ultimate issues of fact, like recommendations for a parenting plan—irrespective of professional licensure or training—is borne of a special family court expert DNA, even if the qualifications or scientific reasoning are threadbare or would not meet admissibility standards in any other legal context. Unlike other forms of civil litigation, however, the Legislature established an

162. See Lidman & Hollingsworth, *supra* note 2, 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.”) (footnotes omitted).

163. Care must be exercised when extrapolating too much blame on a failure to focus on family resilience, or other variables which may influence outcomes. See Michael B. Donner, *Tearing the Child Apart: The Contribution of Narcissism, Envy, and Perverse Modes of Thought to Child Custody Wars*, 23 PSYCHOANALYTIC PSYCHOL. 542, 544 (2006) (“Although there are a number of dynamic variables that may contribute to high-conflict divorces, in this article I describe only those situations in which narcissism, pathological envy, disavowal, and perverse thinking all combine to create a mode of thinking and living that sustains some of these never-ending battles.”); Michael Friedman, *The So-Called High-Conflict Couple: A Closer Look*, 32 AM. J. FAM. THERAPY 101, 105 (2004) (“While our legal system exacerbates the conflict inherent in divorce, it is inaccurate and unfair to place all the responsibility with the system and its practitioners. Clients sign off on their own motions. False and incendiary accusations are ultimately the responsibility of the parent making them, not the parent’s attorney, some of whose other clients may not be engaging in this kind of tactical warfare. Sometimes a parent is quite willing to have a champion go forth to destroy the other parent.”).

164. See *In re Sarah C.*, 2004 ME 152, ¶ 11, 864 A.2d 162 (“To meet the two-part standard for the admission of expert testimony, the testimony must also meet a threshold level of reliability.”).

165. 338 A.2d 500, 504 (Me. 1978).

166. 2008 ME 83, 948 A.2d 1223.

167. *Id.* ¶¶ 28-29 (alteration in original) (citations omitted) (internal quotation marks omitted).

exception for GALs for various policy reasons, including the need to manage and decide a high volume of child custody or child abuse cases. In concrete terms, for example, this may mean a recommendation about primary residence or visitation, the functional capacity of a parent who has a substance abuse problem or disability, overnights for an infant or toddler, how old is too old to force visitation, or whether relocation away from one parent is in the best interests of a child.

The operative policy question, distinct from all other areas of law, is whether a rostered GAL, irrespective of professional discipline or experience, should be an *expert witness about that family* by virtue, alone, of roster status and statute. If GALs are to be an integral part of providing a trial court with an independent *expert* opinion about the best interests of a child, then the next step is to develop criteria for practice and training consistent with expert opinions premised upon reliable science. This framework may better assure that expert means expert and not just value-laden opinion by even the most well-meaning professionals. The statutes and rules enacted or adopted in Maine since 2013 are a foundation for refining and developing institutional and professional practices which more effectively protect children and assist the court.

V. CONCLUSION

To accomplish the ethical duties required by these new laws and rules, in real time and within the bounds of real disputes, requires respect for the unique institutional needs and burdens that govern child custody conflict, as well as the need to expeditiously and effectively protect children caught in the throes of conflict. An outcome premised on science and evidence requires stakeholder collaboration and professional respect that honors competence and integrity but which is not amputated by weariness from disparagement or personal assaults. Vaporizing the better angels to appease the most vocal constituencies will not help the many and, certainly, will not help this next generation of children.

Although the court is the repository of conflict between parents who cannot resolve those differences privately, this does not mean that professionals and decision makers are bound to accept these choices as an inevitable outcome for a child. Given that these are high-stakes cases for families, the judicial system has an overarching duty to protect the integrity of the process of investigation and opinion. That task is easily criticized when parents offer *a* truth within the confines of a court system overwhelmed and under-resourced. What may be fairly drawn from all sides of this juridical equation is that the absence of organizational and policy research, over decades now, has compromised the ability to transparently explain the “efficacy” of GALs or any other intervention, including mediation or psychological evaluations—among a litany of other judge-imposed interventions—to the public.¹⁶⁸

168. See Werner Bussmann, *Evaluation of Legislation: Skating on Thin Ice*, 16 EVALUATION 279, 290-91 (2010) (“Second, due to their scope and complexity, statutes cannot be evaluated according to the ‘gold standard’ of evaluation. This is not a free pass for purely impressionist assessments. Having no strict standards does not mean that any standard should be abandoned. We would argue for a strategy aimed at furnishing plausible arguments for decision-makers at the appropriate moment. Evaluation needs to be interwoven with the legislative process more closely than it has been up to now.”). An exception for research seems to be drug courts, but there are reasons why this is ethically and methodologically easier to study than child custody or abuse cases in family courts. See Ojmarrh Mitchell et. al., *Assessing the*

To properly perform such a policy function requires rigorous, comprehensive, and sophisticated qualitative and quantitative research over different timelines and within the host environment of the family courts, not a lab or classroom.¹⁶⁹ There are unavoidably complex ethical dilemmas in human-subject research when parents and children are vulnerable, exposed to outcomes by judges bound by Judicial Canons which constrain discussion of pending cases, or lawyers are bound by a duty of zealous advocacy as agents for clients and officers of the court.¹⁷⁰ In the meantime, however, if it is perceived, often quite accurately, that anecdotal reports or institutional convenience or private economic resources guide the quality and availability of interventions in family courts, then public confidence, fairly or not, will continue to erode. This statement, for those who read to the end, may seem melodramatic. I wish that were true. But it really is not.

Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts, 40 J. OF CRIM. JUST. 60 (2012).

169. See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L. Q. 281, 297 (2006) (“Many recent articles on the topic of child custody law in legal, interdisciplinary, and even scientific journals contain serious misstatements of the research literature. Unfortunately, the judges, lawyers and legislators who are their intended audience often lack statistical or scientific training and are unfamiliar with the scientific literature.”); Benjamin D. Garber, *Attachment Methodology in Custody Evaluation: Four Hurdles Standing Between Developmental Theory and Forensic Application*, 6 J. OF CHILD CUST. 38, 45 (2009) (“The leap from validation within research samples to validation among forensic samples is complicated for any instrument (Lamb, 2005). At the broadest level, research with court-involved populations demands rigorous attention to relevant legal and ethical (APA, 2002, standard 8.02 Ethics) mandates regarding informed consent, data collection, coding, storage and publication and the use of experimental methods.”).

170. See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 154 (1999) (“Too much of the debate about professionalism, it seems to me, has been clustered around a series of false dichotomies or polarizations—business versus profession, client defense (zeal) versus truth, adversarialism versus compromise, criminal versus civil, public versus private, client service and autonomy vs. justice, individualism vs. system, rules of law and discretion—as if our actual practices do not often combine aspects of these claimed opposites simultaneously.”). I cannot resist—well, I could but will not—borrowing an apt historical analogy from Professor Menkel-Meadow: In a recent book examining adversarial ethics (and finding them wanting), Arthur Isak Applbaum acknowledges the ethics of professional function (and suggests these can go too far) by recounting the ability of Charles-Henri Sanson in maintaining his position as Executioner of Paris through changes in regime from Louis XVI through all the stages of the French Revolution, because of his extreme professional and functional ethics—he was simply a professional executioner and the underlying political regime for whom he did his work did not matter. What did matter was how and with what professional standards of quality he performed his work. I want to suggest the danger of Sanson’s success – the assumption in our own code of legal ethics, that a lawyer is a lawyer and that all lawyers can be regulated, by the same rules, regardless of how or for whom they perform their services.
Id. at 156 (footnotes omitted).