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# INCONVENIENT TRUTHS: FACTS AND FRICTIONS IN DEFENSE OF GUARDIANS AD LITEM FOR CHILDREN

*Dana E. Prescott*

- I. INTRODUCTION
- II. THE “MODERN FAMILY”
- III. HISTORICALLY SITUATING GALs
- IV. UNDERSTANDING EXISTING POLICY GAPS
  - A. Funding and Access to Justice*
  - B. Existing Law and Practices*
- V. MORPHING FROM INVESTIGATOR TO EXPERT
- VI. THE GAL NOW TO THEN
- VII. CONCLUSION

## INCONVENIENT TRUTHS: FACTS AND FRICTIONS IN DEFENSE OF GUARDIANS AD LITEM FOR CHILDREN

Dana E. Prescott\*

### I. INTRODUCTION

During the 2013 Maine legislative session, citizens, elected officials, and professionals passionately expressed their beliefs concerning the legitimacy and efficacy of guardian ad litem [GAL] appointments in private child custody cases.<sup>1</sup> In many respects, this policy discussion mirrored national trends in the scholarly and social science literature concerning allegations of the overuse or capacious role of a GAL.<sup>2</sup> Establishing the proper legal and scientific contours within which GALs may serve the best interests of children and simultaneously provide constructive investigative and evidence-informed recommendations to judicial fact finding remains a proper concern for proponents and critics alike. The challenge, in this era of emotive and visceral responses to even the most sincere disputes, is how to engage meaningful policy, practice, and legislative changes which effectively and responsibly serve the complex needs of modern family systems.

The specific or precise role of a GAL differs from state to state but the general definition is a “person, not necessarily a lawyer, who in a litigated matter stands in the place of a party deemed legally incompetent” with the specific authority to act within a peculiar combination of a court’s delegation under the applicable law of that jurisdiction.<sup>3</sup> For the most part, this role is a gyrating function of advocate,

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1. The blogs and websites expressing these beliefs, both official and unofficial, are available online to anyone who wishes to view them. The Law Court’s language in one decision was unfortunate but the point was sincerely intended to try and generate good faith attention to this issue. *See* Desmond v. Desmond, 2011 ME 57, ¶ 7, 17 A.3d 1234 (“The litigation has cost these parties—in addition to the significant legal fees they have separately incurred—thousands of dollars in guardian ad litem fees. This is an extraordinary expense for parties whose combined annual incomes total just over \$70,000. Courts hearing family cases are encouraged to cap and/or monitor the costs associated with litigation whenever necessary to protect the child’s best interest so that the funds needed to feed, clothe, and educate children are not spent on generating guardian ad litem reports or paying substantial attorney fees.”) (emphasis added) *appeal after remand*, 2012 ME 77, 45 A.3d 701 [Desmond II]. By Desmond II, the Law Court had a clearer picture of the underlying events of that case, include the role of the parents.

2. For a thorough discussion of this point, see Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002); 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 (1998).

3. ANN M. HARALAMBIE, *THE CHILD’S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 5 (1993); *see also* Resa M. Gilats, *Out-of-Court*

educator, evaluator, mediator, investigator, expert witness, social science consumer, and recommender.<sup>4</sup> As one scholar aptly summarized, GALs perform widely diverse and concurrent tasks when assisting the court, and when “resolving custody disputes, visitation schedules, temporary placements, or other matters, legal and ethical issues arise in everyday GAL practices that have important implications for all parties involved.”<sup>5</sup> The need for judges to delegate flexible and diverse authority to GALs occurs because: (1) a family court judge cannot ethically perform certain functions in the American judicial system such as home visits and ex parte communications and (2) each family system presents unique social and environmental histories. Both these factors require an archeological approach to digging out some semblance of factual reality, which, if done properly, connects to recommended interventions. From those relatively simple truths of civics and human nature, a key point is inadvertently—or conveniently—missed: a trial judge, sitting on the bench each day with dozens of files containing little more than vague identities and undulating allegations, may only presume the most basic biopsychosocial context for child custody conflict.

For example, among many realities when families reconfigure through divorce or partner dissolution is that interpersonal violence, child abuse, or mental health and substance abuse, may only be revealed during child custody litigation. Moreover, a significant percentage of parties are *pro se* today, so the capacity of a judge to obtain even the most basic and material information may be hamstrung by the understandable anxieties of parents trying to manage complex court rules and traditions.<sup>6</sup> Along with the child’s parents, family members and significant others may impede collaborative solutions or encourage litigation to prove “who is right.” Even with lawyers present, the traditions of advocacy (or at least that excuse by certain lawyers) may operate to obscure accurate data more than transparently inform the court.

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*Statements in Guardian ad Litem Written Reports and Oral Testimony*, 33 WM. MITCHELL L. REV. 911, 914 (2006) (“Definitions of the term guardian ad litem vary depending on the source and context.”).

4. See generally Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee*, 22 U. ARK. LITTLE ROCK L. REV. 529 (1999); Dana E. Prescott, *The Liability of Lawyers as Guardians ad Litem: The Best Defense is a Good Offense*, 11 J. AM. ACAD. MATR. LAW. 65 (1993); see also Margaret E. Sjostrom, *What’s a GAL to do?: The Proper Role of Guardians ad Litem in Disputed Custody and Visitation Proceedings*, 24, NO. 3 CHILD. LEGAL RTS. J. 2, 2 (2004) (“GAL roles generally 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).”).

5. Marcia Boumil et al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 45 (2011) (footnotes omitted).

6. See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1538 (2004) (“Probably the only thing growing as fast as the number of self-represented litigants in our state and federal courts are the efforts to assist and accommodate them.”). For an otherwise interesting article which begins well but ends by blaming, see Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012) (“Where the law is simple and disputes are factual, paralegals, investigators, and social workers can help to investigate facts, marshal evidence, and prepare clients to tell their own stories. The real danger to the legal profession has always been that pro se court reform will spread upwards from the poor to the middle class and beyond. Certainly, paid divorce lawyers have little incentive to support straightforward, cheap, and fast pro se divorces for the poor. What is bad for lawyers, however, may be good for citizens and the economy as a whole by reducing the deadweight burden of legal fees.”).

As is too often and rather sadly true today, policy debates encircled by invective rarely encourage long-term, effective interventions. Indeed, as most leaders in the fog-of-crisis learn, invective may actually generate a circular firing squad more likely to wound all participants. Whatever the accuracy and intonation of the debate on both sides, there is a genuine opportunity to improve the efficacy of GAL practices if common sense and collaboration can prevail. This hopefulness is realistic because proponents, stakeholders, legislators, the judiciary, and professional staff skillfully generated legislation under a new 4 M.R.S.A. § 1555<sup>7</sup> and restructured 19-A M.R.S.A. §1507.<sup>8</sup> These statutes implement policy changes that may encourage evidence-informed and ethically sound standards of practice across disciplines.<sup>9</sup>

Whether all parties take advantage of this opportunity remains to be seen. What particularly matters is that an intelligent, dignified, and creative discussion can encourage more thoughtful strategies for reducing the imbalance of poverty, cultural insensitivity, and the impact of interpersonal violence. Although unintentionally marginalized, future policy design should better account—in best practices and sound research—for the realms of privilege and powerlessness.

As a means of providing some perspective, this article begins with a brief historical tour of GAL appointments on behalf of children who are bound by the parental choice to litigate rights and responsibilities.<sup>10</sup> To accomplish such a task, a foray into family demographics is essential, because those demographics drive much of contemporary litigation and are unlikely to abate before the next

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7. See 4 M.R.S.A. §1555(1) (Supp. 2013) (“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.”). I will generally refer to Title 19-A, but the Legislature wisely intended GAL practices to be the same irrespective of a court’s jurisdictional authority.

8. See 19-A M.R.S.A. §1507(1) (2012) (“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. The court may appoint a guardian ad litem when the court has reason for special concern as to the welfare of a minor child.”).

9. The term “evidence-informed” connects the elements of scientific methodology to program design and evaluation. See Ross C. Brownson et al., *Understanding Evidence-Based Public Health Policy*, 99 AM. J. PUB. HEALTH 1576, 1576 (2009) (“Policy change involves both science and art and, therefore, evidence for policymaking can take several forms. The concept of evidence often originates from legal settings in Western societies. In law, evidence comes in the form of stories, witness accounts, police testimony, expert opinions, and forensic science. For policy-relevant evidence, both quantitative data (e.g., epidemiological) and qualitative information (e.g., narrative accounts) are important. Although the use of research-derived evidence may be a key feature of most policy models, it is not a certainty that scientific evidence will carry as much weight in ‘real world’ policymaking settings as other types of evidence.”) (footnotes omitted).

10. In 1983, Maine repealed its child custody law and enacted a radical (for its time) parenting statute that dispensed with the word “custody” in favor of “shared,” “allocated,” and “sole parental rights and responsibilities.” See 19-A M.R.S.A. §§ 1501(1), (5)-(6) (2012). The story of how that change was enacted remains publically untold but my hope is that someday my former law partner, Rod Potter, Esq. will share that story in his words.

generation.<sup>11</sup> Any policies intended to influence parental conflict should reflect family system reality rather than wishful thinking.<sup>12</sup> Indeed, too much child custody policy discussion today is driven by those who believe *Leave it to Beaver*, *Lost in Space*, and *The Brady Bunch* were the reality shows of yesteryear.

Following that foundation, much of the conflict over GALs flows from a lack of shared civic knowledge in relation to a court's *constitutional* functions when parents waive autonomy by asking a judge to tell them when and where they may see the child they created, free of government.<sup>13</sup> As described below, the authority of GALs is judicial in origin, centuries old, and exclusively dependent upon judicial delegation. No court order, no GAL. This article concludes by arguing that the next generation of GAL practices should be based upon research-informed design and assessment. This means that it is important to reinvestigate and redefine the role of the GAL as "expert." It is that very misunderstanding, both contemporarily and historically, that remains the source of much controversy when GALs are asked to be soothsayers for the courts, rather than impartial investigators.

## II. THE "MODERN FAMILY"

The demographics are well-established in the literature. In the United States, approximately 2.3 million couples marry each year, 1.2 million couples divorce, twenty percent of couples in first marriages divorce or separate after five years, and thirty-three percent do so within ten years. Over half of these divorces occur in families with minor children, resulting in more than one million children experiencing parental dislocation annually. Societal acceptance of non-married cohabitants—among other political and cultural developments—has substantially

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11. A recent and rare plurality opinion [3-2-2] by the Law Court highlights, in the best traditions of judicial policy and precedent, the complexity confronting trial courts and GALs. *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."); *see id.* ¶ 52 (Jabar, J., concurring) ("The expansive interpretation of parents' due process rights elevates the rights of the biological relative at a time when advances in reproductive technology, the legalization of same-sex marriage, and the complexities of the modern family render biological ties less relevant in identifying familial relationships."); *see id.* ¶ 72 (Levy, J., dissenting) ("Defining de facto parenthood is a delicate task that should be preceded by a searching evaluation of the competing child welfare, family preservation, and related public policy issues that are involved.")

12. *See*, for example, the discussion in *Pitts v. Moore*, *id.*, ¶¶ 10-12; *see also* Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 36-37 (2009) ("First, same-sex families are gaining recognition and acceptance, and non-biological domestic partners are seeking and are increasingly successful in obtaining legal status towards the children for whom they care. Second, the United States is an increasingly multi-cultural society, and different norms of caretaking are permeating our shared reality and thus influencing the law. Finally, technological developments and the increased use of reproductive technologies have created the potential for multiple potential biological as well as psychological parents for a single child.") (footnotes omitted).

13. For a sensitive and fitting reminder that conflict invokes personal choice, *see* ANDREW HORTON & JOHN DAVID KENNEDY, *DO YOUR OWN DIVORCE RIGHT: STRAIGHT TALK FROM FAMILY COURT JUDGES* 306 (2011) ("Acts of kindness are more likely to be repaid with other acts of kindness. Mean spirited acts are almost certain to generate means spirited responses. This is true everywhere, but it is especially true with current or former intimate partners.")

expanded the population of such couples since the 1970s.<sup>14</sup>

Research suggests that parents in cohabitating unions are even more likely to dissolve at shorter intervals than marriages, such that a substantial proportion of children under age twelve commonly experience maternal cohabitation after birth to a single mother or separation of the birth parents.<sup>15</sup> What is also evolving is more comprehensive data concerning gay and lesbian couples who may marry or cohabitate, as well as grandparent, kinship, and de facto parenting arrangements.<sup>16</sup>

These are national demographics, but Maine faces its own particular and well-publicized demographic changes over the next few decades, including: an aging population less able to help children and grandchildren; endemic under-employment and unemployment; serious and embedded mental health and trauma; interpersonal violence; growing hunger and poverty; educational declines; drug and substance abuse or addictions (legal or illegal); and family systems struggling without economic resources beyond social services. There is, of course, always a risk of oversimplifying the association between demographic shifts and the progression of social problems like parental conflict and child custody litigation.<sup>17</sup>

From the research, two relevant outcomes can be fairly extrapolated. First, the frequency and fluidity with which parental relationships reform has increased the

14. See Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE AND FAM. 403, 405 (2010); Sheela Kennedy & Catherine A. Fitch, *Measuring Cohabitation and Family Structure in the United States: Assessing the Impact of New Data From the Current Population Survey*, 49 DEMOGRAPHY 1479 (2012); ROSE MARIE KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009 4 (2011); ROSE MARIE KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, LIVING ARRANGEMENTS OF CHILDREN: 2009 8 (2011); JONATHON VESPA ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012 17, (2013).

15. See generally PAULA Y. GOODWIN ET AL., CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, MARRIAGE AND COHABITATION IN THE US: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH, 23 VITAL AND HEALTH STATISTICS No. 28 (2010); Cherlin, *supra* note 14; Kennedy & Fitch, *supra* note 14; KREIDER & ELLIS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, *supra* note 14; KREIDER & ELLIS, LIVING ARRANGEMENTS OF CHILDREN: 2009, *supra* note 14; VESPA ET AL., *supra* note 14.

16. See Serena Lambert, *Gay and Lesbian Families: What We Know and Where to go from Here*, 13 FAM. J. 43, 43 (2005) ("Unfortunately, accurate statistics regarding the numbers of families headed by gay men and lesbians in our culture are difficult to determine."); Gregory C Smith & Patrick A. Palmieri, *Risk of Psychological Difficulties among Children raised by Custodial Grandparents*, 58 PSYCH. SERV. 1303, 1303 (2007) (footnote omitted) ("Although increasing numbers of grandparents are becoming surrogate parents to grandchildren, little is known about how custodial grandchildren fare in these families."). See generally Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. OF ORTHO. 203 (1995) (Noting that large-scale surveys of lesbian and gay communities in the United States find that approximately one in five lesbians identify as mothers and about one in 10 gay men identify as fathers. Careful consideration of available data has led to an estimate of between 2 and 14 million children with lesbian or gay parents in the United States, with figures depending on the exact criteria employed).

17. For a recent discussion of "fragile families" and the connection to economic and class divides, see generally MARSHA GARRISON & ELIZABETH S. SCOTT, MARRIAGE AT THE CROSSROADS: LAW, POLICY AND THE BRAVE NEW WORLD OF TWENTY-FIRST CENTURY FAMILIES (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp. eds., 2012).

complexity and intensity of parental conflict across multiple developmental stages for children.<sup>18</sup> Second, unresolved or recurring parental conflict may be a more powerful predictor of a child's healthy adjustment than the event of separation, with recognition that these are complex variables to test and measure.<sup>19</sup>

As a society, we are far beyond the point of arguing that children do not suffer from chronic parental and familial conflict throughout the educational, emotional, psychological, and economic domains.<sup>20</sup> Although there is legitimate concern that this data may be skewed too negatively, that concern should not obscure the reality that, for many parents and children, chronic conflict is their daily horseradish.<sup>21</sup> Parents, of course, have a presumptive right to privately resolve conflicts concerning their children through negotiation, mediation, or counseling so as to mitigate negative outcomes or enhance the probability of positive outcomes. Alternatively, one parent may choose to sue the other parent in their parenting case and/or engage various other portals to the courthouse, such as child protection and protection from abuse or harassment filings so as to request that a judge enter, modify, or enforce, a child custody order.<sup>22</sup>

The most troubling trend is that parents may habitually resort to a court as the *first* resort, and not the last. Over these decades, parental autonomy may have inevitably yielded to the habit of substituted judgment by GALs, mediators,

18. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 384-85 (2008); Hyun Sik Kim, *Consequences of Parental Divorce for Child Development*, 76 AM. SOC. REV. 487, 497 (2011); Marsha Kline Pruett et al., *Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children*, 17 J. FAM. PSYCHOL. 169, 169-70 (2003); Heidi R. Riggio, *Parental Marital Conflict and Divorce, Parent-Child Relationships, Social Support and Relationship Anxiety in Young Adulthood*, 11 PERS. RELATIONSHIPS 99, 99, 108 (2004).

19. See Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional well-being of the Next Generation*, 15 THE FUTURE OF CHILDREN 75, 84 (2005) ("Interparental conflict is a direct stressor for children, and it can also interfere with their attachments to parents, resulting in feelings of emotional insecurity."); Brenda L. Bacon & Brad McKenzie, *Parent Education after Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes*, 42 FAM. CT. REV. 85, 85 (2004) ("... continuing parental conflict [*sic*] was a more powerful predictor of children's maladjustment than the event of separation.").

20. There are numerous articles on this topic across professional disciplines. See generally Robert Bauserman, *A Meta-Analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody following Divorce*, 53 J. DIV. & REMARRIAGE 464 (2012). An additional challenge with the data is that research design may not account for differences, resiliencies, or other confounding, mediating, or moderating variables. See Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L. Q. 353, 354 (2013) ("A greater understanding of the process of scientific research can lead to a more thorough understanding of how to evaluate the quality of research and the conclusions drawn from the studies.").

21. There is an old Yiddish saying that I share with clients: "To a worm in horseradish, the whole world is horseradish." See HAROLD KUSHNER, WHEN ALL YOU'VE EVER WANTED ISN'T ENOUGH: THE SEARCH FOR A LIFE THAT MATTERS 22 (2002).

22. For statistical data concerning all forms of family law filings in Maine over a five year trend, see *Maine State Court Caseload: 5 Year Trend*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/reports\\_pubs/reports/5yr%20Court%20Stats%20for%20Internet/All%20Courts%20Caseload%20FY'09\\_FY'13.pdf](http://www.courts.maine.gov/reports_pubs/reports/5yr%20Court%20Stats%20for%20Internet/All%20Courts%20Caseload%20FY'09_FY'13.pdf) (last visited Sept. 12, 2014). One of the difficulties with this data is that quantity should not be confused with complexity or the percentage of parents who may be responsible for a statistically significant share of litigation. The Administrative Office of the Courts does an excellent job of compiling the data and making it accessible.

therapists, and judges. As a consequence, many parents find themselves embedded in the courts at substantial emotional and financial cost, and over many years. Whatever the habit or portal, parents who chose to organize their family through court not only use litigation as a proxy but consume substantial social and judicial resources nationally.<sup>23</sup>

As the contours of these social welfare problems evolved from trend to serious crisis in our mental health and court systems, interdisciplinary professionals had a responsibility to design interventions for parents and children in the legal system that were effective and accessible. In the past, these interventions have included GALs, parenting education, parenting coordinators, mediation, psychological evaluations, and various forms of conjoint therapy. Since the 1970s, however, the judicial system has too often embedded these interventions as *experiments* into judicial decision-making as a function of policy and practice, despite an absence of coherent theory or evidence-informed research. Whether any of these interventions actually work effectively and efficiently for parents, children, or judges over various time-horizons is not the source of much empirical study by the judicial system.<sup>24</sup>

There are various reasons that tradition and constitutional functions have impeded evidence-informed policy research in the courts. This reality, however, translates an intervention like GALs into more a “feeling” that “it works” than evidence that it does what it is intended to do in most cases: facilitate settlement, enhance the reliability of fact finding and judicial decision making, and improve the potential for positive change for family systems. The roots of policy change, therefore, should begin with an understanding of how we, as a society, reached this friction between the abdication of parental autonomy and self-determination and the imposition of judicial responsibility as a substitute for both; neither of which was an inevitable or foreseeable outcome from the creation of courts as a co-equal, constitutional branch of government.

### III. HISTORICALLY SITUATING GALs

It is fair to point out that in the beginning, the crafters of neither the United States Constitution in 1787 nor the Maine Constitution in 1820 sat down with parchment and quill and thought that they should include family, drug, juvenile, and other specialty courts as a means to serve their citizenry.<sup>25</sup> Quite the contrary,

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23. This is difficult data to compile or aggregate, but see Alan J. Hawkins, *A Proposal for a Feasible, First-Step, Legislative Agenda for Divorce Reform*, 26 *BYU J. PUB. L.* 215, 216 (2012); David G. Schramm et al., *Economic Costs and Policy Implications Associated with Divorce: Texas as a Case Study*, 54 *J. DIV. & REMARRIAGE* 1, 1, 4 (2013).

24. See, e.g., Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 *VA. J. SOC. POL'Y & L.* 129, 163 (2002).

25. See, e.g., *S\*\*\*\* S\*\*\*\* v. State*, 299 A.2d 560, 562 (Me. 1973) (“The social problem created by the conduct of the deviant child, i. e., a child whose conduct is antisocial, is not a problem which has come into being this year or this decade or even this century. It has existed in this country since our beginning days and has occupied the attention of jurists and sociologists perhaps more than any other single problem.”). In dissent, Chief Justice Dufresne wrote that the “power of the State to act as *parens patriae* for the benefit of children and adolescents does not override the constitutional privilege of

courts were generally intended for criminal, commercial, estate, and property issues so as to keep the peace in a “civilized” society (though one should never neglect the historical use of courts to oppress minorities or protect the property rights of powerful interest groups).<sup>26</sup> For similarly perceived reasons for social stability over centuries, state government enacted restrictive laws pertaining to family dissolution and child custody but conferred upon the judicial branch exclusive jurisdiction to enter judgments concerning those matters.<sup>27</sup> In the absence of some specific constitutional or statutory restriction, trial courts had authority to act as *parens patriae* for children from the founding of the State and to appoint third parties to act as officers on behalf of a minor.<sup>28</sup> As described in more detail below, the court appointment of GALs for “incompetents” such as children pre-dated the judicial evolution of best interest factors which itself pre-dated legislative enactment.

In the 1851 case *King v. Robinson*, Chief Justice Shepley stated that a court “is authorized to appoint a guardian ad litem, when a party becomes insane pending the suit.”<sup>29</sup> The Court noted that cases “have been cited to show, and they do show, that a judgment rendered against an infant [child or minor] will be erroneous, if the

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substantive due process to while minor children are entitled equally as much a[s] adults.” *Id.* at 571 (Dufresne, C.J., dissenting).

26. *See, e.g.*, Corey A. Johanningmeier, *Law & Politics: The Case Against Judicial Review of Direct Democracy*, 82 IND. L.J. 1125, 1129 (2007) (“Are the people really just selfish bigots that need guidance from enlightened judges? Can a legal scholarship that is structurally beholden to a hierarchical representative advocacy model give adequate deference to populist mechanisms? Do enlightened progressive ideals inevitably partner with disabling skepticism about mass human motivations and a preference for legislative or judicial fiat?”).

27. In *Adams v. Palmer*, 51 Me. 480 (1863), the Law Court affirmed the granting of a divorce without the authority of the Legislature. The argument was that this impaired the obligation of contracts under the Constitution. The parties had remarried and released dower. Times may change but it was still all about the money. The Court held that marriage is “a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds--but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, the true basis of human progress . . . ‘*Tunc genus humanum primum mollescere coepit.*’” *Id.* at 484-85. This phrase means: “The human race first began to soften,” from a passage by Lucretius. The full quote in translation is: “Then, after they had got huts and skins and fire for themselves, and woman joined to man had retired into a single marriage, and they saw children created from them, then it was that the human race first began to soften.” Gordon Campbell, *Lucretius 5.1011-27: The Origins of Justice and the Prisoner’s Dilemma*, LEEDS INT’L CLASSICAL STUDIES (2002), <http://lics.leeds.ac.uk/2002/200203.pdf>.

28. *See Roussel v. State*, 274 A.2d 909 (Me. 1971). This scholarly decision by Associate Justice Wernick roots Maine’s child custody law: “It is to be emphasized that in 1830 the Supreme Judicial Court of Maine which decided *State v. Smith* lacked a full jurisdiction automatically carrying over from English Chancery. The court possessed only that limited equity jurisdiction explicitly conferred upon it by the Maine Legislature. In the year 1830, when *State v. Smith* was decided, the legislature had withheld from the court the equity powers relating to the control or custody of infants (as shown by R.S. of Me., 1841, c. 96, Sec. 10, which summarized the totality of the grant of equity powers from 1821 to 1841).” *Id.* at 918; *see also* *Harmon v. Emerson*, 425 A.2d 978, 984 (Me. 1981) (“We find that the Legislature intended for courts in determining issues of custody in divorce proceedings to apply the equitably-based principles which are applied to custody determinations made under the full equitable jurisdiction, (deriving from the English Court of Chancery) which was originally granted by the Legislature to the Supreme Judicial Court in 1874.”).

29. *King v. Robinson*, 33 Me. 114, 122 (1851).

record shows that he appeared by attorney and not by guardian.”<sup>30</sup> In *Easton v. Eaton*, the Law Court reasoned that:

It is a rule of common law that in all civil actions an infant must be represented by a guardian or next friend, and whenever it appears to the court in which an action is pending that one or more of the parties are infants, and such infant has no guardian by appointment of the probate court who has appeared to protect his rights, the court should appoint a guardian ad litem to appear in the cause and protect and safeguard the rights of the infant, and, unless the infant is so protected and the record so show, a judgment or decree against him is erroneous and may be reversed on a writ of error.<sup>31</sup>

Over the ensuing decades, nothing otherwise limited this inherent authority. Indeed, in the case of *Cyr v. Cyr*, the Court reaffirmed that a GAL appointment may occur when the “minor’s interests require separate representation.”<sup>32</sup> The Law Court also made clear that this appointment authority was a correlative function of the judicial duty to render judgment about child custody:

To choose the greater of two goods is admittedly no easier than to identify the lesser of two evils. Nevertheless, the judge is obliged to make the choice. He must seek not merely to preserve the child from harm, but to discern, “as a wise, affectionate and careful parent,” what custody arrangement will further the child’s best interest.<sup>33</sup>

Even if not said explicitly, these quotes from *Cyr* reveal the evolving social and legal conundrum for courts beginning decades ago.<sup>34</sup> As the repository for child custody decision-making, courts struggled to find ways to “identify” and “choose” those custody arrangements that protected children from the vagaries of a parent’s choice to sue the other parent. In this legal universe, courts were *not* the creator of the parental choice to litigate, but were instead a decider of fact and imposer of law and, thereby, a critical party to all child custody cases.<sup>35</sup>

30. *Id.* at 126; *see* *Inhabitants of Vinalhaven v. Ames*, 32 Me. 299, 304 (1850) (“The case provided for in the part of the statute touching the duties of overseers on the subject of minor children of paupers is peculiar. Such children should be suitably provided for, and their future happiness attended to; they are not supposed to have guardians, and the pauperism of their parents unfit them to attend effectually to their paternal duties.”).

31. *Easton v. Eaton*, 112 Me. 106, 107-08, 90 A. 977, 977 (1914).

32. *Cyr v. Cyr*, 432 A.2d 793, 798 (Me. 1981).

33. *Id.* at 796 (quoting *Sheldon v. Sheldon*, 423 A.2d 943, 946 (Me. 1980)).

34. *See also* *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.”).

35. *See* *Grover v. Grover*, 143 Me. 34, 37, 54 A.2d 637, 638 (1947) (“The family ‘war’ is fought by the father and mother, but too often the lifetime scars are carried by their children. Too frequently, also, the principals in the divorce are more concerned in defeating the wishes of a former wife, husband, or ‘relative-in-law,’ than they are interested in the welfare of the child. The law looks, however, only to the

From *King* to *Cyr*, courts and policy makers could not rationally foresee that the role of the GAL would morph from investigator and advocate to opining on recommendations in the specific context of the court's duty to allocate a child's physical and legal custody. Like the judicial authority to appoint a GAL, the best interests' factors were first developed by the judiciary as a common law means to provide contours for decision-making. Many years before the Legislature acted,<sup>36</sup> the Law Court, in *Lane v. Lane*,<sup>37</sup> reiterated its adoption of this non-inclusive list:

[T]he age of the child, the relationship of the child with his parents and any other persons who may significantly affect the child's best interests, the wishes of the parents as to the child's custody, the preference of the child (if old enough to express a meaningful preference), the duration and adequacy of the current custodial arrangement and the desirability of maintaining continuity, the stability of the proposed custodial arrangement, the motivation of the competing parties and their capacity to give the child love, affection and guidance, and the child's adjustment to his present home, school and community.<sup>38</sup>

By itself, this common law could be read as merely a judicial checklist reflecting shifts in mores and social norms concerning co-parenting and domestic violence, among other factors. But this would ignore the profound tensions that exist in a democracy between the *power* of a judge to enter a judgment and the *duty* to render a judgment beyond the personal values of that judge.

What is beyond dispute is that the authority of the court to appoint GALs is co-extensive with its specific delegation of that authority, which then defines the scope and authority of the GAL.<sup>39</sup> Although the Law Court has occasionally opined that

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child's welfare; and the father, mother, and other blood relatives, as such, have no rights in or to the child. A child is not 'owned' by anyone. *The State has, and for its own future well-being should have, the right and duty to award custody and control of children as it shall judge best for their welfare.*" (emphasis added) (citation omitted).

36. See 19-A M.R.S.A. §1653(3) (2012).

37. 446 A.2d 418 (Me. 1982).

38. *Id.* at 419 (quoting *Costigan v. Costigan*, 418 A.2d 1144, 1146 (Me. 1980)).

39. This point requires some care. A GAL is not an authoritative decision maker, nor can a trial court delegate that authority. See, e.g., *Griffin v. Griffin*, 2014 ME 70, ¶ 36, 92 A.3d 1144 ("In this case, the court's final divorce judgment ordered Cristie to give approval authority over her choice of counselor to the GAL, which authorized the GAL to continue working with this family—and presumably submit invoices requiring payment—after the entry of the final divorce judgment. This grant of postjudgment authority is neither contemplated in the GAL's appointment order nor authorized by statute. Once an adversarial relationship had developed between the mother and the GAL, it would generally be contrary to therapeutic goals to allow that GAL to choose a counselor for the mother."); *Knight v. Knight*, 680 A.2d 1035, 1038 (Me. 1996) ("The court also erred in making future visitation contingent on the certification of the therapist that the child is ready for visitation. As stated by the court, that contingency transfers the court's responsibility for determining the best interest of the child to the therapist. Although the court can consider the expression of such an expert opinion by a therapist, the court cannot make the visitation outcome dependent upon that opinion."). A discussion of parenting coordinators is beyond the scope of this article, but such a delegation may require enabling legislation rather than inherent judicial authority. See Lyn Greenberg & Matthew J. Sullivan, *Parenting Coordinator and Therapist Collaboration in High-Conflict Shared Custody Cases*, 9 J. CHILD CUSTODY 85, 87-88 (2012) ("With the appropriate legal authority, a PC can assume responsibility for making decisions about the child within the PC process when parents cannot agree.").

divorce is purely a creature of statute,<sup>40</sup> once the Executive and Legislative branches delegate a function, courts have the authority—equitable or legal—to render and enforce judgments within constitutional parameters.<sup>41</sup>

To say that the courts may not exercise their power in the field of domestic relations without a legislative mandate to do so does not necessarily limit the nature of the power which the court may undertake to exercise if that mandate is given. Once the Legislature has generally delegated to the judiciary the performance of the dispute-resolution function in the area of domestic relations, it is the responsibility of the judiciary to determine how that function may best be carried out within the intent of the legislative mandate.<sup>42</sup>

Yet in a potent dissent, Justice Rudman, in *Rodrigue v. Brewer*,<sup>43</sup> succinctly exposed the limits of judicial discretion with the admonition that the trial court “may not do as it pleases.”<sup>44</sup> When the trial court applies this “sobering responsibility of deciding the care and custody of a minor child” the court “acts not at all as a mere arbiter between two adult adversaries, simply reacting to the evidence they may see fit to adduce in support of their respective positions.”<sup>45</sup> In the oft-quoted words of Judge Cardozo, as subsequently adopted by the Law Court:

He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights ‘as between a parent and a child’ or between one parent and another. He ‘interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the [state] as *parens patriae*.<sup>46</sup>

From the 19<sup>th</sup> century, the GAL was a means to assure the protection of those whom the law considered unable to protect their own interests when the state (in the guise of a court) required a means for independent advocacy. What is too frequently ignored is that then Judge Cardozo was a product of an era in which private differences were private and the state interfered to protect the future interests of the state. This political and constitutional point was (and is) neither novel, nor radical. No one knew, however, what was to occur rapidly and inexorably decades later to family structures and societal values.

Social, cultural, and legal change began in earnest rather dramatically in the

40. See *Carter v. Carter*, 419 A.2d 1018, 1021 (Me. 1980) (“The law of divorce in Maine is purely statutory.”).

41. See *Bd. of Overseers of The Bar v. Lee*, 422 A.2d 998, 1002 (Me. 1980) (“Each of the three great ‘departments’ being independent and co-equal, it follows that they are ‘severally supreme within their legitimate and appropriate sphere of action.’ (citation omitted) From this concept of separation of powers there is derived the inherent power of the Supreme Judicial Court. It is a fundamental principle of constitutional law that each department in our tri-partite scheme has, without any express grant, the inherent right to accomplish all objects necessarily within the orbit of that department when not expressly allocated to, or limited by the existence of a similar power in, one of the other departments. The inherent power of the Supreme Judicial Court, therefore, arises from the very fact that it is a court and connotes that which is essential to its existence and functioning as a court.”).

42. *Harmon*, 425 A.2d at 983-84 (footnote omitted) (citations omitted).

43. 667 A.2d 605 (Me. 1995).

44. *Id.* at 608 (Rudman, J., dissenting).

45. *Id.*

46. *Id.* (quoting *Finlay v. Finlay*, 148 N.E. 624, 626 (1925)).

1960s, and continued to morph during the post-Vietnam era. Courts were forced to respond to the tensions between privacy rights (de-stigmatization of no-fault divorce and out-of-wedlock births) and the traditional roles of mothers and fathers and marital and child custody laws often well behind the public's needs and desires.<sup>47</sup> In general terms, courts nationally responded with a fluid combination of legal *rhetoric* ("choosing two goods versus two evils"), legal *norms* ("best interests of the child"), and legal *interventions* (GALs/Parent Education/child custody evaluations).

Underlying each of these paradigms was the inclusion of social science experts like psychologists, psychiatrists, and clinical social workers to whom judges sought advice and guidance as a means to make evidence-informed child custody decisions. And this union of social science with the authority of courts and the role of GALs remains even today a complex and understudied matter of policy and practice. For reasons explored in the next section, most parents eventually discover that litigation is not an inexpensive, rational, or elegant process, and that judges must make decisions based upon evidence proffered in the courtroom and not what may be perceived as a truth (and with or without the assistance of social science or GALs).

#### IV. UNDERSTANDING EXISTING POLICY GAPS

Until 2001, families in private child custody cases had equal and concurrent access to the resources of the Superior and District Courts, just like all corporations and civil litigants. After some debate, the Maine Legislature granted exclusive jurisdiction over parents and children to the District Courts as a new family court but this legislation did not remove the burden from the District Court to decide everything from evictions to OUIs to small claims cases, as well.

Unlike other states with family courts dedicated only to family court litigation,

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47. See, e.g., *Jacobs v. Jacobs*, 507 A.2d 596, 598 (Me. 1986) ("In other words, he contends that both constitutions mandate a preference for joint custody, or 'shared parental rights and responsibilities' as it is called in 19 M.R.S.A. § 752 (Supp.1985-1986), and that a joint custody arrangement may constitutionally be rejected in favor of allocating the parental responsibilities between the parents in the way the Superior Court justice did in the case at bar, *only* upon proof by clear and convincing evidence that the constitutionally preferred arrangement would harm the children. We can find nothing in the authorities or in any latent command of our constitutions that supports Dr. Jacobs' contention."); *Lane v. Lane*, 446 A.2d 418, 419-20 (Me. 1982) ("This Court has never sanctioned the application of a rebuttable presumption in favor of the mother in custody cases and we see no reason to do so at this time. Sensitive to the current changes in societal perceptions of gender roles generally and in parenting specifically, we see no sufficient reason to accept the plaintiff's suggestion that we adopt a presumption in favor of the mother. We remain convinced that the best rule is the one we have followed for many years, *i.e.* the best interests of the child should be the primary consideration.") (footnote omitted); *Messer v. Jones*, 88 Me. 349, 354, 34 A. 177, 178-79 (1896) ("One provision of the act has remained unmodified through all the various changes that have been made since its enactment in 1838, and that is in relation to the illegitimate being the heir of its mother. No act on the part of any one is required to make the child heir of the mother who bore it. The maternity can never be in doubt, while the paternity may be. The history of legislation upon the subject, not only in this state, but in most of the states of the Union, shows a continual advancement, and a breaking away from those antiquated English maxims, in the direction of humanity and justice towards innocent and unoffending sufferers. There has been but one current, and that has been steadily advancing towards a modification of the strict rules of the common law.").

funding this family court in more than name required sufficient court staffing and professional resources. The reality was that such funding was unavailable so judges, deciding these most important cases, would be limited to the families' capacity to privately pay for child custody evaluations, mediation, alternative dispute resources, GALs, or other mechanisms for conflict-resolution. As a matter of fact, the Law Court's decision in *Desmond*,<sup>48</sup> and much of the public discussion in the Legislature concerning the fairness and appropriateness of GAL fees, actually stems from this policy gap. From the family court's inception more than a decade ago, the lack of resources for delivery of services irrespective of wealth or income, as well as professional and community accountability and supervision, has impeded equal access to justice.<sup>49</sup>

The sections that follow describe a few of these policy gaps, as well as exploring the specific role of the GAL as expert witness when making recommendations rather than acting as an investigator. Policymakers and the public alike benefit when less myth and more reality governs future policy discussions and statutory enactments.

#### A. Funding and Access to Justice

The Law Court made clear decades ago that there is no constitutional or statutory right to have counsel or GALs paid by the state (taxpayers) in *private* cases for parents, including termination of child contact, limitations on the authority to make parenting decisions or relocation.<sup>50</sup> Any such constitutional right is limited to Title 22 child abuse and neglect cases brought by the state.<sup>51</sup>

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48. See *supra* note 1 and accompanying text; see, e.g., *Akers v. Akers*, 2012 ME 75, ¶ 10, 44 A.3d 311 (“Regarding the GAL fees, Timothy challenged the allocation of the fees, not the fees themselves. The court found that Timothy’s income was substantially greater than Jennifer’s and that Timothy had already paid the initial \$2,000 fee to the GAL. It was not an abuse of discretion for the court to split the remainder of the GAL fee between the parties.”); *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.”).

49. See Gabrielle Davis, Nancy Ver Steegh, & Loretta Frederick, *An Appeal for Autonomy, Access, and Accountability in Family Court Reform Efforts*, 52 FAM. CT. REV. 655, 658 (2014) (“All dispute resolution processes, whether provided in court, community agencies, or through the private sector, should meet minimum standards for procedural fairness, competency, and accountability.”).

50. Compare *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.”), with *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, although the proceeding is labeled civil rather than criminal, “the full panoply of the traditional weapons of the state are marshalled against the defendant parents.”).

51. 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.”) (footnote 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

In private custody proceedings as well, minors have no independent right to hire a lawyer on their own, nor is there a due process right to counsel for a child.<sup>52</sup> Only a court has authority to appoint a GAL to protect and secure the best interests of a child. This legal authority, however, begs the issue of equal resources for indigent or vulnerable children caught in conflict between parents.<sup>53</sup> Whether an equal protection argument is available remains an open question until the Court receives that specific appeal. The words of the Law Court in *Harrington v. Harrington*—nearly fifty years ago, protecting rights in a forcible entry and detainer—provides a perceptive equal protection framework for such a policy discussion in the future:

While the great number of cases which have applied the Equal Protection Clause to all stages of the judicial process have dealt with criminal defendants, *the constitutional mandate that there be no invidious discrimination between indigent and rich litigants does not differentiate between civil and criminal cases.* The Constitution protects life, liberty and property.

It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case . . . . *Court procedures, at the trial level or in appellate review, even though the result of statutory requirement, which in and of themselves invidiously discriminate between rich and poor impair guarantees of equal justice which the Constitution was designed to protect.* This is equally so in civil litigation as in criminal prosecutions. An indigent litigant may have more at stake in a civil case than in a criminal case. Furthermore, equal access to the civil courts was among the Fourteenth Amendment's primary objectives.<sup>54</sup>

What generated much kerfuffle in 2013 was an expectation that child custody litigation invokes a right to participate in the court system without cost (or at minimum cost) irrespective of the behaviors of the parents, the hours required to resolve the dispute(s), the number of professionals appointed to try and help, the cost to society of intergenerational conflict upon children, or an unrealistic understanding of the limits of judicial authority. The legitimate expectation that rational steps should be taken to improve, supervise, and regulate the quality of GAL work, and the distribution of resources to do that work, was buried beneath blameworthiness and polemics. What was then lost is the fact that Maine made a

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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.”).

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

53. For a policy and moral rationale, see Karin Landgren, *The Protective Environment: Development Support for Child Protection*, 27 HUM. RTS. Q. 214, 223 (2005) (“Child protection has neither a vaccine nor a universal blueprint for interventions. Country by country, situation by situation, the systematic factors that enable violence, exploitation, and abuse against children to continue unchecked—policies, practices, and the absence of systems and institutions—have to be understood and addressed.”).

54. *Harrington v. Harrington*, 269 A.2d 310, 314 (Me. 1970) (emphasis added) (citations omitted).

conscious policy decision decades ago not to publically fund GALs (or other interventions or diagnostic tools) in private custody cases. And that policy decision remains in full force and effect today.

The point is simply that Maine, like many states, could and did label its District Court a “Family Division,” but the absence of funding for a menu of services—from mediation to parental capacity evaluations to GALs—diminishes the effectiveness of family courts.<sup>55</sup> The cost becomes both a source of power for parents (or more often one parent), as well as the source of fear that money generates bias, or, correlatively, that lack of money impedes the best possible efforts by GALs for the family. This absence of resources and sense of fair play will inevitably continue to anger and frustrate those who feel disappointed by rulings that thwart expectations and/or the perception that these parents and children are denied equitable access to justice.<sup>56</sup>

### B. Existing Law and Practices

With that important premise, however, there were and are flaws in the delivery of GALs as an intervention, and those flaws have appeared regularly in the legal literature for more than a decade.<sup>57</sup> After all, the Law Court, sitting as an appellate court, and the Maine Supreme Judicial Court, sitting in its rule making capacity, consists of the same seven appointed and confirmed lawyers.<sup>58</sup> One of the intriguing developments during the 2013 debates was the complex policy conundrum in which the Law Court found itself. The Court, as rule and law maker, empowered GALs over a century ago to act as an aide and advocate to the trial courts, generated binding standards over the past 20 years, created its own training and certification requirements a relatively few years ago, and then seemed rather uncomfortable with its progeny.

This outcome is understandable given the complexity of the GAL task in the context of ever-evolving family structures in the 21st century. Most of these flaws

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55. The concept of specialized courts is not novel. *See generally* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL’Y 2, at 1 (2001) (Various courts across the nation “target different kinds of concerns in different kinds of places.”).

56. *See, e.g., In re T.B.*, 2013 ME 49, ¶ 15, 65 A.3d 1282 (“The father here repeatedly invoked his right to court-appointed counsel, and for good reason. There is significant benefit derived from representation by counsel and disadvantages that arise from a party’s proceeding without counsel in child protective matters.”).

57. *See* Allison B. Adams, *War of the Wiretaps: Serving the Best Interests of the Children*, 47 FAM. L. Q. 485, 496 (2013) (“The GAL’s role as the court’s witness has elicited significant criticism from legal scholars.”).

58. Though it can be a thin line of reasoning, there is a difference between enabling legislation and the Court’s authority to delegate authority to effectuate its decision-making. *See, e.g., Bellegarde Custom Kitchens v. Leavitt*, 295 A.2d 909, 911 (Me. 1972) (“The Maine Rules of Civil Procedure were promulgated by this Court in 1959 on the express authorization of the Legislature. ‘The Supreme Judicial Court shall have the power to prescribe, by general rules, for the District and Superior Courts of Maine, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant . . .’ [a]s the Enabling Act gave the Court no authority to promulgate rules which would affect the substantive rights of parties, the ‘applicable statute(s)’ which Rule 6(a) would control must be those concerned with procedural matters. The dividing line between substance and procedure is not always easily discernible.”) (citations and footnote omitted).

begin with a systemic design of family courts that did not fund interventions irrespective of family wealth, failed to provide regional supervision models familiar to social service agencies,<sup>59</sup> and may have underestimated (as do many well-meaning professionals) the level of mental health and social science training required to assist conflicted family systems.<sup>60</sup> Yet the appointment of a GAL was, and is, the most efficient and least imperfect means to try and help parents mediate disputes, keep children away from court, and provide judges with investigative data which, if done properly, logically connect the facts to an outcome which is feasible for that family system.<sup>61</sup>

A review of fairly recent law in the Court's own words may yield a better understanding of the situation today. In *Gerber v. Peters*,<sup>62</sup> the Court explicitly rejected any 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."<sup>63</sup> The Law Court added that the trial court:

[H]as the sole and continuing authority to determine parental rights and responsibilities with respect to a minor child of the parties . . . and is invested with broad discretion in making this determination . . . . The duty of a court appointed guardian ad litem of a minor child in a divorce case is to the court, and the scope of that duty lies within the parameters of the order of appointment.<sup>64</sup>

In a subsequent case, the Law Court held in *Kennedy v. State*,<sup>65</sup> that GALs appointed by the Court in a custody dispute were employees of the state within the meaning of the Maine Tort Claims Act.<sup>66</sup> The Court reasoned that, "the guardian ad litem 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."<sup>67</sup> Within the functions described in *Kennedy* the GAL:

[F]ills a void inherent in the procedures required for the adjudication of custody disputes . . . . Unhampered 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

59. For a review of the standards for clinical supervision, see generally PETER HAWKINS & ROBIN SHOET, *SUPERVISION IN THE HELPING PROFESSIONS* (2nd ed. 2012).

60. The Law Court has posted its new proposed rules for comment. For details of current operating rules and standards, see *Guardian ad litem Standards*, STATE OF MAINE JUDICIAL BRANCH, [http://www.courts.maine.gov/maine\\_courts/family/gal/standards.html](http://www.courts.maine.gov/maine_courts/family/gal/standards.html) and for the new proposed rules, see [http://www.courts.maine.gov/maine\\_courts/supreme/comment/public\\_hearing\\_notice\\_2014-10-10.shtml](http://www.courts.maine.gov/maine_courts/supreme/comment/public_hearing_notice_2014-10-10.shtml).

61. See generally Susan R. Elsen, *Guardian ad litem*, in *FAMILY LAW ADVOCACY FOR LOW AND MODERATE INCOME LITIGANTS* 282 (2nd ed. 2008). This chapter describes the different categories of GAL appointment under Massachusetts law, as well as the cost and available resources if a parent is indigent. Of critical importance, the manual makes clear that lawyer GALs do "not do mental health assessments (such as clinical interviews, mental health testing, or analysis that draws on expertise from the mental health field)." *Id.* at 282.

62. 584 A.2d 605 (Me. 1990).

63. *Id.* at 607.

64. *Id.* (citations omitted).

65. 1999 ME 85, 730 A.2d 1252.

66. See *id.* ¶ 12.

67. *Id.* at ¶ 9 (quoting *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo.Ct.App.1993)).

standard that must ultimately govern the court's decision—i.e., the “best interest of the child.”<sup>68</sup>

Of critical importance, interventions imposed on families often have no funding for the design, implementation, or assessment of the efficacy of those interventions over short-, medium-, and long-term runs. Professionals recognized many years ago that one of the deepest flaws in the judicial system was the lack of accountability; not as a matter of punishment, but as a matter of proper supervisory roles that would allow for a review of GAL practices, investigations, opinions, and reports *before* submission to the court. In a human system, of which the courts are in fact a part, there will be mistakes. There will be errors of fact and of law. There will be anger and rage; sympathy and tears; biases and prejudices; and feelings of warmth and acceptance. And in too many cases this range of reason and emotion will generate conflict between professionals, parents, and judges.<sup>69</sup>

In other respects, public reaction and criticism may reveal a lack of a shared civic knowledge about the role of family courts in a constitutional democracy, and the courts' rather radical acceptance of responsibility for deciding the most mundane of parenting choices: from haircuts to email usage.<sup>70</sup> This combination of

68. *Id.* (citations omitted) (internal quotation marks omitted); *see also* Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) (concluding that the guardian ad litem in a divorce proceeding functions as an agent of the court). In Massachusetts, GALs and custody evaluators are required to give parents and children the *Lamb Warning* derived from *Commonwealth v. Lamb*, 311 N.E.2d 47, 51 (Mass. 1974) (“We construe G. L. c. 233, § 20B, as preserving a patient’s rights to keep privileged any communications made to a court-appointed psychotherapist in the case of a court-ordered examination, absent a showing that he was informed that the communication would not be privileged and thus, inferentially, that it would be used at the commitment hearing. In so doing we avoid considering whether the use of such statements in the absence of such warnings infringes upon the rights of due process guaranteed by the Fourteenth Amendment of the United States Constitution.”) (emphasis omitted).

69. An example of how these disputes may frustrate courts may be found in *Hogan v. Venno*, 2006 ME 132, ¶ 22, 909 A.2d 638 (“The court found that Hogan had committed serious violations of the provisions of the 2002 judgment that were intended to reunite the daughter with Venno. With this history, the court’s decision to grant Hogan the discretion to choose between two alternatives—intensive counseling designed to reunite Venno and his daughter as recommended by the guardian ad litem, or two annual one-hour visits between Venno and his daughter—cannot be reconciled from the perspective of the daughter’s best interest.”).

70. A database search reveals a staggering volume of appeals. *See, e.g.*, *Carpenter v. Carpenter*, 737 S.E.2d 783, 787 (N.C. Ct. App. 2013) (“The primary disputed issues regarding the child’s welfare in this case were defendant’s allegations of excessive alcohol consumption by plaintiff, conflicts in the parties’ parenting styles, and George’s resulting anxiety. The order makes findings regarding the evidence and contentions of each party on these issues, but resolves few of them.”); *Cole v. Cole*, 95 So. 3d 369, 370 (Fla. Dist. Ct. App. 3d Dist. 2012) (“The primary issues before the court—the fourth judge to consider the parties’ inability or unwillingness to reach agreement on scheduling, haircuts for their daughter, and other decisions affecting the school-age children—were (1) the former husband’s obligation to provide health insurance for the children and (2) the selection and costs of the children’s ‘sporting and extracurricular events.’”) (footnote omitted); *Faellaci v. Faellaci*, 98 So. 3d 521, 526 (Ala. Civ. App. 2012) (“The wife stated that she does not allow the husband to e-mail her and that she only occasionally answers his telephone calls. The husband stated that the wife turns off her home telephone, that she rarely answers her cellular telephone, that her voicemail is always full so that he cannot leave messages, and that they only way he can communicate with the wife is through text messaging.”); *Vose v. Iowa Dist. Court for Marshall Cnty.*, 786 N.W.2d 873, 873 (Iowa Ct. App. 2010) (“After the order was entered, Vose registered a complaint with the Marshalltown Police Department. He told a responding officer that he received a harassing text message from Angela disapproving of haircuts he gave their

knowledge gaps in the public square, changes in expectations of personal responsibility, and the glacial erosion of the courts' ability to decide these disputes should have generated thoughtful questions years ago. What is a guardian *ad litem* anyway? What are the duties and obligations of the guardian *ad litem* to a child and the court? What does it mean to offer predications of the future based upon the past? Is there an evidence-informed science that can help guide these predications when connecting investigations to recommendations?

Answering credibly or even empirically studying these questions requires a more precise discussion of what legal and social science standards may apply when a GAL investigation transforms into expert opinion. It is this policy drift between science, intuition, and experience that is most problematic, and least understood, on all sides of the debate concerning the role of GALs in child custody litigation.

#### V. MORPHING FROM INVESTIGATOR TO EXPERT

A GAL is often called upon to make recommendations that connect the factual investigation with reliable and relevant science—or nonscientific methodologies—for allocating parental rights and responsibilities.<sup>71</sup> In concrete terms, this may mean a recommendation about: overnights for an infant; how old is too old to force visitation; what form of visitation is most beneficial to a child at various developmental stages; or whether relocation away from one parent is a good parenting decision.

As a matter of practice, a GAL investigation is initially a lay opinion based upon personal experience and observations obtained from interviews, collateral sources, and records. 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.”<sup>72</sup> Such perceptions must be “adequately grounded on personal knowledge or observation” and not merely material provided from sources that may otherwise not be observable by a layperson.<sup>73</sup>

Conversely, *expert* opinion may be based upon facts “perceived by or made known to the expert at or before the hearing” and that is not ordinarily within the common knowledge of a lay witness.<sup>74</sup> This is a means of describing a form of hearsay evidence in which the actual witness who made the statement need not appear in court but whose voice may be heard through the expert. The categories of expert and lay opinion testimony are often deemed mutually exclusive because statutory or court rules create hearsay and evidentiary exceptions for an opinion

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children. Vose showed the officer the protective order and advised him that Angela was not supposed to contact him. At the same time, Vose admitted he posted a message on his social networking homepage, which made reference to the dispute, and that he assumed Angela might have seen it. He also told the officer that he sent Angela an e-mail stating, ‘Go get fucked you retarded bitch.’ The officer arrested Vose for violation of the protective order.”). I do not usually repeat this type of profanity, but it is a fair representation of modern vernacular and values expressed to judges and professionals today.

71. See Harlambie, *supra* note 3.

72. Emery Waterhouse Co. v. Lea, 467 A.2d 986, 992 (Me. 1983).

73. Chrysler Credit Corp. v. Bert Cote’s L/A Auto Sales, Inc., 1998 ME 53, ¶ 21, 707 A.2d 1311 (quoting FIELD & MURRAY, MAINE EVIDENCE, §701.1 (4th ed.1997)).

74. ME. R. Evid. 703; see State v. Marden, 673 A.2d 1304, 1311 n.5 (Me. 1996).

based on “scientific, technical, or other specialized knowledge.”<sup>75</sup> If the proffered evidence is not lay opinion under Rule 701 then, of logical necessity, the evidence is expert evidence that must meet the qualification and foundational requirements to be admitted in court. In most child custody cases, GALs are lawyers without social science, statistical, or research training. Yet, GALs do observe and experience directly much (though not all) of the data included in the investigation, so a foundation under Rule 701 is rarely a problem.

Conversely, much of the other data connected to GAL recommendations is drawn from mental health records, child custody evaluations, therapists, school or medical records, and the statements of lay and expert witnesses. These extrajudicial sources are beyond the ordinary common knowledge and five available senses of the GAL. Unlike other forms of civil litigation, however, the Legislature established evidentiary exceptions as a means to recognize the trial court’s need to manage and decide a high volume of complex child abuse and neglect cases.

For example, Maine statutes have admitted the report of the GAL with its content and recommendations, subject to cross-examination at trial but not admissibility in the first instance.<sup>76</sup> In *In re Chelsea C.*, the Law Court held that “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.”<sup>77</sup> The Court then rejected the due process argument for reasons that apply to few other forms of expert testimony:

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 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

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75. ME. R. Evid. 702; *but see* Mitchell v. Kieliszek, 2006 ME 70, ¶ 14, 900 A.2d 719.

76. See 4 M.R.S.A. §1555(6) (2012) (“The guardian ad litem shall 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.”); 19-A M.R.S.A. § 1507(5) (2012) (“A guardian ad litem 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.”); 18-A M.R.S.A. § 1-112(e) (2012) (“If 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.”); 22 M.R.S.A. § 4005(1)(D) (2004) (“The guardian ad litem shall 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.”).

77. *In re Chelsea C.*, 2005 ME 105, ¶ 10, 884 A.2d 97 (citing Ziehm v. Ziehm, 433 A.2d 725, 729 (Me. 1981)).

the mother from calling a declarant to testify, or producing a witness of her own to rebut the challenged statements.<sup>78</sup>

Thus, the opinion of GALs on ultimate issues of fact (like recommendations for a parenting plan)—irrespective of professional discipline—is borne of special family court expert DNA, even if the qualifications or scientific reasoning is threadbare or a matter of policy convenience.<sup>79</sup> This outcome is now accepted because any constitutional objection is forfeited by virtue of the status of being a parent. As described, *In re Chelsea* presumes “expert-expertise” by virtue of no more than a training program. This means that college majors from Economics to Medieval History to Music Performance may qualify as “sufficient.” This is not cynicism, but a reality that no other civil litigant in commercial and tort law would expect or accept.

Courts have held rather consistently that as long as the GAL is available for cross-examination the essentials of due process are fulfilled.<sup>80</sup> While there still exist the quaint notion that adversarial combat in the courtroom elicits the “truth,” a more harmonic truth of child custody litigation is that familial resources are frequently imbalanced and lawyer skills insufficient to challenge or mitigate a report with *expert* opinions and *personal* observations ebbing and flowing throughout the pages of a report.<sup>81</sup> The family court judge, as umpire under these rules, must balance and weigh the evidence—but inevitably, in the report will come

78. *Id.* ¶ 14 (emphasis added).

79. This criticism crosses lines in most forms of civil litigation. See Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 195 (2004) (“With its explosion across America’s litigation landscape, expert witnessing has become a foundation for decision-making in virtually all significant cases. Described by some courts as a ‘cottage industry,’ it has also become more lucrative than the usual day job for many professionals. With litigants and their counsel shopping relentlessly for key specialists, and the experts themselves pursuing engagements aggressively, the growth of expert consultations has spawned a proliferation of allegations concerning conflicts of interest.”) (footnotes omitted).

80. The Mississippi Supreme Court has written an important decision regarding these conceptual problems, which should be the subject of study. See *S.G. v. D.C.*, 13 So.3d 269, 282 (Miss. 2009) (“Therefore, a guardian ad litem appointed to investigate and report to the court is obligated to investigate the allegations before the court, process the information found, report all material information to the court, and (if requested) make a recommendation. However, the guardian ad litem should make recommendations only after providing the court with all material information which weighs on the issue to be decided by the court, including information which does not support the recommendation. The court must be provided all material information the guardian ad litem reviewed in order to make the recommendation. Recommendations of a guardian ad litem must never substitute for the duty of a chancellor. *In the present case, the guardian ad litem was entitled to his opinion, but he should have presented at trial the allegations of abuse and both the evidence that substantiated the allegations and the evidence that did not. As previously stated, the trial court, and not the guardian ad litem, is the ultimate finder of fact.*”) (emphasis added).

81. One of the difficult issues presented when GALs act as experts, is that much of the report and testimony can be perceived as stemming from the role of “truth-detector.” Lawyers as advocates can certainly make an argument about truthfulness (without violating the “Abe Lincoln rule” or vouching), but this concern is often overlooked. See, e.g., *State v. Black*, 537 A.2d 1154, 1157 n.1 (Me. 1988) (“We note that a significant number of jurisdictions have recognized that although an expert may testify in order to explain inconsistent conduct or testimony of the victim, the expert cannot offer an opinion as to the truth of the victim’s story.”). The relatively unlimited resources of the federal courts afford more protection in spirit. See *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that in death penalty cases, for example, the Supreme Court purports to apply “meaningful adversarial testing.”).

into the record as substantive evidence of fact and truth.<sup>82</sup>

What is oddly left from a discussion of *expert* opinion involving GALs is that any standards betwixt the then-famous *Frye*<sup>83</sup> test and the now-mythical *Daubert*<sup>84</sup> “gatekeeping” factors are rather irrelevant. In essence, *Frye* and *Daubert* recognized:

[T]he importance of separating an assessment of the expert’s qualifications from an assessment of the relevance and reliability of the expert’s methods and procedures, yet the two cases propose different approaches to addressing the reliability of expert testimony. *Frye* assesses the general acceptance of the expert’s assertion among the relevant scientific community, while *Daubert* provides criteria for judges to use to directly evaluate the scientific basis of the expert’s methodology and opinions.<sup>85</sup>

For generations of lawyers and scholars, *Frye* and *Daubert* has been the subject of a plethora of case law and commentary across the legal and social sciences. In Maine, however, the Law Court has repeatedly rejected both the *Daubert* analyses. The reason for grounding this discussion in those cases is that, unlike other standards for expert testimony, it may not matter in the context of GALs. The GAL, not the court, determines “reliability”<sup>86</sup> without the more serious rigor required of scientific and nonscientific evidence outside the realm of child custody litigation.<sup>87</sup>

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82. The Law Court held in *Gendron v. Pawtucket Mut. Ins. Co.*, 409 A.2d 656, 660 (Me. 1979) that motions in limine are an appropriate pre-trial device for the resolution of evidentiary issues by narrowing the issues, shortening the trial, and saving costs for the litigants. In sum, the Court held that “the motion in limine can be a valuable tool while protecting a party’s right to a fair trial.” *Id.* at 661. In Maine, however, there is no single judge who presides over case management in family matters, so these motions are rather ineffective without the same judge.

83. *Frye v. United States*, 293 F. 1013 (D.C. 1923).

84. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); see Brett Baber, *Much Ado about Daubert: The Gatekeeper’s Decisions on the Admissibility of Expert Testimony*, 25 Me. Bar J. 84 (2010).

85. Elrod & Dale, *supra* note 18, at 416 (footnotes omitted); see also Kristina L. Needham, *Questioning the Admissibility of Nonscientific Testimony after Daubert: The Need for Increased Judicial Gatekeeping to Ensure the Reliability of All Expert Testimony*, 25 FORDHAM URB. L.J. 541, 561 (1998) (noting that “[n]onscientific testimony should be just as reliable as scientific testimony if jurors are to make well informed decisions. Furthermore, it should not be assumed that a jury, without judicial gatekeeping, will necessarily have an easier task in assessing the reliability of nonscientific expert testimony simply because an expert does not use a complicated methodology to reach his or her conclusion.”) (footnotes omitted).

86. 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.”).

87. The nub of the discussion in private child custody cases typically concerns the admissibility of child custody evaluations or new “syndromes” like “parental alienation.” See Robert P. Archer & Dustin Wygant, *Child Custody Evaluations: Ethical, Scientific, and Practice Considerations*, 17 J. PSYCHOL. PRAC. 1, 21 (2012) (“The *Daubert* 1993 Supreme Court decision, and its subsequent refinements, generally created a legal environment that favors testimony based on scientific instruments and procedures with established reliability and validity. Scientific reliability and validity is established, in turn, by research findings that have been subjected to peer-reviews in professional journals, techniques that have quantifiable error rates, as well as having gained general acceptance in the field.”) (citation omitted); Allison M. Nichols, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 MICH. L. REV. 663, 679 (2014) (“Given the complex issues involved in these cases, it is understandable why judges might wish to rely on the advice of mental health professionals. Yet the law charges courts, not psychologists, with issuing custody orders, and

The “reliability” test was first enunciated in *State v. Williams*.<sup>88</sup> Two decades later, in *Tolliver v. Dep’t of Transp.*,<sup>89</sup> the Law Court summarized its judicial holdings on the subject:

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 . . . because if an expert’s methodology or science is unreliable, then the expert’s opinion has no probative value.<sup>90</sup>

Reliability is not a rigid test as summarized by *Tolliver*. If “expert testimony ‘rests on newly ascertained, or applied, scientific principles,’ a trial court may consider whether ‘the scientific matters involved in the proffered testimony have been generally accepted or conform to a generally accepted explanatory theory’ in determining whether the threshold level of reliability has been met.”<sup>91</sup> By itself, general acceptance is not the only prerequisite for admission if a showing has been made that “the proffered evidence is sufficiently reliable to be held relevant.”<sup>92</sup> Indicia of scientific reliability may include:

[W]hether any studies tendered in support of the testimony are based on facts similar to those at issue; whether the hypothesis of the testimony has been subject to peer review; whether an expert’s conclusion has been tailored to the facts of the case; whether any other experts attest to the reliability of the testimony; the nature of the expert’s qualifications; and, if a causal relationship is asserted, whether

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Daubert and Frye stand for the proposition that judges may only call on experts to assist them in their duties if the testimony offered by those experts is valid. As testimony regarding PAS cannot meet that standard under either test, it has no place in the courtroom.”)

88. 388 A.2d 500, 504 (Me. 1978) (“On the approach we adopt the presiding Justice will be allowed a latitude, which the Frye rule denies, to hold admissible in a particular case proffered evidence involving newly ascertained, or applied, scientific principles which have not yet achieved general acceptance in whatever might be thought to be the applicable scientific community, if a showing has been made which satisfies the Justice that the proffered evidence is sufficiently reliable to be held relevant.”). For a discussion of relevance under Fed. R. Evid. 401 and related state codes, see generally John Monohan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991).

89. 2008 ME 83, 948 A.2d 1223.

90. *Id.* ¶¶ 28-29 (alteration in original) (citations omitted) (internal quotation marks omitted). For a pre-*Tolliver* law review article, see Thomas L. Bohan, *Scientific Evidence and Forensic Science since Daubert: Maine Decides to Sit Out the Dance*, 56 ME. L. REV. 101 (2004).

91. *Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 22, 878 A.2d 509 (quoting *State v. Williams*, 388 A.2d 500, 504 (Me. 1978)).

92. *Searles*, 2005 ME 94, ¶ 22, 878 A.2d 509 (internal quotations omitted); see also *State v. Black*, 537 A.2d 1154, 1157 (Me. 1988) (rejecting expert testimony that fails to demonstrate any scientific reliability).

there is a scientific basis for determining that such a relationship exists.<sup>93</sup>

Moreover—and of considerable consequence with expert testimony in child custody litigation—the mere status as an “expert” about one thing is still insufficient to warrant the admissibility of an expert opinion based exclusively on the subjective opinion about another thing.<sup>94</sup> Indeed, the reliability *and* probative value requirements should not be translated into an argument about “weight” when expert opinion, based upon feeling or experience, is tautologically transformed into *reliable* expert knowledge upon which a fact finder may base an ultimate opinion.

The United States Supreme Court in *General Electric Co. v. Joiner* captured this gist from *Tolliver* “but for” the expedient exceptions which have evolved in child custody or abuse/neglect cases:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.<sup>95</sup>

This reliability debate, as posited by *Joiner* and *Tolliver* albeit from different angles, has been the subject of considerable argument in the scientific, social science, and legal literature for decades now.<sup>96</sup> As the Texas Supreme Court explained regarding well-driller leases (rather than attachment theory), it “is

93. *Searles*, 2005 ME 94, ¶ 23, 878 A.2d 509 (citations omitted); see *Ellipsis, Inc. v. Color Works, Inc.*, 428 F. Supp. 2d 752, 760 (W.D. Tenn. 2006) (An expert opinion which lacks scientific reliability may “be excluded if it is fundamentally flawed or unsupported” because an expert who relies on “a number of guesstimations and speculations” allows the court to conclude that “like a house of cards, once those foundations are disproved, the whole analysis collapses.”); Jonathan M. Dunitz & Nancy J. Fannon, *Daubert and the Financial Damages Expert*, 26 Me. Bar J. 62, 65 (2011) (“[A] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert*.”) (internal quotations omitted).

94. See *Tolliver v. Dep’t of Transp.*, 2008 ME 83, ¶ 35, 948 A.2d 1223 (“Lavigne’s opinion that the lack of an edge substantially contributed to the accident was speculation and did not assist the jury; rather, it infringed on the function or role of the jury. For these reasons, the court erred in admitting Lavigne’s testimony regarding causation.”); *Warren v. Waterville Urban Renewal Auth.*, 235 A.2d 295, 298 (Me. 1967) (“It is true that the opinion of an expert as to value should be stricken and not be considered as evidence where it is demonstrated during his testimony that his opinion rests wholly or chiefly upon reasons and matters which are legally incompetent or upon principles which are unsound. If it appears that the witness has no reasonable basis whatever for his opinion, then his testimony should be stricken. The testimony of a professional appraiser properly to be accepted must be based upon sound principles.”) (citations omitted).

95. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); see Sophia Adrogué & Allen Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts*, 47 S. TEX. L. REV. 881, 899-900 (2006) (“[M]ethodologies that are generally accepted in practice in the real world are not always accepted in court. Further, methodologies interchangeable in the real world are often more strictly separated by case law.”).

96. See, e.g., Lewis H. Larue & David S. Caudill, *A Non-Romantic View of Expert Testimony*, 35 SETON HALL L. REV. 1, 43-44 (2004) (“Reliability, nevertheless, is not so vague as to be useless. We reject both the idealization of science (or scientific methodology) as a source of uncontroversial knowledge (or standards), as well as idealizations of law that seem to render scientific standards superfluous.”).

possible that the hypothetical well could have produced as much as Riley projected. But . . . the gap in Riley's analysis was his 'failure to show how his observations, assuming they were valid, supported his conclusions.'"<sup>97</sup>

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.

No corporation in America, or their lawyers, or federal and state appellate courts, would simply shrug and accept an evidentiary and trial matrix in which the expert alone determines qualifications, reliability, admissibility, and scope of opinion. But that is the reality of family law practice and its scarce resources. If resistance to these policy outcomes concerning GAL investigations and recommendations is to remain futile, then a transparent, respectful, and informed policy discussion is critical to the courts, professionals, and families.

## VI. THE GAL NOW TO THEN

State courts throughout the nation were simply not prepared for child custody litigation which implicated newly grounded constitutional rights for children, legislative and judicial recognition of grandparents and de facto parenting, and social awareness and interdiction of domestic violence and child abuse as a medical and legal disease, among many other strains of familial conflict.<sup>98</sup> Stepping away from the argument that GALs were a function of conspiratorial and Machiavellian planning, the expanded use of GALs was much more rooted in the overwhelming legal, cultural, and familial changes which transformed family law and the courts in the 1970s.<sup>99</sup> These institutional and societal compressions generated a sense of urgency that something was better than nothing amidst the volume and complexity of child custody litigation.

The blurring of roles for GALs increased as certification lumped together the

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97. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 257 (Tex. 2004) (quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998)).

98. *See In re Gault*, 387 U.S. 1, 19-20 (1967) ("Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."); *see also Rideout v. Riendeau*, 2000 ME 198, ¶ 21, 761 A.2d 291 ("We conclude, and no party has challenged, that the Grandparents Visitation Act provides a mechanism by which the State may intervene in the basic exercise of parents' rights to determine the care and custody of their children."); *Sparks v. Sparks*, 2013 ME 41, ¶ 20, 65 A.3d 1223 ("A court order that assigns even temporary rights to a nonparent interferes with the parent's fundamental liberty interest.").

99. *See Barbara Ann Atwood, Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATR. LAW. 183, 183-84 (2005) ("The role of children's representatives in legal proceedings has been the topic of widespread debate across the United States and within the international community.").

lawyer paradigm with lay people, social workers, and psychologists, among other licensed professionals, in terms of knowledge-by-discipline.<sup>100</sup> Critics have been legitimately concerned that the use of GALs expanded over time to a more ephemeral and powerful purpose than originally designed (assuming an intentional design at all). After all, while the GAL role was expanding, trial courts were still *trial* courts—with all the rules and rituals of a product liability or criminal case. Trial lawyers were still *trial* lawyers—not therapists trying to sensitively explore feelings and generate positive change.<sup>101</sup> Meanwhile, courts throughout the country struggled with how to manage the depth, duration, and frequency of child custody litigation *and* concomitantly integrate traditional evidentiary rules like hearsay, new laws assuring the protection of victims of violence, and the shifting of traditional roles of parents and gender.

What changed dramatically and rapidly beginning in the 1970s was not the appointment of a GAL as court custom but the scope and role of GALs in response to substantial shifts in the duration and complexity of child custody litigation. For a century, the traditional role of advocate was not complicated because legal argument is not evidence. Any evidence must be subject to the tests of cross-examination and rules of relevance. An advocate for a child could act like any other lawyer in terms of testing that evidence.<sup>102</sup> The boundary is crossed when the advocate moves from making a legal argument to *becoming* and *being* part of the evidence lawfully admitted by the court. To be clear, this form of evidence by a

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

101. I remember the grumbling by my mentors when “mediation” was made mandatory in Maine in 1983. “Real” lawyers, so the compliant went, were now emasculated and the profession would never be the same; not to mention more profane complaints unsuitable for a family journal. Now every judge or lawyer with a shingle advertises those services. One important lesson from my years in policy has held pretty true—lawyers, whatever their political beliefs, have a conservative internal clock about change. When a new rule is passed lawyers spend the first year complaining, the second year trying to find ways around it, and by the third year or so everyone takes credit for a great idea.

102. See *State v. Dolloff*, 2012 ME 130, ¶ 41, 58 A.3d 1032 (“The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Thus, when allegations based on prosecutorial misconduct are raised, trial and appellate courts must assess whether wit, invective, and zeal have crossed the line into the realm of ‘foul blows.’ The central question is whether the [prosecutor’s] comment is fairly based on the facts in evidence.”) (citations omitted) (internal quotation marks omitted). In *Dolloff*, the Law Court summarized applicable areas of misconduct as: (1) Misrepresenting material facts in the record or making statements of material fact unsupported by any evidence; (2) Using the authority or prestige of the office to shore up the credibility of a witness, sometimes called “vouching”; (3) Shifting the burden of proof on an issue to the defendant; (4) Making statements pandering to sympathy, bias, or prejudice; (5) Injecting personal opinion regarding the guilt or credibility of the accused or other witnesses; and (6) Making unfounded and inflammatory attacks on the tribunal or opposing counsel. *Id.* ¶ 42; see *State v. Moontri*, 649 A.2d 315, 317 (Me. 1994) (“A lawyer is permitted to argue on his analysis of the evidence, for any position or conclusion with respect to the matters stated therein, and the central question is whether the comment is fairly based on facts in evidence . . . .”) (citations omitted) (internal quotation marks omitted).

GAL is not novel. The role of investigator and reporter is not unusual, as police officers, social workers, and caseworkers have performed that function for generations in criminal and family matters.

The risk of a policy conflict in family law is enhanced, however, when these rather conventional roles become the source of expert opinion which influences the behavior and recommendations of lawyers for settlement or the ultimate conclusions that the court should impose on parents.<sup>103</sup> Critics have argued two key points in this regard. First, “courts give too much weight to recommendations by guardians *ad litem*” which may amount to an “abdication of judicial responsibility.”<sup>104</sup> Second, the absence of clear standards may mean that opinions are based on subjective, value-laden, or biased beliefs without regard to evidence-informed data that can be objectively measured for reliability and validity.<sup>105</sup>

Both of these concerns are valid. As to the former, though there is little empirical evidence or research, anyone who works in the legal system knows that even if judges do not accept recommendations verbatim, many lawyers and clients settle cases based upon the content of the reports. So whether or not this is myth or reality, any sample of judicial decision-making is skewed by the number of cases in which a GAL report is not challenged in court. This does not necessarily suggest that settlement of a child custody case with the assistance of the GAL is negative. Trials are expensive and the ramifications of “zealous advocacy” can echo for years in family systems. In too many cases, settlement may be the least detrimental outcome for children.

The latter is more problematic because the development of standards of practice implicates a complex paradigm of policy and program design, implementation, and assessment. The judicial system has been a “black box” for policy research for many historical, bureaucratic, and economic reasons. Rigorous and methodically sound research is expensive and requires years of collaborative study and policy analysis. The distinction between intentional policy design and policy-convenience implicates the basic tenets of human judgment by a judge as a function of fact-finding within a court’s constitutional prerogatives.<sup>106</sup> If a court is

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103. See *Doloff*, 2012 ME 130 ¶ 30, 58 A.3d 1032 (“The court did not abuse its discretion in (1) allowing Wilcox to give her opinion on how the bloody footprints found in Jeffrey’s room were likely made and (2) denying Linda’s request to strike the testimony from the record. The court permitted Wilcox to testify as to her expert opinion based on observations made during her investigation of the crime scene.”).

104. Atwood, *supra* note 99, at 198.

105. This statement implicates two prongs: (1) there is a better way to decide child custody when parents cannot privately agree, and (2) there is a set of skills which properly trained professionals can employ to minimize personal values. See Robert J. Levy, *Custody Investigations in Divorce-Custody Litigation*, 12 J. FAM. L. STUDIES 431, 449 (2010) (“If it is true that the values judges would impose on custody litigants are the same as those that infuse the jurisdiction’s custody investigations, litigants may be better off relying on custody investigators, to the extent judges follow their recommendations, because there is not the slightest chance that values about family life and parental care of children are at any time going to be completely eliminated from custody law.”).

106. See *Harmon*, 425 A.2d at 982-83 (“The issue of child custody is among the most sensitive and vital questions that courts decide. The court’s decision may have a crucial and potentially long-term impact on the physical and psychological well-being and potential future development of the child at a time in its life when its future as a balanced, healthy and happy individual is most clearly at stake. The child’s future as a valued and participating member of society may well rest on the outcome of the

imposing an *obligation* on a parent to participate in an intervention, such as a GAL or parental capacity evaluation, and the court intends to rely on that intervention as substantive evidence, then that *act of authority* should be subject to evidence-informed policy design and accountability.<sup>107</sup>

Within our ever-evolving definition of democracy, however, contemporary Americans voice the language of rights much more vigorously than the language of personal responsibility and accountability. The examples are many and rather unfortunate.<sup>108</sup> When the “myth of the robe” intersects with the court’s visible role as a “street-level social service agency,” the public may, as a rather normal reaction, deflect that anger onto professionals who cannot adequately defend themselves against charges of self-interest or publically reveal the truth in a case because of ethical and legal responsibilities and confidentiality.

More importantly, social welfare and institutional policies may have unintended and unforeseeable consequences. By no means is this point intended to diminish the hurt that someone going through a custody case feels or the risk to victims of domestic violence from child custody litigation. Both require careful respect and thoughtful decision making by all the professional disciplines, GALs, stakeholders, the judicial system, the public, and families.

## VII. CONCLUSION

So questions concerning the future role of GALs begin as this paper ends: In the absence of GALs, will more cases go to trial (over and over again) or settle? Would the outcomes by the judge improve with better training and supervision of GALs? What should the evidentiary rules for the admissibility of lay and expert evidence from GALs look like? Should the courts simply dispense with objections to hearsay, for example, and permit everyone to say whatever they want, leaving judges to sort out the facts? How many more parents will bring children as young as toddlers to court (which anyone sitting in court today can witness) to testify in favor of him or her and against the other parent?<sup>109</sup> How many teachers and

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custody determination. Thus, both the individual child and society, as a whole, have a weighty interest in such decisions . . . .”) (citations omitted) (internal quotation marks omitted).

107. Compare *State v. Woodburn*, 559 A.2d 343, 346 (Me. 1989) (“He at no time stated whether the ‘syndrome’ was listed in any DSM used by mental health professionals or what, if any, were the criteria for its diagnosis.”), with *State v. Twist*, 528 A.2d 1250, 1257 (Me. 1987) (“At the hearing on the State’s motion to videotape the children’s testimony, held one week before trial, Dr. V., who was uniquely situated and qualified to testify on Jane and John’s psychological and emotional conditions, explained that these children would suffer severe psychological distress if they testified in front of the defendant in a trial setting.”).

108. See, e.g., *Ohland v. Ohland*, 442 A.2d 1306, 1309 (Vt. 1982) (“The youngest minor in this case has been dealt with much as a shuttlecock in a game of badminton . . . . The lower court may well have wondered if defendant’s true concern was in fact for the child, rather than his own personal desires. We think the child is entitled at last to whatever stability the court, in its best, albeit human, judgment can provide him. The alleged immoralities of the plaintiff may be appropriate for consideration, and while they may be sordid and not to be condoned, neither are they necessarily conclusive standing alone.”) (citations omitted).

109. For a recent decision concerning procedural requirements when children testify, see *Hutchinson v. Cobb*, 2014 ME 53, ¶ 14, 90 A.3d 438 (“All testimonial proceedings in any family or civil matter must be recorded.”).

therapists will be subpoenaed to bring their files and testify about confidential matters? Would domestic violence and abuse rates increase or decrease during chronic conflict litigation without GALs?

In fairness, these are questions that should already be asked and under study by the courts, as well as the other branches of government because families should not be subject to human-experimentation-by-trial or intervention. It is fair to suggest that if funding were available to train and supervise GALs employed as experts under the same criteria as *State v. Williams*, family courts would more likely receive reports and testimony that are more reliable, more relevant, and less likely to be good intentions or guesswork than a more precise merger of science and law.<sup>110</sup> The goal concerning GALs is not to disassemble or, as suggested in other contexts, to “bend, not break.” The professional and institutional goal should be to re-order and improve efficacy so that children are safer and parents are able to move forward with their lives free of violence and conflict. Leaving the cupboard bare or half-filled is not so good an alternative.

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110. See Pierre Schlag, *Commentary: Law and Phrenology*, 110 HARV. L. REV. 877, 877 (1997) (“As the intellectual credentials of American law become increasingly dubious, the question arises: how has this discipline been intellectually organized to sustain belief among its academic practitioners?”).

