

# Guardians Ad Litem: Confidentiality and Privilege

By

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## Introduction

Every state<sup>1</sup> provides for the appointment of a guardian

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Jacque and Laura would like to thank Dana E. Prescott, Prescott, Jamieson, & Murphy Law Group, LLC, Saco, Maine, for his comments and suggestions.

<sup>1</sup> Alabama: ALA. CODE § 26-2A-52 (2020); Alaska: ALASKA STAT. § 25.24.310 (2020); Arizona: 17B ARIZ. REV. STAT. RULES FAM. LAW PROC., r. 10 (2020); Arkansas: *Kimmons v. Kimmons*, 613 S.W.2d 110 (Ark. Ct. App. 1981); California: CAL. FAM. CODE § 3111 (2020) (child custody evaluator); Colorado: COLO. REV. STAT. § 14-10-116 (2020); Connecticut: CONN. GEN. STAT. § 45a-132 (2020); Delaware: DEL. CODE tit. 13, § 701 (2020); District of Columbia: D.C. CODE § 16-914 (2020); Florida: FLA. STAT. § 61.401 (2020); Georgia: GA. CODE § 19-9-3 (2020); Hawaii: HAW. REV. STAT. § 551-2 (2020); Idaho: IDAHO CODE § 32-704 (2020); Illinois: 750 ILL. COMP. STAT. § 5/506 (2020); Indiana: IND. CODE § 31-9-2-50 (2020); Iowa: IOWA CODE § 598.12 (2020); Kansas: KAN. STAT. ANN. § 38-2205 (2020); Kentucky: KY. REV. STAT. ANN. § 625.041 (2020); Louisiana: LA. STAT. ANN. § 9:345 (2020); Maine: ME. REV. STAT. ANN. tit. 4, § 1507 (2020); Maryland: MD. CODE, FAM. LAW, § 1-202 (2020); Massachusetts: MASS. GEN. LAWS c. 215, § 56A (2020); Michigan: MICH. COMP. LAWS § 722.24 (2020); Minnesota: MINN. STAT. § 518.165 (2020); Mississippi: MISS. CODE § 43-21-121 (2020); Missouri: MO. STAT. ANN. § 452.423 (2020); Montana: MONT. CODE § 40-4-205 (2020); Nebraska: NEB. REV. STAT. § 42-358 (2020), § 43-272.01 (2020); Nevada: NEV. REV. STAT. § 126N.101 (2020); New Hampshire: N.H. REV. STAT. § 461-A:16 (2020); New Jersey: N.J. STAT. ANN. § 9:2-4 (2020), N.J. R. CH. DIV. FAM. PT. r. 5:8B (2020); New Mexico: N.M. STAT. ANN. § 40-4-8 (2020), N.M. RULES CIV. P. FOR DIST. CTS. r. 1-053.3 (2020); New York: N.Y. FAM. CT. ACT § 249(a) (2020); North Carolina: N.C. R. CIV. P. r. 17(b)(3) (2020); North Dakota: N.D. CENT. CODE § 14-09-06.4 (2020), § 14-20-47 (2020); Ohio: OHIO REV. CODE § 3109.04 (2020); Oklahoma: OKLA. STAT. tit. 10, § 7700-608 (2020); OKLA. STAT. tit. 43, § 107.3 (2020); Oregon: OR. REV. STAT. § 107.425(1, 3) (2020); Pennsylvania: PA. R.

ad litem in a child custody case<sup>2</sup> as the court may deem necessary.<sup>3</sup> Generally, in a child custody case, a guardian ad litem acts as an independent advocate for a minor, representing not the child's stated wishes as an attorney would, but rather represent-

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CIV. P. r. 1915.11-2 (2020); Rhode Island: R.I. GEN. LAWS § 15-5-16.2(c)(1) (2020); South Carolina: S.C. CODE § 63-3-810 (2020); South Dakota: S.D. CODIFIED LAWS § 15-6-17(c) (2020); Tennessee: TENN. CODE § 36-4-132 (2020); Texas: TEX. FAM. CODE § 107.001(b) (2020); Utah: UTAH CODE § 30-3-11.2 (2020), § 78A-2-703 (2020); Vermont: VT. STAT. ANN. tit. 15, § 669 (2020), VT. FAM. CT. RULES r. 7 (2020); Virginia: VA. CODE ANN. § 16.1-266 (2020); Washington: WASH. REV. CODE § 26.12.175 (2020); West Virginia: W. VA. CODE § 48-9-302 (2020), W. VA. R. PRAC. & P. FAM. CT. 47 (2020); Wisconsin: WIS. STAT. ANN. § 767.407 (2020); Wyoming: *Fleet v. Guyette*, 466 P.3d 812 (Wyo. 2020).

<sup>2</sup> For purposes of this article, "child custody case" comprises determinations of parentage, legal and joint custody, and allocation of parenting time and responsibilities. This has been termed "private custody litigation." Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 288 (2004). This article does not address the use of a guardian ad litem in adoption cases, termination of parental rights cases, abuse, neglect, and dependency proceedings, and juvenile justice cases.

<sup>3</sup> For a history of the guardian ad litem, see Katherine Hunt Federle & Danielle Gadomski, *The Curious Case of the Guardian ad Litem*, 36 U. DAYTON L. REV. 337, 339-48 (2012) (providing an extensive discussion of history of the guardian ad litem dating from Roman times); George S. Mahaffey, Jr., *Role Duality and the Issue of Immunity for the Guardian ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 280 (2002) (noting that guardianship policy has its origins in ancient Greece and Rome, but the approach to it taken by courts in the United States is based on the English common law and the doctrine of *parens patriae*, which was appropriated by the colonies and applied to both minors and those incapable of caring for themselves in the form of court appointed guardians); Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 ME. L. REV. 43, 50-53 (2014) (historically situating the role of guardian ad litem from 1851); Charles P. Sherman, *The Debt of the Modern Law of Guardianship of Roman Law*, 12 MICH. L. REV. 124 (1913) (explaining that the concept of appointing a guardian ad litem to represent the interest of a minor finds its origins during the time of the Roman Empire, when the protector of the minor's interests was called a special curator); Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representation or Illusory Safeguard* 2, 7 TEX. TECH. L. REV. 619 (1976) (noting that the United States paralleled the English common law in which the king was the protector of infants and incompetents and could issue a letter patent for the appointment of a guardian). *See also* *Morgan v. Getter*, 441 S.W.3d 94, 111-16 (Ky. 2014) (containing an extensive discussion of the history of courts utilizing guardians ad litem in custody proceedings and the problems arising from that).

ing the “best interests of the child.”<sup>4</sup> The generally accepted dif-

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<sup>4</sup> See generally Hastings, *supra* note 2, at 293 (observing that a guardian ad litem “is a legal representative appointed by the court to protect a child’s best interests in litigation before the court.”). See also UNIF. MARRIAGE & DIVORCE ACT § 310, 9A Part II U.L.A. 13 (1998); AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS FOR CHILDREN IN CUSTODY OR VISITATION PROCEEDINGS 2 (2011).

The roles are often confused. See Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 75 (2008) (“[M]any states routinely appoint lawyers as guardians ad litem without careful delineation between the roles.”); Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report* From the National Quality Improvement Center, 46 FAM. L.Q. 87 (2012) (tracing the course of the debate over the suitability of these different roles); Victoria Sexton, *Wait, Who Am I Representing? The Need for States to Separate the Role of Child’s Attorney and Guardian Ad Litem*, 31 GEO. J. LEGAL ETHICS 831, 834-35 (2018); see also ABA, *American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (Summer 2003) (noting that the term “guardian ad litem” and the role of the guardian ad litem have become “too muddled through different usages in different states, with varying connotations”).

The blame for this confusion is hard to place: “Many states do not explicitly define the required duties and responsibilities of a GAL; as a result, the duties performed by GALs are likely to vary, not only from state to state, but often even from court to court.” Elizabeth Weyer, *Respecting Uncustomary Family Traditions: Reforming the Role of Guardians Ad Litem*, 17 J. GENDER RACE & JUST. 197, 205 (2014). See also Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115–16 (2003) (rejecting outright the term “guardian ad litem” because of its inherent ambiguity); Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009) (explaining the different models of child representation prescribed by the AAML, ABA, the National Association of Counsel for Children, and the National Conference of Commissioners on Uniform State Laws); 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, 256–57 (1998) (noting that a guardian ad litem has been variously defined as: the person appointed by the court to serve as an investigator to gather information about the parents and the children and report back to the court recommending which parent should have custody; the lawyer appointed to represent the children; an advocate for the “best interests” of the children; a facilitator/mediator; and some combination of the above and more); see also, e.g., *Morgan*, 441 S.W.3d at 106 (“[T]he term ‘guardian ad litem’ is very much a chameleon. According to one commentator, the term is

ference between the child's attorney and the guardian ad litem was summarized in *Schult v. Schult*:<sup>5</sup>

Typically, the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests, psychologically or financially.<sup>6</sup>

In essence, in its most important role as an advocate for the child's best interests, the guardian ad litem is not an attorney per se, but is an *investigator and reporter*.<sup>7</sup>

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employed in all of the United States' fifty-six jurisdictions, but in no two of them does it have exactly the same meaning.”).

<sup>5</sup> 699 A.2d 134 (Conn. 1997).

<sup>6</sup> *Id.* at 140.

<sup>7</sup> “Today the guardian ad litem serves at the statutory or common law discretion of the judge to play an intermediate (and often indeterminate) role by ferreting out information, gathering evidence, and making recommendations that are intended to protect and foster the best interest of the children.” Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 557 (2000). See also Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 190 (2005); Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 46 (2011) (“The investigator role is by far the most common role for the GAL.”); Elizabeth R. Ellis, Comment, *Whose Role Is It Anyway? Deciphering the Role, Functions, and Responsibilities of Representing Children in Custody Matters*, 31 J. AM. ACAD. MATRIM. LAW. 533, 534 (2019) (“Generally, a GAL is appointed to investigate issues so that the court, with as much information as possible, can safeguard the best interests of the minor child.”); Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1094 (2005/2006) (describing the investigative function of the guardian ad litem); see also, e.g., 750 ILL. COMP. STAT. § 5/506 (2) (2020) (The GAL “shall investigate the facts of the case and interview the child and the parties.”); MASS. GEN. LAWS ch. 215, § 56A (2020) (“Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations.”); MICH. COMP. LAWS § 712A.17d(1)(c) (2020) (The GAL's duties include “determin[ing] the facts of the case by conducting an independent investigation.”).

[T]he attorney's role differs from that of a guardian ad litem . . . . A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate . . . and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed. A court-appointed guardian ad litem's services are to the court . . . . The [guardian ad litem] acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The [guardian ad litem] submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a [guardian ad litem] would be appointed.<sup>8</sup>

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A good summary of the role of the guardian ad litem as investigator is contained in Wisconsin Bar, *Wisconsin Guidelines for Guardians ad Litem in Family Court*, § III (2016), <https://www.wisbar.org/SiteCollectionDocuments/Publications/1-GAL-Practice-Guidelines-2016-Update.pdf>.

<sup>8</sup> *In re M.R.*, 638 A.2d 1274, 1283 (N.J. 1994). *Accord Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001) (“A guardian ad litem is a person appointed by the court in custody proceedings to serve as an investigator and gather information); *Thunelius v. Posacki*, 220 A.3d 194, 203-04 (Conn. App. Ct. 2020); *Padilla v. Melendez*, 491 S.E.2d 905, 908 (Ga. Ct. App. 1997) (the role of the guardian ad litem is to protect the interests of the child and to investigate and present evidence to the court on the child's behalf); *Lee v. Bramlett*, No. 2017-CA-01202-COA, 2019 WL 925488, \*8 (Miss. Ct. App. Feb. 26, 2019) (“While there is not a single exhaustive list of duties generally expected of a guardian ad litem, one would certainly expect the guardian ad litem to interview the parties, investigate the potential custodial living arrangements, and ensure that the court has the information necessary to make a decision that is in the best interest of the minor child.”); *In re Marriage of Duvall*, 67 S.W.3d 736, 739 (Mo. Ct. App. 2002) (it is imperative that the guardian ad litem investigate and have input on the perspective of the child's best interest and present this to the trial judge); *Baumgart v. Baumgart*, 944 S.W.2d 572, 578-79 (Mo. Ct. App. 1997) (the guardian ad litem has a duty to conduct all necessary interviews with persons having knowledge or contact with the child); *In re Marriage of Campbell*, 868 S.W.2d 148 (Mo. Ct. App. 1993) (the guardian ad litem was acting within the scope of his responsibilities when he conducted discovery, interviewed the parties' older child, actively participated in the trial and offered recommendations to the court); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 385 (Mo. Ct. App. 1993) (stating that it is imperative that the guardian ad litem investigate and present its perspective to the trial judge, thereby enabling the court to render a decision in accordance with the statutory standard of the best interests of the child); *Shemek v. Brown*, No. A-14-760, 2015 WL 3863168, \*4 (Neb. Ct. App. June 23, 2015) (the guardian ad litem's duties are to investigate the facts and learn where the welfare of the child lies and to report to the appointing court); *Smith v. Smith*, 623 N.W.2d 705, 710 (Neb. App. 2001) (“The guardian ad litem's duties

This key difference, the guardian ad litem as investigator and not attorney, means that unlike an attorney for a party, a guardian ad litem presents evidence to the court in the form of a report and/or testimony.<sup>9</sup>

The most common role of a guardian ad litem is investigator. In order to determine the best interests of a child, the guardian ad litem must investigate the facts, circumstances, and individuals

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are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.”); *Betz v. Betz*, 575 N.W.2d 406, 409 (Neb. 1998) (“The guardian ad litem’s duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.”); *Longo v. Longo*, 2014-Ohio-4880, 2014 WL 551084, \*5 (Ohio Ct. App. Nov. 3, 2014) (“A GAL’s primary duty is to investigate a child’s situation and request a court to act in accordance with the child’s best interests.”); *Kahre v. Kahre*, 916 P.2d 1355, 1362 (Okla. 1995) (the duty of a guardian ad litem in a custody dispute “has almost universally been seen as owing . . . to the court that appointed him, [and] not strictly . . . to the child”); *Kenney v. Hickey*, 486 A.2d 1079, 1081–82 (R.I. 1985) (approving of the use of a guardian ad litem in a custody proceeding to gather information, prepare a report, and make a recommendation to the court); *Creemeens v. Creemeens*, No. M2014-00152-COA-R3-CV, 2015 WL 1946165, \*4 (Tenn. Ct. App. Apr. 29, 2015) (noting that the guardian ad litem shall conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child); *In re Marriage of Swanson*, 944 P.2d 6, 11 (Wash. Ct. App. 1997) (the role of the guardian ad litem is to investigate the relevant facts concerning the child’s situation). *See generally* LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 12:7 at 1253-57 (2020 rev. ed) (describing the guardian ad litem’s “investigative function”); Robert J. Levy, *Custody Investigations in Divorce-Custody Litigation*, 12 J. L. & FAM. STUD. 431 (2010).

<sup>9</sup> *Seaton v. Tohill*, 53 P. 170, 172 (Colo. Ct. App. 1898) (conceiving of a guardian ad litem as an “agent of the court, through whom [the court] acts to protect the interests of the minor”); *James v. James*, 64 So. 2d 534, 536 (Fla. 1953) (“When a guardian is appointed . . . he is regarded as the agent of the court”); *In re Mark W.*, 888 N.E.2d 15, 20 (Ill. 2008) (“The traditional role of the guardian ad litem is . . . to make a recommendation to the court as to what is in the ward’s best interests.”); *Kennedy v. State*, 730 A.2d 1252, 1255 (Me.1999) (“in custody cases, 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” ); *In re Billy W.*, 875 A.2d 734, 752, n.20 (Md. 2005) (discussing the “traditional role” for guardians ad litem in custody cases as the duty to determine the child’s best interests, make a recommendation to the court on that basis, and testify at the custody hearing); *Croghan v. Livingston*, 6 App. Pr. 350 (N.Y. 1858) (at common law “the guardian ad litem was but the agent of the court to attend to [the minor child’s] interests during litigation”).

involved in the case. This begins with interactions with the child and interviews with individuals involved in the child's life. The guardian ad litem will also review relevant school, medical, and family records. In combination with their investigative role, guardians ad litem function as court reporters. After conducting their investigation, guardians ad litem are required to draft reports of their findings and recommendations for the court. Depending on the prior court procedures, the report is either sealed or shared with the other parties in the proceeding.<sup>10</sup>

Because the guardian ad litem is presenting evidence based on investigation, issues concerning admissibility arise. Two prominent authors, Dana E. Prescott and Diane A. Tennes, recently noted in this Journal that over the last forty years, courts have ostensibly tossed all evidentiary rules to the wind:

[F]ederal law, state legislative enactments and state case law and rulemaking have, over the past four decades, created a unique exception to admissibility of guardian ad litem (GAL) facts and opinions in reports and testimony. This extraordinary exception to the rules of evidence and a century of case law essentially waives expert qualifications, methodology, and reliability thresholds, applicable in all other federal and state courts across the country. As such, by legislative fiat but within constitutional proscriptions, a GAL may provide data to the court in the form of hearsay or other third-party information and then select and connect the data to an opinion on the ultimate issue in a child custody or child maltreatment case.<sup>11</sup>

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<sup>10</sup> Sexton, *supra* note 4, at 835-36. *See also, e.g.*, S.G. v. D.C., 13 So. 3d 269, 282 (Miss. 2009) (a guardian ad litem 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.").

<sup>11</sup> Dana E. Prescott & Diane A. Tennes, *The Lawyer as Guardian ad Litem: Should "Status" Make Expert Opinions "All-in" and Trump "Gatekeeping" Functions by Family Courts?*, 30 J. AM. ACAD. MATRIM. LAW. 379 (2018). Prescott and Tennes ultimately criticize courts and legislatures that allow guardian ad litem reports to repeat hearsay and opine as to the ultimate issues in the case. *See also* Resa M. Gilats, *Out-of-Court Statements in Guardian ad Litem Written Reports and Oral Testimony*, 33 WM. MITCHELL L. REV. 911 (2007); Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine*

But beyond the issues of hearsay and testifying as to ultimate issues, which Prescott and Tennes so ably discuss,<sup>12</sup> are the issues of confidentiality and privilege.

This article focuses on issues of confidentiality and privilege that may arise for a guardian ad litem and the parties to the custody dispute. Part I will address the confidentiality of conversations with a guardian ad litem. Part II will discuss the degree to which, if any, the guardian ad litem is a holder of the child's privilege. Part III will discuss a related but distinct issue – whether the guardian ad litem can pierce privileges held by the parties.

The authors will conclude that blanket waivers of privilege by the parties should be eliminated. Waivers of privilege by the parties should be unique and tailored to the particular case. The authors will also conclude that if the mental health of the child or a party is in issue, the first resort of the court should be to order a mental health exam, with the clear knowledge by the child or a party that the results are not privileged; piercing the privilege of non-court ordered exams must be a last resort.

## **I. Confidentiality of Conversations with the Guardian Ad Litem**

Because the guardian ad litem is not the “attorney” per se for the child, attorney-client privilege does not extend to conversations between the guardian ad litem and the child, or indeed between the guardian ad litem and any other person.<sup>13</sup> This makes inherent sense because there can be no reasonable expect-

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*Guardians ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103 (2010); Steven N. Peskind, *Evidentiary Opportunities: Applicability of the Hearsay Rules in Child Custody Proceedings*, 25 J. AM. ACAD. MATRIM. LAW. 375 (2013); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About “The Best Interests of the Child”? An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 565-66 (1997).

Of course, as a practical matter, the parties can enter into an agreed order that the guardian ad litem can testify as to hearsay statements contained in the report and recommendations provided the guardian ad litem's report contains the name, address, telephone number, and email address of any and all witnesses contacted.

<sup>12</sup> Prescott & Tennes, *supra* note 11, at 379.

<sup>13</sup> “Whereas a child's relationship with the attorney is privileged, the relationship with the GAL is not.” Boumil et al., *supra* note 7, at 52.



tation that statements made to a guardian ad litem would be treated as confidential, given the guardian ad litem's role as reporter to the court.<sup>14</sup>

As stated in *Farris v. McKaig*,<sup>15</sup>

Perhaps the starkest difference between the two is that, unlike [a lawyer for the child], appointment of a GAL “does not create an attorney-client relationship,” and “[c]ommunications between that person and the guardian ad litem are not subject to the attorney-client privilege.”<sup>16</sup>

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<sup>14</sup> *E.g.*, *Robertson v. Central Jersey Bank & Trust Co.*, 834 F. Supp. 705, 710 (D. N.J. 1993) (communications between a minor's parents and a guardian ad litem were not made with the expectation of confidentiality). *Compare* *Green v. Green*, 593 N.W.2d 398, 401 n.2 (N.D. 1999) (“Lawyers who act as both a guardian ad litem and as an investigator should be aware of the conflict if examined by the parties as to statements made to the guardian under an expectation of confidentiality, and advise their clients accordingly.”). *See generally* Tara Lea Muhlhauer & Douglas D. Knowlton, *The Best Interest Team: Exploring the Concept of a Guardian ad Litem Team*, 71 N.D. L. REV. 1021 (1995) (advocating the “best interests team,” comprising a guardian ad litem, physician, mental health professional, each with clearly defined roles and ethical obligations).

<sup>15</sup> 920 N.W.2d 377 (Mich. Ct. App. 2018).

<sup>16</sup> *Id.* at 382. *Accord In re Gabriel C.*, 229 A.3d 1073, 1087 (Conn. App. Ct. 2020); *Linnell v. Linnell*, No. FA064010515, 2010 WL 1224368 (Conn. Super. Ct. Feb. 16, 2010) (holding that notes and materials prepared by a guardian ad litem are not protected from discovery under either the attorney-client privilege or work product doctrine); *In re Guardianship of Mabry*, 666 N.E.2d 16, 24 (Ill. App. Ct. 1996) (citing child representation statute and holding that no attorney-client privilege exists between guardian ad litem and ward because the guardian ad litem's duty is to serve the ward's best interests); *Deasy-Leas v. Leas*, 693 N.E.2d 90 (Ind. App. 1998) (Indiana Code § 31-1-11.5-28 does not confer an attorney/client privilege upon the guardian ad litem/child relationship in that the guardian ad litem is appointed to represent the child's best interests as opposed to the child himself or herself); *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988) (noting that the guardian ad litem represents the child's interests and holding, “Communications between a guardian ad litem and a minor child are not privileged”); *Culbertson v. Culbertson*, 2007-Ohio-4782, 2007 WL 2702450 (Ohio Ct. App. Sept. 17, 2007) (“the requested discovery and the guardian ad litem's Motion for Protective Order do not implicate any privileged matter such as attorney-client privilege or attorney work product. The Magistrate appointed the guardian ad litem in this case to serve as the guardian ad litem for the parties' daughter, not to serve as the attorney for the daughter”); *Radford v. Radford*, 371 P.3d 1158 (Okla. Civ. App. 2016) (there was no attorney-client privilege between the husband and the GAL to protect); *Townsend v. Townsend*, 474 S.E.2d 424, 429 (S.C. 1996) (a guardian ad litem has no absolute

The scholars surveying this area of law have similarly stated that the attorney must be available to testify at the request of the court about the attorney's conclusions regarding what the attorney believes to be the best interests of the child.<sup>17</sup>

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duty of confidentiality to his ward); *Runyon v. Zacharias*, 556 S.W.3d 732 (Tenn. Ct. App. 2018); *Clark v. Alexander*, 953 P.2d 145, 154 (Wyo. 1998) (“As legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child . . . that the attorney/guardian ad litem is charged with protecting the child’s best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship.”). See also R.I. GEN. LAWS § 15–5–16.2(c)(1)(iv)–(v) (2020) (communications between the guardian ad litem and the child are not privileged, but still identifying the child’s best interests as the focus of the court’s determination and the guardian ad litem’s duties); Alaska Bar Ass’n Ethics Op. #85-4 (1985) (stating that the lawyer-client privilege does not apply when the lawyer is appointed to be the child’s guardian ad litem); Ark. Sup. Ct. Admin. Order 15, Attorney Qualifications and Standards § 5(g) (“An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.”); Maine Guardian ad Litem Rules r. 5(g) (2016) (“The guardian shall exercise reasonable discretion about whether to disclose communications made by the child to the court, or to professionals providing services to the child or the family based on the guardian ad litem’s evaluation of the best interest of the child. Any decision by the guardian not to disclose such information, however, shall be subject to review by the court following an in camera review.”); Mass. Prob. & Family Ct. Standing Order 1–05, Standards for Guardians Ad Litem/Investigators §§ 1.3(c), 1.5 & cmt. (making clear that the child’s best interests control and that the guardian ad litem should adhere to professional standards, but also that “[t]here is no attorney-client confidentiality”). *But see Bentley v. Bentley*, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982) (holding that communications between minor children and a guardian ad litem in a divorce and custody case are entitled to the lawyer-client privilege).

<sup>17</sup> Alberto Bernabe, *Guarding the Guardians: Should Guardians ad Litem Be Immune from Liability for Negligence?*, 51 LOY. U. CHI. L.J. 1001, 1023-24 (2020). See also Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833 (2012); Bruce Boyer, *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1372 (1996) (explaining that information disclosed to a “best interest guardian ad litem” can and should be disclosed when disclosure is in the best interest of the child); Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L. J. 1126 (1978); Sexton, *supra* note 4, at 837 (stating that information shared by the child with the guardian ad litem is not privileged); Roy T. Stuckey, *Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1805 (1996) (“In fact, there is a general reluctance by

Because there is no confidentiality as to what is said to a guardian ad litem, many states require that “non-confidentiality warnings” be given to any person or entity providing the guardian with information.<sup>18</sup> This requirement of a warning applies to the child as well.<sup>19</sup>

Nonetheless, at least a few courts have carved out an exception, holding that a guardian ad litem may offer confidentiality to a child and keep that promise if confidentiality is necessary to get the child to provide the guardian ad litem with information.<sup>20</sup> One author has argued that young children simply do not understand the role of a guardian ad litem, and assume that the “secrets” they tell the guardian ad litem will remain secret. In such a case, confidentiality should be the default.<sup>21</sup>

Another issue that arises with regards to the guardian ad litem holding the child’s confidences is that a guardian ad litem may in fact be a lawyer, or may hold other professional licensure such as psychologist, psychiatrist, therapist, social worker, or counselor.<sup>22</sup> Some professionals confuse the rules of confidentiality under a profession’s ethical guidelines and codes, on the one

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judges and legislators to recognize a privilege in any nonprofessional relationships other than between husbands and wives.”).

<sup>18</sup> Boumil, et al., *supra* note 7, at 55.

<sup>19</sup> *Id.* E.g., DEL. CODE ANN. tit. 29, § 9007A(c) (2020) (“The attorney guardian ad litem’s duty is to the child. The scope of the representation of the child is the child’s best interests. The attorney guardian ad litem shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child’s best interests.”). *See also* Stuckey, *supra* note 17, at 1792.

<sup>20</sup> E.g., *In re Kalil*, 931 A.2d 1255 (N.H. 2011).

<sup>21</sup> Emily Buss, “*You’re My What?*” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699,1716 (1996).

<sup>22</sup> *See, e.g.*, MAINE GUARDIAN AD LITEM RULE (2)(b)(2)(A):

Credentials. The applicant must (i) Possess a current valid license to practice law in the State of Maine; (ii) Possess a current valid license to practice as a Licensed Clinical Social Worker (LCSW), Licensed Professional Counselor (LPC), Licensed Clinical Professional Counselor (LCPC), Licensed Master Social Worker (LMSW), Licensed Marriage Family Therapist (LMFT), Licensed Pastoral Counselor (LPaC), psychologist, or psychiatrist in the State of Maine; or (iii) Possess a Certification of Qualification by the Director of the CASA program, provided that a CASA Certification qualified individual may be appointed a guardian ad litem only pursuant to 22 M.R.S. § 4005; or (iv) Have been on the GAL roster on the effective date of the implementation of these Rules (September 2015), have completed the core

hand, with the role of the guardian ad litem and the guardian's duty to the court and child, on the other hand. The two overlap but are not co-extensive.<sup>23</sup> Thus, regardless of professional licensure, a guardian ad litem must follow the rules which guide the law in that jurisdiction vis a vis guardians ad litem, and operate carefully within that role. If a psychologist, for example, acting as a guardian ad litem decides to conduct testing, clinical evaluations, or therapeutic interventions, that role-confusion could create ethical and legal traps. The confidentiality as a guardian ad litem must be governed by that role above any others, because it is in this role that the guardian ad litem is reporting to the court.

## II. The Guardian Ad Litem as Holder of the Child's Privilege

A guardian ad litem engaged in the investigative role is the holder of the child's privilege. Thus, the guardian ad litem determines (sometimes as a recommendation to a judge, sometimes within his or her own powers) whether the child's privilege should be asserted or waived with regard to doctors, therapists,

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training required by these Rules, and if the applicant holds professional licenses, be in good standing.

In Massachusetts, see *Massachusetts Law About Child Custody and Parenting Time*, MASS.GOV, <https://www.mass.gov/info-details/massachusetts-law-about-child-custody-and-parenting-time> (last visited Nov. 3, 2020), and *Standards for Category F Guardian ad Litem Investigators*, MASS.GOV, <https://www.mass.gov/doc/standards-for-category-f-guardian-ad-litem-investigators/download> (last visited Nov. 3, 2020).

<sup>23</sup> See James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluation: Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL.: RES. & PRAC. 261 (2001); Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the "Legal Ethics" Perspective*, 73 IND. L.J. 665 (1998); Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILD. RTS. J. 15 (Mar. 1991).

As a matter of practice, the attorney should consider including in the order appointing the guardian ad litem a provision detailing the applicability of waivers of confidentiality if the guardian ad litem to be appointed is a professional whose professional code of ethics imposes duties and/or privileges that would be inapplicable when acting as a guardian ad litem.

and social workers who have treated the child.<sup>24</sup> The guardian ad litem, not the parents, has this power, because parents would necessarily have a conflict between their own interests and the child's in asserting or waiving privilege.<sup>25</sup>

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<sup>24</sup> Gil v. Gil, 892 A.2d 318, 331 (Conn. App. Ct. 2006) (holding that the child's guardian ad litem was in the best position to evaluate and to exercise the child's confidentiality rights, and thus the guardian ad litem invoked the child's psychologist-patient privilege; therefore, the testimony of the child's current psychologist was not admissible in a contempt proceeding brought against the ex-wife for denying the ex-husband his court-ordered visitation with the child); Garcia v. Guiles, 254 So.3d 637, 640 (Fla. Dist. Ct. App. 2018) (deciding that neither parent can waive a child's patient/psychotherapist privilege, in an action to modify the timesharing of the child, because the subject matter of the litigation is the child's welfare, and holding that the guardian ad litem holds the privilege); PO v. JS, 377 P.3d 50, 58 (Haw. Ct. App. 2018), *aff'd in part, vacated in part on other grounds*, 393 P.3d 986 (Haw. 2017); Evans v. Hess, NOS. 2013-CA-002072-ME, 2014-CA-001512-ME, 2015-CA-000043-ME, 2016 WL 1389799, \*8 (Ky. Ct. App. 2018) (when a guardian ad litem is appointed in a child custody proceeding, it is the guardian ad litem, not the parent, who may invoke or waive the child's psychotherapist-patient privilege); Miller v. Bosley, 688 A.2d 45, 54 (Md. Ct. Spec. App. 1997) (deciding that a court-appointed attorney representing the child in an action in which custody, visitation, or support is contested may exercise certain waivers of child's privileges, act as guardian ad litem, and serve as the court's investigator); Marina C. v. Dario D., 114 N.Y.S.3d 495, 497 (N.Y. Sup. Ct. 2019) (holding that the trial court erred by failing to appoint a guardian ad litem who could have objected to testimony by a child's therapist as to confidential discussions in therapy and the father's testimony regarding child's statements); *see also In re Zappa*, 631 P.2d 1245, 1251 (Kan. Ct. App. 1981) (holding that a parent cannot assert or waive the child's privilege in a termination of parental rights case); State v. S.H., 465 N.W.2d 238, 240 (Wis. Ct. App. 1990) (in a case in which the father was charged with assault of the children, the psychologist-patient privilege asserted by the guardian ad litem on behalf of the children supersedes the father's authorization for release of the children's treatment records); Alaska CINA r. 9(b)(3)(B) (2015) (noting that the child or the child's GAL holds the privilege during dependency and neglect proceedings); CAL. WELF. & INST. CODE § 317(f) (West Supp. I 2015); MASS. GEN. LAWS c. 233, § 20B (2014). *See generally* Boumil et al., *supra* note 7 (evaluating under what circumstances GALs have the power and at times the responsibility to waive children's privileges); Starla Doyal, *The Guardian Ad Litem as the Child's Privilege Holder*, 87 U. COLO. L. REV. 205 (2016); Donald Tye, *The Preferences and Voices of Children in Massachusetts and Beyond*, 50 FAM. L.Q. 471 (2016).

<sup>25</sup> L.A.N. v. L.M.B., 292 P.3d 942, 948 (Colo. 2013) (en banc) (holding that the child patient's parent cannot hold the child's psychotherapist-patient privilege when the parent's interests as a party in a proceeding involving the child might give the parent an incentive to strategically assert or waive the

### III. The Ability of a Guardian ad Litem to Pierce the Privilege of the Parties

A much more difficult question than those addressed above is the ability of the guardian ad litem to pierce the privilege of the parties to the child custody case and demand what would otherwise be privileged medical and mental health records.<sup>26</sup> The

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child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship); *In re Berg*, 886 A.2d 980, 988 (N.H. 2005) (ruling that in divorce proceedings, the trial court or GAL instead of the father must determine if the waiver of privilege as to a psychologist's records is in the child's best interest); *Attorney ad Litem v. Parents of D.K.*, 780 So.2d 301, 307 (Fla. Dist. Ct. App. 2001) ("Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf."); *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 409 (Mo. 1996) (determining that where the privilege is claimed on behalf of the parent rather than the child, and the welfare and interest of the child would not be protected by the parent, the parent should not be permitted to assert or waive the privilege); *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) ("custodial parent may not invoke the psychotherapist-patient privilege for a child in custody litigation"); *In re Adoption of Diane*, 508 N.E.2d 837, 840 (Mass. 1987) ("In a case such as this, where the parent and child may well have conflicting interests, and where the nature of the proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf."); *Compare Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (it is "patent that [a parent involved in a custody battle] has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure," and, therefore, "the appointment of an attorney to act as the guardian of the child in the instant matter is required"), *with Berg*, 886 A.2d at 988 (holding that even if parents and a guardian ad litem agree that a child's therapist-client privilege should be waived, the child has a separate interest that the court must consider, and if the minor is mature enough to assert the privilege personally, that assertion may be given substantial weight).

<sup>26</sup> The court may generally obtain the records of a court ordered physical or psychological exam; there is no expectation of privilege for these exams, and claims of privilege are expressly waived for such exams. *E.g.*, *Johnston v. Weil*, 920 N.E.2d 494, 500 (Ill. App. Ct. 2009) (ruling that the ex-wife's participation in the evaluation performed by the court-appointed evaluator, who was a psychiatrist, did not constitute a therapeutic relationship, and thus, the ex-wife could not invoke the protections of the Mental Health and Developmental Disabilities Confidentiality Act with respect to communications made by the ex-wife to the psychiatrist); *Segarra v. Segarra*, 932 So.2d 1159, 1161 (Fla. Dist. Ct. App. 2006) (holding that no privilege obtained when there was no expectation

first issue that arises is, may a guardian ad litem, without an express and clear waiver from a parent,<sup>27</sup> obtain the confidential/

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of privacy, such as court-ordered counseling). *Compare In re Alethea W.*, 747 A.2d 736, 739 (Md. Ct. Spec. App. 2000) (explaining that since court ordered psychological examinations are performed for the benefit of the court and not the individual and with the understanding that no privilege of confidentiality applies, the purpose of the privilege, which is to aid in providing effective treatment by encouraging free and open communication between the therapist and the patient, is not served and, accordingly, does not apply), *with Gottschalk v. Gottschalk*, 715 S.E.2d 715 (Ga. Ct. App. 2011) (agreeing that the trial court erred in stating that the appellant had no privilege with regard to his therapy because it was court-ordered. “As the appellant’s relationship with the court-ordered therapist involves or *contemplates treatment*, his communications with the therapist are privileged.”) (emphasis added).

Just because these records are discoverable does not mean, however, that a court has the complete authority to order such an exam. Rather, there must be some articulable basis making such an examination necessary, i.e., that good cause exists for the examination. *E.g.*, *Lopes v. Ferrari*, 204 A.3d 1254 (Conn. App. Ct. 2019); *Oldham v. Greene*, 263 So. 3d 807 (Fla. Dist. Ct. App. 2018); *Kelly v. Kelly*, 451 P.3d 429 (Idaho 2019); *Jones v. Jones*, 274 So.3d 811 (La. Ct. App. 2019); *Le-Blanc v. Andrews*, 931 So. 2d 683 (Miss. Ct. App. 2006); *Siegeff v. Iqbal*, 122 N.Y.S.3d 328 (N.Y. App. Div. 2020); *In re Marriage of King*, 371 P.3d 1139 (Okla. Civ. App. 2015); *Jordan v. Jackson*, 876 A.2d 443 (Pa. Super. Ct. 2005); *Gentile v. Gentile*, No. M2008–02685–COA–R3–CV, 2010 WL 2812627 (Tenn. Ct. App. July 19, 2010); *Davis v. Davis*, No 13–01–707–CV, 2003 WL 21355239 (Tex. Ct. App. June 12, 2003); *Smith v. Rawson*, No. 2012-243, 2012 WL 6633514 (Vt. Dec. 13, 2012). *See also Schouw v. Schouw*, 593 So.2d 1200, 1201 (Fla. Dist. Ct. App. 1992) (“A court ordered psychiatric or psychological examination is the suggested method for balancing the court’s need to determine the parents’ mental health as it relates to the best interest of the child, and the need to maintain the confidentiality between a treating psychotherapist and the patient.”).

<sup>27</sup> *Garcia v. Guiles*, 254 So. 3d 637, 640 (Fla. Dist. Ct. App. 2018) (“In situations in custody cases where a parent’s mental health is called into question, allowing parties to directly access other’s medical records, over their objection, is departure from essential requirements of law; *but when privilege is waived*, the trial court is faced with an entirely different situation.”) (emphasis added); *Zarzaur v. Zarzaur*, 213 So. 3d 1115 (Fla. Dist. Ct. App. 2017) (holding that a wife’s participation in independent psychological evaluation did not waive privilege, but her *agreement* to provide past mental health records to the independent psychologist amounted to voluntary waiver of her psychotherapist-patient privilege with respect to mental health records that were actually provided to an independent psychologist) (emphasis added); *Weekley v. Weekley*, 972 N.Y.S.2d 376, 378 (N.Y. App. Div. 2013) (statements made by the mother’s fiancé to his counselor were not privileged and thus were not prohibited from being the subject of testimony during the hearing on the father’s petition to

privileged medical and psychological records of a parent merely because the parties are engaged in custody litigation.<sup>28</sup>

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modify a prior order awarding primary physical custody of the parties' child to the mother, where the mother's fiancé had *expressly authorized* his counselor to disclose privileged communications)(emphasis added); *Grosberg v. Grosberg*, 68 N.W.2d 725, 727 (Wis. 1955) (noting that the record on appeal in a divorce case did not establish that the trial court had required the wife's waiver of privilege as to the psychiatrist's testimony, but established that she had freely and voluntarily waived the privilege).

As noted by a child and family lawyer, however, parents waive their privilege all too often unknowingly:

For years, guardians ad litem and child representatives have given generic consent forms to parents, asking them to waive their personal therapist/patient privilege during litigation regarding their children. The parents (often blindly) sign consents on behalf of their minor children, also because their attorney or the GAL asks them to. Just one parent's consent is enough to waive a minor child's mental health privilege. If a child is over 12 years old, a parent usually tells them that they must sign the consent, and the child routinely complies. Many court-appointed experts begin their investigation, asking for consents to be signed by all.

Kathryn L. Ciesla, *It's Not Broken, So Don't Try to "Fix" It: Keep Counseling Confidential*, 34 CBA REC. 26 (July/Aug. 2020). See also JEFF ATKINSON, 2 MODERN CHILD CUSTODY PRACTICE § 14-5 (2d ed. Supp. 2019) (form release to guardian ad litem); CHILDREN'S LAW CENTER, 2020 GUARDIAN AD LITEM TRAINING MANUAL 3 (blanket release), <https://www.childrenslawcenter.org/sites/default/files/attachments/resources/Tab%2010.pdf>.

Implied waiver is discussed *infra* in text at notes 31-32.

<sup>28</sup> See Amy J. Amundsen, *Balancing the Court's Parens Patriae Obligations and the Psychological-Parent Privilege in Custody Disputes*, 28 J. AM. ACAD. MATRIM. LAW. 1 (2015) (surveying the states on the issue, and arguing that the studies that support the view that privilege should not be waived based on the argument that privilege encourages treatment are flawed); Boumil, et al., *supra* note 7; Marcia M. Boumil, Debbie F. Freitas & Cristina F. Freitas, *Waiver of the Psychotherapist-Patient Privilege: Implications for Child Custody Litigation*, 22 HEALTH MATRIX 1 (2012); Gale Humphrey Carpenter, *Overriding the Psychologist-Client Privilege in Child Custody Disputes: Are Anyone's Best Interests Being Served?*, 68 UMKC L. REV. 169 (1999); Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAW. 453 (2013); James K. Filan, Jr., *Psychotherapist-Patient Privileges in Child Custody Disputes: Connecticut and Beyond*, 13 BRIDGEPORT L. REV. 281 (Winter 1993) (focusing on Connecticut law); Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499 (2008); Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963, 981 (1998)



As stated by prominent scholars in this area,

The classic family courtroom drama over psychotherapist-patient privilege often revolves around whether litigants put their mental health at issue, or whether privilege should yield to the child's welfare. Contested child custody proceedings often add another wrinkle to the analysis: whether the patient waives her privilege by authorizing the psychotherapist to be interviewed by a guardian ad litem (GAL).<sup>29</sup>

Right now, more states than not have held that merely requesting custody, without more, does *not* put one's mental health in issue, with the plurality of states taking an intermediate position.<sup>30</sup> Thus, in most states, the mere allegation of mental insta-

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(arguing that an absolute psychotherapist-patient privilege is within the constitutional right to privacy, and that patients' interests in confidentiality of private affairs are included in the liberty interests protected by the Due Process Clause of the Fifth and Fourteenth Amendments); Ralph Slovenko, *Child Custody and the Psychotherapist-Patient Privilege*, 19 J. PSYCHIATRY & L. 163, 171 (1991); Carlton D. Stansbury, *Accessibility to a Parent's Psychotherapy Records in Custody Disputes: How Can the Competing Interests Be Balanced?*, 28 BEHAV. SCI. & L. 522 (July/Aug. 2010); Courtney Waits, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIM. LAW. 159 (2001).

It is worth noting that no physician or mental health professional privilege applies to court ordered examinations. ELROD, *supra* note 8, at § 9:18 at 1090. See *supra* sources in note 27.

<sup>29</sup> Boumil et al., *supra* note 29, at 20.

<sup>30</sup> For cases holding that a parent does not put his or her mental health in issue by a prayer for custody, see *Lester v. Lester*, 690 So. 2d 378, 380 (Ala. Civ. App. 1996); *Hodson v. Hodson*, No. S-10572, 2003 WL 22815939 (Alaska Nov. 26, 2003); *Darab Cody N. v. Olivera*, 242 Cal. Rptr. 3d 891, 897 (Cal. Ct. App. 2019); *In re Marriage Meteer*, No. B154682, 2003 WL 1084650 (Cal. App. Mar. 12, 2003) (rejecting the “[h]usband’s theory that by filing the marital dissolution petition and requesting child custody, [w]ife waived the psychotherapist-patient privilege”); *Simek v. Super. Ct.*, 172 Cal. Rptr. 564, 568 (Cal. Ct. App. 1981); *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990); *Reno v. Reno*, 282 So.3d 163, 170 (Fla. Dist. Ct. App. 2019); *Roper v. Roper*, 336 So. 2d 654, 657 (Fla. Dist. Ct. App. 1976); *Weksler v. Weksler*, 325 S.E.2d 874, 874-75 (Ga. 1985) (holding that the wife’s clinical records were admissible except for those portions that were privileged under the psychiatrist-patient privilege); *Barker v. Barker*, 440 P.2d 137, 139 (Idaho 1968); *L.G. v. S.L.*, 76 N.E.3d 157, 169 n.11 (Ind. Ct. App. 2017); *Laznovsky v. Laznovsky*, 745 A.2d 1054, 1066 (Md. Ct. Spec. App. 2000); *Navarre v. Navarre*, 479 N.W.2d 357, 358 (Mich. Ct. App. 1991) (“potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships.”); *Belding v. Belding*, 736 So. 2d 425, 431 (Miss. Ct. App. 1999); *State ex rel Husgen v. Stussie*, 617 S.W.2d 414 (Mo. Ct. App. 1981) (limited in part by *Roth v. Roth*, 793 S.W.2d 590, 592 (Mo. Ct. App. 1990),

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which held that a party may not invoke physician-patient privilege in any custody proceedings involving known or suspected child abuse or neglect); *Kinsella v. Kinsella*, 696 A.2d 556, 576-77 (N.J. 1997); *Spencer v. Spencer*, 301 S.E.2d 411, 413 (N.C. Ct. App. 1983); *Weaver v. Weaver*, No. 2003CA00096, 2004 WL 1784595, \*8 (Ohio Ct. App. Aug. 9, 2004); *Avery v. Nelson*, 455 P.2d 75, 78 (Okla. 1969) (finding that a party to litigation does not waive the privilege against compulsory disclosure of physician-patient communications simply by placing in issue in litigation his own physical condition or disability); *State v. Evans*, 317 P.3d 290, 293 (Or. Ct. App. 2013) (“[Oregon law’s] limited reach does not extend to psychotherapist-patient privileged statements that do not mention a child’s abuse, or the cause thereof.”); *Gates v. Gates*, 967 A.2d 1024, 1032 (Pa. Super. Ct. 2009); *Osdoba v. Kelley-Osdoba*, 913 N.W.2d 496, 505 (S.D. 2018); *Culbertson v. Culbertson*, 393 S.W.3d 678, 686 (Tenn. Ct. App. 2012) (*Culbertson I*); *Clausen v. Clausen*, 675 P.2d 562, 565 (Utah 1983); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 424 (Wis. 1995). *See also* 740 ILL. COMP. STAT. § 110/10(a)(1) (2020) (“[F]or purposes of this Act, in any action brought or defended under the [Marriage Act], or in any action in which pain and suffering is an element of the claim, mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or communication.”).

For cases holding that a parent *does* put his or her mental state in issue in a custody case, see *Pliego v. Hayes*, 86 F. Supp. 3d 678, 691 (W.D. Ky. 2017) (determining that the father put his mental health in issue by seeking return of his child under the Hague Convention); *Slaton v. Slaton*, 682 So.2d 1056 (Ala. Civ. App. 1996); *In re Marriage of Hall*, 241 P.3d 540, 543 (Colo. 2010) (en banc); *Shumaker v. Andrews*, 1992 WL 510196, \*4 (Del. Fam. Ct. Dec. 3, 1992) (holding that seeking visitation places a party’s mental condition at issue); *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990) [superceded by IND. CODE § 16–39–3 (“Release of Mental Health Records in Investigations and Legal Proceedings”)]; *Atwood v. Atwood*, 550 S.W.2d 465, 467 (Ky. 1976) (recognizing that a specific legislative exception to the psychiatrist-patient privilege applies by operation of law to a parent seeking custody); *Dawes v. Dawes*, 454 So. 2d 311, 312–13 (La. Ct. App. 1984); *Clark v. Clark*, 371 N.W.2d 749, 752 (Neb. 1985) (relying on NEB. REV. STAT. § 27–504(4)(c)); *Smith v. Gayle*, 834 S.W.2d 105 (Tex. App. 1992).

As noted in *Culbertson v. Culbertson*, 455 S.W.3d 107, 134 (Tenn. Ct. App. 2014), however, there is an “intermediate approach” whereby the court will conduct an in camera review to determine what may be admitted or disclosed:

Some jurisdictions that follow this less protective approach mitigate its harsh effects by directing trial courts to review the privileged documents in camera to determine whether the relevancy of the documents is outweighed by the prejudicial effect. *See Kinsella*, 696 A.2d at 581–82 (citing *Owen*, 563 N.E.2d at 608; *Morey v. Peppin*, 353 N.W.2d 179, 183 (Minn. Ct. App. 1984) [noting that before disclosing therapy records, the court is required to review the records in camera in or-

der“to prevent disclosures that are irrelevant to the custody question or otherwise annoying, embarrassing, oppressive, or unduly burdensome”)], *rev'd on other grounds*, 375 N.W.2d 19 (Minn. 1985); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749, 752–53 (1985) [stating that since seeking custody “does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant,” a court must review evidence in camera for relevance before disclosure]; *Kirkley v. Kirkley*, 575 So.2d 509, 510–11 (La. Ct. App.1991).

In addition to Minnesota, Nebraska, Louisiana, and New Jersey cited in *Culbertson*, New York takes this intermediate position, holding that while it is true that parties to a contested custody proceeding place their physical and mental condition at issue, the court has broad discretionary power to limit disclosure and grant protective orders in a custody case. *Stephen KK v. Kristina KK*, 69 Misc. 3d 186, 2020 WL 3096292 (N.Y. App. Div. Apr. 15, 2020); *Ryan v. Nolan*, 21 N.Y.S.3d 469 (N.Y. App. Div. 2015); *Wilson v. Hendrickson*, 931 N.Y.S.2d 170 (N.Y. App. Div. 2011); *Matter of Cool v. Malone*, 887 N.Y.S.2d 334 (N.Y. App. Div. 2009); *Garvin v. Garvin*, 556 N.Y.S.2d 699 (N.Y. App. Div. 1990).

Massachusetts apparently takes this intermediate position as well. In *P.W. v. M.S.*, 857 N.E.2d 38, 44-45 (Mass. App. Ct. 2006), the court stated:

If there is no genuine issue of visitation, then there is no basis for an order requiring disclosure of the father’s medical or psychiatric records. If there is a genuine issue regarding visitation, then the judge must make a determination whether the medical and psychiatric records are relevant to the resolution of the terms of visitation. The judge should issue an order, reasonably tailored in time, for the father to produce the records. The father may then segregate the records he alleges are privileged and make an appropriate claim of privilege supported by affidavit. It is the judge’s responsibility then to determine whether the records are privileged and, if so, whether their relevance and importance to the welfare of the children outweigh the privilege. If the judge determines that privileged material should be disclosed to the GAL, he or she may enter such an order with appropriate limitations on its disclosure and orders of confidentiality.

For other states adopting this intermediate approach, see *Lowdermilk v. Lowdermilk*, 825 P.2d 874, 879 (Alaska 1992); *Blazek v. Superior Ct.*, 869 P.2d 509, 516 (Ariz. Ct. App. 1994) (stating that the court conducts an in camera review to determine what information may lead to admissible evidence); *In re Marriage of Kiister*, 777 P.2d 272, 275-76 (Kan. Ct. App. 1989) (“In child custody matters and visitation rights, the court’s paramount concern is the welfare the child. Thus, it was error to have failed to grant the discovery order. In-camera inspection is available to prevent disclosure of irrelevant evidence at trial.”); *Sweet v. Sweet*, No. 2004–A–0062, 2005 WL 3610481, \*2 (Ohio Ct. App. Dec. 29, 2005) (determining that the court must conduct an in camera

bility and the denial of such instability similarly does not put mental health in issue.<sup>31</sup>

The law in Virginia presents an interesting case study as to the volatility of this issue. After some lobbying by mental health professionals, in 2003, the Virginia Legislature enacted Virginia Code § 20-124.3:1, barring mental health professionals from testifying in child custody cases without the parent's explicit consent. After a number of cases came down barring such testimony,<sup>32</sup> the family law bar lobbied for repeal of the statute,<sup>33</sup> and it was re-

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review for disclosure and only those records that are "causally or historically" related to a condition relevant for custody is disclosed).

This authors wonder whether the intermediate approach has validity in light of the following statement by the U.S. Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996):

We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 393.

<sup>31</sup> *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989) ("[T]he custodial parent's denial of allegations of mental instability does not operate as a waiver of the patient-psychotherapist privilege. To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity.").

<sup>32</sup> *E.g.*, *Rice v. Rice*, 638 S.E.2d 702, 706 (Va. Ct. App. 2006) (holding that because the testimony of the child's therapist was being offered by the child's grandparents, it was likely that the substance of the testimony would be adverse to mother's position in the case, and therefore the mother's consent to the therapist's testimony must be given under Code § 20-124.3:1); *Schwartz v. Schwartz*, 616 S.E.2d 59, 65 (Va. Ct. App. 2005) (finding that the trial court committed reversible error by admitting testimony from the therapist over the mother's objection).

<sup>33</sup> *E.g.*, Katherine C. Dewart, *A Privilege for "Mommy Dearest?" Criticizing Virginia's Mental Health Records Privilege in Custody Disputes and the Court's Application in Schwartz v. Schwartz*, 13 GEO. MASON L. REV. 1341 (2006).

pealed.<sup>34</sup> Thus, Virginia ended up taking the middle road: there is no preclusive bar to mental health records, and mental health records may be obtained for cause in cases where the mental health of a parent is at issue.<sup>35</sup>

The second issue that arises is, if a parent's mental state is not automatically in issue in a custody case, what constitutes a waiver of privilege.

First, if a parent agrees to a court ordered psychological examination, does that constitute a waiver of all psychological records, even treatment that occurred before the litigation?<sup>36</sup> Assuming that the mental states of the parties are not clearly in issue, then merely agreeing to a court ordered mental health

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<sup>34</sup> 2008 Va. Acts, ch. 809.

<sup>35</sup> *Child Custody, Pleading and Practice, and Trial Considerations*, VIRGINIA PRAC. FAMILY LAW § 15:14 (2020 ed.).

<sup>36</sup> Compare the situation in *Stancuna v. Stancuna*, 41 A.3d 1156 (Conn. App. Ct. 2011). In that case, the court ordered the following:

Before the court will consider unsupervised visitation with the minor children, the [defendant] must engage the services of an experienced psychotherapist and psycho-pharmacologist approved by the [guardian ad litem], each of whom has had training in managing and treating individuals with delusional disorders, and comply with their recommendations for a period of at least [six] consecutive months. The [defendant] also must submit to a neuropsychological evaluation to assess any consequences of past head trauma and to rule out complications of other diseases if such evaluation is recommended by the psychotherapist. Attorney for the [plaintiff] and the [guardian ad litem] shall have access to these professionals, their treatment recommendations and [the defendant's] compliance with these recommendations, including making and keeping appointments and filling and taking prescriptions prescribed by the aforesaid professionals. The [defendant] shall execute appropriate authorizations to [the plaintiff's] attorney and the [guardian ad litem] to obtain such information.

41 A.3d at 1161. The court held this did not violate the defendant's privilege, because the court's order was concerned solely with the procedure that would occur if and after the issue of his unsupervised visitation with either of the children is presented to the court. Had the trial court treatment allowed for "unrestricted access" to the "treaters" and "unlimited disclosure" by them of his mental health records, as the husband erroneously claimed, the court would have ruled differently. *Id.*

evaluation does not constitute waiver of privilege for other mental health records.<sup>37</sup>

Second, merely assenting to the factual investigation by a guardian ad litem does not act as a waiver,<sup>38</sup> and testifying about one's own mental state does not constitute waiver.<sup>39</sup> On the other hand, having one's own mental health professional testify

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<sup>37</sup> *Meteer*, 2003 WL 1084650, \*3 (holding that the wife did not waive the psychotherapist-patient privilege and the physician-patient privilege by filing a marital dissolution petition and requesting child custody and agreeing to a private psychological custody evaluation); *M.M. v. L.M.*, 55 A.3d 1167, 1176 (Pa. Super. Ct. 2012); *Gates v. Gates*, 967 A.2d 1024, 1030 (Pa. Super. Ct. 2009). See also *Cabrera*, 580 A.2d at 1234 (deciding that specific releases did not operate as a blanket waiver of privilege); *Peisach*, 539 So.2d at 546 (holding that the custodial parent's agreement to submit to a psychological examination rendered the testimony of parent's psychiatrist, who treated the custodial parent seven years before, unnecessary); *Care and Protection of M.C.*, 94 N.E.3d 379, 392 (Mass. 2018) (holding that the mother's introduction of psychiatric evidence at the care and protection trial did not serve as a waiver of her right to assert the patient-psychotherapist privilege at a subsequent criminal trial); *Clark*, 371 N.W.2d at 753 (determining that the fact that a litigant seeks custody of a child in a dissolution of marriage proceeding does not result in making relevant information contained in the file cabinet of every psychiatrist who has ever treated the litigant). But see *Feurman v. Feurman*, 447 N.Y.S.2d 838, 841 (N.Y. Sup. Ct. 1982) (ruling that by agreeing to a stipulation to referral for psychological study and evaluation, parties to custody proceedings may waive any objection to unlimited access to certain portions of confidential reports and supporting data).

<sup>38</sup> *In re Marriage of Trepeck*, No. D048190, 2007 Cal. App. Unpub. LEXIS 2187 at \*19 (Mar. 20, 2007) (the father sought to subpoena the mother's psychotherapist based on a waiver of privilege after the mother permitted the court-appointed evaluator to contact her psychotherapist and obtain privileged information for the purposes of the evaluation; the trial court found that this authorization did not result in a broad waiver of her privilege); *In re Marriage of True*, 16 P.3d 646 (Wash. Ct. App. 2000) (holding that the statutory privilege between counselor and patient prohibited discovery of the former husband's ten-year-old mental health records, in post-divorce proceedings to resolve child custody dispute, though the parties had authorized release of certain information in the order appointing a guardian ad litem, where the authorization allowed release of the parties' mental health information only to the guardian ad litem, guardians were ordered to maintain confidentiality of the records, and the former wife demonstrated no relevance to her perceived need to have the records).

<sup>39</sup> *Culbertson*, 455 S.W.3d at 139-40.

as to mental state waives privilege and opens the door to cross-examination.<sup>40</sup>

Finally, acts that may or may not constitute a waiver of privilege must be examined on a case by case basis, with due regard to whether the parent's privacy interests<sup>41</sup> should give way to the custody determination.

## Conclusion

As it now stands, fifty states, plus the District of Columbia, plus four U.S. territories, plus federal law, means there are fifty-six definitions of a guardian ad litem and its duties. Because family law is an area of law uniquely entrusted to the states,<sup>42</sup> there is no reason to believe this will change without adoption by every state of a uniform law.<sup>43</sup>

What can and should happen, however, is that a guardian ad litem should make his or her function absolutely clear to all those involved in the custody case. There should be no "blanket waivers" handed to parents when the guardian ad litem begins his or her investigation. Rather, a complete and knowing waiver for

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<sup>40</sup> *Roper*, 336 So.2d at 657 (ruling that if the wife had offered the testimony of her treating psychiatrist to prove her mental condition, the patient-psychiatrist privilege would have been waived and the husband on cross-examination could then have inquired as to any relevant communications between his wife and her psychiatrist); *Gil v. Gil*, 2003-Ohio-180, 2003 WL 132447 (Ohio App. Jan. 26, 2003) (holding that the wife waived privilege by filing a counterclaim seeking child custody and by introducing into evidence letters from her treating physicians); *Com. ex rel. Romanowicz v. Romanowicz*, 248 A.2d 238 (Pa. Super. Ct. 1968) (deciding that where the wife in custody proceeding not only consented to, but actually sought introduction of, the testimony of her psychiatrist relating to her own examination and such testimony would have been subject to cross-examination, the court erred in refusing to allow the wife to introduce testimony of the psychiatrist relating to such examination).

<sup>41</sup> *Jaffee*, 518 U.S. at 15 (stating that a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth).

<sup>42</sup> "The regulation of domestic relations is traditionally the domain of state law." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013), citing *In re Burrus*, 136 U.S. 586, 593-94 (1890).

<sup>43</sup> *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 1 (2008) (defining roles and duties of a "child's attorney" and a "best interests" attorney). To date, no jurisdiction has adopted this Act.

each and every physical and mental health professional should be provided and explained to a parent, upon a court determination, after hearing and fact findings, that such a waiver is necessary for the particular case.

Finally, and most importantly, if mental health is at issue, the first resort of the court should be a court-ordered examination, where it is clear that there is no privilege.<sup>44</sup> If mental health is in issue, the first resort should be a court-ordered exam, which is not privileged. As noted by a Florida court,

We recognize that in a child custody case the mental health of a parent may be a relevant issue. Where this issue is raised the trial court must maintain a proper balance, determining on the one hand the mental health of the parents as this relates to the best interest of the child, and on the other maintaining confidentiality between a treating psychiatrist and his patient. The court in this case has an alternate tool which may accomplish both purposes. Upon proper motion the court may order a compulsory psychiatric examination.<sup>45</sup>

Selected factors that might compel such an exam would be a past history of mental health issues that resulted in private or court-ordered evaluations or therapy; a history of domestic violence; a history of parental alienation. Only if the court-ordered

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<sup>44</sup> *E.g.*, *M.M.*, 55 A.3d at 1175 (holding that the “preferred method” is through an evaluation and that the privilege is waived only to specific records); *Kinsella*, 696 A.2d at 583 (ruling that courts must look first for information from a court-appointed evaluator or one hired by the partys); *Kinsella*, 696 A.2d at 584 (requiring the court to examine “whether all other sources of information available to the court are adequate to justify adjudication of the custody and visitation issues without resort to the plaintiff’s therapy records); *Cabrera*, 580 A.2d at 1233 (the “most appropriate” source of information regarding a parent’s mental health is to hire an expert for litigation rather than obtaining the parties’ mental health records from a treating therapist); *Husgen v. Stussie*, 617 S.W.2d 414, 416-17 (Mo. Ct. App. 1981) (holding that the proper source of psychological information regarding a parent in a child custody proceeding is a mental examination rather than by piercing the psychologist-patient privilege); *Simek*, 172 Cal. Rptr. at 568-69 (preferring a court-ordered mental examination over piercing the psychotherapist-patient privilege in a child custody proceeding); *Perry v. Fiumano*, 403 N.Y.S.2d 382, 386-87 (N.Y. App. Div. 1978) (requiring a showing that the information gleaned from an evaluation is inadequate to resolve a child custody issue); *Barker*, 440 P.2d at 139 (declining to hold that the psychological-patient privilege was waived automatically in child custody litigation, indicating that a court-ordered psychological examination was the proper avenue to obtain this data).

<sup>45</sup> *Roper*, 336 So. 2d at 656-57.



exam is inadequate should the guardian ad litem be allowed to pierce the privilege, and only upon a showing that the records or testimony sought is essential to the presentation of the child's best interests. In this way, the expectations of confidentiality recognized by the Supreme Court and relied upon by individuals in therapy can be meaningful.

