

## THE GUARDIAN AD LITEM AS THE CHILD'S PRIVILEGE HOLDER

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*Children in therapy have a strong interest in maintaining the confidentiality of communications with their therapists. Without the assurance of confidential communications, children may not be as open with their therapists, which can make therapy less effective. Although children have privilege rights to their psychotherapist-patient communications just as adults do, their parents generally hold and exercise that privilege. Many courts have recognized that a parent should not hold a child's privilege when the parent and child have divergent interests. This raises the question of who should hold the privilege in the parent's place. In L.A.N. v. L.M.B., the Colorado Supreme Court decided the child's guardian ad litem (GAL) should hold the child's privilege. The court reasoned that the GAL's expertise with the particular child and general duties toward the child's best interests made the GAL the appropriate privilege holder. Although other jurisdictions have also ruled this way, some states have instead allowed the trial court to make decisions regarding a child's privilege. Awarding the privilege to the court raises issues of impartiality, expertise, and judicial economy. Designating the GAL as the privilege holder is a better solution because it ensures that the child receives an advocate on the privilege issue whose only goal is representing the child's best interests.*

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## INTRODUCTION

Approximately four million children in the United States suffer from a major mental illness that significantly impairs their home, school, and social life,<sup>1</sup> and two to four million participate in some sort of outpatient psychotherapy.<sup>2</sup> The communications between these children and their therapists are subject to the psychotherapist-patient privilege and are not typically discoverable in court proceedings.<sup>3</sup> A child's parent typically holds his privilege and can make decisions about whether to reveal therapy communications to other parties.<sup>4</sup> But when a child in therapy becomes embroiled in the court system, particularly through custody battles or dependency and neglect proceedings, information obtained during privileged communications can become a subject of dispute.<sup>5</sup> Parties with competing interests, such as parents in custody disputes or state agencies filing dependency petitions, may have strategic reasons for introducing or suppressing this information.<sup>6</sup> Courts often find that such motivations make the

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1. U.S. PUB. HEALTH SERV., DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 124 (1999), <http://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf> [<http://perma.cc/ZU6Z-9AZZ>].

2. *Id.* at 168.

3. *See, e.g.,* L.A.N. v. L.M.B., 292 P.3d 942, 947 (Colo. 2013) [hereinafter *L.A.N. II*] (noting that the psychotherapist-patient privilege applies to minors); *In re Berg*, 886 A.2d 980, 984 (N.H. 2005) (same); *see also* *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (recognizing the psychotherapist-patient privilege applies in federal courts). It should be noted that all states have "mandatory reporter" statutes, which abrogate the privilege by requiring the therapist to report information to authorities regarding child abuse. *See* Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 851 (2010); *see also, e.g.,* COLO. REV. STAT. § 19-3-311(1) (2014); MICH. COMP. LAWS ANN. § 722.631 (West 2014); N.H. REV. STAT. ANN. § 169-C:32 (West 2015). This Comment does not address abrogation of the privilege in child abuse reporting, but rather deals with the less settled privilege issues that arise in dependency and custody disputes.

4. *See* *People v. Superior Court*, 182 P.3d 600, 611 (Cal. 2008) (describing parents holding a young child's privilege); *Dymek v. Nyquist*, 469 N.E.2d 659, 664 (Ill. App. Ct. 1984) (same); *Berg*, 886 A.2d at 985 (same). *But see* Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAW. 453, 468 (2013) (noting that states vary as to whether parents may access their children's mental health records).

5. *See, e.g.,* *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 955 (Fla. Dist. Ct. App. 2003) (involving a dispute over access to a child's privilege during a dependency proceeding); *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky. Ct. App. 1994) (involving a custody dispute in which the mother sought to introduce privileged material from her son's therapist).

6. *See, e.g.,* *Gil v. Gil*, 892 A.2d 318, 329-31 (Conn. Ct. App. 2006) (as an

parties ineligible to hold a child's privilege.<sup>7</sup> Because a minor child is often not mature enough to hold his own privilege, courts must decide what party in the proceeding has the authority to make privilege decisions on the child's behalf.<sup>8</sup>

In *L.A.N. v. L.M.B.*, the Colorado Supreme Court ruled that a child's guardian ad litem (GAL) should hold the child's psychotherapist-patient privilege when neither the child nor the parent has the authority to do so.<sup>9</sup> The decision recognized the importance of the privilege to the child's therapy<sup>10</sup> and the need for a privilege holder focused on advocating for the best interests of the child.<sup>11</sup> Not all jurisdictions have ruled this way. Some bypass the GAL and instead vest the trial court with the child's privilege.<sup>12</sup> This Comment argues that *L.A.N.*'s assignment of the privilege to the GAL is the better option because, as an advocate for the child's best interests, the GAL can best protect the privilege.<sup>13</sup>

*L.A.N.* arose out of a termination of parental rights proceeding in which a mother sought access to the therapy

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example of a parent attempting to introduce evidence from a child's therapist, claiming it would show that the parent had complied with custody orders); *McCormack v. Bd. of Educ.*, 857 A.2d 159, 161 (Md. Ct. Spec. App. 2004) (stating that, during a civil damages suit, the school board's efforts to prevent the parents from introducing privileged information resulted in a "disappointingly small verdict" for the family).

7. See, e.g., *In re Daniel C.H.*, 269 Cal. Rptr. 624, 629–34 (Cal. Ct. App. 1990) (a dependency proceeding in which the court refused to allow a father to waive the privilege to access therapy information the father believed supported his case); *In re Adoption of Diane*, 508 N.E.2d 837, 840 (Mass. 1987) (noting that when "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").

8. See, e.g., *L.A.N. II*, 292 P.3d at 948; (noting that the child in the case was too young to hold the privilege); *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (same).

9. *L.A.N. II*, 292 P.3d at 950.

10. See *id.* at 947 ("The purpose of the [psychotherapist-patient privilege] is to preserve the 'atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears' necessary for effective psychotherapy.") (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)).

11. *Id.* at 950.

12. See, e.g., *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) (allowing the trial court to make decisions as privilege holder); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 766 (N.Y. Sup. Ct. 2012) (same); *In re Berg*, 886 A.2d 980, 984 (N.H. 2005) (same).

13. *L.A.N. II*, 292 P.3d at 950.

records of her minor daughter, L.A.N.<sup>14</sup> During the dependency and neglect proceedings prior to the termination action, L.A.N.'s therapist wrote to the child's GAL and expressed concerns regarding L.A.N.'s welfare if she were to be reunited with her mother.<sup>15</sup> The GAL shared the letter with the court and the other parties involved in the case,<sup>16</sup> and the Department of Human Services (DHS) eventually moved to terminate the parent-child relationship.<sup>17</sup>

In response, the mother's counsel subpoenaed the therapist to gain access to L.A.N.'s case file, including notes, documents, and recordings of L.A.N.'s counseling sessions.<sup>18</sup> Presumably, the mother hoped to find information that would refute the damaging statements from the therapist's letter.<sup>19</sup> L.A.N.'s therapist moved to quash the subpoena, arguing that the therapy records were protected by the psychotherapist-patient privilege.<sup>20</sup> The trial court held that the court itself could authorize a limited waiver of the privilege because it had allowed and encouraged the therapist to make reports to the court.<sup>21</sup> Nonetheless, the trial court ultimately terminated parental rights.<sup>22</sup>

The mother appealed the termination, arguing that she should have had access to the entirety of the therapist's files on

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14. *Id.* at 946. As in all court proceedings involving children, L.A.N.'s full name is not used for privacy reasons.

15. *People ex rel. L.A.N.*, 296 P.3d 126, 131 (Colo. App. 2011) [hereinafter *L.A.N. I*], *aff'd in part, rev'd in part sub nom. L.A.N. v. L.M.B.*, 242 P.3d 942 (Colo. 2013). The letter quoted specific statements from L.A.N., such as "I'm fine with visits at Mommy's house as long as I don't have to go alone," and "Mommy hurts bodies." *L.A.N. II*, 292 P.3d at 946. For the purposes of the footnotes in this Comment, "*L.A.N. I*" refers to the appellate decision which preceded the Colorado Supreme Court decision in "*L.A.N. II*."

16. *L.A.N. II*, 292 P.3d at 946.

17. *Id.*

18. *Id.*

19. "*The Lay of the L.A.N.: Practical & Ethical Issues Webinar*, COLO. OFF. CHILD'S REPRESENTATIVE at 15:25–55 (Apr. 30, 2013) [hereinafter *OCR Presentation*], <http://www.coloradochildrep.org/the-lay-of-the-l-a-n-practical-ethical-issues-webinar/> [<http://perma.cc/AJN8-8Z76>]. When a parent's fitness as a custodian is questioned, that parent often seeks to introduce evidence from a child's therapy sessions to refute the claim. *See, e.g., In re Berg*, 886 A.2d 980, 982 (N.H. 2005) (involving parents who attempted this strategy); *Nagle v. Hooks*, 460 A.2d 49, 50 (Md. 1983) (same).

20. *L.A.N. II*, 292 P.3d at 946.

21. *Id.* The trial court allowed the mother to depose the therapist, but prevented her from accessing the therapist's entire file. *Id.*

22. *Id.*

her daughter.<sup>23</sup> The appellate court decided that a partial privilege waiver had occurred when the GAL shared the letter, and as a result, the mother was entitled to a portion of the therapist's files.<sup>24</sup> L.A.N.'s GAL and the DHS appealed to the Colorado Supreme Court for a ruling on which party had the authority to waive L.A.N.'s psychotherapist-patient privilege.<sup>25</sup> The state high court ruled that, in a dependency and neglect matter like L.A.N.'s, the GAL is best positioned to assert or waive a child's privilege.<sup>26</sup>

If L.A.N. had been an adult, questions about who could see her privileged records would have been much easier to resolve. As the patient, she would hold her own privilege and could make determinations as to what, if any, information should be disclosed, absent a court order to the contrary.<sup>27</sup> Since L.A.N. was a minor child in the midst of a termination of parental rights proceeding, the issue was much murkier. Who actually had a right to L.A.N.'s therapy records? Her mother, from whose care the court had removed her?<sup>28</sup> Her GAL, charged with advocating for her best interests? Or the juvenile court, the general arbiter of disputes regarding those best interests?<sup>29</sup>

The importance of this decision cannot be overstated. Safeguarding the psychotherapist-patient privilege is vital for successful psychiatric treatment.<sup>30</sup> The psychotherapist-patient privilege functions like other legal privileges in that it prevents confidential communications from being disclosed during legal actions.<sup>31</sup> If patients do not feel they can communicate confidentially with their therapists, they may not be willing to

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 945.

27. James Alexander Tanford, *The Therapist-Patient Privilege: A Brief Guide for Mental Health Professionals*, IND. U. MAURER SCH. L., <http://www.law.indiana.edu/instruction/tanford/web/archive/Psypriv.html> [<http://perma.cc/H798-TBN5>].

28. *L.A.N. II*, 292 P.3d at 945 (noting that during L.A.N.'s initial dependency and neglect proceeding, the juvenile court removed her from her mother's care and placed her with her aunt).

29. *See id.* at 948 (discussing the different options for privilege holder).

30. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); *see* Dorothy W. Cantor, *Patients' Rights in Psychotherapy*, in *PSYCHOLOGIST'S DESK REFERENCE* 181, 181 (Gerald P. Koocher et al. eds., 2d ed. 2005) (noting that confidentiality, which the privilege protects, "is the cornerstone of the psychotherapy process").

31. 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, 500-01 (2009).

fully discuss emotions and circumstances essential for their treatment.<sup>32</sup>

The parent, who is presumed to look after the child's best interests, typically holds the child's psychotherapist-patient privilege.<sup>33</sup> The parent has the authority to decide whether to waive the child's privilege,<sup>34</sup> and as such, the parent controls what information can be disclosed in a court proceeding.<sup>35</sup> However, if the parent's own interests become contrary to those of the child, courts often decide it is no longer appropriate for the parent to hold the privilege.<sup>36</sup> For example, in custody or termination of parental rights proceedings, a parent may have strategic reasons for waiving the privilege. If a parent thinks the child shared something in therapy that makes that parent appear to be a particularly fit custodian of the child, that parent has an incentive to waive the child's privilege in order to gain an advantage over the opposing side.<sup>37</sup> A waiver may not be in the best interest of the child, particularly since disclosure may harm that child's relationship with his therapist and thus impede the treatment.<sup>38</sup>

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32. *Jaffee*, 518 U.S. at 10.

33. See *People v. Superior Court*, 182 P.3d 600, 611 (Cal. 2008) (describing parents holding a young child's privilege); *Dymek v. Nyquist*, 469 N.E.2d 659, 664 (Ill. App. Ct. 1984) (same); *In re Berg*, 886 A.2d 980, 985 (N.H. 2005) (same). *But see* *Ike Vanden Eykel & Emily Miskel, The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAW. 453, 468 (2013) (noting that states vary as to whether parents may access their children's mental health records).

34. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.12.3 (Supp. 2015).

35. See, e.g., *L.A.N. II*, 292 P.3d at 947 (noting that the privilege holder can permit disclosure by waiving the privilege).

36. See, e.g., *L.A.N. II*, 292 P.3d at 948; *People v. Marsh*, No. 08CA1884, 2011 WL 6425492, at \*10 (Colo. App. Dec. 22, 2011); *Berg*, 886 A.2d at 984–88.

37. See *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (“[I]t is patent that [the] custodial parent has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure. . . . [There is a] very real possibility . . . of one of two warring parents exercising the power of veto for reasons unconnected to the polestar rule of ‘best interests of the child.’”).

38. See e.g., *L.A.N. II*, 292 P.3d at 951; *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 960 (Fla. Dist. Ct. App. 2003) (“[F]ailing to permit a mature minor the opportunity to object to the involuntary disclosure of private and intimate details shared with a therapist can only have a negative effect on the minor's relationship with both the therapist and the guardian ad litem . . . .”); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 767 (Sup. Ct. N.Y. 2012); see also *Protecting Your Privacy: Understanding Confidentiality*, AM. PSYCHOL. ASS'N, <http://www.apa.org/helpcenter/confidentiality.aspx> [<http://perma.cc/V3A3-AGA3>] (last visited May 9, 2015) (“Psychotherapy is most effective when you can be open and honest . . . for people to feel comfortable talking about private and revealing information, they need a safe place to talk about anything they'd like, without fear of that

If the parent cannot hold the privilege, courts must decide who should hold it instead.<sup>39</sup> The court has three options as to whom that privilege holder will be: the local DHS, a GAL, or the court itself.<sup>40</sup> Like the parents, the DHS has a potential conflict of interest with the child, so it is also not an appropriate privilege holder.<sup>41</sup> In an adversarial setting, the DHS has duties to bring and defend neglect petitions, which could incentivize it to waive the child's privilege, even if a waiver would not be in the child's best interests.<sup>42</sup> This leaves courts with the option of either the GAL or the trial court.<sup>43</sup>

As the Colorado Supreme Court explained in *L.A.N.*, since the GAL is charged with representing the best interests of the child,<sup>44</sup> the GAL is better positioned to hold the privilege.<sup>45</sup> The *L.A.N.* court further held that the juvenile court should not hold the privilege because doing so would violate its role as a

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information leaving the room.”).

39. Some courts allow the child to hold the privilege if the child demonstrates appropriate maturity. Attorney ad litem for D.K. v. Parents of D.K., 780 So. 2d 301, 307–08 (Fla. Dist. Ct. App. 2001); *Berg*, 886 A.2d at 987. A full discussion of the circumstances under which a mature child should hold his own privilege is beyond the scope of this Comment. However, this Comment does address the possibility that a child will become sufficiently mature over the course of a GAL's representation. See *infra* Section III.B for examples and analysis of jurisdictions awarding the privilege to a mature child for the purposes of this discussion.

40. *L.A.N. II*, 292 P.3d at 948.

41. *Id.* at 948–49.

42. *Id.*

43. See, e.g., *id.* at 950; *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (asserting the GAL should hold the privilege); see also, e.g., *Berg*, 886 A.2d at 984 (N.H. 2005); *Liberatore*, 955 N.Y.S.2d at 766 (asserting that the court should make decisions about whether to assert or waive the privilege).

44. In Colorado and most other states, the GAL is charged with representing the “best interests” of the child, rather than the child himself. See, e.g., CAL. FAM. CODE § 7647.5 (West 2013); COLO. REV. STAT. § 19-1-103(59) (2014); FLA. STAT. § 39.4085(20) (2014); see also Supreme Court of Colo., Chief Justice Directive 04-06(V)(B) (2013), [https://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-06revised3-19-13withattArev3-14.pdf](https://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-06revised3-19-13withattArev3-14.pdf) [<https://perma.cc/7825-3KZ4>] (“The unique statutory responsibilities of a GAL . . . do not set forth a traditional attorney-client relationship between the appointed attorney and the child; instead the ‘client’ of a GAL . . . is the best interests of the child.”). See generally Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996) (discussing different models states have adopted for determining and representing a child's best interests). This differs from the traditional form of representation in that the GAL does not necessarily act in accordance with the child's wishes, but rather makes decisions based on what the GAL believes to be in the child's best interests. *Jones v. McCoy*, 150 So. 3d 1074, 1080 (Ala. Civ. App. 2013).

45. *L.A.N. II*, 292 P.3d at 949–50.



neutral decision-maker between parties.<sup>46</sup> However, not all states view this as a potential conflict, and they consequently assign the privilege to the trial court rather than a GAL.<sup>47</sup>

This Comment argues that the Colorado Supreme Court's decision to award the privilege to the GAL is the better approach. The GAL's role as an independent fact-finder with "duties of loyalty and confidentiality to the child's best interests" allows the GAL to advocate for and protect the privilege in ways that the trial court cannot.<sup>48</sup> Part I describes the function of the GAL in general proceedings and provides context for how the psychotherapist-patient privilege arises in judicial proceedings involving juveniles. Part II discusses how the Colorado Supreme Court confronted these issues in *L.A.N.* and advocates that the court's decision to allocate the privilege to the GAL is preferable to awarding the privilege to the trial court.

Assigning the privilege to the GAL is not a panacea for privilege matters, and *L.A.N.* left several questions unanswered. For example, the decision does not establish a clear framework for determining when to transfer the privilege to the GAL, nor does it address the possibility that a child could achieve sufficient maturity to hold his own privilege.<sup>49</sup> In addition, assigning the privilege to the GAL unleashes a number of other potential problems, including negative impacts on the way the GAL interacts with other professionals in an increasingly collaborative environment<sup>50</sup> and increased importance of competent representation by the GAL.<sup>51</sup> Part III

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46. *Id.* at 949.

47. *See, e.g.*, *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) (allowing the trial court to make decisions as privilege holder); *Liberatore*, 955 N.Y.S.2d at 766 (same); *Berg*, 886 A.2d at 984 (same). *See infra* Section II.B.2 for a discussion of the rationale of these jurisdictions.

48. *L.A.N. II*, 292 P.3d at 950.

49. *Id.* at 948 n.1 (declining to address the issue of how a juvenile court should determine whether a child is able to hold her own privilege since none of the parties asserted that *L.A.N.* was capable of doing so).

50. Candi Mayes et al., *Collaboration vs. Zealous Advocacy: Ethically Inconsistent or Highly Compatible?*, A.B.A. 1–3 (June 9, 2011), [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/CollaborationvsZealousAdvocacyPaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/CollaborationvsZealousAdvocacyPaper.authcheckdam.pdf) [<http://perma.cc/KA62-XURQ>] (discussing the varying roles of different professionals in the juvenile law system and the importance of collaboration).

51. *See L.A.N. II*, 292 P.3d at 950 (noting that a GAL should not share privileged information unless doing so is in the child's best interests, and that, by sharing *L.A.N.*'s therapist's letter, the GAL in *L.A.N.* did in fact waive the child's

discusses these various issues and recommends solutions in light of ways other states have confronted similar problems.

## I. BACKGROUND PIECES: THE GAL, THE PRIVILEGE, AND THE IMPACT OF LITIGATION ON THE PRIVILEGE

The manner in which GALs and the psychotherapist-patient privilege independently interact with the justice system strongly informs the *L.A.N.* decision and juvenile privilege holder case law. This Part provides background information on a GAL's functions during litigation, as well as the ways in which the psychotherapist-patient privilege may become a contested point in that litigation. It first lays out the traditional duties of a GAL, including states' varying approaches to the position, then goes on to discuss the existence of the psychotherapist-patient privilege and its importance in dependency and neglect litigation. Finally, this Part explains why parents often have a conflict of interest concerning their child's privilege and identifies the possible parties a court could designate as the child's privilege holder.

### A. *The GAL*

Most states require courts to appoint GALs to children for all dependency and neglect proceedings.<sup>52</sup> For domestic relations and custody disputes, courts often have discretion as to whether to appoint a GAL, although some states require appointment if abuse is alleged.<sup>53</sup> Once appointed, the GAL

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privilege to at least some information).

52. *Id.* See 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012) (requiring that states receiving federal funding under the Child Abuse Prevention and Treatment and Adoption Reform Act have plans which appoint "in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings"); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 424–25 (2000) (noting that states meet this requirement in a variety of ways, with some mandating that an attorney fill the role and others permitting a non-attorney court-appointed special advocate to serve as GAL).

53. See LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 12:4 (database updated 2015) (noting that states have a variety of ways of determining whether to appoint a GAL in a custody dispute; a GAL is often appointed when abuse has been alleged, when a party requests it, or when the judge finds it appropriate to

represents the best interests of the child.<sup>54</sup> This role differs from the typical attorney-client relationship in that the GAL acts according to what he believes to be in the child's best interests, as opposed to acting on the express wishes of a client.<sup>55</sup> In effect, "the 'client' of a GAL . . . is the best interests of the child," not the child himself.<sup>56</sup>

Nonetheless, ethical guidelines do urge GALs to take the child's wishes into consideration.<sup>57</sup> In Colorado, for example, the Colorado Supreme Court has noted that a determination of the child's best interests "must include consultation with the child in a developmentally appropriate manner and consideration of the child's position."<sup>58</sup> A GAL must consider the wishes of the child, but he is not bound to follow them.

As part of their representation of the child's best interests, GALs in Colorado and the majority of other states serve as "quasi-experts" who investigate the issues in a particular case and make recommendations to the court.<sup>59</sup> A GAL typically interviews the parents and other significant figures in the child's life, visits the child's home, and uncovers any other information related to the judicial proceeding.<sup>60</sup> He then reports these findings to the court and makes appropriate recommendations.<sup>61</sup> Theoretically, as an outside party, a GAL

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do so).

54. See *supra* note 44 and accompanying text.

55. *Id.*

56. Supreme Court of Colo., *supra* note 44.

57. 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN REV. § 16:31 (2d ed. 2004).

58. *Id.*; see also COLO. REV. STAT. §14-10-116(2) (2014) (pertaining to children affected by domestic relations disputes).

59. See Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 46 (2011) (noting that "the investigator role is by far the most common role for the GAL" and GALs often submit dispositional recommendations along with their investigation findings); COLO. REV. STAT. § 19-3-203(3) (2014) (requiring the GAL to make investigations to ascertain facts and to make recommendations to the court concerning the child's welfare).

60. See Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 277-78 (1998) (discussing the GAL's common role as an investigator); see also Boumil et al., *supra* note 59, at 46 (noting that GALs often review documents and interview caregivers, healthcare providers, and education personnel).

61. See 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012) (requiring states receiving federal grant money for child abuse or neglect prevention and treatment programs to have state plans which mandate that GALs obtain a clear understanding of a child's situation and needs and to make recommendation to the court regarding

offers the judge a more objective view of the figures in a child's life than the child's family members could, thus allowing the judge to make a better decision regarding the child's best interests.<sup>62</sup> GALs have also traditionally acted as mental health evaluators, gathering information on the child's age-appropriate development, identifying signs of abuse or neglect, and recommending the child for specific mental health services.<sup>63</sup>

In this investigative role, a GAL comes into contact with a variety of professionals involved in dependency and neglect proceedings, including social workers, mental health professionals, foster parents and other caretakers, school officials, probation officers, and other GALs.<sup>64</sup> Many states go so far as to mandate that the professionals involved in a child's proceeding must work in a collaborative team model.<sup>65</sup> Such a collaborative model, which may provide many benefits regarding efficiency and ingenuity, nevertheless raises concerns about the disclosure of privileged information.<sup>66</sup>

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the child's best interests); IND. CODE § 31-9-2-50 (2014) (providing that GALs research, examine, and monitor the child's situation); MICH. COMP. LAWS ANN. § 712A.17d(1)(d) (West 2014) (requiring GALs to monitor the implementation of case plans and advocate for the child's best interests).

62. See *Gil v. Gil*, 892 A.2d 318, 331 (Conn. App. Ct. 2006) (noting that the court "may appoint a disinterested person to be the guardian ad litem . . . to ensure that the interests of the ward are well represented") (quoting *Cottrell v. Conn. Bank & Trust Co.*, 398 A.2d 307, 309 n.1 (Conn. 1978)). *But see* Lidman & Hollingsworth, *supra* note 60, at 280 (arguing that although the GAL system is meant to provide an objective analysis, since GALs tend to only interview the parents and parties identified by the parents, that analysis is rarely truly objective).

63. Boumil et al., *supra* note 59, at 47.

64. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T. OF JUSTICE, FAMILY DEPENDENCY TREATMENT COURTS: ADDRESSING CHILD ABUSE AND NEGLECT CASES USING THE DRUG COURT MODEL 18–19 (2004), <https://www.ncjrs.gov/pdffiles1/bja/206809.pdf> [<https://perma.cc/9KBA-3YUP>] (discussing the role staffings play in dependency and neglect cases in Suffolk, New York); *see also* *Staffings*, LA. YOUTH SERVS. OFF. JUV. JUST., <http://ojj.la.gov/index.php?page=sub&id=187> [<http://perma.cc/47MY-FDXC>] (describing how staffings operate in Louisiana).

65. See, e.g., FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS 14 (2014), <http://guardianadlitem.org/wp-content/uploads/2014/08/Standards-of-Operation-2014.pdf> [<http://perma.cc/QCK4-XWY4>]; N.C. ADMIN. OFF. CTS. GUARDIAN AD LITEM PROGRAM (2014), [http://www.nccourts.org/Citizens/JData/Documents/Guardian\\_ad\\_Litem\\_Facts.pdf](http://www.nccourts.org/Citizens/JData/Documents/Guardian_ad_Litem_Facts.pdf) [<http://perma.cc/WP22-3RQA>].

66. See *In re Kristine W.*, 114 Cal. Rptr. 2d 369, 372 (Cal. Ct. App. 2001) (involving a controversy over how much information a child's therapist could disclose to the court, when the therapist had been in regular communication with

The licensing requirements for GALs vary between states. Some states allow non-attorneys or volunteer laypeople to serve as GALs,<sup>67</sup> while other states require GALs to be attorneys.<sup>68</sup> In states that allow a volunteer layperson to serve as a GAL, a licensed attorney is sometimes assigned to the child as well.<sup>69</sup> If a GAL is licensed to practice law, some states allow that person to serve as both the GAL and the child's attorney.<sup>70</sup> In Colorado, GALs in custody disputes and dependency and neglect proceedings must be attorneys.<sup>71</sup>

### *B. Recognition and Importance of the Psychotherapist-Patient Privilege*

Mental health professionals generally agree that psychotherapist-patient confidentiality is essential to successful treatment.<sup>72</sup> Psychologists have a professional

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the child's social worker). *See infra* Section III.A.2 for further discussion.

67. States that permit non-attorneys to serve as GALs typically require prospective volunteers to undergo thirty to forty hours of training, a background check, and six to ten hours of recertification training every year. *See, e.g., Becoming a Volunteer*, MINN. ST. GUARDIAN AD LITEM BOARD, [http://mn.gov/guardian-ad-litem/volunteer/Becoming\\_a\\_Volunteer.jsp](http://mn.gov/guardian-ad-litem/volunteer/Becoming_a_Volunteer.jsp) [<http://perma.cc/6BUP-ESXB>]; *Volunteer Duties Description*, N.C. CT. SYS., <http://www.nccourts.org/Citizens/GAL/Duties.asp> [<http://perma.cc/Q8MT-AKWR>]; *Volunteer FAQ*, FLA. GUARDIAN AD LITEM PROGRAM, <http://guardianadlitem.org/faq/> [<http://perma.cc/NL88-6N7W>]; MINN. STATE GUARDIAN AD LITEM BOARD, POLICY NO. 4: GUARDIAN AD LITEM PROGRAM REQUIREMENTS AND GUIDELINES (2011), <http://mn.gov/guardian-ad-litem/images/Policy%2520No%252E%25204%2520Final.pdf> [<http://perma.cc/DM65-YWMF>]; 2 KRAMER, *supra* note 57, § 16:31.

68. *See e.g.*, COLO. REV. STAT. ANN. § 19-3-203(1) (West, Westlaw through the First Regular Session of the 70th General Assembly (2015)); NEB. REV. STAT. ANN. § 43-272(3) (West 2015); WIS. STAT. § 767.407(3) (2014).

69. *Compare* N.C. GEN. STAT. § 7B-601 (2014) ("In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding.") with FLA. GUARDIAN AD LITEM PROGRAM, *supra* note 65, at 7 (distinguishing between a "Child's Best Interest Attorney," whose "client is the GAL Program, whose sole function is to independently advocate for the best interest of . . . children appointed to the Program by the court" and an "Attorney ad Litem," "who is appointed by the Court to represent the child. An attorney-client relationship exists between the AAL and the child.").

70. *See e.g.*, NEB. REV. STAT. ANN. § 43-272(3) (West 2015); TEX. FAM. CODE ANN. § 107.011(b)(3) (West 2014).

71. COLO. REV. STAT. § 19-1-103(59) (2014) (requiring GALs in dependency and neglect proceedings to be attorneys who are licensed to practice in Colorado); COLO. REV. STAT. § 14-10-116(1) (2014) (noting that during domestic relations cases, the court may appoint a legal representative of the child's best interests who is an attorney licensed to practice in Colorado).

72. *See* Cantor, *supra* note 30, at 181 ("Confidentiality is the cornerstone of

ethical duty of confidentiality to their patients,<sup>73</sup> and statutes and common law give that confidential relationship legal effect by defining it as a privileged relationship, much like an attorney-client relationship.<sup>74</sup> In *Jaffee v. Redmond*, the Supreme Court recognized that the need for the privilege outweighed the need for probative evidence in a legal proceeding.<sup>75</sup> The Court acknowledged that patients in therapy often reveal deeply personal emotional and factual details that may cause great embarrassment or fear.<sup>76</sup> Without the confidential protection of privilege, patients will be less likely to share those details, which ultimately hinders successful treatment.<sup>77</sup>

Several independent studies confirm the Court's assertion.<sup>78</sup> In 2003, Jennifer Evans Marsh conducted a study in which she presented participants with a set of hypothetical, emotionally-stressful situations.<sup>79</sup> She then asked participants whether they would disclose confidential information about

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the psychotherapy process."); Paruch, *supra* note 31, at 500–01. *See also* David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 PROF. PSYCHOL. 15, 15 (1986) (describing research that found that when patients are told their personal information may be disclosed, they give more socially desirable responses and demonstrate fewer psychopathological symptoms, but when they are told their information is confidential, they provide more "open" responses).

73. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 7 (2010), <http://www.apa.org/ethics/code/principles.pdf> [<http://perma.cc/L22G-JRH3>].

74. *See* Paruch, *supra* note 31, at 512–21 (discussing the development of the statutory and common law recognition of the privilege); *see also* *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (comparing the psychotherapist-patient privilege to the attorney-client privilege).

75. *Jaffee*, 518 U.S. at 9–10.

76. *Id.* at 10.

77. *Id.*

78. Daniel W. Shuman et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L J.L. & PSYCHIATRY 393, 415–16 (1986) (noting that removing the guarantee of privileged communications did not deter everyone from participating in therapy, but it did produce a "statistically significant reduction" in participants' willingness to discuss a variety of issues with therapists); *see also id.* at 420 (describing the results of a study that found that when patients were told that their communications with their therapist were not privileged, average willingness to discuss sexual fantasies dropped from 84% to 47%, average willingness to discuss work failure dropped from 93% to 51%, and average willingness to discuss physical violence dropped from 92% to 57%, among other drops). Miller & Thelen, *supra* note 72, at 18 (reporting a study that found that only 15% of study subjects said they would discuss non-confidential information).

79. Paruch, *supra* note 31, at 526.

those situations with a therapist.<sup>80</sup> She told one group of participants that the therapist-patient privilege was in place and the other group that their communications would not be privileged.<sup>81</sup> Evans Marsh found “statistically significant differences” between the willingness of the groups to disclose information, and she ultimately concluded that the Court’s assertion in *Jaffee* had “strong empirical support.”<sup>82</sup> Another study conducted with a group of undergraduates found that when researchers placed participants in a “non-privileged” group, the participants were more likely to tell their therapist that they did not suffer psychopathological symptoms.<sup>83</sup> In contrast, participants placed in the “privilege” group “provided fewer socially desirable responses,” and were more likely to tell their therapists that they did suffer from psychopathological symptoms.<sup>84</sup>

Children have a particular need for confidentiality in therapy, a need which is magnified for a child involved in a dependency and neglect proceeding.<sup>85</sup> A child may fear that revealing negative information about his family will cause the therapist to disclose the information to the court, and by extension, his parents.<sup>86</sup> This fear may cause that child not to be open with a therapist.<sup>87</sup> Consequently, as the *Jaffee* Court and numerous other mental health professionals have concluded, the child will not receive the intended benefits of that therapy.<sup>88</sup> Similarly, any disclosures actually made can

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80. *Id.*

81. *Id.* at 526–27.

82. *Id.* at 527.

83. *Id.* at 529 (citing a study cited in Howard B. Roback & Mary Shelton, *Effects of Confidentiality Limitations on the Psychotherapeutic Process*, 4 J. PSYCHOTHERAPY PRAC. & RES. 185, 189 (1995)).

84. *Id.*

85. Margaret Hunter-Smallbone, *Child Psychotherapy for Children Looked After by Local Authorities*, in THE HANDBOOK OF CHILD & ADOLESCENT PSYCHOTHERAPY 316, 317 (Monica Lanyadho & Ann Horne eds., 2d ed. 2009) (noting that there is a particular need to build trust and provide ongoing support for children in public care).

86. *See In re Daniel C.H.*, 269 Cal. Rptr. 624, 631 (Cal. Ct. App. 1990).

87. *Id.*

88. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). *See also Daniel C.H.*, 269 Cal. Rptr. at 631 (noting that a child may not share information necessary for treatment with a therapist if the child fears the therapist will disclose the information to other family members); JOHN A. ZERVOPOULOS, CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL GUIDE TO RELIABILITY AND EXPERTS IN FAMILY LAW 182 (2008) (“The mere possibility that [personally sensitive concerns] will be disclosed outside the psychotherapy relationship may impede development

damage the child's relationship with other family members.<sup>89</sup> Revealing what a child has said about family members during therapy may put strain on those relationships and can hinder a family trying to move toward reunification during a dependency and neglect proceeding.<sup>90</sup>

Because the protection of the psychotherapist-patient privilege is so important to successful treatment, and because disclosures present significant problems for children, it is imperative that the child's privilege is only waived when it is in the child's best interests.<sup>91</sup> As the next Section illustrates, designating who should make such privilege decisions creates its own set of difficulties.

### C. *The Impact of Litigation on a Child's Privilege*

In the typical psychotherapist-patient relationship, the patient holds the privilege.<sup>92</sup> When the patient is incompetent, whether because of age, mental disorder, or other reason, generally the patient's guardian serves as the privilege holder.<sup>93</sup> For a child patient, the parent normally holds the privilege.<sup>94</sup> However, if the parent's interests come into conflict with the child's interests, the parent is no longer an

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of the confidential relationship necessary for successful treatment"); Kathryn E. Gustafson & J. Regis McNamara, *Confidentiality with Minor Clients: Issues and Guidelines for Therapists*, 18 PROF. PSYCHOL. 503, 505 (1987) ("An adolescent not guaranteed confidentiality may decide not to enter therapy or may reluctantly participate without disclosing his or her concerns.").

89. See David Wolowitz & Jeanmarie Papelian, *Minor Secrets, Major Headaches: Psychotherapeutic Confidentiality After Berg*, 48 N.H. B.J. 24, 26–27 (2007) (noting the conflict that may arise with family members when a therapist refuses to disclose information).

90. Bernard P. Perlmutter, *More Therapeutic, Less Collaborative? Asserting the Psychotherapist-Patient Privilege on Behalf of Mature Minors*, 17 BARRY L. REV. 45, 48 (2011).

91. See *L.A.N. II*, 292 P.3d 942, 950 (Colo. 2013) (noting that a child's privilege must not be waived unless it is in his best interests).

92. Tanford, *supra* note 27.

93. See, e.g., CAL. EVID. CODE § 1013 (West 2015) (delegating the ability to waive privilege to the incompetent patient's guardian); CONN. GEN. STAT. § 52-146c (2015) (same); MD. CODE ANN., CTS. & JUD. PROC. § 9-109(C) (West 2014) (same); OHIO REV. CODE ANN. § 2317.02(B)(1) (West 2014) (same). A child's "guardian" is a different entity than a "guardian ad litem." A "guardian" acts for a person incapable of managing his own affairs. 39 AM. JUR. 2D *Guardian and Ward* § 1, Westlaw (database updated Aug. 2015). Parents are typically the guardians of their children, *id.* § 5, although a court may provide for the judicial appointment of another party, *id.* § 19.

94. *L.A.N. II*, 292 P.3d at 948; *In re Berg*, 886 A.2d 980, 985 (N.H. 2005).



appropriate person to hold that privilege.<sup>95</sup> In both custody and neglect proceedings, one parent may have an incentive to waive or assert the child's privilege for the purpose of gaining an advantage over another party.<sup>96</sup> Controlling disclosure of therapy information may benefit a parent in litigation, but those benefits may not be in line with the child's best interests.<sup>97</sup> In fact, during a custody proceeding, "it can be said the interests of [the] parents become potentially, if not actually, adverse to the child's interest."<sup>98</sup> The parent is no longer the best person to hold the privilege because of the temptation to waive the child's privilege in favor of the parent's own interests.<sup>99</sup>

Since the parent can no longer hold the privilege in these situations, courts must determine which party should be deemed the privilege holder instead:<sup>100</sup> the juvenile court or the GAL.<sup>101</sup> Part II examines the costs and benefits of each option and argues that the GAL is the best choice.

## II. THE GAL SHOULD HOLD THE PRIVILEGE

In *L.A.N.*, the Colorado Supreme Court grappled with the question of who should hold the child's privilege when it is not appropriate for the child or parent to do so.<sup>102</sup> The court considered the consequences of either the trial court or the GAL holding the privilege and ultimately rejected the

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95. *Berg*, 886 A.2d at 984–86; *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky. Ct. App. 1994).

96. *Bond*, 887 S.W.2d at 560.

97. *Id.*

98. *Id.* Although *Bond* concerned a custody dispute, the court also cited with approval a dependency and neglect case in which the court awarded the privilege to a GAL. *Id.* (citing *In re Adoption of Diane*, 508 N.E.2d 837 (Mass. 1987)).

99. *Id.* See also *In re Daniel C.H.*, 269 Cal. Rptr. 624, 631 (Cal. Dist. Ct. App. 1990) (holding that any forced disclosure could cause emotional harm to the child).

100. *L.A.N. II*, 292 P.3d 942, 948. (Colo. 2013). The Department of Human Services is not an appropriate option because, like the parent, the DHS's adversarial role in proceedings could conflict with advocacy of the child's best interests. *Id.* at 948–49.

101. Boumil, et al., *supra* note 59, at 59. See, e.g., *Bond*, 887 S.W.2d at 561; *In re Berg*, 886 A.2d 980, 987 (N.H. 2005); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 765–66 (N.Y. Sup. Ct. 2012) (holding that the trial court should make privilege determinations, including the possibility of appointing a GAL at its discretion). *But see In re S.A.*, 106 Cal. Rptr. 3d 382, 388–89 (Cal. Ct. App. 2010); *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (holding that the court must appoint a GAL to exercise privilege).

102. *L.A.N. II*, 292 P.3d at 950.

former.<sup>103</sup> Rather, it concluded that the GAL should hold the privilege because doing so falls within the GAL's range of duties and because the GAL's advocacy efforts can best protect the privilege.<sup>104</sup> Not all states have come to this conclusion, and several instead award the privilege to the trial court.<sup>105</sup> This Part gives an overview of both sets of jurisdictions, analyzes the rationale behind each system, and concludes that awarding the privilege to the GAL is better than awarding it to the trial court. Section A examines the Colorado Supreme Court's decision to award the privilege to the GAL in *L.A.N.* Section B looks at other jurisdictions that award the privilege to the GAL and contrasts them with other states' decisions to award the privilege to the trial court. Finally, Section C explains why the GAL is the best option to designate as privilege holder.

A. *L.A.N.'s Recognition of the GAL as the Preferred Privilege Holder*

In *L.A.N.*, the Colorado Supreme Court held that the GAL, an objective party charged with advocating for the child's best interests, is the best option to hold the privilege when neither the parent nor the immature child can do so. The court also explained why the DHS, the juvenile court, and the child (in that case)<sup>106</sup> were not appropriate choices.<sup>107</sup>

*L.A.N.* arose out of a termination of parental rights action.<sup>108</sup> In December 2008, *L.A.N.*'s mother brought *L.A.N.* to a Denver hospital because *L.A.N.* had exhibited out-of-control behavior and made several suicidal statements.<sup>109</sup> At the time, *L.A.N.* was seven years old.<sup>110</sup> Hospital staff informed the

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103. *Id.* at 949.

104. *Id.* at 950.

105. *Bond*, 887 S.W. 2d at 561 (allowing the trial court to make decisions as privilege holder); *Liberatore*, 955 N.Y.S.2d at 766 (same); *Berg*, 886 A.2d at 984 (same).

106. The Colorado Supreme Court explicitly noted that because no party argued that *L.A.N.* was mature enough to hold her own privilege, the court's decision only addressed the choice of an immature child's privilege holder. *L.A.N. II*, 292 P.3d at 948 n.1. Section III.B *infra* addresses how courts have handled awarding a mature minor's privilege, and the costs and benefits of those approaches.

107. *L.A.N. II*, 292 P.3d at 950.

108. *Id.* at 945.

109. *Id.*

110. *Id.*

mother that they were considering moving the child to a mental health facility.<sup>111</sup> After hearing the hospital staff's plan, the mother attempted to flee.<sup>112</sup> The Denver DHS filed a dependency and neglect petition, and the court appointed a GAL to represent the best interests of L.A.N.<sup>113</sup> The court removed the child from her mother's care and placed her with her aunt.<sup>114</sup> Three months later, the juvenile court adjudicated L.A.N. as dependent and neglected.<sup>115</sup>

After the adjudication, L.A.N. began working with a therapist, creating the psychotherapist-patient relationship that would become the focus of subsequent litigation.<sup>116</sup> In February 2010, the therapist wrote a letter to the child's GAL in which she discussed her sessions with L.A.N., provided examples of direct quotations from L.A.N., and assessed the child's progress.<sup>117</sup> Based on a number of statements L.A.N. had made in therapy, the therapist expressed concern over the possibility of L.A.N. reuniting with her mother.<sup>118</sup> The GAL subsequently distributed the letter to the juvenile court and to all parties involved in the dependency and neglect case.<sup>119</sup> No party made any mention of the psychotherapist-patient privilege.<sup>120</sup> Several months later, the DHS moved to terminate the parent-child relationship.<sup>121</sup> In response, the mother subpoenaed the therapist to produce her case file on L.A.N.<sup>122</sup> The therapist refused, claiming psychotherapist-patient

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111. *Id.*

112. *Id.*

113. *Id.* Once a dependency and neglect petition has been filed, the court is required to appoint a GAL for the child. COLO. REV. STAT. ANN. § 19-3-203 (West, Westlaw through the First Regular Session of the 70th General Assembly (2015)).

114. *L.A.N. II*, 292 P.3d at 945.

115. *Id.* The court's opinion made no mention of L.A.N.'s father.

116. *Id.* at 946.

117. *Id.*

118. *L.A.N. I*, 296 P.3d 126, 131 (Colo. App. 2011). Examples of L.A.N.'s statements include: "Mommy hurts bodies," and "I'm fine with visits at Mommy's house as long as I don't have to go alone." *L.A.N. II*, 292 P.3d at 946.

119. *L.A.N. II*, 292 P.3d at 946.

120. *Id.*

121. *Id.* In Colorado, a court may terminate parental rights if the child has been adjudicated dependent or neglected, the parent has not reasonably complied with the treatment plan put in place by the court, and the parent's conduct is unlikely to change within a reasonable time. COLO. REV. STAT. § 19-3-604(1)(c) (2014).

122. *L.A.N. II*, 292 P.3d at 946. Presumably, the mother wanted to uncover information from the therapy sessions that would refute the damaging statements in the therapist's letter.

privilege.<sup>123</sup> In response, the juvenile court authorized a limited waiver of the child's privilege, including a deposition of the therapist, but not access to her full records.<sup>124</sup> The juvenile court reasoned that since it had allowed and encouraged the therapist to provide information on the child's therapy, the juvenile court itself could authorize a limited waiver of the child's privilege.<sup>125</sup> Eventually, the juvenile court terminated the parent-child relationship.<sup>126</sup>

On appeal, the mother argued that the juvenile court's waiver should have allowed her access to L.A.N.'s entire file from the therapist.<sup>127</sup> The Colorado Court of Appeals found that by distributing the therapist's letter to all parties, the GAL, not the juvenile court, had waived L.A.N.'s privilege.<sup>128</sup> As a result, the waiver was likely broader than the juvenile court believed it to be.<sup>129</sup>

When the case came before the Colorado Supreme Court, the parties asked for a ruling as to who actually had the authority to waive the privilege.<sup>130</sup> The court rejected the idea that the DHS should hold the privilege. Like a parent, the DHS had an adversarial role in the proceeding, and its interests could similarly come into conflict with the child.<sup>131</sup> The court commented in a footnote that since none of the parties had argued that L.A.N. could hold her own privilege, the court did not need to consider the issue.<sup>132</sup> The court was thus left with two choices for the privilege holder: the GAL or the juvenile trial court.<sup>133</sup>

Ultimately, the court decided that the GAL "is in the best

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123. *Id.*

124. *Id.*

125. *L.A.N. I*, 296 P.3d 126, 131 (Colo. App. 2011).

126. *L.A.N. II*, 292 P.3d at 946.

127. *Id.*

128. *Id.* (citing *L.A.N. I*, 296 P.3d at 131–32).

129. *L.A.N. I*, 296 P.3d at 135 (noting that the waiver "extended at least to all material in the therapist's filed [sic] that supported, related to, or contradicted the therapist's statements and opinions as presented in the February 18 letter and the therapist's testimony at the hearing").

130. *L.A.N. II*, 292 P.3d at 948.

131. *Id.* at 948–49. As the party who brings and defends the neglect petition, the DHS is directly opposed to the parents in litigation. *Id.*

132. *Id.* at 948 n.1. L.A.N. would have been eleven years old at the time the court heard oral arguments. *Id.* at 945 (L.A.N. was seven years old in December 2008).

133. *Id.* at 948.

position to hold the privilege.”<sup>134</sup> As a representative of the child’s best interests, the GAL’s professional duties “serve the privacy interest of the psychotherapist-patient privilege . . . because the GAL must refrain from revealing privileged information if doing so would be contrary to the child’s best interests.”<sup>135</sup> The court also found that the GAL’s ongoing relationship with the case, as well as the GAL’s constant duty to gather information relating to the best interests of the child, made the GAL the best choice for the privilege holder.<sup>136</sup>

In contrast, the court found that it would not be appropriate to designate the juvenile court as the child’s privilege holder. Most importantly, doing so would interfere with the court’s role as an independent decision-maker.<sup>137</sup> While the juvenile court must consider the best interests of the child throughout a proceeding, “its role is not to *represent* the best interests of the child.”<sup>138</sup> The decision also noted that awarding the privilege to the GAL would be more efficient for the juvenile court, since the GAL would have already done all the necessary investigative work to make an appropriate privilege decision.<sup>139</sup> If the juvenile court held the privilege, it would unnecessarily duplicate the GAL’s work.<sup>140</sup>

The rationale for the Colorado Supreme Court’s decision strongly emphasized the duties a GAL has as an advocate for a child’s best interests.<sup>141</sup> A child’s interests are clearly implicated by the disclosure of therapy communications,<sup>142</sup> so the court’s choice to assign the privilege to the party charged with protecting those interests is appropriate.<sup>143</sup> The next Section addresses the rationales other states have used in allocating the privilege to either the GAL or the juvenile court.

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134. *Id.* at 950.

135. *Id.*

136. *Id.*

137. *Id.* at 949.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.* at 950.

142. *See id.* at 947 (discussing the importance of the privilege).

143. *Id.* at 950 (noting that the professional duties of the GAL require the GAL to “refrain from revealing privileged information if doing so would be contrary to the child’s best interests”).

### B. Possible Privilege Holders

As *L.A.N.* noted, a trial court has two primary options for assigning the privilege: the GAL and the trial court.<sup>144</sup> This Section analyzes these possibilities in turn and presents examples of jurisdictions that have adopted each.

#### 1. Jurisdictions Awarding the Privilege to the GAL

Several jurisdictions have chosen to uniformly assign the child's privilege to a GAL, just as the *L.A.N.* court did. For example, Maryland's highest state court held in *Nagle v. Hooks* that when the parent's interests conflict with the child's, and the child is too young to assert the privilege, "the court must appoint a guardian to act, guided by what is in the best interests of the child."<sup>145</sup> The *Nagle* court emphasized the importance of having an actual representative exercise the privilege.<sup>146</sup> Similarly, the Connecticut Court of Appeals recognized that when a parent's interests conflict with the child's, the appointed GAL "[is] in the best position to evaluate and to exercise the child's confidentiality rights."<sup>147</sup> Courts that assign the privilege to the GAL typically note that the purpose of the GAL is to "ensure that the interests of the ward are well represented,"<sup>148</sup> just as the *L.A.N.* court did.<sup>149</sup>

Interestingly, rather than leaving the matter up to the courts, Alaska, California, and Massachusetts have enacted statutes requiring the GAL to hold the privilege when the child patient is not capable of holding it himself.<sup>150</sup> Under these statutes, when privilege issues arise in a court proceeding, the judge makes a decision based on the arguments from the GAL

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144. *Id.* at 948. Since assigning the privilege to a DHS would create the same problems as assigning the privilege to the child's parents, *id.* at 948–49, and since the author has found no jurisdictions that award the privilege to a DHS, this Comment will proceed considering only the GAL and the trial court as options.

145. *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983).

146. *Id.* at 50 (quoting the lower court's discussion of the necessity of designating a representative for the privilege issue).

147. *Gil v. Gil*, 892 A.2d 318, 325 (Conn. App. Ct. 2006).

148. *Id.* at 324; *see also Nagle*, 460 A.2d at 51 (discussing the importance of having a third party to advocate for the child's best interests).

149. *L.A.N. II*, 292 P.3d at 950.

150. 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 ch. 233 § 20B (2014).

privilege holder and the opposing party.<sup>151</sup> This allows the judge to weigh the arguments and make a neutral decision.

Part III of this Comment contains a fuller discussion of the rationale and benefits of designating the GAL as privilege holder. The next Subsection gives an overview of jurisdictions awarding the privilege to the trial court and analyzes their rationale for doing so.

## 2. The Trial Court as Privilege Holder

When a conflict of interest arises between a parent and child, some jurisdictions designate the trial court as privilege holder.<sup>152</sup> Courts typically justify these actions by finding that decisions concerning privilege should be treated the same as other matters affecting the best interests of the child.<sup>153</sup> Since trial courts make determinations as to a child's best interests on custody and other matters, appellate courts in these jurisdictions reason that the trial court should also make determinations about whether a child's privilege should be waived.<sup>154</sup>

The New Hampshire Supreme Court's *In re Berg* decision to assign the privilege to the trial court reflects this reasoning.<sup>155</sup> In *Berg*, the respondent-father tried to access his children's therapy records to look for evidence to aid him in a custody dispute with the children's mother.<sup>156</sup> The court

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151. See, e.g., *Simone H. v. State Dep't of Health & Soc. Servs.*, 320 P.3d 284, 288 (Alaska 2014) (describing the procedure that an Alaskan court uses to determine whether the need for disclosure outweighs the child's interest in confidentiality, as argued by the privilege holder); *In re Kristine W.*, 114 Cal. Rptr. 2d 369 (Cal. Ct. App. 2001) (example of a California court deciding a privilege waiver question after hearing arguments from a child's attorney asserting the privilege and a state agency seeking to waive the privilege).

152. See, e.g., *In re Berg*, 886 A.2d 980, 987 (N.H. 2005) (awarding the privilege waiver decision to the court); *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) (same); *In re the Marriage of Khan v. Ansar*, No. A09-977, 2009 WL 4040862, at \*11 (Minn. Ct. App. Nov. 24, 2009) (same); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 766-67 (N.Y. Sup. Ct. 2012) (same).

153. See, e.g., *Carney v. Carney*, 525 So. 2d 357, 358 (La. Ct. App. 1988); *Liberatore*, 955 N.Y.S.2d at 766 (citing *Perry v. Fiumano*, 403 N.Y.S.2d 382 (N.Y. App. Div. 1978)).

154. See, e.g., *Liberatore*, 955 N.Y.S.2d at 766.

155. *Berg*, 886 A.2d at 987.

156. *Id.* at 982-83. The children, aged eleven to seventeen, had alleged instances of inappropriate conduct by their father and other reasons for not wanting to visit him. *Id.* at 982. Their mother, who was the primary custodian, had placed them in individual therapy to address the issue. *Id.*

appointed a GAL to represent the children's best interests throughout the proceedings.<sup>157</sup> In response to the father's attempts to access his children's therapy files, the GAL moved to seal the children's records.<sup>158</sup> The New Hampshire Supreme Court found that since the parents' interests in this case could conflict with the children's interests, neither parent had the exclusive right to assert or waive the privilege.<sup>159</sup> Instead, the court found that the trial court had the ability to do so.<sup>160</sup>

In justifying this decision, the New Hampshire Supreme Court underscored the "authority and discretion" the trial court possessed in making best-interests determinations for the child.<sup>161</sup> Although the decision acknowledged that the trial court could consider the opinion of the child and the GAL, it emphasized that the trial court would ultimately come to its own determination.<sup>162</sup> In keeping with this deference, the decision also affords the trial court wide discretion as to the procedure by which privilege determinations should be made.<sup>163</sup> The trial court may make an *in camera* inspection of the records itself, allow a GAL representing the child's interests to do so, or not examine the records at all.<sup>164</sup> *Berg's* emphasis on the "sound discretion" of the trial court reflects a deference to the trial court's ability to make appropriate decisions based on its understanding of the child's best interests.

This belief is further reflected in the manner the opinion frames the appointment of a GAL. Although the New Hampshire Supreme Court noted that the trial court could utilize the opinion of a GAL in making a privilege determination, the Court commented that a GAL who viewed a child's therapy records for privilege issues might provide a

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157. *Id.* at 983.

158. *Id.*

159. *Id.* at 987.

160. *Id.* The New Hampshire Supreme Court did not decide whether the records should be sealed or not, although it noted the risk of disclosure to the children. *Id.* at 986. The state high court remanded to the trial court, *id.* at 982, to allow it to consider what procedure it would use to determine if the privilege should be waived or asserted, *id.* at 987–88.

161. *Id.* at 987.

162. *Id.* at 987–88 (noting that the court had discretion to give weight to a mature child's preference); *see also id.* at 988 (noting that the trial court could appoint a GAL to assist in investigation of privilege issues).

163. *Id.* at 987.

164. *Id.* at 988.



tainted recommendation regarding other matters before the court, such as custody or visitation.<sup>165</sup> Should this concern arise, the decision proposed appointing a separate GAL who would only investigate and report on privilege issues.<sup>166</sup> Interestingly, the decision does not address the possibility that the *judge's* opinion on other issues might be tainted by viewing a child's privilege records. This discrepancy again reflects a belief in the ability of trial courts to consistently make appropriate decisions in the child's best interests.

Several state appellate courts have similarly found that the trial court's expertise in deciding the best interests of the child justifies allowing the court to make privilege determinations. For example, in *Liberatore v. Liberatore*, the Supreme Court of Monroe County in New York noted that privilege decisions should be made in the best interests of the child,<sup>167</sup> and that the trial court had the duty to determine the best interests of the child in a custody matter.<sup>168</sup> As such, the *Liberatore* court agreed with the *Berg* court that "the trial court has the authority and discretion to determine whether assertion or waiver of the privilege is in the child's best interests."<sup>169</sup> Applying this principle, the *Liberatore* court focused on the damage that disclosure would do to the child's therapeutic relationship and ultimately held that disclosure would not be in the child's best interests.<sup>170</sup> Similarly, in *Carney v. Carney*, Louisiana's Court of Appeal reasoned that the privileged material should be treated like other factors a court considers when determining the best interests of the child.<sup>171</sup> Therefore, when a trial court finds privileged information to be relevant to making custody decisions in the best interests of the child, the court may waive a child's privilege.<sup>172</sup>

In *Bond v. Bond*, the Kentucky Court of Appeals went even further than other state courts, finding that involvement in a custody dispute resulted in an *automatic* waiver of the

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165. *Id.*

166. *Id.*

167. *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 766 (N.Y. Sup. Ct. 2012) (citing *Perry v. Fiumano*, 403 N.Y.S.2d 382 (N.Y. App. Div. 1978)).

168. *Id.*

169. *Id.* (quoting *In re Berg*, 886 A.2d at 984).

170. *Id.* at 769.

171. *Carney v. Carney*, 525 So. 2d 357, 358 (La. Ct. App. 1988).

172. *Id.* at 359.

psychotherapist-patient privilege for both parents and children.<sup>173</sup> The *Bond* court recognized that the child might not want to have privileged information revealed, but the court decided that the need for relevant information on the child's mental health was necessary for making a decision as to her best interests.<sup>174</sup> The court did not question *if* privileged material should be disclosed, but rather *what* privileged material should be disclosed.<sup>175</sup> Unlike the *Berg* and *Liberatore* courts, which noted that the trial court had discretion to waive or assert the privilege depending on the facts of a case,<sup>176</sup> the *Bond* court assumed privileged material would be relevant and waived privilege as a general matter.<sup>177</sup> Much like the *Berg* court, the *Bond* court gave the trial court broad discretion to decide the method by which it accessed the privileged information, allowing it to conduct *in camera* reviews of the file, interview the therapist, or even appoint a GAL to investigate and make recommendations.<sup>178</sup>

These decisions illustrate the rationale for awarding the privilege to the trial court, concluding that trial courts inherently have the authority, expertise, and discretion to make privilege decisions.<sup>179</sup> However, these decisions neither take into account that the trial court's role as neutral decision-maker could be compromised, nor do they give appropriate weight to the expertise of the GAL.

### C. *The GAL is the Best Choice for Privilege Holder*

By allowing the GAL to decide privilege issues instead of the juvenile court, courts avoid the neutrality, expertise, and efficiency problems that the *L.A.N.* court identified.<sup>180</sup> As such, the GAL is in the best position to hold the child's privilege.

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173. *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994).

174. *Id.*

175. *Id.*

176. *In re Berg*, 886 A.2d 980, 987 (N.H. 2005) (noting that the trial court "must engage in fact-finding to determine whether waiver or assertion of the privilege is in the best interests of the child"); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 766 (N.Y. Sup. Ct. 2012) (contemplating that the court would authorize either a waiver or an assertion of the privilege).

177. *Bond*, 887 S.W.2d at 561.

178. *Id.*

179. *See, e.g., Carney v. Carney*, 525 So. 2d 357, 358–59 (La. Ct. App. 1988); *Berg*, 886 A.2d at 987.

180. *L.A.N. II*, 292 P.3d 942, 949 (Colo. 2013).

Although allocating privilege determinations to the trial court may seem to protect the child's interests by ensuring a neutral decision-maker makes waiver decisions, giving privilege decisions to the trial court actually compromises the objectiveness of the judge by making the judge a party to the dispute.<sup>181</sup> Several jurisdictions that allocate privilege decisions to the trial court frame the privilege waiver as one of fairness.<sup>182</sup> They reason that waiving the privilege provides the judge with more information, which naturally makes other decisions, such as custody, more in line with the best interests of the child.<sup>183</sup> However, doing so removes the privilege issue from the benefits and protections of the adversary system by depriving the child of an advocate who can advance his interests regarding what information should and should not be disclosed.<sup>184</sup> Our adversary system relies on individual parties to put forth their best arguments so that the judge, as neutral decision-maker, can weigh the opposing arguments and interests to come to an equitable solution.<sup>185</sup> Assigning the privilege to the GAL preserves this system and ensures that the child's best interests are satisfactorily represented. If a court holds the child's privilege, it risks "injecting the juvenile

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181. *Id.* See also *Commonwealth v. Oliveira*, 780 N.E.2d 453, 462 (Mass. 2002) ("It is not appropriate for the judge to effectively assert the privilege on the witness's behalf on the assumption that, if informed, the witness would assert the privilege. While well intentioned, such assumptions do not necessarily reflect the witness's actual preferences, and may indeed be contrary to the witness's wishes.").

182. See, e.g., *Bond*, 887 S.W.2d at 562 (Johnstone, J. concurring); *In re Marriage of Markey*, 586 N.E. 2d 350, 394 (Ill. App. Ct. 1991); *Carney*, 525 So. 2d at 358–59.

183. See *Bond*, 887 S.W.2d at 562 (Johnstone, J. concurring) (agreeing with the majority's decision to allow the child's psychologist to testify and noting that making decisions in compliance with Kentucky's child custody modification statute becomes more challenging "without such vital information" from the psychologist); see also *Markey*, 586 N.E. 2d at 394 ("It is plain that the best interest of the child is served if in the process of determining the best interest of a child in a custody proceeding the trial assays all of the mental health and developmental disabilities records and communications of the child so that the trial court can be fully apprised of the child's mental health and developmental disabilities."); *Carney*, 525 So. 2d at 358–59 (noting that the testimony of the child's psychologist was relevant to making a custody determination in the best interests of the child).

184. See *L.A.N. II*, 292 P.3d at 949 (noting that the trial court serves as the "independent decision-maker rather than as advocate").

185. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 34–35 (1988) (discussing the importance of each party controlling and presenting his own case).

court's subjective opinion regarding the child's privilege into what should be a purely objective calculus."<sup>186</sup> The judge oversteps the court's role as neutral decision-maker by considering the child's best interests from an advocacy perspective.<sup>187</sup> In contrast, since the GAL already functions as an advocate for the child's best interests, no conflict of interest arises from the GAL making privilege decisions.<sup>188</sup> Furthermore, the creation of several statutory schemes that explicitly assign the privilege to the GAL signals that some legislatures recognize the importance of having the GAL hold the privilege.<sup>189</sup>

Awarding the privilege to the trial judge can also harm the interests of the parent. In neglect proceedings, as well as in custody disputes, a parent's rights regarding the child are put in jeopardy.<sup>190</sup> The information disclosed or withheld as a result of a privilege decision may negatively affect a parent's custody rights or even contribute to a court's decision to terminate the parent-child relationship entirely.<sup>191</sup> As the neutral decision-maker, the court must consider the parent's interests as well as the child's.<sup>192</sup> If the court holds the privilege, then it potentially faces a conflict of advocating for the child's best interests while also considering the interests of the parent. For example, in the adversarial setting of a hearing, courts may be asked to decide privilege-related issues.<sup>193</sup> If a court holds the privilege of one of the parties, the

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186. *L.A.N. II*, 292 P.3d at 949.

187. See LANDSMAN, *supra* note 185, at 2–3 (noting the importance of a neutral decision-maker).

188. *L.A.N. II*, 292 P.3d at 950.

189. See, e.g., CAL. WELF. & INST. CODE § 317(f) (West Supp. I 2015); MASS. GEN. LAWS ch. 233 § 20B (2014); see also *Gil v. Gil*, 892 A.2d 318, 330–31 (Conn. App. Ct. 2006) (interpreting CONN. GEN. STAT. § 52-146c(b) (2015) as allowing the GAL to be an “authorized representative” capable of waiving the privilege).

190. See, e.g., N.C. GEN. STAT. § 7B-1102 (2014) (providing that parental rights may ultimately be terminated as a result of a dependency or neglect petition); OHIO REV. CODE ANN. § 2151.353 (West 2014) (same). See also, e.g., GA. CODE ANN. § 19-9-3 (2015); WIS. STAT. § 767.41 (2014) (providing that the court shall make custody determinations in divorce cases).

191. See *L.A.N. II*, 292 P.3d at 946 (in which the child's therapist disclosed information that was used against the mother during the termination of parental rights hearing).

192. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (finding that parents have a fundamental right to make decisions concerning the care, custody, and control of their children).

193. See, e.g., ALASKA CINA R. 9(b)(3) (2015) (providing a list of factors a court should consider when asked to override a child's psychotherapist-patient

judge may appear to no longer be neutral.<sup>194</sup> This becomes particularly problematic in a termination of parental rights proceeding, in which the parent has a strong interest in a meaningful adversarial hearing.<sup>195</sup> Awarding the privilege to the GAL removes this potential conflict. The GAL, who is already positioned to advocate for the child's interests, can then make arguments regarding privilege issues, the opposing side can respond to them, and the judge can then consider the parties' arguments in neutral balance.

In addition, a GAL's expertise in a particular case makes the GAL uniquely suited to decide privilege matters on behalf of that child.<sup>196</sup> GALs often conduct personal interviews with not only the child's parents, but also other proposed caretakers, relatives, caseworkers, mental health professionals, school personnel, and anyone else the GAL deems necessary.<sup>197</sup> GALs are thus ideally positioned to "provide the court with relevant information and an informed recommendation as to the child's best interest."<sup>198</sup> As a result of the expertise developed during the investigative process, "courts have come to rely heavily on the [GAL]'s recommendation because it is based on professional judgment after a marshalling of the relevant facts."<sup>199</sup> Furthermore, judges often expect that the GAL, as an

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privilege); *L.A.N. II*, 292 P.3d at 949 ("These motions—like the motion . . . in this case—on occasion ask the juvenile court to objectively decide privilege related issues); *Munstermann ex rel. Rowe v. Alegent Health-Immanuel Med. Ctr.*, 716 N.W.2d 73, 85 (Neb. 2006) (example of a court deciding a privilege-related issue—in that case whether a patient communicated a serious threat of violence that triggered a psychiatrist's duty to warn); *Kostel v. Schwartz*, 756 N.W.2d 363, 388 (S.D. 2008) ("This is not intended to say that there is never a place for discovery and disclosure of a party's confidential psychological health information, but merely that the trial court, before sanctioning such discovery and disclosure, consider thoroughly and proceed with great care so as not to open that door for an inappropriate purpose.").

194. See *LANDSMAN*, *supra* note 185, at 77 ("It is a fundamental principle of the adversary system that the decision maker remain passive while the parties develop facts upon which a decision may be based.").

195. *In re P.T.*, 657 N.W.2d 577, 587–88 (Minn. Ct. App. 2003); see also *Santosky v. Kramer*, 455 U.S. 745, 761 (1982) (noting that "a permanent neglect proceeding is an adversary contest between the State and the natural parents").

196. *L.A.N. II*, 292 P.3d at 950.

197. Supreme Court of Colo., *supra* note 44, at (V)(D)(4); MO. R. JUV. P. 129 App. C, Standard 4.0 cmt. (2010); N.M.R.A., Rule 1-053.3(F)(1) (2014); FRANKLIN CNTY. COMMON PLEAS JUV. CT. R. 27(G)(12) (2014).

198. FRANKLIN CNTY. COMMON PLEAS JUV. CT. R. 27(G)(12),

199. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 46 (2006).

appointed non-party to litigation, “will provide a more objective and neutral rendering of the facts.”<sup>200</sup> Thus, it makes sense that judges would place weight on the GAL’s recommendation when making their own decisions about the child’s best interests.

Even in jurisdictions that allow the trial court to hold the child’s privilege, judges still utilize the recommendations and reports of GALs.<sup>201</sup> This reliance should extend to allowing GALs to use their expertise and familiarity with a particular child’s circumstances to make privilege decisions for that child. Unlike custody or neglect decisions, which involve parents opposing either each other or a state agency, privilege decisions concern the internal communication of a patient with his mental healthcare provider.<sup>202</sup> While a court should certainly decide matters between opposing parties, like parental rights issues,<sup>203</sup> the person with the best ability to make an informed decision for the individual in question should be the one to decide whether to waive the privilege.<sup>204</sup> Since the GAL represents the child’s best interests, the privilege matter is one for a GAL to decide, not the court.

However, if a court appoints a separate GAL who only addresses privilege matters, as the *Berg* court suggested, the court subverts the purpose of appointing the original GAL. Although the *Berg* court reasoned that appointing a privilege GAL preserves the independent judgment of both the court and the original GAL, such an appointment forfeits the knowledge

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200. Lidman & Hollingsworth, *supra* note 60, at 279.

201. See, e.g., *In re Marriage of E.D.*, No. DA 08–0114, 2000 WL 1814583, at \*2 (Mont. June 25, 2009) (noting that the trial court may take the opinions and recommendations of the GAL into consideration when deciding whether to waive the child’s privilege); *In re Berg*, 886 A.2d 980, 988 (N.H. 2005) (same); *Liberatore v. Liberatore*, 955 N.Y.S.2d 762, 765 (N.Y. Sup. Ct. 2012) (same).

202. Gerald P. Koocher, *Privacy, Confidentiality, and Privilege, in PSYCHOLOGIST’S DESK REFERENCE*, *supra* note 30, at 545–46 (noting that the privilege protects the patient from “having the covered communications revealed without explicit permission”).

203. See *In re P.T.*, 657 N.W.2d 577, 587–88 (Minn. Ct. App. 2003) (“Fundamental fairness guarantees a parent facing termination proceedings a right to a meaningful adversarial hearing.”).

204. See Daniel W. Shuman & William Foote, *Jaffee v. Redmond’s Impact: Life After the Supreme Court’s Recognition of a Psychotherapist-Patient Privilege*, 30 PROF. PSYCHOL. 479, 481 (1999) (“On a philosophical basis, psychotherapist-patient privilege has a firm grounding in ideas of fidelity, respect for the patient, and a desire for the therapeutic process itself to reflect a common goal of client autonomy.”).

and experience the original GAL gained while working with the case.<sup>205</sup> The *L.A.N.* court emphasized that the GAL's general duties to the child's best interests make the specific consideration of the privilege waiver particularly appropriate.<sup>206</sup> In contrast, the *Berg* court concluded that the original GAL's duties to the child's best interests might be compromised by the knowledge gained from accessing the therapy files.<sup>207</sup> This concern overlooks the fact that a GAL's primary purpose is to investigate the circumstances in a child's life in order to make a recommendation about what would be in the child's best interests.<sup>208</sup> Thus, accessing therapy records for the purpose of determining whether a privilege waiver is in the child's best interests is precisely the sort of decision a GAL should make.

Finally, awarding the privilege to the GAL utilizes the court's resources more efficiently. As the *L.A.N.* court pointed out, the juvenile court would have to review extensive documentation on a child's treatment in order to make an informed privilege decision.<sup>209</sup> Since the GAL reviews this information during a normal investigation, the trial court would duplicate the work the GAL had already done.<sup>210</sup> Furthermore, the GAL's expertise on the child's case would likely make the work of sifting through the therapy material easier for the GAL than for the judge.<sup>211</sup>

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205. See *L.A.N. II*, 292 P.3d 942, 949 (Colo. 2013).

206. *Id.*

207. *In re Berg*, 886 A.2d 980, 988 (N.H. 2005).

208. GUARDIAN AD LITEM BD. FOR THE STATE OF N.H., GUARDIAN AD LITEM BROCHURE 2 (2009), <http://www.nh.gov/gal/documents/brochure.pdf> [<http://perma.cc/6URX-UZUC>]; 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012) (requiring states receiving federal grant money for child abuse or neglect prevention and treatment programs to have state plans mandating that GALs obtain a clear understanding of a child's situation and needs and to make recommendations to the court regarding the child's best interests).

209. *L.A.N. II*, 292 P.3d at 949.

210. *Id.*; see also Boumil et al., *supra* note 59, at 46 (describing the many investigatory tasks a GAL carries out, including "reviewing documents . . . observing the children in appropriate settings, and interviewing the natural parents, foster parents or kinship caregiver, healthcare providers, . . . and any other person, such as school personnel, with knowledge relevant to the case"); W. VA. R. CHILD ABUSE & NEGLECT P. App. A(D)(7) (West, Westlaw through June 1, 2015 amendments) (providing that a GAL "[c]omplete the investigation of the case with sufficient time between the interviews and court appearances to thoroughly analyze the information gleaned to formulate meaningful arguments and recommendations to the court").

211. See Boumil et al., *supra* note 59, at 46 (noting the many different types of

Designating the GAL as the child's privilege holder thus serves the interests of all parties involved in the proceeding. The child receives an advocate for this important issue, the parent is ensured a neutral decision-maker, and the judge can exercise his role as that neutral decision-maker in an efficient manner. *L.A.N.* laid out a general framework for choosing the GAL in recognition of these benefits. However, the decision did not address some of the likely consequences of allocating the privilege to the GAL.

### III. RECOMMENDATIONS – QUESTIONS *L.A.N.* LEAVES UNANSWERED

In outlining its reasons for choosing the GAL to be the privilege holder, the Colorado Supreme Court provided an analysis that other jurisdictions confronting the issue should utilize.<sup>212</sup> This Part explores the issues *L.A.N.* left unresolved. For instance, while the court noted that a GAL should hold the privilege when a conflict existed between the parent's interests and the child's,<sup>213</sup> the court did not establish a framework for when that conflict determination should occur.

Section A explores the negative consequences of failing to recognize this conflict, both for the parties in litigation and the child. Section B goes on to address the possibility of a child achieving maturity over the course of a GAL's representation as privilege holder.<sup>214</sup> Sections C and D consider possible problems with designating the GAL as privilege holder and show that the benefits of a GAL outweigh any potential problems.

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people and documents with which a GAL typically becomes familiar).

212. *L.A.N. II*, 292 P.3d at 948–50 (analyzing the negative consequences of awarding the privilege to the parent, the DHS, or the trial court, rather than the GAL).

213. *Id.* at 948.

214. *See id.* at 948 n.1 (“We do not address the criteria that juvenile courts should employ to determine whether a child is old enough or otherwise competent to hold his or her own privilege in this case because that issue is not squarely before the Court. None of the parties in this case assert that *L.A.N.* holds her own psychotherapist-patient privilege.”).



A. *When Should the GAL Be Designated as Privilege Holder?*

Normally, a child's parent holds the privilege, and a new privilege holder needs to be assigned only when the parent's interests conflict with the child's.<sup>215</sup> However, *L.A.N.* does not provide lower courts with a procedure for determining when such a conflict exists.<sup>216</sup> Other jurisdictions that have confronted the privilege issue have similarly failed to provide a method for making this determination.<sup>217</sup> Without such a procedure, the need for a privilege holder may not be immediately recognized. Instead, the privilege issue may arise later in the case, as it did in *L.A.N.*, *Berg*, and most of the other cases involving the privilege question.<sup>218</sup> This delay can have serious consequences for all parties in litigation, particularly the child. The following Subsection analyzes an example in which a defendant in a tort case took advantage of this lack of procedure.

1. Consequences of Delaying Designation

In custody and neglect proceedings, the conflict between parties is clear.<sup>219</sup> But when privileged information becomes

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215. *Id.* at 948; *In re Berg*, 886 A.2d 980, 985 (N.H. 2005); *see also* Norskog v. Pfiel, 733 N.E.2d 386, 391 (Ill. App. 2000) (noting that because parents typically initiate therapy for their child and because they act on a child's behalf, the psychotherapist-patient privilege necessarily extends to them).

216. *See L.A.N. II*, 292 P.3d at 954 (Coats, J., dissenting) (commenting that "the practical effect of the majority's allocation of authority to the guardian ad litem remains . . . somewhat unclear" and noting that the GAL "cannot be confident he is the holder of the privilege without a ruling by the court").

217. *See, e.g., Berg*, 886 A.2d at 987 (in which that court similarly "refrain[ed] from establishing a detailed procedure through which the privilege should be waived or asserted, and instead le[ft] that determination to the sound discretion of the trial court"); *In re Lindajeon K.S.*, No. 97-1850, 1997 Wisc. App. LEXIS 1482, at \*14 (Wis. Ct. App. Dec. 18, 1997) (noting that the state's high court had "declined to determine 'whether and under what circumstances a circuit court must appoint a guardian ad litem or counsel to assist a minor in making a decision regarding the physician-patient privilege'" (internal citations omitted)).

218. *See, e.g., L.A.N. II*, 292 P.3d at 946 (describing the privilege issue arising over a year after the dependency proceeding began); *Berg*, 886 A.2d at 982-83 (noting that the privilege question came up after the father had filed a contempt proceeding); *Nagle v. Hooks*, 460 A.2d 49, 50 (Md. 1983) (noting that the privilege issue needed to be decided as a result of a motion filed by the father a year after a custody proceeding began).

219. *In re Adoption of Diane*, 508 N.E.2d 837, 840 (Mass. 1987) (discussing dependency proceedings); *Berg*, 886 A.2d at 986-87 (discussing custody

the subject of other types of litigation, the conflict between a parent and a child's interests may not be as easy to see. If a party intends to introduce privileged information during a proceeding, and the court does not make a threshold determination as to whether a conflict exists, an opposing party may use privilege holder litigation as a strategic delaying tactic later in the proceedings to the detriment of the child and the child's family.<sup>220</sup> Whenever it becomes apparent that a party wants to implicate a child's communications with his therapist, the court should immediately determine whether the parents' interests conflict with the child's interests. If so, a GAL should be assigned the privilege. Making this determination at the outset of litigation prevents either party from later raising the privilege issue as a delaying tactic, which will be more efficient for both the court and the parties. An early determination also ensures that the privilege issue is decided solely on the basis of the child's interests, not litigation strategy.

For example, the defendants in *McCormack v. Board of Education of Baltimore County* used privilege-holder litigation to draw out a personal injury case and force a child's parents to end litigation sooner than they wished.<sup>221</sup> In *McCormack*, four-year-old Ryan was a passenger on a school bus involved in a single vehicle accident.<sup>222</sup> Following the accident, Ryan suffered from post-traumatic stress disorder (PTSD), including increased anxiety, aggressive behavior, nightmares, and day wetting.<sup>223</sup> The School Board conceded liability for the accident, but it would not compensate Ryan for the psychological damage he had suffered.<sup>224</sup> When Ryan's parents sought to introduce the testimony of his psychologist about his PTSD, the School Board argued that Ryan's parents could not waive his patient-psychologist privilege "because [the parents'] interest in obtaining reimbursement for the costs of his psychological and psychiatric treatment conflicted with Ryan's interest in keeping his mental condition a private matter."<sup>225</sup>

The trial court agreed that a potential conflict of interest

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proceedings).

220. See *McCormack v. Bd. of Educ.*, 857 A.2d 159 (Md. Ct. Spec. App. 2004); *infra* notes 234–38 and accompanying text.

221. *McCormack*, 857 A.2d at 162.

222. *Id.* at 162.

223. *Id.* at 163.

224. *Id.* at 161.

225. *Id.* at 164.

existed and found that a GAL needed to be appointed to determine whether a waiver was in Ryan's best interests.<sup>226</sup> The trial court did not make an inquiry as to whether the conflict actually existed.<sup>227</sup> Although the School Board's actions appeared altruistic on the surface, in fact they served to create a delay that ultimately caused the McCormacks to forgo presenting the psychiatrist's testimony.<sup>228</sup> Appointing a GAL and affording him time to gather information to make a privilege determination would postpone the trial.<sup>229</sup> The court told Ryan's parents they would be responsible for some of the School Board's increased trial costs during the delay.<sup>230</sup> In addition, if the GAL decided not to waive the privilege, the evidence from Ryan's therapist would not be admitted at trial, and the School Board likely would not be held liable for his psychological damages.<sup>231</sup> Faced with the prospect of paying the School Board's expenses, with no guarantee of a favorable privilege decision by the GAL, the McCormacks decided to proceed without the psychological testimony.<sup>232</sup> As a result, the trial only addressed Ryan's physical issues and yielded what the appellate court called "a disappointingly small verdict" for the family.<sup>233</sup>

The Maryland Court of Special Appeals ultimately reversed the decision.<sup>234</sup> The appellate court concluded that the trial court should have reviewed the evidence to determine whether a conflict existed, rather than assuming one did exist.<sup>235</sup> Such a review would have protected Ryan's interests while also preventing either party from using privilege litigation as a delaying tactic. The court noted that conflicts of interest between parents and children exist outside of child custody cases, but here, the parents and child had common interests and compensation would benefit both parties.<sup>236</sup>

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226. *Id.* at 165–66.

227. *Id.* at 171.

228. *Id.* at 162.

229. *Id.*

230. *Id.* at 162 & n.4.

231. *Id.* at 162 (noting that because the psychiatric evidence was suppressed, Ryan's parents were not able to show that his later behavior was a result of the accident).

232. *Id.*

233. *Id.* at 161.

234. *Id.* at 170.

235. *Id.* at 171.

236. *Id.* at 169, 171.

Significantly, the privilege issue arose in *McCormack* not out of concern for Ryan's best interests, but as part of the School Board's litigation strategy. By raising the issue, the School Board succeeded in suppressing the psychologist's testimony about the PTSD Ryan suffered after the bus accident, thus greatly reducing the School Board's liability.<sup>237</sup> The School Board's actions parallel those parents often take when seeking to waive or assert a child's privilege during custody or dependency proceedings. As several courts have noted, parents in these proceedings may benefit from the waiver or assertion of a child's privilege, so they cannot be trusted to make privilege decisions.<sup>238</sup> Just like these parents, the School Board stood to benefit from preventing Ryan's parents from waiving his privilege.

In cases like *McCormack*, which do not implicate a child's privilege as obviously or frequently as in neglect and custody settings, an inquiry into the appropriateness of a child's privilege holder should not merely be the result of litigation tactics. As the *McCormack* court noted, conflicts of interest between parents and children can arise not only in custody cases and dependency cases, but also in adoption proceedings and even in criminal cases.<sup>239</sup> Privilege holder decisions in all these cases should advance the child's best interests, not the strategy of adversarial parties.<sup>240</sup> Waiting until an adversarial party raises the privilege holder issue also wastes the time and resources of both the court and the parties.<sup>241</sup> If the trial court in *McCormack* had made the privilege determination at the first mention of using the therapist's testimony, rather than

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237. *Id.* at 162.

238. See *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky. Ct. App. 1994) (citing concern over the child being treated as a pawn in litigation); *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (noting that "it is inappropriate in a continuing custody 'battle' for the custodial parent to control the assertion or waiver of the privilege of nondisclosure" and a possibility exists that the parents may "exercis[e] the power of veto for reasons unconnected to the polestar rule of 'the best interests of the child'").

239. *McCormack*, 857 A.2d at 169.

240. See *Gustafson & McNamara*, *supra* note 88, at 505 (noting that minors who consider themselves "active participants" in confidentiality decisions "are more likely to be allied with the therapist and hence less likely to resist the therapeutic process"); *Shuman et al.*, *supra* note 78, at 416 (reporting the findings of a study that found that making therapist-patient communications unprivileged "produced a statistically significant reduction in lay persons indicating willingness to discuss a variety of issues with therapists").

241. *McCormack*, 857 A.2d at 162.

waiting for the School Board to file a motion to suppress the evidence, then the appointment of a GAL would not have caused the trial delay.

To combat these problems, a court should make a privilege holder determination at the outset of litigation. Any time a child's communications with a therapist will be at issue, the court should first ascertain whether the child's parent has a conflict of interest that would prevent the parent from holding the child's privilege.<sup>242</sup> Making this determination will require additional time and energy from all parties at the outset of litigation. However, conducting this inquiry will ultimately be more efficient, both for the court and the parties.<sup>243</sup> In addition to creating clarity on the privilege issue, establishing a privilege holder early in a proceeding would reduce potential litigation surrounding the child's relationship with the therapist, which would be beneficial for that relationship.<sup>244</sup>

Perhaps more importantly, addressing the privilege issue early in litigation also benefits the child by ensuring that the appropriate party makes privilege decisions from the very beginning of the proceeding. The next Subsection examines this issue in light of the current trend toward collaborative case management, particularly in dependency and neglect settings.

## 2. The Impact of Delay on Collaborative Case Management

Given the impact a privilege waiver can have on both a child's relationship with a therapist and the outcome of a court proceeding, courts should establish a privilege holder as soon

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242. See *id.* at 170 (“[T]he test for determining whether the appointment of a guardian is necessary is . . . the presence or absence of a conflict of interest between parent and child.”); *People v. Marsh*, No. 08CA1884, 2011 WL 6425492, at \*10 (Colo. App. Dec. 22, 2011) (holding that a court must examine “the nature of a conflict between the interests of a parent and of his or her child” in order to determine whether the parent should be prohibited from waiving the privilege).

243. See, e.g., *McCormack*, 857 A.2d 159; (example of a case which would have been resolved much earlier if a privilege inquiry had been conducted at the opening of the case); *Nagle*, 460 A.2d at 162 (same).

244. See Adele Frances Campbell & Janette Graetz Simmonds, *Therapist Perspectives on the Therapeutic Alliance with Children and Adolescents*, 24 COUNSELING PSYCHOL. Q. 195, 202 (2011) (noting that gaining a child patient's trust was a significant aspect of developing a beneficial therapeutic relationship with the child); see also Hunter-Smallbone, *supra* note 85, at 317, 320 (describing the effort and care therapists must take to develop trust with child patients involved in the child welfare system).

as possible so that privileged information is not inappropriately disclosed.<sup>245</sup> The danger of disclosure increases when multiple professionals—including social workers, therapists, and attorneys—collaborate and share information with one another.<sup>246</sup> If no person clearly holds the privilege, the child's best interests on the privilege matter may not be represented. The professionals themselves may also be confused or unaware about the potential for disclosure.<sup>247</sup>

State services for children involved in dependency and neglect proceedings have become increasingly collaborative, involving case workers, caregivers, therapists, parole officers, the GAL, and others as needed.<sup>248</sup> This trend has surfaced in response to complaints from families and service providers that information about a child has not been available to all professionals dealing with the case.<sup>249</sup> For example, in Orlando, Florida, a task force investigating the services provided for disabled children in foster care<sup>250</sup> discovered that the records containing information on psychological, medical, and educational information was not regularly monitored or maintained.<sup>251</sup> The task force noted:

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245. *OCR Presentation, supra* note 19 at 30:00 (discussing danger of pretrial disclosures of privileged information).

246. *See L.A.N. II*, 292 P.3d 942, 950–51 (Colo. 2013) (illustrating an example of such a party, the GAL, who waived the child's psychotherapist-patient privilege when she disseminated a letter from the child's therapist to other parties involved in the case).

247. *See Wolowitz & Papelian, supra* note 89, at 25–26 (noting that the *Berg* decision created confusion among therapists as to when they would be permitted to release a patient's therapy records).

248. Mayes et al., *supra* note 50 (discussing the varying roles of different professionals in the juvenile law system and the importance of collaboration). "Staffings" are meetings at which a variety of professionals involved in a case meet to discuss the status of the child's case and plan for continued progress. *See Staffings, supra* note 64; *Community Services Unit*, JUD. BRANCH ARIZ.: MARICOPA COUNTY, <http://www.superiorcourt.maricopa.gov/SuperiorCourt/JuvenileCourt/commServicesUnit.asp> [<http://perma.cc/732R-3ZHM>].

249. GLORIA HOCHMAN ET AL., FOSTER CARE: VOICES FROM THE INSIDE 11 (2004), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster\\_care\\_reform/fostercarevoices021804pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/fostercarevoices021804pdf) [<http://perma.cc/8V6S-LS3Z>].

250. FAMILY SERVS. OF METRO ORLANDO, FINAL REPORT OF THE REGIS LITTLE TASK FORCE 2 (2010), <http://centerforchildwelfare.fmhi.usf.edu/kb/mmppts/Dependency2010/Regis%20Little%20Report%20-%20Response%20to%20the%20Death%20of%20a%20Former%20Foster%20Child%20with%20Disabilities%20-%20Handout%201%20-%20Task%20Force%20Report.pdf> [<http://perma.cc/ZDV4-AV69>].

251. *Id.* at 15.

[C]aregivers must have access to as much information as possible about the child, including information from other agencies serving that child. . . . Access to [these records] should be given to at least Child Protective Investigators, Dependency Case Managers, Foster Parents, Guardians ad Litem, Attorneys ad Litem, and the child, as appropriate.”<sup>252</sup>

Similarly, in a 2004 study on children in foster care, the Pew Research Center discovered that families receiving services from state agencies expressed frustration with “a system in which decision-making is fragmented and information [is] guarded rather than shared. . . . [N]early everyone said that more information would help those involved feel that the system is working with them.”<sup>253</sup>

Given these perceived failures, many states encourage professionals to share information with each other.<sup>254</sup> Many facilities hold “staffings” in which the constellation of professionals interacting with a child update each other on the child’s situation and plan together for continued progress.<sup>255</sup> These multi-disciplinary meetings allow professionals with different areas of expertise to form a plan that utilizes community and government services to address the particular issues in a case.<sup>256</sup> The meetings also ensure that the individual services do not unintentionally undermine each other.<sup>257</sup>

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252. *Id.* at 16–17.

253. HOCHMAN ET AL., *supra* note 249, at 11.

254. *See* 1710. *Shared Planning*, WASH. STATE DEP’T OF SOC. & HEALTH SERVS., (July 28, 2013), <https://www.dshs.wa.gov/ca/1700-case-staffings/1710-shared-planning> [<https://perma.cc/6MYJ-GADC>] (requiring that family members, caregivers, agency personnel, the GAL, and any others needed be invited to staffings to discuss a child’s case); DIV. OF CHILDREN & FAMILY SERVS., ARK. DEPT OF HUMAN SERVS., POLICY & PROCEDURE MANUAL 163 (2015), <http://humanservices.arkansas.gov/dfs/dfsDocs/Master%20DCFS%20Policy.pdf> [<http://perma.cc/5PYW-58UN>] (describing department requirements for interdivisional staffings that agency officials, education representatives, and other stakeholders attend); U.S. PUB. HEALTH SERV., *supra* note 1, at 174 (noting that, in a mental health provider setting, an interdisciplinary team approach yielded fewer days spent in psychiatric hospitals, greater utilization of community-based services, a more comprehensive array of services, and greater patient satisfaction).

255. *Staffings*, *supra* note 64; *Community Services Unit*, *supra* note 248.

256. *See Staffings*, *supra* note 64 (describing different staffing options and structures for various types of situations).

257. *See* Gabrielle Crockatt, *The Child Psychotherapist in the Multi-*

Although collaborative and multi-disciplinary meetings benefit cases in many ways, they increase the likelihood of inappropriate assertion or waiver of the privilege where the court has not specifically designated the GAL as the privilege holder. For example, when a court has not declared whether the parent, GAL, or mature child holds the privilege, a party may inadvertently disclose privileged information that would otherwise be closely guarded.<sup>258</sup> Conversely, if disclosure actually *is* in the best interests of the child, the beneficial disclosure may not occur because the party with privileged information fears sharing the information impermissibly.<sup>259</sup>

Obtaining a judicial order early in a proceeding which affirmatively denotes the child's privilege holder can prevent these issues.<sup>260</sup> Once a privilege holder has been determined, that person can take steps to assert or waive the child's privilege as appropriate.<sup>261</sup> If the court decides a GAL needs to hold the privilege, that GAL should be aware of the ramifications of holding the privilege.<sup>262</sup> The GAL should also ensure that all other professionals understand the impact of this role of the privilege holder so that inadvertent disclosures do not occur, particularly at collaborative meetings.<sup>263</sup>

Further complicating matters, a child may become mature enough to hold his own privilege if a case extends for several

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*Disciplinary Team*, in THE HANDBOOK OF CHILD & ADOLESCENT PSYCHOTHERAPY, *supra* note 85, at 102, 104 (noting that a "single source of knowledge can address only a part of the problem . . . [t]he impact of one approach will be undermined if other services do not act in support"); *see also* W. VA. CODE ANN. § 49-1-207 (West, Westlaw through 2015 Regular Session) ("Multidisciplinary team' means a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose, and treat specific cases of child abuse and neglect. . . . Their goal is to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity . . .").

258. *OCR Presentation*, *supra* note 19, at 30:00–31:45.

259. *See "The Lay of the L.A.N." Practical and Ethical Issues*, COLO. OFF. CHILD'S REPRESENTATIVE 8 (Apr. 30, 2013) [hereinafter *OCR PowerPoint*], <http://www.coloradochildrep.org/wp-content/uploads/2013/04/The-Lay-of-the-LAN.pptx> [<http://perma.cc/F7PZ-FYX5>] (acknowledging that a waiver may be in the child's best interests, and noting that the GAL must exercise the privilege in the best interests of the child).

260. *OCR Presentation*, *supra* note 19, at 30:00–31:45.

261. *OCR PowerPoint*, *supra* note 259.

262. *See L.A.N. I*, 296 P.3d 126, 134 (Colo. App. 2011) (noting that the GAL may not have intended to waive the child's privilege when she disseminated the therapist's letter to all parties).

263. *See OCR Presentation*, *supra* note 19, at 15:25–55.



years. The next Section addresses how courts should deal with this possibility.

*B. What Happens When a Child Achieves “Sufficient” Maturity?*

As previously noted, the *L.A.N.* court chose not to address the method a trial court should use to determine whether a child possesses the maturity to assert his own privilege.<sup>264</sup> The court also did not decide how or when a trial court should reexamine a child to determine whether he has gained sufficient maturity to assert the privilege personally, even if the child had been too young and immature to hold it previously.<sup>265</sup>

As *L.A.N.*'s case demonstrates, dependency and neglect proceedings may extend for several years.<sup>266</sup> When a child is very young, the issue of later maturity may not surface during the life of the case.<sup>267</sup> For an older child, however, a case could easily begin while the child is too immature to hold the privilege, but during the course of the proceedings, he may gain sufficient maturity to hold the privilege for himself.<sup>268</sup> Several jurisdictions that have confronted the privilege issue with regard to a mature child have emphasized the importance of incorporating that child's views into the privilege decision, and in some cases, the court has awarded the privilege to the mature child himself.<sup>269</sup> As the following Subsection shows, the

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264. *L.A.N. II*, 292 P.3d 942, 948 n.1 (Colo. 2013) (declining to address the issue of how a juvenile court should determine whether a child is able to hold her own privilege since none of the parties asserted that *L.A.N.* was capable of doing so).

265. *See id.* (refraining from any discussion of mature children because *L.A.N.*'s case did not present the issue).

266. *L.A.N. I*, 296 P.3d at 128 (detailing *L.A.N.*'s history with the court system, which dated back to a report made to the Denver Department of Human Services in December 2008).

267. *L.A.N.* was seven years old when court proceedings began. *L.A.N. II*, 292 P.3d at 950.

268. *See Gustafson & McNamara, supra* note 88, at 504 (noting that “minors of certain ages may have obtained sufficient developmental maturity to make well-informed decisions about psychotherapeutic treatment” and youth ages fifteen and older likely possess this capacity, while children under age eleven likely do not have the ability to consent).

269. *See, e.g., CAL. WELF. & INST. CODE* § 317(f) (West Supp. I 2015); *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 308 (Fla. Dist. Ct. App. 2001).

trial court, in its role as neutral decision-maker, is ideally positioned to make these determinations.

### 1. Jurisdictions Recognizing the Mature Child as Privilege Holder

Florida's Fourth District Court of Appeal has frequently addressed the possibility of a mature child holding the privilege.<sup>270</sup> It has consistently ruled that when a child seeks to exercise his privilege rights, the court must "determine whether the child is of sufficient emotional and intellectual maturity to make the decision on his or her own."<sup>271</sup> If so, the court should appoint an attorney ad litem (AAL) to "assert the child's position."<sup>272</sup> In Florida, GALs are typically non-attorneys who advocate for the best interests of the child, while AALs represent the child through a traditional attorney-client relationship.<sup>273</sup> Under systems like Florida's that utilize both a GAL and an AAL, the AAL advocates for a child's "strongly articulated preference," while the non-attorney GAL only represents the child's best interests, potentially irrespective of the child's wishes.<sup>274</sup> When a child expresses a privilege preference, the AAL, as advocate for the child's wishes, is thus the appropriate party to raise the issue to a court.<sup>275</sup>

For example, in *Attorney ad Litem for D.K. v. Parents of D.K.*, a seventeen-year-old utilized her AAL to successfully assert her privilege rights against her parents during custody

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270. *E.C. v. Guardian ad Litem Program*, 867 So. 2d 1193 (Fla. Dist. Ct. App. 2004); *S.C. v. Guardian ad Litem*, 845 So. 2d 953 (Fla. Dist. Ct. App. 2003); *D.K.*, 780 So. 2d. at 308.

271. *D.K.*, 780 So. 2d at 308; *S.C.*, 845 So. 2d at 957 (upholding *D.K.*); *E.C.*, 867 So. 2d at 1194 (similarly affirming that the court must make an inquiry into the minor's position).

272. FLA. GUARDIAN AD LITEM PROGRAM, STATEWIDE GUARDIAN AD LITEM OFFICE, STANDARDS OF OPERATION 2 (2012), <http://www.guardianadlitem6.org/PDF/Standards%20of%20Operation-%20July%202012%20FINAL.pdf> [<http://perma.cc/2CBY-C7UB>] (describing an attorney ad litem as an attorney who "advocate[s] for the child's wishes" and has an attorney-client relationship with the child, as opposed to a traditional GAL, referred to in Florida as a "Child's Best Interest Attorney," who "provide[s] independent legal services for the purpose of protecting a child's best interest").

273. *Id.* at 7–8.

274. *Newman v. Newman*, 663 A.2d 980, 987 (Conn. 1995). *See also* *Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993) (noting the role of the GAL differs from that of an attorney ad litem in that the GAL serves to assist the court in protecting an incompetent person's interests).

275. *D.K.*, 780 So. 2d at 308.

litigation.<sup>276</sup> The court found that children with “sufficient emotional and intellectual maturity” should be allowed to assert that privilege through counsel.<sup>277</sup> Because the child in *D.K.* was only five months away from her eighteenth birthday, the court did not bother to conduct a lengthy inquiry into her maturity, but simply stated that she was entitled to assert her privilege.<sup>278</sup>

The same Florida court ruled similarly two years later in *S.C. v. Guardian ad Litem*.<sup>279</sup> The trial court had appointed a GAL to represent the fourteen-year-old child’s best interests during a dependency proceeding with its usual standard form order.<sup>280</sup> This standard form ordered health providers—including mental health therapists—to allow the GAL access to the child’s therapy records.<sup>281</sup> In preparation for trial, the local DHS requested release of the child’s therapy records.<sup>282</sup> The child objected through her AAL, but the court denied her motion.<sup>283</sup>

On appeal, Florida’s Fourth District quashed the order allowing the GAL unrestricted access to the child’s records<sup>284</sup> and ordered the trial court to instead “consider the age and maturity of the child in deciding whether to appoint an attorney ad litem to assert the *child’s* position.”<sup>285</sup> At minimum, the trial court must allow the child to be heard *in camera* on the issue.<sup>286</sup> The court also cited research on the importance of the child having authority to make such a determination, particularly in the context of a therapist-patient

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276. *Id.*

277. *Id.*

278. *Id.*

279. *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 957 (Fla. Dist. Ct. App. 2003).

280. *Id.* at 955.

281. *Id.*

282. *Id.* In Florida, the entity that functions as a DHS is called the “Department of Children and Families.” Like other DHS entities discussed in this Comment, it initiates dependency petitions on behalf of the state. FLA. STAT § 39.501 (2015).

283. *S.C.*, 845 So. 2d at 956.

284. *Id.* at 955.

285. *Id.* at 957. Although the appellate court declined to make a judgment as to the maturity of *S.C.*, it noted that “[t]here is no evidence in this record that [*S.C.*] is not old enough, mature enough, and competent enough to seek relief through a court appointed attorney rather than cede control of her privilege privacy interest to a guardian ad litem.” *Id.*

286. *Id.* at 955.

relationship.<sup>287</sup>

Almost one year later, the same Florida Court of Appeal rather impatiently reiterated its holding when the issue arose again, this time with S.C.'s seventeen-year-old sibling, E.C.<sup>288</sup> The trial court had appointed E.C.'s GAL using the same standard form order from S.C.'s case—an order which permitted the GAL to access the child's therapy records without discussing the matter with the child.<sup>289</sup> The court again quashed the trial order, stating that the trial court should not have allowed the GAL to have access to the information without first allowing the minor an opportunity for an *in camera* hearing to assert the privilege.<sup>290</sup>

These Florida cases emphasize the role of the privilege in ensuring effective treatment for the child,<sup>291</sup> as well as the general importance of hearing the mature child's opinion.<sup>292</sup> By removing the GAL as the "middleman" privilege holder, these decisions keep the psychotherapist-patient relationship within the bounds of the parties to the therapy session: the child and the therapist. The decisions thus achieve the primary goal of the privilege: safeguarding a patient's communications to a therapist in order to encourage the patient to be open with the therapist.<sup>293</sup> In addition, by requiring the trial court to conduct an initial hearing *in camera* any time the privilege issue arises, the decisions create a consistent procedure for courts to follow.<sup>294</sup>

Other courts have also referenced the possibility of allowing a mature minor to personally hold the privilege, albeit not as strongly as the Florida courts. The Maryland Court of Appeals, for example, noted in *Nagle* that the court should

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287. *Id.* at 959–60.

288. *E.C. v. Guardian ad Litem Program*, 867 So. 2d 1193, 1194 (Fla. Dist. Ct. App. 2004) (finding that the trial court's appointment order for E.C.'s GAL contained the same flawed language as the GAL appointment order in *S.C.*). The terse *E.C.* opinion is only about a page long, *id.*, as compared to *S.C.*, which is eight pages long, *S.C.*, 845 So. 2d at 960. *See also* Perlmutter, *supra* note 90, at 57 (discussing the Florida court's impatience with being confronted with the same issue again).

289. *E.C.*, 867 So. 2d at 1194.

290. *Id.*

291. *Id.*; *S.C.*, 845 So. 2d at 960; *Attorney ad Litem for D.K. v. Parents of D.K.*, 780 So. 2d 301, 306 (Fla. Dist. Ct. App. 2001).

292. *S.C.*, 845 So. 2d at 960; *D.K.*, 780 So. 2d at 304–05 (discussing other legal areas where a child may assert her own opinion).

293. *See* Paruch, *supra* note 31, at 501.

294. *See E.C.*, 867 So. 2d at 1194; *S.C.*, 845 So. 2d at 959.

appoint a GAL “when a minor is too young to personally exercise the privilege.”<sup>295</sup> This implies that if the child were not too young, a GAL would not need to be appointed. Even the *Berg* court, which held that the court had the final say in whether the child’s privilege should be asserted or not, found that the judge could “give substantial weight to the preference of [a] mature minor to either waive or assert his privilege.”<sup>296</sup> The *Berg* court also identified factors the trial court should consider when deciding whether a minor has sufficient maturity.<sup>297</sup> Interestingly, it adopted the same set of factors that New Hampshire courts use to determine whether a child should have a say as to which parent he will live with.<sup>298</sup> The court noted that age is not determinative of maturity, and that the trial court must consider “(1) the child’s age, intelligence, and maturity; (2) the intensity with which the child advances his preference; and (3) whether the preference is based upon undesirable or improper influences.”<sup>299</sup> Although these factors do not offer bright line outcomes, they do provide a starting point for the privilege inquiry. Much like the *in camera* procedure suggested by the Florida decisions,<sup>300</sup> the *Berg* factors give courts a consistent procedure to apply when the privilege issue arises.

## 2. Recognition of a Child’s Ability to Hold the Privilege

When confronted with a long-running case, courts in Colorado and other jurisdictions can apply the procedures and rationale discussed above to periodically determine whether the GAL is still the best choice to hold the privilege. However, as the Florida decisions noted, a mature child receives significant benefit from making privilege decisions on his own.<sup>301</sup> Moreover, to assume that an older child does not have the ability to hold the privilege adds an unnecessary third

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295. *Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983).

296. *In re Berg*, 886 A.2d 980, 987–88 (N.H. 2005).

297. *Id.* at 987–88.

298. *Id.*

299. *Id.* (citing *Butterick v. Butterick*, 506 A.2d 335 (N.H. 1986)).

300. *See, e.g.*, *E.C. v. Guardian ad Litem Program*, 867 So. 2d 1193, 1194 (Fla. Dist. Ct. App. 2004).

301. *See, e.g.*, *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 959–60 (Fla. Dist. Ct. App. 2003).

party to the privilege relationship. If a child has the maturity to hold his own privilege, it seems to be against his best interests to award it to someone else.

To determine whether a child has reached sufficient maturity, courts could employ the sorts of procedures discussed in the Florida decisions and *Berg*.<sup>302</sup> *In camera* discussions with a child posing questions like those *Berg* suggested would allow the court to make a determination as to the child's maturity.<sup>303</sup> And, unlike privilege decisions, competency evaluations *are* matters in which courts can act as neutral decision-makers.<sup>304</sup> Courts frequently make decisions about an individual's competency, and they could apply that expertise in these cases.<sup>305</sup>

To ensure that the privilege issues receive regular attention, courts could institute a yearly review of the child's maturity, specifically for the purpose of determining whether the GAL should still hold the privilege or whether the child has gained sufficient maturity to hold it. Courts already conduct regular review hearings for dependency proceedings, and a yearly review on the privilege issue could be incorporated into such hearings.<sup>306</sup> Although adding this element to a case would increase the demand on a court's resources, it would likely be more efficient in the long term. Examining the privilege issue on a yearly basis would limit future, more extensive litigation on the subject that might result from an untended issue spinning out of control.<sup>307</sup> More importantly, yearly reviews

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302. *See id.*, at 959; *Berg*, 886 A.2d at 987–88.

303. *Berg*, 886 A.2d at 987–88.

304. *See, e.g., In re Marriage of Sorensen*, 166 P.3d 254, 256 (Colo. App. 2007) (discussing the authority of a court to appoint a GAL to parties in need of one); *In re P.D.R.*, 737 S.E.2d 152, 157 (N.C. Ct. App. 2012) (same).

305. *See e.g., In re Guardianship of J.G.S.*, 857 N.W.2d 847, 851 (N.D. 2014) (noting that a district court may appoint a conservator to a ward after the basis for appointment has been established); *In re Guardianship of McNeel*, 109 P.3d 510, 518 (Wyo. 2005).

306. *See, e.g., CAL. WELF. & INST. CODE* § 366(a)(1) (West Supp. I 2015) (ordering review of dependent children at least every six months); *COLO. REV. STAT.* § 19-3-702(6) (2014) (mandating periodic reviews of a child's placement during a dependency proceeding); *FLA. STAT.* § 39.701(1)(a) (2015) (requiring review hearings every six months for children involved in dependency proceedings).

307. *See supra* Section III.A.1 discussion of *McCormack v. Board of Educ.*, 857 A.2d 159 (Md. Ct. Spec. App. 2004); *see also L.A.N. II*, 292 P.3d 942 (Colo. 2013) (another example of a case that was extended for several years because of questions over what party could waive the privilege).

serve the child's best interests by ensuring that the most appropriate party holds the privilege: GALs for immature children and older children themselves as they mature.

### C. *Potential Friction Between Parties and Families*

Unfortunately, assigning a child's privilege to the GAL as opposed to the trial judge may also cause heightened friction between the parties. When the judge holds the privilege, his status as the decision-maker lends a level of authority and stability to conflicts regarding the child's privilege. In contrast, the GAL in his fact-finding capacity is in the parties' lives constantly, interviewing family members and observing the child's living conditions.<sup>308</sup> Such a relationship can foster tension between the GAL and the parents.<sup>309</sup> As the privilege holder, the GAL will make decisions concerning the child that would normally be left to the parents.<sup>310</sup> If the GAL makes a decision that the parents strongly disagree with, the GAL could become a target for the parents' frustration and possibly even their anger.<sup>311</sup> Because the GAL must preserve a continuing functional relationship with the parents, these feelings could hamper the GAL's ability to do his job appropriately.<sup>312</sup>

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308. See Lidman & Hollingsworth, *supra* note 60, at 277–78 (discussing typical duties of a GAL).

309. See Boumil et al., *supra* note 59, at 74 (noting that high-conflict matters can escalate and involve the GAL); see also Robert L. Aldridge, *Practical Ethics and Professionalism of the Guardian ad Litem*, 53 *ADVOCATE* 16 (2010) (discussing misunderstandings and complaints from families about how a GAL is to be paid).

310. *In re Berg*, 886 A.2d 980, 985 (N.H. 2005). See also *Norskog v. Pfiel*, 733 N.E.2d 386, 391 (Ill. App. Ct. 2000) (noting that because parents typically initiate therapy for their child and because they act on a child's behalf, the psychotherapist-patient privilege necessarily extends to them).

311. See generally NW. JUSTICE PROJECT, *WHEN YOU DISAGREE WITH A GUARDIAN AD LITEM REPORT* (2014), [http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/89715AB1-A3D3-4181-9C1B-67552F72CF62/3111en\\_disagree-with-gal.pdf](http://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/89715AB1-A3D3-4181-9C1B-67552F72CF62/3111en_disagree-with-gal.pdf) [<http://perma.cc/59B2-MQXQ>] (offering parents advice on how to handle conflicts with a GAL). While other outside parties, such as a social worker or investigator, may also come into conflict with parents regarding recommendations they make, these parties do not supplant the role of the parents. See, e.g., W. VA. CODE ANN. § 48-9-301 (West 2002) (noting that a court may order an investigator to prepare a report to assist it in deciding custody matters). When a GAL makes a privilege decision, he steps into the role the parents once filled. See *L.A.N. II*, 292 P.3d at 950 (noting that the GAL shall make privilege decisions when the parent cannot). This interference with the dynamics intrinsic to families may increase the tension of an already difficult situation.

312. See Boumil et al., *supra* note 59, at 73–77 (describing the difficulties a

The GAL's decisions may also cause the child to experience increased tension. Most children in proceedings in which the privilege issue arises will interact with their parents in a family setting during and after the proceeding. When the GAL asserts or waives the privilege against the parents' wishes, the decision may foster additional friction in an already tense family situation.<sup>313</sup>

While neither of these scenarios is ideal, considering the importance of maintaining the integrity of the therapist-patient privilege to the child's health, the resulting friction may be justified. Children placed in therapy are often there to "fix a harm that has been done to the child,"<sup>314</sup> and only by safeguarding the privilege can the therapeutic process have full effect.<sup>315</sup> A GAL can defend the privilege so that the child has the opportunity to take advantage of the psychotherapist-patient relationship. As discussed, the GAL's role as an advocate of the child's best interests and as an investigator familiar with the case equip him to provide the protection the child needs.<sup>316</sup> The GAL has access to information to help him make a decision in the child's best interests without the interference of other parties' competing interests.<sup>317</sup> Even though holding the child's privilege may cause friction with other family members, the benefits of having the GAL's advocacy and expertise outweigh these concerns.

*D. What If the GAL is Not Equipped to Handle the Privilege Issue?*

States have differing standards for their GALs,<sup>318</sup> and it is possible a GAL may not be as equipped to hold a privilege as a judge would be. Some states require a GAL to be an attorney, while others only require that the GAL attended a certain

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GAL may confront when dealing with high-conflict cases).

313. Perlmutter, *supra* note 90, at 48 (suggesting that conflicts over privilege disclosure damage a child's relationship with his or her family).

314. *Simone H. v. State*, 320 P.3d 284, 289 (Alaska 2014) (quoting ALASKA CINA/DELINQUENCY RULES COMM., MINUTES (Jan. 8, 1998)).

315. *See id.* ("Although it may be helpful for the parties to know what the child says in therapy, this disclosure may reduce the chances that the therapy will succeed.").

316. *L.A.N. II*, 292 P.3d at 950.

317. *Id.*

318. *See supra* Section I.A (discussing differing requirements for GALs).



number of training hours.<sup>319</sup> In some states, the GAL serves both an investigative role for the court and as the child's attorney.<sup>320</sup> Not all states have a robust system for overseeing their GALs, and like in any profession, not all GALs do their job as well as they could.<sup>321</sup> In most states GALs do not go through as extensive a vetting process as judges do.<sup>322</sup> Judges also may undergo more extensive training than GALs do.<sup>323</sup> In

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319. FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS 12–13 (2015), <http://guardianadlitem.org/wp-content/uploads/2014/08/Standards-of-Operation-July-2015-Update-Final.pdf> [http://perma.cc/G552-TP6A]; *Requirements to Become a Maine Rostered Guardian ad Litem (GAL)*, ST. ME. JUD. BRANCH, [http://www.courts.maine.gov/maine\\_courts/family/gal/requirements.html](http://www.courts.maine.gov/maine_courts/family/gal/requirements.html) [http://perma.cc/TWT7-9Z4N]; VA. JUD. SYS., FREQUENTLY ASKED QUESTIONS: GUARDIAN AD LITEM FOR CHILDREN PROGRAM (2014), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/faq\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/faq_children.pdf) [http://perma.cc/5XV7-FA7E] (all listing different qualifications for GAL appointment).

320. CAL. WELF. & INST. CODE § 356.5 (West Supp. I 2015).

321. In 1996, the Colorado State Auditor released a study on the GALs in Colorado finding that 32% of GALs did not meet with the child assigned them, and 48% of GALs had no documentation of visiting the child's home. COLO. OFFICE OF STATE AUDITOR, REPORT OF THE STATE AUDITOR: COLORADO JUDICIAL DEPARTMENT GUARDIANS AD LITEM PERFORMANCE AUDIT JUNE 1996, at 2 (1996), [http://www.leg.state.co.us/OSA/coauditor1.nsf/ff6fad6acbd83a8c85256d2600666738/9a10d357963b72b987257790005b91a1/\\$FILE/12286JudicialDeptGuardianAdLitemJune1996ReducedSize.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/ff6fad6acbd83a8c85256d2600666738/9a10d357963b72b987257790005b91a1/$FILE/12286JudicialDeptGuardianAdLitemJune1996ReducedSize.pdf) [http://perma.cc/9YDV-WC8P]. Ten years later, after Colorado reorganized its GAL program under the oversight of the Colorado Office of the Child's Representative, a similar study by the State Auditor found that 100% of GALs had met with their assigned child, and 73% had visited with the child during the first thirty days of their assignment, as required. COLO. OFFICE OF STATE AUDITOR, OFFICE OF THE CHILD'S REPRESENTATIVE GUARDIANS AD LITEM JUDICIAL BRANCH PERFORMANCE AUDIT JUNE 2007, at 18 (2007), [http://www.leg.state.co.us/osa/coauditor1.nsf/All/28E2E06A4D2DF74E87257310005DE427/\\$FILE/1762%20GAL%20Performance%20Audit%20Report%206-29-07.pdf](http://www.leg.state.co.us/osa/coauditor1.nsf/All/28E2E06A4D2DF74E87257310005DE427/$FILE/1762%20GAL%20Performance%20Audit%20Report%206-29-07.pdf) [http://perma.cc/FQ6X-BXDC]. For those that did not comply with the child visitation requirement, the Office of the Child's Representative terminated their contracts, decided not to renew their contracts, or temporarily removed them in order to investigate their other cases. *Id.*

322. See generally Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904 (1996) (discussing the various processes through which judges are selected, including gubernatorial appointment, gubernatorial appointment with retention election, gubernatorial appointment with consent of legislature, and general election). Compare with WYO. STAT. ANN. § 14-12-101(c) (2015) (noting that the state's office of the public defender "shall adopt policies and rules and regulations governing standards for the legal representation by attorneys acting as guardians ad litem . . ."), as well as Supreme Court of Colo., *supra* note 44 at (II)(B) (noting that the Office of the Child's Representative, the state agency that oversees GALs has "sole discretion to determine which attorneys are placed on the appointment list" courts use to assign GALs to children).

323. Compare KY. REV. STAT. ANN. § 21A.170 (West 2006) (requiring trial court

short, a judge may handle the matter of a child's privilege more competently than a GAL would, so some jurisdictions may prefer to award the privilege to the court.<sup>324</sup>

Despite this fact, the solution to a less-than-capable GAL is not to appoint the judge as privilege holder. As discussed above, the judge's role as neutral decision-maker must not be compromised, and allocating the privilege to the judge would do just that.<sup>325</sup> Rather, the judge should monitor the proceedings and retain the discretion to intervene if he feels that the GAL is not performing the privilege duties competently.<sup>326</sup> Taking an active role in monitoring a GAL's representation safeguards the privilege while also ensuring that the judge's objectivity is not compromised. Furthermore, just as GALs in most states undergo training in child development in order to better understand the children they work with, GALs should be required to attend training on the implications of holding a child's privilege.<sup>327</sup> This would ensure that GALs are fully equipped to handle the important task given to them.

## CONCLUSION

The Colorado Supreme Court's decision to allocate an immature child's psychotherapist-patient privilege to the GAL ensures that the child's privilege is handled by the party best able to stand in for the child. The GAL's familiarity with the

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judges to undergo in-service training in child development, abuse, and domestic violence every two years), *with* KY. R. FLOYD, KNOTT, & MAGOFFIN FAM. CT. 503(A) (2012) (only requiring a GAL to be a licensed attorney who has completed an approved training course). In Kentucky, each party's privilege, including the child's, is automatically waived in domestic relations cases. *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994). The court determines what privileged information should be disclosed in the proceeding. *Id.*

324. *See Bond*, 887 S.W.2d at 561; *see also supra* note 323 and accompanying text.

325. *L.A.N. II*, 292 P.3d 942, 949 (Colo. 2013).

326. *See* Stephen F. Florian, *Guardian ad Litem Representation of Children in Kentucky Circuit Courts*, 9 KY. CHILD. RTS. J. 1 (2001) (describing the practice of Kentucky judges of monitoring their cases to ensure children receive competent and effective representation). For example, at each hearing, a judge could ask the GAL general questions to gauge the GAL's level of engagement and expertise on a particular case, such as when he last had contact with the child or how the child felt about a particular issue. Supreme Court of Colo., *supra* note 44, at (VI)(B)(1) (commentary) (suggesting that judges ask GALs questions as a means of monitoring their general quality of representation).

327. *See generally* *OCR Presentation*, *supra* note 19 (as an example of a training session given to help GALs understand their role as privilege holder).

case and unique responsibilities to the child's interests give the GAL the clearest understanding of how asserting or waiving the privilege would affect the child. Awarding the privilege to the GAL also preserves the advantages of the adversary system by allowing the judge to remain an independent decision-maker. The GAL will advocate for the position he believes to be in the best interests of the child, the opposing party will advocate for his own position, and the judge can then weigh the arguments against one another without the concern of violating an individual responsibility to the child's privilege.

By designating the GAL as privilege holder in situations when the child's parents cannot hold the privilege, *L.A.N.* raises several other concerns. Generally, these issues can be resolved by conscientious management of proceedings involving children. Courts can be alert for possible situations in which a child's therapy records may have bearing on litigation. To avoid inappropriate disclosures and inefficient proceedings, courts should recognize potential privilege conflicts at the outset of litigation and assign a GAL as privilege holder at the earliest opportunity. Once the GAL has been awarded the privilege, both the GAL and the court must remain vigilant regarding the child's growing capability so that the privilege may revert back to the child when he has achieved sufficient maturity. At that point, the GAL's role as privilege holder has ended.

The psychotherapist-patient privilege is central to effective treatment, and child patients are uniquely vulnerable to having that privilege abused by a third-party privilege holder. As such, it is essential to establish protections that ensure the privilege cannot be waived without careful consideration. Awarding the privilege to the GAL gives the child an advocate who can make such considered decisions in the child's best interests.