§ 12-245-203.5. Minors - consent for outpatient psychotherapy services - immunity - definition

(1) As used in this section, unless the context otherwise requires, "mental health professional" includes a professional person as defined in section 27-65-102(27); a mental health professional licensed pursuant to part 3, 4, 5, 6, or 8 of this article 245; a licensed professional counselor candidate; a psychologist candidate; a clinical social worker candidate; a marriage and family therapist candidate; or an addiction counselor candidate.

(2)

(a) Notwithstanding any other provision of law, a mental health professional may provide psychotherapy services, as defined in section 12-245-202(14)(a), to a minor who is twelve years of age or older, without the consent of the minor's parent or legal guardian, if the mental health professional determines that:

(I) The minor is knowingly and voluntarily seeking such services; and

(II) The provision of psychotherapy services is clinically indicated and necessary to the minor's well-being.

(b) A minor may not refuse psychotherapy services when a mental health professional and the minor's parent or legal guardian agree psychotherapy services are in the best interest of the minor.

(3) If a minor voluntarily seeks psychotherapy services on the minor's own behalf pursuant to subsection (2)(a) of this section:

(a) The mental health professional may notify the minor's parent or legal guardian of the psychotherapy services given or needed, with the minor's consent, unless notifying the parent or legal guardian would be inappropriate or detrimental to the minor's care and treatment;

(b) The mental health professional shall engage the minor in a discussion about the importance of involving and notifying the minor's parent or legal guardian and shall encourage such notification to help support the minor's care and treatment; and

(c) Notwithstanding the provisions of subsection (3)(a) of this section, a mental health professional may notify the minor's parent or legal guardian of the psychotherapy services given or needed, without the minor's consent, if, in the professional opinion of the mental health professional, the minor is unable to manage the minor's care or treatment.

(4) A mental health professional shall fully document when the mental health professional attempts to contact or notify the minor's parent or legal guardian and whether the attempt was successful or unsuccessful, or the reason why, in the mental health professional's opinion, it would be inappropriate to contact or notify the minor's parent or legal guardian. If a minor seeks psychotherapy services on the minor's own behalf pursuant to subsection (2)(a) of this section, documentation must be included in the minor's clinical record, along with a written statement signed by the minor indicating that the minor is voluntarily seeking psychotherapy services.

(5) Psychotherapy services must be provided in a culturally appropriate manner. Written and oral instruction, training of providers and staff, and the overall provision of services must be culturally appropriate and provided in a manner and format to support individuals with limited English proficiency or challenges with accessibility related to a disability and with respect for diverse backgrounds, including individuals with different cultural origins and individuals who are lesbian, gay, bisexual, or transgender.

(6) As used in this section, "psychotherapy services" does not include inpatient psychotherapy services.

(7) If a minor who is receiving psychotherapy services pursuant to this section communicates a serious threat of imminent physical violence against a specific person or persons, including a person who is identifiable by the person's association with a specific location or entity, the mental health professional is subject to the notification provisions of section 13-21-117(2) and shall notify the minor's parent or legal guardian unless notifying the parent or legal guardian would be inappropriate or detrimental to the minor's care and treatment.

(8) Repealed.

History:

Amended by 2022 Ch. 451, §9, eff. 8/10/2022. Amended by 2022 Ch. 222, §5, eff. 7/1/2022. Added by 2019 Ch. 136, §1, eff. 10/1/2019.

Editor's Note:

This section is similar to § 12-43-202.5 as added in HB 19-1120. That section was superseded by the repeal and reenactment of this title 12, effective October 1, 2019. For the former section in effect from May 16, 2019, to October 1, 2019, see HB 19-1120, chapter 197, Session Laws of Colorado 2019.

Note:

2022 Ch. 451, was passed without a safety clause. See Colo. Const. art. V, § 1(3).

Cross Reference Note:

For the legislative declaration in HB 19-1120, see section 1 of chapter 197, Session Laws of Colorado 2019.

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L.A.N., a/k/a L.A.C., by and through her Guardian ad Litem, and The People of the State of Colorado, In the Interest of Minor Child: L.A.N., a/k/a L.A.C., Petitioners
v.
L.M.B., Respondent.

No. 11SC529.

Supreme Court of Colorado,
En Banc.

Jan. 22, 2013.

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Denver Department of Human Services, Douglas J. Friednash, Denver City Attorney, Laura Grzetic Eibsen, Assistant City Attorney, Denver, Colorado, Attorneys for Petitioner the People of the State of Colorado.

Packer Law Firm, LLC, Amy J. Packer, Littleton, Colorado, Attorneys for Petitioner Guardian ad Litem.

Pickard & Associates, P.C., Joe Pickard, Kerry Simpson, Justin Ross, Littleton, Colorado, Attorneys for Respondent.

Colorado Office of the Child's Representative, Sheri M. Danz, Amanda Donnelly, Denver, Colorado, Attorneys for Amicus Curiae Office of the Child's Representative.

Justice RICE delivered the Opinion of the Court.

¶ 1 In this parental rights termination case, we hold that the guardian ad litem ("GAL") is in the best position to waive the child's psychotherapist-patient privilege in a dependency and neglect proceeding when: (1) the child is too young or otherwise incompetent to hold the privilege; (2) the child's interests are adverse to those of his or her parent(s); and (3) section 19–3–311, C.R.S. (2012), does not abrogate the privilege. We therefore affirm the court of appeals' holding that the GAL in this case held the child's ("L.A.N.'s") psychotherapist-patient privilege.

¶ 2 In addition, we hold that the court of appeals correctly determined that the GAL partially waived L.A.N.'s psychotherapist-patient privilege when she disseminated a letter from the child's therapist to the juvenile court and to all of the parties. Nevertheless, we disagree with the procedure the court of appeals described for determining the scope of that waiver. Therefore, we remand to the court of appeals with instructions to remand to the juvenile court to determine the scope of the waiver in accordance with this opinion.

I. Facts and Procedural History

¶ 3 Children's Hospital staff contacted the Denver Department of Human Services ("DDHS") on December 9, 2008, after then seven-year-old L.A.N.'s mother, L.M.B. ("Mother"), brought L.A.N. to the hospital as a result of L.A.N.'s out-of-control behavior and suicidal statements. Mother attempted to flee with L.A.N. when hospital staff told Mother that they were considering transferring L.A.N. to a mental health facility.

¶ 4 On December 12, 2008, DDHS filed a petition in dependency and neglect regarding L.A.N. in the Denver juvenile court. The juvenile court appointed a GAL to represent L.A.N.'s best interests. DDHS placed L.A.N. in the care of her aunt while the action remained pending. After Mother made a no-fault admission to the dependency and neglect petition, the juvenile court adjudicated L.A.N. dependent and neglected as to Mother on March 11, 2009. A month later, the juvenile court adopted a treatment plan for Mother that required her to, among other things, secure lawful income, secure housing, and undergo psychological treatment and evaluation.

¶ 5 L.A.N. remained with her aunt after the juvenile court's March 2009 adjudication.

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The aunt hired a licensed professional counselor, Kris Newland, to provide therapy for L.A.N. beginning in April 2009. L.A.N. continued in therapy with Newland after moving into her grandparents' home later that year.

¶ 6 On February 18, 2010, Newland wrote a letter to the GAL assessing L.A.N.'s progress. The letter contained a number of Newland's specific observations from her therapy sessions with L.A.N. For example, Newland expressed "[c]oncern about [the parent's] level of anger that I have heard about from [L.A.N.] and witnessed myself in the courtroom after the court hearings." She additionally quoted L.A.N. directly several times, including statements such as, "Mommy hurts bodies," and "I'm fine with visits at Mommy's house as long as I don't have to go alone."

¶ 7 Without expressly waiving or mentioning the psychotherapist-patient privilege contained in subsection 13–90–107(1)(g), C.R.S. (2012), the GAL distributed Newland's letter to the juvenile court and to all of the parties. On June 17, 2010, DDHS moved the juvenile court to terminate the parent-child relationship between Mother and L.A.N. on account of Mother's alleged failure to adequately comply with her court-prescribed treatment plan. On June 28, 2010, Mother's counsel subpoenaed Newland to appear for a deposition and to produce her entire case file in connection with the termination motion. Newland's counsel filed a motion to quash the subpoena and stated therein that the therapist-patient privilege of subsection 13–90–107(1)(g) protected Newland's records from disclosure.

¶ 8 After a hearing on the motion, the juvenile court granted the motion to quash as to the records, but denied it as to the deposition. In both written and oral findings, the juvenile court determined that neither L.A.N. nor Mother could waive L.A.N.'s psychotherapist-patient privilege. Instead, it found that the juvenile court itself had the authority to authorize a limited waiver of L.A.N.'s privilege because the court allowed and encouraged Newland to report to the court regarding L.A.N.'s therapy. The juvenile court balanced the risks of disclosing Newland's records—and thereby damaging the therapeutic relationship between Newland and L.A.N.—against Mother's interest in putting on a sufficient case to protect her parental rights. It concluded that Mother's counsel could depose Newland, but that Newland should not disclose her notes, video tapes, or personal records because doing so would be "clearly beyond the scope of any limited waiver" of L.A.N.'s privilege. Mother's counsel deposed Newland on August 13, 2010.

¶ 9 The case proceeded to a trial before the juvenile court. Newland testified in her expert capacity as L.A.N.'s therapist. During cross-examination, Mother's counsel again requested that the juvenile court order Newland to produce her case file. Reiterating the findings from its July 15, 2010, order that protected the file, the juvenile court once more determined that Newland's disclosure of information to assist the court constituted a limited waiver of L.A.N.'s therapist-patient privilege, but that this waiver did not include the documents Mother requested.

¶ 10 On November 3, 2010, the juvenile court terminated the parent-child relationship between Mother and L.A.N. Mother appealed the termination order to the court of appeals on several grounds, including that the juvenile court erred when it denied Mother's request for production of Newland's case file. The court of appeals determined that Mother was entitled to at least a portion of Newland's file because the GAL partially waived L.A.N.'s psychotherapist-patient privilege when she disseminated Newland's letter. *People ex rel. L.A.N.*, ––– P.3d ––––, ––––, 2011 WL 2650589 (Colo.App.2011). As such, the court of appeals opined that the juvenile court's denial of Mother's access to Newland's file deprived Mother of a fundamentally fair opportunity to protect her parental rights. *Id.* It therefore reversed the order of the juvenile court. *Id.* at ––––.

¶ 11 The GAL and DDHS petitioned this Court for certiorari review of the court of appeals' opinion. We granted certiorari to determine: (1) whether a GAL in a dependency and neglect proceeding can waive the child's psychotherapist-patient privilege; and (2) whether the court of appeals erred in determining that L.A.N.'s psychotherapist-

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patient privilege was waived with respect to certain materials in Newland's file.

II. Analysis

¶ 12 We first describe the psychotherapist-patient privilege and discuss its application in dependency and neglect cases. Next, we explain why the GAL holds the child's privilege in a dependency and neglect case when neither the child nor the child's parent(s) have such authority. Finally, we outline the privilege log and balancing procedures that the juvenile court shall apply on remand to determine the scope of the GAL's waiver of L.A.N.'s psychotherapist-patient privilege.

A. The Therapist–Patient Privilege in Dependency and Neglect Proceedings

¶ 13 We first review subsection 13–90–107(1)(g) and the dependency and neglect provisions of the Children's Code, sections 19–3–100.5 to 19–3–703, C.R.S. (2012), de novo to determine how the psychotherapist-patient privilege applies in the dependency and neglect context. *See Klinger v. Adams Cnty. Sch. Dist. No. 50,* 130 P.3d 1027, 1031 (Colo.2006) (statutory interpretation presents a question of law that this Court reviews de novo).

¶ 14 The psychotherapist-patient privilege statute states that a psychotherapist "shall not be examined without the consent of the [patient] as to any communication made by the [patient] to the [therapist]." § 13–90–107(1)(g). The purpose of this provision 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. *Jaffee v. Redmond,* 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996); *see People v. Sisneros,* 55 P.3d 797, 800 (Colo.2002); *Bond v. Dist. Court,* 682 P.2d 33, 38 (Colo.1984). Juvenile patients in particular require the privacy protection provided by the psychotherapist-patient privilege due to the sensitive nature of children's mental health care. *See Dill v. People,* 927 P.2d 1315, 1321 (Colo.1996) (describing the importance of the psychotherapist-patient privilege in the child sexual assault context).

¶ 15 The psychotherapist-patient privilege shields communications between the therapist and the patient from disclosure and also prevents pretrial discovery of files or records derived from or created during the course of ongoing mental health treatment. *Sisneros,* 55 P.3d at 800;*Dill,* 927 P.2d at 1321. If not otherwise abrogated by statute, the privilege applies absent an express or implied waiver by the privilege holder. § 13–90–107(1)(g) (privileged information cannot be disclosed "without the consent" of the privilege holder); *see Clark v. Dist. Court,* 668 P.2d 3, 9 (Colo.1983). Waiver occurs if the evidence shows that the privilege holder "by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question." *Sisneros,* 55 P.3d at 801 (quoting *Clark,* 668 P.2d at 8).

¶ 16 Having generally described the psychotherapist-patient privilege, we now determine how this privilege applies in the dependency and neglect context by examining the relevant portions of the Children's Code. Article 3 of the Children's Code governs dependency and neglect proceedings. *See*§§ 19–3–100.5 to 19–3–703. Section 19–3–311 specifically abrogates the psychotherapist-patient privilege with respect to communications between a client and a licensed mental health professional that form the basis of a report of child abuse or neglect under section 19–3–304. Aside from section 19–3–311, the dependency and neglect provisions are silent regarding the psychotherapist-patient privilege.

As such, if communications between a child-patient and his or her psychotherapist do not form the basis of a report of child abuse or neglect as described in section 19–3–304, then the psychotherapist-patient privilege applies to those communications in a dependency and neglect proceeding. *See People v. Dist. Court,* 743 P.2d 432, 434 (Colo.1987).

¶ 17 In this case, Newland provided L.A.N. with ongoing therapy beginning in April 2009 after the juvenile court adjudicated L.A.N. dependent and neglected as to Mother. Newland and L.A.N. therefore have a psychotherapist-patientt

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t relationship subject to the privilege contained in subsection 13–90–107(1)(g). The notes and other documents in Newland's file for L.A.N. did not form the basis of a report of child abuse or neglect under section 19–3–304. Therefore, L.A.N.'s psychotherapist-patient privilege was not abrogated by section 19–3–311. Accordingly, Newland's records derived from or created during the course of her ongoing treatment of L.A.N were protected from pretrial discovery and testimonial disclosure under subsection 13–90–107(1)(g) unless the privilege holder expressly or impliedly waived the privilege. *See Sisneros,* 55 P.3d at 801.

¶ 18 Having determined that a privileged relationship subject to subsection 13–90–107(1)(g) exists between Newland and L.A.N., we now explain why the GAL holds L.A.N.'s psychotherapist-patient privilege in this case before examining the waiver issue.

B. The GAL Holds the Privilege

¶ 19 Subsection 13–90–107(1)(g) does not specify who holds a child's psychotherapist-patient privilege in a dependency and neglect proceeding. In general, however, Colorado courts have recognized that the patient holds the privilege. *See, e.g., People v. Wittrein,* 221 P.3d 1076, 1083–84 (Colo.2009) (patient held her own psychologist-patient privilege). When the patient is a child who is too young or otherwise incompetent to hold the privilege, the child's parent typically assumes the role of privilege holder.[1] *See, e.g., id.* at 1084 n. 6 (noting that the mother of an eight-year-old child had expressly waived the child's privileges relating to treatment provider's records); *Lindsey v. People,* 66 Colo. 343, 355, 181 P. 531, 536 (1919) ("[T]he proper person to claim or waive the privilege as to a minor is the natural guardian of such minor—in this case his mother." (citation omitted)).

¶ 20 The parent, however, cannot hold the child's psychotherapist-patient privilege when the parent's interests as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship. *See People v. Marsh,* ––– P.3d ––––, ––––, 2011 WL 6425492 (Colo.App.2011) ("[T]he nature of a conflict between the interests of a parent and of his or her child may preclude the parent from waiving the child's psychologist-patient privilege."); *see also Attorney ad Litem v. Parents of D.K.,* 780 So.2d 301, 307 (Fla.Dist.Ct.App.2001) ("Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf."); *In re Zappa,* 6 Kan.App.2d 633, 631 P.2d 1245, 1251 (1981) (parent cannot assert or waive the child's privilege in a termination of parental rights case); *In re Berg,* 152 N.H. 658, 886 A.2d 980, 988 (2005) (warning that parents could waive or assert the child's therapist-patient privilege for reasons unconnected to the child's interests in a child custody dispute).

¶ 21 The question of who holds the child's psychotherapist-patient privilege in a dependency and neglect case when neither the child nor the parent has such authority remains unsettled in Colorado. As such, we now discuss whether the authority to assert or waive the privilege in this type of case should lie with the department of human services, the juvenile court, or the GAL.[2]

¶ 22 The county department of human services should not hold the child's psychotherapist-patient privilege because its duties could conflict with the child's interest in maintaining the confidentiality of therapeutic communications. For example, the department of human services has exclusive authority to

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initiate dependency and neglect proceedings. *L.G. v. People,* 890 P.2d 647, 654 (Colo.1995). Therefore, unlike the GAL whose sole obligation is to advocate on behalf of the child's best interests during a dependency and neglect proceeding, the department of human services participates as an adversarial party in defending its dependency and neglect petition. If vested with the authority to hold the child's psychotherapist-patient privilege, the department of human services, like the parent as discussed above, could assert or waive that privilege as part of its litigation strategy. While strategic assertion or waiver of the privilege could advance the department of human service's position that that the child is dependent and neglected, such action could also damage the child's beneficial relationship with his or her therapist. This tension between the department of human services' duty to diligently bring its case and its duty to further the best interests of the child illustrates why the department of human services should not hold the child's privilege in a dependency and neglect case when neither the child nor the parent(s) have such authority.

¶ 23 Likewise, the juvenile court is not in the best position to hold the child's psychotherapist-patient privilege for several reasons. First, the juvenile court's role in a dependency and neglect proceeding, as in other types of cases, is that of independent decision-maker. *See People v. Romero,* 694 P.2d 1256, 1266 (Colo.1985) (stating that court should not deviate from its role as impartial arbiter). Among other obligations stemming from this role, the juvenile court independently reviews and decides the parties' discovery motions. These motions—like the motion to quash Mother's subpoena of Newland's file in this case—on occasion ask the juvenile court to objectively decide privilege-related issues. Requiring the juvenile court to both hold the child's psychotherapist-patient privilege, and objectively review and decide privilege-related discovery issues, could undermine the juvenile court's objective review function by injecting the juvenile court's subjective opinion regarding the child's privilege into what should be a purely objective calculus. The interest in preserving the juvenile court's objectivity in reviewing and deciding discovery issues demonstrates why the juvenile court is not in the best position to hold the child's psychotherapist-patient privilege.

¶ 24 Similarly, although the juvenile court must consider the child's best interests throughout the dependency and neglect proceeding, *see, e.g.*,section 19–3–604(3), C.R.S. (2012) (requiring court at termination hearing to "give primary consideration to the physical, mental, and emotional conditions and needs of the child"), its role is not to *represent* the best interests of the child. That advocacy function rests with the GAL. *See* § 19–3–203(3); Chief Justice Directive 04–06 § V.B (Dec. 2011). Therefore, although the juvenile court must render its decisions with the best interests of the child in mind, it is not in an ideal position to assert or waive the child's psychotherapist-patient privilege due to its position as an independent decision-maker rather than as an advocate.

¶ 25 Finally, the obligation to assert or waive the child's psychotherapist-patient privilege could unduly burden the juvenile court and would constitute a wasteful allocation of resources. The juvenile court would likely have to review a vast amount of information provided by the psychotherapist to determine whether, and to what extent, to waive the child's psychotherapist-patient privilege. This review process could significantly slow down juvenile proceedings and thereby increase the burden on the juvenile courts' already-overloaded dockets. Additionally, by serving as the child's privilege holder, the juvenile court would likely duplicate the GAL's work by reviewing and assessing information from the psychotherapist. *See* § 19–3–203(3)

(GAL must investigate the case, question witnesses, and make recommendations to the court concerning the child's welfare); Chief Justice Directive 04–06 § V.D.4 (directing the GAL to "[c]onduct an independent investigation"). This duplication of efforts would constitute a waste of scarce state resources. Thus, the juvenile court is not in the best position to hold the child's psychotherapist-patient privilege.

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¶ 26 Having determined that neither the department of human services nor the juvenile court should hold the child's psychotherapist-patient privilege when both the child and the child's parent lack the authority to do so, we now analyze whether the GAL is in the best position to hold the child's privilege, and conclude that he or she is. The GAL's "client" is the "best interests of the child." § 19–3–203(3); Chief Justice Directive 04–06 § V.B. The GAL's ethical obligations as an attorney "flow from this unique definition of 'client' "; therefore, the GAL owes fiduciary duties of loyalty and confidentiality to the child's best interests. Chief Justice Directive 04–06 § V.B.; *see*Colo. RPC 1.6 (duty of confidentiality); Colo. RPC 1.7 cmt. 1 ("[L]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."). These professional duties serve the privacy interest of the psychotherapist-patient privilege that the General Assembly aimed to protect with subsection 13–90–107(1)(g) because the GAL must refrain from revealing privileged information if doing so would be contrary to the child's best interests. *See Sisneros,* 55 P.3d at 800.

¶ 27 In addition, unlike the other potential privilege holders discussed above, the GAL is in an optimal position to understand when to assert or waive the child's privilege in order to serve the child's best interests due to the nature of the GAL's statutory duties. Colorado law requires the juvenile court to appoint a GAL in every dependency and neglect case. § 19–1–111(1), C.R.S. (2012); Chief Justice Directive 04–06 § III.A. Therefore, the GAL is consistently available to hold the child's privilege when neither the child nor the child's parent(s) have such authority. To represent the child's best interests, the GAL must investigate the case, question witnesses, and make recommendations to the court concerning the child's welfare. *See* § 19–3–203(3). The GAL accomplishes these tasks in part by interviewing people involved in the child's life, including therapists. Chief Justice Directive 04–06 § V.D.4.e. The knowledge gained by fulfilling these obligations places the GAL in the best position to determine what information to disclose in the best interests of the child. Therefore, the GAL should hold the child's privilege when neither the child nor the child's parent(s) have authority to do so.

¶ 28 We now turn to the second issue before us on certiorari review: whether the court of appeals erred in determining that L.A.N.'s psychotherapist-patient privilege was waived with respect to certain materials in Newland's file.

C. Waiver

¶ 29 We hold that the court of appeals correctly determined that the GAL waived L.A.N.'s psychotherapist-patient privilege to at least some of the information in Newland's file. The scope of this waiver, however, remains at issue. In reviewing this waiver issue, we defer to the juvenile court's findings of fact if they are supported by the evidence, and we review conclusions of law made by the juvenile court and by the court of appeals de novo. *In re B.J.,* 242 P.3d 1128, 1132 (Colo.2010).

¶ 30 As noted above, the psychotherapist-patient privilege prevents disclosure of privileged information "without the consent" of the privilege holder. § 13–90–107(1)(g); *Sisneros,* 55 P.3d at 800;*Clark,* 668 P.2d at 9. Consent, or waiver, occurs if the evidence shows that the privilege holder "by words or conduct, has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question." *Sisneros,* 55 P.3d at 801 (quoting *Clark,* 668 P.2d at 8).

¶ 31 The court of appeals correctly determined as a matter of law that the GAL at least partially waived L.A.N.'s psychotherapist-patient privilege when she disseminated Newland's letter. *People ex rel. L.A.N.,* ––– P.3d at ––––. The GAL had no obligation to disclose the letter itself to comply with her duty to "provide accurate and current information directly to the court," Chief Justice Directive 04–06 § V.D.1., or to comply with her duty to make recommendations to the juvenile court concerning L.A.N.'s welfare, section 19–3–203(3). The GAL could have conveyed Newland's opinions to the juvenile court in a number of ways apart from distributing Newland's entire letter. By opting to disseminate the letter, the GAL waived L.A.N.'s psychotherapist-patient privilege as

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to the letter's contents. The scope of the waiver with respect to information related to the letter, however, remains at issue.

1. Procedure for Determining the Scope of the Waiver

¶ 32 The question of how the juvenile court should determine the scope of a GAL's waiver of a child's psychotherapist-patient privilege in a dependency and neglect proceeding is one of first impression before this Court. We adopt the following procedure in the juvenile context.[3] First, after the juvenile court determines that the GAL waived the child's privilege, it will decide whether the scope of that waiver is readily apparent by considering the words or conduct that waived the privilege. If the scope is readily apparent, then the juvenile court may exercise its discretion and order disclosure of the evidence subject to the waiver. If the scope is not readily apparent, then the juvenile court will instruct the GAL to compile a privilege log with the help of the psychotherapist that identifies the documents that the GAL believes should remain subject to the privilege despite the waiver. *See Alcon v. Spicer,* 113 P.3d 735, 742 (Colo.2005) (describing privilege log procedure). The privilege log will explain why each document should remain privileged and must describe each document in enough detail to allow the juvenile court and the other parties to sufficiently assess the privilege claims. *Id.* (citations omitted). If, however, the juvenile court or any of the parties contend that the privilege should not apply to any of the communications listed in the privilege log, then the juvenile court may perform an *in camera* inspection of the documents at issue. *Id.* (citations omitted); *Sisneros,* 55 P.3d at 800 (trial court may order the documents potentially subject to waiver produced for *in camera* inspection).

¶ 33 After receiving the privilege log and performing any necessary *in camera* inspection of the listed documents, the juvenile court will determine the scope of the waiver by balancing the competing interests surrounding disclosure. *See Bond,* 682 P.2d at 40 (applying balancing test to determine the scope of a waiver of privilege). On the one hand, maintaining the psychotherapist-patient privilege encourages and protects the patient's privacy in seeking mental health treatment. *Id.* at 38 (citing *People v. Taylor,* 618 P.2d 1127, 1140 (Colo.1980)). Disclosing information obtained during therapy sessions could damage the trust the patient has for the therapist and for the therapeutic process generally. *Id.* at 39–40;*Clark,* 668 P.2d at 8. This concern is particularly pronounced in cases involving children due to the sensitive nature of treating children's mental health. *See Dill,* 927 P.2d at 1321. Thus, strong policy reasons support keeping records derived from a child's ongoing therapy sessions confidential. *See Bond,* 682 P.2d at 39–40.

¶ 34 On the other hand, compelling policy considerations encourage disclosure of pertinent information during discovery. For example, disclosure might satisfy a party's, like a parent's, need to obtain information essential to a claim or defense. *See Clark,* 668 P.2d at 9. In addition, disclosure can eliminate surprise at trial, bring forth relevant evidence, simplify the issues, and promote expeditious resolution of the case. *Silva v. Basin W., Inc.,* 47 P.3d 1184, 1188 (Colo.2002) (citing *Bond,* 682 P.2d at 40). Moreover, the

juvenile court may benefit from the disclosure of otherwise-privileged information from the child's psychotherapist by using that information to form its recommendations and decisions regarding the child's welfare. *See*

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In re Kristine W., 94 Cal.App.4th 521, 527, 114 Cal.Rptr.2d 369 (Cal.Ct.App.2001).

¶ 35 A juvenile court tasked with determining the scope of a GAL's waiver of the child's psychotherapist-patient privilege in a dependency and neglect case must accordingly weigh the benefits of maintaining the privilege and protecting information potentially subject to the waiver against the benefits of disclosing certain information, all the while keeping in mind its overarching duty to further the best interests of the child. It may use the following discretionary factors, among any other considerations particular to the facts of the case, to guide its balancing analysis:

1. The best interests of the child and the impact of the waiver on the child;

2. The parent(s)' due process rights and ability to adequately respond to the information provided by the psychotherapist;

3. The impact of disclosure on any applicable permanency plan—for example, a permanency goal of reunification would weigh against divulging information that could potentially damage the parent-child relationship;

4. The significance of the information to be disclosed and its impact, if any, on the case;

5. Whether the information potentially subject to disclosure is available from any other source, especially one that has already been disclosed or is less problematic to disclose;

6. The procedural posture of the proceeding; and

7. The impact that disclosure might have on any other parties or people beyond the litigation—for example, siblings, therapists, or teachers.

¶ 36 Once the juvenile court balances the interests and determines the scope of the GAL's waiver, it should order disclosure of the communications subject to the waiver to all of the parties. The juvenile court will then honor the protection the psychotherapist-patient privilege provides to the communications not subject to the waiver and will not rely on any of those communications when making decisions in the case.

2. Application

¶ 37 The scope of the GAL's waiver in this case was not readily apparent because of the breadth of information in Newland's letter.[4] Therefore, on remand, the juvenile court shall first order the GAL to compile a privilege log with Newland's assistance describing the communications that the GAL believes should remain subject to L.A.N.'s psychotherapist-patient privilege despite the disclosure of the letter. The GAL shall submit the privilege log to the juvenile court and to all of the parties. Upon request by any party, or upon its own volition, the juvenile court may review any of the communications listed in the privilege log *in camera*. To determine the scope of the waiver, the juvenile court shall then balance the interests in maintaining the privilege against the interests supporting disclosure using the factors described above at its discretion to guide its analysis.

¶ 38 If the juvenile court determines, after balancing the interests, that the scope of the waiver differs from the juvenile court's original findings, then the juvenile court shall order Newland to disclose the communications for which the GAL waived L.A.N.'s privilege. In such an instance, the juvenile court shall then conduct a new termination hearing. In the event that a new termination hearing occurs, the juvenile court shall not consider any of the communications that remain subject to L.A.N.'s

psychotherapist-patient privilege in rendering its termination decision.[5]

[292 P.3d 953]

III. Conclusion

¶ 39 We conclude that the GAL holds the child's psychotherapist-patient privilege in a dependency and neglect proceeding when neither the child nor the child's parent(s) have such authority and the privilege is not abrogated by section 19–3–311. We further hold that the GAL in this case waived L.A.N.'s psychotherapist-patient privilege when she disclosed Newland's letter. The scope of that waiver remains at issue. Therefore, we remand to the court of appeals with instructions to remand to the juvenile court for proceedings consistent with this opinion.

Justice COATS dissents.

Justice COATS, dissenting.

¶ 40 Because I find the majority's opinion driven more by policy choices than by law, but also because I believe its quest to discover the "best position" to exercise a child's statutory privilege suffers from fundamental conceptual shortcomings, with the effect of actually devaluing the privilege, I respectfully dissent.

¶ 41 Unlike either the majority or intermediate appellate court, I believe the trial court was right in concluding that under our legal structure, in proceedings to determine whether (and if so, under what conditions) a respondent will be considered fit to continue to parent his or her child, the court alone can ultimately decide what is in the best interests of the child, and therefore the court alone can decide whether the child's secrets must be exposed in furtherance of those interests. Although the ultimate question will not yet have been decided, once a parent's fitness has been sufficiently challenged to limit his parental rights and responsibilities, his access to otherwise privileged materials necessary to carry out those responsibilities is clearly no longer required. By the same token, however, I find nothing in the statutory scheme to suggest that the legislature intended by the appointment of a guardian solely for purposes of this litigation to permit that guardian complete access to the child's otherwise legally protected secrets, much less to divulge those secrets to others at his choice.

¶ 42 The legislature has created a privilege for communications made to a licensed therapist, running to the client, by expressly prohibiting the examination of a therapist about those communications without the client's consent. *See*§ 13–90–107(1)(g), C.R.S. (2012). With regard to children in particular, the legislature has limited the privilege to the extent of requiring the therapist to report whenever there is reason to suspect a child has been subjected to abuse or neglect, § 19–3–304, C.R.S. (2012), and by making clear that the therapist-client privilege cannot be a ground for excluding from proceedings resulting from such a report any communications upon which the report is based or any discussion of future or other past misconduct that could be the basis for such a report. § 19–3–311, C.R.S. (2012). The legislature has not, however, specified circumstances under which a child should be considered incapable of giving or withholding consent for the release of communications that remain privileged, nor has it expressly authorized any person or agency to give consent for the child if the child were incapable of doing so himself.

¶ 43 In this regard, I find particularly problematic the majority's characterization of a statutorily appointed guardian ad litem as the "holder" of the child's privilege. I would not even characterize a parent or legal guardian, who is expressly granted access to certain otherwise confidential records and has legal obligations for the child's safety and welfare requiring him to make important decisions on behalf of the child, as the holder of the child's privilege. Even someone with parental responsibilities may act only in the interests of the child and does not become a person to whom the privilege runs and for whose benefit it exists. Not only do I believe the express and deliberate waiver of a child's

privilege, even by one with uncontested parental responsibilities, may nevertheless be ineffective under certain circumstances; I believe the privilege of a child most certainly cannot be implicitly waived by acts of a parent that are not in the child's best interests, even though those acts would otherwise be

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sufficient for an implied waiver of the parent's own privilege.

¶ 44 In addition to the obvious dearth of authority for an appointed guardian ad litem to command the child's privilege, I confess to being baffled by the majority's staunch objections to allowing the privilege to be overridden only by court order. Courts are constantly called upon to hear evidence preliminary to determining its admissibility and to review allegedly privileged communications in camera to determine their discoverability or admissibility. It seems particularly strained in the context of dependency and neglect proceedings, where the court has uncommonly broad authority to seek assistance and order evaluations of the child on its own, to limit the role of the court out of concern for maintaining its independence and objectivity. Where virtually every decision the court makes is already limited by consideration for the best interests of the child, and where the court must ultimately decide whether communications between the child and her therapist, despite not falling within the broad category of abuse or neglect singled out for disclosure by the legislature, are nevertheless sufficiently relevant to the question of dependency and neglect, or possibly actual termination of parental rights, I find it unconvincing to assign the power of disclosure, rather than to the court, to a guardian ad litem, appointed to assist the court in evaluating the child's best interests.

¶ 45 Finally, in light of the majority's reservation of the determination whether a child retains authority over her own privilege to the court, virtually without guideline or restriction, and its similar reservation of the determination of the scope of any waiver by the guardian ad litem, the practical effect of the majority's allocation of authority to the guardian ad litem remains for me somewhat unclear. If a guardian ad litem cannot be confident he is the holder of the privilege without a ruling by the court, and if any dispute over the scope of a waiver must ultimately be resolved by the court following in-camera review, even the majority's solution appears to leave the ultimate decision about disclosure in the hands of the court, excepting only where the guardian ad litem is willing to divulge everything sought by the parties. And while the majority's prescription may permit a guardian ad litem to safely fashion agreements for disclosure among the parties without troubling the court (simply because there is likely to be no one left to object on the child's behalf), it is precisely this eventuality that I believe devalues the privilege intended by the legislature.

¶ 46 Nothing would preclude a guardian ad litem (after alert from the child's therapist) or the child's therapist himself from moving the court for an in camera review of communications the therapist suspects of having relevance, despite failing to suggest abuse or neglect. In that event, the court would merely be called upon to perform substantially the same functions required under the majority's proposal for every case lacking complete agreement of the parties and the guardian ad litem about the scope of waiver.

¶ 47 Because I believe there to be no good reason, in either law or logic, to bypass the court's review before allowing disclosure of the confidences of a child whose status is pending litigation, and a plethora of good reasons to require it, I respectfully dissent.

Notes:

[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.

[2] While other people or entities might participate in some dependency and neglect proceedings, the parties do not assert that anyone other than the juvenile court, the department of human services, or the GAL should hold the privilege when neither the child nor the child's parent(s) have such authority. Therefore, we limit our analysis to these three potential privilege holders.

[3] We disagree with the court of appeals' instructions to the trial court and to the parties on remand. *See People ex rel. L.A.N.,* ––– P.3d at ––––. The court of appeals directed the parties to confer to determine whether they could agree to allow the juvenile court to decide the case on the basis of the evidence that would remain after excluding all information from the therapist. *Id.* If they so agreed, then the juvenile court was to make new findings on the basis of the remaining evidence. *Id.* If they did not agree, then the court of appeals directed the juvenile court to conduct an *in-camera* review of the therapist's file to identify the portions of the file that the court of appeals held were discoverable while considering any arguments from the parties regarding the scope of the waiver. *Id.* Finally, the court of appeals directed the juvenile court to order Newland to provide Mother with the discoverable portions of her file. *Id.*

[4] Newland's letter contained five single-spaced pages of information including quotes from L.A.N. that appear to have occurred during multiple therapy sessions, Newland's observations of L.A.N., Newland's observations of L.A.N.'s family members, analysis of L.A.N.'s progress, and Newland's recommendations for L.A.N.'s future.

[5] The court of appeals remanded the portion of this case having to do with the Indian Child Welfare Act ("ICWA") to the juvenile court. Our instructions on remand do not conflict with the court of appeals' ICWA holding because the ICWA issue is not before this Court. As such, the juvenile court must still resolve the ICWA issue as instructed by the court of appeals.

396 P.3d 1

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Anthony Edwin MARSH, Defendant–Appellant.

No. 08CA1884.

Colorado Court of Appeals, Div. I.

Dec. 22, 2011.

[396 P.3d 5]

John W. Suthers, Attorney General, John T. Lee, Assistant Attorney General, Denver, Colorado, for Plaintiff–Appellee.

Douglas K. Wilson, Colorado State Public Defender, Ari Krichiver, Deputy State Public Defender, Anne T. Amicarella, Deputy State Public Defender, Denver, Colorado, for Defendant–Appellant.

Opinion by Judge MILLER.

Defendant, Anthony Edwin Marsh, appeals his judgment of conviction entered on a jury verdict finding him guilty of nine counts: three counts of sexual assault on a child by one in a position of trust, two counts of sexual assault on a child, two counts of sexual assault on a child as part of a pattern of

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abuse, one count of sexual exploitation of a child, and one count of inducement of child prostitution. We affirm.

In affirming, we address two issues of first impression in Colorado:

> • First, we consider whether images contained in an "Internet cache," a storage mechanism whereby a computer automatically stores information displayed on a web page, are sufficient to establish that a defendant knowingly possessed sexually exploitative material under section 18–6–403, C.R.S.2011. We conclude that such evidence, when considered together with evidence that the defendant intentionally sought the sexually exploitative material, can be sufficient to show that the defendant possessed the images at the time he or she visited the web page.
>
> • Second, we consider whether a parent has the absolute authority to waive a minor child's psychologist-patient privilege. We conclude the nature of a conflict between the interests of a parent and of his or her child may preclude the parent from waiving the child's psychologist-patient privilege.

We also address the numerous other issues raised by defendant.

I. Background

Defendant has three daughters, R.K., B.L., and C.O., and several grandchildren. The charges in this case stem from incidents involving three of defendant's granddaughters, C.S., E.M., and S.O. C.S. is the daughter of R.K., E.M. is the daughter of B.L., and S.O. is the daughter of C.O. The granddaughters' ages ranged from nine to eleven years old at the time of trial.

Each of these granddaughters testified at trial that defendant took her to his basement, where she sat on his lap in front of his computer. C.S. and E.M. testified that while they sat on his lap, defendant viewed pornographic material on his computer and rubbed their genitalia over their clothes. C.S. also testified that defendant performed oral sex on her, asked her to touch his penis in exchange for receiving a banana, and required C.S. and her younger brother to simulate sexual intercourse in exchange for a treat. S.O. testified that defendant similarly touched her crotch while she sat on his

lap in front of the computer. Although she denied at trial remembering what was on the computer while defendant touched her, evidence was admitted that she previously told investigators that defendant watched pornographic movies on these occasions.

A.S., E.M.'s older sister, testified that she too had been sexually assaulted by defendant in his basement and that she had been with defendant when he looked at pictures of naked children on his computer. The allegations made by A.S. resulted in a previous criminal case against defendant that was dismissed.

In addition to the two issues set forth above, defendant contends that the trial court committed reversible errors by (1) denying defendant's request for a continuance; (2) denying three challenges for cause of prospective jurors; (3) ruling that if defendant called another two of his granddaughters to testify that they had not been sexually assaulted by him, the prosecution would be permitted to offer evidence of his prior convictions, including one for sexual assault; (4) impermissibly limiting defendant's cross-examinations of R.K. and C.O.; (5) allowing two prosecution witnesses to provide expert testimony under the guise of lay opinion; and (6) ruling that taking judicial notice of the dismissal of the criminal charges regarding A.S. would open the door to defendant's previous convictions being presented to the jury. He also contends that the cumulative effect of the trial court's errors, other than insufficiency of evidence, warrants reversal. We reject each contention.

II. Sufficiency of the Evidence

Defendant contends that there was insufficient evidence to support his conviction for sexual exploitation of a child as a class 4 felony. We disagree.

A. The Statute

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Section 18–6–403[1] makes it unlawful to knowingly possess or control any sexually exploitative material, which it defines[2] to include any electronic or digitally reproduced material that depicts a child participating in, or being used for, explicit sexual conduct. The offense is a class 6 felony but is increased to a class 4 felony if the defendant possesses more than twenty items of sexually exploitative material. § 18–6–403(5)(b)(II), C.R.S.2011. Defendant does not contend that the evidence was insufficient to convict him of a class 6 felony. Rather, he contests the sufficiency of the evidence to establish that he knowingly possessed more than twenty different items of sexually exploitative material during the relevant time frame set out in the complaint, January 1, 2007 through May 16, 2007.

B. Facts

The facts regarding this issue are undisputed. Pursuant to a search warrant, police seized defendant's computer on April 26, 2007. Forensic analysis of the computer revealed numerous sexually exploitative images. The prosecution presented a compilation of seven "lost" files, thirty-eight "recent file thumbs," one image from the computer's "My Pictures" folder, and seventeen images from the "AOL cache," for a total of sixty-three images.

The prosecution's computer expert testified that the seven lost files were created on April 24, 2007, but had been deleted from the computer before it was seized two days later. The thirty-eight recent file thumbs were smaller images depicting files that had been opened on the computer at some time but had been deleted from the hard drive. The computer expert could not specify when the files had been opened or when they had been deleted. The My Pictures image remained stored on the hard drive in the My Pictures folder when police seized the computer.

The expert also testified that the AOL cache contained images downloaded from web pages visited using defendant's computer. He explained that an Internet cache, such as the AOL cache, is a storage mechanism by which the computer

automatically stores information displayed on a web page. When a user revisits a web page with information saved in the Internet cache, the web page will load the locally saved information instead of re-downloading the information from the Internet. This process allows web pages to load more quickly. The expert was unable to identify the exact date defendant's computer had saved the images in the AOL cache, but he did testify that the earliest date on which these seventeen images could have been saved to the AOL cache was March 7, 2007, which is within the relevant time frame.

The jury found defendant guilty of knowingly possessing more than twenty different items of sexually exploitative material within the relevant time frame. Therefore, defendant was convicted of a class 4 felony.

Defendant does not contest the sufficiency of the evidence regarding the seven lost files or the My Documents file. Therefore, if the evidence is sufficient regarding the seventeen AOL cache images, then the number of sexually exploitative items knowingly possessed by defendant during the relevant time frame exceeds twenty, supporting the class 4 felony conviction. We conclude that the evidence is sufficient regarding the seventeen AOL cache images and therefore do not consider the recent thumb files.

C. Analysis

When asked to review the sufficiency of the evidence supporting a guilty verdict, we "determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of the accused's guilt beyond a reasonable

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doubt." *People v. Sprouse,* 983 P.2d 771, 777 (Colo.1999). In making this determination concerning the AOL cache images, we consider three issues: (1) the meaning of the term "possession" as used in section 18–6–403 ; (2) whether Internet cache images can be used as evidence of possession; and (3) if so, whether defendant knowingly possessed the AOL cache images.

1. The Meaning of "Possession" as Used in the Statute

Our interpretation of the term "possession" is guided by several principles of statutory construction. "The primary goal in statutory interpretation is to ascertain and effectuate the General Assembly's intent, and we begin this task by examining the plain meaning of the statutory language." *Platt v. People,* 201 P.3d 545, 551 (Colo.2009). "We read words and phrases in context and construe them literally according to common usage unless they have acquired a technical meaning by legislative definition. Where the language is clear and unambiguous, we do not resort to other rules of statutory construction." *Klinger v. Adams County Sch. Dist. No. 50,* 130 P.3d 1027, 1031 (Colo.2006) (citation omitted). When the language is ambiguous, we may consider other aids to statutory construction, including the object sought to be attained by the General Assembly. *Bostelman v. People,* 162 P.3d 686, 690 (Colo.2007) (citing *Klinger,* 130 P.3d at 1031).

"Possession" is not defined in section 18–6–403. *Cf. Patton v. People,* 35 P.3d 124, 131 (Colo.2001) (finding that "possession" of a controlled substance is not statutorily defined); *People v. Garcia,* 197 Colo. 550, 554, 595 P.2d 228, 231 (1979) (" 'Possession' is not defined in the [weapons] statute, nor is it a term of art in the law."). Therefore, we must give the term "possession" its generally accepted meaning. *See People v. Gross,* 670 P.2d 799, 801 (Colo.1983) ("A common term is to be given its generally accepted meaning.").

According to *Webster's Third New International Dictionary* 1770 (2002), "possession" is "the act or condition of having in or taking into one's control or holding at one's disposal." Similarly, *Black's Law Dictionary* 1281 (9th ed. 2009), defines "possession" as "[t]he fact of having or

holding property in one's power; the exercise of dominion over property." Possession need not be exclusive. In construing the statute prohibiting possession of a weapon by a previous offender, our supreme court has held that possession does not require the ability to exclude others, because "imposing the requirement of exclusive control alters the generally accepted meaning of the term, making it both unduly restrictive and a potential source of confusion for jurors." *People v. Martinez,* 780 P.2d 560, 561 (Colo.1989) ; *see also Garcia,* 197 Colo. at 554, 595 P.2d at 231.

The General Assembly's declarations concerning this statute demonstrate the intent to extend a broad reach to the conduct prohibited. *See Hernandez v. People,* 176 P.3d 746, 753 (Colo.2008) ("Often the best guide to determining legislative intent is the General Assembly's declaration accompanying the statute."). The declarations include the following:

> • "[T]o protect children from sexual exploitation it is necessary to prohibit the production of material which involves or is derived from such exploitation and *to exclude all such material from the channels of trade and commerce.* " § 18–6–403(1), C.R.S.2011 (emphasis added).
>
> • "[E]ach time [sexually exploitative] material is *shown or viewed* the child is harmed." § 18–6–403(1.5), C.R.S.2011 (emphasis added).
>
> • Sexually exploitative "material is used to break down the will and resistance of other children to encourage them to participate in similar acts of sexual abuse." *Id.*

Thus, the General Assembly clearly intended to reach each instance of viewing of sexually exploitative material in all channels of trade and commerce, including the Internet. The General Assembly also sought to protect children from being groomed for sexual abuse by preventing adults, like defendant, from showing them sexually exploitative material from any channel of trade or commerce.

We therefore conclude that for purposes of section 18–6–403, "possession" means the

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non-exclusive control or dominion over sexually exploitative material,[3] and the statute requires that any such control or dominion be carried out knowingly.

2. Internet Cache Files as Evidence of Possession

Defendant does not contest that one may possess or control electronic or digital images on a computer for purposes of section 18–6–403. Indeed, the definition of "sexually exploitative material" in section 18–6–403(2)(j) encompasses any electronically or digitally reproduced visual material obtained on the Internet. *See Fabiano v. Armstrong,* 141 P.3d 907, 910 (Colo.App.2006) (receipt of a solicited e-mail attaching prohibited material constitutes possession for purposes of the statute).

Defendant nonetheless argues that only persons with specialized knowledge can access Internet cache files and that there is no evidence that he knew of the existence of the seventeen files in the AOL cache, that he knew how to access them, or that he exercised any physical dominion or control over them. This argument, however, addresses only whether the mere existence of the files in the AOL cache constitutes knowing possession or control of them. Defendant ignores that the files in the AOL cache provide evidence that the images were previously viewed on his computer. Evidence of this fact was provided by the prosecution's computer expert and conceded in defendant's opening brief, which states that these images were stored in the AOL cache "following the simple act of visiting a website."

Thus, the existence of the seventeen files in the cache constitutes proof that defendant's computer

was used to visit web pages containing sexually exploitative material. That visit or viewing of the web pages constitutes possession of the images displayed on the web pages.

When a web page is visited, an image is displayed on the computer screen. When the image is viewed, the user possesses and controls it in the sense that he or she has the ability to enlarge, save, copy, forward, or print the image. The user can also show the image on the screen to others. *See Ward v. State,* 994 So.2d 293, 301 (Ala.Crim.App.2007) (defendant had possession of images viewed on web pages because he had the ability to copy, print, email, or save them); *People v. Kent,* 79 A.D.3d 52, 910 N.Y.S.2d 78, 89 (N.Y.App.Div.2010) ("The defendant knowingly accessed the Web page and displayed it on his computer screen for his personal consumption, establishing his dominion and control over the images."), *leave to appeal granted,* 17 N.Y.3d 797, 929 N.Y.S.2d 105, 952 N.E.2d 1100 (2011) (table); *State v. Hurst,* 181 Ohio App.3d 454, 909 N.E.2d 653, 665 (2009) (evidence sufficient because the defendant "sought out the images and exercised dominion and control over them"); *State v. Mercer,* 324 Wis.2d 506, 782 N.W.2d 125, 136 (App.2010) (evidence was sufficient because the "user could save, print or take some other action to control the images, and the user affirmatively reached out for and obtained the images knowing that the images would be child pornography"); *see generally* Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files,* 19 Berkeley Tech. L.J. 1227, 1254 (2004).

We therefore hold that the presence of digital images in an Internet cache can constitute evidence of a prior act of possession.[4]

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Other courts have reached similar conclusions.*See, e.g., Tecklenburg v. Appellate Div.,* 169 Cal.App.4th 1402, 87 Cal.Rptr.3d 460, 472 (2009) ("[T]he [Internet] cache evidenced defendant's knowing possession or control of the images. There was no need for additional evidence that defendant was aware of the [tagged image file format] or cache in order for the defendant to have violated [the child pornography statute]."); *People v. Josephitis,* 394 Ill.App.3d 293, 333 Ill.Dec. 188, 914 N.E.2d 607, 616 (2009) ("[Internet cache] files, even absent knowledge of their presence or how to control them may be proper evidence of past possession."); *see also* Giannina Marin, Note, *Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?,* 60 Fla. L. Rev. 1205, 1231 (2008) ; Howard, 19 Berkeley Tech. L.J. at 1254.

In this case, the files in the AOL cache provide evidence of prior possession of the images displayed by web pages visited. The prosecution's computer expert testified that the seventeen images were displayed on web pages visited using defendant's computer and that these images were all saved to the AOL cache no earlier than March 7, 2007. Therefore, since the police seized the computer on April 26, 2007, the prosecution presented unrebutted evidence that each of these images was viewed on web pages visited during the relevant time frame of January 1, 2007 through May 16, 2007.

3. Knowing Possession by Defendant

Finally, the prosecution presented substantial evidence that defendant possessed these images knowingly. This evidence includes the following:

- The computer belonged to defendant and was in his house and under his control.

- Three of defendant's granddaughters testified that he viewed sexually exploitative material on his computer while they sat on his lap, and a fourth provided the same information to investigators.

- In addition to the AOL cache images, lost files, and My Pictures

> image, numerous other images fitting the definition of sexually exploitative material were found on the computer's hard drive.
>
> • Three of the images contained in the AOL cache are identical to three lost images that were saved to the computer on April 24, 2007.

Based on this evidence, the jury could infer that defendant, and not another person, on multiple occasions viewed sexually exploitative material using the computer on which the images were found. The jury could also infer that, on at least three occasions, defendant intentionally saved images he viewed on the Internet to his hard drive. Thus, the jury could decide that defendant did not accidently or unintentionally visit the web pages from which the cache files were created.

We therefore conclude that the prosecution presented sufficient evidence to prove that defendant knowingly possessed more than twenty items fitting the definition of sexually exploitative material during the relevant time frame.

III. Psychologist–Patient Privilege

Defendant contends that the trial court erred by refusing to allow him to question A.S. about a session she had with a psychologist and denying his request to enter the psychologist's report of this session into evidence. We are not persuaded.

A. Facts

Several years prior to the filing of charges in this case, A.S. alleged that defendant had sexually assaulted her, and charges were filed against him. B.L., A.S.'s mother, sent her to a psychologist. After the session, the psychologist provided B.L. with a written report. Defense counsel represented to the trial court in this case that B.L. gave him a copy of the report in 2003, when he represented defendant in the prior case, and that he also received a copy from the Boulder district attorney's office, presumably in connection with that case. The prior case was dismissed.

When A.S. testified at the trial in the present case that defendant had sexually assaulted her, defendant sought to cross-examine her using information obtained from the

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psychologist's report and to enter the report into evidence. The trial court pointed out that the report was protected by the psychologist-patient privilege and held that neither B.L. nor the Boulder district attorney's office had waived or was authorized to waive the privilege on behalf of A.S. In response to the court's inquiry, A.S.'s guardian ad litem (GAL) said she would not waive the privilege on behalf of A.S. The trial court held that A.S.'s session with the psychologist and the psychologist's report remained protected by the psychologist-patient privilege and were inadmissible.

On appeal, defendant contends that (1) the psychologist's report was never privileged because the session with A.S. was not a treatment session, and (2) if the report was privileged, B.L. waived the privilege on behalf of A.S. Defendant does not contend that the Boulder district attorney waived the privilege.

B. Analysis

1. Privileged Status of the Psychologist Session and Report

We apply here the principles of statutory interpretation discussed above.

The psychologist-patient privilege is created by section 13–90–107(1)(g), C.R.S.2011:

> A licensed psychologist ... shall not be examined without the consent of the [psychologist's] client as to any communication made by the client to the [psychologist] or the [psychologist's] advice given in the course of professional employment....

"The purpose of the psychologist-patient privilege is to enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the psychologist's disclosure of information divulged by the client during the course of treatment." *People v. Sisneros,* 55 P.3d 797, 800 (Colo.2002). While the same policy supports the physician-patient privilege, the supreme court has explained that the justification is even more compelling when applied to the relationship between a psychologist and his or her patient. *Id.*

The claimant of a privilege bears the burden of establishing its applicability. *People v. Pressley,* 804 P.2d 226, 227 (Colo.App.1990). Once the privilege attaches, "the psychologist-patient privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment." *Sisneros,* 55 P.3d at 800.

Here, defendant contends that A.S.'s session with the psychologist was not privileged because it was intended to determine the veracity of A.S.'s allegations concerning defendant rather than to treat A.S. Defendant relies upon two supreme court decisions, *Williams v. People,* 687 P.2d 950 (Colo.1984), and *B.B. v. People,* 785 P.2d 132 (Colo.1990), to support his contention.

In *Williams,* the supreme court refused to extend the psychologist-patient privilege to conversations the defendant had with a police officer not qualified to provide psychological therapy. 687 P.2d at 954. It is undisputed in this case that A.S. visited a trained psychologist, and therefore *Williams* does not apply here.

In *B.B.,* the trial court appointed a clinical psychologist to serve as an expert witness to assist a mother in defending against a petition for termination of her parental rights. 785 P.2d at 140. The supreme court held that the mother's statements made to the psychologist were not privileged because they were made for the purpose of preparing for litigation and not for diagnosis and treatment.*Id.* Here, there is no allegation that the purpose of A.S.'s session with the psychologist was to prepare the psychologist or A.S. to testify in the prior criminal proceedings against defendant. Rather, defense counsel argued to the trial court that the purpose of the session was "to find out if there was truth to the allegations" A.S. had made against defendant. Defendant has not explained how the psychologist could undertake such an effort without diagnosis of A.S.'s emotional and mental condition.

We therefore conclude that A.S.'s psychologist session falls within the ambit of the psychologist-patient privilege. This conclusion

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promotes the purpose of the privilege, which is to promote trust between a psychologist and his or her patient. The psychologist's ability to diagnose A.S. with respect to the allegations depended upon that relationship of trust in order to encourage candor on the part of A.S. in discussing highly sensitive and personally embarrassing matters. *See Sisneros,* 55 P.3d at 800 ; *People v. Dist. Court,* 719 P.2d 722, 726–27 (Colo.1986). To hold that the session was not privileged would undermine the confidentiality and trust inherent in the psychologist-patient privilege.

2. Waiver

Waiver of a right is a mixed question of fact and law that we review de novo. *See People v. Alengi,* 148 P.3d 154, 159 (Colo.2006) (waiver of right to counsel). However, when reviewing mixed questions of fact and law, we give deference to the district court's factual findings. *See People v. Garcia,* 11 P.3d 449, 453 (Colo.2000).

"To establish a waiver [of the psychologist-patient privilege], the defendant must show 'that the privilege holder, by words or conduct has expressly or impliedly forsaken his claim of confidentiality with respect to the information in question.' " *People v. Wittrein,* 221 P.3d 1076, 1083 (Colo.2009) (quoting *Clark v. Dist. Court,* 668 P.2d 3, 8 (Colo.1983)).

As a general matter, parents can waive privileges held by their minor children. *See Pressley,* 804 P.2d at 228 (parents may waive child's privilege related to medical records); *see also Lindsey v. People,* 66 Colo. 343, 355, 181 P. 531, 536 (1919) ("the proper person to claim or waive the privilege as to a minor is the natural guardian of such minor—in this case his mother"). This authority extends to other individuals charged with acting on the child's behalf. *See Wittrein,* 221 P.3d at 1083 n. 4 (GAL assigned to determine if it was in the best interests of the child accuser to waive her privilege in sexual assault case); *People in Interest of L.A.N.,* 296 P.3d 126, 134 (Colo.App.2011) (holding that GAL had authority to waive child's privilege in dependency and neglect proceeding). No Colorado appellate case, however, has addressed whether a parent may waive a privilege when a conflict exists between the interests and of the parent and a child.

Other jurisdictions have addressed this issue and concluded that a parent does not have the authority to waive a child's privilege when a conflict exists. *See, e.g., Attorney ad Litem v. Parents of D.K.,* 780 So.2d 301, 307 (Fla.Dist.Ct.App.2001) ("Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf."); *Bond v. Bond,* 887 S.W.2d 558, 561 (Ky.Ct.App.1994) ("custodial parent may not invoke the psychotherapist-patient privilege for a child in custody litigation"); *Nagle v. Hooks,* 296 Md. 123, 460 A.2d 49, 51 (1983) (it is "patent that [parent involved in a custody battle] has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure," and, therefore, "the appointment of an attorney to act as the guardian of the child in the instant matter is required"); *In re Adoption of Diane,* 400 Mass. 196, 508 N.E.2d 837, 840 (1987) ("In a case such as this, where the parent and child may well have conflicting interests, and where the nature of the proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf."); *State ex rel. Wilfong v. Schaeperkoetter,* 933 S.W.2d 407, 409 (Mo.1996) (where the privilege is claimed on behalf of the parent rather than the child, and the welfare and interest of the child would not be protected by the parent, the parent should not be permitted to assert or waive the privilege); *In re Berg,* 152 N.H. 658, 886 A.2d 980, 988 (2005) (in divorce proceedings, trial court or GAL instead of father must determine if waiver of privilege as to psychologist's records is in child's best interest).

In *L.A.N.,* the division acknowledged that other jurisdictions do not allow a conflicted parent to determine whether a child's psychiatrist-patient privilege should be asserted or waived, 296 P.3d at 134, (citing

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Berg, 886 A.2d at 984–88), but the issue there did not require deciding whether Colorado courts should follow those jurisdictions. We now hold that the nature of a conflict between the interests of a parent and of his or her child may preclude the parent from waiving the child's psychologist-patient privilege. In so doing, we are not called upon to agree with the holdings in all of the cases cited above, which involve a variety of proceedings and differing degrees of conflict. We do, however, hold that the trial court in this case properly concluded, based on the nature of the proceedings at issue, the nature of the interests of B.L., and the extent of the conflict between B.L.'s interests and the interests of A.S., that B.L. lacked authority to waive A.S.'s privilege.

The trial court's conclusion is supported in two ways by substantial evidence in the record. First, B.L. was caught in the middle of a highly sensitive and inflammatory conflict. When she provided copies of the psychologist's report to defense counsel and the district attorney, her father, defendant, was formally charged with sexually abusing her daughter A.S. Thus, B.L.'s natural affection and affinity for her child and her father were in direct conflict. It could be difficult for a parent to place the interests of her child over her own interest in not having her father convicted of

such a crime and incarcerated perhaps for life and in avoiding her own shame in such a conviction.

Second, the trial court found that B.L. was antagonistic to the prosecution. Given the defense's interest in presenting the psychologist's report to the jury, it appears that B.L. wanted to assist her father's defense. The trial court was also aware that B.L. did not believe the allegations made by her daughters A.S. and E.M. or the other two victims in this case. There was evidence that B.L. had instructed A.S. not to repeat her allegations to anyone else. Under these circumstances, an objective observer would necessarily conclude that B.L.'s motives for attempting to waive A.S.'s privilege were at least mixed and therefore not based solely on the interests of A.S.

Once the trial court decided that B.L. lacked authority to waive the privilege, the court asked the GAL whether she would waive it for A.S. The GAL, as noted above, declined. This procedure was consistent with *L.A.N.,* which held that a GAL has authority to waive the child's privilege. *Id.*

Accordingly, we conclude that the trial court properly declined to recognize B.L.'s attempted waiver of A.S.'s privilege with respect to A.S.'s session with the psychologist, that the communications related to that session remained privileged information, and that the trial court properly excluded all evidence regarding it.

IV. Denial of Trial Continuance

"A trial court's decision to grant or deny a continuance is entitled to deference and may not be reversed on appeal absent a gross abuse of discretion." *People v. Cruthers,* 124 P.3d 887, 888 (Colo.App.2005).

"A trial court abuses its discretion in denying a motion to continue if, under the totality of the circumstances, its ruling is manifestly arbitrary, unreasonable, or unfair." *People v. Mandez,* 997 P.2d 1254, 1265 (Colo.App.1999). When deciding a motion to continue, the trial court must consider the peculiar circumstances of each case and balance the equities on both sides. *People v. Fleming,* 900 P.2d 19, 23 (Colo.1995). It must also consider the "prejudice to the moving party if the continuance is denied and whether that prejudice could be cured by a continuance, as well as the prejudice to the opposing party if the continuance is granted." *People in Interest of D.J.P.,* 785 P.2d 129, 132 (Colo.1990). A defendant must show that the denial of the continuance resulted in actual prejudice. *People v. Alley,* 232 P.3d 272, 274 (Colo.App.2010).

Three weeks before trial, defendant filed a motion for continuance. Defendant contends that the trial court abused its discretion in denying the motion because of the unavailability of a potential defense witness. Defendant claimed at trial that this witness would testify that A.S. told him that defendant had never touched her. Defendant further stated that the witness had a medical condition and that "the current trial schedule is difficult or nearly impossible" for him to

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attend. The trial court denied defendant's motion.

After considering the totality of the circumstances, we conclude for several reasons that the trial court did not abuse its discretion by denying defendant's motion to continue the trial. First, the witness's testimony was of limited relevance. A.S. was not a named victim in this case and defendant does not allege that the witness could have provided evidence directly pertinent to the accusations of the three named victims. Second, defendant did not show that a continuance would prevent any prejudice because he could not establish a reasonable probability that the witness would ever be available to testify. Third, the trial court concluded that a continuance would be highly prejudicial to the prosecution, stating that "a further continuance will in all probability, upon the Court's personal observations, cause further consequences regarding [E.M.'s] ability to testify in the court." The trial court added, "[T]he duration of this case has caused manifest deterioration of material witnesses for the prosecution." Finally, the trial

court found that defendant had not acted diligently because he had not endorsed or subpoenaed the witness.

Thus, the trial court's decision was not arbitrary, unreasonable, or unfair.

V. Challenges for Cause

Defendant contends that the trial court erred by denying his challenges for cause to Jurors M, F, and R. We disagree.

A. Law

"Where a trial court erroneously denies a challenge for cause and the defendant exhausts his or her peremptory challenges, reversal is required without any further showing of prejudice." *People v. Hancock,* 220 P.3d 1015, 1016 (Colo.App.2009) (citing *People v. Macrander,* 828 P.2d 234, 244 (Colo.1992)). Here, defendant exercised peremptory challenges in excusing the three prospective jurors and exhausted his remaining available peremptory challenges.

"[T]he standard for appellate review of a trial court's ruling on a challenge for cause is whether the trial court abused its discretion." *People v. Young,* 16 P.3d 821, 824 (Colo.2001) (citing *Carrillo v. People,* 974 P.2d 478, 485 (Colo.1999)). "The trial court is afforded broad discretion in ruling on whether to excuse a prospective juror for cause," and "such determinations often turn on assessments of the potential juror's demeanor, credibility, and sincerity." *Dunlap v. People,* 173 P.3d 1054, 1082 (Colo.2007). The trial court's ability to evaluate these factors is superior to that of a reviewing court, which has access only to a cold record. *Morrison v. People,* 19 P.3d 668, 672 (Colo.2000).

"A trial court must grant a challenge for cause if a prospective juror is unwilling or unable to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions." *Hancock,* 220 P.3d at 1016 (citing *Morrison,* 19 P.3d at 672). The mere expression of some concern by a prospective juror regarding an aspect of a case should not result in automatic dismissal for cause. *People v. Shover,* 217 P.3d 901, 907 (Colo.App.2009). Consequently, the trial court's denial of a challenge for cause will be upheld "where the record contains a general statement by a juror that, despite any preconceived bias, he or she could follow the law and rely on the evidence at trial." *People v. Phillips,* 219 P.3d 798, 802 (Colo.App.2009). A juror's commitment to try to put his or her biases aside and expression of a belief that he or she can be fair has been deemed sufficient. *Shover,* 217 P.3d at 907. "A trial court is entitled to give considerable weight to the prospective juror's assurances that he or she can be fair and impartial." *Id.* at 907–08.

B. Facts

1. Juror M

Juror M stated in his juror questionnaire he had an ex-girlfriend who had been sexually assaulted by her stepfather. When questioned about how this experience would affect him, he stated that he was not "100 percent sure" that he could prevent it from influencing him, but he immediately added, "[I]f

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called upon, I will do what is expected of me." When asked whether he could be fair and impartial and follow the court's instructions, Juror M replied, "I will certainly do the best I can with[in] my ability."

The court denied defendant's challenge, stating that, based on Juror M's manner and demeanor, it believed Juror M was "thoughtful, [had] taken instructions of the court seriously, indicated that he has a strong commitment to the system of justice and has a strong sense of duty, [and] that he will follow instructions."

2. Juror F

Juror F disclosed to the court that two daughters of a friend were victims of child abuse. When asked if she could be fair and impartial to both sides, she replied, "I would have a difficult time with this case, I think." She continued, "I would like to think I am fair and impartial, but I don't know for sure. I would try to be." When asked if she could hold the prosecution to its burden of proof, she replied, "I would like to think I can do that." The trial court then asked Juror F if she could find defendant not guilty if the prosecution failed to meet its burden of proof. Juror F responded, "I think I could."

In denying defendant's challenge to Juror F, the trial court found:

> [S]he expressed clear willingness to listen to all of the evidence before making a final decision. Although in—not articulated in a technical fashion, that she will give full benefit to the defendant with regard to the presumption of innocence.
>
> ....
>
> ... This juror can be fair and impartial based upon what I have observed.

3. Juror R

Juror R indicated on her juror questionnaire that she had read about the case in the local newspaper. When asked if reading about the case would influence her ability to be impartial, she responded, "I would like to think that I would listen to the evidence and base whatever opinion on that rather than the article ... you can't always believe what you read in the newspaper."

When asked by defense counsel if she was concerned that the information in the newspaper article would influence her decision, she responded, "I don't think it would be a concern." She then later affirmed to the court that she would base her decision on what she heard in court and not on extraneous matters like the article.

The trial court denied the challenge to Juror R, stating, "[I am] impressed with the manner and demeanor, what I have observed." The court also found Juror R to be "a thoughtful person who will follow instructions of law of the court, and will not in any way prejudice the defendant."

C. Analysis

Defendant asserts that Jurors M and F were similar to a potential juror in *People v. Luman,* 994 P.2d 432, 436 (Colo.App.1999). There, a division of this court determined that the potential juror's experiences with sexual assault and her inability to ensure that she could remain an impartial juror could not be overcome by a positive demeanor. *Id.* There are important differences between the potential juror in *Luman* and Jurors M and F, however. In *Luman,* the potential juror was a physiotherapist who treated sexual abuse victims, had a family history of sexual abuse, and, most importantly, had been a victim of sexual assault as a child. *Id.* at 435. The potential juror was unable to state that she would be fair, or that she would not have empathy for the victim. *Id.* at 435–36. In this case however, Jurors M and F were not victims of sexual assault and had far fewer experiences with victims of sexual assault. Therefore, *Luman* is not persuasive for purposes of this case, and the trial court acted within its discretion by commenting on and relying upon the potential jurors' positive demeanor. *See also Dunlap,* 173 P.3d at 1082.

With regard to all of the challenged jurors, the trial court acted within its discretion by relying on its own credibility determinations of them and on their assurances. *See Shover,* 217 P.3d at 907–08. The record contains statements from all three that support the trial court's decision not to remove them

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for cause. Juror M stated he would do the best he could to remain impartial and follow the court's

instructions. Juror F stated that she would listen to all the evidence before making a final decision and that she thought she could hold the prosecution to its burden of proof. Although Juror R initially expressed some concern regarding the effect the newspaper article would have on her ability to serve as a juror, she, too, ultimately assured the trial court that her final decision would be based on only the evidence presented at trial.

Therefore, the trial court did not err in denying defendant's challenges for cause of Jurors M, F, and R.

VI. Testimony of Other Granddaughters

At trial, defendant sought to call two of his other granddaughters to testify that he had not sexually assaulted them. Defendant contends that the trial court erred by ruling that this proffered testimony would be admitted only as CRE 404(a) character evidence and would open the door to the prosecution's use of defendant's prior convictions. We are not persuaded.

A. Law

"A trial court is granted substantial discretion to decide questions concerning the admissibility of evidence, including similar transaction evidence." *People v. Larson,* 97 P.3d 246, 249 (Colo.App.2004).

"In order to be admissible, evidence must be relevant...." *People v. Rath,* 44 P.3d 1033, 1038 (Colo.2002) ; *see* CRE 402. Relevant evidence is " 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Rath,* 44 P.3d at 1038 (quoting CRE 401).

A defendant may present evidence of a pertinent character trait under CRE 404(a)(1). "A defendant's law-abiding character is a pertinent trait in any criminal prosecution." *People v. Goldfuss,* 98 P.3d 935, 937 (Colo.App.2004) (citing *People v. Miller,* 890 P.2d 84, 92 (Colo.1995)). However, unless the character trait sought to be proved is an essential element of a charge, a defendant may not offer specific instances of his or her conduct. CRE 405(a) ; *see also United States v. Ellisor,* 522 F.3d 1255, 1270–71 (11th Cir.2008) (evidence of a defendant's legitimate business activities not admissible under Fed.R.Evid. 404 or 405 to negate evidence of fraudulent intent with respect to mail fraud charges in connection with a specific Christmas show); *United States v. Benedetto,* 571 F.2d 1246, 1249–50 (2d Cir.1978) (evidence that meat inspector charged with taking bribes from four meat packers did not solicit or take bribes from other meat packers not admissible under Fed.R.Evid. 405); *State v. Mahoney,* 188 N.J. 359, 908 A.2d 162, 170–71 (2006) (lawyer charged with stealing client funds properly barred, under New Jersey versions of CRE 404 and 405, from presenting evidence of his honesty and diligence in dealing with other clients). When a defendant's character witness testifies regarding a character trait, that testimony may be rebutted or impeached on cross-examination by inquiry into specific instances of conduct. CRE 405(a) ; *see People v. Dembry,* 91 P.3d 431, 434 (Colo.App.2003).

B. Facts and Analysis

Defendant's argument to the trial court, in its entirety, was as follows:

> [W]hat they would essentially be testifying to is that they had plenty of contact with their grandfather. Sat on his lap—or at the computer and went to the movies and a variety of other things like that, and that they were never touched by their grandfather. *This is to rebut the opportunity argument of the 404(b) evidence* [presented by the prosecution through A.S.]. *It's not for character.*

(emphasis added). The court found the testimony not relevant but stated that it would allow the testimony to be admitted as CRE 404(a) character

evidence. The court then cautioned defendant that the admission of the evidence would open the door to defendant's prior criminal convictions, one of which was for sexual assault. Defendant did not call the other granddaughters.

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On appeal, defendant again argues that the evidence was not character evidence, but was relevant evidence to rebut the testimony of A.S.

Therefore, we must first look at the purpose of A.S.'s testimony.

The trial court instructed the jury that A.S.'s testimony was to be considered only for purposes of "establishing a common plan, design or scheme, establishing a modus operandi or MO, and lack of mistake or accident." Thus, A.S.'s testimony was not presented to prove "opportunity," which was the only issue for which the other granddaughters' testimony was proffered. At the close of trial, the court repeated its instruction that A.S.'s testimony could be used only for the purposes stated. We assume that the jury followed the trial court's instructions. *See Armentrout v. FMC Corp.,* 842 P.2d 175, 187 (Colo.1992).

Defendant also contends that the other granddaughters' testimony was relevant because it would have shown that defendant did not follow his modus operandi when given an opportunity to do so with these granddaughters. The alleged fact that defendant did not sexually assault the other granddaughters does not make it less probable that he followed a common plan or modus operandi when he sexually assaulted the three victims. Although the other granddaughters allegedly spent some time in his company, the offer of proof was not sufficient to determine whether defendant had the same opportunity with them that he had with the three victims. For example, defendant's proffer did not indicate how much time he spent with the other granddaughters, as compared to his time with the victims, or whether he was ever alone with either of the other granddaughters. Defendant has also failed to cite any authority, and we are aware of none, supporting his theory of admissibility. Therefore, we conclude that the trial court did not abuse its discretion in finding that the proffered testimony of the other granddaughters was not relevant to whether defendant assaulted the three victims.

The court nonetheless offered to admit the evidence under CRE 404(a)(1) regarding the propensity of defendant to commit the alleged acts. The trial court correctly then warned that if defendant presented the other granddaughters' testimony as CRE 404(a) evidence, the prosecution could rebut or impeach their testimony on cross-examination using defendant's previous convictions. *See* CRE 404(a)(1), 405(a). Defense counsel recognized this principle by conceding, before the trial court even ruled, that reception of this testimony as character evidence would "open[ ] the door." Clearly, defendant's prior convictions would be relevant to rebut the proffered evidence that defendant had a law-abiding character, and the prior sexual assault conviction would be relevant to rebut any other trait tending to prove that he does not commit sexual assault. *See* CRE 405(a) ; *Dembry,* 91 P.3d at 434 (a witness testifying to the good character of a defendant may be asked if he or she knew the defendant had been arrested for a crime).

Therefore, the trial court did not err by advising that the admission of the other granddaughters' testimony under CRE 404(a) would open the door to admission of evidence concerning defendant's previous convictions.

VII. Limitations on Cross–Examination

Defendant challenges the trial court's limiting of his cross-examination of C.S.'s mother, R.K., and S.O.'s mother, C.O. We are not persuaded.

A. Law

We review the trial court's limiting of a defendant's cross-examination for abuse of discretion. *Merritt v. People,* 842 P.2d 162, 166

(Colo.1992). A trial court's discretionary ruling will not be overturned unless it is manifestly arbitrary, unreasonable, or unfair. *Kinney v. People,* 187 P.3d 548, 558 (Colo.2008).

"The right of a defendant to confront adverse witnesses is guaranteed by the Sixth and Fourteenth Amendments and includes an opportunity for effective cross-examination."

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People v. Herrera, 87 P.3d 240, 253 (Colo.App.2003) (citing *Olden v. Kentucky,* 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988)); *see Kinney,* 187 P.3d at 558–59. "However, an accused's right to confront and to cross-examine witnesses is not absolute and may be limited 'to accommodate other legitimate interests in the criminal trial process....' " *People v. Cole,* 654 P.2d 830, 833 (Colo.1982) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). "Thus, a trial court has wide latitude, insofar as the Confrontation Clause is concerned, to place reasonable limits on cross-examination based on concerns about, for example, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation which is repetitive or only marginally relevant." *Merritt,* 842 P.2d at 166 ; *see also Kinney,* 187 P.3d at 559. "The trial court must exercise its discretion to preclude inquiries that have no probative value, are irrelevant, or are prejudicial." *People v. Hendrickson,* 45 P.3d 786, 788 (Colo.App.2001).

"The focus in terms of constitutional error analysis is not the effect of the alleged error on the outcome of trial, but on the individual witness." *Merritt,* 842 P.2d at 166. "The error is prejudicial when a reasonable jury would have had a 'significantly different impression' of the witness's credibility had the defendant been allowed to pursue the desired cross-examination." *Kinney,* 187 P.3d at 559 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

B. Facts and Analysis

At trial, defendant's theory was that his granddaughters fabricated the sexual assault allegations. Defendant sought to advance this theory through his cross-examination of both R.K. and C.O. Defendant sought to ask R.K. about his refusal to lend R.K.'s husband tools for use in a business. Defendant alleges that this evidence would have shown that R.K. was angry with defendant, and therefore had a motive to encourage her daughter, C.S.,[5] to fabricate her allegations. Defendant then sought to question C.O. about R.K.'s relationship with C.S. Defendant alleges that this testimony would have shown that R.K. gave more attention to her son, C.S.'s brother, than to C.S., thereby giving C.S. an incentive to follow R.K.'s request to falsely accuse defendant.

The prosecution objected to both lines of questioning, and the trial court sustained both objections. In limiting the cross-examination of R.K., the court stated:

> That is so attenuated with respect to influencing the child, and there is no [ ] indication whatsoever that this witness has in any way influenced the child's testimony. It is so attenuated, it is irrelevant.
>
> I will grant you some—some significant leeway in cross-examination if, in fact, there is a basis for a motive, but this is—this is completely attenuated, and does not establish a basis or motive to—for her to speak to the child to lie, and to make [up] the allegations.
>
> And, additionally, there has been absolutely no indication whatsoever to link up what you are making the offer of proof for with the child's testimony. The Court finds and concludes that this examination is irrelevant.
>
> Moreover, the Court, in balancing the probative value of the evidence,

> which is extraordinarily slight, with the potential for confusion of the facts before the jury, misleading the finder of fact, and unfair prejudice to the Prosecution, [finds] that the danger of misleading the jury, delay, waste of time, presentation of evidence that is tangentially involved in this case, outweighs what slight probative value the evidence has.
>
> So the Court—since the evidence is being offered to show her motive to influence her daughter, the Court finds that the evidence is irrelevant. The objection is sustained.

In upholding the objection to the questioning of C.O., the court stated, "It is not relevant whatsoever."

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We conclude that the trial court did not abuse its discretion in limiting defendant's cross-examination of R.K. and C.O. We agree with the trial court's determination that the evidence offered by defendant was, at best, of minimal probative value. The trial court applied the balancing test set forth in CRE 403 and concluded that the potential negative consequences that could arise if the evidence were admitted outweighed whatever slight probative value the evidence might have. Thus, the trial court's decision was not manifestly arbitrary, unreasonable, or unfair and was not an abuse of its discretion.

VIII. Forensic Interviewers' Testimony

Defendant contends that the trial court erred by allowing two forensic interviewers to offer testimony that constituted expert testimony and improperly vouched for the granddaughters they interviewed. We disagree.

A. Facts

Jennifer Martin and Michelle Peterson are forensic interviewers. Prior to trial, Ms. Martin had interviewed E.M. and A.S., and Ms. Peterson had interviewed C.S and S.O. These interviews were recorded, and, at trial, the court admitted, without objection, video recordings and transcripts of all four interviews. Ms. Martin and Ms. Peterson testified concerning their experience as interviewers and how they conduct forensic interviews, laid the foundation for the admission of the videos and transcripts, and discussed the interviews after the videos were played for the jury. Neither of these witnesses was offered or qualified as an expert.

B. Analysis

1. Lay Opinion Testimony

We review the admission of opinion testimony by a lay person for abuse of discretion. *People v. Veren,* 140 P.3d 131, 136 (Colo.App.2005).

CRE 701 provides that a lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." A lay opinion is proper when it "results from a process of reasoning familiar in everyday life." *Veren,* 140 P.3d at 137.

A witness may be qualified as an expert in the area of interviewing techniques. *See Tevlin v. People,* 715 P.2d 338, 339 (Colo.1986) (noting that the trial court qualified the social worker as an expert in the field of child abuse investigation). The testimony of the forensic interviewers in this case, however, is similar to the testimony held to constitute proper lay testimony in *People v. Tillery,* 231 P.3d 36 (Colo.App.2009)*cert. granted on other grounds* 2010 WL 2026599 (May, 24, 2010). In *Tillery,* a forensic interviewer testified regarding, among other things, her qualifications, training, and techniques for

interviewing children. *Id.* at 42. The division there stated:

> The interviewer's qualifications, training, and interview protocols and techniques do not constitute opinion testimony. Certain basic information about a subject may fall within the scope of lay opinion testimony, even if more detailed discussion of the same area would require specialized knowledge.

Id.

We agree with this analysis and conclude that the testimony of the interviewers in this case bears strong similarity to that of the forensic interviewer in *Tillery*. Ms. Martin and Ms. Peterson also testified about their qualifications, experience, and training as forensic interviewers and their protocols and techniques, and provided some basic information about interviewing children concerning possible sexual abuse. Their testimony was brief and did not involve any detailed discussion or opinions about the interviewees or defendant.

We therefore conclude that the trial court did not abuse its discretion in admitting this testimony as lay opinion testimony pursuant to CRE 701.

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2. Improper Vouching

A witness may not "give opinion testimony with respect to whether a witness is telling the truth on a specific occasion." *People v. Koon,* 713 P.2d 410, 412 (Colo.App.1985). We review a trial court's ruling regarding the scope of opinion testimony for an abuse of discretion. *See Robinson v. People,* 927 P.2d 381, 384 (Colo.1996).

An opinion concerning the credibility of a victim is admissible if that testimony relates to general characteristics only. *Tillery,* 231 P.3d at 42 (citing *People v. Gillispie,* 767 P.2d 778, 780 (Colo.App.1988)). For example, in *Tillery,* a forensic interviewer testified that she explained the rules of the interview to the interviewee, including that the interviewee had to tell the truth, and told the interviewee that one "answer does not make sense." 231 P.3d at 42. The division held that those statements did not express an opinion concerning the interviewee's truthfulness or sincerity. *Id.*

Here, Ms. Peterson explained the goals of a forensic interview in general and did not speak to the truthfulness of the answers given by any specific interviewee. Similarly, Ms. Martin did not express an opinion about the truthfulness of either of the children she interviewed, but instead expressed her opinion about the goals of forensic interviews and techniques she employs. We conclude that the trial court did not abuse its discretion in admitting such testimony.

Ms. Peterson also testified, "Forensic means fact finding[6] so I'm determining if anything happened. And if something happened, I get the facts and details around it." In reaction to the language concerning fact finding by the interviewer, defendant objected on the ground that the testimony invaded "the province of the jury." The trial court overruled the objection, finding that the testimony "does not invade the province of the jury." To avoid any possible confusion, the court immediately, and without any request by defendant, instructed the jury:

> [Y]ou are the ultimate and sole determiners of the facts of this case. You are not bound by the testimony of any witness. You will be instructed at the conclusion of this case as to what your responsibilities will be in terms of the fact-finding process. However, the fact-finding process is exclusively yours. And you will be the only arbiters of what has and has not been proven in the case.

Jurors are presumed to follow instructions given to them by the trial court. *See Armentrout,* 842 P.2d at 187. This instruction therefore removed any confusion the testimony may have created. In any event, Ms. Peterson's testimony did not include any fact finding or determination concerning the children she interviewed.

Accordingly, the trial court did not abuse its discretion because the forensic interviewers did not vouch for the credibility of the victims.

IX. Judicial Notice of Previous Proceeding

Defendant contends that the trial court erred by ruling that if it took judicial notice of the dismissal of the criminal case involving A.S., it would open the door to admission of evidence of defendant's previous convictions. We disagree.

Generally, a trial court has discretion to take judicial notice of an adjudicative fact. CRE 201(c) ; *see Martinez v. Reg'l Transp. Dist.,* 832 P.2d 1060, 1061 (Colo.App.1992). "[F]or a court to be required to take judicial notice upon the request of a party, it must, of necessity, be supplied with the specific information that is the subject of the request." *Durbin v. Bonanza Corp.,* 716 P.2d 1124, 1129 (Colo.App.1986) ; *see* CRE 201(d).

When evidence of prior criminal charges against a defendant is introduced at trial, the trial court may instruct the jury that the defendant was acquitted or permit evidence of the acquittal. *See Kinney,* 187 P.3d at 557. Trial courts must make their

[396 P.3d 21]

determinations on a case-by-case basis; "there is not a per se rule either always requiring an instruction or always ruling such evidence inadmissible." *Id.* "An acquittal instruction is appropriate when the testimony or evidence presented at trial about the prior act indicates that the jury has likely learned or concluded that the defendant was tried for the prior act and may be speculating as to the defendant's guilt or innocence in that prior trial." *Id.* Appellate courts review a trial court's determination on this issue for an abuse of discretion. *Id.*

We conclude for two reasons that the trial court did not abuse its discretion in its ruling regarding defendant's request for taking judicial notice. First, defendant did not provide the trial court with any documentation supporting the dismissal. He accordingly failed to comply with the requirements of CRE 201(d), and the trial court could have declined to take judicial notice on that ground alone. *See Durbin,* 716 P.2d at 1129.

Second, although the prosecution presented evidence that charges had been filed against defendant concerning A.S., the jury also heard testimony from the same witness that these charges were dismissed. Thus, the jury was not left to speculate whether defendant was convicted of sexually assaulting A.S. *See Kinney,* 187 P.3d at 557.

We therefore cannot say that the trial court's ruling regarding defendant's request to take judicial notice of the dismissal of the charges concerning A.S. amounted to an abuse of discretion.

X. Cumulative Error

Defendant contends that his conviction should be reversed because of the cumulative effect of the alleged errors in this case. We disagree.

"The doctrine of cumulative error requires that numerous errors be committed, not merely alleged." *People v. Rivers,* 727 P.2d 394, 401 (Colo.App.1986). Here, we have found no error, and therefore defendant was not deprived of a fair trial.

Defendant's judgment of conviction is affirmed.

Judge TAUBMAN and Judge TERRY concur.

Notes:

[1] Section 18–6–403(3), C.R.S.2011, states, in relevant part: "A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: ... [p]ossesses or controls any sexually exploitative material for any purpose...."

[2] " 'Sexually exploitative material' means any photograph, motion picture, video, video tape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." § 18–6–403(2)(j), C.R.S.2011.

[3] Here, the trial court's jury instruction defining "possession" was consistent with this understanding of the term:

> "POSSESSION," as used in these instructions, does not necessarily mean ownership, but does mean the actual, physical possession, or the immediate and knowing dominion or control over the object or the thing allegedly possessed. "Possession" need not be exclusive, provided that each possessor, should there be more than one, actually knew of the presence of the object, or thing possessed, and exercised actual physical control or immediate, knowing dominion or control over it.

[4] Possession can be established by circumstantial evidence in connection with other crimes. *See, e.g., People v. Robinson,* 226 P.3d 1145, 1154 (Colo.App.2009) (possession of drugs); *People v. Warner,* 251 P.3d 556, 565–66 (Colo.App.2010) (possession of a gun).

[5] Defendant's opening brief refers to C.S., while the People's answer brief refers to A.S. Our understanding of the context of defendant's argument and review of the record confirms that the proper reference is to C.S.

[6] While it is not clear from the record whether Ms. Peterson's definition of "forensic" is correct within the field of forensic interviewing, defendant did not object to the definition in the trial court and has not questioned its accuracy on appeal.

DOI: 10.1111/fcre.12722

SPECIAL FEATURE

Lowering the age of consent: Legal, ethical, and clinical implications of adolescent-directed therapy

Kathleen McNamara

Independent Practice, Fort Collins, Colorado, USA

Correspondence
Kathleen McNamara, Independent Practice, 333 W Drake Rd., Ste 280, Fort Collins, CO 80526, USA.
Email: kathleenmcnamaraphd@gmail.com

Abstract

This article discusses a recently enacted Colorado law that aims to reduce the youth suicide rate by lowering the age of consent for psychotherapy from age 15 to age 12. The author discusses the challenges therapists face when young adolescents seek therapy without parental consent in cases involving interparental conflict. Suggestions for managing adolescent-directed therapy are offered.

KEYWORDS
adolescent-directed therapy, Colorado, court-involved therapy, high conflict, youth mental health, youth suicide

Key points for the family court community

- To address the alarming rates of youth suicide in Colorado, legislation has been passed that enables youth, 12 years of age and older, to have access to outpatient psychotherapy without parental consent.
- Ambiguities in the law are still being discussed and debated, including whether the law restricts parental or guardian access to records, and when a young person's report of suicidal ideation triggers mandatory parental or legal guardian notification.
- Adolescent-directed therapy changes the way therapists begin therapy, and when interparental conflict is a key component of the clinical picture, various legal, ethical, and clinical challenges can arise.

- Managing the parental consent issue, staying neutral with respect to parental conflicts, fostering adaptive coping skills, supporting emotional/social development, and declining inappropriate cases are a few ways to manage the challenges that are commonly encountered in adolescent-directed therapy.

INTRODUCTION

Suicide is the leading cause of death for Colorado youth ages 10–14 and the second leading cause of death after unintentional injuries for youth ages 15–24 (Center for Disease Control, 2020). Alarmingly, Colorado's youth suicide rate increased by 86% between 2007 and 2017 (Curtin & Heron, 2019). Of further concern, Colorado and its neighboring states, Wyoming, Montana, New Mexico, Idaho, and Oklahoma, rank among the ten worst states in the country for number of suicides (Center for Disease Control, 2020). In response to this crisis, in May 2019, Colorado Governor Jared Polis signed legislation that now enables youth, 12 years of age and older, to have legal access to outpatient psychotherapy services without parental consent.

The author of this article is a child and family therapist in private practice in Colorado, specializing in separating and divorcing families. Since the law was enacted, she has experienced an increase in minors with mental health problems seeking therapy without the consent of one or both parents. These youth are often struggling with parent–child relationship problems, stress related to interparental conflict, anxiety, depression, and issues pertaining to identity and self-esteem. Sometimes both parents know about the child's therapy, but do not mutually agree or consent to it. In these cases, the adolescent consents to therapy on their own with the backing of one parent, but not the other. Other times, one parent supports the adolescent's therapy, and the other parent is not informed at all. Once in a while another adult, usually a family member, is supporting the child's therapy. However, it is rare in this author's practice for a minor to initiate services without one parent being involved, even if only to pay the bill. Typically, the parents share joint decision-making responsibility, but have a strained relationship characterized by conflict, poor communication, and lack of coordination. It is not uncommon for these parents to be involved in litigation when the child enters therapy.

When a young person enters therapy without parental consent, an initial required task for the therapist is to try to obtain permission from the minor to notify the unaware parent or parents. The exception to this requirement is when the therapist believes that doing so would be inappropriate or detrimental to the minor's care and treatment. However, if the minor refuses to give consent, the therapist must honor the child's wishes unless the minor is unable to manage their care and treatment, in which case the parents may be notified. Adolescent-directed therapy changes the way therapists begin therapy, and various legal, ethical and clinical challenges can arise along the way, particularly in cases involving interparental conflict.

This article discusses key provisions in the new Colorado law, ambiguities in its interpretation, and challenges therapists face when young adolescents[1] seek treatment without the consent of both parents in the context of interparental conflict and litigation. Suggestions are offered for managing adolescent-directed therapy based on the author's experience.

[1]The terms "adolescents," "youth," "child," "minor," and "young person" are used interchangeably in this paper to refer to 12–15-year-olds.

COLORADO'S LEGISLATION TO REDUCE YOUTH SUICIDE

Recently amended Colo. Rev. Stat. §12-245-203.5, which lowered the age of consent for psychotherapy services, states:

> "…a mental health professional…may provide psychotherapy services…to a minor who is twelve years of age or older, with or without the consent of the minor's parent or legal guardian, if the mental health professional determines that:

a. The minor is knowingly and voluntarily seeking such services; and
b. The provision of psychotherapy services is clinically indicated and necessary to the minor's well-being…"

The law includes several provisions regarding what is discretionary and what is mandatory for mental health professionals who provide psychotherapy to minors without parental consent. Specifically, the law states that mental health professionals:

- may notify the minor's parent or legal guardian of the psychotherapy services given or needed, with the minor's consent, or with the consent of the individual who a court has ordered holds the minor's therapeutic privilege, unless doing so would be inappropriate or detrimental to the minor's care and treatment;
- shall engage the minor in a discussion about the importance of involving and notifying the minor's parent or legal guardian, and shall encourage such notification to help support the minor's care and treatment;
- may notify the minor's parent or legal guardian of the psychotherapy services without the minor's consent, if in the professional's opinion, the minor is unable to manage the minor's care and treatment;
- shall fully document each of the following:
  When the therapist attempted to contact or notify the parents or guardians
  Whether the contact was successful or unsuccessful
  The reason why, if contact was not attempted, such contact would be inappropriate or detrimental to the minor;
  Documentation in the clinical record, including a written statement signed by the minor, indicating that the minor is voluntarily seeking services; and
- Psychotherapy services must be provided in a culturally appropriate manner.

AMBIGUITIES IN THE LAW

The meaning and implications of the law are still being discussed and debated among mental health providers and attorneys in Colorado. One issue pertains to the question of what "age of consent" for psychotherapy services encompasses. The law clearly grants young people aged 12 and up the right to seek treatment without parental consent, but it is unclear whether the law grants youth the privilege to determine who has access to their mental health information and records. Traditionally, consent to treatment has included the privilege to control the release of one's health information and records. In this case, however, since the law encourages the involvement of parents or guardians, an arguable interpretation of the law is that it does *not* restrict parental access to the minor's records. This issue may not be fully resolved until there is clarification legislation or a test case is brought before the court. Nevertheless, in this author's experience, most mental health professionals in Colorado do *not* release information or records to parents (or anyone else) without the adolescent's written consent, except as specifically allowed by law.

The new law affirms mandatory reporting obligations of mental health professionals and adds a specific provision, concerning notifying parents or guardians when a teen is suicidal. This provision reads as follows:

> "If a minor who receiving psychotherapy services pursuant to this section communicates an intent to commit suicide, the mental health professional…shall notify the minor's parent or legal guardian of such suicidal ideation." [Emphasis added.]

For many mental health professionals, and the attorneys who advise them, it is unclear from this language when the obligation to notify parents or legal guardians of a minor's suicidal ideation is triggered. Consider, for example, a teen who is thinking about committing suicide, has chosen a method of suicide, has access to their chosen method, has disclosed suicidal thoughts (e.g., "I'd be better off dead," etc.), and has a history of substance misuse as well as other risk factors, but denies *immediate* intention to commit suicide. Is the therapist obligated to report the teen's "suicidal ideation" to the parents or guardians, or is this prohibited, short of clear and imminent harm, due to confidentiality obligations? The language of the law, which includes the terms "intent to commit suicide" and "suicidal ideation" in the same sentence is unfortunate because "suicidal ideation" is a broad term used to describe a range of contemplations, wishes, and preoccupations with death and suicide with no specific definition (Harmer et al., 2023). "Intent to commit suicide," on the other hand, implies imminent danger and triggers mandatory reporting and mental health holds. It is unknown how practitioners are interpreting this provision in situations where a youth is suicidal but has not communicated or denies an immediate intent to kill themselves. This is another issue that is likely to require clarification legislation or a test case to be fully resolved.

CHALLENGES OF ADOLESCENT-DIRECTED THERAPY

Beyond these interpretation issues, therapists face a number of challenges when youth seek psychotherapy without a parent or guardian's consent. A practical matter is how 12–15-year-olds will be transported to sessions if they do not have the consent of a parent or guardian, and another issue is who will pay for the services. A young person might seek psychotherapy completely on their own at a mental health center or elsewhere to receive free services; however, when private therapy is sought, an adult is almost always involved due to financial and practical matters. That being the case, the adult who is supporting the child's therapy may play a key role in the child's decision to seek therapy and have significant influence over the child's presentation and functioning in treatment. Thus, there is a heightened possibility that a vulnerable young teen, ostensibly seeking therapy on their own, is being triangulated in the parental conflict.

To illustrate this point, imagine a divorcing parent calls a therapist and requests psychotherapy services for their 12-year-old child "under the new 12-year-old consent law." The parent says the child wants to begin therapy, and the parent is willing to transport the child to sessions and pay the fees. The parent is also happy to provide any background information the therapist requests. When the therapist asks what is prompting the request for therapy, the parent states the child is stressed, irritable, withdrawn, and seems unhappy, especially after spending time with the other parent. The parent mentions that a nasty divorce is underway, and although the parents currently share joint decision-making responsibility, both decision-making and parenting time are at issue in the litigation and will be decided by the court. The parent comments that the teen's issues stem from "problems in the other parent's home" and the child "needs someone to talk to about those problems." The parent further informs the therapist that the other parent does not know that the child is seeking therapy, and *the child* wants to keep it confidential from that parent, "*as the child is entitled to do under the new law*." This scenario, or variations of it, typifies the way adolescent-directed therapy cases come into the author's practice.

Immediate questions arise, such as who wants the young person in therapy and why? Is the parent who is seeking services for the youth deliberately skirting around joint decision-making by asserting the minor's legal right to

access services without parent consent? In other words, is one parent encouraging the minor to exclude the other parent? If so, does that parent have a legal agenda and expect the therapist to play a role in it, or does that parent simply want their child to get help without obstruction or interference by the other parent? Another question: What are the implications of proceeding when the other parent—who has joint decision-making authority—is excluded from knowledge of the treatment and is prevented from providing information during the intake process and possibly the entire treatment? What burdens might fall upon the minor if such an arrangement is supported? And the list goes on.

Despite the child's legal authority to keep their therapy a secret from one parent, the request raises concerns. Secret-keeping is generally antithetical to healthy family functioning, and excluding one parent from the child's therapy is generally contrary to best practices. For example, the AFCC Guidelines for Court-Involved Therapy urge therapists to obtain the perspectives of both parents in court-involved cases (AFCC, 2011, Guideline 1.2 d). Well-informed therapists routinely do this as part of their intake process to assist in obtaining a fuller and more accurate assessment of the minor, and to minimize therapist bias based on one parent's input. However, in adolescent-directed therapy, the young person decides to whom the therapist may release information and from whom the therapist may seek information. Therefore, best practices regarding parental involvement must be modified when an adolescent does not consent to the involvement of one or both parents. In the author's experience, this is best accomplished by managing the matter within the therapeutic relationship with the youth.

MANAGING THE CHALLENGES

In Colorado, therapists are mandated to discuss with minors the importance of involving their parents or guardians in their care and treatment and must encourage them to consent to the therapist notifying their parents or guardians of the psychotherapy services. To effectively accomplish this task, it is important to consider how the young person decided to enter therapy, what the youth's hopes or goals are for treatment, and the degree to which parental involvement will assist in assessing the youth's needs and facilitating treatment. Framing *how* the involvement of both parents can be helpful—and perhaps kept limited—is often the key to a minor giving consent. For example, one young teen came to therapy with the author, with the support and encouragement of her father who was concerned about her mental health. Her mother objected to the child being in therapy, ostensibly due to fear that the therapist would align with the father and his criticisms of her. The thirteen-year-old was insistent that neither parent be involved because their conflict was so toxic. The teenager would not consent to either of them providing input, despite encouragement to do so. In therapy it was discovered that the teen was suffering from several physical symptoms, possibly related to overwhelming anxiety. She had not seen a pediatrician in several years and needed to see a healthcare provider to rule out a possible medical basis for her symptoms. As this was discussed with the teen, she agreed she needed to see a medical doctor. This opened the door to the youth allowing limited conversations with her parents for the purpose of making the arrangements for a medical appointment. By taking great care to avoid aligning with either parent, and staying child-focused when speaking to either parent, a limited working relationship began with the parents, with the minor's consent. Like so many other issues in therapy, taking an incremental approach to the consent issue, commensurate with the young person's readiness, was effective in achieving a positive outcome for the child.

It is important to be mindful that when a minor refuses to give consent, there may be a good reason. The therapist is often in no position to judge the truth of what the young person has to say about either parent, but a good therapist can help the minor focus on developing skills for managing and coping with their situation. A therapist who stays neutral with respect to parental conflicts, avoids pulls for alignments, and stays focused on supporting the minor's healthy emotional and developmental growth can be enormously helpful to a young person without ever hearing a word from either parent. Staying out of the parental fray and helping the child think through and make sense of troubling matters, learn and practice perspective-taking, problem-solving, and emotional regulation skills, and experience the support of a consistent and caring adult can go a long way in helping the minor achieve and maintain good mental health.

A therapist who believes they cannot be effective without the consent and involvement of both parents is always free to decline the case and refer the child to another qualified therapist, who may provide the requested services. This author has certainly made that decision when certain fact patterns are presented. For example, when it appears likely that a parent's agenda is driving the request for therapy and the child's therapy is part of a manipulation dynamic, the request is declined.

OTHER CONSIDERATIONS

One of the greatest pressures currently facing therapists is *keeping up with demand* (see APA, 2022). Those seeking services are often put on long waitlists or referred to other providers who also may not be available or are located many miles away. Unsurprisingly, burnout is a growing problem among therapists (American Psychological Association [APA], 2022; Simionato & Simpson, 2018). As a result of these pressures, youth needing mental health services whose parents are embroiled in conflict and litigation may be at increased risk of not receiving services at all. Working with high conflict families requires a high level of case management and specialized knowledge and skills, and many therapists fear an increased risk of facing grievances when working with litigating parents. Additionally, many therapists are reluctant to interface with the court system. For all these reasons, many therapists turn away "nasty divorce cases." As a result, these youth may not receive services until they reach a crisis state.

This author was initially unwilling to accept a therapy case involving a minor who was unwilling to sign a release allowing communication with each parent due to concerns that therapy would not be effective in these cases. That position has softened with recognition that when a young person is able to identify and work toward therapeutic goals, and balanced and appropriate boundaries with both parents can be maintained, positive outcomes are possible, and the work can be incredibly rewarding.

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How to cite this article: McNamara, K. (2023). Lowering the age of consent: Legal, ethical, and clinical implications of adolescent-directed therapy. *Family Court Review*, *61*(3), 472–477. https://doi.org/10.1111/fcre.12722

AUTHOR BIOGRAPHY

Kathleen McNamara is a licensed psychologist in private practice in Fort Collins, Colorado, specializing in counseling and forensic psychological services for court-involved families. Her practice focuses on child and family therapy, coparenting, conflict resolution, and adjustment after divorce.

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University of Colorado Law Review
Winter 2016

Casenotes and Comments
Starla Doyal[a1]

THE GUARDIAN AD LITEM AS THE CHILD'S PRIVILEGE HOLDER

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.*

***207 Introduction**

Approximately four million children in the United States suffer from a major mental illness that significantly impairs their home, school, and social life,[1] and two to four million participate in some sort of outpatient psychotherapy.[2] The communications between these children and their therapists are subject to the psychotherapist-patient privilege and are not typically discoverable in court proceedings.[3] A child's parent typically holds his privilege and can make decisions about whether to reveal therapy communications to other parties.[4] 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.[5] 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.[6] Courts often find that such motivations make the ***208** parties ineligible to hold a child's privilege.[7] 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.[8]

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.[9] The decision recognized the importance of the privilege to the child's therapy[10] and the need for a privilege holder focused on advocating for the best interests of the child.[11] Not all jurisdictions have ruled this way. Some bypass the GAL and instead vest the trial court with the child's privilege.[12] 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.[13]

L.A.N. arose out of a termination of parental rights proceeding in which a mother sought access to the therapy ***209** records of her minor daughter, L.A.N.[14] 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.[15] The GAL shared the letter with the court and the other parties involved in the case,[16] and the Department of Human Services (DHS) eventually moved to terminate the parent-child relationship.[17]

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.[18] Presumably, the mother hoped to find information that would refute the damaging statements from the therapist's letter.[19] L.A.N.'s therapist moved to quash the subpoena, arguing that the therapy records were protected by the psychotherapist-patient privilege.[20] The trial court held that the court itself could authorize a limited wavier of the privilege because it had allowed and encouraged the therapist to make reports to the court.[21] Nonetheless, the trial court ultimately terminated parental rights.[22]

The mother appealed the termination, arguing that she should have had access to the entirety of the therapist's files on ***210** her daughter.[23] 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.[24] 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.[25] 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.[26]

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.[27] 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?[28] Her GAL, charged with advocating for her best interests? Or the juvenile court, the general arbiter of disputes regarding those best interests?[29]

The importance of this decision cannot be overstated. Safeguarding the psychotherapist-patient privilege is vital for successful psychiatric treatment.[30] The psychotherapist-patient privilege functions like other legal privileges in that it prevents confidential communications from being disclosed during legal actions.[31] If patients do not feel they can communicate confidentially with their therapists, they may not be willing to ***211** fully discuss emotions and circumstances essential for their treatment.[32]

The parent, who is presumed to look after the child's best interests, typically holds the child's psychotherapist-patient privilege.[33] The parent has the authority to decide whether to waive the child's privilege,[34] and as such, the parent controls what information can be disclosed in a court proceeding.[35] 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.[36] 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.[37] 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.[38]

***212** If the parent cannot hold the privilege, courts must decide who should hold it instead.[39] The court has three options as to whom that privilege holder will be: the local DHS, a GAL, or the court itself.[40] Like the parents, the DHS has a potential conflict of interest with the child, so it is also not an appropriate privilege holder.[41] 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.[42] This leaves courts with the option of either the GAL or the trial court.[43]

As the Colorado Supreme Court explained in *L.A.N.*, since the GAL is charged with representing the best interests of the child,[44] the GAL is better positioned to hold the privilege.[45] 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 ***213** neutral decision-maker between parties.[46] However, not all states view this as a potential conflict, and they consequently assign the privilege to the trial court rather than a GAL.[47]

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.[48] 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.[49] 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[50] and increased importance of competent representation by the GAL.[51] Part III ***214** 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.[52] 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.[53] Once appointed, the GAL ***215** represents the best interests of the child.[54] 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.[55] In effect, "the 'client' of a GAL . . . is the best interests of the child," not the child himself.[56]

Nonetheless, ethical guidelines do urge GALs to take the child's wishes into consideration.[57] 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."[58] 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.[59] 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.[60] He then reports these findings to the court and makes appropriate recommendations.[61] Theoretically, as an outside party, a GAL ***216** 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.[62] 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.[63]

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.[64] Many states go so far as to mandate that the professionals involved in a child's proceeding must work in a collaborative team model.[65] Such a collaborative model, which may provide many benefits regarding efficiency and ingenuity, nevertheless raises concerns about the disclosure of privileged information.[66]

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

B. Recognition and Importance of the Psychotherapist-Patient Privilege

Mental health professionals generally agree that psychotherapist-patient confidentiality is essential to successful treatment.[72] Psychologists have a professional ***218** ethical duty of confidentiality to their patients,[73] and statutes and common law give that confidential relationship legal effect by defining it as a privileged relationship, much like an attorney-client relationship.[74] In *Jaffee v. Redmond*, the Supreme Court recognized that the need for the privilege outweighed the need for probative evidence in a legal proceeding.[75] The Court acknowledged that patients in therapy often reveal deeply personal emotional and factual details that may cause great embarrassment or fear.[76] Without the confidential protection of privilege, patients will be less likely to share those details, which ultimately hinders successful treatment.[77]

Several independent studies confirm the Court's assertion.[78] In 2003, Jennifer Evans Marsh conducted a study in which she presented participants with a set of hypothetical, emotionally-stressful situations.[79] She then asked participants whether they would disclose confidential information about ***219** those situations with a therapist.[80] 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.[81] 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."[82] 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.[83] 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.[84]

Children have a particular need for confidentiality in therapy, a need which is magnified for a child involved in a dependency and neglect proceeding.[85] 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.[86] This fear may cause that child not to be open with a therapist.[87] Consequently, as the *Jaffee* Court and numerous other mental health professionals have concluded, the child will not receive the intended benefits of that therapy.[88] Similarly, any disclosures actually made can ***220** damage the child's relationship with other family members.[89] 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.[90]

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.[91] 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.[92] When the patient is incompetent, whether because of age, mental disorder, or other reason, generally the patient's guardian serves as the privilege holder.[93] For a child patient, the parent normally holds the privilege.[94] However, if the parent's interests come into conflict with the child's interests, the parent is no longer an ***221** appropriate person to hold that privilege.[95] 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.[96] 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.[97] 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."[98] 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.[99]

Since the parent can no longer hold the privilege in these situations, courts must determine which party should be deemed the privilege holder instead:[100] the juvenile court or the GAL.[101] 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.[102] The court considered the consequences of either the trial court or the GAL holding the privilege and ultimately rejected the ***222** former.[103] 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.[104] Not all states have come to this conclusion, and several instead award the privilege to the trial court.[105] 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)[106] were not appropriate choices.[107]

L.A.N. arose out of a termination of parental rights action.[108] 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.[109] At the time, L.A.N. was seven years old.[110] Hospital staff informed the ***223** mother that they were considering moving the child to a mental health facility.[111] After hearing the hospital staff's plan, the mother attempted to flee.[112] The Denver DHS filed a dependency and neglect petition, and the court appointed a GAL to represent the best interests of L.A.N.[113] The court removed the child from her mother's care and placed her with her aunt.[114] Three months later, the juvenile court adjudicated L.A.N. as dependent and neglected.[115]

After the adjudication, L.A.N. began working with a therapist, creating the psychotherapist-patient relationship that would become the focus of subsequent litigation.[116] 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.[117] 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.[118] The GAL subsequently distributed the letter to the juvenile court and to all parties involved in the dependency and neglect case.[119] No party made any mention of the psychotherapist-patient privilege.[120] Several months later, the DHS moved to terminate the parent-child relationship.[121] In response, the mother subpoenaed the therapist to produce her case file on L.A.N.[122] The therapist refused, claiming psychotherapist-patient ***224** privilege.[123] 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.[124] 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.[125] Eventually, the juvenile court terminated the parent-child relationship.[126]

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.[127] 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.[128] As a result, the waiver was likely broader than the juvenile court believed it to be.[129]

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.[130] 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.[131] 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.[132] The court was thus left with two choices for the privilege holder: the GAL or the juvenile trial court.[133]

Ultimately, the court decided that the GAL "is in the best ***225** position to hold the privilege."[134] 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."[135] 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.[136]

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.[137] 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."[138] 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.[139] If the juvenile court held the privilege, it would unnecessarily duplicate the GAL's work.[140]

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.[141] A child's interests are clearly implicated by the disclosure of therapy communications,[142] so the court's choice to assign the privilege to the party charged with protecting those interests is appropriate.[143] The next Section addresses the rationales other states have used in allocating the privilege to either the GAL or the juvenile court.

***226** *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.[144] 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."[145] The

Nagle court emphasized the importance of having an actual representative exercise the privilege.[146] 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."[147] 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,"[148] just as the *L.A.N.* court did.[149]

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.[150] Under these statutes, when privilege issues arise in a court proceeding, the judge makes a decision based on the arguments from the GAL ***227** privilege holder and the opposing party.[151] 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.[152] 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.[153] 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.[154]

The New Hampshire Supreme Court's *In re Berg* decision to assign the privilege to the trial court reflects this reasoning.[155] 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.[156] The court ***228** appointed a GAL to represent the children's best interests throughout the proceedings.[157] In response to the father's attempts to access his children's therapy files, the GAL moved to seal the children's records.[158] 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.[159] Instead, the court found that the trial court had the ability to do so.[160]

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.[161] 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.[162] 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.[163] 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.[164] *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 ***229** tainted recommendation regarding other matters before the court, such as custody or visitation.[165] Should this concern arise, the decision proposed appointing a separate GAL who would only investigate and report on privilege issues.[166] 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,[167] and that the trial court had the duty to determine the best interests of the child in a custody matter.[168] 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."[169] 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.[170] 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.[171] 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.[172]

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* wavier of the ***230** psychotherapist-patient privilege for both parents and children.[173] 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.[174] The court did not question *if* privileged material should be disclosed, but rather *what* privileged material should be disclosed.[175] 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,[176] the *Bond* court assumed privileged material would be relevant and waived privilege as a general matter.[177] 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.[178]

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.[179] 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.[180] As such, the GAL is in the best position to hold the child's privilege.

***231** 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.[181] Several jurisdictions that allocate privilege decisions to the trial court frame the privilege waiver as one of fairness.[182] 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.[183] 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.[184] 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.[185] 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 ***232** court's subjective opinion regarding the child's privilege into what should be a purely objective calculus."[186] The judge oversteps the court's role as neutral decision-maker by considering the child's best interests from an advocacy perspective.[187] 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.[188] 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.[189]

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.[190] 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.[191] As the neutral decision-maker, the court must consider the parent's interests as well as the child's.[192] 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.[193] If a court holds the privilege of one of the parties, the ***233** judge may appear to no longer be neutral.[194] This becomes particularly problematic in a termination of parental rights proceeding, in which the parent has a strong interest in a meaningful adversarial hearing.[195] 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.[196] 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.[197] GALs are thus ideally positioned to "provide the court with relevant information and an informed recommendation as to the child's best interest."[198] 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."[199] Furthermore, judges often expect that the GAL, as an ***234** appointed non-party to litigation, "will provide a more objective and neutral rendering of the facts."[200] 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.[201] 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.[202] While a court should certainly decide matters between opposing parties, like parental rights issues,[203] 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.[204] 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 ***235** and experience the original GAL gained while working with the case.[205] 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.[206] 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.[207] 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.[208] 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.[209] Since the GAL reviews this information during a normal investigation, the trial court would duplicate the work the GAL had already done.[210] 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.[211]

***236** 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.[212] 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,[213] 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.[214] 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.

*237 *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.[215] However, *L.A.N.* does not provide lower courts with a procedure for determining when such a conflict exists.[216] Other jurisdictions that have confronted the privilege issue have similarly failed to provide a method for making this determination.[217] 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.[218] 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.[219] But when privileged information becomes ***238** 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.[220] 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.[221] In *McCormack*, four-year-old Ryan was a passenger on a school bus involved in a single vehicle accident.[222] Following the accident, Ryan suffered from post-traumatic stress disorder (PTSD), including increased anxiety, aggressive behavior, nightmares, and day wetting.[223] The School Board conceded liability for the accident, but it would not compensate Ryan for the psychological damage he had suffered.[224] 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."[225]

The trial court agreed that a potential conflict of interest ***239** existed and found that a GAL needed to be appointed to determine whether a waiver was in Ryan's best interests.[226] The trial court did not make an inquiry as to whether the conflict actually existed.[227] 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.[228] Appointing a GAL and affording him time to gather information to make a privilege determination would postpone the trial.[229] The court told Ryan's parents they would be responsible for some of the School Board's increased trial costs during the delay.[230] 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.[231] 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.[232] 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.[233]

The Maryland Court of Special Appeals ultimately reversed the decision.[234] 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.[235] 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.[236]

***240** 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.[237] 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.[238] 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.[239] Privilege holder decisions in all these cases should advance the child's best interests, not the strategy of adversarial parties.[240] Waiting until an adversarial party raises the privilege holder issue also wastes the time and resources of both the court and the parties.[241] If the trial court in *McCormack* had made the privilege determination at the first mention of using the therapist's testimony, rather than ***241** 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.[242] 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.[243] 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.[244]

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 ***242** as possible so that privileged information is not inappropriately disclosed.[245] The danger of disclosure increases when multiple professionals--including social workers, therapists, and attorneys--collaborate and share information with one another.[246] 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.[247]

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.[248] 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.[249] For example, in Orlando, Florida, a task force investigating the services provided for disabled children in foster care[250] discovered that the records containing information on psychological, medical, and educational information was not regularly monitored or maintained.[251] The task force noted:

> ***243** [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."[252]

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."[253]

Given these perceived failures, many states encourage professionals to share information with each other.[254] 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.[255] 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.[256] The meetings also ensure that the individual services do not unintentionally undermine each other.[257]

***244** 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.[258] 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.[259]

Obtaining a judicial order early in a proceeding which affirmatively denotes the child's privilege holder can prevent these issues.[260] Once a privilege holder has been determined, that person can take steps to assert or waive the child's privilege as appropriate.[261] If the court decides a GAL needs to hold the privilege, that GAL should be aware of the ramifications of holding the privilege.[262] 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.[263]

Further complicating matters, a child may become mature enough to hold his own privilege if a case extends for several ***245** 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.[264] 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.[265]

As L.A.N.'s case demonstrates, dependency and neglect proceedings may extend for several years.[266] When a child is very young, the issue of later maturity may not surface during the life of the case.[267] 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.[268] 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.[269] As the following Subsection shows, the ***246** 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.[270] 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."[271] If so, the court should appoint an attorney ad litem (AAL) to "assert the child's position."[272] 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.[273] 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.[274] 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.[275]

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 ***247** litigation.[276] The court found that children with "sufficient emotional and intellectual maturity" should be allowed to assert that privilege through counsel.[277] 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.[278]

The same Florida court ruled similarly two years later in *S.C. v. Guardian ad Litem*.[279] 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.[280] This standard form ordered health providers--including mental health therapists--to allow the GAL access to the child's therapy records.[281] In preparation for trial, the local DHS requested release of the child's therapy records.[282] The child objected through her AAL, but the court denied her motion.[283]

On appeal, Florida's Fourth District quashed the order allowing the GAL unrestricted access to the child's records[284] 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."[285] At minimum, the trial court must allow the child to be heard *in camera* on the issue.[286] 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 ***248** relationship.[287]

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.[288] 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.[289] 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.[290]

These Florida cases emphasize the role of the privilege in ensuring effective treatment for the child,[291] as well as the general importance of hearing the mature child's opinion.[292] 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.[293] 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.[294]

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 ***249** appoint a GAL "when a minor is too young to personally exercise the privilege."[295] 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."[296] The *Berg* court also identified factors the trial court should consider when deciding whether a minor has sufficient maturity.[297] 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.[298] 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."[299] 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,[300] 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.[301] Moreover, to assume that an older child does not have the ability to hold the privilege adds an unnecessary third ***250** 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*.[302] *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.[303] And, unlike privilege decisions, competency evaluations *are* matters in which courts can act as neutral decision-makers.[304] Courts frequently make decisions about an individual's competency, and they could apply that expertise in these cases.[305]

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.[306] 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.[307] More importantly, yearly reviews ***251** 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.[308] Such a relationship can foster tension between the GAL and the parents.[309] As the privilege holder, the GAL will make decisions concerning the child that would normally be left to the parents.[310] 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.[311] 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.[312]

***252** 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.[313]

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,"[314] and only by safeguarding the privilege can the therapeutic process have full effect.[315] 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.[316] 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.[317] 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,[318] 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 ***253** number of training hours.[319] In some states, the GAL serves both an investigative role for the court and as the child's attorney.[320] 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.[321] In most states GALs do not go through as extensive a vetting process as judges do.[322] Judges also may undergo more extensive training than GALs do.[323] In ***254** 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.[324]

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.[325] 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.[326] 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.[327] 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 ***255** 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.

Footnotes

a1 J.D. Candidate, 2016, University of Colorado Law School; Production Editor, *University of Colorado Law Review*. Special thanks to Larry Myers for his thoughtful comments and tireless efforts in editing this Comment. Thanks also to Jennifer Knight, Caitlin Miller, Josh Pens, Caitlin Cronin, Dustin Rickett, Samantha Ford, and Emily Foster for their work in the publication process. Dedicated to Mathieu, for his patience.

1 U.S. Pub. Health Serv., D ep'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.*, C olo. 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 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.

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.*

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).

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 alsoProtecting Your Privacy: Understanding Confidentiality*, Am. Psychol. Ass'n,

http://www.apa.org/helpcenter/confidentiality.aspx [[[http://perma.cc/V3A3-AGAQ] (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 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://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.

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.auth [[[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 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 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 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 alsoStaffings*, 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://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 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://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/NLB8-6N7W]; 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%CC252E%CC25204%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)); N eb. 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 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 93, 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.

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 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 A m. 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).

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.

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.*

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. C olo. 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.

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.

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").

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).

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.*

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 alsoid.* 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.

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.

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).

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 alsoMarkey*, 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).

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) ; O hio 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 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).

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.").

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 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.").

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* Lindajean 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 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.

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.

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.

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).

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://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%CC20Report%20-%20Response%20to%CC20the%CC20Death%CC20***o***f%CC20a%CC20Former%CC20Foster%CC20Child%CC20with%CC20Disabilities%20-%20Handout%201%20-%20Task%20Force%20Report.pdf [[[http://perma.cc/ZDV4-AV69].

251 *Id.* at 15.

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. Dep't of Human Servs., Policy & Procedure Manual 163 (2015), http://humanservices.arkansas.gov/dcfs/dcfsDocs/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-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]the 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.

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).

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%20***o***f%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.

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.

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.

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).

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); C olo. 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).

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 *Seegenerally* 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://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 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 *Seesupra* Section I.A (discussing differing requirements for GALs).

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://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://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/$FILE/12286JudicialDeptGuardianAdLitemJune1996 [[[http://perma.cc/9YDV-WC8P]. Ten years later, after Colorado reorganized its GAL program under the oversight of the Colorado Office of the Child's Representative, a similar study by the State Auditor found that 100% of GALs had met with their assigned child, and 73% had visited with the child during the first thirty days of their assignment, as required. Colo. Office State Auditor, Office of the Child's Representative Guardians ad Litem Judicial Branch Performance Audit June 2007, at 18 (2007), http://www.leg.state.co.us/osa/coauditor1.nsf/All/28E2E06A4D2DF74E87257310005DE427/$FILE/1762%20GAL%CC20Performance%CC20Audit%CC20Report%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 judges to undergo in-service training in child development, abuse, and domestic violence every two years), *with* K y. 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 generallyOCR Presentation*, *supra* note 19 (as an example of a training session given to help GALs understand their role as privilege holder).

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