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Kentucky's Guardian Ad Litem Litigation: A Model for Seeking Role Clarity

*By Amy E. Halbrook**

INTRODUCTION

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or what the appointee should do.

-- American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, August 2003.

Lawyers should act like lawyers in custody proceedings.

-- *Morgan v. Getter*, 441 S.W.3d 94, 98 (Ky. 2014).

Children, some of the most vulnerable people in our society, deserve highly competent lawyers who understand their roles, duties, responsibilities, and authority under the law. Children's lawyers, however, frequently struggle with conflicting obligations and lack of direction. These lawyers often have to reconcile their obligations as lawyer/advocates, investigator/reporters, and decision-makers, and these challenges can raise legal and professional responsibility concerns.

In *Morgan v. Getter*, the Kentucky Supreme Court was asked to clarify the role of counsel for children in private custody matters.¹ The litigation, the possibilities it raised, and its aftermath provide a model for other jurisdictions to seek role clarity as well.

Part I of this article describes the national problem of role confusion, the reasons therefor, and the varying roles that a child's attorney can perform in custody matters. Part II describes and dissects *Morgan*, the Kentucky case that analyzed and ultimately defined the role of counsel for

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¹ *Morgan v. Getter*, 441 S.W.3d 94, 97 (Ky. 2014).

child advocates in Kentucky custody matters. Part III explores the impact of *Morgan* beyond the scope of the custody context in Kentucky. Part IV explains and clarifies the investigator/reporter and advocate roles delineated in *Morgan* and explores ways in which they may be better defined in the future; and Part V explores the ways in which practitioners from other jurisdictions may use lessons from *Morgan* to seek role clarity in their own jurisdictions.

I. ROLE CONFUSION AND CHILDREN'S LAWYERS NATIONALLY

Confusion about the role of attorneys representing children is ubiquitous.² Practical and ethical issues related to role confusion have been debated by scholars and practitioners for over twenty years,³ but there is still a lack of national consensus about the proper role of counsel for children in private custody matters.⁴

When advocates are appointed for children in custody matters, they generally serve in one of two roles: guardian ad litem (GAL) or some form of attorney for the child.⁵ The GAL is obligated to

² See, e.g., Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L. Q. 63, 75 (2008) (“[M]any states routinely appoint lawyers as guardians ad litem without careful delineation between the roles.”).

³ See, e.g., *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L. J. 592 (2006); ABA, *American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (Summer 2003) [hereinafter ABA Standard]; *American Academy of Matrimonial Lawyers Standards for Attorneys for Children in Custody or Visitation Proceedings With Commentary*, 22 J. AM. ACAD. MATRIM. L. 227 (2009) [hereinafter AAML Standard]; *National Conference of Commissioners on Uniform State Laws Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act*, 42 FAM. L. Q. (Spring 2008) (withdrawn from consideration by the ABA House of Delegates) [hereinafter NCCUSL Standard].

⁴ See, e.g., *In re Marriage of Campbell*, 868 S.W.2d 148 (Mo. Ct. App. 1993) (guardian ad litem was acting within the scope of his responsibilities when he conducted discovery, interviewed the parties’ older child, actively participated in the trial and offered recommendations to the court). *But see* *Stefan v. Stefan*, 465 S.E.2d 734, 736 (S.C. Ct. App. 1995) (family court abused its discretion by delegating to the parenting specialist and the guardian the judicial authority to devise a visitation plan for the father).

⁵ See, e.g., IOWA CODE ANN. § 232.89(4) (West 2016); N.C. GEN. STAT. ANN. §§ 7B-601, 7B-1108, 7B-1200 (West 2011); TENN. SUP. CT. R. 40A § 1(c)(1) (West 2016) (provisional) (in Tennessee, the guardian ad litem may be an attorney or a specially trained non-lawyer such as the Court-Appointed Special Advocates (CASA)); WIS. STAT. ANN. § 767.407 (West 2008) (“[t]he court shall appoint a guardian ad litem for a minor child in any action affecting

advance the best interests of the child within the case.⁶ In some jurisdictions, the GAL is required to be an attorney,⁷ and in others he or she is not.⁸ In some jurisdictions, the GAL is required to make reports and recommendations to the Court,⁹ and in some he or she is not allowed to do so.¹⁰ Adding to the confusion, roles and duties of child advocates are also frequently different across legal contexts within the same jurisdiction -- for example, a GAL in a child protection proceeding, a private custody proceeding, and a criminal matter involving a child victim all require different roles and duties despite the fact that they have the same title of GAL.¹¹

In addition to the title of GAL, some courts appoint attorneys in custody matters to represent the child's interests, sometimes framed as the child's "best interests"¹² and sometimes as the child's expressed wishes.¹³ The titles of GAL and child's attorney are often used interchangeably and

the family . . ."); *See also* WASH. REV. CODE ANN. § 26.10.070 (West 2016) ("[t]he court may appoint an attorney to represent the interests of a minor or dependent child with respect to custody, support, and visitation.").

⁶ *See* Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 907-08 (2007).

⁷ *See, e.g.*, ALASKA STAT. ANN. § 25.24.310 (West 2016).

⁸ *See, e.g.*, S.D. CODIFIED LAWS § 25-4-45.4 (2016).

⁹ *See, e.g.*, MONT. CODE ANN. § 40-4-205 (West 2015); *In re Marriage of Hammill*, 732 P.2d 403, 405 (Mont. 1987); *Jacobsen v. Thomas*, 100 P.3d 106, 107 (Mont. 2004).

¹⁰ *See, e.g.*, *State ex rel. A.D.*, 6 P.3d 1137, 1139 (Utah Ct. App. 2000) (guardian ad litem may not be compelled to testify and may not be called as expert witnesses based on fulfilling statutory duties to make best interests recommendations).

¹¹ *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/2-17 (West 2013) (role of GAL in neglect cases); *See also* 705 ILL. COMP. STAT. ANN. 405/4-16 (West 2013) (role of GAL for child victims); 750 ILL. COMP. STAT. ANN. 5/506(a)(1) (West 2016) (role of GAL in child custody cases). *See also* 705 ILL. COMP. STAT. ANN. 405/5-610 (West 1999) (GAL appointed whenever there is a conflict between parent(s) and child).

¹² *See* *Roussel v. State*, 274 A.2d 909, 925-26 (Me. 1971) (The best interest of the child standard has been largely influenced by the common law doctrine of *parens patriae*, which holds that the state has the right and duty to control the custody of a minor child as it deems appropriate for the child's welfare, once the child has become a subject of the jurisdiction of a court).

¹³ *See* *Ziehm v. Ziehm*, 433 A.2d 725, 728 (Me. 1981) (quoting *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925)) (Justice Benjamin Cardozo described the judge's function under the *parens patriae* doctrine as "[the trial judge] acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. He 'interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the [state] as *parens patriae*.'").

the attorneys performing these roles are often asked to perform both reporting duties as agents of the court and advocacy duties on behalf of the child.

Scholars and advocates have argued that it is improper for a child's attorney-GAL to also play the role of reporter to the court in child custody matters.¹⁴ Scholars are concerned that allowing an attorney-GAL to present an opinion about the outcome of a proceeding, through testimony or report, raises the attorney-GAL to the status reserved for the court,¹⁵ and may raise evidentiary issues,¹⁶ professional responsibility concerns,¹⁷ and/or due process violations.¹⁸ In some jurisdictions, GAL Reports are automatically admitted.¹⁹ Parents may be allowed to cross examine a GAL in one jurisdiction and not another,²⁰ despite the fact the GAL serves the best interests of the child (not the parents' interests) in both jurisdictions.²¹

¹⁴ See, e.g., ABA Standard, *supra* note 3, at III.B (recommending that attorneys for the child not make recommendations, file a report or testify in court).

¹⁵ See *Pace v. Pace*, 22 P.3d 861, 868-70 (Wyo. 2001) (guardian ad litem who was licensed attorney impermissibly presented custody recommendation to court in form of sworn testimony and trial court erred in admitting testimony) (“ . . . guardians ad litem must take the necessary steps to assure sufficient evidence is presented at trial either by introducing the evidence themselves or assuring counsel for one or both parents are prepared to do so. Finally, guardians ad litem should present their recommendations to the court in the form of closing argument and not through personal testimony.”).

¹⁶ See, e.g., Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105, 116-18 (2003).

¹⁷ *Id.*

¹⁸ See Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine Guardians Ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103, 2104 (2010).

¹⁹ MASS. GEN. ANN. LAWS ch. 215, § 56A (West, Westlaw through 2016 Legis. Sess.) (“Said guardian ad litem shall, before final judgment or decree in such proceeding, report in writing to the court the results of the investigation, and such report shall be open to inspection to all the parties in such proceeding or their attorneys.”).

²⁰ See WIS. STAT. ANN. § 767.407 (West 2016) (defining the appointment and responsibilities of a guardian ad litem); *Hollister v. Hollister*, 496 N.W.2d 642, 644-45 (Wis. Ct. App. 1992) (parent not entitled to cross examine guardian ad litem); See also *Gilmore v. Gilmore*, 341 N.E.2d 655, 659 (Mass. 1976) (the right to cross-examine a guardian ad litem in a custody proceeding is guaranteed regardless of whether the parties consent to the investigation).

²¹ UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987) (“The court shall determine custody in accordance with the best interest of the child. . . [and shall consider] all relevant factors, including the parents' wishes, the child's wishes, the child's relationships with the significant people in his life, the child's “adjustment to his home, school, and community,” and “the mental and physical health of all individuals involved.”).

In an attempt to address issues related to role confusion and promote uniformity of practice, the ABA promulgated the Standards of Practice for Lawyers Representing Children in Custody Cases (hereinafter “ABA Standards”).²² Several other entities promulgated Standards as well; this article will focus on the ABA Standards and note certain places where other Standards deviate from the ABA Standards in significant ways.²³

The ABA Standards do not refer to guardians ad litem, noting that the term and the role have become “too muddled through different usages in different states, with varying connotations.”²⁴

The ABA Standards instead refer to two distinct attorney roles within the custody context: the “Child’s Attorney” and the “Best Interests Attorney.”²⁵ The Child’s Attorney is “a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation that are due an adult client.”²⁶ The Best Interests Attorney is “a lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s objectives or directives.”²⁷

Both the Child’s Attorney and the Best Interests Attorney are obligated to accept appointment

²² ABA Standard, *supra* note 3.

²³ See, e.g., *American Academy of Matrimonial Lawyers Standards for Attorneys for Children in Custody or Visitation Proceedings With Commentary*, 22 J. AM. ACAD. MATRIM. L. 227 (2009); *National Conference of Commissioners on Uniform State Laws Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act*, 42 FAM. L. Q. (Spring 2008) (withdrawn from consideration by the ABA House of Delegates).

²⁴ ABA Standard, *supra* note 3, at § II.B cmt. (“[The role of GAL] is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective, expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a non-lawyer capacity.”).

²⁵ See *id.* at § II.B (1) and (2) (“These Standards do not use the term ‘Guardian Ad Litem.’ The role of ‘guardian ad litem’ has become too muddled through different usages in different states, with varying connotations.”).

²⁶ See *id.* at § II.B (1) (“Child’s Attorney”: A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client).

²⁷ See *id.* at § II.B (1) §II.B (2) (“Best Interests Attorney”: A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives).

and clarify their role if necessary,²⁸ ensure that they play an attorney's and not a reporter's role,²⁹ exercise independent judgment,³⁰ meet with the child,³¹ participate in file review and pretrial activities,³² participate in hearings in a lawyer's role,³³ participate in appeals,³⁴ seek enforcement of the court's orders,³⁵ and inform the client when the representation ends.³⁶

Apart from the aforementioned overlaps, the roles of the Child's Attorney and the Best Interests Attorney deviate. The Child's Attorney is generally required to advocate for the result sought by the client, so long as the client, in the lawyer's judgment, is capable of making adequate decisions.³⁷ The Child's Attorney functions as legal counsel with the same ethical obligations

²⁸ *See id.* at § III.A (“If the appointed lawyer considers part of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.”).

²⁹ ABA Standard, *supra* note 3, at § III.B (“A lawyer appointed as a Child's Attorney or a Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.”).

³⁰ *See id.* at § III.C (“The lawyer has the right and responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.”).

³¹ *See id.* at § III.E (“The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.”).

³² *See id.* at § III.D (Initial tasks include reviewing the file, informing the parties and/or counsel of appointment, and notifying that as counsel he or she should receive notice of pleadings, discovery, hearings, and major changes of circumstances); *id.* at § III.F (Pretrial responsibilities include, among other things: independent investigation and discovery; theory and strategy development; participating in meetings, negotiations, depositions, hearings and trials; and participating in motion practice.).

³³ *Id.* at § III.G (“The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. . .”).

³⁴ ABA Standard, *supra* note 3, at III.H (“If appeals on behalf of the child are allowed by state law, and if it has been decided [that an appeal is necessary], the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal. . . . The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged. . . . When the appeals court's decision is received, the lawyer should explain it to the child.”).

³⁵ *Id.* at § III.I (“The lawyer should monitor the implementation of the court's orders and address any non-compliance.”).

³⁶ *Id.* at § III.J (“When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.”).

³⁷ *Id.* at § IV.C (“The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.”).

“in all matters,”³⁸ including scope of authority³⁹ and confidentiality.⁴⁰ The Child’s Attorney must follow the client’s directives so long as the child is competent to give instructions.⁴¹ The Child’s Attorney must abide by the client’s decisions, making a separate decision about whether the client has the capacity to direct counsel on each distinct legal issue.⁴² If the child does not express his or her wishes, the Child’s Attorney must “make a good faith effort to determine the child’s wishes . . . [and when the child’s opinion is unavailable] the Child’s Attorney should determine and advocate the child’s legal interests or request the appointment of a Best Interests Attorney.”⁴³ In the event that the Child’s Attorney determines that the child’s expressed objective would put the child at substantial risk, the Child’s Attorney may request the separate appointment of a Best Interests Attorney.⁴⁴

The Best Interests Attorney’s role is to investigate and advocate for the child’s best interests,⁴⁵ to investigate the child’s views and inform the court unless the child does not wish them to be

³⁸ *Id.* at § IV.A (1) (“Child’s Attorneys are bound by their states’ ethics rules in all matters.”).

³⁹ ABA Standard, *supra* note 3, at § IV.A (1).

⁴⁰ *Id.* at § IV.A (1) cmt. (“The child is an individual with independent views. To ensure that the child’s independent voice is heard, the Child’s Attorney should advocate the child’s articulated position and owes traditional duties to the child as client, subject to rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct.”).

⁴¹ *Id.* at § IV.C (“The child is entitled to determine the overall objectives to be pursued. The Child’s Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult’s lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child’s developmental limitations make it not feasible to obtain the child’s direction, as with an infant or preverbal child.”).

⁴² *Id.* at § IV.C (i) (“The Child’s Attorney should make a separate determination whether the child has “diminished capacity” pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.”).

⁴³ *Id.*

⁴⁴ ABA Standard, *supra* note 3, at § IV.C (iii) (“If the Child’s Attorney determines that pursuing the child’s expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer’s opinion of the child’s interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child’s expressed position, unless the child’s position is prohibited by law or without any factual foundation. The Child’s Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child’s position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.”).

⁴⁵ *Id.* at § V.E (“The Best Interests Attorney should conduct thorough, continuing, and independent investigations . . .”).

disclosed;⁴⁶ to use information from the child for the purpose of advocating for the child's best interests;⁴⁷ and not necessarily to advocate for the child's wishes.⁴⁸ The Best Interests Attorney is obligated to explain this role to the child in a developmentally appropriate manner.⁴⁹ The Best Interests Attorney is "bound by their states' ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks."⁵⁰ A Best Interests Attorney is subject to the rules of lawyer-client confidentiality, "except that the lawyer may also use the child's confidences for the purposes of representation without disclosing them."⁵¹ The Best Interests Attorney must conduct a thorough investigation of the case.⁵² The Best Interests Attorney's assessment of the child's best interests should be based on the criteria set in the Best Interests Standards or other relevant standards, not the attorney's own judgment.⁵³

In the past twenty years, scholars and practitioners have argued against the GAL role, citing the ABA Standards, the American Academy of Matrimonial Lawyers (AAML) Standards and the

⁴⁶ *Id.* at § V.F ("At hearings on custody or parenting time, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.").

⁴⁷ *Id.* at § V.F cmt. ("A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.").

⁴⁸ *Id.* at § V.D (4).

⁴⁹ ABA Standard, *supra* note 3, at § V.D (4).

⁵⁰ *Id.* at § V.A.

⁵¹ *Id.* at § V.B cmt. ("The distinction between use and disclosure means, for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child.").

⁵² *Id.* at § V.E.

⁵³ *Id.* at § V.F; *see also id.* at § V.F cmt. ("A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law.").

National Conference of Commissioners on Uniform State Laws (NCCUSL) Standards for the position that children's advocates should not make recommendations, file reports, or testify.⁵⁴ They argue instead that children's attorneys should make evidence-based arguments, consistent with traditional attorney practices,⁵⁵ and that they should call their own witnesses and cross-examine the parties' witnesses to ensure due process while allowing the child's attorney to comply with the Rules of Professional Conduct.⁵⁶ Scholars have also argued against Best Interests Attorneys, noting that best interests lawyering creates ethical conflicts for attorneys and impinges on the rights of the child to direct the litigation.⁵⁷ Finally, some scholars have argued against the appointment of any lawyers at all for children in custody matters, expressing concern that doing so elevates the child's position in the litigation unnecessarily,⁵⁸ and that lawyers should be appointed "only when [the court believes] that the child's wishes need to be forcefully advocated" and then only "to advocate the outcome desired by the child."⁵⁹ The AAML recommends, for example, that the purpose of lawyers for children is to advocate for the child's expressed wishes⁶⁰ and the AAML opposes attorneys taking any position absent client direction.

⁵⁴ ABA Standard, *supra* note 3, at § II.B; AAML Standard, *supra* note 3, at 3.2; UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT, *supra* note 3, at § 17 (NCCUSL 2007).

⁵⁵ ABA Standard, *supra* note 3, § III.B cmt. ("Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.").

⁵⁶ *Id.* at § III.G.

⁵⁷ See Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyering At All?*, 53 ARIZ. L. REV. 381, 382 (2011); Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 910-11 (2007).

⁵⁸ See generally MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) (arguing that children's interests as antagonistic to those of their parents and argues that "children's rights" can serve as a screen for the interests of the adults).

⁵⁹ Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. L. 251, 263 (2009).

⁶⁰ *Id.*

In the event that a child cannot expressly direct counsel, the AAML's position is that no attorney should be appointed for the child.⁶¹

This hodge-podge of state practices sets the backdrop for *Morgan v. Getter*, the 2014 Kentucky case that clarified the role and responsibilities of children's advocates in custody matters.

I. *MORGAN v. GETTER: THE KENTUCKY GAL LITIGATION*

The child's attorney's role in custody litigation was historically as confusing in Kentucky as it has been in other jurisdictions.⁶² Until 2014, a Kentucky GAL was required to be a practicing attorney of the court,⁶³ subject to professional responsibility obligations,⁶⁴ but was also required to provide recommendations and a report to the court.⁶⁵ As an attorney, the GAL was not subject

⁶¹ "Thus, the AAML's insistence that a child's lawyer should only advocate the expressed wishes of the child has shaped its approach to the appointment decision itself. Since children's lawyers are only to function as client-directed attorneys, they should be appointed only when courts want children's wishes to figure prominently in the litigation." Atwood, *supra* note 57, at 389-90, noting that the American Law Institute also recommends "that lawyers adhere to traditional client-directed representation and that guardians ad litem (GALs) be appointed to children lacking competence to direct the representation. Am. L. Inst. 2.13 cmts. d-e (2002)."

⁶² The Supreme Court of Kentucky held that Kentucky children had due process rights to have their interests defended by Guardians Ad Litem: "No judgment shall be made against an infant...until the...guardian ad litem shall have made defense [on the child client's behalf]. . . A guardian ad litem must be a regular, practicing attorney of the court; . . . it shall be [the Guardian Ad Litem's] duty to attend properly to the preparation of the case; and in an ordinary action he may cause as many witnesses to be subpoenaed as he may think proper." *Morgan v. Getter*, 441 S.W.3d 94, 107 (Ky. 2014). Subsequently, however, Kentucky adopted KY. REV. STAT. ANN. § 387.305 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.), defining the role of the guardians ad litem as a best interests attorney. See also KY. REV. STAT. ANN. § 403.270(2) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (best interests of the child control custody determination).

⁶³ KY. REV. STAT. ANN. § 387.305 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

⁶⁴ Ky. Sup. Ct. R. 3.130 (1.14) ("When a client is a minor or suffers from diminished mental capacity . . . maintaining the ordinary lawyer-client relationship may not be possible in all respects . . . Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions, about matters affecting the client's own well-being. For example, clients as young as five or six years old, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in the legal proceedings concerning their custody.").

⁶⁵ Kentucky Court of Justice, *Recommendations of the Commission of Guardian ad Litem, Responsibilities of a Guardian ad Litem* (1999) (A GAL should first determine the facts of the case by interviewing all relevant parties; A GAL should meet with the child to assess adequately the child's needs and wishes with regard to the representation and issues in the case; A GAL should appear at all hearings concerning the child; A GAL should make recommendations, clear and specific evaluations, services and treatment orders for the child and the child's family; A GAL should file all necessary pleadings and papers, and maintain a complete file with notes instead of solely relying on the court files; A GAL should monitor the implementation of court orders and determine whether the

to cross examination.⁶⁶ While there were alternate roles -- including Friend of the Court⁶⁷ or Investigator⁶⁸ -- available for use within custody cases pursuant to statute, the use of these roles had been discontinued; Kentucky had, as a practical matter, created a hybrid role where the GAL served as both an attorney and a reporter to the court in custody matters.⁶⁹ This hybrid role was challenged by the mother in *Morgan v. Getter* as a violation of the mother's procedural due process rights.⁷⁰

A. The Trial Court

The case arose in a Northern Kentucky family court.⁷¹ The parties had two daughters born to the marriage.⁷² At the time of the divorce, the mother was granted custody and the father was

services ordered for the child or child's family are being provided in a timely manner; A GAL must continue to represent the child as long as the appointing authority retains jurisdiction over the child; Consistent with the rules of Professional Responsibility, a GAL should identify the common interests among the parties and, if possible, promote a cooperative resolution to the matter; A GAL should submit an oral or written report to the court as ordered; and a GAL should advocate for the child's best interests, but advise the court when the child disagrees with the attorney's assessment of the case.)

⁶⁶ *Confidentiality of Information*, Ky. Sup. Ct. R. 3.130(1.6)(a) ("A lawyer shall not reveal information relating to the representation of a client."); Ky. Sup. Ct. R. 3.130(3.7)(a) ("A lawyer shall not act as advocate at a trial where the lawyer is likely to be a necessary witness.").

⁶⁷ KY. REV. STAT. ANN. § 403.090(4) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) ("[T]he Friend of Court . . . shall make such investigation as will enable the Friend of Court to ascertain the facts and circumstances that will affect the rights and interests of the children."); KY. REV. STAT. ANN. § 403.300 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (court investigator investigates and makes recommendations concerning custodial arrangements for the child; report may be received into evidence and the investigator may be called as a witness); KY. REV. STAT. ANN. § 403.290 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (court may appoint a professional advisor to the court for diagnosis or professional evaluation); FCRPP 6 (Opinions sought in family matters may include custody evaluations, psychological evaluations, or "such other . . . opinions or advice which the court deems appropriate.").

⁶⁸ KY. REV. STAT. ANN. § 403.300(2) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) ("In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent.").

⁶⁹ *Morgan*, 441 S.W.3d at 97; See, e.g., *S.G. v. D.C.*, 13 So.3d 269, 282 (Miss. 2009) (court may not appoint a GAL to serve in the dual role of lawyer for the child and advisor to the court).

⁷⁰ *Morgan v. Getter*, No. 2012-CA-000655-ME, slip. op. at 6 (Ky. Ct. App. Feb. 23, 2013), *rev'd.*, *Morgan v. Getter*, 441 S.W.3d 94 (2014).

⁷¹ *Morgan v. Getter*, No. 03-CI-00281 (Ky., Campbell Cty, Cir. Ct., Dec. 19, 2011) (unpublished).

granted supervised visits.⁷³ About seven years after the divorce, the elder daughter, who had reached adulthood, moved to Florida to attend college and live with the father.⁷⁴ The father then filed a motion for modification of custody to allow the younger daughter, a fifteen-year-old minor, to relocate to Florida as well.⁷⁵

The Court appointed a GAL to represent the younger daughter, A.G.⁷⁶ Pursuant to the Kentucky GAL requirements at the time,⁷⁷ the GAL conducted an investigation and submitted a GAL Report to the trial court, recommending that A.G. be “allowed the opportunity to live with her father”⁷⁸ in Florida, consistent with the child’s wishes.⁷⁹ The GAL represented A.G. as counsel at the hearing.⁸⁰ The mother’s attorney put the GAL on her witness list.⁸¹ She indicated that she “intended to call the GAL to question him about his report” and “then moved, if that questioning was not to be allowed, to strike the GAL’s report.”⁸² The GAL objected to being called to testify as a witness, as he was an attorney who would himself call witnesses in the matter, and the Court

⁷² *Morgan*, 441 S.W.3d at 97.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Morgan*, 441 S.W.3d at 97 (“In mid-October, the GAL filed his report. It was largely based, according to the GAL, on his interviews with the parties and A.G., and on his visit to Morgan’s residence. For information regarding Getter’s Florida residence, the GAL apparently relied on Getter and on A.G. Both parties admitted to the GAL having altercations with A.G., each described the other’s behavior as worse than his or her own, and each accused the other of trying to alienate A.G.’s affections. A.G. told the GAL that she wanted to live near her sister in Florida, and she described a volatile relationship with her mother. The GAL noted that A.G. thus far had been a successful student and appeared to be a highly motivated one. The GAL discounted Morgan’s more serious accusations against Getter as belied by her having allowed A.G. to visit him, while also indicating serious concern regarding Morgan’s admission that she shared her disparaging allegations about Getter with her daughters. Having considered all of these factors and satisfied that A.G. would continue to do as well in school in Florida as she had done in Kentucky, the GAL saw no reason why A.G.’s desires to be near her sister and away from her mother should not be respected.”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 97-98.

⁸² *Id.* at 98.

refused to allow the mother's attorney to cross-examine the GAL.⁸³ The mother's attorney did not make a subsequent formal request that the GAL's report be stricken from the record,⁸⁴ and the Court did not do so.⁸⁵

The trial court proceeded with the hearing. The GAL was allowed to examine witnesses to corroborate the information provided in the GAL Report, including calling the child herself.⁸⁶ The trial court later issued Findings of Fact and Conclusions of Law modifying custody and allowing relocation, noting that the child's maturity, academic ability, intelligence, and a poor relationship with her Kentucky-based mother were all factors in the decision.⁸⁷ The trial court also mentioned in the Findings of Fact and Conclusions of Law that the GAL was in support of the modification, specifically referencing the GAL's report.⁸⁸

B. The Court of Appeals

After the trial court's ruling was issued, the mother appealed, arguing that the GAL had served as a professional advisor/reporter to the court,⁸⁹ and that the trial court violated her right to due process by refusing to allow her to cross-examine the GAL.⁹⁰ She highlighted the contradiction in the Kentucky statutes, arguing that the provision of the family code that applied to court

⁸³ *Morgan*, 441 S.W.3d at 98 (“The court advised Morgan that she would not be allowed to call the GAL as a witness, the GAL being ‘like [A.G.’s] representative.’ Morgan would, however, be allowed to challenge the report, in effect, by her questioning of the persons referred to in the report.”).

⁸⁴ *Id.*

⁸⁵ *Id.* (“The trial court deferred ruling on the motion, and the hearing proceeded.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Morgan v. Getter*, No. 2012-CA-000655-ME, 2013 Ky. App. Unpub. LEXIS 517, at *3 (Ct. App. Feb. 22, 2013).

⁹⁰ *Morgan*, slip op. at 2-3.

consultants/advisors/investigators should apply to the GAL, who had provided a report to the trial court.⁹¹ She relied on the provisions of the Kentucky Family Code that allowed the trial court to “seek the advice of professional personnel”⁹² and “order an investigation and report concerning custodial arrangements,”⁹³ and that provided: “[c]ounsel may examine as a witness any professional personnel consulted by the court.”⁹⁴

Counsel for the GAL, on the other hand, argued that the GAL could not be called to testify as a matter of professional responsibility.⁹⁵ He argued that, because the Kentucky Guardian Ad Litem statute required all GALs to be practicing attorneys of the court, and the GAL was indeed an attorney, the GAL would be in an ethically compromised position which would likely require him to reveal client confidences⁹⁶ and violate the mandate against attorneys testifying in their own cases.⁹⁷

The Kentucky Court of Appeals recognized the conflict between the requirements of the GAL -- “Is the GAL acting as advocate for a client or as expert counselor to the court?”⁹⁸ -- and noted that “[t]he ambiguity create[d] a clear potential for prejudice by precluding cross-examination of a GAL by the parties whose interests are at issue and are the very subject matter of the report prepared by the GAL at the behest of the Court.”⁹⁹ Still, while noting that the case highlighted the conflict, and mentioning that the conflict “merits (indeed necessitates) the scrutiny of the General Assembly and/or the Supreme Court to define the proper role of the GAL in child

⁹¹ *Id.* at 3.

⁹² KY. REV. STAT. ANN. § 403.290 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

⁹³ KY. REV. STAT. ANN. § 403.300 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

⁹⁴ KY. REV. STAT. ANN. § 403.290(2) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

⁹⁵ *Morgan v. Getter*, No. 2012-CA-000655-ME, 2013 Ky. App. Unpub. LEXIS 517, at *5-6 (Ct. App. Feb. 22, 2013).

⁹⁶ *Id.* at 4-6.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

custody cases,”¹⁰⁰ the Kentucky Court of Appeals held that any error was harmless and reversal was not warranted.¹⁰¹

C. The Kentucky Supreme Court

After the Court of Appeals ruling, the mother filed a discretionary appeal to the Kentucky Supreme Court.¹⁰² In her Appellate Brief, the mother argued that the trial court committed reversible error when it required the GAL to serve in two conflicting roles and thereby denied the mother her right of due process.¹⁰³ In addition, the mother indicated that the “Kentucky Supreme Court ha[d] the unique opportunity to clarify and define the roles and responsibilities of a GAL appointed for a minor in a circuit court custody action.” Citing various other state models,¹⁰⁴ the mother argued against the hybrid attorney-GAL model as a violation of her due process rights. She asked that the Court take notice that other jurisdictions allowed for cross examination or some kind of redress if the GAL ma[de] a written recommendation to the court.¹⁰⁵ She proposed three potential roles for child advocates in custody matters: first, an advisor to the trial court

¹⁰⁰ *Id.*

¹⁰¹ The court noted that “the thoroughness of the testimony at the hearing – that of both the child and that of the other witnesses – sufficed as adequate basis for the court’s decision.” In addition, “it [did] not appear that the court relied heavily on the GAL Report.” *Id.* at 7.

¹⁰² *Morgan*, 441 S.W.3d at 98.

¹⁰³ *Id.*

¹⁰⁴ The appellate brief directs the Kentucky Supreme Court to guidance from other courts. Brief of the Guardian ad Litem at 20, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *5-6 (Ct. App. Feb. 22, 2013); 750 ILL. COMP. STAT. 5/506 allows for attorney, GAL or child representative and the statute sets out duties of each – if the GAL submits a report with recommendations to the court, he or she may be called to testify; S.D. CODIFIED LAWS § 63-3-80 lists the responsibilities of a GAL as including submitting a report and being subject to cross-examination; Florida provides that the same person cannot serve as both attorney for the child and GAL, and that “it is a fundamental right in this country to confront one’s accuser and to examine evidence the trial court relies upon to make a decision. The parent in a change of custody case must be allowed an opportunity to rebut the conclusions of the report and to cross-examine the preparer.”; *Leinenbach v. Leinenbach*, 634 So.2d 252, 253 (Fla. Dist. Ct. App. 1994); *Clayman v. Clayman*, 536 So.2d 358, 359 (Fla. Dist. Ct. App. 1988) (citing *In re Gregory*, 313 So.2d 735 (Fla. 1975)); TEX. FAM. CODE ANN. § 107.002 permits a GAL to submit a report to the court and requires that the GAL be subject to examination as to the contents of the report and as to the child’s best interests; see also OHIO SUP. R. 48 allowing for appointment of a GAL or a GAL and attorney for the child -- when the GAL makes a report, the GAL shall be available to testify.

¹⁰⁵ Appellate brief at 20, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *5-6 (Ct. App. Feb. 22, 2013).

under Kentucky Family Court Rule of Practice and Procedure 6 subject to cross examination; second, an attorney for the child who would not file a report or advisory opinion and would not be subject to cross examination; or third, an approach allowing for the appointment of two attorneys, one to act in each of the delineated roles as the case required.¹⁰⁶

Counsel for the GAL argued that in Kentucky, a GAL must be an attorney, and was therefore bound to follow the Kentucky Rules of Professional Conduct.¹⁰⁷ Counsel for the GAL argued that the GAL was not investigator or a witness, subject to examination by the parties, but rather was counsel for the child. The GAL's role was, first and foremost, to act in his or her capacity as an attorney to represent the interests of the child to whom he or she was appointed to represent.¹⁰⁸

In addition, Counsel for the GAL argued that the GAL's relation to the court was clear: since the GAL was required to be a practicing attorney, it followed that the GAL was required to perform his duties as an attorney and not an investigator/reporter. Finally, the Counsel for GAL suggested that the mother's argument that the GAL served as a court investigator was incorrect because the investigator/reporter statutes made no mention of GALs and did not apply to GALs.¹⁰⁹ Rather, Counsel for the GAL argued that the statutes anticipated that the court might require the help of an expert instead of or in addition to the GAL when making its custody determination.¹¹⁰ Counsel for the GAL argued that the statute was meant to apply to such

¹⁰⁶ *Id.* at 20-21.

¹⁰⁷ KY. REV. STAT. ANN. § 403.090(1) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

¹⁰⁸ *See also*, Black v. Wiedeman, 254 S.W.2d 344, 346 (Ky. Ct. App. 1952).

¹⁰⁹ KY. REV. STAT. ANN. § 403.290 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.); KY. REV. STAT. ANN. § 403.300 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

¹¹⁰ Brief of the Guardian ad Litem at 20, Morgan v. Getter, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *2 (Ct. App. Feb. 22, 2013).

professionals as psychologists and social workers, who have specialized training and could make helpful, objective observations based on the established principles in their field of expertise regarding the well-being of the child.¹¹¹

Amici weighed in. Several Kentucky law professors submitted an *Amicus* Brief [hereinafter the Law Professors' Brief] that was consistent with the ABA Standards; it argued both that the current role of the GAL in Kentucky custody proceedings was to act subject to standard professional responsibility obligations and the role of the children's counsel be modified to align with national standards.¹¹² In short, the Law Professors' Brief argued that until there was legislative action or a Kentucky Supreme Court ruling on the definition of the GAL, the Kentucky Rules of Professional Conduct required GALs to serve as attorneys under professional responsibility rules and, under the rules, the GAL was required to advocate for the child's best interests, and the GAL should not submit a report to the court or be called as a witness.¹¹³

As for the role of the child's counsel, the Law Professors' Brief suggested that attorneys should be appointed in the client-directed role and attorneys should not substitute judgment for the child's judgment; the attorney should counsel and interview the client, and if the attorney's position differs from the child's position even after counseling, then the attorney should follow

¹¹¹ Brief for the Kentucky Chapter of the American Academy of Matrimonial Lawyers as *Amicus Curiae*, *Morgan v. Getter*, 2013 WL 8610403 (Ky.); *See also* *Chalupa v. Chalupa*, 830 S.W.2d 391, 392 (Ky. Ct. App. 1992) ("KRS 403.290(2), which allows a court to order psychological tests of a child, as well as the parents, in order to assist in making a custody determination is permissive, not mandatory, and the professional's conclusions are merely expert testimony, or evidence to be considered by the courts and not dictates.") (internal cites removed).

¹¹² Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as *Amicus Curiae*, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *3 (Ct. App. Feb. 22, 2013).

¹¹³ *Id.* at *6.

the child's direction.¹¹⁴ In addition, the Law Professors' Brief acknowledged the possibility of a small number of cases where the child was not mature enough to direct counsel; in that event the Brief argued that the attorney must try to ascertain the child's wishes.¹¹⁵ The Law Professors' Brief argued that, if the child's attorney came to the conclusion that the child's desires were not in the child's best interests, then the attorney should take no position, refusing to advocate against the client's wishes.¹¹⁶

The Kentucky Chapter of the American Academy of Matrimonial Lawyers (KYAAML) also submitted an *Amicus* Brief [hereinafter the KYAAML Brief], imploring the Court to fill in the gap in the roles expected of attorneys in Kentucky custody matters. The KYAAML Brief urged the court to adopt the AAML's proposed standards described in *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings*.¹¹⁷

The KYAAML Brief noted that the AAML Standards provide definitions and differentiation for the terms “counsel for the child,” “court-appointed professional other than counsel for the child,”¹¹⁸ “court-appointed advisor”¹¹⁹ “experts,”¹²⁰ and “protectors.”¹²¹ The KYAAML Standards also state that a GAL should not be named as “counsel” or “attorney”¹²² and that “[t]hese professionals should never be mistaken for being counsel for the child or serving in any

¹¹⁴ *Id.* at *9.

¹¹⁵ See Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105, 116-18 (2003).

¹¹⁶ Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as *Amicus Curiae*, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *10 (Ct. App. Feb. 22, 2013).

¹¹⁷ American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIM. LAW. 227 (2009).

¹¹⁸ *Id.* at 234.

¹¹⁹ *Id.* at 247 (to investigate and report information to the court).

¹²⁰ *Id.* at 248 (an expert capacity to provide the court with an opinion about some contested matter).

¹²¹ *Id.* (to protect children from the harms associated with litigation.)

¹²² *Id.* at 237.

kind of attorney role.”¹²³ The KYAAML Brief argued that the AAML Standards were consistent with existing Kentucky Statutes.

Additionally, the KYAAML Brief argued that, experts who provide reports to the court must be subject to cross examination; under FCRP 3(4)(a), experts, such as a GAL, must provide the court with a report must be subject to cross examination; if this examination is prohibited then due process is violated.¹²⁴ The KYAAML Brief noted that the lack of differentiation between professionals in the GAL and professional advisor roles brought about dangers in professional ethics and requested clarity: “[T]he KYAAML requests this Court clearly establish that an attorney who submits a recommendation be treated as an expert appointed by the Trial Court—whether or not given the title of Guardian Ad Litem...”¹²⁵

After considering the arguments by the parties and *Amici*, the Kentucky Supreme Court agreed that the role confusion was rooted in the varying rules and provisions that defined what professionals could do on behalf of children in custody cases.¹²⁶ The Court also highlighted the Rules of Professional Conduct that might be implicated if an attorney-GAL were allowed to be cross-examined.¹²⁷

¹²³ Brief for the Kentucky Chapter of the American Academy of Matrimonial Lawyers as *Amicus Curiae* at *3, *Morgan v. Getter*, 2013 WL 8610403 (Ky.).

¹²⁴ *Id.* at 2.

¹²⁵ *Id.* at 11.

¹²⁶ Relevant provisions included KY. REV. STAT. ANN. 403.270 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (listing relevant factors related to the best interests of the child determination); FRCPP 6 (differentiating “evaluator, counselor or other advisor” from GAL); KY. REV. STAT. ANN. § 403.290 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (allowing the court to appoint a professional to assist the court); KRS § 403.300 (allowing the court to seek an investigation and report concerning custodial arrangement); and KY. REV. STAT. ANN. § 387.305 (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (requiring that a GAL be a “practicing attorney of the court,” who “attend[s] to the preparation of the case,” “advocate[s] for the client’s best interest in the proceeding,” and whose duties include subpoenaing and calling witnesses).

¹²⁷ Ky. Sup. Ct. R. 3.130(1.1) (competent representation); Ky. Sup. Ct. R. 3.130(1.4) (client with diminished capacity); SCR 3.130(1.6) (duty to maintain client confidences); Ky. Sup. Ct. R. 3.130(3.7) (attorney is not to act as advocate in a proceeding in which he/she is likely to be called as a witness).

The Court recognized that, until its decision in *Morgan*, Kentucky law had not clearly addressed concerns as to differing definitions of the GAL, requiring the GAL to serve as an investigator for the court, a lawyer appointed to represent the child, an advocate for the best interests of the child, a facilitator/mediator, or some combination.¹²⁸ It recognized that, historically, GALs had been asked to blur their role by both litigating on behalf of the child and investigating/reporting for the trial court.¹²⁹ The court acknowledged that the hybrid role could lead to a violation of the parties' due process rights.¹³⁰

While counsel for the GAL and *amici* had advocated for the Supreme Court to adopt a traditional attorney role, the court only partially adopted their request.¹³¹ The Court clarified that the Kentucky GAL is an attorney who should, therefore, not file reports or make recommendations.¹³² Doing so would make the GAL both an attorney and an investigator/reporter, which would be improper.¹³³

The Court in *Morgan* decided that the proper role of counsel for children in Kentucky custody matters is as a best interests attorney, referred to as a GAL; pursuant to *Morgan*, the GAL is now explicitly the representative of the child's best interests, rooted in the best interests factors.¹³⁴

The GAL is an attorney who is subject to the Rules of Professional Conduct, including competence, confidentiality, the duty not to be an advocate in cases where the GAL is likely to

¹²⁸ *Morgan*, 441 S.W.3d at 106.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 104.

¹³² *Id.* at 118.

¹³³ *Morgan*, 441 S.W.3d at 119.

¹³⁴ KY. REV. STAT. ANN. § 403.270(2) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.) (lists best interests factors, including wishes of the parents or de facto custodian; wishes of the child; interaction of the child with parents, siblings and others significantly impacting the child's best interests; connection to home, school, and community; mental and physical health of all individuals involved; evidence of domestic violence; intent of parent placing the child with a de facto custodian; and circumstances of the child being placed with a de facto custodian).

become a witness, and obligations to clients under Rule 1.14.¹³⁵ The GAL is to serve as an independent advocate to explain the process, convey the client's wishes to the court where appropriate, introduce evidence, and help move the proceedings along toward resolution.¹³⁶ As an attorney, the GAL is required to investigate, but as an agent of the child and not the court.¹³⁷ The GAL is not, however, bound by the client's wishes; a GAL must apply "objective legal standards to [the facts of the case] to arrive at and then advocate for a disposition that would serve the child's best interests."¹³⁸

In the event that the trial court wants an investigator, the *Morgan* court highlighted the formal statutorily-defined "Friend of the Court" role as an option in lieu of, or in addition to, the GAL.¹³⁹ The Friend of the Court, who must be an attorney, is represented to "investigate the child's and the parents' situations, to file a report summarizing his or her findings, and to make recommendations as to the outcome of the proceeding."¹⁴⁰ Friends of the Court make recommendations to the trial court based on the best interests factors, provide a report to the court, and are subject to examination.¹⁴¹ The trial court may appoint both a GAL and a Friend of the Court, but the court should not ask one person to perform both roles.¹⁴²

The Court also delineated a third role, referred to as "de facto Friend of the Court," which includes investigators and other professionals to analyze custodial arrangements and make recommendations to the court.¹⁴³ These investigators, who need not be attorneys, may consult

¹³⁵ Ky. Sup. Ct. R. 3.130 (1.14).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Morgan*, 441 S.W.3d at 103; KRS 403.090; FRCPP 6 (allowing for the appointment of court investigators).

¹⁴⁰ *Morgan*, 441 S.W.3d at 111.

¹⁴¹ *Id.* at 119; KY. REV. STAT. ANN. § 403.290(2) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

¹⁴² *Morgan*, 441 S.W.3d at 113.

¹⁴³ *Id.* at 114.

with individuals with knowledge of custodial arrangements and refer children for assessments.¹⁴⁴ The de facto Friend of the Court's report must be provided to the court and counsel, and they are subject to cross examination.¹⁴⁵ In addition, any fact witnesses or other people consulted by the de facto Friend of the Court regarding best interests determinations may also be cross-examined.¹⁴⁶

II. *MORGAN* v. *GETTER*: THE AFTERMATH

Morgan reached the Kentucky Supreme Court after the child had already turned eighteen, rendering the legal issues moot.¹⁴⁷ Still, the Court reviewed the issue as a matter of public interest, noting that the Court was in a position to provide lower courts with a consistent framework for making important decisions related to children.¹⁴⁸ The impact of *Morgan* has reached further than anticipated. The case has been cited multiple times in both private custody and child protection matters, each time clarifying the role of the child advocate.¹⁴⁹ From the cases, it is obvious that courts, practitioners, and attorneys now have to grapple with how to separate the role of court investigator/reporter from the role of the GAL.¹⁵⁰ Following *Morgan*, the Kentucky Court of Appeals began reversing the decisions of trial courts that had asked GALs to serve in hybrid roles as investigator/reporters and advocates.¹⁵¹

¹⁴⁴ *Id.* at 118.

¹⁴⁵ *Id.* at 119.

¹⁴⁶ KY. REV. STAT. ANN. § 403.300(3) (West, Westlaw through Ch. 7, 12, 13 of the 2017 Reg. Sess.).

¹⁴⁷ *Morgan*, 441 S.W.3d at 98.

¹⁴⁸ *Id.* at 103.

¹⁴⁹ See, e.g., *Hoskins v. Hoskins*, 2013-CA-001748-ME, 2015 WL 222177, at *1 (Ky. App. Jan. 16, 2015), *reh'g denied* (Mar. 30, 2015), *review denied* (Aug. 12, 2015); *Dhawan v. Naumchenko*, 2014-CA-000088-MR, 2015 WL 3533214, at *1 (Ky. App. June 5, 2015); *S.E.A. v. R.J.G.*, 470 S.W. 3d 739 (Ky. Ct. App. 2015); *M.L.W. v. Heart to Home Adoption Agency*, 2015-CA-001110-ME, 2016 WL 3213493, at *1 (Ky. App. June 10, 2016).

¹⁵⁰ *Morgan*, 441 S.W.3d at 119.

¹⁵¹ See, e.g., *Hoskins v. Hoskins*, 2013-CA-001748-ME, 2015 WL 222177, at *1 (Ky. App. Jan. 16, 2015), *reh'g denied* (Mar. 30, 2015), *review denied* (Aug. 12, 2015).

In *Hoskins v. Hoskins*,¹⁵² which was pending while *Morgan* was before the Kentucky Supreme Court, the Court of Appeals pointed out the role that the Kentucky Supreme Court played in clarifying the role of the guardian ad litem.¹⁵³ In *Hoskins*, the parents had joint custody and neither parent was the primary residential custodian.¹⁵⁴ The mother filed a motion for modification of custody and parenting time.¹⁵⁵ The trial court appointed a GAL to submit a report making a recommendation as to custody and parenting issues, and asked that it be submitted within thirty days, similar to the report submitted in *Morgan*.¹⁵⁶ The GAL interviewed the child and filed a report in which the GAL, among other things, disclosed confidences of the child.¹⁵⁷ The GAL recommended that the trial court follow the child's expressed wishes, and the trial court generally followed the recommendation, continuing the parties' joint custody arrangement, naming the mother as the primary physical custodian and giving the father parenting time pursuant to the local rule.¹⁵⁸ The trial court made its decision without citing to specific evidence or allowing the GAL's report or the GAL herself to be cross examined.¹⁵⁹ The father appealed the trial court's order.¹⁶⁰ The Court of Appeals noted that, under *Morgan*, the roles of Friend of the Court and GAL could not be confused.¹⁶¹ A statutorily-permitted Friend of the Court would be allowed to file a report with the court and be cross examined.¹⁶² A GAL, however, would "participate actively as legal counsel for the child," including all the

¹⁵² *Id.*

¹⁵³ *Id.* at *2.

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.*

¹⁵⁶ *Morgan*, 441 S.W.3d at 96.

¹⁵⁷ *Hoskins*, 2015 WL 222177, at *1.

¹⁵⁸ *Id.* at *2.

¹⁵⁹ *Id.* at *4.

¹⁶⁰ *Id.* at *2.

¹⁶¹ *Id.*

¹⁶² *Hoskins*, 2015 WL 222177, at *3.

responsibilities of regular counsel.¹⁶³ The court made it clear that the GAL could not file a report or testify,¹⁶⁴ but the trial court had used the GAL's report as the basis for its findings on custody modification.¹⁶⁵ Because the trial court's order merged the two roles and used the same person in both roles, the parents' due process rights were compromised because the GAL had served as both advocate and witness.¹⁶⁶ The case was reversed and remanded to the trial court for compliance with *Morgan*.¹⁶⁷

In *Dhawan v. Naumcheko*, the GAL submitted a report to the court making a custody recommendation, but the GAL was not subject to cross examination.¹⁶⁸ The trial court's order contained language requiring the GAL to obtain information from the child and report it to the court.¹⁶⁹ The trial court admitted that the GAL was acting in some respects as a de facto Friend of the Court. On appeal, the appellate court concluded that the parties have a due process right to cross examine the GAL to the extent that the GAL acted in that capacity. The court noted that, if a trial court accepts a report from the GAL, the GAL must testify and be subject to cross examination, but only as to the specific facts that were presented to the court in the GAL's capacity as a Friend of the Court

The reasoning in *Morgan* has now also been extended to child protection matters in Kentucky.¹⁷⁰

*S.E.A. v. R.J.G.*¹⁷¹ involved both an abuse-neglect-dependency action and a private custody

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.* at *3.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.* at *4.

¹⁶⁸ *Dhawan v. Naumchenko*, 2014-CA-000088-MR, 2015 WL 3533214, at *1 (Ky. App. June 5, 2015).

¹⁶⁹ *Id.* at *2.

¹⁷⁰ *Morgan*, 441 S.W.3d at 97.

¹⁷¹ *S.E.A. v. R.J.G.*, 470 S.W.3d 739 (Ky. Ct. App. 2015).

action.¹⁷² The father filed a child protection action and the family court held a temporary removal hearing, finding that the child should be removed from the mother's custody.¹⁷³ A GAL was appointed to the child before the hearing.¹⁷⁴ Subsequently, the child protection court held a full dispositional hearing, finding that the child would remain in the father's temporary custody and asking the GAL to file an additional report with the court.¹⁷⁵ The GAL filed the report in the abuse-neglect-dependency matter and that court entered an order granting the father sole custody and noting that no further orders were to be entered in that action.¹⁷⁶ Subsequently, the father filed a motion for permanent custody in both the abuse-neglect-dependency matter and in a private custody action.¹⁷⁷ The court granted the father's motion and entered a permanent order in the abuse-neglect-dependency matter without an evidentiary hearing.¹⁷⁸ The mother filed a motion to vacate, and the court asked the GAL to file an additional report with the court.¹⁷⁹ Soon after the report was submitted, the court entered Findings of Fact and Conclusions of Law and entered a final custody order without conducting a hearing.¹⁸⁰ On appeal, the court used the holding in *Morgan* to find that the trial court abused its discretion, vacating the trial court's orders, and remanding with instructions to conduct a full evidentiary hearing.¹⁸¹ The court noted that, in *Morgan*, the court had concluded "the parties' right to due process includes the right to cross examine authors, including so-called GALs, of evidentiary reports upon which the fact

¹⁷² *Id.* at 741.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *S.E.A.*, 470 S.W.3d at 742.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 743.

finder is entitled to rely.”¹⁸² The court in *S.E.A.* used this reasoning to find that the trial court erred in relying on the GAL Report for its findings of fact, and concluded that a “full evidentiary hearing is a necessary pre-requisite to entry of a permanent custody order” in a child protection case.¹⁸³

In *M.L.W. v. Home Adoption Agency*,¹⁸⁴ a pregnant mother looked into the possibility of placing the parties’ three children up for adoption.¹⁸⁵ The children had been living with the mother in squalid conditions, and were later moved into foster care.¹⁸⁶ The adoption agency that the mother had contacted identified two adoptive families for the children and the foster care agency petitioned the court to have the parents’ rights terminated.¹⁸⁷ The trial court appointed counsel for the parents and a GAL for the children.¹⁸⁸ The GAL provided reports to the court and participated in the evidentiary hearing.¹⁸⁹ The father contested the termination of his parental rights.¹⁹⁰ The court conducted a hearing, and entered Findings of Fact and Conclusions of Law that supported termination for each child.¹⁹¹ On appeal, the father argued that the Findings of Fact were improper to the extent that they relied on the GAL’s report as to best interests, and the appellate court agreed: “paragraph 11 [related to best interests] is not a proper ‘factual finding,’ it is simply a description of the report filed by the GAL, which . . . ought not to have been

¹⁸² *Morgan*, 441 S.W.3d at 112.

¹⁸³ *S.E.A.*, 470 S.W.3d at 743.

¹⁸⁴ *M.L.W. v. Heart to Home Adoption Agency*, 2015-CA-001110-ME, 2016 WL 3213493, at *1 (Ky. App. June 10, 2016).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *M.L.W. v. Heart to Home Adoption Agency*, 2015-CA-001110-ME, 2016 WL 3213493, at *2 (Ky. App. June 10, 2016).

¹⁹⁰ *Id.* at *1.

¹⁹¹ *Id.*

prepared and relied on by the court in the first place.”¹⁹² The appellate court noted that, in child protection proceedings, the trial court is required to make individualized findings that must be supported by fact.¹⁹³ In remanding the case for additional findings, the appellate court addressed the trial court’s “apparent reliance on and reference to the GAL’s reports.”¹⁹⁴ The court noted that the GAL had “provided her account of factual information, not found elsewhere in the record, concerning her observations . . . [s]he then expressed her personal opinion that termination of Father’s rights is in the best interest of the children. The reports are akin to expert reports. They offer definitive opinions based on observation and investigation.”¹⁹⁵ Pursuant to *Morgan*, the court of appeals stated, “it was error for the GAL to provide an evidentiary report and for the trial court to rely on that report. On remand, the GALs reports should be stricken from the record.”¹⁹⁶

The *Morgan* holding has also been reviewed in cases where parents have objected to GAL’s performance in cases.¹⁹⁷ For example, in *Laney v. Fields*, the parties argues that the court used the GAL improperly by requiring the GAL to serve as an advocate for the child but also asked

¹⁹² *Id.* at *2 (“As related to the best interest prong, the trial court’s findings and conclusions are virtually the same in each case: 10. That the Petition has pled and proved by clear and convincing evidence that it is in the best interest for . . . that the Rights of Respondent [Father] in and to her be terminated; 11. That the Hon. Dori H, Thompson was appointed Guardian Ad Litem for the Infant Respondent on December 15, 2014. That she has met with the Infant Respondent and her perspective adoptive parents; that said GAL took an active part in the evidentiary hearing in this matter held on May 26, 2015; that she filed her Report herein in which she concluded that it is her belief that it is in the best interest of the Infant Respondent that the rights of [Father] be terminated. A copy of said Report is in the record herein.”).

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.*

¹⁹⁵ *M.L.W. v. Heart to Home Adoption Agency*, 2015-CA-001110-ME, 2016 WL 3213493, at #3 (Ky. App. June 10, 2016).

¹⁹⁶ *Id.*

¹⁹⁷ *See, e.g.,* *Breeding v. Hall*, No. 20156-CA-001257-ME, 2016 WL 3226173 (Ct. App. June 2, 2016) (unpublished) (*Morgan* inapplicable where GAL was not directed to investigate on behalf of the court and the parties never asked to cross examine); *Laney v. Fields*, 2015 Ky. App. Unpub. LEXIS 790 (Ky. Ct. App. Nov. 20, 2015) (GAL was used properly when the court asked what she wanted to advocate and the GAL indicated that she stood with what the children told the court in an in camera interview; court did not misuse GAL when it asked her to arrange supervised visits, retrieve AA slops and prepare activity schedule because the duties assigned were not investigative and did not hinder the GAL’s ability to act in the best interest of the child).

the GAL to arrange supervised visits, retrieve verification of Alcoholics Anonymous compliance and prepare an activity schedule for the children.¹⁹⁸ The court reasoned that the court did not act improperly in requesting, and the GAL did not act improperly in providing, such assistance because it was not investigative and it did not hinder the GAL's ability to advocate for the best interests of the child.¹⁹⁹

III. *MORGAN v. GETTER: WHERE IT STANDS IN KENTUCKY*

The advocates in *Morgan v. Getter* acted in a thoughtful manner to address a widespread problem in Kentucky practice. They used the litigation as an opportunity to educate the court about the problems associated with role confusion,²⁰⁰ and both the mother's counsel and the GAL's counsel asked that the role of counsel for the child be clarified.²⁰¹ The mother's attorney highlighted several role options,²⁰² while the GAL's counsel²⁰³ and amici²⁰⁴ argued specifically for the court to adopt a client-directed model of advocacy.²⁰⁵ All agreed that the role needed to be clarified in order to promote consistent practice and comport with the rules of professional responsibility.²⁰⁶ The advocates highlighted several ways that the role confusion might be addressed, including legislative changes, a new Supreme Court Rule, or a court decision directly

¹⁹⁸ *Laney v. Fields*, 2015 Ky. App. Unpub. LEXIS 790 (Ky. Ct. App. Nov. 20, 2015).

¹⁹⁹ *Id.*

²⁰⁰ *Morgan*, 441 S.W.3d at 103-10.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Brief of the Guardian ad Litem at 20, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *2 (Ct. App. Feb. 22, 2013).

²⁰⁴ Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as *Amicus Curiae*, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *10 (Ct. App. Feb. 22, 2013).

²⁰⁵ See *Morgan*, 441 S.W.3d at 114; Brief of the Guardian ad Litem at 20, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at 2 (Ct. App. Feb. 22, 2013); Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as *Amicus Curiae*, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *10 (Ct. App. Feb. 22, 2013).

²⁰⁶ *Id.*

defining the role.²⁰⁷ While they did not address seeking a legal ethics opinion, that would be an additional option.²⁰⁸

The Kentucky Supreme Court decided to address the issue directly,²⁰⁹ but despite the court's attempt to clarify the different roles that may be played by professionals in custody matters, the roles were not clearly articulated in a manner easy for practitioners to understand. The chart below summarizes the cases and rules addressed by the Kentucky Supreme Court in *Morgan*, and attempts to make the roles clear so that the separate duties required of each appointed individual are clear and based in law.

²⁰⁷ *Id.*

²⁰⁸ *See, e.g.*, Virginia Ethics Opinion 1870 (addressing the issue of whether a party's attorney or government attorney may communicate directly with a child represented by a GAL) ("The GAL acts as an attorney and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of evidence, and closing arguments to present salient information the GAL feels the court needs to make its decisions. The role and responsibility of the GAL is to represent, as an attorney, the child's best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child's best interests. Decision-making power resides with the court.").

²⁰⁹ *Morgan*, 441 S.W.3d at 118.

**CHILDREN'S ATTORNEYS AND PROFESSIONALS
IN KENTUCKY CUSTODY MATTERS**

	Guardian Ad Litem	Attorney Investigator "De Facto Friend of the Court"	Non-Attorney Investigator "Other Such Agency"	Other Professional Personnel
How To Describe This Role?	Best Interests Attorney for the Child	Court Investigator	Court Investigator	Professional Advisor to the Court
To Whom Does This Person Owe Duties?	The Child Within Best Interests Framework	The Court	The Court	The Court
Must This Person Be an Attorney?	Yes	Yes	No	No
Does This Person Serve a Traditional Attorney's Role?	<p>Yes, this person is required to investigate as an attorney, make motions, introduce evidence, and make evidence-based arguments consistent with the child's best interests.</p> <p>The GAL operates under Ky. Sup. Ct. R. 1.14 and advances the child's best interests.</p>	<p>No, this person is required to investigate and report concerning custodial arrangements for the child.</p> <p>This person may request an Order to refer the child to professional personnel for diagnosis.</p> <p>This person makes recommendations and may be called as a witness. The report may be received in evidence so long as it is (1) served on the parties 10 days in advance; (2) the investigator makes his/her file available, including all underlying data and contact information for all persons consulted. KY. REV. STAT.403.300.</p>	<p>No, this person is not an attorney, but is required to investigate and report concerning custodial arrangements for the child.</p> <p>This person may request an Order to refer the child to professional personnel for diagnosis.</p> <p>This person makes recommendations and may be called as a witness. The report may be received in evidence so long as it is (1) served on the parties 10 days in advance; (2) the investigator makes his/her file available, including all underlying data and contact information for all persons consulted. KY. REV. STAT. 403.300.</p>	<p>No, this person provides professional advice to the Court.</p> <p>This may include diagnosis or professional evaluation. KY. REV. STAT. 403.290.</p> <p>Under FCRPP 6, may include, for example:</p> <p>Custody Evaluation</p> <p>Psychological Evaluation</p> <p>Such Other . . . Opinions or Advice Which the Court Deems Appropriate</p>

Can This Person File Reports?	No	Yes, must be in writing	Yes, must be in writing	Yes
Can This Person Make Recommendations?	No, takes a legal position	Yes	Yes	Yes
Can This Person be a Witness in the Case?	No	Yes	Yes	Yes
Can The Parties Access Files?	No	Yes	Yes	It Depends
Does This Person Have to Take a Position Consistent With the Child's Wishes?	No, this lawyer must take steps to discover the child's wishes, but "[a] properly trained GAL . . . who has thoroughly investigated the child's situation and consulted with the child, is not disqualified from advocating for what he or she believes is in the child's best interests merely because the child disagrees."	No, this person makes recommendations based on the best interests of the child. One statutory factor the court is to consider is "the wishes of the child as to his custodian."	No, this person makes recommendations based on the best interests of the child. One statutory factor the court is to consider is "the wishes of the child as to his custodian."	No, this person provides professional advice to the Court.
Relevant Law And Standards	<i>Morgan v. Getter</i> , 441 S.W.3d 94 (KY 2014) KY. REV. STAT.387.305 (Ky. Sup. Ct. R. 3.130(1.1)-(8.4)) ABA Standards of Practice for Lawyers Representing Children in Custody Cases, 37 Fam. L.Q. 131 (Summer 2003)	KY. REV. STAT.403.300 "Investigator" KY. REV. STAT.403.090 ("Friend of the Court" -- in effect but not used)	KY. REV. STAT.403.300 "Investigator" FRCPP 6(2)(g): "Such other action deemed appropriate by the court"	FCRPP 6(2)(f): "Such other professional(s) for opinions and advice which the court deems appropriate" KY. REV. STAT.403.290 "Professional Personnel"
Who Pays?	FCRPP 6: Apportioned at the expense of the parents or custodians.	FCRPP 6: Apportioned at the expense of the parents or custodians.	FCRPP 6: Apportioned at the expense of the parents or custodians.	FCRPP 6: Apportioned at the expense of the parents or custodians.
Credentials Required?	Attorney	Attorney	Professional	Professional

This kind of side-by-side analysis can help practitioners and courts decide which role is appropriate and would best serve the child and the case. It does not, however, clearly articulate specific guidelines and tasks for each professional to complete within a case. Kentucky trial courts are still, then, left with trying to define the scope of appointment on a case-by-case basis.

The question is where to go from here in seeking greater role clarity. As the role of the child's advocate is scrutinized -- and the *Morgan* reasoning is applied outside the custody context -- the most effective option might be for the General Assembly to fully articulate the child's attorney's role by revising Kentucky's GAL statute to clearly declare that GALs serve as attorneys who are not subject to cross examination in any context. This has been done in other jurisdictions²¹⁰ and would reduce any confusion about whether the reasoning in *Morgan* should be applied to other types of cases involving children.

While the Kentucky Family Court Rules include provisions that address the appointment of particular individuals in family court cases, they do not articulate any duties or set forth any expectations about what those individuals must do in cases.²¹¹ The Rules could be amended to articulate the specific duties of each individual, and could also update the list to include Friend of

²¹⁰ See, e.g., 750 ILL. COMP. STAT. ANN. 5/506(a)(1)-(3) (West 2016) (domestic relations courts may appoint an attorney to serve as client-directed counsel, child representative or GAL in private custody matters. Child representatives act as best interests attorneys while GALs investigate and make recommendations to the court and are subject to cross examination); MICH. COMP. LAWS § 722.22(c) (West 2015) ("If appointed to represent a child under this act, the attorney [is] the child's legal advocate in a traditional attorney-client relationship with the child... An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client."); N.Y. FAM. CT. ACT § 249 ("An attorney for the child is not a mental health professional, a mediator, a fiduciary, or, most importantly, an arm of the court... [T]he attorney for the child is subject to the same rules of good lawyering and professional responsibility and applicable to any attorney in a civil proceeding or action, and must represent the client within those bounds.").

²¹¹ See FCRPP 6(1): If "disputes regarding custody, shared parenting, visitation or support are properly before the court, a parent or custodian may move for, or the court may order, one or more of the following, which may be apportioned at the expense of the parents or custodians: (a) A custody evaluation; (b) Psychological evaluation(s) of a parent or parent(s) or custodians; (c) Family counseling; (d) Mediation; (e) Appointment of a guardian ad litem; (f) Appointment of other such professional(s) for opinions or advice which the court deems appropriate; or (g) Such other action deemed appropriate by the court."

the Court and statutorily-allowed investigator roles. If so, it should be made clear that the Friend of the Court role is an investigator's role, subject to cross-examination, is entirely separate from the GAL role, and that the trial court may appoint both a GAL and a Friend of the Court where necessary but may not ask a single advocate to serve in both roles.

The Supreme Court could assign a commission to examine the roles of professionals serving children in family matters. The Commission could be tasked with deciding whether to adopt the Standards of Practice for children's lawyers promulgated by the ABA,²¹² thus recognizing the Kentucky GAL as being the same as a Best Interests Attorney as defined in the ABA Standards and subjecting the GAL to its requirements. The Commission may also decide to adopt different standards, as has been done in other jurisdictions.²¹³

In any event, even without additional guidance, the Administrative Office of Courts should create and disseminate model appointment orders in domestic cases consistent with the proper roles of advocates in private custody cases.²¹⁴ The appointment order should, at minimum, designate the appointment as GAL or Friend of the Court, and designate basic duties assigned to each role pursuant to *Morgan*.²¹⁵

IV. MORGAN V. GETTER: Kentucky's Guardian Ad Litem Litigation as a Model for Seeking Role Clarity

It is difficult for children's attorneys to address role conflict issues within their cases because, in order to do so, they would frequently be in a position to compromise their client's interests. In

²¹² ABA Standard, *supra* note 3.

²¹³ See, e.g., 705 ILL. COMP. STAT. ANN. 405/2-17 (West 2013).

²¹⁴ See ABA Standard, *supra* note 3, at Appendix A. (Children Representation Appointment Order, outlining reasons for the appointment, nature of the appointment, fees and costs, and access to confidential information).

²¹⁵ For a sample Appointment Order, see ABA Standards or Cook County Illinois Order

that way, the problems with role of counsel for the child -- including the child's advocate serving in dual roles or presenting information to the court against the client's interests -- are problems that frequently evade review.

The Kentucky Supreme Court in *Morgan* was asked to address the role of counsel for children in custody matters by both the mother's counsel and the child's GAL. The GAL, and *amici* from Kentucky law schools and the Kentucky chapter of the AAML argued that children should have client-directed counsel in custody matters, while the mother's counsel asked that the role be clarified but did not take a position as to proper role. *Morgan* addressed the basic question about what children's lawyers should do, and indicated "[l]awyers should act like lawyers in custody proceedings."²¹⁶

This article does not address whether the Kentucky Supreme Court got it right when it decided that the proper role of counsel was best interests attorney rather than traditional attorney for the child, but merely supports the proposition that attorneys for children should provide the same functions as attorneys. The proper role of counsel for children in custody matters -- whether a traditional client-directed attorney is more appropriate than a best interests attorney or vice-versa -- is the stuff of another article, with its arguments based on constitutional law, professional responsibility, and other concerns.²¹⁷ The issue for this article is as follows: the role confusion problems that Kentucky faced and the ongoing need for role clarity continue to plague other jurisdictions as well. Seeking role clarity nationally will allow children's attorneys to advance their clients' interests and ensure that all parties to custody litigation are afforded proper process,

²¹⁶ *Morgan*, 441 S.W.3d at 98.

²¹⁷ See Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, __ DUKE J. CON. LAW & PUB. POL'Y __ (forthcoming 2017).

thus improving family court practice and protecting all parties involved, particularly children.

Can the *Morgan* litigation and its aftermath be used to inform practitioners from other jurisdictions of ways to seek role clarity?

The question requires reflection on what was effective and what was ineffective in Kentucky. In *Morgan*, the GAL was asked to serve as both an investigator/reporter and an advocate. The mother objected to the appointment and specifically asked the Court to “reconcile the existing patchwork of statutes and rules and to define the responsibilities of Guardians ad Litem (GALs) in circuit court custody actions in order to protect her due process rights as well as the rights of other litigants and to ensure the fundamental fairness of her child custody proceeding and other child custody proceedings.”²¹⁸ Many jurisdictions still allow for a combination of attorney and investigator/reporter practice,²¹⁹ as was allowed in Kentucky prior to *Morgan*, which places the attorney in an ethically compromised position.

What could the GAL in *Morgan* have done in order to protect his client and his ethical obligations in the trial court? What would have happened if the GAL in *Morgan* had simply asked for his appointment to be limited, or refused to perform the reporting tasks requested?

The ABA Standards direct children’s attorneys to “only accept appointment with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the

²¹⁸ Brief of Law Professors Amy Halbrook, John Bickers, Jamie Abrams, and Anibal Lebron as *Amicus Curiae*, *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014) (No. 2013-CA-000655) 2013 Ky. App. Unpub. LEXIS 517, at *10 (Ct. App. Feb. 22, 2013).

²¹⁹ See, e.g., MONT. CODE ANN. § 40-4-205 (West 2015); *In re Marriage of Hammill*, 732 P.2d 403, 405 (Mont. 1987); *Jacobsen v. Thomas*, 100 P.3d 106, 107 (Mont. 2004).

lawyer should (1) decline the appointment; or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order; or (3) both.”²²⁰ The GAL would then not have been in a position to argue against being cross-examined in his own case.

In seeking relief from appointment duties that cause potential conflicts, attorneys from other jurisdictions may use the chart provided in Section IV herein to reflect on which other individuals may be appointed to serve the non-attorney functions needed by the court. Every jurisdiction in the U.S. has adopted some form of the Uniform Marriage and Divorce Act, (UMDA),²²¹ which provides for the same kinds of appointment of professional personnel as provided for in KY. REV. STAT. 403.290 (professional advisor to the court who may provide diagnosis and professional evaluation)²²² and 403.300 (investigator who is required to investigate and report considering custodial arrangements for the child.)²²³ As such, there is an

²²⁰ ABA Standard, *supra* note 3, at § III.A.

²²¹ UNIF. MARRIAGE AND DIVORCE ACT § 401-10 (1974) [hereinafter UMDA].

²²² UMDA § 404 (b) (“The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.” Further, the comments note “the judge may call informally on experts in a variety of disciplines without subjecting them, in the first instance, to the formal hearing process. But the experts’ advice should be available to counsel for the parties so that the judge’s decision will not be based on secret information; and the parties should be able to examine the expert as to the substance of his advice to the judge.”).

²²³ UMDA § 405 [Investigations and Reports] (“(a) In contested custody proceedings, and in other custody proceedings if a parent or the child’s custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by [the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose]. (b) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child’s custodian; but the child’s consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (c) are fulfilled, the investigator’s report may be received in evidence at the hearing. (c) The court shall mail the investigator’s report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator’s file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (b), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.”).

investigator's role allowed by statute in each jurisdiction that would allow a GAL or Best Interests Attorney to seek that person's opinion/report rather than the attorney continuing in an ethically compromised position within the litigation.

The chart will help practitioners seek role clarity within existing frameworks under the UMDA. But what about taking a position on the correct role of counsel? In *Morgan*, the mother simply asked that the role of the child's advocate be clarified, but did not ask that the court adopt a specific role. Over the past twenty years, commentators have moved toward consensus that the GAL or best interest attorney model is inappropriate because it compromises children's dignity and voice in the court process²²⁴ and dilutes quality of representation.²²⁵

Kentucky used litigation to clarify role of counsel. Further clarification has come from case law. So far, the legislature has not modified the statutes that affect practice and the Kentucky Supreme Court has not adopted new rules. Practitioners remain confused to a certain extent. A follow-up by the legislature or the Supreme Court in its rule-making capacity could be beneficial.

Illinois was in a somewhat similar position to Kentucky in the early 2000s and did just that.²²⁶

Under the Illinois statute, trial courts have the ability to appoint an attorney, guardian ad litem, or

²²⁴ See, e.g., Ann Haralambie, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (Section of Family Law, American Bar Association, 1993) (proposing that a child's attorney should advocate the child's wishes unless they are potentially harmful to the child, but suggesting increased counseling to reduce ethical problems.).

²²⁵ *Id.*

²²⁶ It should be noted that, like Kentucky, Illinois has various provisions related to children's attorneys and investigators for the court, consistent with the UMDA. Illinois recently revised its statutory provisions related to child representation in custody matters. See, e.g., 750 ILL. COMP. STAT. 5/506 (West 2016) (in any domestic proceeding involving a child, the court may appoint an attorney for the child, a guardian ad litem, or a child representative, each of whom has a different defined role in terms of representation, investigation, case evaluation, recommendation, and professional responsibilities to the child); 750 ILL. COMP. STAT. 5/604.10(b)(West 2017) (the court may seek advice from professional personnel); 750 ILL. COMP. STAT. 5/604.10(6)(the court may order an

child representative for the minor in custody matters.²²⁷ The child representative role in custody matters was created in 2000, seeking to create a hybrid of the GAL and attorney roles.²²⁸ The child representative was to have “the same power and authority to take part in the conduct of the litigation as does any party,” while having the investigation authority of a guardian ad litem, and the ability to act against client directive and wishes when the child representative determined it was in the child’s best interests.²²⁹

In 2004, the Illinois Supreme Court looked at the hybrid child representative role and found it unconstitutional as applied in *In re Marriage of Bates*.²³⁰ In the *Bates* trial court, the mother asked that the child representative be required to testify or, in the alternative, that his report be stricken.²³¹ Her motion also asked that the child representative statute be declared unconstitutional because it allowed the child representative to make recommendations without allowing the parties to cross examine.²³² The trial court denied the motion, admitted the report as evidence, and relied on the child representative’s report in making custody, parenting time and support determinations (although it was consistent with the trial testimony as well.)²³³ The court of appeals held that the child representative could make recommendations based on personal observations and could be questioned about those observations as a witness; thus, the opportunity

evaluation of the best interests of the child); 750 ILL. COMP. STAT. 5/604.10(d)(West 2017) (the court may order an investigation and report to assist in allocating parental responsibilities.) Illinois Supreme Court Rule 215 also allows for mental and physical examination of the parties and others persons in the event that their mental health is at issue in the litigation.

²²⁷ 750 ILL. COMP. STAT. 5/506.

²²⁸ See Rebecca J. Whitcombe, *The Child’s Representative Law After In Re Marriage of Bates*, 93 ILL. B. J. 26 (2005) (“For years, only two types of representatives were available - the guardian ad litem (GAL) and the attorney for the child. . . . That changed effective 2000 with the enactment of an amendment to section 506 creating the child’s representative, an attorney-for-the-child/GAL hybrid designed to combine the best features of both.”(internal citations omitted).

²²⁹ See Carl W. Gilmore, *Understanding the Illinois Child’s Representative Statute*, 89 ILL. B. J. 458 (2001).

²³⁰ *In re Marriage of Bates*, 819 N.E.2d 714, 728 (Ill. App. Ct. 2004).

²³¹ *Id.*

²³² *Id.*

²³³ *In re Marriage of Bates*, 819 N.E.2d at 729.

for cross examination was not denied to the parties.²³⁴ The mother petitioned the Illinois Supreme Court, which held that the child representative statute was unconstitutional as applied because it denied the mother the right to cross-examine the child representative about his observations, but found that the error was harmless and upheld the custody determination.²³⁵

After *Bates*, practitioners were challenged in practice, concerned that they would be subject to cross-examination if they made personal observations, thus limiting their attorney functions.²³⁶

In 2006, the Illinois legislature fine-tuned the statute noting that “the child representative shall be an advocate for the child, but shall not give an opinion, recommendation, or report to the court, and shall not be called as a witness. . . . The child representative shall offer evidence-based legal arguments, and shall disclose what the representative intends to advocate in a pre-trial memorandum.”²³⁷ The amendment made it clearer that the court could appoint a GAL whose function was to report to the court or a child representative whose function was to serve as best-interests attorney to the child.²³⁸ Based on practice and need, the statute was then amended again in 2016.²³⁹

Without changes to the statute or Supreme Court rules, the role of the GAL has continued to be defined and redefined by the courts in Kentucky. Illinois chose a path that was perhaps more controlled -- a court decision followed by legislative amendments to bring the statute in conformity with the ruling -- that allowed for greater clarity and uniformity of practice. The

²³⁴ *Id.* at 214.

²³⁵ *In re Marriage of Bates*, 819 N.E.2d at 730.

²³⁶ See Ill. R. Prof. Conduct 1.3 (Attorney diligence includes investigation).

²³⁷ 705 ILL. COMP. STAT. 5/506(a)(3) (West 2016).

²³⁸ See, e.g., *In re Marriage of Debra N. and Michael S.*, 4 N.E.2d 78 (Ill. 2013) (The court was not required to follow the recommendations of the attorney who did not testify but did have the authority to litigate and investigate on behalf of the child.)

²³⁹ 750 ILL. COMP. STAT. 5/506 (West 2016).

Illinois model creates an ongoing opportunity to modify role of counsel as needs arise, taking into account the voices of practitioners and experts who may submit comments. In addition to modifying the child representative statute, certain counties in Illinois also adopted model appointment orders defining the role of counsel in custody cases and allowing the court to designate the duties assigned, which allows for clarity of practice.²⁴⁰ Practice can also be improved and made more uniform with training. Multiple jurisdictions have also implemented uniform training requirements for children's attorneys to promote uniform and competent lawyering on behalf of children.²⁴¹ Basic training for competency is also a recommendation under the ABA Standards, which lay out the qualifications that a children's lawyer should possess. Promoting high-quality and consistent training for children's lawyers is another means in which jurisdictions can promote improved practice even without litigation.

In short, Kentucky's *Morgan* litigation is one model for seeking role clarity, but may not be the most complete or best model. Practitioners from other jurisdictions may use lessons from *Morgan* to seek role clarity in their own jurisdictions, but may choose not to follow the route of litigation alone.

CONCLUSION

Children's lawyers must have clarity on their roles, obligations and authority. Lack of role clarity often puts children's lawyers in the compromised position of being both a reporter to the

²⁴⁰ See 13 ILL. PRAC. FAM. L. 750 ILL. COMP. STAT. 5/506(5) (West 2016) for the Cook County, Illinois appointment form. See also *ABA Standards Model Forms*, 37 FAM. L. Q. 131 (Summer 2003).

²⁴¹ See, e.g., 750 ILL. COMP. STAT. 5/506(a)(3)(West 2016) ("a child representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child representative has been appointed.").

court and an advocate for the child. The dilemma created by these conflicting roles continue to cause legal and professional responsibility concerns.

In *Morgan v. Getter*, the Kentucky Supreme Court was asked to clarify the role of counsel for children in private custody matters.²⁴² The litigation, the possibilities it raised, and its aftermath provide a model for other jurisdictions to seek role clarity as well. Seeking role clarity nationally will allow children's attorneys to advance their clients' interests and ensure that all parties to custody litigation are afforded proper process, thus improving family court practice and protecting all parties involved, particularly the child.

²⁴² *Morgan*, 441 S.W.3d at 97.

APPENDIX A

In Alaska, types of representation include: Attorney; Guardian Ad Litem Best Interests Attorney; Child's Attorney; Court Appointed Advisor. The attorney represents the child's preferences, if not appointed as GAL. The GAL can be an attorney, but doesn't have to be, and represents the child's best interests.²⁴³

In Arizona, types of representation include: Best Interests Attorney; Child's Attorney; and Court Appointed Advisor.²⁴⁴

In California, the type of representation is a Court Appointed Private Counsel. The role of the attorney is to represent the child's best interest and present the child's wishes to the court if the child so desires.²⁴⁵

In Colorado, the type of representation include: CASA; attorney. The role of the attorney is to represent the child's best interests, and the role of CASA is to act in the best interest of the child.²⁴⁶

In Connecticut, the type of representation is an attorney. The role of the attorney is to represent the child's best interests.²⁴⁷

In Delaware, the type of representation is an attorney. The role of the attorney is to represent the child's best interests.²⁴⁸

In Florida, the types of representation include: Guardian Ad Litem; Attorney. The role of the Guardian Ad Litem is to represent the best interests of the child by conducting interviews with child and parents/guardians, doing home visits, and attending hearings. A trial court's error in failing to appoint a Guardian Ad Litem is not a fundamental error where an attorney is appointed for the child early in the proceeding and fulfilled nearly all the functions required of a Guardian Ad Litem, including representing the child's best interest. The GAL does not have to be an attorney.²⁴⁹

In Georgia, the types of representation include: Custody Evaluator; Guardian Ad Litem. The GAL acts in the best interests of the child.²⁵⁰

²⁴³ ALASKA STAT. ANN. § 25.24.310 (West, Westlaw through 2016 Legis. Sess.).

²⁴⁴ 17B A.R.S. Rules Fam. Law Proc., Rule 10.

²⁴⁵ CAL. FAM. CODE § 3150 (West 2011); CAL. FAM. CODE § 3151 (West 2011).

²⁴⁶ COLO. REV. STAT. ANN. § 19-1-208 (West 2015); COLO. REV. STAT. ANN. § 14-10-116 (West 2012).

²⁴⁷ CONN. GEN. STAT. ANN. § 46b-54 (West 2014).

²⁴⁸ DEL. CODE ANN. tit.13, §721 (West 2009).

²⁴⁹ FLA. STA. ANN. §§ 61.401, §61.403 (West 2008); *A.F. v. Dep't Children and Families*, 3014-1382, 2014 WL 515623 (Fla. Dist. Ct. App. Oct. 15, 2014).

²⁵⁰ GA. CODE ANN §19-9-3(a)(3)(O) (West 2011).

In Hawaii, the type of representation is a Guardian Ad Litem. The GAL acts in the best interests of the child.²⁵¹

In Idaho, the type of representation is an attorney. The attorney represents the interest of the child with respect to custody, support, or visitations. The attorney also provides legal counsel.²⁵²

In Illinois, the types of representation include: Attorney; Guardian Ad Litem; Child Representative. The Child Representative advocates in the child's best interest. The GAL provides recommendations in child's best interest. The GAL does not have to be an attorney.²⁵³

In Indiana, the types of representation include: CASA; Guardian ad Litem. The GAL or CASA may be represented by an attorney, and the GAL shall represent and protect the best interests of the child. The GAL provides recommendations in child's best interest. The GAL does not have to be an attorney.²⁵⁴

In Iowa, the types of representation include: Attorney; Guardian Ad Litem. The attorney represents the legal interests of the child. GAL represents the best interests of the child by conducting interviews, with child and parents/guardians, doing home visits, and attending hearings. The same person may act as both legal counsel and GAL, though the court may appoint a separate GAL.²⁵⁵

In Kansas, the GAL is appointed and the attorney for the child may be appointed. The attorney's role is to act as legal counsel. The GAL shall investigate and represent the child's best interests, and is an attorney.²⁵⁶

In Louisiana, the type of representation is an attorney. The role of the attorney is to represent the child's best interest.²⁵⁷

In Maine, the types of representation include: Guardian ad Litem; Best Interest Attorney; Attorney. The role of the GAL is to act in the best interest of the child, and the attorney must meet standards prescribed by the Supreme Court of Maine.²⁵⁸

In Maryland, the types of representation include: Child Advocate Attorney; Best Interest Attorney.²⁵⁹

In Massachusetts, the type of representation is an attorney. The Attorney advocates for the child's preferences. The GAL must be an attorney.²⁶⁰

²⁵¹ HAW. REV. STAT. ANN. §571-46(8) (West, Westlaw through 2016 Legis. Sess.).

²⁵² IDAHO CODE ANN. § 32-704(4) (West, Westlaw through Ch. 58 of the First Reg. Session of the 64th Legis.).

²⁵³ 750 ILL. COMP. STAT. ANN. § 5/506 (West 2016).

²⁵⁴ IND. CODE ANN. § 31-17-6-1 (West 2016); IND. CODE ANN. § 31-17-6-3 (West 2016); IND. CODE ANN. § 31-17-6-5; IC 31-9-2-50 (West 2016).

²⁵⁵ IOWA CODE ANN. § 598.12 (West, Westlaw through 2016 Legis. Sess.).

²⁵⁶ KAN. STAT. ANN. § 38-2205 (West, Westlaw through 2017 Reg. Sess.).

²⁵⁷ LA. STAT. ANN. § 9:345 (Westlaw through 2016 Legis. Sess.).

²⁵⁸ ME. STAT. tit. 19-A, §1507 (2006).

²⁵⁹ MD. CODE ANN., FAM. LAW § 1-202 (West 2008).

In Michigan, the type of representation is a Lawyer Guardian ad Litem. The GAL owes a duty to the child and not the court and advocates for the child's best interest. The GAL must be an attorney.²⁶¹

In Minnesota, the type of representation is a Guardian ad Litem. The GAL acts in the best interest of the child and must consider the child's wishes as appropriate.²⁶²

In Mississippi, the type of representation is a Guardian ad Litem. The GAL's role is defined by the appointing judge and the judge determines whether the GAL must be an attorney.²⁶³

In Missouri, the type of representation is a Guardian ad Litem. The GAL shall be the legal representative of the child.²⁶⁴

In Montana, the type of representation is a Guardian ad Litem. The GAL may be an attorney. Duties include: Investigating the facts related to the child's support, care, and custody; interviewing/observing the child; making written reports; appearing and participating in all proceedings necessary to adequately represent the child; making recommendations to the court; other duties as directed. The role of the attorney can be to advocate for the child, but unless specifically indicated in the order, duty to represent the best interests of the child. The GAL does not have to be an attorney.²⁶⁵

In Nebraska, the types of representation include: Attorney; Guardian ad Litem. The role of the Attorney is to protect the interests of the child. The role of the attorney is that of an advocate and not of a GAL. The primary function of the guardian ad litem is to give the judge the necessary information by way of admissible evidence so the judge may issue an order which is in the best interests of the ward and which will be upheld on appeal. The GAL may be an attorney, but does not serve as an attorney.²⁶⁶

In New Hampshire, the type of representation is a Guardian ad Litem. The role of the GAL is to act in the best interest of the child. The GAL can waive privilege, but only if they reasonably believe the waiver to be in the child's best interest. The GAL does not have to be an attorney.²⁶⁷

In New Jersey, the type of representation is a Guardian ad Litem. The GAL shall file a written report with the court setting forth findings and recommendations and the basis thereof, and shall be available to testify and shall be subject to cross-examination thereon. In addition to the preparation of a written report and the obligation to testify and be cross-examined thereon, the

²⁶⁰ MASS. GEN. LAWS. ANN. ch. 119, § 29 (West 2011).

²⁶¹ MICH. COMP. LAWS ANN. § 722.24 (West, Westlaw through P.A. 2016); MICH. COMP. LAWS ANN. § 712A.17d (West, Westlaw through P.A. 2016).

²⁶² MINN. STAT. ANN. § 518.165 (West 2013).

²⁶³ MISS. CODE. ANN. § 93-5-23 (West, Westlaw through 2017 Reg. Sess.).

²⁶⁴ MO. ANN. STAT. § 452.423 (West 2009).

²⁶⁵ MONT. CODE ANN. § 40-4-205 (West, Westlaw through chapters eff. Mar. 15, 2017, 2017 sess.); *In re Marriage of Hammill*, 732 P.2d 403 (1987); *Jacobsen v. Thomas*, 100 P.3d 106, 107-08.

²⁶⁶ NEB. REV. STAT. ANN. § 42-358 (West, Westlaw through legis. eff. Feb. 16, 2017); *Betz v. Betz*, 575 N.W.2D 406, 409 (1998).

²⁶⁷ N.H. REV. STAT. ANN. § 461-A:16 (2015); *In re Peirano*, 930 A.2d 1165 (2007).

duties of a guardian may include, but need not be limited to, the following: Interviewing the children and parties; Interviewing other persons possessing relevant information; Obtaining relevant documentary evidence; Conferring with counsel for the parties; Conferring with the court, on notice to counsel; Obtaining the assistance of independent experts, on leave of court; Obtaining the assistance of a lawyer for the child on leave of court; Such other matters as the guardian ad litem may request, on leave of court.²⁶⁸

In New Mexico, the type of representation is a Guardian ad Litem. The role of the GAL is to appear for and represent minor children and to represent the child's interests. The GAL must be an attorney.²⁶⁹

In New York, the type of representation is an Attorney. The child's attorney is required to maintain a traditional attorney-client relationship with his client, unless the youth lacks sufficient capacity to engage in the traditional relationship or her wishes concerning the litigation are likely to result in an imminent risk of substantial harm to her.²⁷⁰

In North Carolina, the type of representation is a Guardian ad Litem. The GAL can be appointed acts in the best interests of the child. The GAL has the duty to cross-examine witnesses.²⁷¹

In North Dakota, the types of representation includes: Guardian ad Litem and Investigator. The GAL's role is to act in the best interests of the child. The GAL's appointment is to represent the child and the Investigator does not act in a representative capacity.²⁷²

In Ohio, the types of representation includes: Attorney and Guardian ad Litem. The role of the GAL is to act in the best interest of the child. The GAL must be an attorney, if specifically appointed and is counsel for the child by the court.²⁷³

In Oklahoma, the type of representation is a Guardian ad Litem. The role of the GAL is to act in the best interest of the child. The GAL must be an attorney.²⁷⁴

In Oregon, the type of representation is an Attorney. The role of the attorney is to act in the best interest of the child, and the child's preference is one factor to be considered in determining which custodial arrangements will be in its best interest.²⁷⁵

In Pennsylvania, the type of representation is an Attorney, and the attorney may be appointed by the court.²⁷⁶

²⁶⁸ N.J. STAT. ANN. §§ 5:8A, 5:8B (West, Westlaw through Jan. 1, 2017).

²⁶⁹ N.M. STAT. ANN. § 40-4-8 (West, Westlaw through 1st Reg. Sess. of the 53rd Legis.).

²⁷⁰ N.Y. FAM. CT. ACT §§ 241-42, 249 (McKinney 2010).

²⁷¹ N.C. GEN. STAT. ANN. § 7B-600 (West 2013); *Matter of Baby Boy Searce*, 345 S.E.2d 404, 409 (1986).

²⁷² N.D. CENT. CODE ANN. § 14-09-06.4 (West, Westlaw through 2017 Reg. Sess.).

²⁷³ Ohio R. Rule 4 (West, Westlaw through Feb. 1, 2017); *In re Clark*, 749 N.E.2D 833, 837 (2001).

²⁷⁴ OKLA. STAT. ANN. tit, 43, § 107.3 (West, Westlaw through ch. 1 of the 1st Reg. Sess. of the 56th Legis.).

²⁷⁵ OR. REV. STAT. ANN. § 107.425 (West, Westlaw through 2016 Legis. Sess.); *Matter of Marriage of Moe*, 676 P.2d 336 (1984).

²⁷⁶ PA. R. C. P. No. 1915.11-1; PA. R. CIV. P. 1915.11-2.

In Rhode Island, the types of representation include: Attorney and Guardian ad Litem. The attorney's role is to represent the child's preferences and the GAL's role is to represent the best interests of the child. The GAL does not allow have to be an attorney.²⁷⁷

In South Carolina, the type of representation is a Guardian ad Litem. The GAL acts in the best interest of the child and does not have to be an attorney.²⁷⁸

In South Dakota, the type of representation is an Attorney. The attorney acts in the best interest of the child.²⁷⁹

In Tennessee, the type of representation is a Guardian ad Litem. The GAL acts in the best interest of the child.²⁸⁰

In Texas, the types of representation include: Attorney ad Litem; Attorney Amicus; and Guardian ad Litem. The Attorney ad Litem's duty is to represent the child in the same extent as an ordinary client. The Attorney Amicus' duty is to the court, rather than the child. The GAL's duty is to represent the best interests of the child. The GAL does not have to be an attorney.²⁸¹

In Utah, the types of representation include: Guardian ad Litem and Attorney. The attorney will be appointed by the court. The GAL's duty is to represent the best interests of the child. The GAL must be an attorney.²⁸²

In Vermont, the types of representation include: Attorney and Guardian ad Litem. The attorney appointed to represent the interests of the minor child stands in the same relationship to the child and to the court as any other attorney representing his client. The attorney may present evidence, cross-examine witnesses and argue on evidence on behalf of his client. The GAL is to represent the child's best interests.²⁸³

In Virginia, the type of representation is a Guardian ad Litem. The GAL acts in the best interests of the child.²⁸⁴

In Washington, the types of representation include: Attorney and Guardian ad Litem. The court may appoint an attorney to represent the interests of a minor or dependent child with respect to custody, support and visitation. The GAL acts in the best interests of the child.²⁸⁵

²⁷⁷ 15 R.I. GEN. LAWS ANN. § 15-5-16.2 (West, Westlaw through 2016 Legis. Sess.).

²⁷⁸ S.C. CODE ANN. § 63-3-810 (2008).

²⁷⁹ S.D. CODIFIED LAWS § 25-4-45.4 (West, Westlaw through Mar. 24, 2017).

²⁸⁰ TENN. R. S. CT., Rule 40A, § 3; TENN. CODE ANN. § 36-4-132 (West, Westlaw through 2016 Reg. Sess.)

²⁸¹ TEX. FAM. CODE ANN. § 107.001-010 (West 2015)

²⁸² UTAH CODE ANN. § 30-3-11.2 (West, Westlaw through 2016 Special Sess.); *State v. Harrison*, 24 P.3d 936 (Utah 2001).

²⁸³ VT. STAT. ANN. tit. 15, § 594 (West, Westlaw through Law No. 3 of the 1st Sess. of the 2017-2018 Vt. Gen. Assembly)

²⁸⁴ VA. CODE ANN. § 16.1-266 (West, Westlaw through 2016 Leg. Sess.); 2016 Va. H. B. 1241 (NS); Virginia State Bar Standing Comm. on Legal Ethics, Op. 1870, 40 FAM. L. REP. (BNA) 1011 (Va. 2013).

²⁸⁵ WASH. REV. CODE ANN. § 26.10.070 (West, Westlaw through 2016 Legis. Sess.); WASH. REV. CODE ANN. § 26.12.175 (West 2011)

In West Virginia, the types of representation include: Guardian ad Litem and Attorney. In its discretion, the court may appoint a lawyer to represent the child, if the child is competent to direct the terms of the representation and court has a reasonable basis for finding that the appointment would be helpful in resolving the issues of the case. The court shall specify the terms of the appointment, including the lawyer's role, duties, and scope of authority. The GAL shall act in the best interests of the child.²⁸⁶

In Wisconsin, the types of representation is a Guardian ad Litem. The GAL acts in the best interests of the child. The GAL must be an attorney.²⁸⁷

In Wyoming, the type of representation is a Guardian ad Litem. The GAL acts in the best interests of the child, but GAL in custody case acts both as traditional GAL and as an attorney for child, therefore, subject to ethical constraints of Rules of Professional Conduct, as modified to accommodate hybrid nature of the role of attorney. The GAL must be an attorney.²⁸⁸

²⁸⁶ W. VA. CODE ANN. § 48-9-302 (West, Westlaw through 2016 Legis. Sess.)

²⁸⁷ WIS. STAT. ANN. § 767.407 (West 2008)

²⁸⁸ *Clark v. Alexander*, 953 P.2d 145, 149 (Wyo. 1998) (Public interest exception to mootness ruled applied to issue in domestic custody case regarding role of guardian ad litem.)