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OUT-OF-COURT STATEMENTS IN GUARDIAN AD LITEM WRITTEN REPORTS AND ORAL TESTIMONY

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OUT-OF-COURT STATEMENTS IN GUARDIAN AD LITEM WRITTEN REPORTS AND ORAL TESTIMONY

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I. INTRODUCTION

Guardians ad litem (GALs), when appointed in a CHIPS (CHild In need of Protection or Services) matter under Minnesota Statutes Chapter 260C (Child Protection) are able to incorporate out-of-court statements obtained in the course of their investigation in their written reports and oral testimony under the provisions of Rule 3.02 of the Minnesota Rules of Juvenile Protection Procedure (MRJPP).[1] There is no comparable rule of court in the family court context when a GAL is appointed under Minnesota Statutes Chapter 518 (Marriage Dissolution).[2] But both GAL appointments are governed by the Minnesota Rules of Guardian Ad Litem Procedure in Juvenile and Family Court (GAL Rules) in Rules 901 through 907.[3]

Rule 905 of the GAL Rules enumerates the responsibilities and role of the GAL.[4] This rule does not differentiate between the juvenile court or family court contexts. GAL responsibilities include independently gathering information relevant to the case.[5]

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1. MINN. R. JUV. PROT. P. 3.02, subdiv. 2; *see also* MINN. STAT. § 260C.165 (2006).
2. *See* MINN. STAT. ch. 518.
3. MINN. GEN. R. PRAC. 901–907. As used herein, "GAL Rules" refer to Minnesota General Rules of Practice, Title X, Minnesota Rules of Guardian Ad Litem Procedure in Juvenile and Family Court.
4. *Id.* R. 905.01.
5. *Id.* R. 905.01(a).

The statutory provisions upon which Rule 905 is based require the GAL to interview parents, caregivers, and others with knowledge relevant to the case, and to meet with and observe the child.[6] The governing statutes and rules require the collection of oral, out-of-court statements.[7]

These out-of-court statements are part of the factual basis upon which the GAL forms recommendations. These statements should be allowed in family court cases unless the judge finds the statements to be more prejudicial than probative. It would be inconsistent with the plain meaning of the statutory and rule provisions to not allow them.

An analysis of Minnesota statutes, rules, and case law regarding GALs leads to the conclusion that family courts, like juvenile courts, should admit out-of-court statements obtained by the GAL and offered by the GAL in oral testimony and written reports. This conclusion is based on a plain meaning application of the law and analogizing MRJPP 3.02 to family court cases. The analysis also leads to recommendations for rule amendments that incorporate the same or similar language from MRJPP 3.02 in rules governing GAL practice in family court cases. Additional training for GALs is implicated, as well. Finally, the analysis provides a framework for family and juvenile court stakeholders to discuss and resolve these issues. This article presents this analysis, in conjunction with recommendations, conclusions, and a framework for further discussion and exploration.

This article first reviews definitions of GALs and presents the statutory and rule authority for the appointment and responsibilities of a best interests GAL in Minnesota.[8] The article then explores the similarities of the role of the GAL in family and juvenile court, the admissibility of out-of-court statements through the GAL in family and juvenile court, and legal concepts that support the admissibility of out-of-court statements through the GAL in family court.[9] Next, the article presents proposed rule amendments to Minnesota's Rules of Court and a framework for GAL training regarding the admissibility of out-of-court statements through the GAL.[10] The article concludes with the suggestion that

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6. MINN. STAT. §§ 260C.163, subdiv. 5(b), 518.165, subdiv. 2a(1).
7. MINN. GEN. R. PRAC. 905.01(a).
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.

family and juvenile court stakeholders may use the article as a "think piece" for discussion and deliberation in rulemaking committees, or, until the issues can be resolved through rulemaking, for guidance in resolving questions about GAL out-of-court statements.[11]

II. BEST INTERESTS GAL: APPOINTMENT AND RESPONSIBILITIES OF THE GAL IN FAMILY AND JUVENILE COURTS

A. *Best Interests GAL*

Definitions of the term guardian ad litem vary depending on the source and context. A GAL may be appointed by the court to take legal action or accept service on behalf of a minor or an incompetent adult.[12] This definition is sometimes called "standing in the shoes of" a parent or duly appointed representative, who would normally serve in such a capacity for a minor or incompetent adult.[13] A GAL may also be a person appointed by the court to advocate for the best interests of a minor or an incompetent adult.[14] This latter definition is the one commonly applied when a GAL is appointed under Minnesota Statutes Chapters 260C or 518. The GAL appointed in this context is called the "best interests GAL."[15] The best interests GAL is established in the Federal Child Abuse Prevention and Treatment Act (CAPTA).[16] CAPTA requires each state to appoint a GAL for every child in every case involving

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11. *See infra* Part V.
12. MINN. R. CIV. P. 17.02.
13. In Minnesota, the authority for this rule-based appointment is found in Minnesota Rules of Civil Procedure 17.02, Infants or Incompetent Persons, which states:

> Whenever a party to an action is an infant or is incompetent and has a representative duly appointed under the laws of this state or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. A party who is an infant or is incompetent and is not so represented shall be represented by a guardian ad litem appointed by the court in which the action is pending or is to be brought. . . . A guardian ad litem appointed under this Rule is not a guardian ad litem within the meaning of the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court and is not governed by those Rules except when appointed in a paternity action.

Id. A GAL appointed under this rule is not a best interests GAL.

14. MINN. STAT. §§ 260C.163, subdiv. 5, 518.165, subdivs. 1–2 (2006).
15. *See id.* §§ 260C.163, subdiv. 5(b)(2), 518.165, subdiv. 2a(5).
16. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000).

abuse or neglect that results in a judicial proceeding.[17] CAPTA permits the GAL to be an attorney or a trained lay advocate, or both.[18] "It also requires the guardian ad litem to obtain, firsthand, a clear understanding of the situation and needs of the child and make recommendations to the court concerning the best interests of the child."[19]

In Minnesota, judges are required or permitted to appoint a GAL under several statutes. The contexts of many GAL appointments are unrelated to the types of juvenile or family court matters discussed in this article.[20] The types of juvenile and family court GAL appointments that are governed by the GAL Rules are discussed in GAL Rule 901.01, Scope of Rules.[21] The case types in family court include marriage dissolution, legal separation,

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17. *Id.*

18. *Id.*

19. Donald N. Duquette & Marvin Ventrell, *The Role and Duties of the Child's Lawyer, in* CHILD WELFARE AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 493–94 (Marvin Ventrell & Donald N. Duquette eds., 2005) [hereinafter CHILD WELFARE AND PRACTICE].

20. MINN. GEN. R. PRAC. 901.01.

These unrelated contexts are identified in the GAL Rules in Rule 901.01, and include Minnesota Statutes sections: 245.487–245.4888 (Minnesota Comprehensive Children's Mental Health Act); 256B.77 (Coordinated Service Delivery System for Disabled); 257.60(1) (Children; Custody, Legitimacy; Parties (compromise agreement or lump sum payment in paternity suit settlements)); 494.01–494.05 (Community Dispute Resolution Program); 501B.19 (Trusts; Petition for Court Order); 501B.50 (Trusts; Sales and Leases of Real Property); 508.18 (Registration, Torrens); 524.1-403 (Uniform Probate Code; Notice, Parties and Representation in Estate Litigation and Other Matters); 540.08 (Parties to Actions, Injury to Child or Ward; Suit By Parent or Guardian); and chapter 253B (Civil Commitment). *Id.*

These contexts are specifically excluded from the scope of the GAL Rules. *Id.* These, too, are not best interests GAL appointments. Typically, the GAL under these statutes is appointed under Minnesota Rules of Civil Procedure 17.02 and is not governed by the GAL Rules. The distinction between a GAL who is governed by the GAL Rules and one who is not is important. The GAL Rules serve to place parameters on the role of the GAL appointed in juvenile and family court.

In Minnesota, GALs acting within the scope of their duties are entitled to absolute immunity from claims arising from alleged negligent performance of those duties. Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988). A GAL acting within the scope of the GAL Rules is entitled to immunity under *Tindell*. *Id.* Arguably, *Tindell* provides immunity to GALs appointed under the other appointment contexts, although *Tindell* focuses on the best interests GAL. *Id.* Unless the court appointment order in the other appointment contexts states that the appointment is governed by the GAL Rules, or that the GAL is to advocate for the best interests of the child, the protection afforded the GAL under *Tindell* is uncertain.

21. MINN. GEN. R. PRAC. 901.01.

annulment proceedings, child custody proceedings, domestic abuse and harassment proceedings, and parentage determination proceedings.[22] In juvenile court, the case types governed by the GAL Rules include: child in need of protection or services, neglected and in foster care; termination of parental rights; review of out-of-home placement; and adoption proceedings.[23]

The GAL Rules make almost no distinctions between the role of a GAL serving in juvenile or family court.[24] There is a single exception, which is procedural and not substantive.[25] Rule 903, Appointment of Guardian Ad Litem, recites distinctions with respect to the appointment orders used in appointing the GAL and enumerates the contents of the appointment order in juvenile court.[26] Rule 903.03 lists the required contents of the appointment order in family court.[27] Rule 907 enumerates separately and, therefore, distinguishes between rights of GALs in every case, i.e., rights for GALs with *either* participant *or* party status, and rights as a party.[28] Insofar as GALs are always parties in juvenile court matters, the GAL Rules do afford the GAL more rights in juvenile court than family court, where the GAL is usually appointed as a participant. The GAL may, however, move the court for party status. With party status, GALs in family court have identical rights to GALs in juvenile court. Other than these distinctions, there is nothing in the GAL Rules that states or suggests that the rules apply differently to GALs in family court than they do to GALs in juvenile court.

The intent of the GAL Rules is to standardize the role, responsibilities, and scope of the GAL appointed to advocate for the best interests of children in juvenile and family court. While the underlying statutory authority for the GAL appointment may differ, once a GAL is appointed, the GAL Rules are essentially silent with regard to that underlying authority.

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22. *Id.* R. 901.01(a).
23. *Id.* R. 901.01(b).
24. *See id.* R. 903.02–.03.
25. *See id.*
26. *Compare id.* R. 903.02 (juvenile court appointment) *with id.* R. 903.03 (family court appointment).
27. *Id.* R. 903.03.
28. *Id.* R. 907.

B. Statutory and Rule Authority for Appointment and Responsibilities of the GAL

The GAL statutory appointment authority for the family and juvenile court case types included in the scope of the GAL Rules is found in Minnesota's Marriage Dissolution statute[29] and Child Protection statute.[30] These authorities provide the basis for the GAL Rules.[31] Much of the language contained in the GAL Rules is a restatement of the statutes.[32] The lack of distinctions within the GAL Rules regarding the role of the GAL in family and juvenile court can be traced to the underlying statutory authorities. Additionally, the Minnesota Rules of Court implement these statutory provisions through the Minnesota Rules of Family Court Procedure (MRFCP) and the Rules of Juvenile Protection Procedure (MRJPP).

1. Statutory Appointment Authority in Family Court

Minnesota's Marriage Dissolution statute provides the statutory authority for the appointment of GALs in family court matters.[33] GAL appointments under this statute may be permissive or mandatory.[34] In a permissive appointment, the judge is not required to appoint a GAL, but may do so when there is a dispute over custody or parenting time.[35] A GAL in a permissive

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29. MINN. STAT. ch. 518 (2006).

30. *Id.* ch. 260C. The challenge to out-of-court statements in GAL written reports and oral testimony does not emerge as frequently in the juvenile delinquency context. The statutory and rule authority for the appointment of a GAL in a juvenile delinquency matter may be found in Minnesota Statutes section 260B.163, subdivision 6(b) (2006) and Rule 24 of the Minnesota Rules of Juvenile Procedure.

31. Some of the basis for the GAL Rules is also found in a document created by the judges of Minnesota. MINN. JUDGES ASS'N, GUIDELINES FOR GUARDIANS AD LITEM (1986). These guidelines were used to develop proposed statutory amendments and the GAL Rules. *See* SUPREME COURT OF MINN., PROGRESS REPORT ON MINNESOTA'S GUARDIAN AD LITEM SYSTEM IN RESPONSE TO THE 1995 MINNESOTA LEGISLATIVE AUDITOR'S REPORT 3–4 (2004), *available at* http://www.courts.state.mn.us/documents/0/Public/Guardian_Ad_Litem/report20to20legislative20auditor20feb_202004.doc. The legislature adopted amendments to Minnesota Statutes chapters 518 and 260C in 1995; the initial GAL Rules were promulgated by the Minnesota Supreme Court in 1997 and went into effect on January 1, 1999. *Id.* at 2, 4. The GAL Rules were amended in 2004 and 2006.

32. *See, e.g.*, MINN. STAT. chs. 518, 260C; MINN. GEN. R. PRAC. 902–907.

33. MINN. STAT. § 518.165.

34. *Id.* § 518.165, subdivs. 1, 2.

35. *Id.* § 518.165, subdiv. 1.

appointment advises the court with respect to custody and parenting time.[36]

In custody, marriage dissolution, or legal separation proceedings in which custody or parenting time is an issue, the judge must appoint a GAL if he or she believes that the minor child is a victim of abuse or neglect.[37] A GAL in a mandatory appointment also advises the court with respect to custody and parenting time.[38] The statute clarifies that the basis for the judge's belief that the minor child is a victim of abuse or neglect must stem from an allegation of abuse or neglect.[39] The judge is not required to appoint a GAL unless such an allegation has been made.[40] If there happens to be a concurrent proceeding involving the child, e.g., a CHIPS matter, and a GAL is already appointed to the child in that concurrent matter, the judge may appoint that same GAL in the family court matter.[41] Further, if the alleged abuse or neglect is the subject of a concurrent CHIPS matter, i.e., a CHIPS petition has been filed based on the same abuse or neglect, the mandatory appointment statute relieves the judge of the need to appoint a GAL in the family court matter.[42]

2. *Statutory Appointment Authority in Juvenile Court*

In a juvenile court case, the statutory authority for the

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36. *Id.* In practice, the frequency of permissive appointments in Minnesota is influenced by resources. Given scarce GAL resources, especially during a recent state budget crisis, GAL appointments for abused and neglected children in juvenile court and mandatory appointments in family court take priority over permissive appointments. *See id.* It is important to note that the current statute for permissive appointments includes advising the court on support issues. *See id.* GALs in Minnesota typically do not advise the court on child support. There is currently legislation pending that will remove support from the statute in both permissive and mandatory appointments, if approved. *See* S. 1349, 85th Leg., Reg. Sess. (Minn. 2007).

37. MINN. STAT. § 518.165, subdiv. 2.

38. *Id.* In practice, GALs in permissive or mandatory appointments in family court proceedings advise the court on either custody or parenting time and sometimes on both. *See generally* MINN. STAT. ch. 518. Appointments on custody modifications are more common than appointments in the original custody matter.

39. MINN. STAT. § 518.165, subdiv. 2 (referencing statutory definitions of domestic child abuse and neglect in Minnesota Statutes sections 260C.007, 626.556 (2006)).

40. *Id.* The statute does not state from whom the allegation must come. *See id.* Nor does it require any formality on the form of the allegation. *See id.*

41. *Id.*

42. *Id.*

appointment of a GAL is found in a different statute.[43] This statute requires appointment of a GAL in every proceeding where it is alleged that a child is in need of protection or services, and goes on to enumerate when a child is in need of such protection or services.[44] Two of those statutory bases, runaways and truants, are excluded from this requirement.[45] The statute provides three other scenarios under which the judge must appoint a GAL: 1) when the child is without a parent or guardian, 2) the child's parent is a minor or is incompetent, or 3) the parent or guardian is indifferent or hostile to the child's interests.[46] The statute also provides permissive appointments when the court feels that such an appointment is desirable.[47]

3. *Rule Appointment Authority in Family and Juvenile Courts*

Each of the statutory provisions for the appointment of a GAL has its own corresponding rule of court that provides for the appointment of the GAL. MRFCP 302.04(b) provides that the appointment of a GAL is governed by the GAL Rules, and requires the GAL to carry out the responsibilities and have the rights set forth in the those rules.[48]

In juvenile court, MRJPP 26.01, subdivision 1 provides for mandatory appointments in child protection cases.[49] The rule requires the court to appoint a GAL to advocate for the best interests of the child in all cases where such an appointment is mandated by Minnesota Statutes section 260C.163, subdivision 5.[50] Subdivision 2 of this rule provides for discretionary or permissive appointments in child protection cases.[51]

Similar to MRFCP 302.04(b), the juvenile protection procedure rules require that any appointment of a GAL under MRJPP 26 be made pursuant to the GAL Rules.[52]

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43. *Id.* § 260C.163.
44. *Id.* § 260C.007, subdiv. 6.
45. *Id.*
46. *Id.* § 260C.163, subdiv. 5(a).
47. *Id.* The statute also provides that, if necessary, the court may appoint separate counsel for the GAL. *Id.*
48. MINN. GEN. R. PRAC. 302.04(b).
49. MINN. R. JUV. PROT. P. 26.01, subdiv. 1.
50. *Id.*
51. *Id.* R. 26.01, subdiv. 2.
52. *Id.* R. 26.01, subdiv. 3.

4. *Statutory and Rule Authority for GAL Responsibilities*

Minnesota Statutes enumerate the responsibilities of a GAL in both family court[53] and juvenile court.[54] The statutory provisions are identical, and the paragraphs relevant to the analysis in this article provide that a GAL shall carry out the following responsibilities:

> conduct an independent investigation to determine the facts relevant to the situation of the child and the family, which must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case;[55] . . . and present written reports on the child's best interests that include conclusions and recommendations and the facts upon which they are based.[56]

The GAL responsibilities provided in these statutes are restated in Rule 905 of the GAL Rules.[57]

The legislature and the supreme court have not distinguished between GALs appointed in juvenile or family court, either in the appointment or GAL responsibilities provisions. Rather, there appears to be a concerted effort to create consistency and standardization in the roles and responsibilities of the GAL, regardless of the type of case to which they are appointed.[58]

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53. MINN. STAT. § 518.165, subdiv. 2a (2006).
54. *Id.* § 260C.163, subdiv. 5(b).
55. *Id.* §§ 260C.163, subdiv. 5(b)(1), 518.165, subdiv. 2a(1).
56. *Id.* §§ 260C.163, subdiv. 5(b)(5), 518.165, subdiv. 2a(5).
57. MINN. GEN. R. PRAC. 905. There are two differences between the statutes and the rule that are not relevant to the analysis in this article. First, in addition to children, the rule includes incompetent adults for occasions when the GAL appointment is for an incompetent adult in a CHIPS matter. *Id.* Second, paragraph (a) of the rule includes a home study in the documents that a GAL appointed in an adoption matter must review. *Id.*
58. An argument may be made that participant status in family court implies a difference in expectations of a GAL in family court. But participant status relates to the GAL's rights under the GAL Rules and not appointment and responsibilities provisions in the Rules. Even as participants, GALs in family court cases collect and use out-of-court statements and the analysis in this article applies to GALs with either participant or party status.

III. SIMILAR ROLES, LAW, AND LEGAL REASONING SUPPORT THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS THROUGH THE GAL

A. *Similarity in Role and Purpose of the GAL in Juvenile and Family Courts*

The law requires a GAL to execute the same responsibilities whether he or she serves on juvenile court cases[59] or family court cases.[60] A review of all the relevant statutory and rule provisions shows the exact or nearly exact language has been used in both contexts.[61] It is important to note that the purpose of the appointment is also the same. A GAL in juvenile or family court is appointed to advocate for the best interests of the child to whom he or she is appointed.[62] A mandatory appointment under the Minnesota family law statutes is essentially the same as an appointment under the Minnesota juvenile law statutes, in that the underlying basis for the appointment is tied to the judge's belief the child may be a victim of domestic abuse or neglect.[63]

The notion that the role of the GAL is the same in family court cases as it is in juvenile protection matters is reinforced by Minnesota Statutes section 518.165, which states that "[n]o guardian ad litem need be appointed if the alleged domestic child abuse or neglect is before the court on a juvenile dependency and neglect petition."[64] A judge would not need to appoint a GAL in a family court matter under this provision when a "juvenile dependency and neglect petition"—i.e., a CHIPS petition—has been filed because the law requires the appointment of a GAL in the CHIPS petition matter.[65] The purpose for the appointment in the family court matter is served by the appointment in the juvenile court matter. If the role or responsibilities were different, then the judge would need to appoint a separate GAL in the family court matter.[66]

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59. MINN. STAT. § 518.165, subdiv. 2a (2006).
60. *Id.* § 260C.163, subdiv. 5(b).
61. *See supra* Part II.B.4.
62. *See* MINN. STAT. §§ 260C.163, subdiv. 5(b)(2), 518.165, subdiv. 2a(2).
63. *See id.* §§ 260C.163, subdiv. 5(b), 518.165, subdiv. 2a.
64. *Id.* § 518.165, subdiv. 2.
65. *Id.* § 260C.163, subdiv. 5(a).
66. While this is the literal interpretation here, it is conceivable that the best interests of the child in this scenario may not be served completely if a GAL is not appointed in the family matter. There is some risk that a GAL in the juvenile matter may not be aware of important issues and information in the concurrent family case, and could miss something relevant to the child's best interests. The

B. Law Supporting Admissibility of Out-of-Court Statements Through GAL

1. Out-of-Court Statements Permissible in Juvenile Court

The statutes and rules governing the appointment of a GAL clearly state the GAL is to interview a variety of people involved in the life of the child to whom they are appointed; the law directs the GAL to consider the child's wishes, as appropriate.[67] The GAL learns of the child's wishes primarily by meeting with and observing the child.[68] It is in meetings with the child that the GAL will hear the out-of-court statements (or observe nonverbal conduct that the child intends as a statement, such as a head nod). The admissibility of these statements is linked directly to the central purpose of the public policy and corresponding law that are designed to protect children, and, arguably, the congressional and legislative intent behind the appointment of a GAL.

The out-of-court statements admissible in child protection matters include statements made by a child under ten or by a child ten or older who is mentally impaired, and

> the statement alleges, explains, denies, or describes: (1) any act of sexual penetration or contact performed with or on the child; (2) any act of sexual penetration or contact with or on another child observed by the child making the statement; (3) any act of physical abuse or

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question of whether the GAL appointed in the juvenile court matter would have standing in the concurrent family court matter is not addressed in the statute. While this may not be a common scenario, this conundrum warrants further research and discussion.

67. MINN. STAT. §§ 260C.163, subdiv. 5(b)(1), 518.165, subdiv. 2a(1); MINN. GEN. R. PRAC. 905.01(a)(ii).

68. MINN. STAT. §§ 260C.163, subdiv. 5(b)(1), 518.165, subdiv. 2a(1); MINN. GEN. R. PRAC. 905.01(a)(ii). The statutes and rules do not require or direct the GAL to interview the child to whom they are appointed. Rather, the statutes and rules mandate the GAL's "meeting with and observing the child in the home setting." MINN. STAT. §§ 260C.163, subdiv. 5(b)(1), 518.165, subdiv. 2a(1); MINN. GEN. R. PRAC. 905.01(a)(ii).

The reason for this distinction is explained by Jo Howe, retired GAL Program Manager for the Second Judicial District. "Guardians ad litem listen to children; we meet with children and observe them over time. This method of information gathering reduces psychological stress for children, and leads to a more accurate picture of the child's thoughts, wishes and needs." Interview with Jo Howe, Retired GAL Program Manager, Minnesota Second Judicial District, in St. Paul, Minn. (Jan. 23, 2007). Ms. Howe participated in the legislative process that led to passage of the statutory provisions that established the role and responsibilities of the GAL.

> neglect of the child by another; or (4) any act of physical abuse or neglect of another child observed by the child making the statement.[69]

The court must find that the time, content, and circumstances of the statement and the person to whom the statement is made provide sufficient indicia of reliability.[70]

This rule allows GALs who serve on juvenile protection matters to incorporate out-of-court statements admissible under this rule in their written reports and oral testimony.[71] There is no comparable rule regarding out-of-court statements in family court.

2. *Appellate Courts Affirm Admissibility of Out-of-Court Statements Through the GAL*

Objections to out-of-court statements in GAL reports and oral testimony are made in both juvenile and family cases. The appellate courts have addressed these issues and have affirmed the decisions of trial courts that allow GAL reports and oral testimony that contain out-of-court statements.[72] The appellate courts have also affirmed the role of the GAL and the appropriateness of the GAL to collect out-of-court statements.[73]

a. *Out-of-Court Statements—Generally*

Juvenile cases have permitted GALs to collect and rely on out-of-court statements when such statements merely form part of the investigation. In one such case, the appellant, H.P., one of the children, challenged the trial court's termination of H.P.'s parent's

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69. MINN. R. JUV. PROT. P. 3.02, subdiv. 2. MRJPP 3.02 does not limit the out-of-court statements to only the child or children to whom the GAL is appointed. *See id.* Therefore, out-of-court statements from any child provided to the GAL in the course of his or her investigation that conform to MRJPP 3.02 are admissible.

70. *Id.* R. 3.02, subdiv. 2(c). The rule also requires the proponent of the statement to notify all parties of the statement and the intent to offer the statement in advance of the proceeding at which the proponent intends to offer it to provide the parties a fair opportunity to respond to the statement. *Id.* R. 3.02, subdiv. 2(d). Minnesota Rules of Court provide deadlines for the filing, service, or submission of GAL written reports. *Id.* R. 38.01, subdiv. 3 (requiring reports to be filed and served upon the parties five days before review and permanency placement determination hearings); MINN. GEN. R. PRAC. 108.01 (requiring GAL reports to be submitted to the family court and parties ten days before any hearing at which recommendations shall be made).

71. MINN. R. JUV. PROT. P. 3.02, subdiv. 2.

72. *See, e.g.*, *In re* D.J.N., 568 N.W.2d 170, 175 (Minn. Ct. App. 1997).

73. *See infra* Part III.B.2.a.

rights.[74] H.P. argued that the trial court had placed undue weight on the GAL's recommendations.[75] The appellate court found that the trial court had not relied on any one piece of evidence to reach its decision.[76] The appellate court affirmed the GAL's role in collecting out-of-court statements when it wrote:

> We also note that the record reflects that the guardian ad litem's recommendations were based on her personal knowledge gained from continuous and substantial involvement with H.P.'s case throughout these proceedings, including the guardian's *independent inquiries* of experts working with the family. Therefore, there was no error in the trial court's consideration of and agreement with the guardian ad litem's recommendation.[77]

In juvenile court cases, GALs have incorporated out-of-court statements in their written reports and oral testimony that are not included in MRJPP 3.02.[78] The Minnesota Court of Appeals has found that not all out-of-court statements used by the GAL are admitted for the truth of the matter asserted; therefore they are admissible as relevant to the GAL's observations and decision-making process.[79] In *In re Children of A.L.*, the GAL had been appointed to advocate for the best interests of the child in a termination of parental rights (TPR) matter that followed a CHIPS case.[80] Appellant denied the TPR petition and the case went to trial.[81] In the course of the GAL's investigation, the GAL spoke with the children's day care teacher and maternal great-grandparents.[82] On appeal, appellant argued that the district court abused its discretion by admitting hearsay statements offered by the GAL that came from those conversations with the teacher and great-grandparents.[83] The appellate court disagreed and found the

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74. *In re* M.P., No. C1-96-877, 1996 WL 557427, at *1 (Minn. Ct. App. Oct. 1, 1996).
75. *Id.*
76. *Id.*
77. *Id.* (emphasis added).
78. *See, e.g.*, *In re* Children of A.L., No. A04-2416, 2005 WL 1685129, at *6 (Minn. Ct. App. Jul. 19, 2005); *In re* Children of L.D., No. A04-1187, 2005 WL 221966, at *4–6 (Minn. Ct. App. Feb. 1, 2005) (explaining that the court may take judicial notice of findings of fact and reports in a juvenile's file).
79. *See A.L.*, 2005 WL 1685129, at *6.
80. *Id.* at *1, *2, *4.
81. *Id.* at *2.
82. *Id.* at *6.
83. *Id.*

statements were not admitted for the truth of the matter asserted.[84] Rather, it found the statements relevant because they showed what information the GAL had received and what she did with that information.[85]

Furthermore, the Minnesota Court of Appeals has affirmed the trial court's decision to allow out-of-court statements through the GAL in family court.[86] Sometimes a challenge is made to the entire GAL report on the basis of hearsay.[87] In *J.W. ex rel D.W. v. C.M.*, the juvenile biological father appealed a trial court's decision to grant permanent legal and physical custody of his child to the foster parents.[88] The father had petitioned for custody.[89] The biological mother decided to give the child up for adoption.[90] She chose the respondents in this matter as the adoptive parents, who then cared for the child since the child was born.[91] Upon the father's request, a GAL was appointed to advocate for the best interests of the child.[92] On appeal, the father argued the trial court abused its discretion by admitting the GAL's report into evidence.[93] The court held that

> [w]hether to receive evidence is discretionary with the district court.
>
> Appellant requested that the guardian ad litem be appointed by the court, and Minn. Stat. § 518.165, subd. 2a(5) (2000), provides that the guardian ad litem "shall" make "written reports on the child's best interests" including "recommendations and the facts upon which they are based." The reports made for the purposes of a court-ordered evaluation are admissible as business records under Minn. R. Evid. 803(6). The admission of such records does not constitute an abuse of discretion if the parties were given an opportunity to cross-examine the author of the report.[94]

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84. *Id.*
85. *Id.*
86. *See, e.g.*, J.W. *ex rel* D.W. v. C.M., 627 N.W.2d 687 (Minn. Ct. App. 2001).
87. *See, e.g.*, *id.*
88. *Id.* at 692.
89. *Id.* at 690.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 697.
94. *Id.* (citations omitted). Coincidentally, in considering *In re Children of A.L.*, the appellate court also addressed the admissibility of business records, although with regard to a social worker's parenting assessment not a GAL report.

In this case, the GAL had used information she had obtained from a law enforcement official in her report.[95] The appellate court found that the record established that the appellant father had seen the GAL report well before trial, and that the GAL had been subjected to rigorous and lengthy cross-examination.[96] Additionally, the law enforcement official whose out-of-court statements were used by the GAL was available as a witness at the trial but appellant chose not to cross-examine him.[97] The appellate court affirmed the trial court's decision to admit the GAL's report.[98]

b. Statements of the Children's Wishes

In *Kawleski v. Strommen*, another family court case, the GAL had recommended granting physical custody to the appellant father.[99] The GAL relied upon the children's express statements that they wished to live with their father rather than their mother.[100] While these hearsay statements were not challenged on appeal, the appellant father argued that the court should have adopted the GAL's recommendation.[101] Although the trial court did not adopt the GAL's recommendation, the court did rely upon the GAL's report, including the statements of the children's wishes.[102] Of particular interest to the court was the fact that the children had never expressed a desire to live with appellant father previously.[103] Persuaded by other evidence, the trial court denied the father's motion for sole legal and physical custody.[104] The appellate court affirmed.[105]

While not always required by statute, in termination of

No. A04-2416, 2005 WL 1685129, at *4 (Minn. Ct. App. Jul. 19, 2005). The court cited the business-records exception and addressed the requirements of the exception: 1) the record must be kept in the course of regularly conducted business activity, 2) the record was made as a regular practice of that business activity, and 3) the custodian or another qualified witness provides foundation for the evidence. *Id.* at *5.

95. J.W. *ex rel.* D.W v. C.M., 627 N.W.2d at 697.
96. *Id.*
97. *Id.*
98. *Id.*
99. No. C8-02-756, 2003 WL 139557, at *1 (Minn. Ct. App. Jan. 14, 2003).
100. *See id.*
101. *Id.* at *5.
102. *Id.*
103. *Id.*
104. *Id.* at *1.
105. *Id.* at *5.

parental rights (TPR) matters, appellate courts have found that the trial court is required to take into account the child's express wishes.[106] In an Ohio case, the appellate court reversed and remanded the trial court's decision to terminate the mother's parental rights because the child's wishes had not been considered.[107] A GAL had been appointed to advocate for the five-year-old child's best interests, but the GAL's report did not include the child's wishes.[108] The GAL had supported the TPR.[109] The GAL argued on appeal that the child was too young to express his wishes and, therefore, his wishes did not need to be considered.[110] The Ohio Court of Appeals disagreed and held that the child's wishes may be expressed directly or *through the GAL* and must be considered in a TPR proceeding.[111]

The Minnesota Court of Appeals has held similarly.

> "In analyzing the best interests of the child, the court must balance three factors: (1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child." Competing interests may include stability and the child's express wishes.[112]

Furthermore, the Minnesota Court of Appeals has affirmed admissibility of the child's express wishes when the child is older than ten years old.[113]

> In testimony taken in chambers outside the presence of his parents, the oldest child, D.J.N., who is 14, expressed his desire that he not be adopted and that his mother's parental rights be preserved. Even if a statutory basis for termination is shown, the trial court should not terminate parental rights unless there is a showing that termination is in the child's best interests. In considering the best interests of the child, the court *is required* to take into account both the child's wishes and his chances for

106. *See e.g.*, MINN. STAT. § 260C.301 (2006).
107. *In re* Walling, No. C-050646, 2006 WL 445981, at *4 (Ohio Ct. App. Feb. 24, 2006).
108. *Id.* at *1–2.
109. *Id.* at *4.
110. *Id.*
111. *Id.*
112. *In re* Child of L.J.R., No. A06-143, 2006 WL 2129875, at *5 (Minn. Ct. App. Aug. 1, 2006) (quoting *In re* R.T.B., 492 N.W.2d 1, 4 (Minn. Ct. App. 1992)).
113. *In re* D.J.N., 568 N.W.2d 170 (Minn. Ct. App. 1997).

adoption. Further, if a child is over the age of 14, his consent is required for adoption.[114]

c. Summary of Out-of-Court Statements Admissible

In family court, when a GAL is asked to provide recommendations regarding custody, the GAL's analysis is guided by the best interests factors in Minnesota Statutes section 518.17, one of which includes the reasonable preference of the child if the court deems the child to be of sufficient age to express preference.[115] The GAL Rules direct the GAL to consider the child's wishes, as appropriate.[116] Minnesota Appellate Court has affirmed the admissibility of GAL reports that contain statements of the child's wishes.[117] There are three categories of out-of-court statements provided by GALs that ought to be allowed in family and juvenile court: 1) statements consistent with MRJPP 3.02; 2) statements of the child's wishes; and 3) statements that are not admitted for the truth of the matter asserted but, rather, in furtherance of the role of the GAL and the best interests of the child.

In spite of MRJPP 3.02, the provisions in the GAL Rules, and case law that affirms trial court decisions to allow out-of-court statements in GAL reports and oral testimony that includes statements of the child's wishes, objections to these forms of evidence are raised with some frequency around the state. When these objections are raised, GALs, attorneys, and judges are not always aware of the authorities that provide for the admissibility of out-of-court statements through the GAL. Trial court judges have sustained these objections to the dismay of the GALs. An analytic framework for understanding the issues, a training program appropriate for GALs, and rule amendments are needed to help family and juvenile court stakeholders resolve these issues.[118]

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114. *Id.* at 177 (emphasis added) (citations omitted).

115. MINN. STAT. § 518.17, subdiv. 1(a)(2) (2006).

116. MINN. GEN. R. PRAC. 908.01.

117. *See D.J.N*, 568 N.W.2d at 175 ("It is an established element of trial court discretion in personal welfare cases to admit written materials as hearsay evidence, provided that the affected parties have an opportunity to dispute the material, either by calling the authors of those reports as witnesses or otherwise responding.").

118. The impetus for this article stems from several inquiries by GALs who have asked the State GAL Program for guidance on how to respond to these objections, and what to do when the judge sustains the objection.

C. Legal Reasoning Concepts Support the Admissibility of Out-of-Court Statements Through the GAL

There are two legal concepts that may justify treating out-of-court statements offered by GALs the same in family and juvenile court. These are the concepts of plain meaning and analogy. But a starting point for understanding these issues is looking at the definition of hearsay, and the rationale behind the inadmissibility of hearsay statements.

1. Legal Concepts

a. Hearsay and the Probative Value or Undue Prejudice of Out-of-Court Statements

Rule 801(c) of the Minnesota Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to provide the truth of the matter asserted."[119]

Out-of-court statements are hearsay, because they are not made while testifying at a trial or hearing.[120] Minnesota Rule of Evidence 802 provides that hearsay is not admissible except as provided by the Rules of Evidence or by other rules prescribed by the Minnesota Supreme Court or by the legislature.[121] This is called the hearsay rule.[122] Some out-of-court statements are recognized by the rules as statements that are not hearsay and, therefore, would be allowed as admissible evidence.[123] There are also several exceptions to the hearsay rule, which are enumerated in Rule 803.[124] The exceptions provide that certain out-of-court statements are admissible even though they are hearsay.[125]

The purpose of the hearsay rule is to exclude unreliable evidence, and it is based on the premise of fairness in judicial proceedings.[126] It is important for GALs to understand and honor the purpose of the hearsay rule. MRJPP 3.02 should not lead GALs to assume that all oral out-of-court statements they hear ought to

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119. MINN. R. EVID. 801(c).
120. *Id.*
121. *Id.* R. 802.
122. *Id.*
123. *See id.* R. 801(d).
124. *Id.* R. 803.
125. *Id.* R. 801(d).
126. *See id.* R. 102, 803 committee comments.

be used in their written reports and oral testimony. The hearsay rule excludes oral out-of-court statements based on the supposed unreliability of such statements.[127] The purpose of a rule such as MRJPP 3.02 is to overcome the unreliability problem. The GAL—the person to whom the statement was made—is presumed to be reliable and the statements are allowed.[128] Nevertheless, a judge may use discretion to not allow certain out-of-court statements in GAL written reports and oral testimony on the basis that the statement has an unfair prejudicial impact that outweighs the probative value of the statement.[129]

In the context of the GAL role, the GAL should evaluate carefully the probative value of the oral out-of-court statements they incorporate in their written reports and oral testimony. If challenged on these statements, a GAL should be prepared to explain the importance or significance of the statement relative to any prejudice.[130]

b. Plain Meaning

One concept used in legal analysis is the concept of plain meaning. The plain meaning rule in legal analysis provides that when courts interpret statutes, words should be given their ordinary and natural meaning.[131] Minnesota courts apply the plain meaning analysis on a regular basis when confronted with decisions that flow from statutory or rule interpretation.[132] Legal analysis typically begins with the language of the statute or rule, i.e., with the questions, "What does the law say?" and "What did the legislature or supreme court intend when the law was enacted or rule adopted?" The legislature codified the plain meaning rule in

127. *See id.*

128. MINN. R. JUV. PROT. P. 3.02.

129. *See* MINN. R. EVID. 403.

130. Marvin Ventrell, *Making & Meeting Objections in Child Welfare Cases*, *in* CHILD WELFARE AND PRACTICE, *supra* note 19, at 636, 643. Also, guardians ad litem have the right to respond to motions that seek to exclude these statements. MINN. GEN. R. PRAC. 907.01, subdiv. 1(d).

131. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). The *Leocal* Court also used a "context" analysis, where a word or phrase is construed "in its context and in light of the terms surrounding it." *See id.* While Minnesota law directs courts to use a plain meaning approach, either the plain meaning or context analysis may be used regarding out-of-court statements in GAL testimony and written reports to arrive at the conclusions presented in this article. MINN. STAT. § 645.08(1) (2006) ("words and phrases are construed according to rules of grammar and according to their common and approved usage").

132. *See infra* Part III.C.2.

Minnesota Statutes Chapter 645 to aid in this process.[133]

c. Analogy

Another tool or concept available for understanding and applying law is the concept of analogy. "An analogical argument in legal reasoning is an argument that a case should be treated in a certain way because that is the way a *similar* case has been treated."[134] It is an argument based on the premise that two situations are similar enough that a decision applied in the first instance ought to be applied in the second instance.[135] While analogy as legal reasoning has its critics and, indeed, it may have weaknesses, its value is recognized and justified, especially when combined with the merits of a case or other considerations.

2. Statutes and Rules Governing the GALs in Family and Juvenile Courts Should Be Given Their Plain Meanings

The language of the GAL appointment and responsibilities provisions ought to be construed according to their plain meaning. Not allowing out-of-court statements in a GAL written report or oral testimony would thwart the legislative intent and public policy upon which the governing provisions are based. And, in the case of advocating for the best interests of children who are in the midst of their parents' dispute or are victims of parental neglect or abuse, the omission of these statements can lead to damaging outcomes for children.

There is substantial support in statute and case law for applying the plain meaning concept to the GAL appointment and responsibilities provisions. Minnesota statutes explicitly state that words should be interpreted according to their common meaning.[136] Section 645.16 of the Minnesota Statutes also provides: "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."[137]

The Minnesota Appellate Court applies this reasoning regularly: "A basic canon of statutory construction is that words and

133. MINN. STAT. § 645.08(1).
134. Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, June 20, 2006, http://plato.stanford.edu/archives/sum2006/entries/legal-reas-prec/.
135. *Id.*
136. MINN. STAT. § 645.08(1).
137. *Id.* § 645.16.

phrases are construed according to their plain meaning."[138] Further, "[w]hen a statute's meaning is plain and unambiguous, we apply that meaning as a manifestation of legislative intent."[139] The courts apply the plain meaning concept directly: "When the language of [a] statute is plain and unambiguous, it manifests the legislative intent and [a court] must give the statute its plain meaning."[140]

The legislature directed GALs to interview parents, caregivers, and other people relevant to the case.[141] It could not have intended for them to interview people and then not incorporate the oral statements collected into their investigation, their recommendations to the court, and the factual basis upon which those recommendations are based. The plain meaning in this context is that GALs in family court are allowed to incorporate oral out-of-court statements in their written reports and oral testimony.

The question of whether certain out-of-court statements by persons other than the children described in MRJPP 3.02 should be allowed in GAL written reports or oral testimony is not addressed specifically in the statutes and rules reviewed for this article. Generally, in the family court context the hearsay rule and hearsay exceptions apply.[142] But here again, the notion of plain meaning of the word "interview" should apply. And the notion that the legislature would require a GAL to gather oral out-of-court statements, and then not allow the GAL to incorporate those statements in a written report or oral testimony, leads to the conclusion that these statements should be allowed subject to the judge's discretion regarding probative value and unfair prejudicial impact.

3. The Rules and Case Law in the Juvenile Court Context Should Be Analogized to the Family Court Context

MRJPP 3.02 should be analogized to family court cases. Because the role of the GAL is the same in family court cases as it is in juvenile court matters—and the purpose of the appointment is

138. Gada v. Dedefo, 684 N.W.2d 512, 515 (Minn. Ct. App. 2004).
139. *Id.*
140. Kersten v. Minn. Mut. Life Ins. Co., 608 N.W.2d 869, 874–75 (Minn. 2000).
141. MINN. GEN. R. PRAC. 905.01.
142. *See* MINN. R. EVID. 101, 804; *but see* MINN. GEN. R. PRAC. 364.10, subdiv. 1 (providing conditions under which a child support magistrate may admit hearsay evidence).

the same—MRJPP 3.02 should be analogized to family court matters so that the same oral out-of-court statements that are admissible under 3.02 in juvenile protection matters are also allowed in family court matters, when provided by the GAL.

Moreover, the absence of a rule in family court matters similar to MRJPP 3.02 creates another conundrum. For mandatory GAL appointments in family court cases, section 518.165 of the Minnesota Statutes states: "If the child is represented by a guardian ad litem in any other pending proceeding, the court may appoint that guardian to represent the child in the custody or parenting time proceeding."[143]

This means that if a concurrent case exists where a GAL has been appointed in a juvenile court matter for the same child (or children) in the family court matter, the judge may appoint that same GAL in the family court case.[144] Under the current rules, the GAL would have the benefit of MRJPP 3.02 in a concurrent juvenile protection matter; i.e., the GAL could incorporate statements admissible under 3.02 into written reports and oral testimony. But the GAL could not incorporate those statements in the family court matter, or at least would not have the benefit of MRJPP 3.02 in doing so. This absurd outcome defies common sense and should be corrected ultimately by a rule amendment to the GAL Rules, the Rules of Family Court Procedure, or both.[145] Similarly, the case law that allows for expressions of the child's wishes through the GAL ought to be analogized in the family court context and

143. MINN. STAT. § 518.165, subdiv. 2 (2006).

144. A recent unscientific survey (conducted by Resa Gilats) of the State GAL Program Managers who administer GAL services in each of the state's ten judicial districts indicates that the practice varies from district to district and is driven by caseload. It is common throughout the state for a GAL to first be appointed on a CHIPS matter, and then be appointed on a concurrent family court matter. The reverse occurs with some frequency, too: the GAL is first appointed in the family court matter, then appointed in a concurrent CHIPS matter. But in Hennepin County, the juvenile and family court GAL programs are separate; therefore, it would be rare, though not impossible, for a GAL already appointed in a juvenile matter to then be appointed to a family court matter, or vice versa.

145. *See, e.g.*, *In re* S.M.E., 725 N.W.2d 740, 743 (Minn. 2007) (allowing an appeal to proceed in the interests of justice, despite an apparently untimely filing of the appeal). While the facts and issues in *S.M.E.* are not relevant to the analysis in this article, the *S.M.E.* court referenced the "defies common sense" reasoning found in *Servin v. Servin*. *Id.* at 744 (discussing the *Servin* court's rationale for its holding, 345 N.W.2d 754, 758 (Minn. 1984)). *S.M.E.* and *Servin* are examples of the appellate court's use of reasoning and interpretation to avoid and correct absurd results in judicial decision-making.

incorporated in a rule amendment.[146]

IV. RECOMMENDATIONS

There are at least three recommendations to be drawn from this analysis. The first two are rule amendments, and the third is a framework for GAL training.

A. *Proposed Rule Amendments*

1. *Proposed Rule Amendment to Minnesota Rules of Family Court Procedure (MRFCP) 302.04(b)*

MRJPP 3.02 can be analogized to the family court context and, therefore, should be extended to GALs serving on family court matters who are governed by the GAL Rules. Additionally, the family court GAL governed by the GAL Rules should be able to incorporate the child's wishes when expressed in out-of-court oral or nonverbal statements as the law permits currently in juvenile court matters. This proposed change honors the plain meaning of the statutes and rules governing the responsibilities and role of the GAL appointed to advocate for the best interests of children.

This change should be implemented by an amendment to the appointment rule in family court. MRFCP 302.04(b) should be amended to include the content of MRJPP 3.02 and a provision regarding the child's wishes. This alteration could be accomplished either by creating a subsection (c) in the rule, incorporating the provisions of MRJPP 3.02 verbatim, adding a statement regarding the child's wishes, and/or by referencing an additional statement regarding the child's wishes as follows:

> (b) Guardians Ad Litem. Appointment of a guardian ad litem is governed by the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court. The guardian ad litem shall carry out the responsibilities set forth in the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court. The guardian ad litem shall have the rights set forth in the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court.
>
> <u>A guardian ad litem appointed under this rule may include in oral testimony and written reports certain out-of-court statements as enumerated in the Minnesota Rules</u>

146. *See* cases cited *supra* notes 99–105, 107–114 and accompanying text.

of Juvenile Protection Procedure 3.02 and expressions of the child's wishes when obtained as out-of-court oral or nonverbal statements.[147]

2. *Rule Amendment in the GAL Rules*

For the same reasons, MRFCP 302.04(b) should be amended, and to provide even greater clarity regarding the role of the GAL in juvenile and family court, the Rules of Guardian Ad Litem Procedure in Juvenile and Family Court should be amended as follows:

Rule 907. RIGHTS OF GUARDIANS AD LITEM

Rule 907.01. Rights in Every Case

In every case in which a guardian ad litem is appointed pursuant to Rule 903, the guardian ad litem shall have the rights set forth in clauses (a) to (d).

. . . .

(d) The guardian ad litem shall have the right to participate in all proceedings through submission of written and oral reports, and may initiate and respond to motions. A guardian ad litem in juvenile or family court may include in oral testimony and written reports certain out-of-court statements as enumerated in the Minnesota Rules of Juvenile Protection Procedure 3.02 and expressions of the child's wishes when obtained as out-of-court oral or nonverbal statements.[148]

B. *Framework for GAL Training*

In Minnesota, some GALs have a legal education, but the majority do not have a law degree, paralegal training, or a law enforcement background, nor are they required to have this education or experience.[149] All persons who serve as GALs under

147. MINN. GEN. R. PRAC. 302.04(b). The underlined paragraph is the author's amendment proposal.

148. *Id.* R. 907.01. The underlined portion is the author's amendment proposal.

149. Rule 902 of the GAL Rules enumerates the minimum qualifications that a person who serves as a GAL in Minnesota must satisfy before they can be appointed to serve on a case. *Id.* R. 902. Qualifications are also addressed in the Minnesota Guardian Ad Litem Program Standards. *See* MINN. STATE COURT ADM'R,

the GAL Rules must complete a forty-hour pre-service training, which includes instruction on how to conduct an investigation and interview children.[150] The analysis in this article underscores the need for additional training for GALs. Expansion of this training to include guidance on evaluating the probative value or unfair prejudicial impact of out-of-court statements is indicated.[151] The use of experts in child interviewing skills for this training, child therapists, and perhaps law enforcement investigators, is strongly recommended.[152] The training should include instruction on hearsay evidence, the hearsay rule, the law and reasoning for allowing certain out-of-court statements through the GAL, and framing interactions with children such that the GAL does not lead the child. This article can serve as a framework for a training module for the GAL pre-service training, family court training, or even a stand-alone training program.

Hearsay issues emerge in both juvenile and family court cases, even though MRJPP 3.02 and case law address many of the questions that arise. Even though the Rules of Evidence may be more relaxed in juvenile court than in family court, all GALs should have a basic understanding of the concepts presented in this article. Further, regardless of whether GALs are serving in a juvenile or family court matter, they should be skilled in interacting with children so as to elicit reasonably reliable statements from the children to whom they are appointed and with whom they encounter in their investigations. Training should include both presentation by trainers who are experts in interviewing skills and

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GUARDIAN AD LITEM SYSTEM PROGRAM STANDARDS, (2005) [hereinafter GAL PROGRAM STANDARDS], *available at* http://www.mncourts.gov/documents/0/Public/Guardian_Ad_Litem/GAL_Program_Standards_Dec_6_2004.pdf.

150. *See* MINN. GEN. R. PRAC. 902; GAL PROGRAM STANDARDS, *supra* note 149, at 1. While the law does not require a GAL to interview children (they require the GAL to meet with and observe the child), in practice, the GAL does incorporate interviewing techniques when meeting with the child. Case law suggests that courts do not take issue with the use of the word or practice of interviewing. *See* Kawleski v. Strommen, No. C8-02-756, 2003 WL 139557, at *1 (Minn. Ct. App. Jan. 14, 2003) (exemplifying the court's use of the words interview and interviewing). The State GAL Program is sensitive to the need to train GALs in appropriate interviewing strategies for meetings with children.

151. Research for this paper included the presentation of the basic concepts to a group of about twenty-five active GALs. Virtually all of these GALs expressed the need for this training.

152. An example of a service provider for this training is CornerHouse, a private, non-profit organization based in Minneapolis, Minnesota. *See* CornerHouse Interagency Child Abuse Evaluation and Training Center, http://www.cornerhousemn.org/index.html.

practical, hands-on exercises so that GALs may practice the skill through experiential learning methodologies. Training should also include instruction on evaluating the probative value and undue prejudice of oral out-of-court statements, and guidance on defending against objections to these statements when they are raised. Finally, training should include discussion of assessing when it is in the best interests of the child to include statements of their express wishes or omit them.

V. CONCLUSION

This article has been written, in part, as a "think piece" for juvenile and family court stakeholders to use as a foundation and framework for further research and deliberation. Proposed amendments to the rules of court must be reviewed and considered using the rigorous process followed currently by the Minnesota Supreme Court rules committees. This process includes a careful examination of the current rules, statutes, practices, and the implications of the proposed amendments. The committee that would likely review the proposals in this article is the Minnesota Juvenile Protection Rules Committee. The members of this committee include representatives from all the stakeholders in child protection cases, including judges, GALs, and private attorneys who also represent clients in family court. There are other Supreme Court rules committees that review the rules on family court procedure, and those committees may also wish to review these recommendations.

If a committee recommends amendments to the Rules of Family Court Procedure or GAL Rules, those proposals will be made available to the public for review and comment. Until these issues are resolved through a rules committee process, the analysis presented in this article may be used by GALs, attorneys, and judges to help frame and ultimately decide questions related to hearsay evidence offered by GALs in family court cases.

The plain meaning of the statutes and rules of court governing the appointment and responsibilities of a best interests GAL in Minnesota require the GAL, regardless of whether they are serving in family or juvenile court, to obtain and rely upon out-of-court statements. Training for GALs should include instruction on the admissibility of out-of-court statements, as well as appropriate strategies for interacting with children to learn their thoughts, needs, and wishes without creating risk to the child. GALs should

learn to defend against objections to out-of-court statements that they feel they must use in advocating for the child's best interests and should develop sound judgment regarding the use of the child's express wishes. Judges should permit out-of-court statements from the GAL when the probative value of those statements outweighs any undue prejudice that arguably exists.