Procedural Due Process and the Improper Expert Opinions of Court-Appointed Special Advocates

Morgan Bates[*]

There are almost 400,000 children currently separated from their families and living in foster care in the United States. In many of these cases, court-appointed special advocates volunteer to investigate the family, prepare a formal report, and make recommendations to the court on behalf of the children. Studies show that the current judicial system tends to unnecessarily and wrongfully remove children from their families and terminate parental rights based on the implicit socioeconomic and racial biases of the court-appointed special advocate volunteers. Although court-appointed special advocates receive minimal training before their involvement in juvenile cases, these volunteers are often permitted by the court to testify about their opinion of the ability of a parent to care for their child, the nature of the parent–child relationship, the mental health of family members, the quality of the family environment, and any diagnoses of health issues in the family. Because the volunteers do not have the necessary training, experience, or education, this Note argues that this testimony violates the evidentiary rules of most states—which track the Federal Rules of Evidence on improper expert opinions—and do not ensure the specific guarantees of reliability and accuracy established in the Federal Rules of Evidence. Specifically, this Note argues that these volunteers fail to meet the standards set out by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. *and* Kumho Tire Co. v. Carmichael. *Given that court-appointed special advocates have such a unique, influential role in the courtroom, this Note applies the Supreme Court balancing test set out in* Mathews v. Eldridge *to conclude that the repeated evidentiary error in juvenile proceedings is a violation of procedural due process and a threat to the long-established constitutional right to the companionship, care, custody, and management of one's children.*

* Morgan Bates is a third-year student at The University of Texas School of Law and serves as a Notes Editor on Volume 103 of the *Texas Law Review*. Morgan thanks Professor Allison Benesch for leading the Child Protection Issues Seminar, which inspired this Note. This Note was also inspired by Morgan's participation in the Texas Law Advocacy Program, which has always instilled the importance of utilizing the rules of evidence to ensure fair trial outcomes.

Introduction

A court-appointed special advocate, commonly referred to as a "CASA," walked into the home of a family just separated by Child Protective Services to begin a formal investigation.[1] She took out her notebook and began her observations. She walked around the house, peered into the children's room, and formed conclusions for the judge about the family's future. Should the children stay in foster care? Should the parents have their parental rights terminated? As she walked around the house, determining the

1. *In re* W.R.E., 167 S.W.3d 636, 638 (Tex. App.—Dallas 2005, pet. denied).

parents' fitness to have the rights to their children, she noted the cat food on the floor.[2] She noticed a litter box in the children's room.[3] She recorded the roach floating in the toilet.[4] And she reported the dirty dishes remaining in the sink during her next visit.[5] When in the courtroom, she could tell the judge about her observations in the home. She could tell the judge that not only did she find the home in terrible shape, but that her observations in the home contributed to a recommendation that the court must terminate the rights of the parents to their children and their family. The court stripped these parents of the right to raise their own children.[6]

While giving surface-level observations of the home—which, if anything, often indicate some experience of poverty, rather than of abuse—the CASA does not testify about how her own upbringing could have influenced her observations. She does not tell the judge that a struggle with personal hygiene may indicate that the parents could not afford to buy the same Dove deodorant that she chose to wear.[7] She does not tell the court that she could be biased because when she was growing up, she had a maid come to her house biweekly or enough pest treatments to keep the cockroaches out of the bathrooms during the hot summer. She does not admit that just because she has enough resources to keep her house as clean as possible for her family does not mean that *these* parents cannot care for their child. She does not even tell the judge the bare minimum: that because she completed only a few hours of online training to become a volunteer court-appointed special advocate, she may not be qualified to form an opinion about another parent's right to their child. She doesn't tell the judge that she's not an expert or that this decision should not be her call to make. These are the perspectives that courts fail to credit when using the opinions of volunteers to inform the decision to terminate parental rights.

Too often, CASAs use their platform as an advocate in the courtroom to offer opinions about the lifestyles of families without having adequate training or expertise to remove bias, accurately relay information, or sincerely present opinions to the factfinder. With most states adopting the federal approach to this type of testimony, this Note relies on the Federal Rules of Evidence to conclude that any opinions rendered by CASAs should

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See id.* at 643 (affirming judgment of trial court terminating parental rights).

7. In cases involving a CASA, there is a possibility that observations relating to odor may have been based on an implicit racial or socioeconomic bias. For a study discussing the relationship between body odor sensitivity and xenophobia and finding that body odor sensitivity is positively correlated with racial biases, see Marta Zakrzewska, Jonas K. Olofsson, Torun Lindholm, Anna Blomkvist & Marco Tullio Liuzza, *Body Odor Disgust Sensitivity Is Associated with Prejudice Towards a Fictive Group of Immigrants*, 201 PHYSIOLOGY & BEHAV. 221, 221–22, 224–26 (2019).

be subject to evidentiary rules on expert testimony and should be barred in juvenile proceedings. Other scholars have discussed the evidentiary issues relating to CASAs in the courtroom, ranging from arguments regarding the unauthorized practice of law[8] to improper opinions on "the ultimate issue"[9] to widespread hearsay in written reports.[10] Aside from evidentiary concerns, other scholars have also documented the homogeneity of the CASA program and the overwhelming risk of racial biases in the volunteer assessment of families.[11] This Note is the first published argument to tie together these two concepts: the implicit racial biases of a homogenous group of volunteers and the risk of improper expert testimony. This Note discusses the significant evidentiary issues with the testimony of CASAs, similar to the example above, and argues that CASAs should not have the power in the courtroom to offer unqualified expert opinions that threaten the constitutional right to family.

This Note begins in Part I with an overview of the National CASA Program and the multitude of roles that CASAs have in the courtroom, including providing important information to judges about the welfare of a child. In Part II, this Note provides an overview of the fundamental federal evidentiary rules on the admissibility of expert testimony. Part II focuses on the policy implications of expert testimony and discusses the standards for qualification of expert witnesses. Further, Part II applies the Federal Rules of Evidence framework, including the Supreme Court's holdings in *Daubert v.*

8. *See* Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 53, 56, 66–70 (2007) (arguing that CASAs can cross the line into the unauthorized practice of law).

9. *See* Dana E. Prescott & Diane A. Tennies, *The Lawyer as Guardian ad Litem: Should "Status" Make Expert Opinions "All-In" and Trump "Gatekeeping" Functions by Family Courts?*, 30 J. AM. ACAD. MATRIM. LAWS. 379, 379–80, 382 (2018) (addressing how a lawyer appointed as guardian ad litem may write reports including an "expert opinion on the ultimate issues in the case").

10. *See* Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 61–62 (2011) (examining the admissibility of hearsay in guardian ad litem reports).

11. *See generally* Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23 (2016) (arguing that the implicit biases of CASAs harm the foster care system); Cynthia Osborne, Hilary Warner-Doe, McKenna LeClear & Holly Sexton, *The Effect of CASA on Child Welfare Permanency Outcomes*, 25 CHILD MALTREAT. 328 (2020) (conducting a study that showed CASA involvement decreased the child's chance of remaining in their home); Cynthia Osborne, Hilary Warner-Doe & Jennifer Lawson, *Who Gets a CASA? Selective Characteristics of Children Appointed a CASA Advocate*, 98 CHILD. & YOUTH SERVS. REV. 65 (2019) (analyzing selection bias in the assignment of CASAs to better evaluate CASA efficacy empirically); Julie Chang, *Study Finds Texas CASA Kids Less Likely to Find Permanent Homes*, AUSTIN AM.-STATESMAN (Nov. 10, 2019, 2:43 PM), https://www.statesman.com/story/news/local/flash-briefing/2019/11/07/study-finds-texas-casa-kids-less-likely-to-find-permanent-homes/2311976007/ [https://perma.cc/GPY7-PANT] (discussing a study that "found that Texas foster children with CASA volunteers . . . are 19% less likely to be placed in permanent homes than those without CASA volunteers").

Merrell Dow Pharmaceuticals, Inc.[12] and *Kumho Tire Co. v. Carmichael*,[13] to CASA testimony. In Part III, this Note provides numerous recent examples across the country of CASAs testifying about parent–child relationships, the physical health of the child, opinions about the future of the child, the conclusions of medical documents, and other impermissible expert opinions. Finally, in Part IV, this Note applies the procedural due process framework in *Mathews v. Eldridge*[14] to conclude that the consistent bend in evidentiary rules to admit the improper expert testimony of CASAs is a violation of procedural due process as guaranteed by the U.S. Constitution.

I. The Role of the Court-Appointed Special Advocate

Court-appointed special advocates (CASAs) play an extremely active role in the United States foster care system. However, before a detailed discussion of the roles of CASAs in the courtroom, this Part begins with an overview of the current state of foster care in the United States. Specifically, this Part first focuses on different racial and socioeconomic disparities within the foster care system and the recent trend towards the unnecessary removal of children from their homes. Next, this Part provides a brief overview of the immense risk of harm caused by the termination of parental rights. With that background, this Part then delves into the history of the CASA program, the National CASA/GAL Association, and the roles of CASAs in the courtroom.

A. Current Trends in the United States Foster Care System

State intervention with families is almost always a good-faith last resort to protect children from abuse or neglect. However, recent studies show that the juvenile system in the United States—instead of focusing on rehabilitation or the delivery of necessary resources—unnecessarily trends towards the removal of children into foster care.[15] In fact, studies show that removal of children to the foster care system can produce far worse outcomes for children; when children are removed from their families, any preexisting support system is stripped away from the child, and as a result, children become much more vulnerable to anxiety and trauma disorders.[16] Children in foster care also suffer from disproportionate rates of "toxic stress," or

12. 509 U.S. 579 (1993).

13. 526 U.S. 137 (1999).

14. 424 U.S. 319 (1976).

15. *See* Rachel Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L.J. 911, 944 (2023) (discussing studies finding numerous unsubstantiated removals and highlighting the system's history of erring toward removal).

16. *Id.* at 943–44. *See generally* Emily P. Leen, *Systemic Foster Care Reform: An Essential Constitutional Remedy for Vulnerable Foster Youth*, CONN. PUB. INT. L.J., Fall–Winter 2022, at 157 (summarizing the dire impacts of the foster care system on children and arguing for systemic reform as a remedy to violations of the substantive due process rights of foster youth).

"excessive or prolonged activation of stress response systems in the body and brain," that cause lifelong learning, behavioral, and health problems.[17]

The trend towards removal of children to foster care is worsened due to the subjectivity and bias in dependency hearings. For example, a Boston-area study of the foster care system determined that the "'best predictor of removal' to foster care after an emergency room visit 'was not [the] severity of abuse'" to the child, "but the child's *Medicaid eligibility*."[18] Another study found that poverty, or "inadequacy of income," increased a child's chance of removal to the foster care system by more than 120 times.[19] Not only does the subjectivity in the system disproportionately affect families living in poverty, but families of color are also disproportionately subject to unnecessary removal.[20] Another study analyzed 180,000 allegations of maltreatment in Texas and found that when looking at family incomes, "'race was not a significant predictor' of whether the allegations would be substantiated."[21] "However, when the model accounted for the caseworkers' *subjective* assessment of risk"—a "dispositive factor of whether an allegation of maltreatment is substantiated—race became 'a significant predictor.'"[22] "When accounting for this subjective element, all non-white families were more likely to have substantiated findings of maltreatment than white families."[23] Studies like these show that the subjectivity of CASAs and other

17. Leen, *supra* note 16, at 157 (quoting *Toxic Stress*, CTR. ON THE DEVELOPING CHILD, HARV. UNIV., https://developingchild.harvard.edu/science/key-concepts/toxic-stress/ [https://perma.cc/MR4W-Q2JV]).

18. Kennedy, s*upra* note 15, at 935 (emphasis added) (quoting Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000)).

19. DUNCAN LINDSEY, THE WELFARE OF CHILDREN 153 (1994); *see also* Mulzer & Urs, *supra* note 11, at 27 ("[P]overty is the single greatest predictor of a child welfare case." (citing MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 192–93 (2005))).

20. *See* Kennedy, *supra* note 15, at 935 ("[O]ver the past half-century, scholars have extensively documented how children of color are disproportionately involved and face worse outcomes during encounters with the child welfare system.").

21. *Id.* at 936 (quoting Alan J. Dettlaff, Stephanie L. Rivaux, Donald J. Baumann, John D. Fluke, Joan R. Rycraft & Joyce James, *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634 (2011)).

22. *Id.* at 936–37 (emphasis added) (quoting Alan J. Dettlaff, Stephanie L. Rivaux, Donald J. Baumann, John D. Fluke, Joan R. Rycraft & Joyce James, *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634–35 (2011)).

23. *Id.* at 937 (citing Alan J. Dettlaff, Stephanie L. Rivaux, Donald J. Baumann, John D. Fluke, Joan R. Rycraft & Joyce James, *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634–35 (2011)).

caseworkers in dependency hearings has become a constitutional threat to the right of parents to raise their family.[24]

B. The History of the CASA Program

The National CASA website says it best, proudly stating: "The National CASA/GAL Association for Children supports and promotes court-appointed volunteer advocacy for children and youth who have experienced abuse or neglect. We believe that every child should be given the opportunity to thrive in a safe and loving home."[25] The National CASA/GAL Association[26] organizes 88,000 volunteers through 941 state organizations and local programs across the country to advocate for children in juvenile court proceedings.[27]

The idea of using volunteers to support children in court proceedings began in a juvenile court in Seattle, Washington.[28] In 1976, a juvenile court judge, Judge Soukup, determined that he had limited information to make the correct rulings in complicated cases involving the future of a family.[29] In a video posted to the National CASA website, Judge Soukup described a case where a three-year-old child suffered from injuries possibly related to abuse.[30] He described this decision as having to decide between returning the child to an environment with possible abuse or taking the child away from the only environment they had ever known due to a misunderstanding.[31] Through the emotional and moral complexity of this decision, Judge Soukup realized that he did not have enough information on the interests of the child and that there was significant need for a volunteer to give the court

24. *See infra* Part IV (arguing that admitting improper expert opinions of CASAs into evidence violates the Due Process Clause). As discussed further throughout this Note, these CASAs also tend to be very homogeneous, as white, middle-aged, middle-class women dominate the CASA program. *See* Mulzer & Urs, *supra* note 11, at 24 ("The demographic make-up of CASA programs—mostly middle-class white women over the age of 30—easily recalls the women who, after the Civil War, played the primary role in establishing the modern child welfare system." (citation omitted)).

25. NAT'L CASA/GAL ASS'N FOR CHILD., https://nationalcasagal.org/ [https://perma.cc/AC3C-EZ3B].

26. The "GAL" stands for "guardian ad litem." Guardians ad litem are either licensed attorneys or court-appointed special advocates. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073 (codified at 42 U.S.C. § 5106a(b)(2)(B)(xiii)). This Note focuses on court-appointed special advocates—not attorneys.

27. *Our Reach*, NAT'L CASA/GAL ASS'N FOR CHILD., https://nationalcasagal.org/our-impact/our-reach/ [https://perma.cc/GTK6-BHBF].

28. *Our History*, NAT'L CASA/GAL ASS'N FOR CHILD., https://nationalcasagal.org/about-us/history/ [https://perma.cc/X9W8-9QS6].

29. *See id.* (describing the inspiration for the CASA program as Judge Soukup having "insufficient information" for such "life-changing decision[s]," which "terrified" him).

30. *Id.*

31. *Id.*

information and recommendations on behalf of the child.[32] He looked to his bailiff, asked him to gather some volunteers to represent these children, and the rest is history: The CASA program was born.[33]

The popularity of the CASA program spread across the country in the late 1970s, and by 1982, there were eighty-eight CASA programs.[34] By 1983, twenty-nine states had adopted CASA programs in their courts.[35] With booming national support, President Ronald Reagan presented the National CASA branch with the President's Volunteer Action Award.[36] Finally, after decades of growth in the number of CASA offices, volunteers, and children in the program, CASA was codified in federal law.[37] In 1996, Congress amended the Child Abuse Prevention and Treatment Act (CAPTA) to allow the statutorily required representative for a child in court, known as the guardian ad litem, to be either (1) an attorney or (2) a CASA volunteer.[38] The amendment stated:

> [P]rovisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child[.][39]

The CAPTA amendment completely changed the landscape of the representation of children in court. Before, the guardian ad litem had to be a licensed attorney representing the child in court proceedings. Now, the 1996 CAPTA amendment allows children to be represented by non-attorney

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32. *Id.*; *see also* Carmen Ray-Bettineski, *Court Appointed Special Advocate: The Guardian ad Litem for Abused and Neglected Child*, JUV. & FAM. CT. J., Aug. 1978, at 65, 66. Discussing the utility of a volunteer program, Bettineski described:

> This system of providing representation to children had two disadvantages that the volunteer program was designed to overcome: the cost of paying lawyers' fees was becoming prohibitive, as more and more dependency cases were coming to the juvenile court; and few lawyers were equipped to undertake the kind of thorough social investigation of all circumstances in the child's life necessary to arrive at a plan for the child. A volunteer program would provide less costly representation, along with an inherently more thoroughly researched position from which could be made.

Id.

33. *Our History*, *supra* note 28.

34. *See id.* (outlining the "history of the CASA/GAL movement").

35. *Id.*

36. *Id.*

37. *Id.*; Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073 (codified at 42 U.S.C. § 5106a(b)(2)(B)(xiii)).

38. § 107(b)(2)(A)(ix), 110 Stat. at 3073.

39. § 107(b)(2)(A)(ix), 110 Stat. at 3073–74.

volunteers through CASA's matching and training program.[40] With the CASA program now having an established place in courtrooms across the country and having served millions of children since its inception, its creator Judge Soukup recently reflected on the program:

> [CASA volunteers] almost self-select. They are the people that really care enough about children to go through the training and then to know that they're going to spend a lot of time working for that child and those are the ones that I think we've got right now. Judges need CASA volunteers in their courts and they really need them to be a party to the action because there is no one else in their courtroom whose only function in that case is to provide a recommendation that's based on just the child's needs . . . . No one else in that courtroom can do that except a volunteer.[41]

These volunteers are trained by a CASA program to provide recommendations in juvenile proceedings,[42] and as the CASA program has gained national significance, CASAs play a more significant role in the decision to terminate parental rights.

C. The Role of CASA in the Courtroom

The 1996 CAPTA amendment clearly allows a non-lawyer CASA advocate to represent "the best interests of the child."[43] Although the exact responsibilities of CASAs vary in each state, CASA volunteers generally coordinate with "child welfare professionals, educators, and service providers to ensure that judges have all the information they need to make the most well-informed decisions" for the future of the children.[44] CAPTA requires CASAs to receive some "training appropriate to the role."[45] According to the National CASA website, volunteers must complete thirty hours of training before volunteering and twelve hours of required continued education each year.[46] In order to ensure that children have stable

40. *See* § 107(b)(2)(A)(ix), 110 Stat. at 3073 (providing that children can be represented by attorneys or CASAs). As mentioned earlier, *supra* note 26, this Note only focuses on the CASA volunteer branch of permissible guardians ad litem.

41. *Our History*, *supra* note 28.

42. *See infra* section II(A)(1) (describing the CASA training curriculum).

43. § 107(b)(2)(A)(ix), 110 Stat. at 3073–74.

44. *The CASA/GAL Model*, NAT'L CASA/GAL ASS'N FOR CHILD., https://nationalcasagal.org/our-work/the-casa-gal-model/ [https://perma.cc/8FC4-P2YC].

45. 42 U.S.C. § 5106a(b)(2)(B)(xiii). *But see* Mulzer & Urs, *supra* note 11, at 42 (describing that there are no uniform requirements or standards for CASA training programs).

46. *The CASA/GAL Model*, *supra* note 44.

representation, CASA volunteers are assigned to one or two cases at a time until each case reaches a permanent solution.[47]

States vary in the amount of power that CASAs have in the actual courtroom. This power often depends on the independence of the CASA volunteer to investigate, report, and recommend information to the judge. There are three basic approaches that the states have adopted in response to the 1996 CAPTA amendment.[48] First, states that utilize an attorney-centered approach give the most deference to the attorney representing the child. In this approach, CASAs can be involved, but more as an ally to the child rather than an advocate.[49] Second, other states do not guarantee that an attorney will be the representative of the child in juvenile proceedings and, instead, appoint CASA volunteers as counsel.[50] Third, some states have adopted a hybrid model that allows attorneys and CASA volunteers to work together for the interest of the child.[51]

When CASA volunteers have more independence in court proceedings, volunteers fill in roles that traditionally are filled by attorneys.[52] For example, the State of Washington allows CASA volunteers to file pleadings and motions with the court, as well as participate in discovery.[53] In Oregon, all CASA volunteers become parties to ongoing litigation, which permits CASAs to file pleadings, request hearings, and subpoena and cross-examine witnesses in order to satisfy their duty to monitor court proceedings.[54] Maine

47. *Id. But see* Mulzer & Urs, *supra* note 11, at 44 (discussing a study finding that "volunteers spent an average of only 3.22 hours on each of their cases per month").

48. Glynn, *supra* note 8, at 74 (explaining the three basic models of an "attorney-centered approach," a "volunteer-centered approach," and an "attorney-volunteer team approach").

49. *See, e.g.*, ALA. CODE § 26-14-11 (2024) (guaranteeing the appointment of counsel to each child); ARK. CODE ANN. § 9-27-316 (West 2024) (limiting the role of CASAs and guaranteeing the appointment of counsel to each child); IOWA CODE ANN. § 232.89 (West 2024) (guaranteeing counsel for each child in addition to a guardian ad litem); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 2024) (guaranteeing counsel for children); N.C. GEN. STAT. ANN. § 7B-601(a) (West 2024) (same).

50. *See, e.g.*, IDAHO CODE ANN. § 16-1614(1) (West 2024) (only guaranteeing the appointment of a guardian ad litem for each child under the age of twelve).

51. *See, e.g.*, ALASKA STAT. ANN. §§ 47.10.050, 25.24.310 (West 2024) (guaranteeing the appointment of either a guardian ad litem or an attorney, depending on the facts of the case); FLA. STAT. ANN. §§ 39.820, 39.822 (West 2024) (permitting volunteer guardians ad litem to take on the role of an attorney); GA. CODE ANN. § 15-11-104 (West 2024) (permitting CASAs to serve alongside a child's attorney and limiting CASA activities pursuant to the unauthorized practice of law); MO. ANN. STAT. § 210.160 (West 2024) (describing how CASAs can support attorney guardians ad litem); WASH. REV. CODE ANN. § 13.34.100 (West 2024) (permitting volunteer guardians ad litem to take on the role of an attorney).

52. *See* Glynn, *supra* note 8, at 56 ("This expansion of the definition of a guardian ad litem has led to further confusion over the role of lawyers in these proceedings. If a non-lawyer can do this work, is it the practice of law?").

53. *Id.* at 68 (quoting Wash. Super. Ct. Guardian ad Litem R. 4(h)(1)).

54. OR. REV. ST. ANN. § 419B.112(1)–(2) (West 2024).

permits CASAs to subpoena and examine witnesses.[55] However, not all states operate this way. Some states, such as California, allow the CASA volunteers to participate in the proceedings as a tool of information, rather than a courtroom advocate.[56]

Although some states allow CASA volunteers to act as pseudo-attorneys in the courtroom, two common roles of CASAs in the courtroom are (1) preparing a formal report and (2) if called to testify, providing testimony about their opinions of the case.[57] When CASAs become involved in a case, they almost always prepare a formal report with observations and an opinion about the future of the child. These formal observations include statements from the child, parent(s), or other people in the child's life, descriptions of the home environment, observations of the interactions between the parent(s) and child, physical descriptions of the parent(s) and child, the child's educational progress, and other observations of the child's life.[58] In addition to these observations, CASA volunteers also state their opinions about the best interests of the child, including their opinions on terminating parental rights, placing the child into foster care, or moving the child to live with another family member.[59] These reports are submitted to the court as evidence for review and consideration.[60] If called to testify, CASA volunteers are also permitted to discuss the contents of these reports and their opinions about the case.[61]

CASA reports and testimony are rarely challenged on evidentiary grounds. But why? In many states, CASAs play a huge role in juvenile court dependency hearings and are routinely called to testify about their findings and opinions about the future of the family. Just as Judge Soukup said when he founded the volunteer program, judges need to lean on volunteers to have a third-party opinion in these difficult cases.[62] But what if these third-party opinions are too subjective? What if CASA volunteers cannot separate their own privileges from these opinions? What if CASAs do not undergo enough training to be qualified to testify to an opinion about the case? Isn't the

55. Glynn, *supra* note 8, at 69 (citing ME. REV. STAT. ANN. tit. 22, § 4005(1)(C) (2024)).

56. *Id.* at 69–70 (citing *In re* Charles T., 125 Cal. Rptr. 2d 868, 873 (2002)).

57. *See* Boumil et al., *supra* note 10, at 46, 53, 65–66 (noting that many guardians ad litem include "ultimate issue recommendations" in their reports and that guardians ad litem are routinely called to testify about their investigations).

58. *See id.* at 46–47 (describing common guardian ad litem duties as investigators and mental health evaluators).

59. *See id.* at 65–66 (noting that many guardians ad litem include recommendations on ultimate issues like "custody or visitation arrangements" in their reports).

60. *See* Prescott & Tennies, *supra* note 9, at 382 & n.8 (noting that guardians ad litem write reports that are "admissible in evidence at trial").

61. *See* Boumil et al., *supra* note 10, at 53, 65–66 (highlighting concerns with allowing ultimate issue recommendations in guardians ad litem reports and testimony from guardians ad litem about their investigations).

62. *See supra* notes 28–33 and accompanying text.

purpose of the Federal Rules of Evidence to ensure that we have accurate, unbiased testimony?

II. Federal Evidentiary Standards on Opinion Testimony

To understand the evidentiary concerns of CASA testimony, this Note must first address the history and role of the Federal Rules of Evidence. This Note applies the Federal Rules of Evidence to this analysis because the majority of states have adopted the federal evidentiary approach to expert testimony. First, this Part addresses the Federal Rules of Evidence on lay witness testimony, which applies only to opinions that do not rely on specialized knowledge. Next, this Part establishes that because CASA opinions rely on some specialized knowledge, the evidentiary rules on *expert* testimony must apply. Third, this Part lays the essential groundwork for applying the Federal Rules of Evidence to expert testimony. Applying that framework, this Part then argues that most CASA *opinion* testimony should be rendered inadmissible.

The Federal Rules of Evidence govern all federal courts in the country, create guidelines for state evidentiary standards, and specifically include an entire section of evidentiary rules on expert testimony. The Federal Rules of Evidence were created to ensure that factfinders consider only evidence with certain guarantees of reliability and accuracy.[63] Although state courts do not need to operate under the Federal Rules of Evidence, many states have enacted evidentiary rules that mirror the Federal Rules of Evidence,[64] the underlying policy implications of those rules, and the Supreme Court's interpretation of expert testimony in *Daubert* and *Kumho Tire*.[65] As such, this Note addresses the federal standards for the admissibility of expert testimony, recognizing that there may be some slight (and largely not

63. *See* FED. R. EVID. 701 advisory committee's notes to 1972 proposed rules ("The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.").

64. *Compare* FED. R. EVID. 701–702 (setting out requirements for opinion testimony by lay witnesses and expert testimony), *with* ALA. R. EVID. 701–702 (using similar language to the Federal Rules of Evidence on lay opinion testimony and expert testimony), *and* CAL. EVID. CODE § 720 (same), *and* COLO. R. EVID. 701–702 (same).

65. As of last year, twenty-four states and the District of Columbia follow the *Daubert* and *Kumho Tire* analyses while six states still conform to the general acceptance test under *Frye*. DAMIAN D. CAPOZZOLA, EXPERT WITNESSES IN CIVIL TRIALS § 2:54 & n.1, Westlaw (database updated September 2023). Thirteen states employ a hybrid analysis under *Daubert*, *Kumho Tire*, and *Frye*. *Id.* § 2:54 & n.3. This Note focuses directly on *Daubert* states but also extends to the overarching policy implications discussed in the Federal Rules of Evidence and in the United States Supreme Court decisions on expert testimony. For more information on the timing of the states' adoption of the *Daubert* and *Kumho Tire* approach to expert witness testimony, see Eric Helland & Jonathan Klick, *Does Anyone Get Stopped at the Gate? An Empirical Assessment of the* Daubert *Trilogy in the States*, 20 SUP. CT. ECON. REV. 1, 6–9 tbl.1 (2012). *See also* CAPOZZOLA, *supra*, § 2:54 (analyzing how states have treated *Daubert* and *Kumho Tire* and the different state approaches to the admissibility of expert testimony).

dispositive) variations between states. This Note uses the Federal Rules as a baseline to argue that under these standardized evidentiary rules and the accompanying policy implications, any specialized CASA opinion testimony should be inadmissible.

A. The Federal Rules on Lay Witness Opinion Testimony

The Federal Rules of Evidence define lay witness opinion testimony in Rule 701, stating that lay witnesses may provide testimony in the form of an opinion only when (1) the opinion is "rationally based on the witness's perception," (2) the opinion is helpful to "determining a fact in issue" or the scope of the witness's testimony, and (3) the opinion is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702" (the rule on expert witnesses).[66] The Federal Rules of Evidence adopt the limitations on layperson opinions in order to ensure that witnesses have personal knowledge and are qualified to provide an opinion on the topic.[67] The boundary between lay and expert witnesses, as well as the admissibility of their opinions, hinges on the third factor of Rule 701: the reliance of an opinion on specialized knowledge. When a witness's opinion is based on scientific, technical, or other specialized knowledge, the opinion is automatically subject to Rule 702.[68] This subpart argues that CASA testimony is consistently based on specialized knowledge—in violation of Rule 701—and as such, must fall under the requirements set out under Rule 702.[69]

The Federal Rules of Evidence, designed to admit only evidence with certain guarantees of reliability and accuracy, bar lay witnesses from opinion testimony based on specialized knowledge.[70] However, lay witnesses, or

66. FED. R. EVID. 701–702.

67. *See* JON R. WALTZ, INTRODUCTION TO CRIMINAL EVIDENCE 305–25 (3d ed. 1991), *as reprinted in* ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS 801, 801–02 (13th ed. 2019) (describing how lay witnesses cannot "ordinarily unburden [themselves] of opinions and conclusions which [they have] drawn from [their] firsthand observations" because "either the lay witness[es] [are] technically unqualified . . . to draw such a conclusion; or the jurors themselves are fully capable of drawing the right conclusion from the recited facts").

68. *See* FED. R. EVID. 701 advisory committee's note to 2000 amendment ("The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 . . . .").

69. Although this subpart focuses the interaction between CASA testimony and Rule 702's requirements for expert witness testimony, Rule 702 is not the only expert testimony rule to which CASA testimony is subject. Rather, using Rule 702 to demonstrate that CASA testimony is expert testimony, this Note argues that CASA witnesses should be treated as experts—meaning CASA testimony should be subject to *all* expert testimony rules in the Federal Rules of Evidence, including Rules 703–706. *Cf.* FED. R. EVID. 703–706 (outlining requirements for different situations specific to expert testimony).

70. FED. R. EVID. 701.

witnesses that only testify to matters within their personal knowledge, can come to some *opinions* based on their personal knowledge. Just like any person can come to the opinion that "it was really cold outside," instead of testifying to the temperature in Fahrenheit degrees on the Weather App, lay witnesses can rely on their own perceptions to make rationally based, ordinary opinions in the courtroom. However, there are other more complicated opinions that require a logical inference based on specialized knowledge. For example, a lay witness without any training could not opine that "the man was suffering from a viral infection," but the witness probably could testify that "the man looked really sick." The policy of this evidentiary distinction is straightforward. Just as Professor John MacArthur Maguire described: "It is, of course, plain good sense to refuse to let a non-expert purport to give evidence about matters he does not understand. He is more likely to mislead than to afford sound guidance. The trier of fact is equally capable of forming his own conclusions."[71]

However plain good sense that the policy behind the evidentiary rules may be, the line between expert and lay witness testimony is often blurred when a witness takes the stand in the courtroom. How should a trial judge determine whether the opinion is based on specialized knowledge? How do you know if a witness should be held to the standard of an expert under Rule 702? Professor Jon R. Waltz wrote in his *Introduction to Criminal Evidence* that "[s]ome people think that only a scientist of one sort or another and perhaps a few engineers can rightly be called experts. But the term 'expert,' at least in the law and in common sense, is far broader in meaning than this."[72] In fact, *any witness opinion* that is based on specialized knowledge is subject to the Federal Rules on expert testimony, and these types of opinions can be surprising. Professor Waltz goes on to describe possible expert witnesses, noting that "[a]nyone who has ever tried to repair his own automobile or television set knows that some people are experts at these kinds of work and some are not" and that "[t]he proficient garage mechanic is an expert in his field even though a Ph.D. may be the last thing he ever hoped to acquire."[73] No matter the witness's background—a doctor or a garage mechanic—the admissibility of the opinion testimony depends on whether or not the opinion is rooted in any kind of specialized (and not necessarily scientific) knowledge.

CASA Testimony Is Based on Specialized Knowledge Under Rule 701.—Although CASAs, just like any person called as a witness, can testify about what they have seen, heard, or personally experienced, Rule 701

71. JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 23–27 (1947), *as reprinted in* PARK & FRIEDMAN, *supra* note 67, at 781, 782.

72. WALTZ, *supra* note 67, at 803.

73. *Id.*

explicitly draws the line at testifying to *opinions* based on scientific, technical, or otherwise specialized knowledge. The opinions in CASA testimony consistently require an inference of specialized knowledge to opine about the parent–child relationship, the state of mind of the child, the health of the child, or, as the ultimate issue in the dependency hearing, the termination of parental rights. In fact, working with families—especially to come to any recommendations about the family in front of the factfinders—often requires a graduate degree, or at the very least, years of experience and training.[74] For example, drawing opinions about the parent–child relationship, even a simple opinion such as "he is a good father," requires a vast amount of expertise.[75] Although far more pronounced than possibly enumerated here, the complexity of the simple opinion about the quality of another person's parenting is impossible to disregard in this analysis. While some opinions may seem simple or black-and-white on the surface, judges must determine how the opinion was developed. Specific to CASA opinions on the quality of parenting, there are entire books published on the social science approaches to parenting, wrapped up in race, socioeconomic status, nationality, religion, region, family tradition, moral approaches, and other intangible sciences and philosophies.[76] These scientific and sociological intricacies must drive a conclusion about the quality of parenting. When CASAs testify about the quality of parenting or the state of a child, CASAs are using their observations from the home or interactions with the family to make recommendations to the judge. Any of these opinions, though, require both an understanding of implicit racial bias, the effect of socioeconomic status on parenting, cultural differences, and the family's religion, and also a professional understanding of the development and psychology of children. Without these data points, even the simple opinion that "he is a good father," would be unreliable. After all, family therapists are required to undergo an extensive graduate-level education and pass state-level examinations to evaluate families.[77] Social workers are required to obtain a postsecondary degree and pass state-level examinations.[78] Education for these professionals

74. *See* Boumil et al., *supra* note 10, at 68–69 (describing the controversial use and admissibility of psychological testing offered in family court proceedings by psychologists presented as experts).

75. *See* Mulzer & Urs, *supra* note 11, at 62 (describing the required expertise to opine on complicated child welfare issues).

76. *See generally*, *e.g.*, DAVID M. NEWMAN & LIZ GRAUERHOLZ, SOCIOLOGY OF FAMILIES (2d ed. 2002) (examining important issues in families such as privacy, religion, gender, race, wealth, poverty, marriage, domestic violence, divorce, and remarriage).

77. *See, e.g.*, *Texas State Resources*, AM. ASS'N FOR MARRIAGE & FAM. THERAPY, https://www.aamft.org/Advocacy/State_Resources/Texas.aspx [https://perma.cc/JL2F-JS5Y] (listing the requirements to become a licensed therapist in Texas).

78. *See, e.g.*, *Applying for a License*, TEX. BEHAV. HEALTH EXEC. COUNCIL, https://bhec.texas.gov/texas-state-board-of-social-worker-examiners/applying-for-a-license/

commonly includes bias training and sociological implications of opinion on the parent–child relationship.[79] Other common coursework includes family sociology, psychology, research and statistics, data analysis, anthropology, social service delivery systems, human behavior, social psychology, social work practice, diversity, sociology of illness and health, child development, and political science.[80] For these professionals, even their simple opinions and recommendations are based on extensive skills, research, data, and trained sociological observations.[81]

However, some judges may disagree. As Judge Soukup stated:

> Judges need CASA volunteers in their courts and they really need them to be a party to the action because there is no one else in their courtroom whose only function in that case is to provide a recommendation that's based on just the child's needs . . . . No one else in that courtroom can do that except a volunteer.[82]

Some may argue that CASA testimony uniquely brings common sense and passion for the welfare of children into the courtroom. Even the Texas CASA training guide recognizes that CASAs have the unique ability to enforce "[t]he community's standard for the care and protection of its children."[83] Some may argue that this community enforcement of the welfare of our children is a great resource for the State. For a lot of children, their CASA was instrumental in resolving an unsafe living situation.[84] Volunteers are

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[https://perma.cc/62FV-F36Z] (explaining requirements to become a licensed social worker in Texas).

79. *See, e.g.*, *Implicit Bias Training/Anti-Oppressive Social Work Practice*, GREATER WASH. SOC'Y FOR CLINICAL SOC. WORK, https://www.gwscsw.org/event-5597811 [https://perma.cc/FPN5-FNAX] (describing an implicit bias training for social workers); *Implicit Bias for Social Workers*, GRAND VALLEY STATE UNIV., https://noncredit.gvsu.edu/wconnect/CourseStatus.awp?&course=SOWK00050002 [https://perma.cc/49P6-3JD4] (describing an implicit bias training offered by Grand Valley State University); *Sexuality, Social Work, and Exploring Implicit Bias*, UNIV. OF MICH. SCH. OF SOC. WORK, https://ssw.umich.edu/continuing-education/catalog/course/CAT6523 [https://perma.cc/J2DM-W6LH] (describing a course offering on implicit bias training for health care workers at the University of Michigan); *Advancing Racial Justice in Our Communities: Organizing Together for Racial Justice*, WAYNE STATE UNIV., https://socialwork.wayne.edu/ce/advancing-racial-justice-lecture [https://perma.cc/2BW7-VAB5] (describing a course offering on racial justice and awareness offered by the School of Social Work at Wayne State University).

80. Steve Milano, *Courses Related to Social Work*, CHRON. (Apr. 23, 2021), https://work.chron.com/courses-related-social-work-2899.html [https://perma.cc/2AGL-D43E].

81. *See id.* (explaining the education and licensing requirements for social workers).

82. *Our History*, *supra* note 28.

83. *Texas CASA Pre-Service Training Curriculum Volunteer Manual*, 2018 TEX. CASA 55, https://texascasa.org/wp-content/uploads/2021/06/Volunteer_Training_Manual.pdf [https://perma.cc/8UWE-AVCZ].

84. *See, e.g.*, Monique Calello, *Staunton Family Says CASA Saved Them*, NEWS LEADER (Aug. 5, 2017, 11:25 AM), https://www.newsleader.com/story/news/local/2017/07/13/family-says-casa-saved-them-child-neglect-social-services-addiction-staunton/387531001/ [https://perma.cc/P83E-J6ME] (telling the story of a family who was positively impacted by the

specially equipped to listen to children and observe surroundings as a third party. Especially in cases without any other witnesses, CASAs are able to bring to proceedings facts that otherwise would never come to light. Sometimes, without the involvement of a CASA, children would have remained in unsafe living situations. Sometimes, CASAs are heroes.

Although these stories are certainly heartwarming, this is not always the case. Even if CASAs always helped to save lives, judges and lawyers should stop ignoring the fact that these volunteers are stepping into roles traditionally filled by educated professionals. The reality is that CASAs are still unprofessional volunteers that opine on the nature of parent–child relationships and other complex, delicate topics within a home. A lay volunteer cannot enforce the community's standard for the care and protection of its children without a basic level of understanding of the most crucial scientific and sociological factors of familial relationships. As seen in the robust coursework required to obtain relevant degrees, these opinions do require specialized training and knowledge of the important underlying considerations to develop an opinion about the termination of parental rights. This type of specialized training and knowledge is contemplated by the Federal Rules of Evidence in Rule 701, which requires that for opinions that require specialized knowledge, the opinion must be subject to Rule 702. Given that CASA opinions have an incredible effect on the factfinder, who determines whether parental rights should be terminated, CASA testimony should be subject to the stricter requirements of improper expert testimony.

When testifying about these complex opinions, CASAs are relying on their specialized training through the CASA program and the State. Although this training is not standardized or directly regulated,[85] most CASA programs have some form of training program for the volunteers.[86] For example, the Texas CASA Program requires only twelve hours of in-service training per

CASA program); *see also* Susan Riley, *Court Appointed Special Advocates Volunteers: 'Our Sole Focus Is on the Child*,' EXAM'R-ENTER. (Jan. 13, 2022, 5:26 AM), https://www.examiner-enterprise.com/story/news/2022/01/13/casa-volunteers-our-sole-focus-child/9164345002/ [https://perma.cc/FG4E-F7T6] (discussing how CASAs focus on children's safety); Ladan Nikravan Hayes, *Volunteer to Make a Difference in the Life of a Child in Foster Care in Ventura County*, VC STAR (July 22, 2020, 3:00 AM), https://www.vcstar.com/story/sponsor-story/casa-of-ventura-county/2020/07/22/volunteer-make-difference-life-child-foster-care-ventura-county/3287960001/ [https://perma.cc/6WCG-N87F] (describing CASAs as "everyday hero[es]" who advocate for children to have loving and safe homes).

85. *See* 42 U.S.C. § 5106a(b)(2)(B)(xiii) (requiring only that CASAs have some "training appropriate to the role"); Mulzer & Urs, *supra* note 11, at 42 (describing that there are no uniform requirements or standards for CASA training programs).

86. Although training materials are not available online, most CASA branches at least reference a training. *See, e.g.*, *Becoming a CASA Volunteer*, ARK. STATE CASA ASS'N, https://www.arkansascasa.net/menus/volunteer.html [https://perma.cc/E934-92B6] (referencing a training program); *How You Can Help*, CONN. CASA, https://www.connecticutcasa.org/how-you-can-help/volunteer.html [https://perma.cc/D4UY-9KY3] (same).

year.[87] Within the training program, Texas CASA presents lesson topics such as the role of the CASA, the wellbeing of the child, trauma, mental health, poverty, confidentiality, substance abuse, diversity, domestic violence, bias and cultural competence, and LGBTQ+ youth.[88] While the training materials mostly offer high-level instruction to consider, some topics include specific tests to apply to children in foster care. For example, in the training segment on child abuse and neglect, the training offers specific factors that CASAs should watch for in homes, including a "[m]ismatch between child's temperament or behavior and parent's temperament," "[a]ttachment problems," or even "[p]remature birth or illness at birth."[89] As another example, the training tasks CASAs with applying the "Minimum Sufficient Level of Care" and "Best Interest Principle" analyses to determine whether a child is abused and whether the State should become involved.[90] With over 300 pages of resources on these topics, the CASA organization does make some headway in addressing important issues for their volunteers.[91] Although the depth of that training may have flaws (as discussed in section II(B)(1)), CASA volunteers do depend and rely on this State training to learn how to volunteer and advocate for children in foster care.

Given that CASAs rely on this specialized training to present their findings in the courtroom, any CASA opinions must be subject to the Federal Rules on expert opinion testimony under Rule 702. CASA opinions have an incredible effect on the factfinder to determine whether parental rights should be terminated, and when testifying about those opinions, CASAs are relying on their specialized training through the CASA program and the State.[92] As such, any CASA opinions must be subject to the Federal Rules on expert opinion testimony.[93]

B. The Federal Rules on Expert Opinion Testimony

When a witness's testimony crosses the threshold into expert testimony under Rule 701, the testimony must meet the additional requirements under the Federal Rules of Evidence. For the same reasons that lay witnesses cannot provide opinions based on specialized knowledge, expert witnesses cannot testify to opinions based on their specialization without first establishing

87. *Texas CASA Pre-Service Training Curriculum Volunteer Manual*, *supra* note 83, at 9.

88. *Id.* at 3.

89. *Id.* at 82.

90. *Id.* at 99, 102–03.

91. *See generally id.* (encompassing 300 pages of training resources); *see also supra* text accompanying note 88.

92. For more discussion of the consequences to allowing CASAs to bring implicit biases into the courtroom through improper expert opinions, see *supra* subpart I(A).

93. *See* FED. R. EVID. 701 (noting that opinions based on specialized knowledge fall within the scope of Rule 702).

certain guarantees of reliability. Federal Rule of Evidence 702 and key Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[94] and *Kumho Tire Co. v. Carmichael*[95] outline the requirements for expert witnesses to provide opinion testimony in the courtroom.[96] These requirements are the heart and soul of expert testimony admissibility and are critical to ensuring that trial courts limit opinion testimony to opinions based on sufficient data and reliable methodology. Given that CASAs provide opinions in dependency proceedings that should be based on specialized knowledge, CASAs must be required to adhere to the additional exclusionary rules on expert witnesses.

As Professor Waltz notes: "Before a witness can testify to an expert opinion, examining counsel must lay the necessary foundation by bringing out the witness's training, experience, and special skills."[97] Federal Rule of Evidence 702 guides this witness foundation, stating:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[98]

Before a witness can provide specialized opinion testimony, the witness first must meet these prongs of Rule 702. In order to meet these prongs, the witness must testify to their specialization, the sufficiency of the factual basis, and the reliability of their methodology and application of that methodology to the facts of the case. Although these prongs may seem geared towards "actual scientists," they apply to any witness seeking to provide an opinion based on any unordinary knowledge.[99]

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94. 509 U.S. 579 (1993).

95. 526 U.S. 137 (1999).

96. *See Daubert*, 509 U.S. at 597 ("[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."); *Kumho Tire Co.*, 526 U.S. at 149 (concluding that "*Daubert*'s general principles apply to the expert matters described in Rule 702," not merely science).

97. WALTZ, *supra* note 67, at 803.

98. FED. R. EVID. 702.

99. *See supra* text accompanying note 72.

The expert witness inquiry also requires an analysis of the Supreme Court's jurisprudence in *Daubert* and *Kumho Tire Co*. In *Daubert*, the Supreme Court held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[100] *Daubert* emphasized the important policy restrictions of the Federal Rules of Evidence to limit unreliable or inaccurate testimony and determined that the "primary locus of this [policy] obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify."[101] The *Daubert* Court also emphasized that there are other factors that trial judges may consider when admitting expert opinion testimony, including:

> (1) . . . whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[102]

Trial judges must apply Rule 702, as well as additional *Daubert* considerations, to determine whether the witness qualifies as an expert for the admissibility of opinion testimony.[103]

These judicial limitations on expert testimony were furthered in the Supreme Court's decision in *Kumho Tire Co.* After the decision in *Daubert*, courts across the country were split as to whether the *Daubert* precedent applied to only witnesses with scientific knowledge or to any witness with opinions based on technical or other specialized knowledge.[104] The Supreme

100. *Daubert*, 509 U.S. at 589.

101. *Id.*

102. FED. R. EVID. 702 advisory committee's notes to 2000 amendments; *see also Daubert*, 509 U.S. at 593–94 (outlining these factors). The Supreme Court in *Daubert* incorporated into its factors the original "general acceptance" test for expert opinions from the precedent set in the D.C. Circuit in 1923. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

103. *See Daubert*, 509 U.S. at 592–93 (describing the evidentiary rules on expert testimony as entailing "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue").

104. *See* David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 5–6 (2015) (noting that some courts chose not to apply the *Daubert* reliability test to testimony that was not scientific).

Court settled this issue in *Kumho Tire Co*., stating: "We conclude that *Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[105] Moreover, the Supreme Court emphasized that although the law does grant broad latitude in the trial court's determination of expert witness admissibility, the *Daubert* factors can still help "evaluate the reliability even of experience-based testimony."[106] As an example, the Court stated that the *Daubert* factors can "at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, [such as asking] whether his preparation is of a kind that others in the field would recognize as acceptable."[107] Through *Kumho Tire Co.*, the Supreme Court made clear that the Federal Rules of Evidence on expert testimony, as well as the *Daubert* factors, must be considered when determining the admissibility of expert opinion testimony.

CASA Opinions Are Improper Expert Opinions.—CASA opinion testimony relies on training and expertise, and as such, courts must apply the prongs of Federal Rule of Evidence 702, as well as the Daubert factors, to determine admissibility. Although not all CASA testimony is improper or inadmissible, any opinion testimony that fails to meet the prongs of Rule 702 should be barred from courtrooms. The CASA program was designed to have volunteers with extra eyes and ears around each child's case, ensuring that all relevant information makes its way to the judge for consideration. However, as the program and expert testimony evidentiary limitations have evolved, CASAs do not limit themselves to opinions rationally based on their perception under Rule 701. Instead, CASAs push beyond evidentiary limitations to rely on their training to come to conclusions about social, behavioral, sociological, psychological, and educational aspects of the family unit.[108] Those opinions cannot and will not ever satisfy the Daubert or Rule 702 standards, and as such, those opinions must be excluded from the courtroom.

CASA testimony should fail the first inquiry under the Rule 702 prongs for the testimony's helpfulness to the fact finder to determine a fact in issue. Although Judge Soukup originally founded this program in order to assist the court in determining the outcomes in very difficult cases,[109] that is not the definition of helpful under Rule 702. In order for an opinion to be helpful under the Federal Rules of Evidence, the opinion must actually help the

105. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (referring to FED. R. EVID. 702).
106. *Id.* at 151.
107. *Id.*
108. To read more about the CASA training curriculum, see *supra* section II(A)(1).
109. *See supra* text accompanying notes 28–33.

factfinder understand the evidence or determine a fact in issue.[110] For CASAs, any opinion about their case would not helpfully contribute to the factfinder's understanding about a fact in issue or any evidence. There are some opinions, such as testifying about the weather, the orientation of a map, or an explanation of confusing evidence, that would certainly assist a factfinder in assessing the facts in the case. However, CASA opinions like "I think the parent is bad," or "I believe the child needs to be removed from the home," do not contribute to any factual analysis because the factfinder already has the basic facts to come to their own conclusion about the ultimate issue. Some CASA testimony, though, could be considered helpful. For example, a CASA could testify that "the child was crying last night after his parent yelled" or that "the child had a bruise across his left eye." This factual testimony could be helpful to provide eyes and ears for the court. However, *opinion* testimony without any basis in scientific or professional knowledge of child development is not helpful for the court. Opinions on the ultimate issue in dependency hearings are for the factfinder alone.

Frankly, Judge Soukup would likely disagree with this argument. Some proponents of the CASA program may argue that these opinions are critical to the resolution of child custody cases. Without these volunteers, there may not be a person to arm the judge with important on-the-ground facts about the condition of the home or the child's welfare. Some may argue that the helpfulness of the CASA opinions is invaluable to the child's future because without the presence of the CASA, there may not be someone advocating for the child's wellbeing.[111] Although CASA testimony may make a judge's job easier, these arguments fail to consider that these opinions are more convenient than they are helpful. Without the adequate training to make nuanced, sociological observations about a family or a child's needs, these opinions are unhelpful because they are unreliable.

Under the second and third prongs of Rule 702, CASA testimony does not rely on sufficient facts or a reliable methodology to come to an opinion about the case. Although CASAs do rely on helpful information about the child and family, such as conversations with the child, parents, and teachers, any medical or educational documentation—and more, the data—is still insufficient to come to an expert opinion in dependency hearings; CASAs do not rely on any outside or comparative data to reach their conclusion.[112] The Advisory Committee Notes to Rule 702 provide guidance on determining whether an opinion is based on sufficient facts or data, stating:

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110. *See* FED. R. EVID. 702(a) (requiring that an "expert's . . . knowledge . . . help the trier of fact to understand the evidence or to determine a fact in issue").

111. For examples of similar arguments, see *supra* notes 82–84 and accompanying text.

112. For additional discussion about the roles of a CASA, see *supra* subpart I(C). For additional discussion on the common CASA training curriculum, see *supra* section II(A)(1).

> Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded.[113]

CASAs, typically staffed on only one or two cases at a time,[114] base any opinions about the case exclusively on their experience, limited training, or specialized knowledge. As such, CASAs must demonstrate that the opinion is based on sufficient comparative data just as any other expert in the field would do. Although some may argue that the raw facts and observations are all a CASA may need to come to helpful opinions about a child's condition, this approach ignores the expansive documentation of bias in CASA opinions.[115] Without holding CASAs to a professional expert standard, these opinions will be unreliable. As discussed in section II(A)(1), social workers, mental health professionals, or doctors do not come to conclusions based off the facts of one case but rather rely on conglomerate studies of familial, sociological, and psychological trends to develop a course of action. Scientists do not test their hypothesis one time to come to a conclusion. Professors do not read one book and proclaim something as "fact" to their class. With only the required thirty-or-so hours of training, CASAs cannot use their involvement in one case and develop "expert" opinions for the court based on an experimental vacuum. CASAs must be held to the same standard under Rule 702 as any other expert witness, and to develop such an important opinion in a dependency hearing without any substantial training or experience is not reasonable.

As illustrated in the recent trend towards unnecessary removal of children from families and into foster care, CASAs will also fail the fourth prong of Rule 702 without any reliable application of the methodology to the case. The Advisory Committee Notes to Rule 702 state that the "more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable."[116] Substantial amounts of research show that CASA opinions in dependency hearings are extremely subjective and often based on biased factors such as inadequacy of income

113. FED. R. EVID. 702 advisory committee's notes to 2000 amendments.

114. *The CASA/GAL Model*, *supra* note 44.

115. *See generally* Mulzer & Urs, *supra* note 11 (arguing that the implicit biases of CASAs harm the foster care system).

116. FED. R. EVID. 702 advisory committee's notes to 2000 amendments.

or race.[117] Even if CASAs were relying on some methodology based on their extremely limited experience and training, that methodology has systematically failed in the courtroom. Just as the Advisory Committee Notes state: "An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist."[118] If similar studies found that our doctors or mathematicians were using a methodology that results in a trend towards racism or classism, there would certainly be a legal uproar. In this case, not only are CASAs developing opinions based on the inherently biased factual material in dependency hearings, but the opinions of CASAs regularly impact the substantive right to family.

Even if courts wanted to give CASA witnesses more leeway, CASA testimony is not supported by any of the *Daubert* factors for admissibility. The Supreme Court has developed these additional factors, outside of the prongs of Rule 702, for courts to consider when determining the admissibility of an expert witness opinion, including objectivity, peer review, testability, rates of error, and general acceptance. Although these factors are neither exclusive nor dispositive of the evidentiary inquiry, the fact that CASA opinions fail to invoke any of the *Daubert* factors or built-in evidentiary concerns speaks volumes about the inherent subjectivity and lack of any guarantee of reliability. In fact, the first *Daubert* factor emphasizes these policy concerns better than the rest, comparing the testability of "whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability."[119] CASAs, relying on limited training, experience, education, or extrinsic data, have no objective qualities to their opinions, which are only a culmination of subjectivity and implicit biases. Clearly evidenced by the lack of training and the extensive pattern of implicit bias in dependency hearings, each *Daubert* factor rejects any argument of the admissibility of CASA opinion testimony.[120]

The Advisory Committee Notes to Rule 702 state:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible

117. For more discussion on the subjectivity of CASAs, see *supra* subpart I(A).

118. FED. R. EVID. 702 advisory committee's notes to 2000 amendments.

119. *Id.*

120. There is likely an argument that CASA opinions are generally accepted under the fifth *Daubert* factor. However, *Daubert* held that the general acceptance test was superseded by the Federal Rules of Evidence, and it also made clear that the test is not dispositive of any admissibility. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587, 597 (1993). Additionally, if the legal community used the general acceptance argument to admit any expert that is remotely accepted by the community, then nothing would ever change. There is a problem in the courtroom that CASA opinions are generally accepted, but that does not mean that the analysis is correct.

> degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[121]

Some proponents of the use of CASAs may argue that this standard *supports* the use of CASA testimony in the courtroom. To some, the safety and welfare of a child may seem like common sense. To some, any volunteer, dedicating their time to improve the lives of children, should have the capability of opining whether a child is in a good or bad situation. In some cases, these descriptions could likely be somewhat cut and dry. These arguments, though, ignore the vast implications of these "cut and dry" comments that may fail to consider the scientific and sociological underbelly of such a conclusion. There are scientific intricacies that underlie every simple conclusion, including deeply rooted implicit biases, racial tensions, symptoms of poverty, or lack of family resources. Without an extensive amount of training to use these sociological considerations as a backbone to any opinion shared in the courtroom, these opinions risk not only being incorrect but also unjust and unnecessary.

Although this entire Part dissected the Federal Rules of Evidence and Supreme Court line of precedent to argue that CASA opinion testimony must be excluded, the real "common sense inquiry" is whether any family would trust the opinion of an untrained stranger, coming into their home unannounced, to decide whether they were "good enough" parents to maintain custody over their children. Adopted by the Advisory Committee Notes, this common sense inquiry is perhaps the strongest argument against the admissibility of CASA opinion testimony. Without the required helpfulness or required sufficiency of data, a lay volunteer's opinion—uncontrolled for the immense amount of sociological and scientific research on families and children—regarding the fitness of a parent must be against the common sense of Americans. Given that CASA testimony fails to provide helpful information to the court, and fails to apply any reliable methodology, CASAs with limited training, education, or experience should not have the opportunity to tell the court who has the right to raise their child.

III. Examples of the Failure to Regulate CASA Testimony in the Courtroom

In finding examples of improper CASA testimony, this Note compiled hundreds of trial court and appellate decisions from across the country that reference CASA testimony. This Part outlines recent cases to demonstrate the improper nature of CASA opinions, including improper opinions on the details of the parent–child relationship and improper opinions on medical

121. FED. R. EVID. 702 advisory committee's notes to 1972 proposed rules (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

issues. Next, this Part turns to different state approaches to handling the admissibility of CASA testimony to demonstrate that some courts have started to suggest that expert evidentiary rules should apply. The common thread in these appellate decisions is that CASAs are given too much evidentiary leeway at the expense of parents in dependency hearings, and courts should reconsider accepting CASA opinions on the parent–child relationship, the child's physical health, and analysis of medical documents.

A. Improper Expert Opinions on the Parent–Child Relationship

One of the most common improper expert opinions of CASAs relates to the parent–child relationship. Although some CASA observations are substantially beneficial and admissible, courts regularly allow CASAs to explain opinions on otherwise general observations. Any opinion on the intimate, personal relationship between a parent and child must rely on specialized knowledge, such as extensive sociological or psychological training, on identifying issues in the family dynamic under Federal Rule of Evidence 702. As such, without the proper foundation discussed in Part II, these improper expert opinions must be excluded from the record.

For example, a CASA testified in a Delaware Family Court that, in her opinion, a father's parental rights should be terminated because he "behave[d] more like a *buddy* than a parent."[122] The CASA, without introducing any factual observations or anything objectively negative about the father, testified that the "Father and [child] get along, [the child] knows who [the] Father is, and that there is physical affection between the two during visits."[123] However, the CASA also ultimately opined that she "does not see a parent–child bond between the two."[124] In a separate section of the appellate opinion, labeled "Position of the CASA," the court stated:

> The CASA fully supports granting the [termination of parental rights], as she believes it is in [the child's] best interests. She testified that [the child] needs a stable home and a family that can provide a firm structure for [the child] and can consistently and lovingly work on his behavior problems.[125]

Further, the CASA testified that she believed the "Father has good intentions, but is too young and inexperienced to be the parent that [the child] needs."[126] As a result, considering the CASA's position, the court concluded that clear

122. Dep't of Servs. for Child., Youth & Their Fams. v. E.C., No. 10-09-04TN, 2012 WL 3568606, at *11 (Del. Fam. Ct. Mar. 9, 2012) (emphasis added).

123. *Id.* at *11.

124. *Id.*

125. *Id.* at *18.

126. *Id.*

and convincing evidence demonstrated that the father's rights should be terminated.[127]

The counsel for the parents never objected to the CASA testimony, and the court never considered whether this testimony included improper expert opinion. However, the CASA's testimony was a staple example of an improper lay and expert opinion, as she was testifying to her *opinion* of the parent–child relationship, which would require specialized knowledge rather than factual observations.[128] An unqualified witness should never be able to provide an opinion on whether a father was too "buddy-buddy" with his toddler son or whether a father living with his girlfriend's family[129]—which was likely his only option due to financial limitation—made him an unfit father. Although a CASA could offer factual testimony that she noticed a father was friendly with his son or that the father was living with his girlfriend's family, a CASA cannot provide an opinion about those observations when the opinion is based on specialized knowledge. With only twelve hours of training and a lifetime of implicit biases, the CASA in this case would never meet the standards set out by Federal Rule of Evidence 702 or the Supreme Court's holdings in *Daubert* or *Kumho Tire Co*. to use these facts as a basis to an opinion that "this father's parental rights should be terminated."[130] After all, fathers from all different families, religions, cultures, and socioeconomic statuses may behave differently than the CASA may have experienced in her life, and that difference could be influencing her opinion without expert qualifications.[131]

Without the proper experience, training, and education, any CASA cannot use facts to develop an expert opinion, especially when that opinion is not helpful to the factfinder. As required by Federal Rule of Evidence 702(a), an expert opinion must also be *helpful* to the factfinder to determine a material fact in the case.[132] In the example above, the CASA's opinion did not add anything to the analysis. The CASA provided her observations, such as the fact that the father was friendly and was physically affectionate with his son. The role of the factfinder—not the CASA—is to utilize these observations in order to come to a conclusion about the termination of parental rights. Improper opinions on the parent–child relationship only

127. *Id.* at *19.

128. For further discussion of the rules regarding lay and expert opinion testimony, see *supra* subparts II(A)–(B).

129. Part of the CASA's opinion seems to have been based on the father not having a place of his own, or at least based on the father not having taken concrete action to secure housing. *See E.C.*, 2012 WL 3568606, at *5 (explaining how the CASA testified to repeatedly warning the father about obtaining his own place).

130. For a longer discussion of the evidentiary standards on expert testimony, see *supra* Part II.

131. For a longer discussion of the effects of implicit biases on CASA testimony, see *supra* Part I.

132. FED. R. EVID. 702(a).

emotionally inflame the jury without providing any probative value to the case.[133]

This case is an example of the classic improper expert opinions offered by CASAs in dependency proceedings. Not only are CASAs not properly qualified by education, training, or experience to determine the health of a parent–child relationship, but such opinions also offer no probative value to the case. These opinions infringe on the duty of the factfinder and have none of the guarantees of reliability built into the Federal Rules of Evidence or Supreme Court standards on opinion testimony.

B. Improper Expert Opinions on Medical Issues

Another common source for improper expert opinion in dependency hearings is the health of a child. Given that CASAs are not qualified as doctors or medical professionals, any lay opinion about a health issue is in violation of Federal Rules of Evidence 701 and 702.

In a recent case in Texas, a CASA recommended termination of parental rights because of the medical condition of the child.[134] Although the CASA was not a doctor (but had attended some of the medical appointments), the CASA testified in open court about the child's diagnoses and the consequences of those diagnoses.[135] She testified that the child was developmentally only at an eight-month level and that "she [could not] swallow very well. . . . You [had] to watch her all the time."[136] The CASA also testified that as a result of the child's medical conditions, the child could not be "rocked vigorously or anything like that."[137] During the CASA's testimony, she stated that

> [the father] had to be redirected three times that I can recall. That was about a month after she had her [procedure]. Once, he was bouncing her on his knee and that was [] very dangerous. She did not have the neck strength at that point, and she also spits up. So she could have choked. And then the other two times, it was just the way he was holding her that he had to be redirected to hold her a different way.[138]

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133. Although not the focus of this argument, Rule 403 would also render this testimony inadmissible, as it states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. In this case, the danger of the prejudicial effect of the CASA's improper testimony would substantially outweigh the probative value of the opinion to the case.

134. *Interest of J.N.P.*, No. 09-20-00245-CV, 2021 WL 922338, at *5 (Tex. App.—Beaumont Mar. 11, 2021, no pet.) (mem. op.).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

The CASA relied on her apparent medical knowledge from attending a few appointments to then conclude that the father did not understand or try to understand the child's needs and, even worse, that "[the father] seemed annoyed at being corrected."[139] She recommended that the court terminate the father's parental rights.[140]

Regardless of the child's health condition, the CASA's testimony crossed the line from layperson testimony to expert opinions. Although the CASA could have shared factual observations about the child and home, the CASA relied on medical knowledge that she learned from a doctor or her own opinions about the parenting of the child. The CASA was not a doctor, nor did the court choose to use information straight from the child's doctor or medical records. Instead, the court allowed the CASA to testify to information for which she does not have the expertise to weaponize against any parent. Any layperson, let alone a CASA with so much power over the substantial rights of a father and his relationship to his child, should never be able to testify to the effect of concrete medical conditions and the parental relationship.

C. Different Approaches to Respond to the Improper Expert Opinions of CASAs

Some courts have recognized that CASAs are not qualified as expert witnesses under Federal Rule of Evidence 702 but still choose to allow CASAs to make recommendations to the factfinder or, despite the influence of CASAs over the factfinder, decide to affirm the lower court's decision to terminate parental rights.

In 2002, a CASA in Texas was asked to testify about her opinion of the psychological states of the children as a basis for her recommendation to terminate parental rights.[141] In response, the CASA stated that due to her limited training, she was not qualified to give an expert opinion.[142] Although the parent's attorney objected to the CASA's lack of qualification, the court instructed the jury that the CASA was not an expert and *still* allowed her to continue her testimony about her recommendation to terminate parental rights, as well as opine about the psychological states of the children.[143] The

139. *See id.* (describing the CASA's involvement in the child's medical procedures).

140. *Id.*

141. *See* Trevino v. Tex. Dep't of Protective and Regul. Servs., No. 03-01-00038-CV, 2002 WL 246328, at *6, *8 (Tex. App.—Austin Feb. 22, 2002, pet. denied) (mem. op.) ("[The CASA] said she was not qualified to give an expert opinion as to the children's psychological states.").

142. *See id.* at *8 ("[The CASA] testified that she had not completed any state bar training, but had completed the forty-hour initial CASA training and the yearly requirement of ten to twelve hours of continuing CASA training. She was not aware of any other requirements that were established for guardians ad litem.").

143. *Id.* at *6, *8. The court relied on the Texas statute on the role of CASAs in the courtroom. *Id.* at *8 (citing Tex. Fam. Code Ann. § 107.002(c)(6)). The Texas statute, similar to CAPTA and

reviewing court found no error in the admissibility of the CASA's improper expert testimony and affirmed the termination of parental rights.[144] Not only is it difficult to imagine a clearer violation of Federal Rule of Evidence 702 than an admission by the CASA that they are unqualified to provide an opinion on a subject, but the reviewing court's approach to ignoring the blatant evidentiary error dismisses the influence of CASAs over the factfinder.

As another example of the evidentiary inconsistency, the Supreme Court of Montana found error in allowing a CASA to testify to the results of a parent's drug test.[145] Instead of requiring the government to bring an actual expert to testify as to the contents of the alleged drug tests, the district judge allowed the interpretation of the drug test results to be admitted through the CASA.[146] Instead of laying the proper foundation, the court allowed the government to use the CASA as the source for the interpretation of a medical record in direct violation of Federal Rule of Evidence 702.[147] The Supreme Court of Montana held that this testimony was an improper expert opinion, stating:

> [T]he Department did not elicit any testimony regarding CASA Lux's scientific skill, education, or expertise qualifying her to testify regarding the hair and urinalysis drug testing process or specimen analysis. . . . Based on this record, we conclude there was inadequate foundation to demonstrate CASA Lux had the requisite knowledge, by training or education, to satisfy the requirements of [Montana Rule of Evidence] 702.[148]

Despite the overt evidentiary error, the Supreme Court of Montana still affirmed the lower court's termination of parental rights.[149]

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other state statutes, allows CASAs to make recommendations in the courtroom regarding the future of the child. *See* Tex. Fam. Code Ann. § 107.002(e) (permitting the recommendation unless the guardian ad litem is an attorney "who has been appointed in the dual role"). If this argument was to be expanded beyond page limitations, it would address that these statutes do not have any bearing on this analysis, as evidentiary rules and policy make clear that any CASA recommendations should be subject to the standards of evidentiary rules on expert testimony.

144. *Trevino*, 2002 WL 246328, at *10, *12.

145. *In re* I.M., 414 P.3d 797, 803 (Mont. 2018).

146. *Id.* at 800.

147. Although not the subject of this Note, there was also an evidentiary error with the admissibility of hearsay evidence. In this case, the trial judge stated, "Well, there's no doubt that the reports are hearsay. The other issue raised was whether or not they would, the reports would get in through the business record exception, which . . . would require a foundation from the creating entity . . . ." *Id*. For evidentiary rules on the admissibility of hearsay evidence, see FED. R. EVID. 801–807.

148. *In re* I.M., 414 P.3d at 803.

149. *See id.* at 806 (concluding that the evidentiary error "did not result in substantial prejudice to the parents and [thus did] not warrant reversal").

As evidenced by the examples above, CASAs constantly delve into material that crosses the line from an admissible layperson opinion under Federal Rule of Evidence 701 into opinions that require specialized, technical, or scientific knowledge. Although CASAs do bring extremely important information to each case, courts cannot abuse the role of CASAs to allow inadmissible, unreliable, and unhelpful opinions based on the lack of training or implicit biases of CASA testimony. The consistent evidentiary error in dependency hearings in admitting improper expert opinions violates the right to procedural due process.

IV. The Unconstitutionality of the Improper Expert Opinions of CASAs in the Courtroom

Life, liberty, and property are the core of our constitutional foundation, and those core rights cannot be taken away from individuals without procedural due process.[150] In order to ensure that families are afforded procedural due process in dependency hearings, the Supreme Court has established three elements to define the requirements of due process: (1) "the private interests at stake," (2) "the government's interest," and (3) "the risk that the procedures used will lead to erroneous decisions."[151] This Part first addresses each of these elements, in turn, and applies each to the admissibility of CASA testimony. Next, this Part argues that the Due Process Clause requires the exclusion of the improper expert testimony of CASAs to conform with the Federal Rules of Evidence and other state evidentiary standards.[152]

The Supreme Court considered the procedural due process limitations in dependency hearings in *Lassiter v. Department of Social Services of Durham County*,[153] where the Court held that indigent parents do not have the right to appointed counsel in dependency hearings.[154] Although the facts in *Lassiter* do not consider the admissibility of CASA testimony, the Court applied the three procedural due process elements of *Mathews v. Eldridge*[155]

150. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

151. Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 27, 31 (1981) (applying these factors from *Mathews*, 424 U.S. at 335 to dependency hearings).

152. This constitutional analysis focuses on the standards of the Federal Rules of Evidence (described in Part II of this Note) but recognizes that the Federal Rules of Evidence do not apply in state courts. However, this analysis applies to any argument that states with substantially similar evidentiary rules on expert opinions also violate the Due Process Clause by failure to limit the improper expert opinions of CASAs.

153. 452 U.S. 18 (1981).

154. *Id.* at 31, 33–34.

155. 424 U.S. 319 (1976).

to dependency hearings and analyzed each of those elements under the specific facts of the case.[156] This Part uses that procedural due process framework, along with Justice Blackmun's *Lassiter* dissent, which focuses on the Supreme Court's jurisprudence on parental rights, to analyze whether the *Mathews* factors weigh in favor of barring improper CASA opinions. While the Court in *Lassiter* held that the balance of the *Mathews* factors does not require courts to appoint counsel for indigent parents,[157] the Court did provide a due process framework to apply to further constitutional inquiries in dependency hearings.[158] Those same elements are used in the subparts below to argue that the admissibility of the improper expert opinions of CASAs is a violation of the Due Process Clause.[159]

A. The First Mathews *Element: The Parental Interest in Dependency Hearings*

The first of the Supreme Court elements in *Mathews* requires courts to determine the private interests at stake in dependency hearings. In dependency hearings, the private interest at stake is one of the most fundamental and intimate relationships to exist—the right to family.[160] As the *Lassiter* majority wrote: "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[161] In fact, the Supreme Court has consistently held that the right to a family is "[f]ar more precious . . . than property rights"[162] and is "essential to the orderly pursuit of happiness by free men."[163] Additionally, the Supreme Court has held that the protections of the

156. *See Lassiter*, 452 U.S. at 27, 32–33 ("We must balance these [*Mathews* factors] against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.").

157. It is worth noting that even before this case was decided, many states had already guaranteed indigent parents appointed counsel. *Id.* at 34 (noting that "33 States and the District of Columbia [at the time] provide[d] statutorily for the appointment of counsel in termination cases").

158. Although this Note follows *Lassiter*'s approach of using the *Mathews* factors, the Supreme Court has also established that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970).

159. *See Mathews*, 424 U.S. at 333 ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

160. Although it was not the main argument about the private interest at stake in dependency proceedings, Justice Stevens, in his dissent to *Lassiter*, recognized that parental termination is "a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed." *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting).

161. *Id.* at 27 (majority opinion) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

162. *Id.* at 38 (Blackmun, J., dissenting) (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).

163. *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

Fourteenth Amendment apply to the "freedom of personal choice in matters of family life."[164] In the Supreme Court's long history of analysis of the right to family, one thing is clear: Parents have the constitutional right to the custody of their children, and that right cannot be taken away without procedural due process.

The State's sole aim in dependency hearings is to terminate the constitutional right to parental custody. The *Lassiter* majority held that "the parent's interest is an extremely important one."[165] In his dissent to the majority opinion in *Lassiter*, Justice Blackmun criticized the majority's diminishment of the importance of the parent's private interests in dependency hearings, stating: "A termination of parental rights is both *total* and *irrevocable*. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development."[166] Further, in his analysis of the private interest in dependency hearings, Justice Blackmun stated that the "magnitude of this deprivation is of *critical significance in the due process calculus*, for the process to which an individual is entitled is in part determined 'by the extent to which he may be "condemned to suffer grievous loss."'"[167] To lose the right to the custody of children is one of the most painful losses that any person could suffer at the hands of the judicial system. In order to properly calculate the weight of the private interest at stake against other state interests, courts must recognize the importance of this constitutional right as an integral function of American society and culture.

The Supreme Court has established through the long line of substantive due process cases that the protections of the Fourteenth Amendment extend to the fundamental right to family. The application of the first *Mathews* factor in *Lassiter* determined that the private interest of a parent's right to their child is inarguably fundamental and protected by the guarantees of due process. The Supreme Court in *Lassiter* determined that parents have the right to procedural due process, and as such, courts must use the *Mathews* factors to determine whether procedural due process bars the admissibility of improper CASA expert opinions.

164. *Id.* (citing Smith v. Org. of Foster Fams., 431 U.S. 816, 845 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

165. *Id.* at 31 (majority opinion).

166. *Id.* at 39 (Blackmun, J., dissenting) (emphasis added).

167. *Id.* at 40 (emphasis added) (quoting Goldberg v. Kelly, 397 U.S. 254, 263 (1970)).

B. The Second Mathews *Element: The State Interest in Dependency Hearings*

However powerful the parent's interest in the constitutional right of custody of their children may be, courts must balance that interest against any interests of the State. Just as the Supreme Court recognized in *Lassiter*, "the State has an urgent interest in the welfare of the child," and the State "shares the parent's interest in an accurate and just decision."[168] However, the State's interest in protecting the wellbeing of its children is more complicated given the judicial trend towards unnecessary, wrongful terminations.[169] There is no legitimate state interest in the unnecessary or wrongful termination of parental rights, and the State's shared interest in an accurate and just decision demands the application of the evidentiary policy concerns in the Federal Rules of Evidence.[170] Although, of course, the State has an interest in protecting the wellbeing of children. Without the State's involvement in these proceedings, there are children that would still be living in abusive or dangerously neglectful homes. The State's goal in protecting its children is one of the most important roles of the state government; an investment in the safe future of children is an investment in the future population of the State. However, the State is also violating its own interest when it "'needlessly separates' the parent from the child."[171] And as seen through recent studies, the CASA program disproportionately leads to the removal of children from their homes and a higher cost imposed on the State.[172] As such, an analysis of the State's interest in justice, fairness, and the wellbeing of children must weigh in favor of ensuring that CASA testimony does not include improper expert opinions.

As discussed in Part I, unnecessary and wrongful parental terminations have become far more likely in the past decade. As evidenced by the spike in children in foster care, as well as the implicit biases demonstrated through the study of CASA recommendations, there has been a significant shift in erroneous parental terminations since *Lassiter* was decided in 1981. This

168. *Id.* at 27 (majority opinion).

169. For more discussion of the trend towards unnecessary parental terminations, see *supra* subpart I(A).

170. *See Lassiter*, 452 U.S. at 47–48 (Blackmun, J., dissenting) ("'[T]he State spites its own articulated goals when it needlessly separates' the parent from the child." (quoting Stanley v. Illinois, 405 U.S. 645, 653 (1972))).

171. *Id.*

172. *See, e.g.*, Chang, *supra* note 11 (discussing a study that "found that Texas foster children with CASA volunteers — who are appointed by judges to advocate for the best interests of foster children — are 19% less likely to be placed in permanent homes than those without CASA volunteers"); *see also* Mulzer & Urs, *supra* note 11, at 44 (discussing a study where "CASA volunteers were found to *reduce* the likelihood of a successful reunification between children and their parents" (citing CALIBER ASSOCS., EVALUATION OF CASA REPRESENTATION: FINAL REPORT 43, 48 (2004))).

analysis relies heavily on Justice Blackmun's dissent, which succinctly relies on the Supreme Court's position on parental rights, to apply to the current state of improper dependency proceedings. *Lassiter*, now outdated, fails to consider the weight of unnecessary terminations at the hands of biased volunteer testimony. Unnecessary terminations impose an immense cost of foster care onto the State, which is surely in violation of the State's interest of efficiency. But more important than the price of foster care, there is far more literature on the drastic decline of a child's physical, mental, emotional, and educational wellbeing when removed from their family than could ever be cited in these few pages. If, as the majority in *Lassiter* reasons, the State's interest in the protection of children and pursuit of justice is equivalent to a parent's fundamental right to family, then the current state of dependency proceedings is now in direct violation of state and parental interests and must be resolved to protect the wellbeing of our children. As such, a balance of the second *Mathews* element also supports the conclusion that the admission of improper expert opinions is a violation of procedural due process in dependency hearings.

C. The Third Mathews *Element: The Risk of Error in Dependency Hearings*

In order to determine whether the admissibility of improper expert testimony in dependency hearings is a violation of procedural due process, courts must decide whether the inclusion of that improper expert testimony increases the risk of erroneous terminations of parental rights. In *Lassiter*, the Court held that "the complexity of [dependency] proceeding[s] and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high."[173] However, there are a few discrepancies between *Lassiter* and the current state of dependency hearings that must be discussed to demonstrate the substantial risk of error when the improper expert opinion of CASAs is included on the record.

First, the case in *Lassiter* had no testifying expert witnesses, and "the case presented no specially troublesome points of law, either procedural or substantive."[174] Second, the Court balanced the *Mathews* factors compared to the weight of *that* plaintiff's evidence—not the weight of evidence that may arise in general dependency hearings.[175] Third, the Court noted that "the

173. *Lassiter*, 452 U.S. at 31.

174. *Id.* at 32.

175. *Id.* The Court even held that "[w]hile hearsay evidence was no doubt admitted . . . the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference." *Id.* at 32–33. The foundation of the Court's decision to not require the appointment of counsel for indigent parents

petition to terminate Ms. Lassiter's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based."[176] But what if, in another case, there are allegations with criminal implications? What if there are expert witnesses involved in the proceeding? What if there are complicated evidentiary issues, such as the admissibility of CASA opinions? The differences between the analysis in *Lassiter* and this argument hinge on the significant changes in dependency hearings since 1981, as well as the application of the *Mathews* elements to dependency hearings in general.

Although the risk of error may not have been insupportably high in Ms. Lassiter's case, that conclusion is not the case for the erroneous, unsupported, and unnecessary separations that are a dominant force in the current foster care system. Just because in *Lassiter* no expert witness testified, there were no criminal charge implications, or there was so much evidence against Ms. Lassiter, does not mean that there is *not* a violation of procedural due process when courts erroneously admit improper expert opinion testimony in dependency hearings.[177] The reality of the current foster care system is that not all evidentiary errors in dependency hearings are harmless. The constant disregard of the policies for reliability and accuracy in the Federal Rules of Evidence is not harmless. The trend of the judicial system to unnecessarily terminate parental rights is not harmless.[178] Although the respondent in *Lassiter* argued that dependency hearings rarely "produce difficult points of evidentiary law, or even of substantive law,"[179] that is no longer the case. The Supreme Court recognized some of these changes in the system, stating that "the ultimate issues with which a termination hearing deals are not always simple . . . . Expert medical and psychiatric testimony . . . is sometimes presented."[180] Now, though, in virtually every dependency proceeding, CASAs testify within the gray area of the Rules of Evidence on expert testimony.

As discussed in Part III, there are significant evidentiary issues with the admission of CASA opinions. Moreover, given the substantial risk of

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was the fact that "the complexity of [a dependency] proceeding" was just not enough "to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Id.* at 31.

176. *Id.* at 32.

177. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

178. The argument recognizes that although the system may be broken, there are elements of CASA testimony that do support just outcomes and protect the welfare of children. In *Mathews*, the Supreme Court wrote that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 349. That idea is still a part of this argument but does not dismiss the violation of evidentiary law and due process to admit improper expert opinion testimony.

179. *Lassiter*, 452 U.S. at 29.

180. *Id.* at 30.

admitted non-expert and biased testimony of CASAs, there are significant risks to the inclusion of such testimony. The Supreme Court in *Mathews* even recognized that the roles of credibility and veracity, both significant risks in CASA testimony, are a part of the calculus to determine risk of error.[181] Judges must make difficult decisions. Given the complexity of the law and influence of the judge, the rate of error in dependency proceedings by improper, uninformed CASA opinion testimony is insupportably high and a violation of procedural due process. This evidentiary error has the potential to erroneously and unfairly terminate the constitutional right of a parent to the custody of their child, and as such, is a violation of procedural due process.

D. The Improper Expert Testimony Is a Violation of Procedural Due Process

The total balance of the three *Mathews* factors clearly weighs heavily against the admissibility of improper expert testimony to protect the constitutional right to family. In his dissent to *Lassiter*, Justice Blackmun wrote that because

> the threatened loss of liberty [to the right of family] is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.[182]

In this case, the analysis is exactly the same, and there is no sound basis to allow improper CASA testimony into dependency proceedings in light of

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181. *See Mathews*, 424 U.S. at 344 ("To be sure, credibility and veracity may be a factor . . . in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."). In further support that credibility and veracity significantly affect the due process inquiry, the Supreme Court adopted language from *Greene v. McElroy*, stating:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Greene v. McElroy, 360 U.S. 474, 496–97 (1959)).

182. *Lassiter*, 452 U.S. at 48 (Blackmun, J., dissenting).

(1) the significant threat to constitutional liberty, (2) the adversarial nature of the State, (3) the interest of the State to protect children from unnecessary termination, (4) the negligible cost of excluding improper opinions, and (5) the substantial risk of error that improper CASA testimony brings into the courtroom.

Conclusion

There are currently almost 400,000 children in the foster care system.[183] Although there are cases that removed children from abusive home environments, the vast majority of foster children are removed from their families based on allegations of neglect. Studies show that these allegations of neglect tend to cause the unnecessary removal of children from their homes and terminate parental rights based on implicit racial and socioeconomic biases. Court-appointed special advocates (CASAs) are appointed by juvenile courts to investigate these families and deliver recommendations to the court, but these volunteers have implicit biases of their own. Without adequate training, experience, or education, these volunteers cannot accurately remove their implicit biases from their opinions to the court about the nature of the parent–child relationship, any medical diagnoses in the family, and the quality of the home environment. As such, any CASA opinions that should be reserved for experts with specialized knowledge are improper expert opinions under Federal Rules of Evidence 701 and 702. In addition, these opinions also violate the evidentiary policies set out in the Supreme Court's holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co. v. Carmichael*. Given the influence of the opinions of these volunteers over the factfinder, the evidentiary error of the admission of improper expert opinions substantially increases the risk of erroneous parental terminations. The application of the Supreme Court's balancing test in *Mathews v. Eldridge* clearly concludes that this evidentiary error violates the parental right to procedural due process and the long-established constitutional right to the companionship, care, custody, and management of his or her children.

183. *New Data Shows a Consistent Decrease of Children in Foster Care*, ADMIN. FOR CHILD. & FAMS. (Mar. 20, 2024), https://www.acf.hhs.gov/media/press/2024/new-data-shows-consistent-decrease-children-foster-care [https://perma.cc/KZ8L-6LM7].