



# *PEOPLE V. GABRIESHESKI*

IMPLICATIONS FOR GALS AND CHILDREN/YOUTH

## *People v. Gabriesheski, 08SC945*

- Court of Appeals had jurisdiction.
- Because a child who is the subject of a D&N proceeding is not the client of a court-appointed GAL, neither A-C privilege nor the ethical rules governing attorney confidentiality obligations to a client strictly apply.
- Trial court did not make sufficient findings to determine that statements made by parent were in compliance with court treatment orders and subject to 19-3-207 protections.

What about the GAL?

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BIG DEAL

*or*

NO BIG DEAL

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# Just so you know . . .

- We are the Office of the Child's Representative.
- We select, oversee, and train GALs.
- We manage the State's dollars for GAL services.
- We filed an amicus brief and participated in oral argument.

# History

- Court of Appeals decision announced 9/4/08.
- Petition for Cert granted 4/27/2009.
- At issue 3/20/2010.
- Oral argument held 9/28/10.
- Supreme Court decision announced 10/24/11.


## Question on which cert. was granted

*"Whether the Court of Appeals erred in concluding that conversations between a child and her GAL in a dependency and neglect case are confidential communications protected by the attorney-client privilege."*

## Court of Appeals' holding

*"The trial court ruled that, in representing the child's best interests, the GAL was also representing the child, and thus, under CJD 04-06 and Colo. RPC 1.6, was precluded from divulging T.W.'s communications to her in the absence of a waiver by T.W. We find no error in that ruling."*

- C.W. was a child in a D&N proceeding.
- GAL was appointed in D&N proceeding.
- Simultaneous criminal proceeding: SAC in which child was alleged victim.
- Previously in the district court case, defense counsel sought discovery of GAL's file & obtained discovery to file, except for personal notes & memoranda.

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- Prosecutor sought to call GAL as witness at trial to testify about the following statements child had made to her:
    - it would make things easier for her if she admitted to lying about the sexual abuse;
    - it would make her mother happy if she said the abuse never occurred.

# What was at issue. . .

#1 Status of information GALs learned during investigation & representation of children in D&N (and possibly other) proceedings.

➤ Rule 1.6

➤ 13-90-107



# What was at issue. . .

#2 Attorney GAL best interests model of representation for children in Colorado.



# Title 19 provisions re GALs

- 19-1-103(59) defines GAL as “a person appointed by the court to act in the best interests of a person whom the person appointed is representing in proceedings under this title and who, if appointed to represent a person in a [D&N] proceeding . . . must be an attorney-at-law licensed to practice in Colorado.”

## Title 19 provisions *cont.*

- 19-1-103(31) defines counsel as “an attorney-at-law who acts as a person’s legal advisor or who represents a person in court.”

## Title 19 provisions *cont.*

- 19-1-111 is the general GAL appointment statute.
  - Mandates appointment of GAL for the child in D&N proceedings.
  - Sets forth discretionary appointment of GALs for children in other proceedings and for parents.
  - States that GAL “shall have the right to participate in all proceedings as a party, except in JD cases.”

## Title 19 provisions *cont.*

- 19-3-203 pertains to GAL in D&N proceeding.
  - Reaffirms need to appoint;
  - Mandates provision of reports and updates re significant case developments to GAL;
  - Sets forth specific responsibilities for GAL.

## Title 19 provisions *cont.*

- 19-3-203 states that GAL “shall be charged in general with the representation of the child’s interests.” To that end, GAL must:
  - Make further investigation as GAL deems necessary to ascertain the facts;
  - Talk with or observe the child;
  - Examine and cross-examine witnesses;
  - Introduce and examine the GAL’s own witnesses;

## 19-3-203 *cont*

- Introduce and examine the GAL's own witnesses;
- Make recommendations to court concerning child's welfare;
- Appeal matters to COA or SCt;
- Participate further in proceedings to the degree necessary to adequately represent the child;

## 19-3-203 *cont*

- In addition, if in best interests of the child, seek to assure that reasonable efforts are being made to prevent unnecessary placement of the child out of home/ facilitate reunification/find other safe and permanent living arrangement.
- Child's health and safety shall be paramount concern.

## Title 19 provisions *cont.*

- 19-3-602(3) requires appointment of GAL “to represent the child’s best interests in any hearing determining the involuntary termination of parental rights.”
- 19-3-606 requires GAL to submit a written report to court at post-termination review; report must contain recommendations based on independent investigation.

# Role of GAL

- Something distinct from traditional counsel
- Best interests/ heightened responsibility

*In re J.E.B.*, 854 P.2d 1372  
(Colo App. 1993)

- If GAL's recommendations are based on evidence received by the court from sources other than the GAL, they are analogous to arguments made by counsel and GAL should not be called as witness.
- If GAL presents recommendation based on an independent investigation, the facts of which have not otherwise been introduced into evidence, GAL functions as witness and is subject to examination and cross-examination.

# Role of GAL

- 13-91-105(1)(a)(1) requires OCR to make recommendations to chief justice for standards for GALs.
- CJD 04-06.

# Role of GAL

- Among standards, CJD states GALs are subject to all rules and standards of the legal profession, including the additional responsibilities of C.R.P.C. 1.14 .

# Role of GAL

- C.R.P.C. 1.14 at time of COA decision
  - When client's capacity to make adequately informed decisions is impaired, lawyer must maintain, as far as is reasonably possible, normal client-lawyer relationship.
  - Impairment may impose additional responsibilities.
  - Lawyer is not relieved of obligation to obtain information from client to extent possible.
  - Protective action only when lawyer reasonably believes client cannot act in client's own interests.
  
- Current version of C.R.P.C. 1.14
  - Seeking appointment of GAL listed as protective action.

# Role of GAL

- COA relied on CJD 04-06 to say that GALs are bound by all rules of professional conduct as any other attorneys, including 1.6 (and attorney-client privilege).

# Role of GAL

- Implications for best interests
  - What about 1.2, which states that lawyer must abide by a client's decision concerning the objectives of representation?
  - What about information relevant to the child's best interests?

## Back to confidentiality/privilege

- How do GALs fulfill statutory responsibility to represent best interests if information is confidential/privileged?
- Example of child who tells GAL she wants to stay with aunt, but also reveals safety concerns with placement
  - 1.6 protects more than just the statements . . .
  - 1.14 solution is to get GAL appointed.

# National Movement re Right to Counsel in D&N proceedings

- Counsel versus best interests
  - ABA
  - NACC
- Reasons for counsel
  - Children's rights (liberty interests & fundamental rights at stake)
  - Equal protection/treatment
  - Youth voice/empowerment
  - Open communication
  - Concerns with substitute judgment

# Supreme Court Decision

- C.R.P.C. and statutes are silent re existence of attorney-client relationship between child and GAL.
- While GALs are statutorily assigned obligations usually associated with legal representation . . . they are ultimately tasked with acting on behalf of the child's health, safety, and welfare.
- CJD does not purport to designate A-C relationship and does not create an A-C privilege.

# Supreme Court decision

- “In the absence of some clearer expression of legislative intent to do so, we are unwilling to impute to the statutory guardian ad litem-child relationship the legislatively-imposed, evidentiary consequences of an attorney-client relationship.”

# Dissenting opinion

- Concern that GALs will be required to disclose information about children even when it is not in the child's best interests to disclose.
- Outcome is at odds with a "child's fundamental right to be represented in court" and fails to protect legal rights.
- Statutory scheme invokes hybrid role; child is client; GAL represents both wishes and BI.
- A-C privilege; GAL decides whether to assert.

# Impact

- Children, youth, and young adults
- GALs
- Courts

# What now?

- What, if anything, protects the statements children/youth/young adults make to their GALs and the information the GAL obtains in the investigation?

# Protections

- 19-1-307
- 19-3-207
- GAL's statutory obligation to act in the best interest of the child and to represent the child's interest
- HIPAA?
- Federal statutes protecting substance abuse and alcohol abuse treatment records?

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# Next Steps

