Making Sense of Sorensen

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Authority for Appointment of Adult GALs and Discretion to Make Such Appointment

Across all dockets, the judiciary is likely to encounter litigants of questionable competence. Appointment of a GAL to represent their interests is one tool for addressing this challenge. CJD 04-05 references the following case types potentially involving appointment of adult GALs:

- Dependency and Neglect: A GAL may be appointed pursuant to Title 19 for a parent or guardian in dependency and neglect proceedings who has been determined to be mentally ill or developmentally disabled, unless a conservator has been appointed.
- Trusts or Estates: In formal proceedings involving trusts or estates of decedents, protected persons, and in judicially supervised settlements pursuant to Title 15, a GAL may be appointed for an incapacitated person, unascertained person, or a person whose identity or address is unknown, if the court determines that a need for such representation exists. Section 15-14-115, C.R.S., provides that a court may appoint a GAL if the court determines that representation of the interest otherwise would be inadequate.
- Civil Suit: A GAL may be appointed for an incompetent person who does not have a representative and who is a party to a civil suit, pursuant to CRCP 17(c).
- Emergency or Involuntary Commitment of Alcoholics or Drug Abusers: Upon the filing of a petition for involuntary commitment of alcoholics or drug abusers, a GAL may be appointed for the person if the court deems the person's presence in court may be injurious to him or her pursuant to Title 27.

Colorado statutes and rules of civil procedure authorize appointment of GALs to represent the best interests of incompetent adults. CRCP 17(c), and its county court counterpart, CRCP 317(c), provide the court with discretion to appoint guardians ad litem for incompetent parties as follows:

> Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person.

Federal Rule of Civil Procedure 17(c) similarly provides that a general guardian, a committee, a conservator or a like fiduciary may sue or defend on behalf of a minor or incompetent person. When no such person has been appointed, the rule permits suit on behalf of the minor or incompetent person by a next friend or guardian ad litem. Like CRCP 17(c), the federal rule does not require appointment of a guardian or other fiduciary, but rather permits appointment of a GAL to proceed on behalf of the incompetent litigant. Guidance is needed regarding the appointment, authorities and duties of GALs appointed to represent incompetent adults.

The determination of whether a person is "incompetent," such that a GAL should be appointed or such that other orders for his or her protection should enter, pursuant to CRCP 17(c), is a difficult one. CRCP 17(c) does not define "incompetent person." Section 25.5–10–237(1), C.R.S., relocated from §27–10.5–135, with minimal amendment, provides that the terms "insane", "insanity", "mentally or mental incompetent", "mental incompetency", or "of unsound mind," as used in Colorado law, shall be deemed to refer to the insane, as defined in §16–8–101 , C.R.S., or to a person with a an intellectual and developmental disability, as defined in §27–10.5–102 , C.R.S. These definitions suggest a high threshold. However, while the term encompasses those who are mentally ill and gravely disabled, the Colorado Supreme Court has recognized that the term also includes "those who, although not mentally ill to the extent of satisfying those statutory criteria, are nonetheless mentally impaired to the degree of being incapable of effectively participating in a termination proceeding and thus need the assistance of a fiduciary representative." In the Interest of MM, 726 P.2d 1108, 1119 (1986).

Colorado law has recognized legal distinctions among those who suffer from impairments. See In the Interest of MM, 726 P.2d at 1117 ("A person who labors under some degree of mental impairment is not necessarily legally incompetent to sue or be sued. A mentally retarded person, for example, might be fully capable of making one type of decision but incapable of making another."). The capacity for rational decision-making may be substantially impaired, although the person may not meet the definition of mentally ill or developmentally disabled, either because the person has not been adjudicated mentally ill, or because the person's condition fluctuates between gross mental impairment and normalcy. The potentially fluctuating nature of a litigant's incompetence or impairment increases the challenge for the court, the GAL and the opposing party.

When issues of competence become apparent to the court, the court can appoint a GAL to meet with the person and report back to the court with information regarding the person's apparent ability to understand the nature of the proceedings, the possible need for a medical or psychological evaluation, or the possible need for appointment of a guardian. While a GAL could petition for appointment of a guardian, this option is problematic for reasons addressed below. If no guardian is appointed to "stand in the shoes" of the person, for instance, when the impairment does not meet the threshold for appointment of a guardian, practitioners disagree regarding the ability of a GAL to litigate on behalf of the person. The GAL could not enter into a settlement agreement on behalf of the person, but could make recommendations to the court about whether such an agreement appeared to be in his or her best interest. If the person wished to settle his or her case and the GAL opined that the agreement was in the person's best interests, could the court then conduct a proceeding (such as a Rule 16 hearing in Probate) and accept the settlement? Would the alleged incompetent person sign the settlement agreement? What if the person fluctuates between competence and incompetence? These issues require further consideration.

The decision of whether to appoint a GAL has been held to fall within a trial court's discretion. See Johnson v. Lambotte, 363 P.2d 165, 167 (1961) ("In the instant case the mental incompetent was 'otherwise represented' by well qualified lawyers of long experience at the bar. In such case the appointment of a guardian ad litem was not necessary."). A mentally disabled adult has no constitutional right to appointment of counsel in dependency and neglect proceedings. See In the Interest of MM, 726 P.2d 1108, 1117 (1986) (noting the 'real differences' between the respective disabilities and legal incapacities of mentally disabled persons on the one hand and minors, who by definition are not legally competent to sue or be sued without a GAL or like fiduciary, on the other.). It is clearly proper for the court to appoint a GAL for a litigant "when the court is reasonably convinced

that the party is not mentally competent to effectively participate in the proceeding." Id. at 1118. While courts possess discretionary authority to address the issue of competence, this discretion is limited.

Limits to the Court's Discretionary Authority

In the context of a dependency and neglect proceeding, the Colorado Supreme Court provided guidance regarding limitations of the courts' discretionary authority:

> If the parent is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding or incapable of making those critical decisions that are the parent's right to make, then a court would clearly abuse its discretion in not appointing a guardian ad litem to act for and in the interest of the parent. A court would also abuse its discretion in not appointing a guardian ad litem in those situations in which it is clear that the parent lacks the intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in her own interest. If, however, the evidence shows that a parent, although mentally disabled to some degree, understands the nature and significance of the proceeding, is able to make decisions in her own behalf, and has the ability to communicate with and act on the advice of counsel, then a court might well conclude, and properly so, that a guardian ad litem could provide little, if any, service to the parent that would not be forthcoming from counsel. In the Interest of MM, 726 P.2d 1108, 1120 (1986).

The Court of Appeals addressed this issue in the context of dissolution of marriage proceedings in In re Marriage of Sorensen, 166 P.3d 254 (Colo.App. 2007). The Court held it to be an abuse of discretion not to appoint a guardian ad litem in dissolution of marriage proceedings when the spouse (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest. Id. at 257. When a substantial question exists regarding the mental competence of a spouse in a domestic relations proceeding, the preferred procedure is for the trial court to conduct a hearing to determine whether or not the spouse is competent, so that a guardian ad litem may be appointed if needed. Id. at 258.

Sorensen, while providing guidance about the duty to conduct a hearing to assess competence, created many practical questions:

- How does the court become aware of Sorensen issues? Within the confines of Rule of Professional Conduct 1.14, how does an attorney for a client most appropriately raise this issue? Rule 1.14(b) permits but does not require an attorney to take reasonably necessary protective action, including seeking appointment of a GAL, conservator or guardian, when the attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest. Comments suggest that the lawyer should be guided by the client's wishes and values, to the extent known, the client's best interests and the goals of intruding into the client's decision making authority to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. The comments recognize that

appointment of a legal representative, such as a guardian or conservator, may be more expensive or traumatic for the client than circumstances require. In taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client only to the extent reasonably necessary to protect the client's interests. What steps should the court take if the court perceives there to be a competence issue but counsel has not raised it? What steps should the court take if a competence issue is observed or has been raised involving a pro set litigant?

- Should the judicial officer presiding over the domestic relations case conduct the Sorensen hearing or should a separate judicial officer step in for this limited purpose?
- What are the procedures for the Sorensen hearing? Should pleadings be filed under seal?
- Is the hearing adversarial, such that the opposing party has an opportunity to participate through examination of witnesses and introduction of evidence? Sorensen suggests that these questions would be answered affirmatively. What are the HIPAA issues?
- What type of evidence is considered? Are evaluations by an expert available? At whose cost? Pursuant to §15-14-306, the court may *sua sponte* order professional evaluations in guardianship cases and such evaluations must be provided at the request of a respondent. Should a provision analogous to §15-14-306, C.R.S., be proposed to provide for an examination by a court-appointed physician, psychologist, or other individual qualified to evaluate an alleged impairment and to provide the court with a description of the nature, type, and extent of any cognitive and functional limitations? Pursuant to CJD 12-03, the Colorado Judicial Department pays for mental health evaluations pursuant to §15-14-306, C.R.S., for indigent respondents. Should this CJD be amended to include examinations and evaluations pursuant to court appointment in other case types involving allegedly incompetent adult litigants? What if an allegedly incompetent adult litigant, who is not indigent, refuses to pay for or submit to such an evaluation? Should the court make a lay determination regarding the Sorensen factors?
- At the Sorensen hearing, who bears the burden of proof? The party raising the issue? What if the issue is raised *sua sponte*? Do statutory provisions regarding determination of competence to testify provide any useful guidance? Would the alleged incompetent person be called to testify? In the context of competence of witnesses, §13-90-106(1)(a), C.R.S., provides that "persons who are of unsound mind at the time of their production for examination" shall not be witnesses. Given the presumption of competency of witnesses, the burden of showing incompetency rests on the party asserting it, except where the incompetency is apparent in the record. American Jurisprudence, 2nd Ed., Witnesses §168 Burden of proof. To overcome the presumption of competency, the party challenging it must demonstrate that the witness does not understand the nature of the oath and does not demonstrate mental capacity sufficient to observe, recollect and narrate things heard and seen. Id. The incompetency may be established by preliminary questions propounded to the proposed witness, or by any of the known methods of establishing a fact. Id.

Post Appointment Issues for the Court and GAL

Following a Sorensen finding of incompetence, questions remain regarding the qualifications, role and payment of GALs. Chief Justice Directive 04-05 addresses the appointment of GALs on behalf of wards or "impaired adults," sets forth the duties of an adult GAL and duties of the appointing court, and addresses training of appointed GALs. Although helpful, one of the challenges with CJD 04-05 is its application to a wide range of court appointed professionals, including court appointed counsel

pursuant to Titles 12, 13, 14, 15, 19 (D&N only), 22, 27, guardians ad litem, CFIs and court visitors, and its limitation to GALs paid by the Office of the State Court Administrator.

Duties of the GAL

CJD 04-05(VII) sets forth the following duties of the adult GAL paid for by SCAO:

- The person appointed shall diligently take steps that he or she deems necessary to protect the interest of the person for whom he or she was appointed, under the terms and conditions of the order of appointment, including any specific duties set forth in that or any subsequent order. If the appointee finds it necessary and in the best interests of the ward or impaired adult, the appointee may request that the court expand the terms of the appointment and scope of the duties.
- Persons appointed shall perform all duties as directed by the court, which may include some or all of the duties described below:
    - Attend all court hearings and provide accurate and current information directly to the court.
    - At the court's direction and in compliance with applicable statutes, file written or oral report(s) with the court and all other parties.
    - Conduct an independent investigation in a timely manner, which shall include, at a minimum:
        - Personally meeting with and observing the client, as well as proposed custodians, when appropriate;
        - Reviewing court files and relevant records, reports, and documents;
        - In cases in which the ward or impaired person is living or placed more than 100 miles outside of the jurisdiction of the court, the requirements to personally meet with and interview the person are waived unless extraordinary circumstances warrant the expenditure of state funds required for such visits. However, the appointee shall endeavor to meet the person if and when that person is within 100 miles of the jurisdiction of the court.

Scope of GAL Authority and Role

Given that a GAL does not "stand in" the litigant's shoes as a guardian would, but rather represents the litigant's best interests, may a suit proceed without a guardian? CRCP 17(c) and its federal counterpart suggest so. If this inquiry is answered in the negative, more troubling questions arise. Pursuant to §15-14-311, C.R.S., the court may appoint a guardian only upon a finding by clear and convincing evidence that a respondent is incapacitated (e.g., unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance) and only if the person's identified needs cannot be met by less restrictive means. Litigants may be "incompetent" under the Sorensen factors (mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; incapable of making critical decisions; lacking the intellectual capacity to communicate with counsel; or mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest), but may not meet the definition of incapacity required for appointment of a guardian. Further, while guardianships may be sought for incapacitated adults, they are not required. Finally, guardianships substantially limit individual liberties and likely are not "the least restrictive option." See In the Matter of Sobrosky, 781 P.2d 106, 107 (Colo.App. 1989).

In the absence of a statutory scheme for someone to "stand in the shoes" of a Sorensen litigant, who would be authorized to negotiate settlement, sign a Separation Agreement, or take other actions on behalf of the litigant? Those appointed as Sorensen GALs have articulated concern about their perceived inability to stand in the shoes of an incompetent adult whose best interests they are appointed to represent, even with language in a court order ostensibly granting this status.

In a Kansas probate proceeding, the Kansas Court of Appeals held that a GAL for an incapacitated adult was authorized to enter a family settlement agreement, subject to court approval. In the Matter of the Estate of Wise, 890 P.2d 744, 750 (Kans.App. 1995). The court reasoned that it seemed "illogical to deprive an incompetent person of the benefit of such an agreement" and that attorneys are under a duty to exercise reasonable care and diligence in handling cases undertaken, including the duty to pursue settlement. Id. at 630-631. The court found no justification to conclude that different duties would apply to attorneys serving as GAL. Id. Given the authority of a GAL for a minor to enter into a settlement agreement on his or her behalf, subject to court approval, the court found no reason to apply a different rule for an incapacitated person. Id. Colorado Rule of Probate Procedure 16 likewise creates a rule-based mechanism for court approval of a settlement for a person under disability, by reason of minority or incapacity, when sought by the protected, disabled or incapacitated person's guardian, conservator or next friend based on a best interest analysis.

Colorado law provides some support for the court acting as guardian. See Seaton v. Tohill, 53 P.170 (Colo.App. 1898) ("The court is itself the guardian.") and In the Matter of JCT, 176 P.3d 726, 733 (2007) ("the probate court as a government entity may itself serve as guardian"). Better solutions likely exist, and perhaps Colorado law could specifically authorize a GAL to make informed decisions on behalf of a litigant, including the informed decision regarding resolution of litigation, subject to court oversight and approval. See In the Matter of the Estate of Milstein, 955 P.2d 78, 83 (Colo.App. 1998) ("A GAL for an impaired adult 'acts as a special fiduciary and makes informed decisions' for an allegedly incapacitated person."). See also Dept. of Institutions v. Carothers, 821 P.2d 891 (Colo.App. 1991), aff'd 845 P.2d 1179 (1993).

Method of Representation

At least in the context of a child's GAL in dependency and neglect proceedings, a GAL may make recommendations either to the court by presenting opinions based upon an independent investigation, advocating a specific result based upon the evidence presented in court, or a combination of the two approaches. In Interest of J.E.B., 854 P.2d 1372, 1375 (Colo.App. 1993). Whether a GAL is subject to examination as a witness depends on which manner of representation is employed. The GAL may be examined as a witness to the extent that recommendations are based on an independent investigation, the facts of which are not otherwise introduced into evidence. Id. However, recommendations based upon evidence received by the court from other sources are analogous to argument of counsel as to how the evidence should be viewed by the trier of fact, such that examination of the GAL should not be permitted. Id.

Provisions of the Uniform Dissolution of Marriage Act, §14-10-101 et seq., C.R.S., regarding child and family investigators, who perform independent investigations and are subject to examination as witnesses, and child legal representatives, who act as best interest attorneys for children, not subject

to examination as witnesses, reflect this duality. While J.E.B. pertains to GALs for children in dependency proceedings, this analysis regarding potential methods of representation would seem to apply to adult GALs. Do GALs need specific guidance regarding actions to be performed, such as whether filing of reports is expected, or is the CJD guidance sufficient? Should a separate CJD applicable to court-appointed GALs for litigants who are not indigent be considered?

GAL Training and Qualifications

CJD 04-05 provides that attorneys appointed as GAL shall possess the knowledge, expertise, and training necessary to perform the court appointment, and shall be subject to all of the rules and standards of the legal profession. GALs must obtain 10 hours of CLE or other relevant course work for each legal education reporting period to enhance the knowledge of relevant issues. The directive requires the court to require that proof of such education, expertise, or experience is on file at the time of appointment.

Pursuant to CJD 04-05, GAL appointments may be made under contracts developed by the Judicial Department, or if necessary to meet the jurisdiction's needs, on a non-contract hourly fee basis. Any attorney not under contract with the Department who requests appointments must submit to the Chief Judge a request with an affidavit of qualifications for such appointments. The Chief Judge, in his or her discretion, may approve additions to the list of non-contract attorneys at any time. An attorney not under contract with the Judicial Department must submit an updated affidavit to the chief judge every three years to ensure that he or she is maintaining his or her qualifications for such appointments. The judge or magistrate is to consider the number of an attorney's active cases, the qualifications of the attorney, and the needs of the party to be represented when making appointments. The extent to which courts are reviewing and monitoring these issues is unknown.

CJD 04-05 directs the Clerk of Court or District Administrator to maintain a list of qualified persons from which appointments will be made. The directive requires the appointing judge or magistrate to, to the extent practical and subject to attorney-client privilege, monitor the actions of the appointee to ensure compliance with the duties and scope specified in the order of appointment. Judges and magistrates are to ensure that GALs involved with cases under their jurisdiction are representing the best interests of adult wards or impaired adults and performing the duties specified. In providing this oversight, judges and magistrates are required to:

- Routinely monitor compliance with CJD 04-05;
- Encourage local bar associations to develop and implement mentor programs that will enable prospective GALs to learn these areas of the law;
- Meet GALs at the first appointment to provide guidance and clarify court expectations; and
- Hold periodic meetings with all practicing GALs and court visitors as the court deems necessary to ensure adequate representation of wards or impaired adults.

Payment

CJD 04-05 addresses payment for adult GALs paid by the Office of the State Court Administrator. Appointment of a state-pay GAL requires a determination of indigence through completion and review of a JDF 208, except for under Title 15 and "some appointments" under Title 27. It is unclear whether there are instances in which a state-pay adult GAL can be appointed in the absence of indigence. What

should the guidelines be for payment of GALs? What duties govern GALS representing litigants who are not indigent? What should the court do if a litigant is not indigent but is unwilling to pay for a GAL?

Recommendations

- Further consideration is required to thoroughly address the questions and uncertainties pertaining to appointment of GALs for incompetent adults from a broad range of stakeholders, including judicial officers from all docket types (including but not limited to civil, dependency, domestic and probate) and attorneys from the specialized practice areas, including representatives from bar association sections.
- For each area addressed, the feasibility of legislative action, modification of procedural rules, issuance or modification of chief justice directives, or development of standards specific to appointment of GALs for adults should be considered. The bench, the bar and the public need meaningful guidance to protect the interests of incompetent litigants so that they too can access the court system, to standardize proceedings, to improve the quality of representation, to increase the efficiency of proceedings, and to safeguard the finality of orders.
- Given that CJD 04-05 applies only to adult GAL appointments paid by the Office of the State Court Administrator, consider how best to set forth eligibility requirements and qualifications, training, duties and procedures regarding privately paid appointments.