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Court of Appeals, Judges Vogt, Terry, Lichtenstein Case Number 07CA1016	
The People of the State of Colorado, Petitioner, v. Mark Joseph Gabriesheski, Respondent.	▲COURT USE ONLY▲
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BRIEF OF AMICUS CURIAE, THE COLORADO OFFICE OF CHILD'S REPRESENTATIVE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 7,944 words.

The brief complies with C.A.R. 28(k). It contains, under a separate heading, (1) a concise statement of the applicable standard of appellate review with citation to authority, and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Nancy J. Walker-Johnson

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE AND FACTS

Mark Joseph Gabriesheski was charged July 13, 2006, with three counts of sexual assault on a child by one in a position of trust. The alleged victim of the assault was T.W., Mr. Gabriesheski's 16-year-old stepdaughter. (v.1, pp. 11-13).[1] As a result of these allegations, a Petition in Dependency and Neglect[2] ("D&N") was also filed. The Court appointed a guardian ad litem ("GAL") to represent the best interests of T.W. in the D&N case. (v.1, p.27).

Prior to the criminal trial, the People endorsed, among others, the GAL as a witness. (v.1, p.25). March 19, 2007, defense counsel issued a subpoena *duces tecum*, requesting to review the GAL's file. (v.1, p.29). A hearing was conducted March 23, 2007, wherein the GAL argued defense counsel's inspection should be limited, excluding only the handwritten notes contained the GAL file. The GAL

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[1] References in parenthesis refer to the record on appeal and will be cited as "v.__, p.(pp.)__, l.(ll.)___". The transcripts contained in CD #1 will be cited as "CD[date of transcript], p.(pp.)___, l.(ll.)___".

[2] El Paso County case number 06JV952. (v.1, p.29).

stated she was not objecting on the basis of attorney-client privilege and had no objection to providing other documents in her file. The GAL considered her notes attorney work product exempt from the subpoena. (v.2, p.2,ll.18-25; v.2,p.3,ll.1-25). Although defense counsel believed an attorney-client privilege existed, he still requested to review documents in the GAL's file relating to T.W.'s recanting of her accusations against Mr. Gabriesheski. (v.2, p.5,ll.2-5; v.2,p.5,ll.6-14;v.2,p.7,ll.4-5).

After taking the matter under advisement, the trial court issued a ruling March 26, 2007. It found an attorney-client relationship existed between the GAL and T.W.; consequently, communications between the GAL and T.W. could not be disclosed absent a waiver. (v.2, p.27). Despite this finding, the trial court allowed defense counsel access to the GAL's file, stating that Mr. Gabriesheski was entitled to discovery of materials held by governmental agencies. See Colo. Crim. P. 16(I)(c)(1). The trial court precluded defense counsel from reviewing the GAL's personal notes and memoranda.

Mr. Gabriesheski appeared for trial April 16, 2007. At that time, defense counsel made an oral motion *in limine*, requesting exclusion of the GAL's testimony on the bases of attorney-client confidentiality and attorney-client privilege between the GAL and T.W. The defense attorney mistakenly represented

to the trial court that the GAL had objected to disclosure of her conversations with T.W. based on confidentiality and the attorney-client privilege. (CD4-16-07, p.3, ll.19-25). Specifically, defense counsel moved to exclude testimony by the GAL that T.W. was being pressured by her mother to recant her accusations against Mr. Gabriesheski. (CD4-16-07,p.7,ll.18-25; CD4-16-07,p.8,ll. 12-13; CD4-16-07,p.15, ll.7-8).

The prosecutor argued that the Colorado Children's Code ("Children's Code") provides that GALs are appointed to represent the best interests of the child and can be called to testify in conditions set forth in *In Interest of J.E.B.*, 854 P.2d 1372 (Colo. App. 1993). Further, the GAL had previously informed T.W. that a traditional attorney-client relationship did not exist and that statements T.W. made to the GAL would not be confidential. (CD4-16-07, p.7, ll. 5-11; CD4-16-07, p. 9, ll. 14-18).

After hearing argument, the trial court ruled:

> By representing the child's best interests, I think they also represent the child. And I think under our rules of professional conduct, especially under Rule 1.6 and under the Chief Justice Directive as to what the guardian ad litem is required, that being 04-06, which is the Chief Justice Directive for guardians ad litem, I think they do have an obligation to the child. If the child is not willing to waive that confidentiality in order for the guardian ad litem to testify and disclose it, then I would have to grant the motion in limine as to that issue as well.

(CD4-16-07, p.19, ll.2-10). The prosecutor later advised that, in light of this ruling, she could not proceed to trial. (CD4-16-07, p.21, ll.7-10). The trial court dismissed the case for failure to prosecute. (CD4-16-07, p.22, ll.10-12).

The People appealed this ruling. The Court of Appeals did not find error with the trial court's ruling, holding that communications between a child and her GAL are privileged under § 13-90-107, Colo. Rev. Stat. (2007). The Court further found that Chief Justice Directive 04-06 requires all attorneys appointed as GALs to be subject to all of the rules and standards of the legal profession, including Colo. RPC 1.14(c) and Colo. RPC 1.6. The Court of Appeals noted that the pre-2008 version of these Rules, applicable here, did not allow an attorney to divulge information relating to representation of a client. *People v. Gabriesheski*, No. 07CA1016, 2008 Colo. App. LEXIS 1409 (Colo. App. Sept. 4, 2008). Certiorari to this Court was granted April 27, 2009.

INTEREST OF AMICUS CURIAE

The Colorado General Assembly created the Office of the Child's Representative ("OCR") in 2000 for the purpose of ensuring the provision of uniform, high-quality legal representation and non-legal advocacy to children in judicial proceedings. § 13-91-104(1), C.R.S. (2008). All GAL services for children in Colorado are provided exclusively through the OCR, which is funded

by general fund appropriations. CJD 04-06; § 13-91-102(2), C.R.S. (2008). The OCR provides services for approximately 20,000 children each year by contracting with approximately 250 attorneys and employing staff attorneys at its El Paso County GAL Office. § 13-91-105(1)(a)(X), C.R.S.; CJD 04-06; OCR 2008 General Assembly Report.

By ruling (1) that a traditional attorney-client relationship exists between a GAL and the child whose interests the GAL is appointed to represent; and (2) that the communications between a child and his or her GAL are confidential and protected by the attorney-client privilege, the Court of Appeals set forth a GAL representation model in conflict with the Children's Code and Colorado courts' longstanding interpretation of the GAL role. This conflict goes to the very essence of the GAL role, and the Court of Appeals' decision has created confusion for GALs throughout the state in every aspect of their representation. Further, the decision has hindered the OCR's ability to provide uniform GAL services to children. Because the parties to the case are not in a position to explain the policy and practical implications of the decision for GALs and the children they serve, the OCR seeks to inform the Court of these implications.

ARGUMENT

Summary

In affirming the District Court's reasoning that "by representing the child's best interests, I think [GALs] also represent the child," the Court of Appeals failed to recognize the unique nature of GAL representation in Colorado. The Children's Code specifies that GALs are appointed to represent the best interests of children, and the General Assembly has set forth a clear distinction between the definition and responsibilities of GALs and the definition and responsibilities of counsel. Unlike other attorneys, GALs are parties to D&N proceedings in Colorado. GALs in all case types in Colorado have a duty that flows to the court, in that they must ensure their appointing courts have all relevant information necessary to make decisions in the best interests of children. GALs fulfill this responsibility by conducting an independent, thorough, and ongoing investigation regarding a child's best interests and providing relevant information and resultant recommendations to the court. Courts in Colorado have recognized the unique nature of the GAL role and GALs' function as an investigative arm of the court by protecting GALs with quasi-judicial immunity.

The Court of Appeals' ruling that statements made by children to their GALs are protected under Colo. RPC 1.6 has put GALs in a position in which their

ethical obligations to children are in conflict with their statutory responsibilities to the court. Moreover, because Colo. RPC 1.6 prohibits disclosure of any information related to the representation of a client, the Court of Appeals' holding that children are clients of their GALs potentially prevents GALs from sharing any information relevant to a child's best interests. Similarly, applying the attorney-client privilege to GALs prevents the sharing of relevant information with the court when that information consists of statements made to GALs, even when there is no other source for those statements. Preventing GALs from being called as witnesses also undermines the due process rights of other parties in proceedings—parties who have the right to test, through cross examination, all information on which a court bases its decision.

As part of its statutory responsibilities, the OCR is required to make recommendations for performance standards for GALs. CJD 04-06 represents the Chief Justice's promulgation of accepted standards recommended by the OCR. In recommending the Directive's emphasis on Colo. RPC 1.14, the OCR did not intend to circumvent the Colorado General Assembly's enactment of a best interests model of representation or to put GALs in a position in which their ethical duties conflict with their statutory responsibilities. Instead, the OCR intended the emphasis on Colo. RPC 1.6 to serve as a strong reminder to GALs that neither the

unique nature of their role nor the minor status of the children with whom they work excuses them from their professional responsibilities to conduct their representation with professionalism, diligence, and competence and to use the full panoply of their legal skills during the course of that representation. This emphasis was necessary to address the problems that motivated creation of the OCR—problems the OCR confirmed in its initial statewide assessment of GAL services.

In its interpretation of CJD 04-06, the Court of Appeals merged Colorado's GAL/best interests model of representation with a traditional attorney-client model of representation. In doing so, it has put Colorado at the forefront of a national debate regarding the rights of children and their right to counsel. States across the nation have adopted various models of representation for children in D&N proceedings, ranging from a traditional attorney-client relationship to a GAL/best interests relationship, with a variety of blended models that adopt qualities of both best-interests and client-directed representation. The *parens patriae* doctrine underlying the GAL/best interests role has now come into question due to an evolving understanding of children's fundamental rights and a recognition of the critical role of counsel in protecting those rights. Consequently, many child advocacy experts and organizations, including the National Association of Counsel

for Children and the American Bar Association, have renounced the best interests model of representation and endorsed client-directed representation for children.

The OCR is aware of the merits of an attorney-client relationship and recognizes the issues inherent in Colorado's best interests model of representation, particularly in cases involving adolescents. The OCR has sponsored symposia to explore alternative forms of representation for youth, and it has trained GALs to maximize youth participation and voice in all aspects of their representation. However, the Colorado General Assembly has clearly defined the model of GAL representation in Colorado as a best interests model. Any Chief Justice Directive, symposium, or youth empowerment training cannot trump the Colorado Legislature's clear determination that attorneys appointed to represent children in D&N proceedings are GALs and that GALs have a unique obligation to the court. The hybrid model created by the Court of Appeals in its blending of the GAL role with the traditional attorney-client relationship has implications that extend far beyond the case at issue. Because the responsibilities inherent in Colorado's model of best interests representation are fundamentally at odds with attorney-client privilege and a confidential attorney-client relationship, the Supreme Court should reverse the Court of Appeals' ruling that GALs have a confidential and

privileged relationship with the children whose interests they are appointed to represent.

Standard of Review

This Court reviews *de novo* any issue of statutory construction. *Bostelman v. People*, 162 P.3d 686, 689 (Colo. 2007). The issue of the nature of the legal relationship between a child and her GAL was raised and ruled upon by the trial court. (CD4-16-07, p.7, ll. 5-11; CD4-16-07, p. 9, ll. 14-18; CD4-16-07, p.19, ll. 2-20).

I.

The Colorado General Assembly has enacted a "best interests" model of GAL representation for children.

In affirming the trial court's ruling that "in representing the child's best interests, the GAL was also representing the child," the Court of Appeals failed to recognize the unique role and responsibilities of GALs in Colorado. *People v. Gabriesheski*, No. 07CA1016, 2008 Colo. App. LEXIS 1409, *9 (Colo. App. Sept. 4, 2008).

The Colorado General Assembly has enacted a best interests model of representation for GALs in D&N and other proceedings. In interpreting any statute,

> [t]he legislature's intent is the polestar of statutory construction. Courts look first to the statute's language to determine the legislative intent, and "[i]f the language in the statute is clear and the intent of the General Assembly may be discerned with reasonable certainty, it is not necessary to resort to other rules of statutory interpretation."

Robles v. People, 811 P.2d 804, 806 (Colo. 1991) (citing *McKinney v. Kautzky*, 801 P.2d 508, 509 (Colo. 1990)). In construing provisions of the Children's Code, this Court has stated that it must

> strive to give effect to the legislative intent. To do so, we look to the language of the statute and give words their plain and ordinary meaning. We must also adhere to the general rule that provisions of the Children's Code should be liberally construed to accomplish the purpose [of] and to effectuate the intent of the legislature.

C.S. v. People, 83 P.3d 627, 634-35 (Colo. 2004) (citations omitted).

The Children's Code consistently provides that a GAL will be appointed to represent the best interests of a child in proceedings pursuant to the Children's Code or the School Attendance Law of 1963. A GAL appointed in a D&N proceeding must be an attorney. § 19-1-103(59), C.R.S. (2008); § 13-91-103(4), C.R.S. (2008). The attorney requirement, however, applies only to GALs in D&N proceedings, and the Legislature has set forth a clear distinction between legal counsel and a GAL. The Children's Code defines a GAL as "a person appointed by a court to act in the *best interests* of a person whom the person appointed is representing in proceedings under this title." § 19-1-103(59), C.R.S. (2008)

(emphasis added). In contrast, the Children's Code defines "counsel" as an "attorney-at-law who acts as a person's legal advisor or who represents a person in court." § 19-1-103(31), C.R.S. (2008). The Children's Code further recognizes the distinct responsibilities of legal counsel and GAL by allowing both to be appointed for youth in juvenile delinquency and truancy proceedings, and for minor parents in D&N proceedings. § 19-1-105(2); § 19-3-202(1); § 19-3-602(3), C.R.S. (2008). These provisions demonstrate the Colorado Legislature consciously intended that a GAL role not be that of traditional legal counsel.

The Legislature specifically set forth the responsibilities of a GAL in D&N proceedings. The Children's Code provides:

> (3) The guardian ad litem shall be charged in general with the representation of the child's interests. To that end, the guardian ad litem shall make such further investigations as the guardian ad litem deems necessary to ascertain the facts and shall talk with or observe the child involved, examine and cross-examine witnesses in both the adjudicatory and dispositional hearings, introduce and examine the guardian ad litem's own witnesses, make recommendations to the court concerning the child's welfare, appeal matters to the court of appeals or the supreme court, and participate further in the proceedings to the degree necessary to adequately represent the child. In addition, the guardian ad litem, if in the best interest of the child, shall seek to assure that reasonable efforts are being made to prevent unnecessary placement of the child out of the home and to facilitate reunification of the child with the child's family, or, if reunification is not possible, to find another safe and permanent living arrangement for the child. In determining whether said reasonable efforts are made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.

§ 19-3-203(3), C.R.S. (2008). This section highlights the unique nature of the GAL role by requiring the GAL to engage in observation of the child, make recommendations to the court regarding the child's welfare, and advocate for family placement and reunification only in those circumstances in which the GAL deems family placement and reunification to be in the best interests of the child. *Cf.* Colo. RPC 1.2. At the same time, it emphasizes the GAL's responsibility to employ all legal skills and tools in his or her advocacy. Such a delineation of responsibilities would be unnecessary if the Legislature intended the GAL merely to act as legal counsel. Furthermore, the Children's Code provides that a GAL in a D&N proceeding "shall have the right to participate in all proceedings as a party, except in delinquency cases." § 19-1-111(3), C.R.S. (2008). This makes clear it is the GAL, not the child, who is a party to the D&N action, a position inconsistent with being counsel of record.

As far back as 1963, Colorado statutes have provided for the appointment of a GAL in D&N proceedings. § 22-1-5(2), C.R.S. (1963) (repealed) (providing for appointment of GAL when "no parent, guardian, or other person is present to represent the interests of the child at the hearing"). The legislature's determination to provide for this appointment is consistent with the common law doctrine of *parens patriae*, which justifies government intervention to protect the welfare of

children when it has reason to believe their biological parents will not protect them. *See* Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1794 (1996). The GAL has historically assisted the State in this role by stepping in to act in *loco parentis* for the purpose of the protective proceeding. *Id.* This rationale for a GAL appointment is distinct from the rationale for the appointment of counsel. *Cf. Gideon v. Wainright*, 372 U.S. 335 (1963) (basing right to counsel on fundamental rights guaranteed by the United States Constitution). While the Colorado General Assembly has expanded the basis for the GAL appointment and clarified the scope of GAL responsibilities over time, it has consistently provided for the appointment of GALs instead of traditional counsel in D&N proceedings. *See* § 22-1-5(2), C.R.S. (1963) (repealed); § 22-3-5, C.R.S. (1967) (repealed); § 19-1-111, C.R.S. (2008).

In 1987, Colorado's General Assembly repealed and recodified the Children's Code. Among the changes included in this recodification was the identification of GALs as parties in D&N proceedings, and the requirement that GALs in D&N proceedings be attorneys licensed to practice law in Colorado. Testimony from the legislative hearings establishes that the General Assembly did not intend, through the requirement that a GAL in a D&N proceeding be an

attorney, to abandon best interests representation or to create a traditional attorney-client relationship between GALs and children. During this session, the House Judiciary Committee specifically debated whether to make the GAL a party or an attorney of record. Recording of House Judiciary hearing April 14, 1987, 14:00-17:00. Ultimately, the conference committee rejected the notion of the GAL as an attorney of record and reinstated the original proposal designating the GAL a party in the proceedings. Recording of Conference Committee hearing June 9, 1987, 00:58-02:0). This change is codified at § 19-1-111(3), C.R.S.

The legislature, however, amended the definition of "guardian ad litem" to require that a GAL appointed in a D&N proceeding be a licensed attorney. Prior to the 1987 amendment, a GAL was defined as ". . . a person, not necessarily an attorney-at-law, appointed by a court to act in the best interests of a person whom he is representing in proceedings under this title." § 19-1-103(15.5), C.R.S. (1986). The amendment to the GAL definition requiring a GAL in a D&N proceeding be an attorney licensed to practice law in Colorado was undoubtedly in response to the Court of Appeals opinion in *In the Interest of R.E.*, 729 P.2d 1032 (Colo. App. 1986). That case held that a D&N petition could not be dismissed over the objection of the GAL. According to that decision, if the GAL objects to dismissal, the trial court must conduct a hearing to determine whether the petition

is supported by a preponderance of competent evidence. *Id.* at 1034. Testimony during the 1987 legislative hearings specifically explained that the GAL needed to be an attorney so that s/he could proceed with the case in court if the county attorney refused to do so. Recording of House Judiciary Committee hearing, April 14, 1987, 38:45-43:00.

Colorado's distinction between the role of a GAL and that of traditional legal counsel is consistent with the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("ABA Standards"). These standards define a child's attorney as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." ABA Standards §A-1 (1996). In contrast, a lawyer who serves as a GAL is defined as "an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences." *Id.* at § A-2. According to these standards, the distinction between the attorney who serves as a GAL and an attorney who acts as counsel of record lies both in who directs the objectives of the representation and in the tasks that GALs may be required to perform:

> "[w]hile a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be

> required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."

ABA Standards, § A-2 Commentary. Colorado's requirement that only licensed attorneys be appointed as the GAL ensures legal expertise in representing a child's best interests, as "[a] lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child." *Id.*

Consistent with the Legislature's intent, courts in Colorado recognize that Colorado has adopted a best interests model for GAL representation. This Court recently reiterated that the responsibility of a GAL is to "represent the best interests of children who are involved in litigation." *In re J.C.T.*, 176 P.3d 726, 735 (Colo. 2007). In another probate case, this Court noted that a GAL is "the agent of the court through whom it acts to protect the interests of the minor." *Miller v. Clark*, 144 Colo. 431, 356 P.2d 965, 966 (Colo. 1960); *see also Yonker v. Thompson*, 939 P.2d 530, 533 (Colo. App. 1997) (citing *Miller*).

The Colorado federal district court has also recognized that Colorado's model of GAL representation does not provide for a traditional attorney-client relationship. That court found GALs serve as adjuncts of the court and should present " 'all evidence available concerning the child's best interests.' " *Short v. Short*, 730 F.Supp. 1037, 1038 (D.Ct. Colo. 1990) (citing *In re Marriage of*

Barnthouse, 765 P.2d 610, 612 (Colo. App. 1988)). Because of their unique role, GALs have quasi-judicial immunity in suits arising from performance of their duties. *Id.* at 1037.

In summary, Colorado's General Assembly has set forth a role for GALs distinct from that of traditional counsel of record. GALs in Colorado have a legal obligation to bring all relevant information to their appointing court so that the court can formulate a decision that serves the best interests of the child/ren. The fact that GALs operate under quasi-judicial immunity in Colorado further indicates their unique responsibilities to the court. Because of their duties to the court and their status as parties in D&N cases, GALs in Colorado do not maintain a traditional attorney-client relationship with the children whose interests they are appointed to represent.

II.

Confidentiality and attorney-client privilege are incompatible with Colorado's best interests representation model.

The GAL's legal responsibility to present to the court all relevant evidence regarding a child's best interests is incompatible with a traditional attorney's duty of confidentiality and with the attorney-client privilege.

Under Colo. RPC 1.6, a lawyer "shall not reveal information relating to representation of a client" unless authorized to do so under the Rule. Colo. RPC

1.6 (2007) (repealed 2008); *see also* Colo. RPC 1.6 (2009). The Court of Appeals' ruling addressed solely whether this duty of confidentiality prohibited a GAL from testifying regarding statements made by a child. However, because the duty of confidentiality set forth in Rule 1.6 applies to all information relating to the representation of a client, any holding that a GAL is bound by this rule essentially prevents the GAL from sharing not only statements made to the GAL by the child, but all relevant information gathered during the course of the GAL's best interests representation. Such a result is in complete contradiction to the GAL's statutory responsibilities.

Applying the attorney-client privilege to the GAL results in a similar conflict. Recognizing that "[t]here are particular reasons in which it is in the policy of the law to encourage confidence and to preserve it inviolate," Colorado's attorney-client privilege provides that "[a]n attorney shall not be examined without the consent of his client as to any communications made by the client." § 13-90-107(1)(b), C.R.S. (2008). This privilege promotes open communication between counsel and their clients not simply for the purpose of litigation, but also for the purpose of obtaining legal advice. *See* 8 WIGMORE ON EVIDENCE § 2290 (1905). These rationales are inconsistent with the rationale for appointing a GAL. Practically, applying the attorney-client privilege to GALs limits the ability of

GALs to present relevant information in accordance with their statutory responsibilities. While GALs generally present evidence and advocate for the best interests of children through the means of traditional legal advocacy, in some circumstances, they are the only source of information relevant to a child's best interests and the information they must share comes directly from their communication with a child. In circumstances in which a GAL must present such information directly to the court, the GAL may be required to be called as a witness and subjected to cross examination. *See J.E.B.*, 854 P.2d at 1375; *People ex rel. M.G.*, 128 P.3d 332, 335 (Colo. App. 2005). Preventing such testimony by invocation of the attorney-client privilege undermines the court's ability to receive all relevant information and other parties' due process rights entitling them to test and challenge all information on which a court bases its decisions.

In essence, the Court of Appeals' ruling—that GALs are bound by attorney-client privilege and a confidential relationship with the children whose best interests they are appointed to represent—puts GALs in a position in which their ethical responsibility to a child may conflict with their legal duty to the court.

> The confidentiality normally required in the lawyer/client relationship might prevent a GAL from carrying out the statutory duty to advocate for what she thinks is in the best interests of the child. This is because MR 1.6 prevents the GAL from disclosing information provided by the child that arguably *should* be disclosed to the court for an adjudication of the child's best interests under the statute.

> Consequently, a GAL generally must bend the restrictions of MR 1.6 to disclose to the court relevant and necessary information provided by the child. There is no satisfactory way to resolve this dilemma.

Jennifer L. Renne, LEGAL ETHICS IN CHILD WELFARE CASES 29-30 (Claire Sandt ed., ABA Center on Children and the Law 2004).

The exceptions set forth in § 13-90-107, C.R.S. and in the Colorado Rules of Professional Conduct do not resolve the conflict between restrictions on the sharing of information and the GAL's responsibility to provide all relevant information to the court. Both provisions set forth *client* consent as grounds for disclosing and/or testifying about information relating to the representation of a *client*, including communications made by a *client*. *See* § 13-90-107(1)(b), C.R.S. (2008); Colo. R.P.C. 1.6 (2007) (repealed); Colo. R.P.C. 1.6 (2009). The best interests nature of the GAL's representation , the GAL's function as an investigative arm of the court, and the GAL's status as a party in D&N proceedings raise the question of who is the GAL's client for the purposes of representation and consent to disclosure and/or testimony. To deem the child the client for the purpose of privilege and confidentiality would be inconsistent with the legal obligations of a GAL.

Requiring consent from children to share information and to allow GALs to testify also raises issues regarding children's legal capacity to consent. The appointment of a GAL is premised on the assumption that a person, child or adult, lacks the capacity to make decisions in his or her own behalf. *See* Colo. RPC 1.14 (b) (2009) (identifying the appointment of a GAL as a protective action that a lawyer can take when the lawyer "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"). While the *parens patriae* assumptions underlying the Colorado Legislature's decision to provide for the appointment of a GAL instead of traditional legal counsel for children in D&N cases have been challenged by many child advocates, the reality is that some children whose interests are represented by GALs do lack the ability to make informed decisions about whether to consent to disclosure of information. *See generally* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose* , 64 Fordham L. Rev. 1873, 1895 and 1907 (1996); Robert Harris, *A Response to the UNLV Conference: Another Look at the Attorney/ Guardian ad Litem Model*, 6 NEV. L.J. 1284, 1285. For the GAL who possesses information relevant to the safety and well-being of a child but who cannot obtain valid consent from that child to disclose the information to the court

in compliance with his or her legal duties, the accepted remedy of seeking appointment of a GAL pursuant to Colo. RPC 1.14(c), would not provide any resolution. Under the Court of Appeals' ruling in this case, the new GAL would also be bound by the child's inability to consent.

The confidentiality requirement in Colo. RPC 1.6 recognizes a number of exceptions in addition to client consent. In its pre-2008 version, Colo. RPC 1.6 set forth the following additional exceptions: disclosures that are impliedly authorized in order to carry out the representation; a client's intention to commit a crime; and information necessary to resolve a controversy between a lawyer and client. Colo. RPC 1.6(a), eff. January 1, 1993 (repealed 2008). In its current version, the Rule sets forth a number of additional justifications for revealing confidential information, including situations in which a lawyer reasonably believes such disclosure is necessary "to prevent reasonably certain death or substantial bodily harm" or "to comply with other law or court order" Colo. RPC 1.6(b)(1), (7), eff. January 1, 2008. The Court of Appeals based its ruling on the pre-2008 version of the Rule and did not address whether any of these other exceptions applied. While holding that these exceptions apply to GALs might provide enough flexibility to allow them to fulfill their statutory responsibilities, it would perpetuate the incorrect characterization of children as clients of their GALs. Additionally, any

holding based only on the current version of the Rule would continue to leave GALs appointed under the former version in a quandary.

Colorado's application of the GAL role is consistent with the general understanding of that role. The ABA Standards recognize that "[t]he lawyer-client role involves a confidential relationship with privileged communications, while a guardian ad litem-client role may not be confidential." § B-2, cmt. (1996) (comparing state decisions regarding confidentiality for GALs). The majority of states that provide for the appointment of a GAL do not recognize any protected status of communications between children and the GAL.[3]

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[3] The Brief of Amicus Curiae of the Colorado Bar Association filed in this case provides a helpful overview of the various models of representation. This overview also highlights the difficulties of with comparing one state's model with that of another state. For example, while Michigan, identified as a state that provides for privileged communications between children and their GALs, may initially appear comparable to Colorado, further analysis reveals otherwise. The Michigan legislature has elected to provide for the appointment of a "lawyer-guardian ad litem" for children in D&N proceedings, and it has set forth a definition for this role that is distinct from the definition of "guardian ad litem." *See* Mich. Comp. Laws §§ 722.630 (2007), 712A.17d (2007), § 712A.13a(1)(c) (2007). Moreover, in Michigan, "the lawyer-guardian ad litem's duty is to the child, and not the court." Mich. Comp. Laws. § 712A.17d(1) (2007). Similarly, while the Supreme Court Rules governing GALs in Tennessee specify that GALs should not be called as a witness, *see* Tenn. Sup. Ct. Rule 40(f)(1), they also clearly state that the child is the client of the GAL and require the GAL "to advocate for the best interests of a child and to ensure that the child's concerns and preferences are effectively advocated." Id. at 40(a). Additionally, the rules prohibit a GAL from submitting recommendations and reports to the court. Id. at 40(f)(2). New Mexico, which is identified in the Colorado Bar Association's brief

Regardless of other states' policies, any decision requiring GALs to maintain client confidences and prohibiting them from testifying contradicts Colorado's current practice and understanding of the role. Such a departure from the Children's Code provisions would signal a change that has broad reaching consequences for GALs appointed in all proceedings in which the GAL is required to represent the best interests of a child, as well as those proceedings in which a GAL must be appointed to protect the interests of an impaired adult. § 12-37.5-107(2)(b); § 13-22-101; § 15-14-115; § 19-1-111(2); § 19-2-517(5), C.R.S.; C.R.C.P. 17(c).

Perhaps most important, the Court of Appeals' departure from the time-honored understanding of the GAL role has undermined GALs' ability to explain their role clearly to the children whose best interests they are appointed to represent.

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as a state that provides for confidentiality between GALs and children, adopts a different model of representation, in which traditional counsel is appointed after a child turns fourteen. N.M. Stat. 32A-4-10(C) (2005). The rules governing GALs do not specifically address confidentiality or privilege. *See* "Performance Standards for Court-Appointed Attorneys in Child Abuse and Neglect Cases: Guardians Ad-Litem & Respondent Attorneys." Adopted July 21, 2003 (available at http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/new_mexico/nm_performance_standards.pdf, (last visited July 16, 2009).

> To make sure the GAL does not violate the trust of these young people, it is critical to let child clients know the GAL's role is to tell the judge what the GAL thinks is best for the child and why. The GAL also should let the child client know that he might have to reveal what they discussed to the judge, the social worker, or someone else.

Jennifer L. Renne, *supra*, at 30. *See also* Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 Fordham L. Rev. 1699, 1756 (1996) ("unlike the client of the traditional attorney . . . the child represented by the GAL needs to be reminded that his lawyer will not necessarily advocate what he wants and may share his secrets with the court and other parties").

Prior to the Court of Appeals' decision in this case and pursuant to their statutory responsibilities and the legal authority of *J.E.B.*, 854 P.2d at 1375, GALs knew to advise children that, while they would not necessarily share with the court and other parties everything that children told them and everything they learned during their representation, some circumstances might arise in which they would have to share information and/or be called to testify. This advisement assisted children, particularly older youth, to make informed decisions about what information they wanted to convey to their GALs. *See* Renne, *supra*, at 30 (explaining why it is particularly important that older children, who may have preconceived expectations about their relationship with an attorney GAL, be

advised of the GAL role and the consequences of disclosure). Because of the conflict that has resulted from the Court of Appeals' decision in this case, GALs themselves no longer have clarity about what information they can and must share with the court, and they face difficulties in assisting children to make an informed decision about the potential consequences of sharing information.

III.

Chief Justice Directive 04-06 neither converts the statutory "best interests" model of GAL representation to traditional client-directed representation nor establishes confidential and privileged relationships between children and their GALs.

The Court of Appeals relied on Chief Justice Directive 04-06 ("CJD") in finding that a traditional attorney-client relationship existed between the GAL and T.W., and, thus, that attorney-client privilege and the duty of confidentiality applied. Specifically, the Court of Appeals referred to the CJD provision stating that " 'all attorneys appointed as a GAL . . . shall be subject to all of the rules and standards of the legal profession, including the additional responsibilities set forth by 1.14.' " *People v. Gabriesheski*, No. 07CA1016, 2008 Colo. App LEXIS 1409, *10-11 (Colo. App. Sept. 4, 2008).

Colorado's General Assembly created the OCR to ensure that quality legal services be provided to effectively serve the best interests of children in the Colorado court system. C.R.S. § 13-91-102(1)(a),(b) (2008). In creating the OCR,

the General Assembly mandated that the OCR enhance the provision of GAL services in Colorado by "making recommendations to the chief justice concerning the establishment, by rule or chief justice directive, of standards to which attorneys serving as guardians ad litem shall be held, including but not limited to minimum practice standards." § 13-91-105(1)(a)(III), C.R.S. (2008).

OCR inherited a system in which, for a variety of reasons, GALs' representation of children was inconsistent and—in too many instances—inadequate. Examples of the inadequate representation included GALs missing court hearings, not visiting children in placement, not communicating with children, and not participating in appeals. Dependency and Neglect Assessment by Court Improvement Program at 49 (1996). The OCR's initial assessment of GAL services confirmed these problems. The OCR learned that in many jurisdictions, GALs neglected to file motions, endorse and examine witnesses, and use the full panoply of the legal skills at their disposal to advance the best interests of children. Moreover, in some jurisdictions, GALs never observed or communicated with the children whose interests they were charged with representing in court.

Based on its assessment of the deficiencies in GAL practice, OCR proposed language for Chief Justice Directive 04-06, including the section requiring that "all attorneys appointed as a GAL or Child's Representative shall be subject to all of

the rules and standards of the legal profession, including the additional responsibilities set forth by Colorado Rules of Professional Conduct 1.14." CJD 04-06(V)(B). The intent of the proposed CJD was to emphasize the responsibility of GALs to act professionally, ethically, and diligently in the performance of their statutory duties. The emphasis on Colo. RPC 1.14 was intended to convey that neither the unique nature of the GAL role nor the minor status of the youth whose interests they represent excuses GALs from their professional responsibility to engage in competent and diligent representation. The intent was not to create an irreconcilable conflict between the GAL's statutory and ethical responsibilities.

A holistic reading of the CJD indicates the lack of intention to create, through a CJD, a traditional attorney-client relationship in conflict with best interests representation. The CJD specifically states that it has been adopted "to assist the administration of justice through the **best interest** appointment and training of Guardians ad Litem . . .." CJD 04-06 (emphasis added). Accordingly, in referring to the duties set forth for attorneys who act as GALs, for courts who appoint GALs, and for the OCR's oversight of GALs, the CJD consistently refers to "best interests" representation. *See* CJD 04-06(V)(D)(1)-(5) (discussing GAL responsibilities within the framework of best interests of the child); CJD 04-

06(VI)(A) (setting forth responsibility of courts to ensure that GALs are "representing the best interests of children/minors").

Any interpretation of CJD 04-06(V)(B) that frustrates the purpose of the Code and creates a conflict between a GAL's statutory duties and a GAL's ethical obligations as an attorney cannot stand. CJD 04-06 should be interpreted in harmony with the Legislature's clear intent – that a GAL is appointed to represent the best interests of the child. *See* § 19-1-103(59), C.R.S. (2008); *In the Matter of Custody of C.C.R.S.*, 892 P.2d 246, 252 (Colo. 1995) (statutes must be construed harmoniously to avoid any conflict). While this Court may issue guidelines to regulate court business, such directives may not override statutory language. Colo. Const. Art. V, Sec. 1(1) (legislative authority vested in the general assembly); *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985); Colo. Const. Art. VI, Sec. 2(1) (the supreme court has general superintending control over all inferior courts); *Bill Dreiling Motor Co. v. Court of Appeals*, 171 Colo. 448, 455-56, 468 P.2d 37, 41 (1970) (the Supreme Court has authority to adopt rules for the regulation of court business, however, cannot adopt changes contrary to the provisions of a statute).

IV.

Whether to change Colorado's model of representation for children is a decision for the Colorado Legislature

The Court of Appeals' ruling in this case puts Colorado at the forefront of a national debate regarding children's right to counsel in D&N proceedings. In this debate, states which have elected to provide for a best interests GAL *instead* of traditional legal counsel in D&N proceedings have come under increasing scrutiny by many child advocates and advocacy organizations. By ruling that aspects of the traditional attorney-client relationship apply to the attorney who is appointed as a child's GAL, the Court of Appeals has captured the attention of many child advocates.

The appointment of a GAL is rooted in the *parens patriae* doctrine , which dates back prior to the common law. *See* Stuckey at 1794. When the State steps in to protect the welfare of children through court proceedings, the GAL assists the State in its *parens patriae* function by acting in *loco parentis* for the purpose of those proceedings. *See id.* at 1795. Consistent with the common law, federal law now requires that states provide for the appointment of a GAL in D&N proceedings and makes the receipt of federal funding contingent on such provision.

See Child Abuse Prevention and Treatment Act, 45 C.F.R. § 1340.14(g), Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§5101-5118).

At one time, the *parens patriae* doctrine was considered enlightened. The determination that children were human beings entitled to protection from the State represented a significant shift away from regarding children merely as parental property. Over time, the *parens patriae* doctrine has been extended to justify increasing state intervention in children and families' lives in an increasing number of contexts. *See generally* CHILD WELFARE LAW AND PRACTICE 123-132 (Marvin Ventrell & Donald N. Duquette eds., National Association of Counsel for Children 2005). The expansion of state involvement and a growing recognition of children's fundamental rights to liberty and due process have led to increasing scrutiny of the doctrine by child advocates. *Id.* at xxx-xxxi.

In *Gault*, the United States Supreme Court rejected the use of the *parens patriae* doctrine to deprive children of fundamental rights in juvenile delinquency proceedings. *In re Gault*, 387 U.S. 1 (1967). Noting "[t]he latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme" and admonishing that "[u]nder our Constitution, the condition of being a boy does not justify kangaroo court," the Supreme Court held

that juveniles subject to delinquency proceedings have a privilege against self incrimination and a right to notice, counsel, and an appellate process under the Due Process Clause of the United States Constitution. *Id.* at 16, 28. With regard to the right to counsel, the Court emphasized

> The juvenile needs the assistance of counsel to cope with problems of law, to make a skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense to prepare and submit it. The child requires the 'guiding hand of counsel at every step in the proceedings against him.'

Id. at 36 (quoting *Kent v. United States*, 383 U.S. 541, 561-562 (1966)) . Despite the broad principles discussed in its ruling, the Court specifically limited its decision to the determination of delinquency that might result in the commitment to an institution in which a juvenile's freedom would be curtailed. *Id.* at 12.

Many child advocates and advocacy groups believe that the same principles justifying the appointment of counsel in delinquency proceedings also justify the appointment of counsel in D&N proceedings. These advocates emphasize that children who are the subject of D&N proceedings do have liberty interests at stake. They potentially face a childhood in foster care, placement in residential facilities, and termination of their relationships with their biological families. According to these advocates, the complexity of the proceedings and the consequences at stake require the assistance of counsel to insist on their regularity. *See Kenny A. ex rel.*

Winn v. Perdue, 356 F. Supp. 2d 1353, 1361 (2005) (discussing risk of erroneous decisions). Children need assistance to understand the legal issues at stake and to exercise their voice in the proceedings. For these advocates, the appointment of a GAL does not serve as an acceptable alternative to counsel. The GAL/best interests model "turns the lawyer-client relationship on its head" and "gives the lawyer a job for which he is neither trained nor qualified, prevents the lawyer from doing the job that he is qualified to do, and creates an unjust system where similar clients are not represented similarly." Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings* 64 Fordham L. Rev. 1507, 1525-26 (1996). Commentators also see the GAL/best interests model as further undermining the due process rights of children and other parties by providing for an unregulated and unreviewable determination regarding children's welfare. *See, e.g.,* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children,* 64 FORDHAM L. REV. 1399, 1415 (1996).

While the OCR recognizes these issues with the GAL role, absent a ruling that children in D&N proceedings are constitutionally entitled to counsel—a question not before this Court—it is up to Colorado's General Assembly to set the model of representation for children in D&N proceedings. While it is possible that

some child advocates will view the Court of Appeals' application of the doctrines of confidentiality and privilege to the GAL role as an enlightened move towards traditional legal counsel, the OCR does not view the Court of Appeals' decision in this way. In effect, the Court of Appeals has created a hybrid model for GALs, in which their relationship with the children they serve includes some aspects of the traditional attorney-client role and some aspects of the best interests role. This hybrid model creates problems rather than resolution for GALs and the children they serve. *See* Section 2 & *Fordham Working Group Report on Conflicts of Interests*, 64 FORDHAM L. REV. 1367, 1368 (1996) ("[s]till more complications arise when the court assigns a single individual multiple responsibilities that may lead to potential or actual conflicts of role").

Separation of powers principles place the decision regarding the model of representation for children squarely in the hands of the Legislature, and practical reasons also justify the determination that such decisions should be made by the legislative branch of government. A change in Colorado's model of representation for children has significant and broad-reaching consequences. The determination to make this change inevitably requires consideration of the following issues: what benefits currently provided through GAL representation may be lost if children were instead appointed counsel; whether to provide for the appointment of new

attorneys in addition to, or in place of, existing GALs; whether to continue to provide for the appointment of the current model of a best interests GAL in truancy and delinquency proceedings, in which counsel is already required; whether attorneys appointed under the new model of representation would be entitled to the same prosecutorial powers of GALs and whether they too would be able to veto the closure of a D&N proceeding; how to resolve the ethical dilemmas of blended models of GAL/traditional counsel representation. Each of these considerations also involves an analysis of the fiscal impact. The Colorado Legislature is the appropriate branch to weigh these decisions for Colorado's children.

CONCLUSION

Because the Court of Appeals' decision is in conflict with GALs' statutory responsibility to provide best interests representation, the OCR respectfully requests that this Court reverse, as contrary to the Code, the Court of Appeals' holding that communications between children and their GALs are confidential and protected by the attorney-client privilege.

In the alternative, should this Court determine that a confidential attorney-client relationship does exist, a position not advocated herein, the OCR requests that this Court issue guidelines on the following matters: (1) how GALs should harmonize confidentiality and privilege with their responsibilities under the best

interests model of representation; (2) the duties of GALs in delinquency and criminal cases; (3) how GALs should advise currently represented persons of the new relationship status; and (4) whether new GALs are required for each existing appointment.

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CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the above and foregoing **BRIEF OF AMICUS CURIAE, THE COLORADO OFFICE OF CHILD'S REPRESENTATIVE** were placed in the United States mail, postage prepaid, this 20th day of July, 2009, addressed as follows:

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