

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue, 4th Floor Denver, Colorado 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Court of Appeals No. 07CA1016 Judges Vogt, Terry, and Lichtenstein</p>	
<p>The People of the State of Colorado, Petitioner,</p> <p>v.</p> <p>Mark Joseph Gabriesheski, Respondent.</p>	
<p>Attorneys for Amicus Curiae:</p> <p>The National Association of Counsel for Children</p> <p>Name: Anne Kellogg (#38536) Address: 13123 E. 16th Ave., B390, Aurora, CO 80045 Telephone: 303-864-5323 Facsimile: 303-864-5351 Email: Kellogg.Ann@tchden.org</p>	<p>Case Number: 08SC0945</p> <div style="border: 1px solid black; padding: 5px; text-align: center;"> <p>RECEIVED</p> <p>OCT 29 2009</p> <p>CLERK COLORADO SUPREME COURT</p> </div>
<p>BRIEF OF AMICUS CURIAE</p> <p>THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN</p>	

Comes now the National Association of Counsel for Children (“NACC”), and co-signers, and pursuant to C.A.R. 29 presents this Amicus Brief in support of the opinion of the Court of Appeals, holding that the child is the client of a Guardian ad Litem.

CERTIFICATE OF COMPLIANCE

I hereby certify that the 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 8,042 words (including addendum A).

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

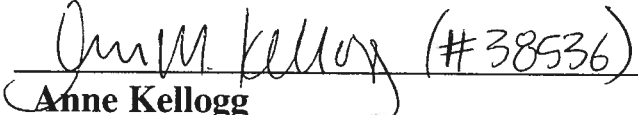

Anne Kellogg (#38536)

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**STATEMENT OF ISSUE PRESENTED FOR REVIEW AND INTEREST
OF THE AMICUS CURIAE**

Amicus NACC will address the following issue on which this Court granted certiorari:

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 attorney-client privilege

Founded in 1977, the National Association of Counsel for Children is a multidisciplinary organization, which consists of nearly 2,500 members representing all fifty states and several foreign countries. Most of the members are attorneys who represent children before the family and juvenile courts of the nation. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. Our mission is to improve the lives of children and families through legal advocacy. The NACC *Amicus Curiae* Program promotes the legal interests of children through the filing of *amicus curiae* briefs in state and federal appellate courts. In recent years, the NACC has filed briefs in numerous state appellate courts, federal courts of appeal and The Supreme Court of the United States.

The NACC submits this amicus brief on behalf of the interests of children and attorneys representing children as Guardians ad litem (“GALs”) in having the

law recognize the significant and important relationship between the GAL as an attorney and the children who are their clients. This relationship supports the role of GALs in protecting the interests of their child clients while respecting the Rules of Professional Conduct that shape all attorney-client relationships.

Additional signatories to this amicus curiae brief are listed after the conclusion section. Their statements of interest are found in addendum A.

ARGUMENT

Standard of Review:

Whether the child is a client of the GAL and the ethical duties of confidentiality apply is a question of mixed law and fact. Appellate courts should defer to a trial court's factual findings so long as there is sufficient evidence in the record to support those findings, but review a trial court's legal conclusions de novo. See People v. Alamo, 193 P.3d 830, 834 (Colo. 2008).

Introduction:

This case turns on the question of whether a child who is represented by an attorney appointed as a GAL in a dependency case is owed professional and ethical responsibilities or whether the child is even represented at all in such proceedings. Prior decisions of this court, as well as the Colorado Children's Code and the Office of the Child's Representative Act, confirm that the child is indeed the client

of the GAL and a GAL's ethical and professional responsibilities do flow to the child.

This case does not involve whether the General Assembly intended to establish a traditional client-directed model of representation for Guardians ad litem. Neither the trial court nor the court of appeals held that a traditional client-directed relationship existed between the GAL and her client. In fact, the trial never mentioned the idea of a client-directed relationship. Nor did the lower courts change the best interests scope of representation of a GAL. To the contrary, the courts held that in representing a child, a GAL also represents the child's best interests. People v. Gabriesheski, 205 P.3d 441, 445 (Colo. App. 2008).

Unlike traditional client directed representation where the client defines the scope of representation, a GAL's scope of representation is defined by statute and case law. Here, the Children's Code charges a GAL with acting in her client's best interests and with the representation of the child's interests, not just her expressed wishes. Stated otherwise, a GAL acts as both advocate and guardian, employing all her legal skill to advance the child's interests zealously and expeditiously while exercising a higher degree of objectivity than in a traditional client-directed relationship.

As this court recognized in In re Marriage of Hartley, 886 P.2d 665, 671-72 (Colo. 1994) and In re J.C.T., 176 P.3d 726, 735 (Colo. 2007), a GAL's role is

fully compatible with the ethical and professional responsibilities of the legal profession. Moreover, by way of illustration, courts and legislatures from other states employ models of representation that harmonize a GAL's obligation to represent her client's best interests with a lawyer's duty of confidentiality and privilege.

Recognizing that an attorney-GAL must adhere to all the rules of professional conduct gives full effect to the public policy in Colorado of providing high quality legal representation to children. Along with competency, confidentiality and privilege are cornerstones of high quality legal representation. Confidentiality and privilege enrich the GAL-child relationship by providing children a unique and open line of communication that encourages them to speak freely and frankly. Confidentiality and privilege likewise aid and guide the GAL in fulfilling her duty to investigate and develop the case fully. This is all the more significant in dependency cases where the compelling interests of the state, children, and parents are uniquely complex, at times divergent, and always at stake.

I. The Colorado General Assembly has established the public policy of providing legal representation directly to children.

The Colorado General Assembly has enacted the Office of the Child's Representative Act, §§ 13-91-101 et seq., C.R.S. (2009), the overriding purpose of which is to "improve the quality of representation and advocacy provided to

children” in the Colorado court system. § 13-91-102(1)(b). The OCR Act regulates “legal representation and non-legal advocacy on behalf of children.” Id. at -102(1)(a). Legal representation includes GALs and other representation provided by lawyers, while non-legal advocacy generally involves Court Appointed Special Advocates and advocacy by other non-attorney professionals. See §§ 13-91-103(3) to (6).

From its outset, the OCR Act directs that it is the interests of the child, not the court, that are served through legal representation. For instance, the OCR Act declares that legal representation of children is a “critical element in giving children a voice in the Colorado court system.” § 13-91-102(1)(a). Focusing entirely upon the interests of children, the legislative declaration provides:

representation of children is unique in that children often have no resources with which to retain the services of an attorney or advocate, they are unable to efficiently provide or communicate to such an attorney or advocate the information needed to effectively serve the best interests or desires of that child, and they lack the ability and understanding to effectively evaluate and, if necessary, complain about the quality of representation they receive.

Id. If, as the District Attorney and its amici contend, a GAL were only an agent of the court, then children would not have a reason to complain about the quality of representation they received because they would not be receiving representation in the first place.

Beyond the legislative declaration, the General Assembly maintains its clear intent that GALs provide legal representation to children. For example, the OCR Act requires the OCR to work to ensure the provision of “uniform, high-quality legal representation . . . to children” and requires GALs to adhere to minimum standards when “representing children” involved in judicial proceedings.¹

§§ 13-91-104(1) & -105(1)(a)(III)(B)–(C); see also Chief Justice Directive (C.J.D.) 04-06, II.A (stating that OCR is responsible for overseeing and enhancing “attorney services” and specifically, “competent representation of children”).

By its own terms, the OCR Act frames the GAL’s role as providing direct legal representation to children. Each interest recognized as the basis for legal representation is that of the child and each reference to the subject of the representation is the child. Notably, the OCR Act never refers to a GAL as an agent or arm of the court.

II. The Colorado Children’s Code provides that an attorney appointed as a GAL represents the child.

When read as a whole, the Colorado Children’s Code provides that a GAL must be an attorney-at-law and is appointed for the child, not the court or the best interests concept. A significant portion of a GAL’s duties are legal in nature and

¹ Of note, the OCR Act also requires that three of its board of directors and the executive director be attorneys experienced with “representing children” as guardians ad litem. §§ 13-91-104(2) & (3)(a)(II), C.R.S. (2009).

must be carried out to the degree necessary to adequately represent the child. This language demonstrates that the child is the client of the GAL.

First, section 19-1-111(1), C.R.S. (2009), requires that the “court shall appoint a [GAL] for the child in all dependency and neglect cases under this title.” (emphasis added). The GAL is not appointed *for the best interests* or *to serve the court*, but solely for the child. Next, section 19-1-103(59) provides that a GAL is appointed “to represent a person.” See also C.J.D. 04-06, V.B (requiring attorney to diligently protect interests of “person whom s/he was appointed to represent”). While section 19-1-103(59) also addresses the GAL’s scope of representation by requiring the GAL to “act” in the best interests of her client, it plainly provides that a GAL “is representing” a person. See also C.J.D. 04-06, VI.B (addressing relationship between child and GAL as “children represented by counsel in dependency proceedings where best interests representation has been deemed necessary”) (emphasis added). Finally, section 19-3-203(3), C.R.S. (2009), mandates that a GAL’s duties shall be carried out “to the degree necessary to adequately represent the child.” Here again, the language is clear -- a GAL’s duties flow to the child. See also In the Interest of D.L.C., 70 P.3d 584, 587 (Colo.

App. 2003) (holding that a GAL's duties are intended primarily to benefit the child).²

Moreover, the Children's Code requires that a GAL appointed to represent a child in a dependency and neglect case be an attorney-at-law licensed to practice in Colorado. § 19-1-103(59). Many, if not all, of the duties required of a GAL are legal in nature and are those that would normally be performed by a lawyer representing a client. For example, a GAL must "talk with and observe the child," "examine and cross-examine witnesses," "introduce and examine the [GAL's] own witnesses," "make recommendations^[3] to the court concerning the child's welfare," and "appeal matters to the court of appeals or supreme court." § 19-3-203(3). Expounding upon this, Chief Justice Directive 04-06 requires GALs to participate in all aspects of litigation including discovery, motions practice, settlement negotiations, court appearances, jury selection, presentation of evidence, and

² The court of appeals in In the Interest of D.L.C., 70 P.3d 584, 587 (Colo. App. 2003), emphasized that "the performance of the GAL's duties is intended primarily to benefit the child." In that case, the GAL was excused from participating in the first two days of a termination hearing due to a family emergency. Id. at 586. On appeal, the respondent mother argued that the termination was per se reversible error as a result of the GAL's absence. Id. In rejecting this challenge, the court found that the mother failed to show that the GAL's absence affected her own interest. Id. at 587 (noting that "without such a showing, a GAL's violation of duty relates only to the child's rights").

³ Some argument has been made that the General Assembly's use of the term "recommendation" necessarily signifies that a GAL functions as an agent of the court. Prior cases addressing this provision, however, have not interpreted this language so incontrovertibly. At least one case has held that a GAL's recommendations may be presented to the court in the same manner as argument by counsel as to how the evidence should be viewed by the court. In the Interest of J.E.B., 854 P.2d 1372, 1375 (Colo. App. 1993).

appeals. C.J.D. 04-06, V.D(3). As noted above, these duties are carried out in order to “represent the child.” § 19-3-203(3).

The statutes and directives are abundantly clear that a GAL represents the child and must perform essentially the same lawyerly functions as any other lawyer representing a client. See Black’s Law Dictionary (8th ed. 2004) (defining “representation” in part, as “[t]he act or an instance of standing for or acting on behalf of another, esp. by a lawyer on behalf of a client”); see also C.S. v. People, 83 P.3d 627, 635 (Colo. 2004) (holding that courts must give effect to a statute’s plain and ordinary language).

III. The General Assembly uses clear language when creating a role that functions as an agent of the court.

The General Assembly’s intent that the child is the client of the GAL is also evidenced by its use of language in other statutes. Here, the Uniform Dissolution of Marriage Act and the OCR Act illustrate that the General Assembly employs clear terminology when it intends to create an investigatory or advisory role that serves as an agent to the court.

The UDMA is a comprehensive legislative scheme that addresses the welfare and best interests of children involved in domestic relations cases. See generally §§ 14-10-101 et seq., C.R.S. (2009). Like the Children’s Code, the UDMA requires that matters involving children be determined in accordance with their best interests, giving paramount consideration to their physical, mental, and

emotional conditions and needs. Compare § 14-10-124(1.5) with § 19-3-604(3).

In order to aid the court in making these determinations, a child and family investigator may be appointed to investigate, report, and make recommendations concerning the best interests of the child. § 14-10-116.5. Unlike a GAL, however, a CFI is specifically appointed “to serve the court” and carries out her responsibilities “for the court,” not for the child. §§ 14-10-116.5(1)-(2). This plain language provides that a CFI serves as an agent or arm of the court. See C.J.D. 04-06 V.E (recognizing that CFI is “investigative arm of the court”); In re the Parental Responsibilities of M.J.K., 200 P.3d 1106, 1114 (Colo. App. 2008) (recognizing that CFI is appointed to “assist the court” and carries out “duties to the court”).

Moreover, the OCR Act, in addition to regulating GALs, also regulates Court Appointed Special Advocates. § 13-91-103(3). Like a CFI, a CASA is appointed “to aid the court” in decisions regarding children involved in judicial proceedings. § 13-91-103(3). As such, the CASA also functions as an investigator or advisor to the court. See id. at (1) to (3) (describing duties of CASA to conduct investigation and provide information to court).

If the General Assembly intended for a GAL in a dependency case to serve in such a capacity, it could have used similar language in the Children’s Code; yet, it did not. Instead, the Children’s Code provides that a GAL is appointed for the

child and is required to carry out her responsibilities to adequately represent the child. §§ 19-1-111(1) and 19-3-203(3); see also § 13-91-103(4) (defining a GAL as an attorney-at-law appointed “to represent a child”). The difference in language is a clear expression by the General Assembly that the child -- not the court -- is the client of the attorney appointed as a GAL under the Children’s Code. See Robinson v. Colo. State Lottery Div., 179 P.3d 998, 1010 (Colo. 2008) (holding that use of different terms signals intent on part of General Assembly to afford those terms different meanings).

IV. The Children’s Code, as well as prior decisions of the supreme court, recognizes a GAL’s role as that of an attorney representing a party.

The District Attorney’s amici assert that a GAL cannot represent the child because the GAL, not the child, is a party to a dependency action. The argument is grounded entirely upon § 19-1-111(3). A careful reading of this section, however, does not lead to such an inescapable conclusion; and, even if such an interpretation could be wrestled from the language, it would be contrary to prior decisions of this court and the provisions of the Children’s Code addressing parties to a dependency case.

In its entirety, § 19-1-111(3) provides: “[T]he guardian ad litem for the child shall have the right to participate in all proceedings as a party, except in delinquency cases.” The section does not state that a GAL “is a party” to the

dependency proceeding or is “named as” a party to the proceeding.⁴ Rather, it provides that the GAL may “participate” as a party.⁵ Consistent with the General Assembly’s intent to provide high quality legal representation to children, this provision allows a GAL unhindered access to the court on behalf of the child.

Further, over fifteen years ago in the case of D.A.S. v. People, 863 P.2d 291 (Colo. 1993), this court answered the question of party status of children and GALs in dependency cases. D.A.S. involved an appeal from a termination of parental rights and the issue of whether the attorney-client privilege between a respondent mother and her attorney protected an evaluation of the mother and her children conducted by the mother’s expert. 863 P.2d at 292. In concluding that the privilege did not apply, an integral aspect of the court’s holding was the fact that

⁴ When the General Assembly intends for a particular person to be a party to a dependency proceeding, it uses specific language. For example, any parent, guardian, or legal custodian alleged to have abused or neglected a child “shall be named” as a respondent. § 19-3-502(5), C.R.S. (2009). Any person who is residing with, has assumed a parenting role toward, participated in the abuse of, or maintains a significant relationship with a child “may be named” as a special respondent. § 19-3-502(6). The child, of course, is “named” in the petition. § 19-3-501(1) to (2). The Children’s Code does not provide that a GAL is likewise “named” as a party to the action.

⁵ In its amicus brief, the Colorado Office of the Child’s Representative mischaracterizes the General Assembly’s rejection of a proposal to modify § 19-1-111(3) to state that a GAL may participate in the proceedings as an attorney of record, rather than as a party. See Brief of Amicus Curiae, the Colorado Office of Child’s Representative at p.15. The conference committee chose the “participate as a party” language because at the time, a GAL was not required to be an attorney. S.B. 144 (1987): Concerning the Repeal & Re-Enactment of the “Colorado Children’s Code”, Conference Committee Hearing (June 9, 1987). Thus, it would have been illogical to have a GAL participate in the proceedings as an attorney of record when some GALs may not have been attorneys. Id. The decision of the conference committee was merely made in an attempt to harmonize the provisions of the Children’s Code existing at the time.

the children (who were represented by a GAL) participated in the evaluation. Id. at 296. Respondent mother contended that the presence of a third party does not destroy attorney-client privilege in all circumstances and that she still held a reasonable expectation of privacy in the communications with her expert, which included the evaluation of her interactions with the children. Id. at 295. This court disagreed, recognizing that the “children themselves [were] parties to the action and represented by counsel” and holding that no expectation of privacy could exist when the third party present during the communications was a represented party. Id.; cf. In the Interest of M.B., 535 P.2d 192, 196 (Colo. 1975) (noting appointment of attorney as GAL and finding error where court proceeded to dispositional hearing “in the absence of counsel for the children”).

V. The role of a GAL is fully compatible with the ethical standards of the legal profession.

To be sure, the attorney-client relationship between a GAL and a child is not the same as that in a traditional attorney-client relationship. The difference, though, is not because a GAL has no client, but rather because of the modified scope of representation in a GAL’s role. Hartley, 886 P.2d at 672 (recognizing that GAL “represents the child”). In a traditional lawyer-client relationship, the client typically establishes the direction of the representation and the lawyer must “abide by a client’s decisions concerning the objectives of representation.” Colo. Rules of Prof’l Conduct R. 1.2(a) (2007). However, where legal representation is afforded

pursuant to the appointment of a GAL in a dependency case, the Children’s Code and Colorado case law define scope and objectives of representation in a GAL-client relationship. See Hartley, 886 P.2d at 672 n.9. Here, the Children’ Code charges a GAL “in general with the representation of the child’s interests” and requires a GAL to “act” in her client’s best interests. §§ 19-3-203(3), -1-103(59); see also J.C.T., 176 P.3d at 735 (“[I]t is the ‘universally acknowledged responsibility of [GALs] . . . ‘to represent the best interests’ of children who are involved in litigation.” (quoting Roy T. Stuckey, Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L.Rev. 1785, 1785-86 (1996))).

This court has previously framed the scope of representation of a GAL as that of acting “both as guardian and as advocate” for a child client. Hartley, 886 P.2d at 671. The additional role of guardian is widely understood to require a GAL to exercise a higher degree of independent objectivity than a traditional client-directed attorney.⁶ See id. at 672; In re Marriage of Barnthouse, 765 P.2d 610, 612 (Colo. App. 1988) (“higher degree of objectivity”); see also Short v. Short, 730 F. Supp. 1037, 1038 (D. Colo. 1990) (“intensified requisite of objectivity”). A GAL cannot simply “parrot the child’s expressed wishes,” but must fully investigate and

⁶ It is this modified scope of representation that provides a GAL with quasi-judicial immunity. See Short v. Short, 730 F. Supp. 1037, 1038 (D. Colo. 1990) (noting that GAL, “like the court, must hold paramount a child’s best interests”).

actively present evidence to the court concerning the best interests of her client.⁷ Hartley, 886 P.2d at 671. This higher degree of objectivity that arises from the GAL's role as guardian, however, does not detract from the GAL's duties as advocate; rather, the GAL's representation gives harmonious effect to both roles.

Nothing in statute or case law excuses an attorney appointed as a GAL from adhering to the ethical standards of the legal profession. Indeed, there is no inherent conflict between a GAL's best-interests representation of her child client and her adherence to the duties of confidentiality and privilege.⁸

At the outset, the Colorado Children's Code creates no statutory exception to confidentiality for an attorney appointed as a GAL for a child. To the contrary, the Code specifically requires GALs to comply with Chief Justice Directive 04-06. See § 19-1-111(6). Directive 04-06 sets forth the authority and responsibilities of the OCR, the responsibilities of GALs, and the duties of judges and magistrates in cases involving children. See also J.C.T., 176 P.3d at 735. In each subject area, the directive requires a GAL to adhere to the ethical and professional standards of

⁷ The court of appeals in Barnhouse stated that under the GAL's higher duty, the GAL is required to present all "available evidence" regarding the child's best interests. See In re Marriage of Barnhouse, 765 P.2d 610, 612 (Colo. App.1988). Information protected by the attorney-client privilege is not "available."

⁸ If there was an actual conflict in this case between the GAL's best interests representation of T.W. and her duties of confidentiality and privilege, that issue would have been resolved by the district court in the dependency case, not the criminal case from which this appeal stems. There is nothing in the record on appeal to indicate that the dependency court identified any such conflict.

the legal profession, including attorney-client confidentiality. For example, in fulfilling her duties, a GAL “shall be subject to all of the rules and standards of the legal profession.” C.J.D. 04-06, V.B. Judges and magistrates are, in turn, required to hold GALs “to the same standards and expectations imposed on every attorney by the Colorado Rules of Professional Conduct.” Id. at VI.B.4. Finally, to the extent any third party may have access to a GAL’s records, it is only the OCR for oversight purposes and only then “subject to the attorney/client privilege.” Id. at IV.B.

Moreover, when given the opportunity to modify the duty of confidentiality in the GAL-child relationship, the General Assembly has declined to do so. In an attempt to protect a “child suffering from abuse,” the General Assembly compiled a list of individuals who are required to report if they know or suspect that a child is being abused or neglected. § 19-3-304(1). These individuals, like GALs, come into contact with children and have opportunities to observe evidence of abuse. They include social workers, mental health professionals, psychologists, counselors, victim’s advocates, family therapists, psychotherapists, state department of human services workers, and juvenile parole and probation officers. § 19-3-304(2). Many of these individuals, like attorneys, have confidential relationships with their clients. See, e.g., § 13-90-107(1)(d) (physician-patient privilege); § 13-90-107(1)(g) (privilege for psychologists, counselors and social

workers); § 13-90-107(1)(k)(I) (victim's advocate privilege). GALs, however, are not included in this list. Notably, in 2005, when the General Assembly created the role of CFI in domestic relations cases, it also amended the list of mandatory reporters to include a CFI. See § 14-10-116.5 (appointment of CFI); § 19-3-304(2)(ee) (including CFIs in list of mandatory reporters). If the General Assembly intended to modify the confidential relationship that an attorney appointed as a GAL owes her client, it certainly could have done so by incorporating GALs in the list of mandatory reporters; yet, it did not.

Section 13-90-107, likewise, makes no GAL exception to attorney-client privilege; it simply provides that “an attorney shall not be examined without the consent of his client as to any communication made by the client to the lawyer or advice given thereon.” § 13-90-107 (1)(b), C.R.S. (2009).

Further, when faced with this issue of whether there is an inherent conflict within a GAL's representation, this court has consistently held that the rules of professional conduct apply to the representation. See, e.g., J.C.T., 176 P.3d at 735; Hartley, 886 P.2d at 671-72.

Hartley involved the question of whether a child involved in a custody dispute had a right to counsel of his choosing to protect his interests and specifically advocate his wishes. 886 P.2d at 671. There, the child's wishes regarding his custodian conflicted with the GAL's opinion as to the child's best

interests. Id. at 669. The child contended “that neither a GAL nor a court can safeguard full representation of the child’s wishes.” Id. at 671. In concluding that, based on the duality of a GAL’s role, a GAL sufficiently represents a child, the court relied upon the rules of professional conduct and applicable statutes. Id. at 671-72. Importantly, the court reiterated that while a GAL’s representation is different from that of a lawyer representing an adult, the GAL as the child’s attorney nonetheless represents the child,⁹ and thus is bound by “ethical duties imposed by the Rules of Professional Conduct.”¹⁰ Id.

In J.C.T., this court addressed whether a lawyer could be appointed both as a child’s GAL and his guardian designee in a probate case. 176 P.3d at 732. In order to resolve whether such a dual appointment created an inherent conflict, the court again looked to the rules of professional conduct. Id. at 735. Notably, the

⁹ Amicus Colorado Bar Association asserts that any time a GAL’s recommendations is different than the wishes of her client, the GAL would subject of serious disciplinary action. See Brief of Amicus Curiae Colorado Bar Association at p. 4. However, this was exactly the factual circumstance faced in Hartley and the court rejected the notion that this created an inherent ethical conflict.

¹⁰ Other cases have affirmed that GALs are bound by ethical rules. For example, in In the Interest of J.E.B., 854 P.2d 1372, 1375 (Colo. App. 1993), the court held that a GAL shall not be examined as a witness in a dependency action when the GAL advocates in the form of legal argument based on evidence that has been presented to the court. In so holding, the court specifically referenced Colorado Rule of Professional Conduct 3.7, which addresses a lawyer as witness. Id. While the court did find that a GAL may be subject to examination if the GAL presents “her recommendations as an opinion based on an independent investigation, the facts of which have not otherwise been introduced into evidence,” nothing in the court’s opinion indicates that the information at issue was confidential in nature. Id. J.E.B. simply harmonized with existing case law by allowing GALs to choose to present information as opinion, and thus subject themselves to examination, when the evidence they would present is otherwise admissible.

court recognized that as a lawyer, a GAL is “subject to all of the rules and standards of the legal profession, including the additional responsibilities set for by Colorado Rule of Professional Conduct 1.14.” *Id.* (citing C.J.D. 04-06).

The Rules of Professional Conduct themselves make no exception to their compliance for lawyers representing children. In fact, they expressly require attorneys in such circumstances to, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Colo. Rule of Prof’l Conduct R. 1.14(a) (2007). Under its pre-2008 version, on which the court of appeals’ ruling was based, Rule 1.6(a) stated: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).”¹¹ Nothing in either rule indicated that a GAL is excused from such ethical duties.

Moreover, the current version of the rules reinforces their applicability to lawyers for children. Rule 1.14(a) specifically provides: “Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under rule 1.6(a) to reveal information about the client, but only to the

¹¹ As the court of appeals noted, the prosecution did not present evidence to the trial court to establish the applicability of any of the exceptions to Rules 1.6 or 1.14. *People v. Gabriesheski*, 205 P.3d 441, 445 (Colo. App. 2008). Thus, while the rules may allow for disclosure of confidential information under limited circumstances, the record is devoid of any evidence of those circumstances in the current case.

extent reasonably necessary to protect the client's interests." Colo. Rule of Prof'l Conduct R. 1.14(a) (2008). The rule allows an attorney to take protective action if the client "is at risk of substantial physical, financial or other harm." Id. While "protective action" is not expressly defined, Rule 1.14 provides examples of possible action "including consulting with individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian." Id. at 1.14(b).

The mere mention of the appointment of a GAL does not indicate that Rules 1.14 and 1.6 do not apply to GALs. Rather, the type of protective action necessarily depends on the particular facts at issue. See id. at 1.14 cmt. 5. For example, in a criminal or civil case, it may be necessary for an attorney to seek appointment of a GAL for their adult client who has a mental impairment. In a case where a GAL is representing a child client, however, that example of protective action is not applicable. The GAL instead might seek alternative protective action, like "consulting with individuals or entities that have the ability to take action to protect the client," individuals such as a caseworker or therapist.

Where, as in this case, the GAL is representing the child in a dependency action, the GAL might take protective action by requesting specific protective

orders of the court under § 19-1-113 and § 19-1-114.¹² As Rule 1.14(a) now states, the GAL would be impliedly authorized in such cases to disclose information relevant to the protective action, but only to “the extent reasonably necessary to protect the client’s interests.” Nothing in these rules, however, wholesale excuses an attorney appointed as a GAL from adhering to the ethical and professional standards, including the duty of confidentiality.

The co-existence of best interests representation and adherence to ethical standards is also supported by model laws and standards in the field. The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, drafted by the National Conference of Commissioners on Uniform State Laws (now named the Uniform Law Commission), (“NCCUSL Act”), draws the distinction between the traditional client-directed and the best interests scopes of representation for children, defining a “best interests attorney” as “an attorney who provides legal representation for a child to protect the child’s best interests without being bound by the child’s directives or objectives.” NCCUSL Act § 2(2) (2006). In addressing the duties of the best interests attorney, the NCCUSL Act explains that the attorney:

may not disclose or be compelled to disclose information relating to the representation of the child except as permitted by [the state’s rules of professional conduct],

¹² The current record is devoid of any information to indicate whether such protective actions were taken in this case, or whether such action was inadequate to protect T.W.’s interests.

but the attorney may use such information, including communications received from the child in confidence, for the purpose of performing duties of a best interests attorney without disclosing that the child was the source of the information.

Id. at § 13(e). Thus, the NCCUSL Act recognizes a best interests attorney's duty of confidentiality toward her child client, except where ethical rules otherwise allow disclosure.¹³ Id.

VI. Other states provide for best interests representation while simultaneously requiring GALs to comply with the duties of confidentiality and privilege.

In presenting its digest of law from other jurisdictions, the Colorado Bar Association confuses the issue in this case -- whether a GAL owes the most basic professional obligations to her client -- with the nationwide debate regarding the model of representation for children. As the CBA explains, there are multiple models of representation. Some states require a child's attorney to advocate the child client's express wishes just as an attorney would do in a traditional attorney-client relationship. Other states provide for a "best interests" model of

¹³This model of a best interest attorney's ethical responsibilities is analogous to that created by the American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases ("ABA Standards"). The ABA Standards specify: "A child's communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them." ABA Standards § V(B) (2003). In the commentary to this section, the ABA explains the distinction between use and disclosure, stating "for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child." Id. at § V(B) cmt. These standards appropriately harmonize best interests representation with the ethical duty of confidentiality.

representation where GALs advocate for their child clients' best interests, regardless of the clients' express wishes. Many states embody some hybrid approach, encompassing elements of both the "express wishes" and the "best interests" models.

While the scope of a GAL's representation is a constant hot topic in the realm of child advocacy, it is not the issue in this case. As recognized by the Children's Code and the lower courts here, Colorado follows a best interests model of representation. Although the state digest is not necessary to answer that question, it is useful to illustrate that a GAL's charge to act in the child's best interests is compatible with confidentiality and privilege.

In Michigan, for example, a lawyer-GAL acts "as an independent representative of the child's best interests" and is entitled to "full and active participation in all aspects of the litigation." Mich. Comp. Laws § 712A.17d(1)(b) (2007). Thus, like Colorado, the scope of the GAL's representation is the child's best interests and the GAL may participate in the litigation as a party would. In fulfilling this role, a lawyer-GAL must abide by the obligation of attorney-client privilege. *Id.* at .17d(1)(a). Even when a lawyer-GAL informs the court of a child's preferences, he must do so in a manner "[c]onsistent with the law governing attorney-client privilege." *Id.* at .17d(1)(i). Expounding on this

concept, Michigan Ethics Opinion RI-318 (2000), explains that a lawyer-GAL “acts as an advocate for the minor and an attorney/client relationship exists.”

Michigan is not alone in this stance. Alabama also adopts the best interests model of representation while simultaneously recognizing a lawyer’s ethical obligations. While the scope of representation is defined by statute,¹⁴ Alabama case law upholds the existence of an attorney-client relationship, and thus attorney-client privilege, between the GAL and the child. See T.O.B. v. C.J.B., 986 So. 2d 433, 437 (Ala. Civ. App. 2007) (noting GAL’s concern in “divulging any specific information given which might violate the attorney client relationship” between herself and children); Ex Parte Montgomery County Dep’t of Human Res., 982 So. 2d 527, 543 (Ala. Civ. App. 2007) (acknowledging existence of concept of attorney-client privilege between GAL and children); see also Ex Parte R.D.N., 918 So. 2d 100, 103-04 (Ala. 2005) (finding that since GAL is to argue case like any other attorney, “rules of ethics applicable to lawyers and the fundamental principles of due process apply to the conduct” of GAL). Similarly, Kentucky acknowledges the ethical obligations of a GAL to a child client. While statute specifies the best interest appointment of a GAL, local rules emphasize that a GAL is “both a fiduciary and lawyer for the child.” See Ky. Rev. Stat. Ann. § 387.305

¹⁴Section 12-15-102 defines a “guardian ad litem” as “[a] licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual.” Ala. Code § 12-15-102 (2009).

(2009); Kenton Fam. Ct. R. 23 (recognizing fiduciary relationship of GAL and child, as well as GAL's duty to advocate for best interests).

Other best interests states, such as West Virginia, recognize an attorney-client relationship between the GAL and the child, yet create exceptions to the duty of confidentiality so as to further the GAL's best interests charge. In In re Christina W., 639 S.E.2d 770 (W. Va. 2006), the Supreme Court of Appeals of West Virginia addressed this very issue. First, the court noted that because the duties of a GAL under West Virginia statute are those duties typically performed by a lawyer on behalf of a client, "the rules of professional conduct generally apply to that representation." 639 S.E.2d at 775. The court then went on to examine the dual role that a GAL plays in abuse and neglect cases, noting that "the obligations of a [GAL] extend much farther than those anticipated by the typical lawyer/client relationship." Id. Considering the balance between a child's desire for confidentiality and the GAL's duties, the court held that the GAL "owes a duty of confidentiality to the child[ren] he or she represents," but the duty is not absolute. Id. at 778. Rather, "[w]here honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the [GAL] must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren]." Id. While creating an exception to confidentiality, West Virginia still

recognizes the essential relationship of attorney-client that exists between the GAL and the child.

Colorado courts have not previously addressed the existence of any exceptions to confidentiality in the GAL-child relationship. Moreover, even if exceptions to confidentiality were established, they would not apply in this case. In West Virginia, the exception exists to allow the GAL to disclose what is necessary so as to prevent the child client's exposure to harm. A GAL's charge to further a child's best interests, however, stems from the dependency and neglect action. Thus, in a criminal case such as the one before this court, the exception would not apply. Even in states such as West Virginia, the confidentiality exception applies in the context of the action in which the GAL is appointed.

As addressed in the sections above, the attorney-client relationship between GAL and child, as well as the accompanying ethical obligations, is firmly rooted in Colorado case law, statute, and ethical rules. While not controlling, the law of other jurisdictions does illustrate that the very construct that the District Attorney and its amici deem impossible -- the co-existence of best interests representation with the ethical duties of confidentiality and privilege -- does indeed exist.

VII. Privilege and confidentiality enrich and enhance a GAL's representation of a child.

Finally, privilege and confidentiality are not barriers to the protection of children or fundamental fairness. Rather, they provide the child and the GAL a

unique avenue to investigate and pursue a child's interests. See Nat'l Farmers Union Property & Casualty Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986) (holding that primary rationale behind privilege is to "facilitate[] the full development of facts essential to proper representation of the client.) A child involved in a dependency case will typically benefit from several professional relationships. Many of these -- with case workers, doctors, and therapists -- are accompanied by the professional duty to report knowledge or suspicion of abuse. In fact, there are thirty-two professionals statutorily mandated to inform authorities when children tell them of child protection concerns. § 19-3-304(2). Each of these persons may (or must in certain circumstances) reveal information a child communicates to them. There is, however, only one person in a dependency case to whom a child can communicate in confidence.

Rather than assuming that the confidential relationship between a GAL and child would prevent relevant information from being revealed, consider that without such a relationship, critical information might never come to light. While important public policy reasons support the reporting of child protection concerns, the very knowledge that information will be shared may influence the decision to reveal the information in the first place. For example, if a child possibly suffering abuse is unwilling to tell any professional for fear of unpredictable consequences such as removal from her home or retaliation by her abusers, where is she to turn?

With the assurance of confidentiality, a child has the confidence to reveal such information to her GAL.¹⁵ Even if the child chooses not to talk openly with the GAL, a confidential relationship among many others without confidentiality is a meaningful addition to the truth-seeking process and fundamental fairness to the child.

While the GAL herself is bound by confidentiality, she may still act in her role as guardian to safeguard the child's interests and seek to prevent potential harm. Cf. Gordon v. Boyles, 9 P.3d 1106, 1122-23 (Colo. 2000). In pursuit of her investigatory duties, the GAL could search for evidence of abuse through other sources, so as to present such information to the court. The GAL could make recommendations and advocate to the court to create an environment where the child would feel safe revealing her information. Perhaps, most importantly, the GAL could counsel the child, assuage the child's fears and concerns associated with disclosure, and answer questions that the child might have. The very nature of the trusted relationship would be the foundation upon which the GAL could advise the child.

¹⁵ In its amicus brief, the Colorado Office of the Child's Representative asserts that in light of the court of appeals' holding in this case, GALs will struggle to clearly explain their role to the children whom they represent. See Brief of Amicus Curiae, The Colorado Office of Child's Representative at p. 25. To the contrary, under the court of appeals' opinion, the GAL can simply tell a child client that his or her communications will be kept confidential according to her ethical rules. It would be much more complicated to differentiate between times in which a GAL would keep a child's confidence and those times in which either exceptions apply so as to allow a GAL to disclose information or times when disclosure would be in the child's best interests.

Even in those rare situations where a child's communication to her GAL is the only source of information and the child does not consent to disclosure, the relationship is enriched: the child is able to speak freely to her GAL. Open and candid communication between a GAL and a client does not create risk or danger. The risk exists whether the child discloses it or not. At a minimum, the unique position of the GAL opens an avenue of communication and provides the child the opportunity to reveal information that might otherwise remain unknown. Denying this opportunity would limit information available to a GAL and have the unintentional consequence of limiting the ability of a GAL to act fully in the interests of her client.

A GAL is intended to add something to the juvenile court process. The GAL is not simply an extension of caseworker, therapist, foster parent, and CASA, who all rightfully endeavor to protect a child's welfare but whose loyalties are shared by others. If this court were to reach a contrary result and find that the GAL-child relationship is not confidential, the GAL would not be much different than any other non-legal professional in the case. The GAL's role, however, is unique and her responsibility flows solely to the child. It is the child whom the GAL represents, and thus, the child who deserves the protections of confidentiality and privilege.

CONCLUSION

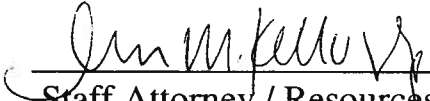
For the reasons stated above, the National Association of Counsel for Children and the co-signors request that this Court affirm the decision of the appellate court.

Dated: October 29, 2009.

Respectfully submitted,

NATIONAL ASSOCIATION OF
COUNSEL FOR CHILDREN

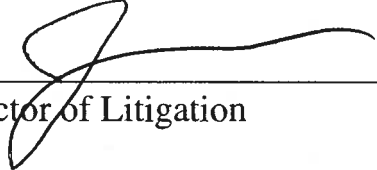
BY: Anne Kellogg (#38536)



Staff Attorney / Resources Director

ROCKY MOUNTAIN CHILDREN'S
LAW CENTER

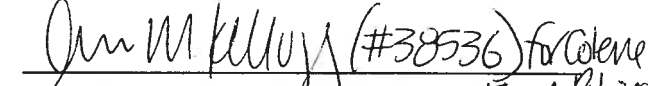
BY: Jeffrey C. Koy (#30052)



Director of Litigation

UNIVERSITY OF COLORADO
LAW SCHOOL'S JUVENILE AND
FAMILY LAW PROGRAM

BY: Colene Flynn Robinson (#34649)



Associate Clinical Professor Flynn Robinson

Addendum A

CO-SIGNATORIES' STATEMENTS OF INTERESTS

Rocky Mountain Children's Law Center, statement of interest

The Rocky Mountain Children's Law Center is a non-profit law center based in Denver, Colorado. The principal mission of the Rocky Mountain Children's Law Center is to provide direct legal representation to abused and neglected children in Colorado. Over the past twenty-eight years, Rocky Mountain Children's Law Center attorneys have represented over 9000 abused and neglected children, many of these through court appointments as Guardians ad litem in dependency and neglect cases. The Rocky Mountain Children's Law Center currently represents over 350 children as their Guardian ad litem in dependency and neglect cases over five counties.

The Children's Law Center also operates a child legal advocacy practicum with the University of Denver, Sturm College of Law. Over the 15 years of the practicum, the Children's Law Center has trained and supervised 150 law students as they represented children as Guardians ad litem in Colorado.

The Rocky Mountain Children's Law Center has assumed a leadership role over the last twenty eight years through the development of child centered legislation, participation on model courts and best practices teams, and appellate litigation. The Rocky Mountain Children's Law Center has also been instrumental in the training of judges, lawyers, and court appointed special advocates across the state.

The Children's Law Center supports the principle that the child is the client of the Guardian ad Litem, and thus owed all of a lawyer's professional and ethical responsibilities including confidentiality and privilege. This concept is embodied in the relationships that the Children's Law Center's attorneys and law students have created with the children whom they represent.

University of Colorado Law School's Juvenile and Family Law Program, statement of interest

The mission of the University of Colorado Law School's Juvenile and Family Law Program is to advance the well-being of children and families by preparing tomorrow's attorneys to work in the field of juvenile and family law,

conducting research into the problems facing children and families, and creating a bridge between the legal academy and policymakers and practitioners.

The Juvenile and Family Law Program believes People v. Gabriesheski raises important questions about the attorney-client relationship between child clients and their guardians ad litem. This brief presents both the state and national legal landscape for answering those questions.

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the above and foregoing **BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN** were placed in the United States mail, postage prepaid, this 29th day of October, 2009, addressed as follows:

John R. Newsome, District Attorney
4th Judicial District
Doyle Baker, Deputy District
Attorney
105 East Vermijo Avenue, Suite 500
Colorado Springs, CO 80903

Denver, CO 80203-4309

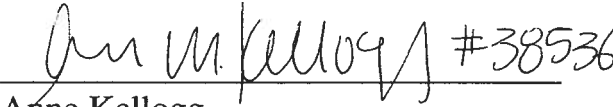
Mary Jane Truesdell Cox
Cox & Baker, LLC
858 Happy Canyon Rd., Suite 215
Castle Rock, CO 80108

Theodore P. McClintock, Esq.
Elizabeth A. McClintock, Esq.
Attorneys for Respondent
McClintock & McClintock, P.C.
421 S. Tejon Street, Suite 331
Colorado Springs, CO 80903

Michael H. Berger
Jacobs Chase Frick Kleinkopf &
Kelley, LLC
1050 17th Street, Suite 1500
Denver, CO 80265

The Colorado Bar Association
William E. Walters, III, President
1900 Grant St., Suite 950

Colorado Office of the Child's
Representative
1580 Logan Street, Suite 340
Denver, CO 80203

 #38536

Anne Kellogg