Guardians ad Litem—Part 1

Serving Adults with Diminished Capacity in Domestic Relations Matters

BY ANN GUSHURST

This two-part article explores the role of guardians ad litem in domestic relations proceedings and offers guidance on working with clients who may need a guardian ad litem appointed for them. This part 1 covers the history and duties of guardians ad litem.

This article is the first in a series of two that outlines the role of guardians ad litem (GALs) in serving adult litigants with diminished capacity.[1] It focuses on domestic relations matters with an emphasis on the 2007 case *In re Marriage of Sorensen*,[2] the first and only major Colorado decision to examine GAL appointments in the context of a dissolution of marriage. This part 1 covers the history and nature of the GAL role.

The Common Law Construct

GALs are a common law construct with a lengthy legal history that can be traced back to Roman law.[3] GALs existed in British common law as early as 1275[4] and were mentioned in Colorado jurisprudence as early as 1871.[5] In Colorado, common law doctrines have full force and effect until modified by legislation, either by a codification of the common law or by an outright repeal of the doctrine.[6] No Colorado statute has codified or modified the GAL common law as it applies to adults.

The concept of court-appointed guardians first arose in antiquity from a need to protect orphaned children, who were by definition incompetent and thus incapable of entering into contracts or managing their own affairs. The role of a general guardian evolved to allow appointment of GALs to assist the court in lawsuits involving children; technically, a GAL is a guardian whose appointment is limited to particular litigation ("ad litem" in English means "for the suit"). The first guardians were granted charge "of the person" but not the person's property,[7] although different types of guardianships were eventually created that merged control over both children and their property.[8]

The historical record reveals a general trend of confusion over GAL authority. One observer, referring to the guardianship of infants, observed that "[n]o part of the early English law was more disjointed and incomplete."[9] Yet the GAL role persisted, due to the pressing need to protect those involved in a legal action who were either incompetent or incapacitated.

Sometime later, this judicial method of protecting persons was extended to include others with legal disabilities, beginning first with unmarried women (who were, at law, legally incompetent until the latter half of the 19th century) and those who were limited by "old age, disease, and mental weakness."[10] The salient feature of early GAL appointments is that they were made for wards who had no legal capacity to manage their own affairs. "Ward" is used in this article to describe a person for whom a GAL has been appointed, while "allegedly incapacitated person" (AIP) refers to a person for whom a GAL appointment is contemplated.[11]

Historically, the grant of power to a guardian over a ward's property—which necessarily implies the ward's loss of that same power—was tempered in two ways. First, courts began imposing personal liability on GALs for costs and losses and holding them to high fiduciary standards that precluded self-dealing and fraud.[12] The evolving responsibility and concurrent liability developed into the modern law of fiduciary duty with simultaneous strict loyalty to those to whom the duty was owed. Second, GAL appointments ended when the ward attained the age of competency.

Appointment Authority

GALs are referred to in many Colorado statutes.[13] In domestic relations cases, they can be appointed (1) pursuant to CRS § 15-14-115 (part of title 15, "Probate, Trusts and Fiduciaries"), which allows a court to appoint a GAL at "any stage of a proceeding" if it finds that "representation of the interest otherwise would be inadequate"; and (2) pursuant to CRCP 17(c), which authorizes the court to appoint GALs for "infants or incompetent persons."

CRS title 15 houses all Colorado statutes relating to the appointments of conservators, special conservators, guardians, and GALs for adults. The GAL section is very brief:

> At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.[14]

Notably, this statute references "a" proceeding and does *not* limit GAL appointments proceedings under the Probate Code.

Courts also have jurisdiction to appoint GALs under CRCP Rule 17(c):

> Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have

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

In addition, a Chief Justice Directive covers GAL appointments and states: “A guardian *ad litem* may be appointed for an incompetent person who does not have a representative and who is a party to a civil suit, pursuant to C.R.C.P. Rule 17(c).”[15]

Neither the statute nor Rule 17(c) clearly describes the GAL’s role, the standard of proof required to appoint a GAL, the type of impairment[16] required to sustain a GAL appointment, the GAL’s potential powers and limits on such powers, the procedure to be followed for appointment, or any other procedural or substantive rules that would modify the common law regarding GAL appointments for adult[17] litigants. And the scope of CJD 04-05 is unclear because it appears to apply to all GAL appointments for “wards or impaired adults in any case," but its statutory authority section refers to appointments subject to state payment.[18] Therefore, domestic relations practitioners must rely on existing GAL case law (of which *Sorensen* features prominently) and general legal principles to guide them.

The *Sorensen* Case

The leading case on GALs is *Sorensen*, decided in 2007, which involved the dissolution of a 29-year marriage. During the *Sorensen* divorce, wife’s attorneys began to suspect that their client was suffering from a psychological impairment that rendered her “incapable of making decisions regarding even minor financial matters.”[19] After investigating what to do about this problem, wife’s attorneys filed a motion[20] to appoint a GAL and advised the court that their client opposed the motion. Wife promptly fired her attorneys and hired successor counsel.

Wife’s new counsel withdrew the GAL motion and represented to the court that wife was competent. The court denied the motion to appoint a GAL without a hearing, and the divorce proceeded. A partial settlement agreement was reduced to writing, and additional oral agreements were reached that were read into the record and adopted by the court. The court then ordered the attorneys to reduce the oral agreements to writing, but wife’s attorneys were unable to do so.

Shortly thereafter, wife retained her third counsel, who filed a motion for a new trial and for relief from the agreements that had ostensibly been reached. This motion alleged that wife’s mental illness had prevented her from understanding the proceedings and achieving a fair settlement. The motion included affidavits from a member of wife’s domestic violence support group and her therapist, who stated that wife was not “capable of making legal decisions” and was “not legally competent to be entering into agreements” due to her “mental state.”[21]

The court denied the second motion, and wife appealed. The Court of Appeals ruled that once a motion to appoint a GAL is filed, it cannot be denied without a hearing, so the trial court erred in denying the original GAL motion. The case was remanded for a hearing in the domestic relations matter to determine if wife had been incompetent at the time of the original permanent orders’ hearing.[22]

From a practitioner’s perspective, *Sorensen* presents logistical challenges. If the trial court had attempted to conduct a hearing on the original motion, it is unclear how that could have resolved the matter, given the facts of the case. Wife had summarily dismissed the attorney who filed the first motion, and her successor attorney did not think she was compromised and immediately filed to withdraw the motion. Wife obviously did not support the motion, and it seems highly unlikely that a court would force litigants in this type of situation to produce evidence against their own perceived interests. Moreover, husband was hoping to settle the case, so presumably he had no incentive to produce evidence of wife’s diminished capacity, and it is unlikely that he would have had access to evidence of her incapacity or incompetence.

The best evidence of wife's incapacity was her therapist's opinion, which was privileged.

The options all seem untenable: The court could have ordered the withdrawn attorney to continue the representation pro bono and to disclose privileged information, or it could have forced wife to testify against herself. Further, it is unclear what protection litigants in wife's position would have if they were unaware of their diminished capacity and thus unable to protect their own interests. If the *Sorensen* court had denied a GAL appointment due to a lack of evidence to support an appointment, would wife have been left with no protection whatsoever?

The GAL Appointment

Sorensen adopted criteria from a previous case[23] for establishing when a court may appoint a GAL for a person in a lawsuit. A GAL appointment is appropriate when a person:

- is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding,
- is incapable of making critical decisions,
- lacks the intellectual capacity to communicate with counsel, or
- is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest.

These criteria are highly focused on mental and cognitive capacity, but they can also encompass physical and cultural disabilities when those prevent effective attorney-client communication that renders the client unable to assist the attorney in prosecuting the case. Thus, it appears that clients can obtain the protection of a GAL even if their inability to communicate is for reasons other than impaired intelligence (e.g., due to stroke, deafness, or cultural communication issues).

Sorensen distinguished previous case law holding that courts need not appoint GALs for represented parties by noting that the previous rule "involved attorneys defending a claim of liability for the tortious conduct of a mentally ill person and, thus, did not require the participation of the party in the resolution of the legal question."[24] This distinction suggests that the resolution of a case involving a legal question *only*—as opposed to one requiring adjudication of facts, which presumably requires client participation—does not necessarily require a fully functioning client, adding yet another layer of discretion to GAL appointments.

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The GAL's Role

Sorensen did not directly address the GAL's role. This lack of instruction is consistent with previous authority; scholars have repeatedly noted that GAL law is "often 'so unclear that the attorney may choose' to define the role as he or she sees fit."[25] Caselaw developed under the Probate Code offers guidance by specifying that a regular guardian's powers and duties,[26] like those of a GAL, must be specified in the court appointment order.[27] However, neither CRS § 15-14-115, CRCP 17(c), nor any published Colorado case limits or sets out the range of allowable GAL duties or powers.

Most cases note that while the attorney advocates for the ward's legal interests and takes instruction from the ward, the GAL protects the ward's best interests, which can be in direct conflict with what the ward wants. Moreover, where a ward is incompetent to make decisions, the GAL may have to make decisions on the ward's behalf based solely on what the GAL believes to be in the person's best interests.[28]

Domestic Relations Challenges

Dissolution of marriage proceedings offer unique challenges to GALs. For example, divorcing parties often strike bargains that go against their pecuniary interests; a party may willingly waive maintenance to reduce potential future conflicts or agree to pay support that is higher than the guidelines amount in exchange for a parenting schedule that accommodates late-night work shifts. It is hard to harmonize such situations with the GAL's fiduciary duty, which has traditionally been defined by preservation of wealth.[29]

GALs in a family setting may also have the difficult task of navigating the divide between a person's own best interests and their interests in their parental role generally and in protecting their children's best interests. In one dependency and neglect action involving a parent with diminished mental capabilities, the GAL advocated that it was not in the parent's best interests to retain parental rights because of the potential future criminal negligence associated with the parent's inability to parent.[30] The Court of Appeals held that it was error to allow the GAL for a parent with an intellectual disability to advocate against the parent's goal of reunification because termination of parenting rights is, as a matter of law, not in a parent's best interests. The GAL's need to consider the parent's duty to look out for their children adds a layer of difficulty to the role.

GALs may also face varied tasks that are potentially confusing. The GAL appointment form, JDF 742,[31] anticipates GAL duties ranging from investigating issues to advocating for and

representing the best interests of the protected person. It includes preparing a report with recommendations but notably does not include making decisions for a protected person.

Whether GALs have a decision-making role is not mentioned in *Sorensen*, though the case noted (presumably with approval) commentary from the Colorado Rules of Professional Conduct that suggests a GAL decision-making role: "If a legal representative has already been appointed for the client, *the lawyer should ordinarily look to the representative* for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests."[32]

Estate of Milstein v. Ayers, a contested probate case, considered the scope of the lawyer's, as opposed to the GAL's, role. There, the probate court dismissed a protected person's attorney after appointing a GAL for the person. In overturning the court on numerous grounds, the Court of Appeals held that "a GAL and counsel represent differing interests. Whereas the GAL acts as a special fiduciary and *makes informed decisions* for the AIP, counsel is an advocate for and represents the legal interests of the AIP."[33]

Similarly, a federal court stated that a GAL is a "lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party . . . with authority to engage counsel, file suit, and to prosecute, control and direct the litigation" who "may make binding contracts for the retention of counsel and expert witnesses and may settle the claim on behalf of his ward . . . [subject to] the court's supervision and is an officer of the court."[34]

There is wide consensus that the GAL's role is to advocate for the client's best interests, as contrasted to the attorney's role, which is to represent the client and advocate according to the client's wishes. This distinction is particularly significant when a client's decisions do not align with what the attorney thinks is in the client's best interests: the attorney may not substitute his or her own judgment for the client's and must continue to take direction from the client within the confines of Colo. RPC 1.16.

On the other hand, the court may empower the GAL to help the client communicate with the attorney, advise the court when the client makes decisions that are contrary to his or her interests, and advocate for the client's needs. Further, as suggested in the above cited cases and Colo. RPC 1.14, the GAL may be empowered to make decisions for the client.

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Constitutional Considerations

GAL appointments implicate constitutional concerns because, by definition, a GAL appointment can interfere with the AIP's autonomy, and the right to direct one's own life is constitutional.[35] These concerns were not discussed in *Sorensen*,[36] but any appointment that grants another person the power to make decisions for a person is a deprivation of constitutionally protected rights to autonomy.[37]

Probate law has long recognized the constitutional issues associated with guardian appointments. Cases under title 15 are subject to case law and statutory protections designed to safeguard the AIP's constitutional rights from being inappropriately abrogated:[38] an "adult's constitutional right to autonomy precludes intervention if the adult is in no way incapacitated."[39] Therefore, when a guardian or conservator is appointed under the Probate Code, the court's grants of power are statutorily restricted to "only those powers necessitated by the ward's limitations and demonstrated needs," and courts are bound to the Probate Code's standard for appointments of all fiduciaries,[40] to "make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence."[41]

GAL appointments under CRS § 15-14-115 should thus be tailored to the needs of the protected person. Anecdotally, the range of powers articulated in GAL appointment orders may be exceedingly broad or not articulated at all, and few such appointments state the standard of proof applicable to the appointment. Attorneys across the state report divergent orders of appointment. Some districts allow GALs to sign pleadings and testify on behalf of wards and regarding their best interests. In other districts, GALs assist clients in gathering information and understanding and communicating regarding their case. Yet other districts permit GALs to only advise the client or the court when they believe the client is not acting in her or his own best interests.

The standard of proof for GAL appointments raises another constitutional issue. Under the Probate Code, appointments that strip a ward of constitutionally protected rights must be based on "clear and convincing" proof.[42] This supports an interpretation that GAL appointments under CRS § 15-14-115 are fiduciary appointments[43] and thus require clear and convincing evidence whenever GAL powers impair a ward's constitutionally protected rights.

While the applicable standard of proof to support a GAL appointment has not been litigated in Colorado, a California case held that a woman who had a GAL appointed in chambers was entitled to due process regarding the

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appointment, including the right to challenge evidence relating to the appointment.[44] However, that case also held that the GAL appointment could be supported by a preponderance of the evidence.

Are GALs Fiduciaries?

Two cases specifically assumed that GALs are fiduciaries, *In re the Interest of M.M.*[45] and *Sorensen*.[46] Other cases have similarly held that “a court-appointed guardian ad litem is such a fiduciary . . . .”[47]; “the GAL acts as a special fiduciary”[48]; and a “guardian ad litem is a fiduciary that must act in the minor’s best interest.”[49]

While case law clearly supports a conclusion that GALs are fiduciaries, many have questioned the continued viability of this duty, and a recently proposed amendment to CRCP 17(c) specifically added language to the rule to unequivocally ensure no fiduciary duty to the ward.[50]

Under CRS title 15, neither guardians nor conservators may be appointed if they have a conflict of interest, and they must serve with an undiluted loyalty to their ward.[51] The consequences for violating this fiduciary duty can be harsh; in one recent case, a conservator who didn’t notify the court of a conflict of interest was convicted of civil theft and ordered to pay fees, costs, and treble damages.[52]

A Note on Diminished Capacity

Domestic relations cases often involve clients with diminished capacity, so attorneys in this field must be aware of signs that a client is impacted by a cognitive impairment. While some clients may exhibit obvious impairment, others may engage in inconsistent behavior that makes impairment difficult to assess. For example, some people are cogent in the morning but gradually “sundown” as the day progresses. Substance abuse and addiction frequently compromise the ability to function. Some clients may have a post-traumatic stress disorder caused by abusive behavior and generally function fine until a spousal conflict triggers a trauma response. Others experience debilitating depressive episodes triggered by loss and conflict that can all to easily be mistaken for intransigence, malingering, or procrastination. Depending on the nature of the issue, clients with diminished capacity may give conflicting orders, forget what they have been told (or what they have said), or be otherwise unable to effectively assist in the resolution or prosecution of their case. To facilitate representation in these challenging circumstances, attorneys should develop a working knowledge of the GAL appointment process and the GAL role.

Conclusion

The GAL role has a long history marked by the cobbling together of multiple duties to protect first children, then legal incompetents such as minors and women, and recently those who are legally competent in some areas but suffer from diminished capacities in others. Though the scope of the role remains hazy, GAL appointments frequently impair a client’s rights to autonomy and thus must be undertaken with care and respect. Part 2 will address the practicalities of working with clients who may need a GAL appointment. CL

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NOTES

1. In Colorado, GAL appointments in juvenile and adult cases differ because appointments in juvenile cases are governed by statute, which has codified and, to some extent, modified the common law. *See* CRS § 19-3-203.
2. *In re Marriage of Sorensen*, 166 P.3d 254 (Colo.App. 2007).
3. *See* Hoyt, “The Guardian Ad Litem,” *Cornell Law School Historical Theses and Dissertations*

Collection Paper 382 at 1–8 (1896).

4. *Id.* at 14–15.

5. *Mills v. Angela*, 1 Colo. 334, 335 (1871).

6. *In re Marriage of J.M.H. and Rouse*, 143 P.3d 1116, 1118 (Colo.App. 2006).

7. *Hoyt*, *supra* note 3 at 9–10.

8. *Id.* at 10–12.

9. *Id.* at 12. *See also* Harkness, "'Whenever Justice Requires': Examining the Elusive Role of Guardian ad Litem for Adults with a Diminished Capacity," 8:2 *Marquette Elder's Advisor* at 7 (2006) ("Unfortunately, as integral as [the use of GALs] would appear to be on a theoretical basis, in practice, the concept has remained elusive and ill-defined.").

10. *See, e.g.*, *Williams v. Hankins*, 258 P. 1114 (Colo. 1927). In some countries women remain legally incompetent. *See, e.g.*, Human Rights Watch, World Report 2013: Saudi Arabia, https://www.hrw.org/world-report/2013/country-chapters/saudi-arabia?msclkid=6cc145a4c7ed11eca4c9475d44fb86d6#.

11. The term "allegedly incapacitated person" has generally been replaced in probate by the term "protected person."

12. *Hoyt*, *supra* note 3 at 2. *See also* Federle and Gadomski, "The Curious Case of the Guardian ad Litem," 36:3 *Univ. of Dayton L. Rev.* 337, 345 (2011).

13. A Westlaw search shows 205 hits for the words "guardian ad litem" in the Colorado statutes and court rules.

14. CRS § 15-14-115.

15. CJD 04-05 at 6. The directive suggests that a GAL appointment for an incompetent person "may" happen, compared with the statute and the rule that require appointment if the court deems a party in need of protection. Many cases state that such appointment is the court's duty whenever an incompetent party appears before it. *See, e.g.*, *State ex rel. Perman v. Dist. Court of Thirteenth Judicial Dist.*, 690 P.2d 419 (Mont. 1984) (district court has affirmative duty to assure that AIP's rights are protected); *Roybal v. Morris*, 669 P.2d 1100 (N.M.Ct. App. 1983) (court has a duty to inquire when circumstances suggest a party is incompetent and to appoint a GAL if needed); *Mondelli v. Berkeley Heights Nursing and Rehab. Ctr.*, 1 F.4th 145, 149 (3d Cir. 2021) (court's duty to appoint a GAL is mandatory, and it must investigate when there is "verifiable evidence of incompetence.").

16. Many situations may lead a court to ponder a GAL appointment, and most involve an impairment of a client's ability to communicate, reason, or function.

17. Previously, the domestic relations statutes provided for a child GAL. That role was eliminated in 2005, and protections for children have developed through appointments of child and family investigators, parental responsibility evaluators, and child legal representatives.

18. CJD 04-05 at 2, 10–12. The directive purportedly limits all GAL appointments to licensed attorneys, which limitation was never required at common law (e.g., a GAL "shall obtain 10 hours of continuing legal education" to "enhance the attorney's knowledge of the issues," *id.* at 10). If the CJD 04-05 guidelines apply to state-rate appointments for indigents, the limitation might be seen as administrative in nature. However, because CJDs cannot modify either statutory or common law as their authority extends only to "matters of court administration," *Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007), this limitation may need to be revisited where a GAL's duties do not require a clear need for legal training.

19. *Sorensen*, 166 P.3d at 258.

20. The record does not state the authority under which the motion was filed, but per discussions between the attorney in the case (who is since deceased) and the author, the original motion for appointment of a GAL cited neither CRCP Rule 17(c) nor CRS § 15-14-115. The appellate court referenced Rule 17(c) in its analysis.

21. *Sorensen*, 166 P.3d at 256.

22. *Id.* at 259.

23. *In re the Interest of M.M.*, 726 P.2d 1108, 1120 (Colo. 1986).

24. *Id.* at 257 (citing *Johnson v. Lambotte*, 363 P.2d 165 (1961)).

25. *Harkness*, *supra* note 9 at 8.

26. The statutory definition of a guardian is "an individual at least twenty-one years of age, resident or non-resident, who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem." CRS § 15-14-102. Guardians are fiduciaries appointed to make decisions regarding the "support, care, education, health, and welfare" of a ward. CRS § 15-14-314(1).

27. CRS § 15-14-115 requires a court to make findings and specify the GAL's duties; it is thus reasonable to assume that the same requirements would apply to appointments under CRCP Rule 17(c).

28. *See, e.g.*, *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo.App. 1998).

29. *Hoyt*, *supra* note 3 at 13, noted that the law primarily "looked at Guardianship and paternal power merely as profitable rights, and it only sanctioned such rights when they could be made profitable."

30. *People in the Interest of T.M.S.*, 2019 COA 136.

31. JDF 742 was first published in 2009 and was revised most recently in 2018.

32. *Sorensen*, 166 P.3d at 257–58 (emphasis added).

33. *Milstein*, 955 P.2d at 83 (emphasis added). *Milstein* cited two other cases for the finding that a GAL makes decisions for a protected person: *Dep't of Insts. v. Carothers*, 821 P.2d 891 (Colo.App. 1991), *aff'd on other grounds*, 845 P.2d 1179 (Colo.1993); and *M.M.*, 726 P.2d 1108.

34. *AT&T Mobility, LLC v. Yeager*, 143 F.Supp.3d 1042, 1052 (E.D.Cal. 2015).

35. In *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992), the US Supreme Court commented on the holding in *Roe v. Wade*, 410 U.S. 113 (1973), regarding a person's right to personal autonomy, especially regarding the right to determine whether to carry a pregnancy to term, stating: "[I]f *Roe* is seen as stating a rule of personal autonomy . . . [then the Supreme Court's] post-*Roe* decisions accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims" . . . "[N]o erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant."

36. Nor is it discussed in *M.M.*, the precursor case cited in *Sorensen*.

37. *Milstein*, 955 P.2d at 81.

38. *Sabrosky v. Denver Dep't of Soc. Servs.*, 781 P.2d 106 (Colo.App. 1989).

39. *Harkness*, *supra* note 9 at 10.

40. There has been some debate among probate practitioners about whether GALs are, in fact, subject to a fiduciary duty. Historically, they have always owed a fiduciary duty toward their wards, and virtually all case law, including both *Sorensen* and *M.M.*, specifically notes that they are fiduciaries.

41. CRS § 15-14-311(2).

42. *Sabrosky*, 781 P.2d 106. *See also* CRS § 15-14-311 (guardian appointments) and CRS § 15-14-401 (conservator appointments). There is an interesting carve out to this proof requirement in § 401 regarding appointments of some conservators, which is not covered in this article.

43. Though it must be noted that CRS § 15-10-201 specifically excludes GALs from the definition of guardian.

44. *In re Sara D.*, 104 Cal.Rptr.2d 909, 913, and 911 (Cal.App. 2001).

45. *M.M.*, 726 P.2d at 1117 (referring to "[a] guardian ad litem *or other like fiduciary representing the minor*" (emphasis added)).

46. *Sorensen*, 166 P.3d at 258 ("whether [wife] needed a guardian ad litem *to act as her fiduciary*" (emphasis added)).

47. *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989).

48. *Milstein*, 955 P.2d at 83.

49. *Wideman v. Colo.*, 09-CV-00095-CMA-KMT, 2009 WL 5947142 at 10 (D.Colo. Sept. 10, 2009), *report and recommendation adopted*, 09-CV-00095-CMA-KMT, 2010 WL 749836 (D.Colo. Feb. 24, 2010), *aff'd and remanded*, 409 Fed. Appx. 184 (10th Cir. 2010).

50. The proposed rule change was suggested by a joint family law and probate committee in 2019 but was rejected by the Supreme Court rules committee.

51. This is a fundamental statutory and case law proposition. *See, e.g.*, CRS § 15-1-103 (defining "fiduciary" to include "a trustee under any trust, expressed, implied, resulting, or constructive, executor, administrator, personal representative, *guardian, conservator* . . . or any other person acting in a fiduciary capacity for any person, trust, or estate." (emphasis added)); CRS § 15-14-207(1) (providing that a guardian "shall act at all times in the ward's best interest") and -314 (a guardian "at all times, shall . . . exercise reasonable care, diligence, and prudence"); and -418(1) (a conservator "is a fiduciary and shall observe the standards of care applicable to a trustee"). *See also Estate of Keenan v. Colo. State Bank and Trust*, 252 P.3d 539, 543 (Colo. App. 2011) (noting "no principled difference between a guardian and a conservator" and stating that at common law "a guardian does owe his ward the duty of undivided loyalty.").

52. *Black v. Black*, 2018 COA 7, ¶ 128.