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# DUE PROCESS AND THE GUARDIAN AD LITEM IN ELDER LAW DISPUTES: WHICH HAT WILL SHE DON WITH HER CLOAK OF NEUTRALITY?

Roger A. Eddleman\* & John A. DiNucci\*\*

## I. INTRODUCTION

In 1987, the Associated Press conducted a nation-wide study exposing abuses of the elderly by their own guardians.<sup>1</sup> One notable instance involved an eighty-three-year-old woman whose adult daughter had been appointed as guardian.<sup>2</sup> The

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1. Jamie L. Leary, Note, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves Against the Need to Guard Individual Autonomy*, 5 VA. J. SOC. POL'Y & L. 245, 246 (1997).

2. *Id.* at n.10. "Guardian" is to be distinguished from guardian *ad litem*. A guardian is a person who is appointed to care for the personal needs and oversee the welfare of an incapacitated person, while a guardian *ad litem*, in the context of this article, is an attorney appointed by a court for purposes of litigation involving the putative incapacitated person who is the ward of the court during the proceeding.

elderly woman was found in a urine-soaked bed, suffering from malnutrition and dehydration. The grandchildren referred to her as “Fido,” feeding her once a day. The daughter, however, never failed to cash her mother’s Social Security checks.<sup>3</sup>

The Associated Press’s study resulted in national attention concerning the plight of the elderly.<sup>4</sup> In 1997, Virginia enacted its guardianship and conservatorship statute<sup>5</sup> (the “Statute”) patterned after the Uniform Guardianship and Protective Proceedings Act.

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3. *Id.*

4. Subsequent studies revealed that the elderly did not fare well in the judicial system either. In a substantial number of cases they were deemed to be incapacitated resulting in a loss of freedom without legal representation and without being present at any stage of the proceedings. In most instances the cases involve allegations that an elderly person cannot properly function and take care of themselves or their interests because of disabilities brought on by Alzheimer’s disease, a chronic and slowly progressive disorder that is irreversible. In the Matter of Conservatorship of Groves, 109 S.W.3d 317, 338 (Tenn. Ct. App. 2003) (citation omitted). According to one study there will be 360,000 or more new cases of the disease every year. *Id.* According to *Campbell v. Thomas*, 73 A.D.3d 103, n.1 (N.Y. Ct. App. 2010), one study found that in approximately 65% of substantiated cases of elder abuse, the offender was a family member of the victim, including his or her adult child, spouse, or intimate partner. As far back as 1984, one court referred to cases involving elderly abuse as “an all-too-familiar modern tragedy.” *Bergman v. Serns*, 443 So. 2d 130, 131 (Fla. Ct. App. 1983). In *Hayes v. Thompson*, 952 So. 2d 498, 501 (Fla. 2006), the elderly ward of the court was the victim of multiple abuses by her nephew and sister who were responsible for the ward’s financial and medical needs. The ward’s living conditions at the nephew’s home were “deplorable” to the extent of placing her in danger. *Id.* In *Groves*, the eighty-eight-year-old ward suffered at the hands of relatives who “brainwashed” her in order to take, among other things, financial advantage of her; once that was accomplished she was placed in a nursing home. 109 S.W.3d at 324. In *In re Guardianship of Santrucek*, 896 N.E.2d 683, 689 (Oh. 2008), a ninety-six-year-old ward had been removed from her Michigan home and forced to live out the rest of her life in a “strange location.” In another typical case, a ward’s children had moved her from Ohio to Florida during a time when her health was at risk, concealed the ward’s location, transferred her accounts and assets into joint ownership, sold her assets and used the proceeds for their personal use, and so forth. *Thorpe v. Myers*, 67 So. 3d 338, 340 (Fla. Ct. App. 2011). (If one is unfamiliar with this area of law and the issues involved, the *Groves* decision is perhaps the best case for becoming initiated. It is a lengthy opinion with 134 footnotes, addressing a plethora of factual, legal, and medical issues typically involved in such cases.)

5. 1997 Va. Acts 921. Title 37.2 of the Virginia Code, “Behavioral Health and Developmental Services,” consists of eleven chapters; chapter ten, “Guardianship and Conservatorship,” embodies the totality of the Statute at issue in this article. VA. CODE ANN. §§ 37.2-1000–37.2-1030 (2012). It should be noted that the Statute addresses not only the elderly but all physically and/or mentally incapacitated persons who cannot properly care for themselves or their property.

One of the primary means of protecting the elderly (the “Respondent”<sup>6</sup> or “ward”) involves the appointment of a lawyer as guardian *ad litem* (“GAL”).<sup>7</sup> Unlike any other person, party, or witness in any type of litigation, the GAL’s role is expansive.<sup>8</sup> They state, often not under oath, their personal beliefs and opinions regarding legal and factual issues reaching directly to the heart of the proceedings.<sup>9</sup> On those occasions when GALs testify, they may not be subject to cross-examination. The GAL’s role is well-intentioned and grounded in part on judicial convenience. A GAL acts as the court’s eyes and ears. She is appointed, *inter alia*, under the Statute and pursuant to a court’s inherent equitable powers.<sup>10</sup> The GAL reports her findings to the trial court after investigating virtually all the facts and legal

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6. As discussed below, the Statute denominates the subject or putative ward in the proceeding as a “Respondent.” VA. CODE ANN. § 37.2-1000.

7. Although the Statute sets forth several definitions, including “guardian” and “conservator,” significantly it does not define a guardian *ad litem*. *Id.* Apparently, the General Assembly concluded that the term was adequately defined by common law. Notably, in some states, a GAL need not be an attorney. In Virginia that is not the case; a GAL must be a licensed Virginia attorney. §§ 8.01-9, 16.1-266.1.

8. § 37.2-1003 (B). While this study focuses on GALs in the elder law context, it should also provide guidance and insight on a GAL’s role in any context because irrespective of the particular statute or other authority authorizing their appointment, in Virginia a GAL’s obligations are generally the same. In addition, although this article focuses on Virginia law, its utility is not limited to the Commonwealth. By necessity, we address the GAL’s role in a number of jurisdictions. Virtually all the states are struggling with the appropriate role a GAL plays in their respective jurisdictions.

9. § 37.2-1003 (B). For example, an expert witness is allowed to testify concerning her opinion but cannot opine on the ultimate issue. An attorney in closing can argue the facts but cannot give his personal opinion. In contrast, a GAL may do all of these.

10. § 37.2-1003. Standards governing a GAL’s appointment were promulgated by the Judicial Council of Virginia in conjunction with the Virginia State Bar and became effective January 1, 2009. *Standards to Govern the Appointment of Guardians Ad Litem for Incapacitated Persons Pursuant to Chapter 10 of Title 37.2, Code of Virginia*, available at [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/gal\\_standards\\_adult.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/gal_standards_adult.pdf). To qualify one must be an active member of the bar and in good standing, complete six hours of approved continuing legal education, and apply to be placed on an approved list of attorneys qualifying as GALs. *Id.* Thereafter, the attorney must complete six hours of approved courses every two years. The courses involve issues pertaining to elder law such as basic estate planning, estate administration, litigation, ethics, Medicaid, Medicare, long term care insurance, facility evaluation, dementia, closed head injuries, gerontology, mental issues, and so forth.

issues involved in the proceedings as set forth in the petition requesting the appointment of a guardian and/or conservator.

The GAL is supposed to be neutral. She purportedly renders an unbiased opinion on such matters as whether the Respondent needs a guardian due to mental or physical incapacity, the scope of the guardian's duties, and whether the proposed guardian is suitable.<sup>11</sup> Significant complications arise, however, when one of the parties, including the Respondent, disagrees with the GAL's often devastating opinion.

The primary concern in the context of this study involves human error and fallibility. Personalities, motives, and practical considerations meet deficient safeguards in the form of inadequate judicial safeguards. A GAL's opinion, like any other witness, can be based on emotion, lack of information, or untrustworthy information. To further complicate matters, the information GALs rely on may be based on hearsay. Personality conflicts often arise and derive from the charged atmosphere of litigation and long-standing family conflicts. In addition, it may be that the GAL has not taken the time or had the time to adequately investigate, resulting in ill-considered recommendations to the trial court.<sup>12</sup>

A host of significant issues, not the least of which are constitutional in dimension, are presented given the GAL's mercurial role.<sup>13</sup> As a lawyer appointed to act in the putative

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11. § 37.2-1003(C).

12. For example, in a ten-day trial involving Washington State's guardianship statute, a GAL admitted on cross-examination that before her investigation was complete and before speaking with two critical witnesses, the GAL "had already decided that she would not recommend a guardianship." *Endicott v. Saul*, 176 P.3d 560, 569 (Wash. Ct. App. 2008). The GAL also testified that if she were making a decision based solely on the elderly woman's testimony in court, "that she too might have doubts as to whether [the ward] needed a guardian." *Id.* at 568. In an unpublished Tennessee opinion, a party accused the GAL of being "hand-picked" (biased) by the opposing side and moved to have the GAL removed. *Davenport v. Adair*, No. E2004-01505 (Tenn. Ct. App. Dec. 27, 2005) (unpublished).

13. A GAL's role has been described as "hybrid" because she functions as an advocate, investigator, and advisor with duties owed to the court and to the putative ward. In the *Matter of M.R.*, 638 A.2d 1274, 1284 (N.J. 1994). In *M.R.*, the New Jersey Supreme Court attempted to set forth the parameters of a GAL's obligations and duties, and in doing so observed that although there were

ward's best interests, what role should the GAL have at trial? Upon receiving the trial court's imprimatur as "neutral," should the GAL be permitted to testify? If so, what impact does that have on a party seeking to challenge the GAL's opinion when the fact-finder has been informed that the GAL is acting for the best interests of the putative ward and is "neutral"? Is it fair to the parties when the GAL wears two hats, an adversarial hat and the hat of a court advisor?

Because most of these issues have not been addressed by Virginia courts, we examine authorities elsewhere.<sup>14</sup> We conclude that Virginia law is unsettled, if not chaotic, and should be remedied by additional legislation and/or promulgation of Supreme Court rules.

## II. THE STATUTE

Virginia's guardian and conservatorship statute is designed to protect those at the mercy of their own physical and/or mental limitations.<sup>15</sup> The elderly are also vulnerable and frequently

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differences between minors and incompetent elderly persons (both requiring court-appointed GALs), the same considerations calling for an advocacy role in the case of minors applied to GALs in the context of elder law proceedings. *Id.* We point this out because in the analysis that follows many of the court decisions derive from case law involving GALs appointed to represent minors in the family law context. This is necessary because as noted there are limited cases addressing the role of GALs in the elder law context. Nevertheless, these opinions are highly instructive. In some respects the nature of the "disability" is irrelevant because the GAL's duties and obligations are the same: they are to represent their ward's best interests, whether the ward is a minor or adult. In either event, the issues are virtually the same; the GAL is engaged for the benefit of someone who is incapable of making decisions or acting in their own best interests.

14. The primary issues addressed in this article can be summarized by asking two questions: how much of an attorney is the GAL, and how much of a client is the client (or ward/Respondent)? At first blush, these questions may appear unclear. Nevertheless, they accurately frame the issues. The first question can be reformulated: how far can the GAL go in advocating her position during the proceedings? Should she be allowed to function fully as an advocate, consistent with her role as the eyes and ears of the court? The second question can also be restated: is the putative ward the GAL's "client" as the term "client" is used in the traditional attorney-client context? Stated differently again, who is the client? Is it the putative ward, is it the GAL's "position," or is the client the GAL herself? As we will see, all of these "clients" have been identified as such by one or more authorities.

15. See *Davenport v. Adair*, No. E2004-01505 (Tenn. Ct. App. Dec. 27, 2005)

unable to defend themselves from the false allegations of family members that a parent, for example, is mentally or physically incapacitated.<sup>16</sup> The Statute is, therefore, designed to ensure that before the elderly person's liberty or property is taken, she is in fact in need of protection because she is incapacitated.<sup>17</sup>

The Statute is intentionally broad, empowering Virginia Circuit Courts to appoint a guardian and conservator<sup>18</sup> to manage and care for the Respondent's<sup>19</sup> health and property. From the Respondent's perspective, however, the Statute is a state-authorized mechanism for taking or limiting their freedom

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(unpublished) ("The purpose of appointing a guardian, conservator, or committee is to safeguard the rights of the incompetent by protecting his person and by managing and preserving his property." (internal quotation omitted)). The "overwhelming public policy" in guardianship proceedings is the protection of the ward. *Hayes v. Thompson*, 952 So. 2d 498, 505 (Fla. 2006). Guardianship proceedings are meant "to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence." *Struck v. Cook Cnty. Pub. Guardian*, 901 N.E.2d 946, 952 (Ill. Ct. App. 2008) (quoting 755 ILL. COMP. STAT. 5/11a-3(b) (2006)).

16. For example, see *Whitmer v. Thomas*, 27 Va. Cir. 202, 203-04 (1992), one of the few reported Virginia decisions involving the Statute. The trial judge ordered the petitioners, two adult children who had instituted the proceeding to appoint a guardian for their mother, to pay the entirety of the GAL's fees. *Id.* at 204. The children, who alleged their mother was incapable of taking care of herself, had three months to gather evidence supporting their allegations; however, as late as six days prior to trial, the children had gathered no evidence (medical or otherwise) documenting their mother's alleged condition. *Id.* at 203-04. Petitioners admitted in deposition that their mother was not incapacitated. *Id.* at 203. The court found that it was "obvious" the petitioners were more concerned about preserving their mother's financial assets than they were for their mother's well-being and ordered they pay the GAL fees. *Id.*

17. A number of safeguards are included in the Statute to ensure that the putative ward is actually incapacitated and in need of protection. As noted, the Statute defines "incapacity." VA. CODE ANN. § 37.2-1000. The court is required to appoint medical professionals to submit an Evaluation Report relating to the putative ward's condition. § 37.2-1005. In addition, the GAL is required to investigate the full scope of the Petition's allegations as well as the evidence, including the suitability of proposed guardian and/or conservator, the residential placement of the putative ward, and so forth. § 37.2-1003(C).

18. Here, guardian is distinguished from GAL and defined by the Statute as a person appointed by the court to be responsible for the personal affairs of an incapacitated person. § 37.2-1000. A guardian's responsibilities include making decisions regarding the elderly person's support, care, health, safety, education and so forth. *Id.* By contrast, a conservator is defined as a person appointed by the court to manage the estate and financial affairs of an incapacitated person. *Id.*

19. The Respondent is the alleged incapacitated person for whom a petition for guardianship or conservatorship has been filed. *Id.*

to live as they wish,<sup>20</sup> jeopardizing virtually everything the Respondent has amassed over a lifetime. Upon a finding of incapacity, they are often uprooted from their homes, neighborhoods, and relatives and separated from life-long friends.

While the Statute is designed first and foremost to protect the Respondent in her person and property, the state is constitutionally restrained because an elderly person's liberty interests are directly implicated in a guardianship proceeding.<sup>21</sup> When the Commissioners on Uniform State Laws drafted the proposed guardianship statute, the ward's civil rights were kept foremost in mind.<sup>22</sup> The Virginia statute follows suit. First, and most significantly perhaps, is the requirement that a finding of incapacity must be based on clear and convincing evidence.<sup>23</sup> Second, a GAL, purportedly an independent party, is appointed to represent the Respondent's interests.<sup>24</sup> Third, the Respondent is entitled to be represented by an attorney of her choice.<sup>25</sup>

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20. Guardianship proceedings carry "the real possibility of displacing the elderly person's ability to make even the most basic decisions for themselves and to live their lives unfettered by the control of others." In the Matter of Conservatorship of Groves, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003). Persons deemed incapacitated face a "substantial loss of freedom." *Id.* A guardianship can be a "drastic restraint on a person's liberty." In the Matter of M.R., 638 A.2d 1274, 1282 (N.J. 1994) (internal quotation omitted).

21. In New York the guardianship statute is "[d]esigned to assure that the individual's constitutional rights are fully protected . . ." In the Matter of Johnson, 658 N.Y.S.2d 780, 783 (1997).

22. As a matter of practice and policy the courts endeavor to impose the least restrictive constraints on a Respondent's liberty. Sometime after the enactment of the uniform law and its adoption by a number of the states, the act was amended to set forth the policy that "limited" guardianships were favored. In New York the statute seeks to impose the "least restrictive form of intervention." Johnson, 658 N.Y.S.2d. at 783. In Tennessee conservatorship proceedings under the statute require that the "least restrictive alternatives be placed upon a disabled person consistent with adequate protection of the individual's person and property." Groves, 109 S.W.3d at 329 (internal quotation omitted) (describing TENN. CODE ANN. § 34-1-127 (2001)).

23. VA. CODE ANN. § 37.2-1007. *See also* Coston v. Petrie, 586 N.W.2d. 52, 61 (Wis. Ct. App. 1998).

24. § 37.2-1003(A).

25. §§ 37.2-1006 and 37.2-1003(B)(iii). *See also* Guardianship of Hocker, 791 N.E.2d 302 (Mass. 2003).



Fourth, the Statute defines “incapacitated person.”<sup>26</sup> Fifth, the Respondent is entitled to notice by personal service of the proceedings,<sup>27</sup> to be present at all stages, and to request a jury trial at which she may present evidence, compel witnesses’ attendance, and cross-examine adverse witnesses.<sup>28</sup>

Usually some real or feigned emergency triggers the filing of a Petition in circuit court.<sup>29</sup> In many instances, an adult child discovers that their father’s or mother’s physical or mental condition has deteriorated to such an extent that the parent is in danger. Quite often a family member motivated by financial gain files a petition, alleging that their parent is incapable of caring for himself and/or his property.<sup>30</sup>

While a family member most often initiates capacity

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26. § 37.2-1000:

“Incapacitated person” means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.

27. § 37.2-1004(B). Section 37.2-1004(C) further requires notice of the date and time of the hearing be mailed at least seven days before the hearing to all adult individuals named in the Petition, including Respondent.

28. § 37.2-1007.

29. Section 37.2-1001(A) provides that a Petition may be filed in the county or city in which the Respondent is a resident or where the Respondent is located. In a significant number of cases, the Respondent may have been involuntarily relocated by a family member to a county or city in Virginia and, therefore, is not a Virginia resident. Consequently, the Statute allows any person to file a Petition where the Respondent is “located.” In 2011, Virginia adopted its version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Act), in part, because of the rash of litigation over jurisdictional disputes involving the elderly who are often taken from their home state (defined in the Act) and detained by family members against their will in another state.

30. So-called criminal elder abuse statutes have relatively recently been enacted. Some define and include financial abuse as “elder abuse,” and convictions are classified as misdemeanors or felonies. Elder abuse statutes can also encompass financial abuse in the civil context. *See, e.g.,* Steinbach v. Thomas, No. A125293 (Cal. Ct. App. Jan. 12, 2011) (unpublished) (discussing allegation that before his death plaintiff’s grandfather sold his property for less than market value as a result of fraud by defendant).

proceedings, Section 37.2-1002 provides that *any* person may file for appointment of a guardian or conservator or both. Section 37.2-1001 requires the petition to be filed with the circuit court in the county or city where the respondent/incapacitated person is a resident or is located.

The Statute also specifies the Petition's contents. Section 37.2-1002 requires, in part, that the Petition include the Petitioner's name, place of residence and the relationship, if any, to the Respondent. The Petition shall further provide:

1. The respondent's name, date of birth, place of residence or location, post office address and the sealed filing of the social security number;
2. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including step-children. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;
3. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;
4. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal or any guardian, committee, or conservator currently acting, whether in this state or elsewhere, with a copy of any such documents, if available, attached by the petitioner;
5. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;
6. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangement and treatment plan;
7. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment

and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

8. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent and that person's relationship to the respondent;

9. The native language of the respondent and any necessary alternative mode of communication;

10. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts;

11. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

12. A request for appointment of a guardian ad litem.

After a petition is filed the court is required to appoint a GAL "to represent the interests of the respondent." Section 37.2-1003(B) further provides:

Duties of the GAL include: (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 37.2-1006<sup>31</sup> and 37.2-1007<sup>32</sup>, and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel should be appointed for the respondent, pursuant to § 37.2-1006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences.

Section 37.2-1003(C) mandates the contents of the GAL's report (the "Report"). The Report must address:

(i) whether the court has jurisdiction; (ii) whether or not a guardian or conservator is needed; (iii) the extent of the duties and powers of the guardian or

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31. Section 37.2-1006 provides that the Respondent has a right to counsel.

32. As noted, this part of the Statute provides that the Respondent is entitled to a jury trial, the right to participate at trial, to compel witnesses, and so forth.

conservator . . . ; (iv) the propriety and suitability of the person selected as guardian or conservator, after consideration of geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond, if any<sup>33</sup>; and (vi) consideration of proper residential placement of the respondent.

Given the GAL's expansive duties and requirements of the Report, the Statute would seem to leave no area untouched by the GAL. In fact, as seen below, that is the case; the GAL's role is central if not crucial insofar as the court's ultimate findings regarding capacity and who should be appointed as guardian.<sup>34</sup>

The Statute does not require the Report to be served on any party (including the Respondent). Moreover, there are no requirements concerning when the Report is to be filed, nor is the Report required to be submitted under oath.<sup>35</sup>

In addition to the foregoing duties, a GAL opines on whether the Respondent needs personal legal representation. Under Section 37.2-1006, the Respondent has a right to counsel of her choice. In some situations the GAL or court may conclude that counsel for the Respondent is unnecessary because one of the parties to the proceeding is protecting the Respondent's interests.

Section 37.2-1007, "Hearing on the petition to appoint," provides in part that the Respondent is entitled to a jury trial

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33. Section 37.2-1019, "Taking of bond by clerk of court," provides that whenever a fiduciary is appointed, the clerk of the court "shall have the authority to take the required bond, set the penalty thereof, and pass upon the sufficiency of the surety thereon."

34. Simply stated, the GAL has a significant impact on the two primary issues in a guardianship proceeding, which are "whether a guardianship should be instituted, and if so, who should be appointed as guardian." In re Guardianship of Miller, 299 S.W.3d 179, 184 (Tex. Ct. App. 2009).

35. While this will be fully addressed below, it should be noted that these deficiencies significantly undermine the fairness of the proceedings, not only to the Respondent but to all parties in a capacity proceeding under the Statute.

and may compel witnesses to attend. The Respondent may also present evidence, confront, and cross-examine witnesses.<sup>36</sup> Either the court or a jury can hear the evidence surrounding the Petition. The Respondent is entitled to be present at all stages of the proceedings. If it is shown by clear and convincing evidence that the Respondent is incapacitated and in need of a guardian or conservator, the court shall appoint one or both, giving due deference to the Respondent's wishes.<sup>37</sup>

Section 37.2-1005 requires an Evaluation Report be provided by a physician or psychologist to the GAL (not the parties) within a reasonable time prior to the capacity hearing. The Statute mandates that the Respondent be evaluated by a licensed professional, skilled in the assessment and treatment of the Respondent's alleged condition.<sup>38</sup> If the Evaluation Report is not available at the hearing, the court may allow the hearing to go forward, unless the GAL objects. The Evaluation Report requires certification by the medical professional concerning:

1. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;
2. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;
3. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and
4. The signature of the person conducting the evaluation and the nature of the professional license held by that person.<sup>39</sup>

Section 37.2-1005(D) provides that the Evaluation Report is admissible as to the evidence of the facts stated therein and the

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36. VA. CODE ANN. § 37.2-1007.

37. *Id.*

38. *Id.*

39. § 37.2-1005(B).

results of the examination, unless Respondent's counsel or the GAL objects.

The Statute is silent concerning the GAL's role at the capacity hearing or trial. As discussed below, the GAL often participates at the trial by presenting evidence, cross-examining witnesses, giving an opening and closing, and testifying. The GAL appears to function as one of the parties' attorneys in an adversarial capacity, although the GAL purportedly represents no party to the proceeding; moreover, the GAL also appears as if she were an expert when testifying and rendering an opinion concerning the ultimate issues in the case.

Before examining the authority under which GALs are appointed, it is important to consider that although the Statute contains a number of safeguards for the Respondent's protection, one of the greatest areas requiring closer scrutiny involves the Respondent's assets. Under Section 37.2-1012(F), the court may award compensation from the Respondent's estate to any attorney, the GAL, and medical evaluators. This provision is also a means of protecting the Respondent. It provides a "fund" so to speak, and may act as an incentive to those without the financial resources to bring to the court's attention those who are in need of assistance, i.e., elderly persons who may be incapacitated. If the Respondent's estate were not subject to being "taxed" for the costs of initiating and consummating the capacity proceeding, then some that are in need of court aid might not be brought to the court's attention because family members may lack the means to finance the litigation.

Courts typically award such compensation to the Petitioner's attorney, the GAL, and medical evaluators whenever the estate can bear the cost as long as doing so does not jeopardize the Respondent's future. However, this provision is also subject to abuse, especially when the Respondent's estate is substantial. In those instances where a family member is motivated by financial gains or other ulterior reasons, the provision allowing for compensation becomes a "war chest" or a

means otherwise not available for financing spurious claims, specifically, false allegations concerning the Respondent's condition. For example, the Respondent may be elderly, wealthy, and physically weak but by no means incapacitated as defined by the Statute. Those who are ill-motivated can be emboldened to file a Petition upon learning that the Respondent's resources can be the source of financing his own demise. The statutory compensation provision might encourage spurious litigation. The courts do not adequately police such practices, especially when the parties reach a settlement prior to a hearing on capacity.<sup>40</sup>

### III. AUTHORITY TO APPOINT A GAL

There are three possible sources of authority concerning a GAL's appointment in the context of a capacity hearing. The first is the Statute. As seen, the Statute requires a GAL to be appointed after the Petition is filed and, in addition, specifies the GAL's duties. The second source of authority derives from a trial court's inherent authority under the *parens patriae* doctrine. Historically the courts have had the power to appoint a guardian for any incompetent person coming within its jurisdiction. Finally, the third potential source of authority for appointing a GAL derives from Virginia Code Section 8.01-9.<sup>41</sup>

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40. Although there are no available studies, it is common to see extraordinary sums paid from the Respondent's estate, especially fees paid to the attorneys. In many instances the Respondent's estate is substantially depleted by such payments. The courts are eager to accept the parties' settlements and if no one complains or brings the matter of attorney's fees to the court, it will go unnoticed and will be paid from the Respondent's funds/assets. The *Hayes* court noted with some irony, if not sarcasm, that the petitioners' complaint that attorney's fees could exceed \$150,000.00 (which was more than the ward's entire estate) was "like the apocryphal story of the man who kills both his parents and begs the court for mercy because he is an orphan." 952 So. 2d 498, 509 (Fla. 2006).

41. Section 8.01-9, "Guardian ad litem for persons under disability; when guardian ad litem need not be appointed for person under disability," provides in full:

A. A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such defendant, whether the

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defendant has been served with process or not. If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of the defendant is so represented and protected. Whenever the court is of the opinion that the interest of the defendant so requires, it shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow the guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of the defendant. However, if the defendant's estate is inadequate for the purpose of paying compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding or, in the case of proceedings to adjudicate a person under a disability as an habitual offender pursuant to former § 46.2-351.2 or former § 46.2-352, shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. In a civil action against an incarcerated felon for damages arising out of a criminal act, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges. If judgment is against the incarcerated felon, the amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth. By order of the court, in a civil action for divorce from an incarcerated felon, the compensation and expenses of the guardian ad litem shall be paid by the Commonwealth out of the state treasury from the appropriation for criminal charges if the crime (i) for which the felon is incarcerated occurred after the date of the marriage for which the divorce is sought, (ii) for which the felon is incarcerated was committed against the felon's spouse, child, or stepchild and involved physical injury, sexual assault, or sexual abuse, and (iii) resulted in incarceration subsequent to conviction and the felon was sentenced to confinement for more than one year. The amount allowed by the court to the guardian ad litem shall be taxed against the incarcerated felon as part of the costs of the proceeding, and if collected, the same shall be paid to the Commonwealth.

B. Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, in any suit wherein a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of guardian ad litem.

Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in compliance with the provisions of this subsection B, shall be as valid as if the guardian ad litem had been appointed.



Virginia courts have read Section 8.01-9 in conjunction with other statutes requiring or authorizing a GAL's appointment, and there is every reason to conclude that they will read Section 8.01-9 in conjunction with the Statute. However, as discussed below, Section 8.01-9 should have no applicability to a GAL appointed in the elder law context.

Reading Section 8.01-9 in conjunction with the Statute results in an expansion of the GAL's duties.<sup>42</sup> Stated differently, a GAL acting under Section 8.01-9 may engage in conduct during the proceedings that exceeds the express and/or implied duties authorized under the Statute.

On the other hand, the Statute is extremely broad in what it empowers a GAL to do. It requires the GAL to investigate and submit a report concerning all the evidence relating to the Petition. So the question is, how could Section 8.01-9 possibly expand the scope of a GAL's duties given the fact that her duties under the Statute are so expansive? The answer to this question is not simple. At present, it suffices to say that reading Section 8.01-9 and the Statute together may result in an expanded role for the GAL because as currently interpreted by the courts, Section 8.01-9 imposes an obligation on the GAL to assume attorney-client responsibilities. In other words, if Section 8.01-9 is read in connection with the Statute, the GAL may be required to assume litigation-type responsibilities. This is more than a little confusing because a GAL appointed pursuant to the Statute is not appointed to act as a lawyer for the Respondent individually.

Given the considerable confusion concerning a GAL's role under Section 8.01-9, not to mention the general befuddlement surrounding a GAL's role in any context, it would be useful to

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42. This article attempts to identify and clarify the GAL's role. As seen below, the GAL's role is beclouded despite the courts' valiant attempts. For example, the Wisconsin Court of Appeals attempted to distinguish a GAL's role from that of the "adversarial" attorney in *Jennifer M. v. Maurer*, stating that "[a]n appointed guardian ad litem is an advocate for the best interests of the ward. . . . A ward's adversary counsel shall be an advocate for the *expressed wishes* of the ward." 779 N.W.2d 436, 439 (Wis. Ct. App. 2009) (internal quotations omitted; emphasis in original).

adumbrate the sequence of the analysis that follows. Because the courts have not been consistent regarding the GAL's role especially as it pertains to Section 8.01-9, we will look first at Section 8.01-9's language, followed by the scant but important case law under Section 8.01-9. Secondly, we address the court's powers under the *parens patriae* doctrine.

Section 8.01-9 appears to be Virginia's codification of two English statutes dating from the thirteenth Century. In general, Section 8.01-9 permits legal actions to continue against or on behalf of a party who is under a disability.<sup>43</sup> Rather than dismissing a suit brought against or on behalf of an incompetent person, the court appoints a GAL to monitor the interests of the person under a disability. Section 8.01-9 is jurisdictional; if the proceedings continue in the GAL's absence, any judgment is void and subject to collateral attack.<sup>44</sup>

A straight-forward reading of Section 8.01-9 would render it inapplicable in the elder law context because it applies only when the "party"<sup>45</sup> or person named in the legal action is under a disability or incapacitated at the time the suit is initiated.<sup>46</sup> In proceedings under the Statute, however, the Respondent has not yet been adjudicated as incapacitated; the determination of the putative ward's capacity is one of the primary purposes of the proceedings.

The language of Section 8.01-9(A) clearly shows this to be

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43. Virginia Code Section 8.01-2(6) defines "Person under a disability" as: (a) a person convicted of a felony . . . ; (b) an infant; (c) an incapacitated person as defined in § 37.2-1000; (d) an incapacitated ex-service person under § 37.2-1016; or (e) any other person who, upon motion to the court by any party to an action or suit or by any person in interest, is determined to be (i) incapable of taking proper care of his person, or (ii) incapable of properly handling and managing his estate, or (iii) otherwise unable to defend his property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both. Such impairment may also include substance abuse as defined in § 37.2-100.

44. See the dissent and cases cited therein in *Graham v. Commonwealth*, 443 S.E.2d 586 (Va. Ct. App. 1994).

45. The Statute defines the putative ward (or the Respondent) as a party. § 37.2-1000. However, as noted, the Respondent is not yet deemed to be under a disability or incapacitated.

46. See § 8.01-2(6), *supra* note 43.

the case:

A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian *ad litem* to such defendant . . . . Every guardian *ad litem* shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed . . . .<sup>47</sup>

The inapplicability of Section 8.01-9 to proceedings under the Statute is evident from the first clause. While the Respondent, under the Statute is in fact a “party,” the Respondent has not yet been adjudged to be a person under a “disability.”<sup>48</sup>

The second clause supports the proposition that Section 8.01-9 does not empower a GAL to assume litigation or advocacy functions on the Respondent/ward’s behalf. It provides that the GAL shall faithfully represent the “estate or other interest” of the person under disability. Section 8.01-9 is not, on its face, a mechanism for appointing a lawyer with litigation responsibilities in a typical attorney-client context; the attorney/GAL under Section 8.01-9(A) functions as a GAL and faithfully represents not a “client,” but the “estate or other interest” of the person under disability. She functions in a “GAL” capacity (however that term is understood), but not as

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47. Section 8.01-9(B) provides in part that notwithstanding subsection A or other provisions of the law to the contrary, in any suit where the person under a disability is represented by an attorney who has entered his appearance, no GAL need be appointed unless the court determines that the interest of justice requires such an appointment. The court may appoint the attorney of record for the person under disability to “perform all the duties and functions of guardian *ad litem*.” § 8.01-9(B). In other words, the attorney of record may continue in her role as an advocate attorney (with the traditional obligations under the attorney-client relationship) as well as be appointed as a GAL.

48. In *Bailey v. Phelps*, 66 Va. Cir. 413, 414 (1997), a GAL was appointed for a prisoner due to his status as a convicted felon, which thus qualified him as being “under a disability.” § 8.01-2(6)(a). After reviewing the various committee statutes, the circuit court determined that Section 8.01-9 is applicable at any time a person is under a disability. This decision is authority for the proposition that § 8.01-9 applies only when a person is already deemed to be under a disability.

the ward's attorney *per se*.<sup>49</sup>

Although the language of Section 8.01-9 on its face would preclude its applicability in the elder law context, Virginia courts have read Section 8.01-9 in conjunction with other statutes involving GAL appointments in situations where the person under disability was not a party. Specifically, courts read Section 8.01-9 in connection with GALs appointed under Title 16, and have done so when the person was not a "party" to the suit.<sup>50</sup> Again, as can be seen from the language of Section 8.01-9, the statute should not be applied in that situation either.

We next address three Virginia cases involving the GAL's role under Section 8.01-9. All three evidence the confusion concerning the GAL's role. In addition, they illustrate both the inapplicability of Section 8.01-9 if that statute were correctly interpreted, as well as the likelihood that courts in the future will apply Section 8.01-9 to GALs in the elder law context.

In *Stanley v. Fairfax County Department of Social Services*,<sup>51</sup> a mother's rights to her children had been terminated.<sup>52</sup> The statute authorizing the petition for termination<sup>53</sup> was silent as to who could actually file it. In this instance, the GAL had done so. Before the petition could be filed, the Department of Social Services ("Department") was required to file a foster care plan<sup>54</sup>

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49. As noted, § 8.01-9(B) allows the attorney to be appointed as GAL. That applies when the attorney of record for the incapacitated party is later appointed as GAL to represent his own client.

50. The pertinent provisions under Title 16 involve the appointment of GALs where the "ward" is a child. § 16.1-266. As we will see from the discussion below, while the child is "under a disability" by virtue of being a minor, the child is not a party to the suit; therefore, § 8.01-9 is inapplicable. For example, in a divorce action with custody disputes, the children may be appointed a GAL under Title 16. However, the children are not parties to the suit—their parents are. Nevertheless, the courts have justified the appointment and conduct of GALs in such circumstances, ruling that § 8.01-9 supported the GAL's actions and/or that § 8.01-9 authorized the GAL's appointment.

51. 405 S.E.2d 621 (Va. 1991).

52. *Id.* at 622. Virginia Code Sections 16.1-283(A) and (B) allow a Juvenile and Domestic Relations court (J&DR) to terminate the residual parental rights (TPR) of parents when there has been a previous judicial determination that the parents have abused or neglected their children.

53. § 16.1-283.

54. § 16.1-281.

documenting the fact that termination was in the children's best interests. Because the Department was required to file the foster care plan, the mother claimed that only the Department was authorized to file the petition. The mother/ appellant argued that the GAL exceeded her authority by filing the petition. She claimed that a GAL acts in an advisory capacity only.<sup>55</sup>

In affirming the GAL's action in filing the petition, the court relied, in part, on Section 8.01-9, reading it with the provisions under Title 16.<sup>56</sup> Although the termination statute was silent concerning who could file, Section 16.1-241(A) allowed the court to consider petitions filed by any "party with a legitimate interest therein."<sup>57</sup> A GAL, said the court, certainly had an interest in whether the ward was subject to abuse and neglect. In addition, the court explained that Section 16.1-266(A) required the Juvenile and Domestic Relations court (J&DR) to appoint a "discreet and competent attorney-at-law" as GAL. Finally, Section 8.01-9 required that "every [GAL] shall faithfully represent the . . . interest of the person under disability for whom he is appointed."<sup>58</sup> Apparently, part of faithfully representing the children under Section 8.01-9 included filing a petition.

As noted, before Section 8.01-9 could apply the children would have to be parties.<sup>59</sup> However, the court never addressed this issue.<sup>60</sup> It merely assumed Section 8.01-9's applicability,

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55. 405 S.E.2d at 622.

56. *Id.* at 623. Section 16.1-266, "Appointment of counsel and guardian ad litem," provides in subsection A that:

Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is otherwise before the court pursuant to subdivision A 4 of § 16.1-241 or § 63.2-1230, the court shall appoint a discreet and competent attorney-at-law as guardian *ad litem* to represent the child pursuant to § 16.1-266.1.

57. *Stanley*, 405 S.E.2d at 623.

58. *Id.* (quoting § 8.01-9).

59. § 8.01-9 ("A suit wherein a person under disability is a *party* . . . ." (emphasis added)).

60. Chief Justice Carrico would have reversed. *Stanley*, 405 S.E.2d at 623. His dissent is not only interesting but illuminating. Relying on the traditional definition of a GAL, he argued that the GAL had no authority to file the petition. *Id.* at 623–

assuming further that Section 8.01-9 applies to literally “every” GAL appointed.<sup>61</sup>

Two years later the Court of Appeals of Virginia, in a matter of first impression, addressed whether Section 8.01-9 applied where a ward was not a “party.”<sup>62</sup> In *Verrocchio v. Verrocchio*, a divorce action involving a custody dispute, the appellant/husband argued that the circuit court had no specific statutory authority to continue a GAL’s appointment.<sup>63</sup> Initially the GAL had been appointed under Title 16 by the J&DR court.<sup>64</sup> The appellant argued that although the J&DR court had specific statutory power for the GAL’s initial appointment, the circuit court could not appoint a GAL under Section 8.01-9, because the child was not a “party.”

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24. Accordingly, once the J&DR court had made a finding that the mother had abused the children that action was resolved. Because the case had ended, the GAL’s role had ended. So when the GAL filed the petition, she lacked any authority to do so. *Id.* at 623. Chief Justice Carrico quoted Black’s Law Dictionary, (6th ed. 1990), defining a GAL as “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.” *Id.* (emphasis by C.J. Carrico). Chief Justice Carrico’s analysis is important because, as addressed below, the scope of a GAL’s duties in Virginia is to some extent defined in light of the common law definition of a GAL. Consequently, when a statute uses the term “guardian ad litem,” that term carries a specific historical and legal meaning. Therefore, a GAL’s duties will be defined to some extent by the common law in addition to the particular statute under which she is appointed.

61. Generally speaking, this decision is authority for the proposition that in addition to a GAL’s advisory and investigatory role, the GAL has the authority, if not the obligation in some circumstances, to file pleadings on the ward’s behalf. Filing pleadings is part of the obligations an attorney assumes in a typical attorney-client relationship. The decision is also authority for the proposition that a lawyer who is a GAL appointed under other statutes also assumes obligations under Section 8.01-9, which may require the GAL to file pleadings or to take on an adversarial role. However, historically under Section 8.01-9, the attorney appointed as GAL is not an advocate in the traditional sense and is not required to assume the role of filing pleadings as an adversary. Under the Statute, the GAL is not the lawyer for the putative ward in the strict sense of the word. The Statute itself provides that the GAL shall investigate whether the ward is in need of separate counsel, and if so, the GAL is to notify the court of the same. However, as noted, if Section 8.01-9 is read in conjunction with the Statute, it may require the GAL to assume that adversarial role herself.

62. *Verrocchio v. Verrocchio*, 429 S.E.2d 482, 484 (Va. Ct. App. 1993).

63. 429 S.E.2d at 483.

64. *Id.*

The case was appealed to the circuit court, and after disposing of the case at that level, the circuit court reconfirmed the GAL's appointment, sending the matter back to J&DR. The Court of Appeals conceded that the child was "technically not a party" but, nevertheless, the child was the "subject" of the proceeding.<sup>65</sup> Therefore, the child was "in a very real sense the ward of the court," and courts have historically been empowered under the doctrine of *parens patriae* to appoint GALs.<sup>66</sup> In addition, the Court of Appeals observed that Section 8.01-9 did not expressly prohibit a circuit court from appointing a GAL, nor did it encompass the entire subject of the court's discretionary protective powers.<sup>67</sup>

The *Verrocchio* Court correctly ruled that the child was not a party, and therefore Section 8.01-9 was inapplicable.<sup>68</sup> However, *Verrocchio* is not the last word on this issue because its decision arises only from an intermediate court.

In *Bottoms v. Bottoms*,<sup>69</sup> Virginia's Supreme Court seemingly ignored the earlier *Verrocchio* holding and its rationale that Section 8.01-9 was not controlling when the child/ward was not a party.<sup>70</sup> In *Bottoms*, the issue involved a custody dispute between the appellant/mother and the maternal grandmother, the appellee. The grandmother sought custody of the child in the J&DR court. No GAL was appointed then. When the grandmother was awarded custody, the mother appealed to the circuit court, which appointed a GAL under Section 8.01-9.<sup>71</sup> The circuit court upheld the J&DR's decision in awarding custody to the grandmother. The mother appealed again and the Court of Appeals reversed the circuit court. This time the grandmother appealed to the Supreme Court, which reversed

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65. *Id.* at 489.

66. *Id.* The *parens patriae* doctrine is addressed below.

67. *Id.* at 485.

68. *See id.* at 485, 486.

69. 457 S.E.2d 102 (Va. 1995).

70. This is not to imply that the Supreme Court is bound by the lower court's opinion.

71. *Id.* at 104, 108.

the Court of Appeals.<sup>72</sup>

In doing so, the Virginia Supreme Court observed that the circuit court had a right to rely on the GAL's opinion; it supported its decision by relying, in part, on Section 8.01-9. The court stated:

The duty of a guardian ad litem in a child custody dispute is to see that the interest of the child is "represented and protected." Code § 8.01-9. See Rule 8:6<sup>73</sup> (describing role of guardian ad litem appointed for child in juvenile and domestic relations district courts.) This child had no other independent participant in the proceeding, aside from the trial court, to protect his interests.<sup>74</sup>

The Supreme Court assumed the applicability of Section 8.01-9 without any analysis. In addition, the court referred to Rule 8:6, describing a GAL's role. However, Rule 8:6, applies only to J&DR courts and although the Supreme Court recognized this, it apparently failed to consider the fact that the GAL in that case had not been appointed by the J&DR court but by the circuit court. The court relied on the fact that the child had no one to protect his interests, other than the trial court. In addition, the Supreme Court never addressed the fact that the circuit court could have appointed the GAL under the *parens patriae* doctrine as was noted in *Verrocchio*.

The foregoing decisions highlight not only the confusion concerning the scope of a GAL's duties, but also the questionable applicability of Section 8.01-9. Apparently, the Virginia Supreme Court assumes that Section 8.01-9 applies any time a GAL is appointed. Universal application of Section 8.01-9

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72. *Id.* at 107.

73. VA. SUP. CT. R. 8:6:

*The Roles of Counsel and of Guardians Ad Litem When Representing Children.* The role of counsel for a child is representation of the child's legitimate interests. When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

74. 457 S.E.2d at 108.



carries with it the requirement that a GAL in every instance “faithfully represent the estate or interest” of the person under disability. In *Stanley* that meant the GAL was authorized to file a petition for termination of parental rights. In *Bottoms*, the Supreme Court held that the circuit court was allowed to consider the GAL’s opinion under Section 8.01-9 even though the statute did not apply. In both cases, the GAL acted as an attorney-advocate, filing a pleading in one instance (*Stanley*) and making a closing statement the other (*Bottoms*<sup>75</sup>).

These decisions raise the following question: is there any distinction between a GAL’s obligations and those of an attorney in a typical attorney-client relationship in a litigation context? In other words, assuming the courts will read Section 8.01-9 in conjunction with the GAL’s duties under the Statute, does the GAL assume litigation responsibilities running to the Respondent such as filing pleadings and so forth? As noted, under the Statute the GAL is not appointed as the Respondent’s attorney; rather the GAL is to notify the court if the GAL surmises that counsel is needed for the Respondent. However, as we shall see in Part IV, GALs typically do function as attorney-advocates. Therefore, perhaps the question should be rephrased: Is there any authority allowing a GAL to function essentially as litigation counsel?

Before reviewing the *parens patriae* doctrine, it would be useful to consider a Maryland decision analyzing a rule of court that is substantially similar to Virginia’s Section 8.01-9. The decision in *Fox v. Wills*,<sup>76</sup> (“*Wills*”) further calls into question whether Section 8.01-9 should be read in conjunction with other statutes and undermines Virginia decisions holding that Section 8.01-9 empowers a GAL to assume litigation or advocacy-type functions.

In *Wills*, the Maryland Court of Appeals, Maryland’s highest court, reversed a finding that an attorney, ostensibly a

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75. 457 S.E.2d at 106.

76. 890 A.2d 726 (Md. 2006).

“guardian *ad litem*,”<sup>77</sup> was immune from a malpractice suit.<sup>78</sup> In the underlying divorce suit with custody issues, a lawyer/GAL was appointed counsel for the parties’ child under Section 1-202 of Maryland’s Family Law article.<sup>79</sup> Section 1-202 provided:

In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may: [ ] appoint to represent the minor child *counsel* who may not represent any party to the action.<sup>80</sup>

After the divorce case ended the mother filed a malpractice action on the child’s behalf against the GAL/lawyer, claiming that the GAL/lawyer had failed to monitor the father who was alleged to have engaged in sexually inappropriate behavior with the child.<sup>81</sup> The mother also alleged, among other things, that the attorney had distorted a psychological evaluation concerning the child because of the lawyer’s friendship with the father.<sup>82</sup> Both the trial court and Maryland’s Special Court of Appeals determined that the attorney was not acting solely as counsel for the minor; rather, he was acting as a GAL. Therefore, his primary allegiance ran to the court as an arm of the court, not the child, and because the lawyer/defendant had taken on judicial functions, the two lower courts held that he was cloaked with immunity and could not be sued.<sup>83</sup>

Maryland’s highest court reversed, holding that there was no support for the lower courts’ conclusion that an attorney appointed under Section 1-202 should be granted immunity.<sup>84</sup>

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77. Guardian *ad litem* is in quotation marks, because the Court of Appeals ultimately held that the attorney did not act in that capacity. *Id.* at 733.

78. The intermediate court of appeals and the trial court had ruled that the attorney was immune from a malpractice action because he acted as a GAL, i.e., as an arm or agent of the court with judicial functions. *Id.* at 728–29. The appellant/lawyer claimed he was performing judicial functions, and the common law doctrine of absolute or qualified immunity foreclosed the malpractice suit against him. *Id.*

79. *Id.* at 726.

80. *Id.* at n.1 (quoting MD. FAMILY CODE ANN. § 1-202 (2004) (emphasis added)). “Counsel” is emphasized because nowhere in the statute is the phrase “guardian *ad litem*” used.

81. 890 A.2d at 727.

82. *Id.*

83. *Id.* at 728.

84. *Id.* at 729.

There was nothing in the wording or history of Section 1-202 indicating that the lawyer functioned as an arm of the court, and there were no legislative enactments granting immunity. Moreover, under Section 1-202, the attorney was not a GAL as that term was used in other states.<sup>85</sup> Consequently, the purported "GAL" was not shielded by absolute or qualified immunity.<sup>86</sup>

The Court of Appeals noted the nationwide confusion surrounding a GAL's role in contrast with Maryland where the term guardian *ad litem* was rarely used.<sup>87</sup> When that term was used, it involved the concept of *prochein ami*, or next friend, as set forth in Maryland Rule 2-202,<sup>88</sup> a rule similar in operation

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85. *Id.* at 732.

86. *Id.* at 737. To solidify the point, the same statute currently reads that the court may "appoint a lawyer who shall serve as a child *advocate attorney* to represent the minor child." § 1-202 (2012) (emphasis added).

87. 890 A.2d at 729. In fact, the *Wills* court noted that the faulty reasoning of the two lower courts was premised on the role of a GAL as the term GAL had come to mean in other states. *Id.*

88. MD. CODE ANN. § 2-202. Rule 2-202 and Virginia § 8.01-9 derive from two English statutes dating to the thirteenth Century. *Wills*, 890 A.2d at 730-31. Both provide that a suit shall not abate against an incompetent. Instead a guardian will be appointed to represent the interests of the incapacitated party/ward. Virginia's statute uses the term guardian *ad litem* while Maryland uses "guardian." Maryland Rule 2-202 (2012) states:

Rule 2-202. *Capacity*

(a) Generally. Applicable substantive law governs the capacity to sue or be sued of an individual, a corporation, a person acting in a representative capacity, an association, or any other entity.

(b) Suits by individuals under disability. An individual under disability to sue may sue by a guardian or other like fiduciary or, if none, by next friend, subject to any order of court for the protection of the individual under disability. When a minor is in the sole custody of one of its parents, that parent has the exclusive right to sue on behalf of the minor for a period of one year following the accrual of the cause of action, and if the custodial parent fails to institute suit within the one year period, any person interested in the minor shall have the right to institute suit on behalf of the minor as next friend upon first mailing notice to the last known address of the custodial parent.

(c) Settlement of suits on behalf of minors. A next friend who files an action for the benefit of a minor may settle the claim in accordance with this subsection. If the next friend is not a parent or person in loco parentis of the child, the settlement is not effective unless approved by each living parent or person in loco parentis. If (1) both parents are dead and there is no person in loco parentis of the child or (2) one of the parents does not approve the settlement, the settlement is not effective unless approved by

and purpose to Virginia's Section 8.01-9. Rule 2-202's concept of *prochein ami* undermined the claim that the attorney/defendant appointed to represent a minor performs judicial functions or owes her primary duty to the court. Instead, as *prochein ami* the attorney's primary allegiance runs to the ward.<sup>89</sup>

Virginia's Section 8.01-9 is substantially the same as Maryland's Rule 2-202. Both embody the concept of *prochein ami*. Under English statutes going back hundreds of years, a person appointed to represent the estate or interests of a minor was not necessarily an attorney. In fact, the *prochein ami* was most often not a lawyer<sup>90</sup> but someone (a family member or friend of the family) familiar with the minor/ward who came forward and asked to be appointed by the court to assist the child/ward. Because the next friend was not an attorney, he was obviously not in a position to assume litigation responsibilities.<sup>91</sup>

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the court in which the suit is pending. Approval may be granted only on verified application by the next friend, stating the facts of the case and why the settlement is in the best interest of the child. . . .

(d) Suits against individuals under disability. In a suit against an individual under disability, the guardian or other like fiduciary, if any, shall defend the action. The court shall order any guardian or other fiduciary in its jurisdiction who fails to comply with this section to defend the individual as required. If there is no such guardian or other fiduciary, the court shall appoint an attorney to represent and defend the individual.

89. *Wills*, 890 A.2d at 731.

90. See e.g., *Hinton v. Norfolk & W. Ry. Co.*, 120 S.E. 135 (Va. 1923) (ward brought suit by *prochein ami* but had separate advocate counsel); *Kirby v. Gilliam*, 28 S.E.2d 40, 43 (Va. 1943) (noting that the practice in Virginia was for the father or near relative to act in the capacity of next friend without a formal appointment for the purpose of bringing suit on behalf of a minor).

It should also be noted, that under Virginia Code Section 8.01-9, a lawyer should be appointed as GAL, but when one is not available, someone else must be appointed: "[T]he court . . . shall appoint a discreet and competent attorney-at-law as guardian ad litem . . . . If no such attorney is found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem." This, too, is further evidence that under Section 8.01-9, a lawyer would not be appointed in the capacity of an advocate with the same duties as a lawyer in a traditional attorney-client relationship.

91. Originally under English common law, only a person standing *in loco parentis* could institute suit on a ward's behalf. In practice, however, those standing *in loco parentis* would often, according to *Fox v. Wills*, hide the ward; if the ward was not before the court, any proposed court-appointed guardian that would have been empowered to bring a suit on the ward's behalf could not do so. 890 A.2d at 731. In 1275, Parliament enacted the first statute of Westminster, allowing anyone to bring suit, not just the person standing *in loco parentis*. *Id.* However, this statute

If the statutory analysis in *Wills* is correct, then Section 8.01-9 does not empower a GAL to function as an advocate in the sense of filing pleadings or acting as litigation counsel for the ward. The mixing of advocacy functions with judicial obligations is simply not embodied in Section 8.01-9. So when the Supreme Court in *Stanley* determined that Section 8.01-9 authorized a GAL to file pleadings, it did not take into consideration Section 8.01-9's history. Specifically, the court did not recognize the *prochein ami* concepts engrafted into Section 8.01-9, which have nothing to do with lawyers appointed in a specific suit to act as an advocate.

Given the history presented in *Wills*, we return to the *Verrocchio* court's holding that in the absence of a specific court rule or statute, courts have the inherent equitable power to appoint a GAL.<sup>92</sup> That power is distinct from the statutory authority a court may exercise in a divorce proceeding.<sup>93</sup> Because a ward is before the court and because Virginia courts have succeeded to the powers of the English chancery courts, the common law doctrine of *parens patriae* is triggered.<sup>94</sup>

*Parens patriae* is the "power of the Commonwealth to watch over the interests of those who are incapable of protecting themselves."<sup>95</sup> The court in *Verrocchio* explained why that power was necessary, observing that parents cannot always be trusted

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was limited to circumstances where the guardian of the person was interfering with the ward's attempt to bring suit. *Id.* Therefore, in 1285, the second statute of Westminster allowed the next friend to sue on the ward's behalf in any circumstances, not merely those where the guardian was attempting to secrete the ward. *Id.* According to *Wills*, these concepts were adopted when Maryland became a state, and engrafted into Maryland Rule 2-202, *id.*, which again is identical in purposes to Virginia Code Section 8.01-9.

92. The decision in *Verrocchio* further noted that Virginia Supreme Court Rule 2:19 authorized courts in the absence of a specific rule to rely on "established practices" of the courts. 429 S.E.2d at n.2 ("The propriety of relying on established practices is recognized by Rule 2:19 of the Rules of the Supreme Court of Virginia, which provides: 'In matters not covered by these Rules the established practice and procedure in equity is continued.'") In addition, *Verrocchio* noted that in the context of child welfare matters, the "established practice" was to appoint a GAL to watch out for the best interests of the child. *Id.* at 484.

93. *Id.* at 485.

94. *Id.*

95. *Id.* (citation omitted).

to watch over a child's interests.<sup>96</sup>

In *Ferguson v. Grubb*,<sup>97</sup> the court likewise invoked *parens patriae*, noting that statutes and court rules are not the exclusive sources of power concerning a GAL's appointment. The appellant/father argued that the circuit court had no authority to continue or reconfirm a GAL's appointment.<sup>98</sup> The matter was before the circuit court because the father had appealed a J&DR ruling. In disposing of the appeal, the circuit court reconfirmed the previous J&DR court order, which included a GAL's appointment. The appellant asserted that the circuit court had no authority to continue the GAL's appointment because no legal proceedings remained before the circuit court when it transferred the case back to J&DR.<sup>99</sup> The case being ended, so did the GAL's authority. Not so, said the Court of Appeals<sup>100</sup>; Virginia courts have equitable power "dating back to chancery days."<sup>101</sup>

\* \* \*

Thus far we have provided a review of a GAL's role when appointed pursuant to Section 8.01-9, Title 16, and under the *parens patriae* doctrine. We have reviewed the derivation of Section 8.01-9 and have seen that a GAL is empowered, if not

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96. *Id.* The decision in *Virginia v. G.R.N.*, 22 Va. Cir. 134 (1990), is an example of a situation where a mother acting as GAL failed to protect her child. The circuit court voided felony convictions of a minor in J&DR court because the mother on behalf of the child waived his Sixth Amendment right to counsel. *Id.* at 135. Under Virginia Code Section 16.1-266, a child can agree to waive this right with parental consent, so long as the parent's interests are not adverse to the child's. *Id.* After waiving his right to counsel, the minor pled guilty. Judge Annunziata ruled that the waiver was invalid because the mother had a conflict of interest: the minor was charged with sodomizing his younger siblings. The mother, said the circuit court, could not consent to the waiver because of conflicting interests between her children who had allegedly been sodomized and her son who was allegedly guilty. *Id.*

97. 574 S.E.2d 769 (Va. Ct. App. 2003).

98. *Id.* at 772.

99. The appellant was essentially arguing what Justice Carrico argued in the *Stanley* dissent. Under the definition of a GAL, a GAL's duties encompass the specific proceeding before the court and when the case has ended, the GAL's duties end.

100. 574 S.E.2d at 772.

101. *Verrocchio*, 429 S.E.2d at 485 (citation omitted).

required, to assume an advocacy role on behalf of her ward in some situations.

Even that, however, cannot be said with certainty given the Court of Appeals' holding in *Ruffin v. Commonwealth*,<sup>102</sup> which involved a GAL's appointment solely under Section 8.01-9. Because the GAL was appointed under Section 8.01-9 only, one might expect more clarity. Specifically, the GAL's role ought to be well-defined, especially concerning the question under discussion—whether a GAL is empowered or required to engage in advocacy functions for the ward as the ward's attorney.<sup>103</sup>

In *Ruffin*, the appellant/defendant was incarcerated when served with a show cause order as to why he should not be declared a habitual offender.<sup>104</sup> He was assigned a GAL for that matter. In response, the appellant sent a letter to the court objecting to the GAL's appointment, claiming that the lawyer assigned as GAL had represented him unsatisfactorily in a previous matter.<sup>105</sup> The defendant heard nothing more of the matter. Years later, he was arrested for driving and learned for the first time that he had been adjudged a habitual offender at the earlier proceeding; he was sentenced to prison. On appeal he argued that his due process rights were violated in the previous case and his status as a habitual offender was void because he had objected to the GAL's appointment. The court had not appointed a replacement,<sup>106</sup> and the GAL had not given him notice of the proceedings.

The Court of Appeals held under Section 8.01-9 that the

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102. 393 S.E.2d 425 (Va. Ct. App. 1990) *overruled in part by* Pigg v. Commonwealth, 441 S.E.2d 216, n.7 (Va. Ct. App. 1994) (overruling *Ruffin* only to the extent it conflicts with *Pigg's* holding that finding a convict statutorily "disabled" does not render such convict legally incompetent to transact business). *Pigg* did not discuss the role of a GAL but rather when to appoint one for convicts.

103. *See Ruffin*, 393 S.E.2d at 426.

104. *Id.*

105. *Id.*

106. *Id.* at 429. The defendant claimed that the circuit court should have appointed another attorney/GAL. The Court of Appeals held that a defendant had no right to a GAL of his choosing; that was left to the discretion of the trial court.

order was void because the GAL did not timely contact the defendant concerning the hearing date or the result of the hearing.<sup>107</sup> Accordingly, the main requirement of a GAL, as found in Section 8.01-9, is that he be “discreet, proper, and faithfully represent the interests of his charge.” The court further held that the lawyer appointed as GAL under Section 8.01-9 did not strictly act in an advocacy role. Moreover, the GAL “did not have the right to assume that he was the defendant’s legal representative in any context other than as guardian *ad litem*.”<sup>108</sup> What a “legal representative” is in the context of Section 8.01-9 is not clear. In fact, the Court of Appeals noted that “[t]he duties of a guardian *ad litem* cannot be specifically spelled out as a general rule . . . .”<sup>109</sup> The court, nonetheless, drew a bright line between a GAL acting in the capacity as a GAL and that of an attorney acting in a traditional attorney-client relationship. The GAL was not an attorney *qua* attorney for the ward. “He is not authorized to consent to anything except mere matters of formal procedure, such as maturing or expediting the cause.”<sup>110</sup> The court further noted that the defendant had a right to receive “counsel of his choosing,”<sup>111</sup> which clearly indicates that the GAL was not representing the ward as a lawyer-advocate.

Apparently, that is the best the Court of Appeals could do to define a GAL’s responsibilities under Section 8.01-9.

The *Ruffin* decision merely adds to the confusion concerning a GAL’s duties. In *Stanley*, we were told that the GAL had the authority to file a petition for termination. In other words, the GAL was filing pleadings as an advocate for the ward. In *Bottoms* we saw the GAL engaged in a closing argument so the GAL was acting as his ward’s attorney-advocate. However, in *Ruffin* we are told that a GAL was not the ward’s attorney, that

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*



the defendant/ward had the right to an attorney of his choosing.

Returning momentarily to *Ruffin*, the GAL, the defendant/ward, and the Court of Appeals were all confused concerning the lawyer's role. Although asserting that the GAL had no right to assume that he was the defendant's legal representative (whatever that means), the Court of Appeals used the term "client" when referring to the ward: "To hold that the guardian *ad litem* has a duty to report to the court every instance in which a *client* expresses displeasure with his services would unduly burden both the guardian and the Commonwealth."<sup>112</sup>

The use of the word "client" in reference to the ward is mystifying. If the GAL/lawyer was not acting as the ward's attorney, why use "client" when referencing the ward?<sup>113</sup> On the defendant's side of the equation, he too seems to have assumed that the lawyer appointed as GAL was acting in an attorney's role as a lawyer/advocate.<sup>114</sup>

It is unclear whether Virginia courts will continue to read Section 8.01-9 in conjunction with other statutes authorizing the appointment of GAL's. To some extent, the Court of Appeals in *Verrocchio* more precisely defined the contours of Section 8.01-9. However, the Supreme Court backtracked in *Bottoms*. As noted, if Section 8.01-9 is tacked onto a GAL's obligations every time a GAL is appointed under any statute, the consequences of doing so requires a GAL to consider that she may be required to

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112. *Id.* at 428 (emphasis added).

113. As addressed more fully below, courts are often confused concerning a GAL's obligations. In *Ruffin*, the confusion could be attributed to the court's poor choice of words, using "client" when the Court of Appeals should have used the word "ward." Obviously, if the defendant had in fact been the "client," then that would mean the lawyer was acting as an attorney. If so, then the defendant's dissatisfaction and desire not to have the attorney/GAL represent him would have arguably required the attorney to withdraw because of a conflict of interest. On the other hand, there are a number of reported decisions requiring a GAL to notify the court where a ward's wishes differ from the GAL's. In either instance, the attorney has a duty to either withdraw or notify the court of the potential conflict.

114. When the incarcerated appellant wrote the trial court that he was dissatisfied with the attorney's previous representation, the attorney had apparently been his court-appointed lawyer pursuant to a typical attorney-client relationship. This was yet an additional reason for the defendant to misunderstand the GAL's role.

assume a more expansive role.

Once the dust settles, a GAL's obligations are unclear. The doctrine of *parens patriae*, the *prochein ami* concepts embodied in Section 8.01-9, the language of Section 8.01-9, and the Statute must all be considered each time a GAL is appointed. Given the confusion, it may be that a GAL is considered, practically speaking, as an advocate in the traditional sense notwithstanding *Ruffin's* vagueness, which in the end adds nothing to the equation.

Having examined the authority to appoint GALs and the duties and obligations in connection therewith, in Part IV we take a closer look at the GAL's role.

#### IV. THE GAL'S ROLE: A CLOSER LOOK

Depending on the complexity of the particular case and the individual GAL, a GAL may present evidence, cross-examine witnesses, give an opening and closing, and render an opinion on the ultimate issue.<sup>115</sup> In addition, the GAL may testify in hearings prior to the capacity trial<sup>116</sup> and at trial. Whatever part the GAL plays, she has a significant impact not only on the course of the proceedings but the final result.

Practicalities underlie the GAL's extensive duties in the elder law context. Courts are not in a position to investigate or monitor the Respondent's condition, nor do they consider the parties capable of accurately conveying the putative ward's status, which is why it is deemed practical to have a so-called

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115. Cases that proceed to trial in the elder law context are often highly contested. As in other types of litigation if the facts or legal issues are clear, they are usually settled prior to trial. For example, in the elder law context if it is unclear whether the Respondent is incapacitated, then this issue will be tried. Other areas that may not be as obvious involve disputes over who should be appointed guardian or conservator, or whether there should be a limited guardianship or conservatorship.

116. Prior to trial, various circumstances arise that may require a GAL's testimony or opinion. For example, there may be questions concerning whether the Respondent is safe in her home. She may need to be relocated in order to receive proper medical treatment. One of the family members may be abusing the Respondent or depleting the Respondent's estate—in many instances pursuant to a power of attorney.

“independent” party to investigate and report their findings.<sup>117</sup> The GAL is viewed as an arm of the court. She acts in an advisory role, ultimately submitting an oral and/or written opinion.<sup>118</sup>

Given a GAL’s extensive role, it is not always clear whom they represent, if anyone.<sup>119</sup> Often they appear to represent the Respondent. In other words, it appears as if the Respondent is the GAL’s client, and as will be seen, from a legal and practical standpoint, this appearance has significant consequences. At other times a GAL can be so aligned with one of the parties that they appear to be the “attorney” for that party. For example, it can appear that the GAL represents an Intervenor. Even if the fact-finder knows that the GAL is not technically the Intervenor’s attorney, the GAL’s advocacy-type activities—that is, what the GAL is doing during the proceeding—may leave the impression that the GAL is an attorney for one of the parties. Lastly, even in those rare circumstances where a GAL does not appear to be representing anyone, their role is so extensive that some authorities have deemed the GAL to be representing their own “position” or “opinion.”<sup>120</sup>

The relevance of these impressions will become clearer as

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117. As we have seen both in parental termination cases and child custody disputes, the courts, and of course Virginia’s General Assembly, recognize that the parties often have interests and motivations that may take precedence over the best interests of persons who are incapable of protecting themselves. GALs are viewed as an answer to these problems.

118. The issues raised by a GAL’s Report are discussed in Part V.

119. As discussed below, GALs under the Statute technically do not represent anyone. They are appointed to represent the Respondent’s “interests.” As a precursor to the discussion that follows, is the foregoing statement/conclusion under Virginia law consistent with Wisconsin’s guardianship statute and the GAL’s role as identified therein? In Wisconsin:

The guardian ad litem shall be an advocate for the best interests of the proposed ward or alleged incompetent as to guardianship, protective placement and protective services. The [GAL] shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the proposed ward or alleged incompetent or the positions of others as to the best interests of the proposed ward or alleged incompetent.

Tamara L.P. v. Dane County, 503 N.W.2d 333, 338 (Wis. Ct. App. 1993) (quoting Wis. Stat. § 880.331(3)).

120. This is discussed in Parts V and VI.

these issues are discussed below. Suffice it to say for now that impressions on the fact-finder are important because the GAL is cloaked with an air of neutrality and independence. Moreover, the party opposing the GAL's position is at a distinct disadvantage.<sup>121</sup> In some instances, this disadvantage can be so debilitating and difficult to overcome that the party cannot get a fair trial.

For the remainder of this Article, we examine these and other issues in connection with the GAL's role.

#### *THE GAL AS INVESTIGATOR AND ADVISER*

A GAL is a buffer in the adversarial system. She monitors and oversees the Respondent's interests because at times the parties, often family members, are more interested in winning than in seeing to the Respondent's interest. (Recall the discussion above where GALs are appointed in the family law context. It is necessary to appoint a GAL because parents often become so involved in "fighting" each other in court that they lose sight of their children's interests.) Courts strive to be fully informed, consistent with their oversight role as embodied in the doctrine of *parens patriae*. Therefore, the GAL investigates<sup>122</sup> and advises the court concerning a vast array of information. As noted, the Statute requires the GAL to investigate the Petition and evidence.<sup>123</sup> This statutory requirement virtually covers the universe of factual and legal issues presented.

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121. Whether the GAL is actually biased against a party or not, it often appears to one of the parties that that is the case. *See e.g.*, *Kartalozzi v. Kartalozzi*, No. A06-1749 (Minn. Ct. App. July 24, 2007) (unpublished) (father claimed GAL did not properly investigate and ignored father's evidence of positive interaction with his children); *In the Matter of Choy*, 919 A.2d. 801 (N.H. 2007) (father claimed GAL was biased because GAL failed to contact any of father's witnesses).

122. In *Ruffin*, 393 S.E.2d at 429, the GAL failed to "thoroughly" investigate the facts surrounding a hearing where the defendant/ward was charged with driving after having been adjudicated a habitual offender. The court stated that it was "clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability." *Id.* Because the GAL did not do so, the order declaring the ward a habitual offender was void. *Id.*

123. § 37.2-1003(B)(iv).

In connection with the duty to investigate and advise,<sup>124</sup> a GAL often testifies. Nothing in the Statute allows this, but neither is it prohibited. As seen below, testifying is common.<sup>125</sup> The GAL's testimony also derives from practical considerations. Her investigatory obligation gives rise to the duty to advise the court of her findings, which may require testimony. Because a GAL's Report is not under oath,<sup>126</sup> a party desiring to establish the legitimacy of the GAL's recommendations may call the GAL to testify.<sup>127</sup>

#### *COURT DEFERENCE AND THE GAL'S SUBSTANTIAL ROLE*

The Statute requires a GAL to opine on the ultimate issues. The significance of this mandate cannot be fully appreciated in a factless vacuum. What happens, for example, when the Respondent herself disagrees with the GAL's assessment that she (the Respondent) is incapacitated?<sup>128</sup> What impact does it have on the Petitioner or an Intervenor when the GAL, purportedly operating under a cloak of "neutrality," opines on the ultimate issue? What effect does it have on the fact-finder after observing the GAL introducing evidence, submitting an opening and closing, and then testifying?

A number of cases illustrate the GAL's considerable impact,

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124. As noted, in *Stanley*, the mother appealed termination of her parental rights, claiming that the GAL acted only in an advisory role. The Virginia Supreme Court disagreed: "[W]e have not regarded that role as merely advisory; instead, we have recognized that a guardian ad litem can appeal an adverse ruling . . ." 405 S.E.2d at 622 (citation omitted).

125. Parts V and VI examine the issues raised by an attorney testifying in the same case where she acts as an advocate.

126. Nothing in the Statute requires the Report to be under oath. It merely requires that the Report to be filed. § 37.2-1003(B)(iv).

127. Of course the party seeking to discredit the Report may also call the GAL as a witness with the hope that the GAL will effectively withdraw some of the prejudicial information contained in the Report.

128. A plethora of conflicts can arise between the Respondent and GAL. For example, the Respondent may agree and realize that she requires some assistance, but may disagree that she needs to leave her home for a nursing home. The Respondent might not think she needs a guardian. The Respondent might vie for a limited guardianship or conservatorship, while the GAL believes a limited guardianship or conservator will not suffice.

and the deference accorded the GAL.<sup>129</sup> Again, we look at decisions in and out of Virginia.<sup>130</sup>

In *Griffin v. Griffin*,<sup>131</sup> the appellant/husband argued that the trial court abused its discretion by awarding his wife sole custody of the children because the husband was a “wonderful father.”<sup>132</sup> The decision was upheld based in large part on the GAL’s testimony. The Court of Appeals noted first that the trial court had ordered the parties to cooperate and not to disparage the other.<sup>133</sup> The appellate court further observed that the GAL had testified that he had not “seen” from the husband the kind of cooperation that he, the GAL, would have liked regarding encouraging the children’s relationship with their mother.<sup>134</sup> The GAL further testified that the children had told the GAL<sup>135</sup>

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129. Remarkably, even mere “concurrence” by a GAL in the trial court’s decision is seen as a basis for supporting a trial court’s decision. The Court of Appeals in *Verrocchio* upheld the trial court’s ruling in a custody case, citing a Virginia Supreme Court decision upholding a trial court’s ruling based, in part, on the GAL’s mere “concurrence.” 429 S.E.2d at 486 (citing *Kern v. Lindsay*, 30 S.E.2d 707, 710 (Va. 1944)). On the other hand, in *Ange v. York/Poquoson Department of Social Services*, 560 S.E.2d 474 (Va. 2002), a mother appealed a circuit court’s summary dismissal of the mother’s appeal from the J&DR court that had terminated her parental rights. The circuit court affirmed the J&DR’s termination without a trial because the mother had failed to comply with the circuit court’s pre-trial deadlines. *Id.* at 475. The husband/appellee, at the Court of Appeals level, argued that there was sufficient evidence to affirm termination of the mother’s rights because the GAL had made the same recommendation. The Court of Appeals disagreed, noting that the record was devoid of any indication that the GAL presented any testimony, filed a GAL Report, or even made recommendations. All the GAL did was concur in the court’s ultimate rulings in the case, and that was insufficient. *Id.* at n.13.

130. To some extent, we previously addressed court deference given a GAL’s opinion in Part III, noting that while the Virginia Supreme Court’s decision in *Bottoms* is technically the final word, it is not, in fact, how a GAL’s opinion is actually considered in practice. These issues will be further examined.

131. No. 2810-08-4 (Va. Ct. App. Dec. 29, 2009) (unpublished), available at <http://www.courts.state.va.us/opinions/opncavwp/2810084.pdf>.

132. *Id.* at 8. The father’s appeal was based on a number of issues, but apparently, his primary argument on appeal was that the mother should not have been awarded sole custody because he was a “wonderful father.” Consequently, the Court of Appeals reviewed the evidence in the record to ascertain whether it supported the trial court’s decision. Relying in large part on the GAL’s Report and testimony, the court upheld the award of the children to the mother. *Id.*

133. *Id.*

134. *Id.*

135. Apparently, the appellant/husband did not challenge the GAL’s testimony regarding the children’s statements as hearsay.

that their father had instructed them to sneak out of the wife's house. The GAL did not "believe"<sup>136</sup> that some of the children should be placed with the father and others with the mother. Finally, the GAL recommended that joint custody be terminated.<sup>137</sup>

Similarly, in *Andrews v. Creacey*,<sup>138</sup> the GAL played a critical role in the divorce of an incapacitated elderly man, and once again, the court's position concerning the GAL was that of deference.<sup>139</sup> The issue was whether the ward had formed the intent to remain permanently separate and apart from his wife. Without such intent, the divorce could not have been granted.<sup>140</sup>

The primary evidence of the ward's intent to remain separated derived from a GAL Report generated during the previous capacity proceeding under the Statute.<sup>141</sup> During the incapacity proceedings, the appointed GAL had interviewed the Respondent and drafted a Report referencing the Respondent's statement that he wanted a divorce. That Report was admitted in the later divorce proceedings over the wife's objection.<sup>142</sup> It was stressed, however, that the trial court had admitted the GAL's Report for one sentence only: "During our meeting [ ], Mr. Andrews expressed his desire to be divorced from his wife and the fact that two of his male children had been physically abusive to him."<sup>143</sup> The Court of Appeals affirmed the divorce, noting that the trial court found the GAL's testimony "most reliable."<sup>144</sup>

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136. The decision repeatedly refers to the GAL's "beliefs."

137. *Id.*

138. 696 S.E.2d 218 (Va. Ct. App. 2010).

139. *See id.* at 228.

140. *Id.* at 223 (interpreting VA. CODE ANN. § 20-91(9)).

141. After the ward had been declared incapacitated and after a guardian and conservator had been appointed, one of the co-guardians filed a petition for divorce on the Respondent's behalf. The wife opposed the divorce. 696 S.E.2d at 222.

142. Without success, the wife objected to the GAL's Report because it contained multiple hearsay. The Court of Appeals, however, admitted the hearsay under the state of mind exception. *Id.* at 228.

143. *Id.* at 227-28.

144. *Id.* at 222.

Turning outside Virginia, in *Gilbert v. Gilbert*,<sup>145</sup> Vermont's Supreme Court addressed a GAL's role and impact. This case is perhaps the clearest enunciation and most accurate analysis of a GAL in any jurisdiction.

The father had been granted custody, in large part based on the GAL's recommendation.<sup>146</sup> In Vermont, a GAL's Report could not be considered absent the parties' agreement, or unless the Report was based on admissible evidence.<sup>147</sup> The Report contained a recommendation that the father have custody and was submitted to the court over the mother's objection.<sup>148</sup> The father argued that the Report was not essential to the trial court's decision because all the information in the Report was ultimately entered into evidence.<sup>149</sup> Therefore, it was cumulative and could not have prejudiced his wife.

The Vermont Supreme Court held that the trial court had abused its discretion, resulting in an unfair hearing; the fact that the information contained in the Report ultimately found its way into evidence at trial "misse[d] the point of what went wrong at trial."<sup>150</sup>

The court emphasized that the GAL and her Report influenced the entire course of the proceedings. The father's

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145. 664 A.2d 239 (Vt. 1995).

146. *Id.* at 240. This decision is analyzed at greater length below because the opinion most accurately analyzes a GAL's impact and role. At first blush this case might not appear to be germane given the substantial differences between Virginia's and Vermont's regulatory framework. However, the duties assumed by the GAL in *Gilbert* are consistent with those in Virginia. The GAL acted in the child's best interests, the GAL acted as a buffer for the child where the parents were antagonistic to the point that the child might suffer but for the appointment of an independent party, the GAL, to monitor and care for the child's interests.

147. *Id.* at 241 (citing VT. R. FAMILY PROCEEDINGS 7(d)).

148. *Id.*

149. *Id.* at 242. The father also argued that the mother had waived her right to object to the Report's admission because at a preliminary hearing she had agreed to admit the report, which at that time had not yet been created. *Id.* The Supreme Court disagreed, stating that Vermont's Rule of Family Procedure 7(d) provides that a GAL "may" prepare a written Report and submit it to the parties, but submission to the Court is allowed only if both parties agree or if the Report complies with the rules of evidence. The parties could only agree to admit the report after an opportunity to review it. 664 A.2d at 242.

150. *Id.*



attorney used the favorable Report as the foundation of his case to legitimize his client's position, while the mother was in a position of having to counter the Report. For example, the father's attorney asked the mother on cross-examination if she were aware of the "guardian's critical role in this case," and if she was aware that the GAL was a "neutral" party appointed for the child.<sup>151</sup> According to the court, "[t]he constant implication of the questioning was to validate the guardian's investigation as comprehensive and neutral."<sup>152</sup> In addition, the Report was used to discredit the mother. The GAL believed that the mother had inappropriately disciplined the child and placed too much emphasis on her work. In other words, said the court, "the GAL report was the standard for all of the facts that could or should be found in the case, as well as the conclusions to be drawn from those facts."<sup>153</sup> In addition, the Report placed the mother in an unfair position because the GAL was not subject to cross-examination. The GAL was seen as "cloaked with neutrality by being independently appointed by the court."<sup>154</sup> Finally, references to the Report throughout the trial and the court's "acceptance of the guardian's expansive role" indicated that the Report had a "substantial impact" on the hearings and deprived the lower court of the "ability to make a fair and impartial decision."<sup>155</sup>

*TO WHOM DOES THE GAL OWE HER PRIMARY ALLEGIANCE: THE COURT OR THE "CLIENT?"*

In addition to testifying, investigating, advising, opining, and reporting, the GAL, as seen in Part III, may be required to file pleadings on the Respondent's behalf.<sup>156</sup> To briefly revisit

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151. *Id.* at 243.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 244.

156. Pleadings are to be distinguished from the filing of the Report.

*Stanley*,<sup>157</sup> the mother/appellant challenged a GAL's authority to file a petition to terminate her residual parental rights. She unsuccessfully argued that the Virginia Code only authorized the Department of Social Services to file such a petition.<sup>158</sup> The mother further argued that a GAL's sole role was advisory. The Supreme Court rejected her limited view, relying on Section 8.01-9, which requires every GAL to "faithfully represent the . . . interest of the person under disability for whom he is appointed."<sup>159</sup> Consequently, in that case, part of the duty to faithfully represent the ward required the GAL to file "affirmative pleadings."<sup>160</sup>

Filing pleadings on another's behalf is an advocacy function. Filing pleadings clearly gives the impression that the person doing so, in this instance the GAL, represents someone. In *Stanley*, that someone was the child. In the context of the Statute, that someone is the Respondent. As seen, under Section 37.2-1003(A), a GAL is appointed "to represent the *interests* of the respondent."

Representing the Respondent's "interests" should be distinguished from representing the Respondent individually as a client. In addition, Section 37.2-1003(B) provides that the GAL determines if counsel is necessary for the Respondent. Therefore, the Statute envisions a situation where the GAL acts as investigator and advisor, but not as an advocate. However, as discussed in Part III, the GAL's common law duties and Section 8.01-9 may impose on the GAL an obligation to file pleadings on the Respondent's behalf, transforming the GAL into an "attorney-advocate," or at a minimum giving the appearance that an attorney-client relationship exists between the Respondent and the GAL.

This gives rise to the question to whom does the GAL actually owe her primary allegiance: the Respondent or the

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157. 405 S.E. 2d. 621 (Va. 1991)

158. *Id.* at 623 (citing VA. CODE ANN. § 16.1-283).

159. 405 S.E.2d at 623.

160. *Id.* at 622.

court? The simple answer is both. The GAL has investigatory and advisory duties that are owed the court under the Statute, and also has advocacy functions under the Statute as well as under Section 8.01-9. Logically speaking, however, one cannot have two *primary* allegiances; though practically speaking a GAL in the Statute's context owes duties and allegiances to both the court and the Respondent. These practical responsibilities flow from statutory and court-imposed mandates. Essentially, the question boils down to what happens when there is a conflict, i.e., what happens when the duty owed the Respondent conflicts with the obligations and allegiances owed the court?

It may be recalled that according to *Ruffin*: "It is the duty of the guardian *ad litem* to represent the *interests* of those for whom he is appointed faithfully and *exclusively*."<sup>161</sup> The GAL in *Ruffin* was appointed solely under Section 8.01-9, and if that statement of the law is accurate, there would appear to be no basis for concluding that the GAL owes any allegiance to anyone other than the Respondent, including the court. Thus, if Section 8.01-9 is read in conjunction with the Statute, then the GAL conceivably would not owe her primary or any other type of allegiance to the court because it is the GAL's duty to exclusively represent the interests of the one to whom she is appointed.

The key words under *Ruffin's* interpretation of Section 8.01-9—*interests* and *exclusively*—are significant and not merely semantics. Concerning *interests*, *Ruffin's* directive does not mean that the GAL represents the ward (or Respondent under the Statute) *per se* as a client. As to *exclusively*, that also would appear to mean that a GAL owes her primary allegiance to the ward's interests, not to the ward individually as a client, and not to the court.

In contrast, when a lawyer represents a client *qua* client, she does so irrespective of her personal beliefs and opinions. In other words, the client's preferences prevail so long as those preferences are consistent with the law and the attorney's ethical

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161. 393 S.E.2d at 429 (emphasis added).

obligations.<sup>162</sup>

Under the Statute, however, the GAL's opinion "trumps" the Respondent's wishes and desires because the GAL is required to do what the GAL thinks is best for the Respondent's interests as distinguished from what the Respondent herself may desire.<sup>163</sup> In theory, a GAL's obligation to "exclusively" represent the Respondent's interests, as opposed to what the Respondent wants, is not inconsistent as long as the GAL's subjective beliefs do not conflict with the ward's wishes.

As noted, the Statute requires the GAL to consider the Respondent's preferences regarding certain matters.<sup>164</sup> But what happens when the Respondent's preferences conflict with the GAL's opinion? For example, what if the GAL believes the Respondent should be placed in a nursing home? What if the Respondent disagrees? What does the GAL do?

Under the Statute the GAL can ask the court to appoint counsel for the Respondent. At this point, the GAL may proceed with her obligations, including the submission of the GAL's opinion, notwithstanding that her opinion is contrary to the Respondent's.

It is imperative to consider the impact such conduct may have. After a Petition is filed, the GAL is appointed to represent the Respondent's interests. As part of that statutory duty, the GAL begins her investigation, which includes interviewing the

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162. Virginia's Disciplinary Rule 1.2, "Scope of Representation," provides, in part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." Comment 1 states: "Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation [within ethical bounds]."

163. In fact, the GAL's duties may require her to take a position directly contrary to what the ward wishes. The GAL "is not bound by the wishes of the ward or the positions of others as to the ward's best interests." *Jennifer M. v. Maurer*, 779 N.W.2d 436, 439 (Wis. Ct. App. 2009) (internal quotation and corresponding punctuation omitted).

164. Section 37.1-1007 requires the court is to give "due deference to the wishes of the respondent" concerning who should be appointed guardian and/or conservator.

Respondent.<sup>165</sup> Subsequently, the GAL may file motions for the Respondent's benefit, for example, to secure funds or to obtain medical benefits during the pendency of the suit and prior to trial. For all practical purposes, it appears as though the GAL is the Respondent's attorney.

This apparent attorney-client relationship creates an atmosphere that encourages the Respondent and perhaps one or more parties to make disclosures to the GAL that ultimately may be detrimental to the discloser.<sup>166</sup> If the GAL later decides that the Respondent's preferences are not in her best interests, the Statute requires the GAL to recommend something contrary to what the Respondent wishes. Taking a contrary position to Respondent's wishes may appear to be a betrayal of the confidences the Respondent and/or some other party reposed in the GAL. The perception is that the GAL has violated the attorney-client relationship or at the least betrayed a confidence. This results because, under the Statute, the GAL owes her primary allegiance, not to the Respondent as "client," but to the Respondent's best interests, said "best interests" being determined by the GAL in her sole opinion.

Therefore, the answer to the question to whom does the GAL owe her primary allegiance would appear to be to the ward's best interests. However, because the GAL's obligations and the court's *parens patriae* responsibilities are the same (ensuring that the ward's best interests are served), in practice the GAL's allegiance is seen as owed to the court. She is

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165. Section 37.2-1003(B) requires the GAL to personally meet and interview the Respondent. The Respondent may or may not have her own counsel at this point.

166. Perceptions are significant because, as we shall see in Part VI, they have an impact on whether the proceedings appear to be fair and impartial. Under Virginia's attorney disciplinary rules, courts are to monitor attorneys' behavior. The witness-advocate rules were enacted in part to ensure that judicial proceedings are fair and *appear to be fair*. Therefore, when an attorney testifies in the same proceeding where she represents a party, the process can appear to be unfair because the testifying attorney takes an oath that is not available to the opposing party's attorney. The testifying attorney secures an advantage. In addition, when a GAL testifies and participates in the proceeding where it appears as though the GAL is advocating one position or some party's position, one of the parties is disadvantaged. Finally, the disciplinary rules are not the only issues raised. Due process concerns are also implicated.

required to investigate and determine what she thinks is in the ward's best interests, and then to report that opinion to the court. So when *Ruffin* states that the GAL's duty is to represent the interests of those to whom she is appointed faithfully and *exclusively*, that is true only up to a point.

The foregoing is not making a mountain out of the proverbial molehill. Attorneys practicing in this arena fully appreciate that the GAL's allegiance runs to the court. They know that every communication with a GAL is potentially a communication to the court. On the other hand, others, such as witnesses and the parties themselves, do not realize the significance of the fact that the GAL's ultimate loyalty is to the court. This insight tells only half of the story. Witnesses' and parties' interactions with the GAL are indirect communications with the court, with the GAL acting as an intermediary. Thus, communications with the GAL and what is ultimately related to the court is filtered through the GAL. The GAL's prejudices, biases, and motives influence her opinions and reports to the court. As observed in the Introduction, the essential concern of this article revolves around human fallibility, personalities, and motives. Given the GAL's extensive and confusing role as well as her substantial impact on the proceedings, the fact that her primary allegiance is owed to the court must be considered.

Turning outside Virginia, Maryland's intermediate court addressed a bitter custody dispute in *Auclair v. Auclair*,<sup>167</sup> finding that the children of the divorcing parents had no right to intervene as parties to their parents' divorce action.<sup>168</sup> In reaching its decision, the court addressed whether a GAL could adequately represent the children's interests given that a GAL's primary allegiance ran not to the children but to the court. According to the court, the children had no right to intervene

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167. 730 A.2d 1260 (Md. Ct. Spec. App. 1999).

168. *Id.* at 1276. *Auclair* pre-dates the *Wills* decision that was discussed in Part III, and its holding concerning the Maryland statute providing for the appointment of a GAL is flawed in light of *Wills*. Nevertheless, *Auclair* accurately analyzes the issues concerning the GAL's ultimate responsibility as owed to the court (as opposed to the ward).

because the GAL fully represented their interests, and the GAL's primary obligation to the court was not deemed inconsistent with the GAL's responsibilities to the children.<sup>169</sup>

The court engaged in an extensive analysis of the GAL's role.<sup>170</sup> GALs filled an inherent void in child custody disputes.<sup>171</sup> Without a GAL, trial courts would be constrained to render decisions in the children's best interests without any practical means to ensure that it had all the requisite information to guard the children's interests. Therefore, "[u]nhampered by the *ex parte* and other restrictions that prevent the court from conducting its own investigation . . . , the [GAL] essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision—i.e., the 'best interests of the child.'"<sup>172</sup> Finally, because a GAL functions as a court's eyes and ears, "it owes its principal duty of allegiance [to the court], and not strictly as legal counsel to a child client."<sup>173</sup>

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169. *Id.*

170. The *Wills* court viewed the Maryland family law statute, Section 1-202, differently from *Auclair*. The latter interpreted the statute as directing appointment of a lawyer as a GAL as that role is commonly viewed outside Maryland, and not as an "attorney" for the children in the sense where the lawyer advocates strictly as an attorney for the ward. 730 A.2d at 1268. In other words, *Auclair* read § 1-202 to provide for the appointment of a GAL acting as GALs acted in other states. The *Wills* court, however, noted that Maryland rarely used the term GAL. Consequently, the attorney in the *Wills* case had been appointed as an attorney in the strict attorney-client sense. Because the attorney in *Wills* was not an "arm of the court" with purely investigatory and advisory duties, he was not immune from a malpractice action. 890 A.2d at 728.

171. Indeed, whenever a GAL is appointed, whether in custody disputes or in capacity proceedings, Virginia courts, not to mention the General Assembly, believe GALs fill a void inherent in the proceedings. The void derives from the perception that the parties in the proceedings have interests that are inconsistent with the ward's; therefore, the parties may not fully bring to the court's attention relevant matters pertaining to the ward. *E.g.*, Verrochio, 429 S.E.2d at 484 ("Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice." (quoting *Ford v. Ford*, 371 U.S. 187, 193 (1962)). In the context of a capacity hearing, it is often the Respondent's children or other family members whose judgment is "beclouded."

172. *Auclair*, 730 A.2d at 1268.

173. *Id.* As previously noted, one way to characterize the issues presented herein is to ask, how much of an attorney is the GAL, and how much of a client is

Virginia would follow *Auclair's* rationale, namely that while a GAL is required to represent the Respondent's interests faithfully and exclusively, that "rule" is not inconsistent with a GAL's obligations and allegiance to the court. The Statute requires a GAL to represent the Respondent's interests. Section 8.01-9 requires the GAL to represent the Respondent's interests. Finally, under the doctrine of *parens patriae* the court itself is obligated to protect those before it who cannot protect themselves. Given such a reading, no conflict exists unless one views the issue from the Respondent's or other party's perspective. It bears restating that it is true that the GAL represents the Respondent's interests exclusively as long as it is understood that such representation is qualified: a GAL is not "strictly" legal counsel for the Respondent; the GAL represents the Respondent's interests as she, the GAL, thinks fit. Stated differently, her opinion controls, and that is different from the attorney-client context where the client "calls the shots."

#### ***THE GAL AS A "PARTY"***

Part III introduced the *Stanley* decision, where the Virginia Supreme Court rejected the assertion that a GAL's role was merely advisory. Recall that the appellant argued that a GAL did not have the authority to file a petition for termination of parental rights. In disagreeing, the Supreme Court observed that a GAL "certainly has a legitimate interest in whether his ward is to be subjected to continued abuse and neglect."<sup>174</sup>

The issue under consideration is how much of an interest does a GAL have in the proceedings, and is the GAL a party? As discussed below, at one time the GAL in certain instances was considered an indispensable or necessary party. Because of this status, the GAL was required to be served with notice of any appeal to the Court of Appeals. If not served, the Court of

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the client. In this instance, the court found that the GAL/attorney did not strictly act as the children's attorney.

174. *Stanley*, 405 S.E.2d at 623.



Appeals lacked any jurisdiction to hear the matter. However, service was not always required because in some instances the GAL was not considered by the courts to be a necessary party.

In response to this view, the Virginia Supreme Court Rules were amended. These amendments elevate a GAL's status, arguably evidencing their significance. At present, Part Five A of the Virginia Supreme Court Rules governs all proceedings in the Court of Appeals and requires GALs to be served with notice in all instances.<sup>175</sup> The amendments evidence Virginia's perspective that a GAL must have some input at the appellate level. In other words, a GAL is so situated in the context of the proceedings that failure to give notice defeats jurisdiction. At a minimum, the requirement that GALs be served and allowed to participate on appeal further undermines the holding in *Bottoms*<sup>176</sup> that a GAL's opinion while not irrelevant, should not be disregarded. Simply put, the appellate courts are required to hear from GALs.

Before addressing the amendments to the Virginia Supreme Court Rules, we address the case law giving rise to them.

In *Yopp v. Hodges*,<sup>177</sup> the Court of Appeals held that the failure to serve the GAL with notice of an appeal did not defeat appellate jurisdiction. Under Rule 5A:6, the party appealing a case must deliver or mail a copy of the notice of appeal to all "opposing counsel."<sup>178</sup> The question, then, was whether the GAL was "opposing counsel."<sup>179</sup> If so, then the GAL had to be served with the notice of appeal.

In a prior case, *Hughes v. York County Department of Social Services*,<sup>180</sup> the Court of Appeals held that notice to a GAL was required. However, *Hughes* was distinguishable because the GAL there was considered "opposing counsel," an "appellee,"

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175. VA. SUP. CT. R. 5A:1(a), (c)(3) (2012).

176. 457 S.E.2d 102, 108 (Va. 1995). This decision is further discussed in Part V.

177. 598 S.E.2d 760, 763 (Va. App. 2004).

178. *Id.*

179. The court answered in the negative, interpreting "opposing counsel" to include "indispensable" parties, of which the GAL was not one. *Id.*

180. 548 S.E.2d 237 (Va. App. 2001).

and a “necessary party.”<sup>181</sup> The GAL was considered an “appellee,” because he had taken a position in opposition to the appellant. The GAL was also deemed an “appellee,” because the GAL was an “indispensable party.”<sup>182</sup> According to *Hughes*, an “indispensable party” constituted “opposing counsel” as well as an “appellee” for purposes of Rule 5A:6 because in a parental termination case, the appointment of a GAL was required.<sup>183</sup> The *Yopp* court defined an indispensable party as:

one who is in the actual enjoyment of the subject matter, or has an interest in it[,] which is likely to be defeated or diminished by the plaintiff’s claim[;] in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary [indispensable] parties to the suit.<sup>184</sup>

The *Yopp* case involved a custody dispute, and under Section 16.1-266(E), the appointment of a GAL was discretionary. Consequently, because courts routinely heard custody disputes without appointing a GAL, the GAL was not considered a necessary party, and the failure to give notice did not deprive the *Yopp* court of jurisdiction to hear the appeal.<sup>185</sup>

Turning to the Virginia Supreme Court Rules, one sees a concerted effort to avoid the complex parsing and analysis undertaken by the Court of Appeals. As noted, the rules require service on a GAL, thus ensuring a GAL’s input at the appellate level. Rule 5A:1(c)(3) expands “Counsel of Record” under Rule 1:5 to include a GAL. Rule 5A:1(c)(5) defines “counsel for appellee” as a GAL, unless the GAL is the appellant. Therefore,

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181. *Id.* at 239.

182. *Id.*

183. *Id.*; VA. CODE ANN. § 16.1-266A.

184. 598 S.E.2d at 763. Notably, the dissent in *Yopp* argued that *Hughes* required dismissal of the appeal because the Court of Appeals lacked jurisdiction. *Id.* at 767–68. The dissent argued that a GAL was an indispensable party no matter what statute she was appointed under because the child’s “interests are subject to being defeated or diminished by the mother’s [appellant’s] claim in this appeal.” *Id.* at 768. In addition, the dissent argued that the GAL in *Yopp* was counsel of record under Virginia Supreme Court Rule 1:5 and, therefore, notice of appeal was required under that rule. *Id.* at 767, n.6.

185. *Id.* at 764.

when Rule 5A:6 requires service of the notice on “opposing counsel” the GAL is included. In addition, Rule 5A:19, setting forth the general requirements for briefs at the Court of Appeals level, provides that if a GAL joins with either the appellee or appellant, the GAL is required to notify the clerk of the Court of Appeals. The GAL may then rely on her side’s brief but is herself entitled to oral argument under Rule 5A:26.<sup>186</sup>

At this point, we see that a Virginia GAL acts as an investigator, witness, and neutral advisor opining on the ultimate issues. In addition, the GAL is obliged to file affirmative pleadings at the trial level and is considered a *de facto* indispensable party and opposing counsel with rights to appellate argument separate from the other parties. It is not a stretch to say that a Virginia GAL<sup>187</sup> is virtually in a category by herself, loosed upon the litigation with fluctuating obligations and duties running sometimes to the court, at times to Respondent’s “interests,” and finally with allegiances to her own opinion, such opinion taking precedence over the Respondent’s because, as seen, the Respondent is not the GAL’s client, and the GAL is not, strictly speaking, the Respondent’s attorney.

## V. THE WRITTEN REPORT

The Statute specifies the contents of the GAL’s written Report.<sup>188</sup> However, the statutory requirements cannot be completely satisfied without considering the GAL’s duties as identified in the Statute,<sup>189</sup> together with the GAL’s common-law obligations. When all three are read together, one can safely posit that the Report should<sup>190</sup> encompass the entire factual and

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186. *E.g., Bennett v. Bennett-Smith*, No. 1852-07-1 (Va. Ct. App. Aug. 12, 2008) (unpublished) (GAL joined with mother on appeal but declined oral argument).

187. This is not to imply that a Virginia GAL is unique. If that is not clear by now, it should be as this article proceeds. The duties and responsibilities of GALs are in disarray nationwide and have been for decades.

188. § 37.2-1003(C)

189. § 37.2-1003(B)

190. “Should” is used because the scope and contents of a Report varies from case to case. In practice, they can vary in length from five to sixty-five pages, depending on the relief sought in the Petition, the issues raised, and the

legal issues involved in the particular case.

Section 37.2-1003(B) specifies the GAL's duties, requiring her to investigate the Petition and evidence. This section also requires the Report to be filed, so clearly the requirement to investigate the Petition and evidence encompasses the full scope of the capacity proceedings. In addition, Section 37.2-1003(C), the portion of the Statute setting forth the Report's contents, requires the GAL to address the "major areas of concern,"<sup>191</sup> including whether a guardian or conservator is needed, the extent and powers of the proposed guardian and conservator, the suitability of the proposed guardian and conservator, the guardian's and conservator's ability to satisfy their duties, and consideration of the Respondent's proper residential placement. These areas of concern are indeed major, encompassing essentially the gamut of the issues before the court.

Given the Report's breadth, additional questions arise. What weight should the fact-finder give the Report? Should the Report be admitted as "substantive" evidence? If so, should the trial court allow the introduction of the entire Report as evidence?<sup>192</sup> Related to that, what if the Report contains hearsay? In fact, is the Report itself hearsay? Should the Report be submitted under oath? When should the Report be filed with the court and/or served on parties?

The weight to be given a Report begins with *In the Matter of Baby K* ("*Baby K*"),<sup>193</sup> goes through *Ruffin*,<sup>194</sup> and ostensibly ends with *Bottoms*.<sup>195</sup> *Ostensibly* is used because the Virginia Supreme Court's pronouncement in *Bottoms* does not accurately reflect Virginia law.

In *Baby K*, a child was born in a Virginia medical facility

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conscientiousness of the particular GAL.

191. § 37.2-1003(C)(i)-(iv).

192. Section 37.2-1003(B) requires the Report to be filed with the court, but is silent as to whether the Report is admitted into evidence. Section 37.2-1003(B) also does not specify the weight to be given to a Report.

193. 832 F.Supp. 1022 (E.D. Va. 1993).

194. 393 S.E.2d 425 (Va. Ct. App. 1990), discussed in Part III.

195. 457 S.E.2d 102 (Va. 1995).

with irreparable brain damage. She was unconscious, deaf, blind, and could not experience pain or pleasure.<sup>196</sup> The medical provider filed a declaratory judgment action in federal court seeking a ruling that if the provider discontinued the child's ventilator, doing so would not violate certain federal and state laws.<sup>197</sup> To further complicate matters, the mother and the father disagreed as to whether their child should be allowed to die.

A Virginia state court had previously appointed a GAL pursuant to Section 8.01-9. The GAL sided with the father and medical facility, opining that the ventilator ought to be discontinued.<sup>198</sup> It was in this context that the *Baby K* court found the GAL's role to be merely a fact finder. The federal court's opinion was based on *Ruffin*.<sup>199</sup> Consequently, a Virginia GAL's recommendation was "irrelevant."<sup>200</sup> Dismissing a GAL's recommendation was deemed consistent with the "limited role of a [GAL] as an independent fact finder and not a surrogate decisionmaker . . ."<sup>201</sup> Relying on *Ruffin*, the federal court reasoned that a GAL's role under Section 8.01-9 is to "'carefully examine[ ] the facts surrounding the case."<sup>202</sup>

The federal court's interpretation of *Ruffin* misses the mark because as we have seen, *Stanley* determined a GAL's role is not merely advisory.<sup>203</sup> The federal court not only overlooked *Stanley*, but misread *Ruffin*. In *Ruffin*, the Virginia Supreme Court determined that Section 8.01-9 established a GAL's minimum qualifications.<sup>204</sup> In addition, Virginia's Supreme

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196. 832 F.Supp. at 1025.

197. *Id.* at 1031. The court held that the Emergency Medical Treatment and Active Labor Act, the Rehabilitation Act, the American with Disabilities Act, and the Child Abuse Act would not allow the medical provider to discontinue the ventilator. *Id.* The court declined to address whether the Virginia Medical Malpractice Act and the "right to die" took precedence over the mother's constitutional rights concerning Baby K's care. *Id.*

198. *Id.* at 1026.

199. *Id.* at n.2.

200. *Id.*

201. *Id.*

202. *Id.* (quoting *Ruffin*, 393 S.E.2d at 429).

203. 405 S.E.2d 621, 622 (Va. 1991). *Stanley* is discussed in Part III.

204. 393 S.E.2d at 428.

Court observed that a GAL's duties could not be "spelled out as a general rule."<sup>205</sup> However, it was clear that the GAL had "a duty to make a bona fide examination of the facts in order to properly represent the person under a disability."<sup>206</sup>

Stated differently, *Ruffin's* analysis of a GAL's duties was not the totality of a GAL's obligations. The Virginia Supreme Court also said that a GAL had a duty to "faithfully represent and protect" his charge.<sup>207</sup> Clearly, this meant something beyond merely acting as a fact finder and advisor. In addition, "faithfully" representing the ward in the context of the *Baby K* case could have included recommending that the ventilator be removed. Moreover, as other courts and litigants have noted, if a GAL's Report and opinion are irrelevant, then why have them?

Virginia's Supreme Court expressly disagreed with the *Baby K* holding in *Bottoms*, finding that a GAL's recommendation "while not binding or controlling, should not be disregarded."<sup>208</sup>

The evolution from *Baby K's* finding that a GAL's recommendation is irrelevant to *Bottoms's* holding is not much guidance. In fact, *Bottoms* substantially understates the weight given GALs' recommendations. Practically speaking, their recommendations are given far more weight, not only by trial courts but also at the appellate level as seen in the discussion

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205. *Id.* at 429.

206. *Id.*

207. *Id.* at 428.

208. 457 S.E.2d at 108. The facts in *Bottoms* are somewhat unique. Four different levels of courts were involved: (1) J&DR; (2) circuit court; (3) the Court of Appeals, and (4) the Supreme Court. At the appellate level, the issues were somewhat charged given the facts. As mentioned, the case involved a child custody dispute between the child's mother and the child's maternal grandmother. *Id.* at 103. The child's mother was involved in a lesbian relationship. *Id.* at 105. The child's grandmother sought custody, claiming that the mother had abused and neglected the child. *Id.* at 106. The two lower trial courts that heard the evidence (J&DR and the circuit court) both ruled that custody should be awarded to the grandmother because there was sufficient evidence that the mother had neglected and abused the child. The Court of Appeals reversed. *Id.* at 107. The Supreme Court reversed the Court of Appeals. *Id.* At the appellate level, the courts seemed to be sparring over the lesbian issue. *Id.* at 108. The Supreme Court's analysis was simple: the judges who heard the evidence and judged the credibility of the witnesses determined that there had been abuse and neglect, and that finding was entitled to deference. *Id.* at 107, 108.

above. Moreover, the Supreme Court's determination in *Bottoms* that a GAL's opinion, while not controlling is not to be disregarded, is inconsistent with the weight accorded the GAL's Report in the same decision. The Supreme Court buttressed its holding, relying on not only Section 8.01-9 and Rule 8:6, but also the GAL's common law obligations and a trial court's obligations under *parens patriae*. "This child had no other independent participant in the proceeding, aside from the trial court, to protect his interests. Thus, this diligent guardian ad litem's recommendation that custody be awarded to the grandmother was entitled to be considered by the court in reaching a decision on the issue."<sup>209</sup>

Given *Bottoms'* view concerning a GAL's recommendations the question of whether the Report should be admitted as "substantive" evidence would seem to be answered in the negative. In other words, if a GAL's recommendations amount to nothing more than something for the trial court's consideration, then logically a Report should not be deemed substantive evidence.

Virginia has not addressed this issue. There are, however, decisions outside the jurisdiction meriting consideration.

In *C.J.L. v. M.W.B.* ("*M.W.B.*"),<sup>210</sup> an intermediate appellate court in Alabama addressed both the weight and admissibility of a Report. A mother appealed a decision granting sole custody to her husband, arguing that the trial court unduly relied on a GAL's Report and erred admitting it.<sup>211</sup> She further claimed that her due process rights had been violated given the GAL's expansive role.<sup>212</sup>

Consistent with the principles set forth in *Bottoms* and *Ruffin*, Alabama law allows trial courts to consider a Report, but they are not bound by a GAL's recommendation.<sup>213</sup> Because

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209. *Id.* at 108.

210. 879 So.2d. 1169 (Ala. Civ. App. 2003).

211. *Id.* at 1172.

212. *Id.* at 1181. Part VI examines a number of cases concerning this issue.

213. *Id.*

Alabama law “clearly permits the use” of a GAL in custody cases, because a GAL under the Alabama statute was required to make a recommendation, and because it was “inherent in the definition” of a GAL to make a recommendation, the use and admission of the Report was not error.<sup>214</sup> Moreover, because the GAL was a licensed attorney and officer of the court, the GAL was further permitted to argue his “client’s case” as any other lawyer.<sup>215</sup> Finally, the court declined to “reconsider” the longstanding use of GALs by Alabama trial courts.<sup>216</sup>

In *In the Matter of Hilyard*,<sup>217</sup> an appeal also involving child custody, the appellant/grandmother sought custody of ten grandchildren after their parents’ rights had been terminated and custody was awarded to the State of Ohio. The trial court appointed a lawyer to act as a GAL and attorney for children.<sup>218</sup> The grandmother argued she was prejudiced by the Report’s admission, because it contained hearsay, without which the record did not substantiate the decision to place the children with the state.<sup>219</sup>

Similar to the Virginia Statute, an Ohio GAL Report was to be submitted to the trial court.<sup>220</sup> Moreover Ohio law, like the Virginia Statute, was silent concerning whether the Report was admissible.<sup>221</sup> The appellee state agency conceded that the Report contained hearsay but argued: “what is the use of requiring the report if the court cannot use it?”<sup>222</sup>

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214. *Id.*

215. *Id.* (quotation omitted).

216. *Id.*

217. 2006-Ohio-1977, ¶ 1 (Ct. App.).

218. *Id.* at ¶ 7. The grandmother argued that the trial court should have appointed a separate advocate attorney for the children, arguing that the dual roles of advocate and GAL were impermissible. *Id.* at ¶ 4. The appellant had failed to make this objection at trial. *See id.* at ¶ 47.

219. *Id.* at ¶ 53, 58-59.

220. *Id.* at ¶ 54; OHIO REV. CODE ANN. § 2151.414 (the GALs report “shall be submitted to the court”). As noted, Virginia’s Statute requires that the Report be filed. *See also* the following footnote.

221. OHIO REV. CODE ANN. § 2151.414(C) (requiring the Report to be “submitted” to the court before or at the time of the permanent custody hearing.) On Ohio GAL Report, as in Virginia, is not submitted under oath.

222. *Hilyard*, 2006-Ohio-1977 at ¶ 54.



The appellate court determined that the Report's admission was error. Moreover, the fact that the statute required its submission did not make it admissible.<sup>223</sup> However, the mere fact that the Report was improperly admitted did not mean the appellant was prejudiced because the GAL was subject to cross-examination and the record substantiated the trial court's decision.<sup>224</sup>

In *In Re Chelsea*,<sup>225</sup> a Maine statute expressly allowed a Report to be admitted.<sup>226</sup> Despite that, a mother in a custody proceeding argued that her due process rights had been violated because the Report contained inadmissible hearsay.<sup>227</sup> There was no question, said the court, that the legislature could empower courts to consider Reports as an exception to the hearsay rule.<sup>228</sup> However, the ultimate issue was whether the court's consideration of the Report prejudiced the mother.<sup>229</sup>

In balancing the mother's rights to her children, the appeals court observed that there were sufficient safeguards offsetting the risk of untrustworthy hearsay information in a Report. One such safeguard involved the fact that a GAL was a

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223. *Id.* at ¶ 54, 55, 58. The court noted that an Ohio "task force" had recommended that Reports not be considered as "substantive proof of the merits." *Id.* at ¶ 56. Another committee had indicated that a GAL's role was advisory. *Id.* at ¶ 57. In addition, the Report was viewed as a mechanism for allowing trial courts to ascertain if the GAL had fulfilled her duties. However, the committee cautioned against using the Report as "substantive evidence." *Id.*

224. *Id.* at ¶ 58-62. This decision, as with others, fails to adequately consider the impact of the Report as well as the GAL's role. As noted, *Gilbert*, 664 A.2d 239, *supra* note 145, reasoned that even though much of the evidence in the GAL's Report eventually made its way into the record, which purportedly rendered the admission of the GAL's Report of no harm, the fact is the appellant was put into the position of having to contradict the evidence of a "neutral" party (the GAL) appointed by the court. Accordingly, the entire proceeding was influenced by the Report, and the Report became the "standard for all of the facts . . . as well as the conclusions to be drawn from those facts." *Id.* at 243. The Report's admission placed the mother in an unfair position, and "significantly influence[d] the outcome" in the case. *Id.* at 244.

225. 884 A.2d. 97 (Me. 2005).

226. *Id.* at ¶ 1 (citing ME. REV. STAT. tit. 22, § 4005(1)(D) (2004)).

227. 884 A.2d. 97 at ¶7.

228. *Id.* at ¶ 10.

229. *Id.* at ¶ 11.

“disinterested party” and an “agent” of the court.<sup>230</sup> Secondly, the GAL had to meet certain qualifications and exhibit competence and experience concerning the reliability of information presented in the Report. Thirdly, the GAL was required to provide copies of the Report to all parties, and the Report was to include the identity of the referred witnesses in advance of trial.<sup>231</sup> The mother argued, however, that even if the Report were admissible, statements of witnesses who were not called to testify ought to be redacted. Similar to the Alabama court in *M.W.B.*, the *Chelsea* court rejected the argument, stating that redaction would negate the purpose of a GAL, which is to “conduct an investigation, recommend what action is in the best interests of the child, and outline the reasons for those conclusions.”<sup>232</sup>

Before considering in more depth the hearsay issues in relation to Reports, the final two questions are whether there should be a service requirement, and whether the Report should be under oath. As noted, the Statute does not require Reports to be submitted under oath or served. They are merely filed with the court with no established time for submission. For now, it suffices to say that there are considerable reasons for requiring service on all parties, including the Respondent, as well as requiring the Report to be served sufficiently in advance of trial to allow challenges. Similarly, for present purposes it suffices to note that there are sound reasons why the Report should be submitted under oath. More comprehensive answers to these questions can be provided after considering the issues in Part VI as well as the next section addressing hearsay and Reports.

To summarize, a GAL’s Report contains opinions regarding the ultimate issues in a capacity hearing. Whether the Report

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230. *Id.* at ¶ 14 (citing ME. REV. STAT. tit. 22, § 4005(1)(G)).

231. *Id.* Although the Maine statute requires the Report to be provided to the parties, it does so with the proviso that it be done “reasonably” in advance of trial. § 4005(1)(D). The question is whether providing the Report “reasonably” in advance of trial allows any party opposing the Report to counter it by subpoenaing witnesses or by taking any other steps.

232. 884 A.2d. 97 at ¶15 (citing § 4005).

should be admitted and its proper weight are substantial issues requiring additional consideration in Virginia. As seen, *Bottoms* is an incomplete and limited statement of law regarding the proper weight to be afforded a GAL's opinion. Whether there should be service requirements and time limits for service and filing are vital considerations that will also be addressed below.

#### *THE REPORT AND HEARSAY*

The vast majority of Reports contain hearsay given their nature and contents. In addition and as important, the Report itself is hearsay.<sup>233</sup>

Hearsay is a statement (oral or written) not made by one testifying at trial, if the statement is offered as proof of the matter set forth in the statement.<sup>234</sup> A GAL's Report is generated outside the context of a hearing. If offered as evidence, it is by definition offered to prove the truth of the Report's contents, namely that the GAL's findings and opinions are true.

Hearsay is generally inadmissible, but there are a substantial number of exceptions, and the party introducing the out-of-court statement has the burden of showing that it meets an exception.<sup>235</sup>

No Virginia statute expressly allows a GAL's Report to be introduced as a hearsay exception. As noted, Section 37.2-1003(B)(iv) requires a Report to be filed. That does not mean, however, that it is admissible. On the other hand, it could be argued that the General Assembly impliedly authorized the introduction of Reports by enacting a statute requiring their filing.<sup>236</sup> And, as noted in *Hilyard*, why have a Report unless it

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233. Effective July 2012, an evidentiary code becomes effective in the Commonwealth for the first time in Virginia's history. VA. CODE ANN., tit. 8.01.

234. *Andrews v. Creacey*, 696 S.E.2d 218, 228 (Va. Ct. App. 2010) (citing Black's Law Dictionary 649 (5th ed. 1979)).

235. *Brown v. Commonwealth*, 487 S.E.2d 248, 251 (Va. Ct. App. 1997).

236. In *Coston v. Petrie*, 586 N.W.2d 52, 59 (Wis. Ct. App. 1998), *supra* note 23, the court addressed the issue of whether a psychologist's report required by the guardianship statute was admissible although objected to as hearsay. Even though the report was required to be prepared the court held that that did not mean the

can be used? But using the Report is not the same as admitting it into evidence. On the other hand, if courts are expressly allowed to consider Reports, and if the Reports are not “admitted” but merely “filed,” how is a party to counter the Report?

One method entails calling the GAL as a witness. Tactically speaking, this may not be a viable option because, as seen, a GAL wears a cloak of neutrality by virtue of being court-appointed to monitor and guard the Respondent’s best interests.

As discussed above in *Creacey*,<sup>237</sup> a wife challenged a trial court’s divorce decree, arguing that a Report’s admission was improper because it contained hearsay. As noted, the Report involved a GAL’s meeting with a husband during his incapacity hearing, which report was introduced by his appointed guardian as evidence of intent when his guardian later filed for his divorce.<sup>238</sup> The wife, who objected to the divorce, claimed that absent admission of the Report, there was insufficient evidence to prove that her husband intended to live separate and apart from her.<sup>239</sup>

In holding that the Report’s admission was not error, the Court of Appeals determined that the hearsay therein was a recognized exception. The issue was whether the husband intended to live separate and apart; that is, his “state of mind” was at issue. Thus, the hearsay concerning his “state of mind” was admissible.<sup>240</sup> Even if the Report’s admission were error, the court opined that it was harmless because the GAL testified subject to cross-examination concerning these statements and did so without objection.<sup>241</sup>

The Court of Appeals’ decision in *Creacey* is not the last

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report was an exception to the hearsay rule: “If the legislature had intended for the report to be admitted into evidence at trial as an exception to the hearsay rule, it would have said so. It did not.” *Id.* (quotation omitted).

237. Cited and discussed above in Part IV, n.235.

238. The *Creacey* court declined to address whether a guardian was empowered to seek a divorce under VA. CODE ANN. § 37.2-1020(D). 696 S.E.2d at 223.

239. *Id.* at 226.

240. *Id.* at 228.

241. *Id.*

word in Virginia because the Report was not challenged in a capacity hearing but in a divorce proceeding. However, *Creacey* is the only reported Virginia decision addressing hearsay in connection with a Report.<sup>242</sup> The opinion raises significant issues concerning the interplay between a Report's admission and cross-examination. As noted above and as will be addressed more fully below, courts outside Virginia often justify the admission of hearsay-laden Reports by finding that the sting or prejudicial impact of their admission is ameliorated if the GAL is subject to cross-examination.

Such was the case in *Hilyard*,<sup>243</sup> and as in *Griffin*, the appellant objected to a Report's admission, arguing that the trial court did not properly consider the children's preferences. Instead their preferences were documented through the GAL's Report and testimony, i.e., hearsay. The appellate court agreed there was error but affirmed because any error was harmless; there was no prejudice because the GAL was subject to "full cross-examination" at trial.<sup>244</sup> In addition, there was evidence beyond the GAL's Report documenting the children's preferences.<sup>245</sup>

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242. In *Mercurio v. Mercurio*, No. 0401-09-2, (Va. Ct. App. Nov. 3, 2009) (unpublished) available at <http://www.courts.state.va.us/opinions/opncavwp/0401092.pdf>, the mother/appellant in a custody suit challenged the admission of a GAL's Report that was submitted the day before the custody hearing. *Id.* at 4. The mother argued that the trial court should not have considered the Report, in part, because it contained inadmissible hearsay. The decision notes that the Report was not admitted as evidence although the trial court indicated that it had "seen" the GAL's recommendation. *Id.* Because the mother/appellant had not complied with appellate rules mandating that the appellant's opening brief include the principles and arguments relating to the appeal, the issue was not addressed by the Court of Appeals. *Id.* See also *Griffin*, No. 2810-08-4 (Va. Ct. App. Dec. 29, 2009) (unpublished) (GAL Report "produced to the court" but opinion does not state whether admitted as evidence), discussed above in Part IV at note 131. The GAL in *Griffin* testified about and submitted a Report containing extensive statements by the children to the GAL concerning their preference as to where they wanted to live. *Id.* at 10. When the appellant/father was not awarded custody, he appealed claiming the trial court did not properly consider the children's preferences as required by statute. *Id.* The Court of Appeals found no error concerning the Report's use. Apparently, the father did not raise any hearsay objections at trial. *Id.* at 5-6.

243. 2006-Ohio-1977, *supra* note 218.

244. *Id.* at ¶ 60.

245. *Id.* at ¶ 6. Similarly in *In the Matter of K.G.*, No. W2003-00809-COA-R3-PT

In *Toms v. Toms*<sup>246</sup> the Tennessee Supreme Court ruled that a GAL's Report itself was hearsay and reversed a custody determination based solely on a Report. Tennessee's Rules of Evidence define hearsay as "'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'"<sup>247</sup> By definition, a GAL's Report constitutes hearsay, said the court. It is an out-of-court statement, introduced for the truth of the statements therein. Therefore, in lieu of admitting the Report, a GAL should testify subject to cross-examination.<sup>248</sup> However, if the GAL's testimony contained hearsay, it must be admissible as an exception.<sup>249</sup> Finally, "[a]lthough a guardian *ad litem*'s report is not admissible evidence, we hold that such a report may be reviewed by a trial court. To hold otherwise would effectively undermine the important role played by a guardian *ad litem*."<sup>250</sup>

As seen, in some states, a Report's admission is justified if the record shows harmless error, i.e., if other evidence substantiates the Report's contents. In addition, if the GAL is subject to cross-examination the Report's admission is deemed harmless. Justification is also seen to exist because of the GAL's role; as noted, why would the legislature authorize or require them if the Report were not admissible or to be used?

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(Tenn. Ct. App. 2004) (unpublished), an intermediate Tennessee appellate court determined that additional evidence supported the trial court's decision where the appellant argued that use of a Report containing hearsay was improper. However, as in *Hilyard*, any error was harmless because the trial court did not exclusively rely on the Report. The appellate court observed that the Tennessee Supreme Court had held, in a decision discussed next, that "exclusive reliance" on a Report would be error because a GAL Report "standing alone" is hearsay. *Id.* (citing *Toms v. Toms*, 98 S.W.3d 140, 144–45 (Tenn. 2003)).

246. 98 S.W.3d 140 (Tenn. 2003).

247. *Id.* at 144 (quoting TENN. R. EVID. 801).

248. *Id.* at 144.

249. *Id.*

250. *Id.* Allowing a trial court to review a Report raises serious questions concerning fairness to any party opposing the GAL's findings or opinion. If the court is the fact-finder and has reviewed the Report, and the Report is not admitted, how can any party challenge it? In addition, the fact-finder, in this case the judge, has been influenced by the Report. However, the extent of the influence on the judge cannot be known, much less challenged, because there is nothing in the record documenting what the judge has considered or its impact on the judge.

While no Virginia court has addressed these issues, it is beyond argument, at least insofar as a traditional evidentiary analysis, that a Report is hearsay and contains hearsay. It remains to be seen whether Virginia will justify a Report's admission based on the rationale used in other states. Whether a Report should be admissible, however, cannot be fully answered without considering the procedural due process implications of such admission on all the parties to the proceedings. These issues and others will be addressed in Part VI.

## VI. DUE PROCESS AND THE GAL

Does the GAL's expansive role implicate due process? Stated differently, is any party to the capacity proceeding unfairly prejudiced by what a GAL does to such an extent that it violates the United States or Virginia Constitutions? Descending to particulars, is due process jeopardized when a Report is filed with and considered by the court despite the existence of additional evidence in the record? Is due process offended when a GAL testifies? Is due process impinged when a party is prohibited from cross-examining the GAL? The answer depends on the circumstances. However, it may be that in many instances due process is violated given the totality of the GAL's role in the particular case. For example, it may be that the mere failure to cross-examine a GAL may not rise to the level of a constitutional violation, but given the totality of the GAL's participation, or the overall role of the GAL, due process was thwarted.

The Virginia and U.S. Constitutions require that before anyone can be deprived of life, liberty, or property, one must be afforded due process.<sup>251</sup> Due process embodies the concept that

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251. U.S. CONST. amends. V, XIV; VA. CONST. art. 1, § 11; *see also* Commonwealth v. DeLapp, No. 0258-10-1 at 8 (Va. Ct. App. Oct. 19, 2010), *available at* <http://www.courts.state.va.us/opinions/opncavwp/0258101.pdf>. The Fifth Amendment of the U.S. Constitution provides in full:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

the government's authority is limited because it derives its powers from the people's consent.<sup>252</sup> Due process does not mean that a person's interest, liberty, or property cannot be curtailed or taken; it simply prohibits unjustified or mistaken deprivations.<sup>253</sup>

There can be little doubt that the Statute implicates the Respondent's constitutional rights.<sup>254</sup> It is a governmental mechanism for limiting or taking of both the Respondent's liberty and property upon a finding of incapacity. In fact, the mere filing of a Petition triggers the Commonwealth's resources, pitting the state against the Respondent,<sup>255</sup> and to some extent, those who have an interest in the Respondent's welfare.<sup>256</sup> While

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service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the U.S. Constitution makes the Fifth Amendment's due process clause applicable to the individual states.

252. Hood v. Commonwealth, No. 092402 at 11 (Va. Cir. Nov. 4, 2010) (unpublished) available at <http://www.courts.state.va.us/opinions/opnscvwp/1092402.pdf>.

253. *Id.* (citing Carey v. Piphus, 435 U.S. 247, 259 (1978)).

254. See, e.g., Sim v. Wright, 403 N.W.2d 721 (Neb. 1987). It is beyond the scope of this article to engage the intricacies regarding the distinctions between substantive and procedural due process. Suffice it to say that the issues here involve procedural due process: whether the GAL's role impacts the proceedings to such an extent that the proceeding is constitutionally defective or unfair to one or more of the parties. Generally speaking, substantive due process involves a right or interest protected under the U.S. Constitution. In order for the right or interest to qualify as substantive, it must be "'deeply rooted in this Nation's history and tradition,' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if it was sacrificed.'" McCabe v. Commonwealth, 650 S.E.2d 508, 510 (Va. 2007) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal brackets omitted)).

255. In *Santosky v. Kramer*, 455 U.S. 745, 747 (1982), the U.S. Supreme Court observed that a termination of parental rights case is analogous to a criminal capitol case. The parents' fundamental or "substantive" right to custody and care of their children is forever terminated. *Id.* at 749. The interests in a capacity hearing are comparable. The court takes from the Respondent her right to live where she desires, to come and go as she wishes, and to do with her property what she wants. On the other hand, the Statute does provide that a Respondent, or other party, may petition the circuit court for a ruling that capacity has been restored, so to some extent, the losses under the Statute are not irretrievably lost as in a parental termination case.

256. A Respondent's family members, if they have intervened, have due process



Respondent's adult children have no substantive due process rights at stake,<sup>257</sup> they do have fundamental procedural rights stemming from their position as parties (as Intervenor or Petitioner).

The touchstone in procedural due process is fundamental fairness. No state can deprive a person of liberty or property without affording procedural protections. Significantly, the minimum requirements of procedural due process is a matter of federal law, and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate . . . ."<sup>258</sup> The required procedures vary according to the nature of the individual's rights at stake.<sup>259</sup> Under *Armstrong v.*

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rights to the same extent as any other party in litigation. All litigants have fundamental rights, such as the right to cross-examine witnesses. In some states adult children are given preferential consideration concerning their parents, that is, the adult children are to be considered first before others when appointing a guardian or conservator. See *In Re Moses*, 615 S.E.2d 573 (Ga. Ct. App. 2005) (discussing Georgia's statutory preference for ward's adult child to be appointed guardian). Under the Virginia Statute, adult children are treated no differently than anyone else.

257. Most courts have determined that the relationship between an adult child and his parent is not constitutionally protected. California is the exception. Such opinions, for the most part, have occurred in the context of 42 U.S.C. § 1983 cases where a state actor/agent has deprived a person of a constitutional right. In *Smith v. Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987), cert. denied, 484 U.S. 935 (1987), the adult children sued, attempting to recover damages for the killing of their father by the police. According to the court, the claim raised the threshold question concerning whether the children had a cognizable liberty interest under the due process clause. *Id.* at 1418. The court reasoned that the constitution protects the parent-child relationship when the children are minors and there was no logical reason for that protection to end when the children became adults. *Id.* at 1419. In *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), the parents sued for loss of society after their adult child was killed by Chicago police. *Id.* at 787. The court of appeals held that the constitution did not allow a parent to recover, determining that the U.S. Supreme Court allowed recovery when the state actors (the police in this instance) intended to interfere with the relationship between a parent and their children. *Id.* at 788-89 (citations omitted). Because the injury to the parents was only "incidental," *id.* at 787, the parents could not recover. In other words, the parents could have recovered if the police had killed their adult child with the specific intent to interfere with the parents' relationship. See also *Struck v. Cook Cnty. Pub. Guardian*, 901 N.E.2d 946 (Ill. Ct. App. 2009) (finding no substantive due process right of adult child to relationship with parent and upholding guardian's denial of visitation).

258. *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

259. *DeLapp*, No. 0258-10-1 at 8 ("Due process is flexible and calls for such procedural protections as the particular situation demands." (quotation omitted)).

*Manzo*,<sup>260</sup> the Due Process Clause requires, at a minimum, the opportunity to be heard at a meaningful time and in a meaningful manner. These rights are guaranteed.<sup>261</sup> The rights do not create constitutionally protected interests, but they provide procedural safeguards against arbitrary governmental deprivation of certain interests.<sup>262</sup>

In the context of a hearing or trial, due process requires notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial fact-finder.<sup>263</sup>

The right to be heard and heard in a meaningful way encompasses the right to cross-examine witnesses.<sup>264</sup> In *Campbell v. Campbell*,<sup>265</sup> a husband in a divorce proceeding appealed because the trial court prohibited him from cross-examining his wife's witnesses.<sup>266</sup> The Court of Appeals reversed: "Virginia has recognized a fundamental right to cross-examination on a relevant matter to litigation, which applies in civil cases."<sup>267</sup> Moreover, cross-examination is not a mere privilege but "an absolute right," and "error of [such] magnitude is never harmless."<sup>268</sup>

It is evident then, that in the context of a capacity hearing, all parties—the Respondent, Intervenors, and the Petitioner—have a right to be heard in a meaningful way. Because due process is a flexible standard tied to the rights at stake in a particular milieu,<sup>269</sup> consideration of these questions requires

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260. 380 U.S. 545, 552 (1965).

261. DeLapp, No. 0258-10-1 at 8.

262. *Id.*

263. *In re Chelsea C.*, 884 A.2d. 97, 102 (Me. 2005).

264. Cross-examination has been called the great engine of truth and, in fact, its utility has been recognized for 3,000 years. *Proverbs* 18:17 (New Living Translation): "The first to speak in court sounds right – until the cross-examination begins."

265. 642 S.E.2d 769 (Va. Ct. App. 2007).

266. The trial court prohibited the appellant/husband from cross-examining the wife's experts solely because of time limitations. *Id.* at 772.

267. *Id.*

268. *Id.* at 773 (quotations omitted).

269. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). In *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982), the U.S. Supreme

considering the GAL's complete role, including presenting evidence, giving an opening or closing, examining witnesses, testifying, submission of reports, and perhaps most importantly, opining on the ultimate issue. Before doing so, however, we will frame the issues, so to speak, by reviewing a well-reasoned opinion holding that a state statute violated due process to the extent that it prohibited a GAL from being cross-examined.

In *Kelley v. Kelley*,<sup>270</sup> the father/petitioner in a child custody dispute sought mandamus because a trial court prohibited him from cross-examining a GAL. He also challenged a state statute prohibiting him from obtaining discovery from the GAL. The petitioner argued that due process necessitated that the GAL, who had prepared a Report containing an opinion that the child remain in the mother's custody, be subject to cross-examination.<sup>271</sup> The GAL argued that she could not be called as a witness, because she was "essentially, an attorney advocating in the cause."<sup>272</sup>

The Oklahoma Supreme Court held that a trial court was constrained by due process, and the judge's decision must be based on evidence that was properly before the court.<sup>273</sup> Therefore, any "investigator," in this case the GAL, could not make a "secret report."<sup>274</sup> Moreover, there was no "backdoor to the courts for witnesses, investigators, or litigants."<sup>275</sup> Allowing a GAL to submit a report, to opine, and so forth without being

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Court ruled that New York's burden of proof in the context of a hearing to terminate parental rights did not comport with the due process. At that time in New York, a parent's right to the custody of their children could be forever terminated based upon a mere preponderance of the evidence, a standard, said the Court, that did not comport with fundamental fairness of the Due Process Clause. *Id.* The Court determined that the nature of the process, in other words, what procedures were due, involved a balancing test. *Id.* at 745. First, courts should identify the private interests affected by the proceeding; second, a court ascertains the risk of error created by the state's chosen procedures, and third, it must identify the countervailing governmental interest in the state's chosen procedures. *Id.*

270. 175 P.3d 400, ¶ 1 (Ok. 2007).

271. *Id.* at ¶ 8.

272. *Id.*

273. *Id.* at ¶ 11.

274. *Id.* (quoting *Malone v. Malone*, 591 P.2d 296, 298 (Ok. 1979)).

275. *Id.*

subject to cross-examination amounted to “private investigations by the court in assembling and receiving evidence, out of the sight and hearing of the parties, who are deprived of the opportunity to defend, rebut, or explain. Due process simply does not exist in such an atmosphere.”<sup>276</sup>

With this framework in mind, we turn to the due process implications concerning a Report’s submission as evidence, the GAL’s testimony, the lack of opportunity to cross-examine a GAL, the GAL’s role during trial, and Virginia’s attorney disciplinary rules as well as their interplay with due process.

### *THE REPORT AND DUE PROCESS*

In *Bates-Brown v. Brown*,<sup>277</sup> the appellant/father in a custody dispute claimed the trial court had violated due process when considering a Report containing hearsay. Additionally, because the Report was filed a month after the hearing, the father argued that he was unable to challenge the GAL’s opinion by cross-examining her.<sup>278</sup> The Report referenced the GAL’s numerous discussions with a psychologist who was also unavailable for cross-examination.<sup>279</sup> In addition to testifying, filing a Report, and giving her opinion that the appellant/father should not be awarded custody, the GAL cross-examined the father.<sup>280</sup>

Because the father had the right to request the Report but did not, the court found no error.<sup>281</sup> In addition, there was no

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276. *Id.*

277. 2007-Ohio-5203 (Ct. App.) (unpublished).

278. *Id.* at ¶ 24.

279. *Id.* at ¶ 3.

280. *Id.* at ¶ 8. As noted in the Introduction, this article essentially concerns human fallibility, bias, and personality issues. It does not take much reading between the lines in this case to see a personality conflict between the father and GAL. The father claimed that the GAL had not performed her statutory duties, in part, because she did not meet with him personally during the pendency of a certain motion. *Id.* at ¶ 30. The court dismissed the argument, noting that while the GAL did not personally interview the father during the pendency of the motion, she had spoken to him on the telephone, and prior to the motion had met with the father “countless” times. *Id.*

281. *Id.* at ¶¶ 27, 28 (discussing OHIO REV. CODE ANN. § 3109.04(C), which states that the GAL Report “shall be made available to either parent . . . not less than five

indication, the court reasoned, that the trial court had actually considered the Report.<sup>282</sup> The record revealed that the lower court's decision was based on the evidence at trial (not the Report), including the GAL's testimony.<sup>283</sup>

As to the father's due process challenge concerning his right to cross-examine, the appellate court observed that the Ohio Supreme Court has held that "'a court errs when it receives testimony in the form of a guardian ad litem's report,'" but only where the objecting party had no opportunity to cross-examine the GAL.<sup>284</sup> As noted above, the father claimed that he did not have the opportunity to effectively cross-examine the GAL, in part because the GAL's Report was submitted a month after the hearing. The appellate court disagreed, reasoning that in addition to the fact that there was no evidence that the trial court ever considered the Report, the father had in fact cross-examined the GAL at trial where she had "summarized her position verbally."<sup>285</sup> Therefore, there was no due process violation.

In *In re Chelsea C.*,<sup>286</sup> the appellant/mother also unsuccessfully claimed that her due process rights were offended when a trial court admitted a Report into evidence.<sup>287</sup>

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days before trial, upon written request.")

282. *Id.* at ¶ 25. The court's ruling is suspect for many reasons, especially given *Gilbert's* observations, discussed above at note 145, that a GAL substantially influences the entire course of the proceedings. The appellate court stressed that there was no evidence that the trial court reviewed or considered the GAL Report submitted a month after the trial, but, practically speaking, what evidence could there be? The trial was over. What was the father supposed to do? Could he file a motion with the trial court asking the court to disclose whether it had reviewed the Report? Moreover, why have a Report if the court was not going to review or consider it?

283. *Id.* at ¶ 23. The totality of the evidence was testimony from the mother, father, the maternal grandmother, and the GAL. *Id.* at ¶ 7.

284. *Id.* at ¶ 24 (quoting *In re Seitz*, 2003-Ohio-5218, ¶ 27 (Ct. App.), which relies on *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368)).

285. *Id.* at ¶ 29.

286. 884 A.2d 97, ¶ 1 (Me. 2005). This was not a child custody dispute, but a parental termination case. As discussed at note 256, under *Kramer* the mother had significantly greater constitutional rights, namely, a liberty interest under the U.S. Constitution in the custody of her children.

287. In 2002, ME. REV. STAT. ANN. tit. 22, § 4005(1)(D) was amended to allow a trial court to admit a GAL Report into evidence. 884 A.2d 97, ¶ 9. The statute says

The Report contained “highly critical” hearsay statements made by the mother’s former landlord and the child’s physician. The statements called into question the mother’s parenting skills and cognitive abilities, and the GAL concluded the mother was unable to keep the child safe.<sup>288</sup> The appellant claimed that even if the Report were admissible,<sup>289</sup> due process required the hearsay to be redacted.<sup>290</sup>

Because Maine’s legislature had granted trial courts discretion to admit Reports, the appellate court found no violation of the mother’s rights despite the U.S. Supreme Court’s ruling in *Kramer* that in parental termination cases the parents be afforded the utmost procedural protections.<sup>291</sup> The court noted that there was no doubt that the legislature could authorize hearsay exceptions, and Maine had expressly done so by allowing trial courts to admit Reports. In addition, the legislature had impliedly recognized the need for a Report’s admission by authorizing a GAL to have access to otherwise confidential information and to conduct interviews.<sup>292</sup> Finally, due process had not been offended because a GAL is a “disinterested party and an agent of the court,” and nothing precluded the mother from producing witnesses to rebut the GAL’s Report.<sup>293</sup>

In contrast to *Brown* and *Chelsea*, the appellant/father in *Miller v. Miller*<sup>294</sup> successfully argued that he was denied due process because the trial court had refused his request to cross-examine a GAL.<sup>295</sup> Significantly, the Report had been produced to the parties’ attorneys, and the witnesses referenced in the

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the court “may” do so.

288. *Id.* at ¶ 5.

289. The court stressed that Section 4005(1)(D) authorized the Report’s admission. *Id.* at ¶¶ 7, 9.

290. *Id.* at ¶ 15.

291. *Id.* at ¶ 11.

292. *Id.* at ¶¶ 8–9.

293. *Id.* at ¶ 14.

294. 671 So. 2d 849, 850 (Fla. Ct. App. 1996).

295. Like the GAL in *Brown*, the GAL cross-examined witnesses at the trial, including the appellant. *Id.* at 851. The decision further notes that “Florida law allows the GAL to participate actively in the trial of a change of custody case.” *Id.*

Report were available at trial and were cross-examined by the appellant. Given these safeguards, the appellee/mother argued that the appellant had not been prejudiced.<sup>296</sup>

The trial court permitted the GAL to orally give her Report; however, the court did not permit the GAL to “testify” or be cross-examined, reasoning that “I’m not going to be able to get lawyers to operate as guardian ad litem if I start subjecting them, you know, to cross-examination by all the lawyers in cases.”<sup>297</sup> As in *Chelsea* and *Brown*, the trial court viewed the GAL as an “independent individual who is giving a position as to what they think is in the best interest of the child . . . .”<sup>298</sup>

The appellate court observed that the trial court had relied on the GAL’s Report to change custody when the children had lived with the father for eight years. In addition, the Report contained hearsay and the GAL’s recommendation.<sup>299</sup> Moreover, it did not matter that the witnesses mentioned in the Report were available at trial and had actually been cross-examined because “[i]t is a fundamental right in this country to confront one’s accuser and to examine evidence the trial court relies upon to reach a decision.”<sup>300</sup>

As seen, a due process challenge based on a Report containing hearsay is often futile if the party had the opportunity to cross-examine the GAL. Due process is considered satisfied if a GAL is subject to cross-examination because the GAL’s availability is viewed as curing any potential prejudice. In addition, the GAL’s role as investigator, agent of the court, and an “independent” or “neutral party” legitimizes the Report’s admission.

Such justifications do not adequately consider the GAL’s impact as accurately observed in *Gilbert* and *Kelley*, nor do they sufficiently recognize a party’s fundamental right to cross-

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296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

examination. In addition, the fact that a GAL is subject to cross-examination does not fully take into consideration the purposes underlying exclusion of hearsay, namely that out of court statements made by absent witnesses are unreliable and untrustworthy. Hence, the fact that a party may cross-examine a GAL regarding statements that out-of-court witnesses made to the GAL obviously does not allow for confrontation of those witnesses. It also does not give the fact-finder the opportunity to judge the absent witnesses' credibility.

In situations where witnesses are at trial but the GAL is not subject to cross-examination, the challenging parties still operate with one hand tied behind their backs. They may challenge the witnesses and their statements as contained in the Report, but any meaningful challenge must include the right to confront the GAL.

The fact that states legislate hearsay exceptions and enact laws authorizing appointment of GALs does not in itself mean that due process has been satisfied. Under *Kramer* and its progeny, courts are required to engage in a balancing test to ascertain whether the procedures are constitutional. Some courts like *Brown* and *Chelsea* inappropriately defer to the state. Due process requires courts to weigh the interests and rights of the individuals against the state's interests in the procedures in place, and mere convenience is insufficient if the right is substantial.

As noted, the Virginia Statute does not require the Report to be served on any party. The Report is merely filed with the court, with no time requirement for submission. In addition, the Statute is silent as to whether any party has a right to view its contents.<sup>301</sup> Consequently, any party disputing the GAL's facts or opinions as set forth in the Report may have no adequate

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301. It would be surprising if any Virginia court would ever prohibit any party in a capacity proceeding from reviewing the Report and to do so prior to the hearing (assuming it has been compiled at that time). However, there is no such statutory requirement. And given the fact that the Statute does not mandate that the Report be served on the parties, nor specify when the Report is to be filed, the safest course would be to amend the Statute.



opportunity to do so. Reports are often filed on the eve of the hearing or trial and as often, perhaps, the GAL opines at the trial. Such uncertainty compromises the proceeding's integrity. Requiring timely service on the parties would ameliorate some of the detrimental impact. At a minimum, the parties should have the Report in time to subpoena rebuttal witnesses. Without such requirements, the court and its surrogate decision-maker, the GAL, have too much discretion.

In summation, due process is called into question when a Report is admitted because the Report itself is hearsay, contains hearsay, and under Virginia law a party has constitutional right to challenge evidence and confront witnesses. As we shall see in more detail to follow, constitutionally sufficient procedures are placed in greater jeopardy when a GAL testifies. In the final analysis, admitting a Report and permitting a GAL to testify tips the balance to the offending side of the due process scale.

#### *DUE PROCESS AND GAL TESTIMONY*

Due process is further implicated when a GAL participates as an advocate (cross-examining, introducing evidence, giving an opening/closing, and so forth) and as a witness in the same proceeding.<sup>302</sup> The question is should a GAL be permitted to testify and act as an advocate consistent with due process? Even if due process is considered to be satisfied, are there other considerations that would or should prohibit the GAL from assuming the roles of both advocate and witness? As addressed in the next subsection, the attorney disciplinary rules prohibit a lawyer from testifying and acting as an advocate in the same proceeding. These rules were implemented for the protection of opposing parties (i.e., fairness)<sup>303</sup> and for appearance purposes;

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302. At this point, we reference the observation made at the outset in note 14 concerning the primary issues raised herein and how these issues can be formulated. Although we have repeatedly touched on this issue and though much ink has spilled, this study now arrives at the point where the questions as initially formed can be more definitively answered: (1) How much of an attorney is the GAL, and (2) how much of a client is the client?

303. As noted, GALs often testify. It is rare when anyone challenges whether a

when an attorney testifies in the same proceeding in which she acts as an advocate, the trial appears to be tainted.

Whether GALs may be said to have testified without offending due process depends upon a virtual metaphysical *post hoc* justification by appellate courts. As seen from the foregoing discussion, courts legitimize GAL conduct by reviewing the record to ascertain if independent evidence exists over and above what the GAL submitted either by way of testimony or the Report. Thus, even if testifying and advocating is considered improper, if independent evidence exists in the record substantiating the GAL's testimony, then no manifest injustice will be found.

The courts also inspect the record to ascertain if the GAL functioned as an advocate in the traditional sense. In many cases, it is not difficult to locate evidence that the lawyer who was appointed as a GAL was not acting as a lawyer/advocate *per se* because the attorney was appointed as GAL, functioning as an arm of the court. That being the case, the GAL will be allowed to take an active advocacy role, testifying, opining, and cross-examining witnesses; it will not be deemed constitutionally infirm to do so because of the unique role a GAL occupies in the proceedings.

On the other side of the equation, the justification continues by finding that the ward is not a "client" as that term is used in a pure attorney-client relationship.<sup>304</sup> And if there is no client, the GAL will not be deemed to have run afoul of the disciplinary rules prohibiting attorneys from acting as advocates and witnesses in the same proceeding, and neither will due process be offended. Essentially the courts are struggling with the many hats GALs wear, resulting from the fragmented statutory and

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GAL may testify without violating the disciplinary rules. This is because the GAL is seen to be wearing not her attorney hat but acting in the capacity as a GAL (whatever that means). In other words, if the GAL is acting as GAL and not as an advocate for one of the parties, then the disciplinary rules do not apply. This is discussed further below.

304. As seen below, that approach does not fully consider the parameters or purposes of the disciplinary rules, nor comport with the realities of a GAL's role. We will also show that a violation of the disciplinary rules implicates due process.

common law schemes.

Two proto-typical cases for addressing these issues are *S.S. v. D.M. ("D.M.")*,<sup>305</sup> and *In the Interests of K Children: D.K. and B.K. ("K Children")*.<sup>306</sup>

In *D.M.*, the appellant/mother appealed, averring that the trial court erred by permitting a GAL to act both as an advocate and witness.<sup>307</sup> The GAL testified in a show-cause hearing involving the adoption of the mother's child by the appellee, the mother's aunt. The appellate court found that the GAL's testimony was "devastating" to the appellant, but concluded that there was no manifest injustice.<sup>308</sup>

The GAL's role in this case was extensive. At the hearing, he explained and commented on the evidence, argued his own credibility,<sup>309</sup> and rendered an opinion that "went to the heart of the adoption proceeding."<sup>310</sup> The GAL further opined on the ultimate issue: the appellee should be allowed to adopt the child. If that were not enough, he also opined that the appellant lacked the requisite parenting skills.<sup>311</sup>

The appellant argued that the GAL's roles as advocate and witness prejudiced her because the GAL's credibility was enhanced in the court's eyes. The GAL, the appellant argued, was court-appointed, purportedly neutral, and an attorney.<sup>312</sup> She further claimed that the GAL violated the District of Columbia's disciplinary rules that prohibit an attorney from acting as an advocate and witness in the same proceeding.<sup>313</sup>

The appellate court reviewed first the GAL's testimony, then the statutory framework, and finally, the disciplinary rules.

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305. 597 A.2d 870 (D.C. Ct. App. 1991).

306. 202 P.3d 577 (Haw. Ct. App. 2007).

307. 597 A.2d at 871.

308. *Id.* at 879.

309. "You have heard my testimony." *Id.* at 878.

310. *Id.*

311. *Id.* at 878-79.

312. *Id.* at 876-77.

313. *Id.* at 877. The disciplinary rules are discussed below.

The GAL testified that he had initially acted<sup>314</sup> “in a kind of protective role” because the ward was only three years old.<sup>315</sup> In the beginning, the GAL said, his efforts were to keep the child and mother together, but he had later changed his mind, becoming a “fan” of the appellee after observing how the child blossomed when living under her care.<sup>316</sup>

The court next analyzed the statute<sup>317</sup> authorizing the GAL’s appointment, noting that some commentators had observed that the GAL’s role is not always clear, and the law does not always distinguish between the roles of a neutral fact-finder, (who, in the court’s view did not make recommendations), and that of an advocate.<sup>318</sup> In the District of Columbia,<sup>319</sup> however, the statute was clear: the lawyer was not a neutral fact-finder, but was appointed to represent the child.<sup>320</sup>

Despite this, the GAL/attorney wore both hats. While monitoring the child’s visits with the mother, the attorney functioned as an investigator and testified at the adoption

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314. In this instance, the lawyer was initially appointed for the neglect proceeding. Subsequently, there was an adoption proceeding. *Id.* at 874. It is not clear whether the GAL was separately appointed in the second proceeding. However, the attorney acted as advocate and witness in the adoption proceeding. *Id.* at 873.

315. *Id.* at 874.

316. *Id.*

317. D.C. CODE § 16-918(b) (1989). See note 319 *infra* for the statute’s language.

318. 597 A.2d at 875.

319. Like the Maryland Court of Appeals in *Wills*, discussed in Part III, the D.C. court relied on the statute’s language, finding that the lawyer was appointed as counsel, not as a GAL, for the child. The D.C. statute provides in part that “in any proceeding wherein the custody of a child is in question, the court may appoint a disinterested attorney to appear on behalf of the child and represent his best interests.” D.C. CODE § 16-918(b).

320. 597 A.2d at 875. Even though the court found that the lawyer was appointed as the child’s lawyer, it observed that “the child was not a party in the usual adversarial sense.” *Id.* at 879. The parties were the mother/appellant and the appellee, the latter seeking to adopt the child and the former opposing the adoption. The fact that the child is not an actual party “in the adversarial sense” hearkens back to the question previously raised: How much of a client is the client? If the child or ward is not strictly a party, and they are not, then does that status impact the GAL’s duties? As seen, in Virginia a GAL may be required under Section 8.01-9 to file pleadings and engage in other advocacy-like functions on a ward’s behalf. If the GAL has assumed an advocacy role, how far can she go? Can she, at a capacity hearing for example, participate as a litigator by presenting evidence, making an opening, and so forth?

proceeding concerning his investigation. After testifying, the GAL resumed his advocacy role.<sup>321</sup> Accordingly, the court said, what the GAL did went well beyond his role, becoming an advocate for the appellee,<sup>322</sup> a fact witness, and opining on the ultimate issue.

The court next examined D.C.'s Disciplinary Rule 3.7, prohibiting an attorney from acting as an advocate and witness in the same proceeding.<sup>323</sup> The court concluded that the disciplinary rules prohibited just the sort of conduct engaged in by the GAL, noting that separate counsel should have been appointed.<sup>324</sup> Remarkably, however, the Court of Appeals found no prejudice to the appellant because the trial court supposedly did not uncritically adopt the GAL's position.<sup>325</sup> There was other evidence in the record supporting the decision. Therefore, the GAL's testimony was merely "cumulative."<sup>326</sup> Moreover, the court found the GAL to be honest.<sup>327</sup> Finally, because the GAL was subject to cross-examination and no objection was raised at trial, the decision was upheld.<sup>328</sup>

Sixteen years later, the court in *K Children* was presented with essentially the same issues. The mother/appellant argued in a parental termination case that her due process rights were

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321. 597 A.2d at 876–77.

322. By all appearances, it seemed as though the lawyer was acting as the appellee's attorney, although he was appointed as the child's counsel. So, again, the question arises: Who is the client? Appearances—how the proceedings appear—can impact whether due process is satisfied. Because a GAL is cloaked with neutrality and assumes her position by virtue of court appointment, if she appears to be siding with one of the parties, as they virtually always do, one of the parties can be at a tremendous disadvantage. The disadvantaged party will be in a position (again appearances) of having to discredit an attorney who is viewed by the fact finder as being neutral, or an arm of the court.

323. In their Rules of Professional Conduct, D.C.'s Rule 3.7 is substantially the same as Virginia's Rule 3.7, which is discussed below.

324. 597 A.2d at 878.

325. *Id.* at 879–80.

326. *Id.* at 878.

327. *Id.* at 879. The latter comment harkens back to *Bottoms* where the Virginia Supreme Court justified its decision based in part on the GAL's testimony and credibility.

328. *Id.* at 880.

violated when the GAL donned his advocate and witness caps.<sup>329</sup> As in *D.M., K Children* recognized that the GAL's opinion "went to the very merits of the case at bar,"<sup>330</sup> but also found no error.<sup>331</sup> However, unlike *D.M., K Children* determined that the GAL was not appointed as the child's attorney in part because the statute provided that separate counsel for the children could be appointed.<sup>332</sup> In addition, the GAL was not appointed to act strictly as the children's attorney because a GAL is defined as an "attorney for the suit."<sup>333</sup> Accordingly, the GAL was not the children's advocate because he "represents the children's best interests" as opposed to the children themselves.<sup>334</sup>

Concerning whether a GAL could testify under Disciplinary Rule 3.7, the court noted the nationwide confusion surrounding the GAL's role, and then proceeded to review a number of other state statutes. In Delaware, the court explained, "an attorney guardian ad litem does not serve directly as counsel for the child under a traditional attorney/client relationship,"<sup>335</sup> in contrast with GALs in states like Wyoming where they have the more traditional role of attorney with undivided loyalty and confidentiality to the child.<sup>336</sup> A Delaware GAL was an officer of the court, appointed to protect the child's best interests, and was not bound by what the child wanted. In addition, a Delaware GAL acts as an "attorney for himself in his capacity as guardian ad litem charged with representing the best interests of the child; he does not act directly as attorney for the child in a pure

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329. 202 P.3d at 580. Although the court found no merited discussion on the mother's point on appeal that she was denied due process, the court did discuss at length the prejudicial effect on the mother's case of the GAL's dual role allegedly taken in violation of the Hawaii Rules of Professional Conduct. *Id.*

330. *Id.*

331. *Id.* at 583–84.

332. *Id.* at 582.

333. *Id.* at 580 (quoting Black's Law Dictionary 46 (8th ed. 2004)).

334. *Id.* at 583.

335. *Id.* at 582 (quotation omitted).

336. *Id.* It may be recalled that the *Wills* court (discussed in Part III) found that the attorney there had not been appointed as a GAL but strictly as counsel for the child, which is why the attorney was not cloaked with judicial immunity and could be sued for malpractice by his client (the child).

attorney/client relationship.”<sup>337</sup>

The court further observed that Delaware’s “convoluted idea” that a GAL “is an attorney for himself in addition to being an officer of the court,” was suspect.<sup>338</sup> Nevertheless, Delaware had correctly decided the issue.<sup>339</sup> Finally, *K Children* cautioned that GALs should provide independent factual information through the testimony and exhibits of others. They must remember, the court cautioned, that a GAL “is not generally a witness, nor especially an expert witness.”<sup>340</sup>

Both *K Children* and *D.M.* attest to the reigning confusion surrounding GALs and the prejudice to any party challenging a GAL’s findings. In *D.M.*, the court found no due process violations in part because the record substantiated the trial court’s decision. Similarly, the *K Children* court advised GALs and trial courts to ensure that the record included evidence from extra-GAL sources, cautioning that the GAL must remember that he or she is generally not a witness. In other words, if at all possible, it is better to have independent evidence of the GAL’s opinions. Finally, both decisions justify their holdings because the GAL was subject to cross-examination.<sup>341</sup>

Turning to the Virginia Statute, one question is whether a GAL represents anyone. If so, whom? Or stated differently, is the ward a client in the pure attorney-client sense? As noted above, one potential “client” under the Statute is the Respondent. The second and third potential clients may be viewed as “ersatz” clients. As *K Children* observed, a GAL could be representing herself as “client.” Finally, the Respondent’s “interests” might be deemed the GAL’s “client.”

Under the Virginia Statute, a GAL is appointed “to

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337. *K Children*, 202 P.3d at 583.

338. *Id.*

339. *Id.* Similarly in Idaho, the court observed, a GAL represents the ward’s best interest and that may not be the same as what the ward desires. *Id.*

340. *Id.*

341. In *K Children*, the court said the GAL’s testimony “was no more than his GAL report submitted orally and under oath.” 202 P.3d at 580.

represent the *interests* of the respondent.”<sup>342</sup> Upon first reading, it might appear that the GAL acts as the Respondent’s attorney. After all the distinction between representing the Respondent’s interests and the Respondent herself is minute. Nevertheless, the Statute does not say a GAL is appointed to represent the Respondent, but rather the Respondent’s “interests.” So, arguably, the GAL is not the Respondent’s attorney. This interpretation is further supported by Section 37.2-1003(B)(iii), requiring the GAL to determine if the Respondent needs counsel and if so, to bring that to the court’s attention.<sup>343</sup>

Therefore, under the Statute the GAL apparently does not represent the Respondent as a client. However, as seen from the discussion above in Part III, if Section 8.01-9 is read in conjunction with the Statute, the GAL may be required to file pleadings on the Respondent’s behalf and otherwise act as an advocate.

If pleadings are required to be filed for the Respondent, the GAL must under the Statute notify the court that separate counsel is needed. Thus, separate counsel could do whatever is called for in the way of advocacy for the Respondent such as filing certain pleadings. However, what if Respondent’s counsel refuses to do so, and what if the GAL thinks that taking a certain course of action is in the Respondent’s best interests?

Under common law, the Statute, and Section 8.01-9, the GAL must act in the Respondent’s best interests. Recall that the Virginia Supreme Court said in *Bottoms* that the ward had no other independent participant in the proceeding, aside from the trial court, to protect the child’s interests. If Respondent’s separate counsel will not act, then does the GAL have an obligation to do so? If the GAL must file pleadings for the Respondent because the Respondent’s separately appointed counsel refuses to do so, then the GAL at the very least appears to be acting as Respondent’s counsel.

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342. VA. CODE ANN. § 37.2-1003(A) (emphasis added).

343. In both *K Children* and *D.M.*, the statutes similarly allowed for appointment of separate counsel to act in an attorney-client sense for the wards.



As discussed above, another potential client is the GAL herself. A GAL may be viewed as representing herself in addition to representing a ward or a ward's interest.

The third client (or the second potential ersatz client) may be the Respondent's "interests." As noted, Section 37.2-1003(A) requires a Virginia GAL to represent the Respondent's interests. We have already noted that the Respondent's "interests" does not mean that the GAL actually represents the Respondent, and while it stretches credulity to deem "interests" as a "client," that is, nevertheless, what at least one jurisdiction has concluded,<sup>344</sup> and what others do implicitly.

In the context of a capacity hearing, the GAL must take a position. That is what she is appointed to do. Typically that position is adverse to at least one of the parties. Whether she is deemed the Respondent's attorney, or deemed to be representing the Respondent's interests (as client), or representing her own "position" as client, it appears that the GAL represents someone. Therefore, when a GAL stands before the fact-finder opining on the ultimate issue, some party with a contrary position will inevitably be disadvantaged.

Given that a GAL appears to represent someone, we next address the witness-advocate disciplinary rules in Virginia and how they impact the proceedings and parties in the context of the Statute. We conclude that a GAL who testifies and participates as an advocate offends due process.

#### ***DUE PROCESS AND VIRGINIA'S DISCIPLINARY RULES***

We have encountered the problems presented when a GAL does not testify. The party opposing the GAL's position has no viable means for countering an often "devastating" opinion,

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344. One might assume that such a fiction is extreme. However, a close reading of the cases reveals that while courts may not expressly identify a GAL's client as the ward's "interests," that is nonetheless the implication as seen in *K Children*. As noted, in the context of the Statute, such an interpretation derives from a straight-forward reading of Section 37.2-1003(A) providing that a GAL is appointed to represent the Respondent's "interests."

whether the opinion is embodied in the Report or via testimony. The question then, from a due process stance, is whether allowing the GAL to testify is any better.

Virginia's disciplinary rules are mandatory and apply to all bar members, establishing minimum standards of conduct.<sup>345</sup> Breach of a disciplinary rule renders the lawyer subject to disciplinary action by the Virginia State Bar.<sup>346</sup>

The disciplinary rules under discussion are inapplicable if the GAL has no identifiable client. In other words, the witness-advocate rules facially would not seem to apply if the GAL has no client because the rules prohibit an attorney from acting as an advocate for a client in a proceeding if the attorney will also be a witness. If there is no client, then the GAL's actions do not implicate the underlying purposes of the disciplinary rules,<sup>347</sup> which are to protect the client, the adversary, and the institutional integrity of the legal system as a whole. On the other hand, as discussed above, a GAL, depending on the circumstances may be required by common law or Section 8.01-9 to assume an advocacy stance in order to protect the Respondent's interest. Because a GAL may in some circumstances be required to assume an advocacy-type role, the underlying purposes of the witness-advocate rules are directly implicated.

As noted, due process essentially concerns fairness. What process is due is impacted when a GAL participates as both witness and attorney despite the fact that under the Statute the

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345. *Estate of Andrews v. United States*, 804 F. Supp. 820, 823 (E.D. Va. 1992).

346. *Id.*; *Personalized Mass Media Corp. v. The Weather Channel*, 899 F. Supp. 239, 242 (E.D. Va. 1995).

347. It is unclear whether the disciplinary rules apply to GALs. For example, in *Auclair*, discussed above in Part IV, the court determined that the conflict of interest rule "necessarily excuses strict adherence to some of the rules of professional conduct." 730 A.2d at 1270 (quotation and emphasis omitted). In *Auclair*, the court appointed a GAL to represent three minors in a child custody dispute. Although there were differences among the children as to what they wanted, the court ruled that the conflict of interest rules would not preclude the GAL from continuing the representation of all three children. *Id.* While *Auclair's* holding is suspect in light of the Court of Appeals' decision in *Wills* (discussed in Part III), the portion of the opinion in *Auclair* dealing with the disciplinary rules is not implicated by *Wills*.

GAL may not have a formal or identifiable client.

Virginia Disciplinary Rules 3.7 ("Rule 3.7") and 1.7 ("Rule 1.7") are commonly referred to as the witness-advocate rules.<sup>348</sup> As noted, these rules prohibit an attorney from serving as advocate and witness in the same proceeding.<sup>349</sup> Rule 3.7, "Lawyer as Witness," provides:

(a) A lawyer shall not act as an advocate in an

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348. While Disciplinary Rule 4.2 is not related to the issues presently under discussion, it is nevertheless implicated and merits mentioning. Rule 4.2, "Communication with Persons Represented by Counsel," provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The rule raises a number of concerns unique to GALs. It prohibits a lawyer that represents a client from communicating about the subject matter of the litigation with other represented persons. As noted, the GAL may not initially have anyone as a "formal" client. Upon the initial filing of a capacity proceeding, the GAL may not have any "advocacy" responsibilities to the Respondent, but as noted, that may change given the GAL's common law obligations and Section 8.01-9. In addition, under the Statute the GAL has an obligation to interview the Respondent in order to advise the Respondent concerning the proceedings as well as to obtain information regarding the entire scope of the proceeding. Moreover, the GAL may at some point believe that the Respondent requires separate representation because the Intervenor or Petitioner may not adequately present to the court matters the GAL deems necessary for the court to make a determination in the best interests of the Respondent. If after interviewing the Respondent the GAL believes it is necessary that the Respondent have separate counsel, for example, because the Respondent and the GAL differ on certain matters, then counsel appointed for the Respondent and the Respondent herself may be prejudiced because the GAL has previously interviewed the Respondent and the Respondent may have let the cat out of the bag, so to speak. In other words, the Respondent may have disclosed to the GAL information that is prejudicial to the Respondent herself. There is also the issue of the GAL communicating with other parties to the suit, either the Respondent or Petitioner. For example, if the GAL is required under Section 8.01-9 or common law to file pleadings or take positions the GAL believes to be in the Respondent's best interests, essentially assuming the role of an advocate, and if the GAL has been communicating with other parties, then the GAL has the advantage of having obtained information from the other parties, information that the Petitioner or Intervenor may not have disclosed had they known that it would be used against them. Lastly, the rule provides that a lawyer who represents a client shall not communicate with other represented persons unless she is "authorized by law to do so." As noted, the Statute requires the GAL to investigate virtually all the facts and issues pertaining to the Petition. It could be argued that Rule 4.2 is inapplicable to a GAL, because the GAL is required by the Statute to communicate with all parties as part of her duties. Whether this was intended is doubtful. These questions highlight additional problems presented given the GAL's role as now practiced.

349. Estate of Andrews, 804 F. Supp. at 823 (referencing 5-101(B) and 5-102(A), the precursor rules to 3.7 and 1.7).

adversarial proceeding in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Rule 1.7, "Conflict of Interest: General Rule," provides in relevant part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, or former client or a third person *or by a personal interest of the lawyer*.<sup>350</sup>

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) the consent from the client is memorialized in writing.

Rule 3.7 protects three different but related spheres of interests: (A) the client; (B) the adverse party; and (C) the institutional integrity of the judicial system.<sup>351</sup>

The client has a right to a lawyer who will act solely in her best interests. When counsel is called to testify, the roles of witness and advocate are fundamentally inconsistent.<sup>352</sup> If a lawyer testifies, she is obligated to do so in an objective and truthful manner; however as advocate for another, the lawyer is required to argue her client's cause irrespective of the attorney's

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350. (emphasis added).

351. Estate of Andrews, 804 F. Supp. at 823.

352. United States v. Franklin, 177 F. Supp. 2d 459, 467 (E.D. Va. 2001).

independent knowledge or personal beliefs.<sup>353</sup> When taking the oath, the lawyer places her own credibility in issue.<sup>354</sup> Consequently, an “actual” conflict of interest exists when a lawyer has independent factual information<sup>355</sup> relating to the issues in the case where the attorney may be called to testify.<sup>356</sup>

Rule 3.7 is also designed to protect the adversary. When counsel testifies, she takes an oath that drapes her with credibility and trustworthiness unavailable to her opponent.<sup>357</sup> Thus, the testifying lawyer’s position is enhanced in the fact-finder’s eyes. Not only is the opposing party at a disadvantage because she is not promising to tell the truth, i.e., she has not taken an oath, but opposing counsel is forced into the position of having to cross-examine the testifying attorney. If cross-examination is foregone, then the opposing counsel’s testimony goes unchallenged. Alternatively, if cross-examination occurs, it may appear as attacking a fellow bar member’s credibility.<sup>358</sup>

Rule 3.7 also protects the institutional integrity of the courts.<sup>359</sup> Courts are required to exercise a supervisory role over bar members in the adversarial context, and must protect against unseemly practices that appear to diminish the role of judicial system in the public eye.<sup>360</sup> The appearance of impropriety arises when a lawyer acts as both witness and advocate. Because a vital interest exists in ensuring that the court

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353. *Personalized Mass Media Corp.*, 899 F. Supp. at 242.

354. *Estate of Andrews*, 804 F. Supp. at 824 (“[T]he rule guards against the danger of a jury according undue weight to the arguments of an advocate who testified under oath.”)

355. As noted, the Statute requires a GAL to gather information as part of her duties.

356. *Franklin*, 177 F. Supp. 2d 459, 467 (E.D. Va. 2001).

357. As discussed below, a GAL’s testimony is especially enhanced because the GAL has been court-appointed to act in the Respondent’s best interest in addition to taking an oath.

358. The court in *Estate of Andrews*, 804 F. Supp. at 829, indicated that a lawyer who testifies puts his credibility at issue.

359. Noting that the public has an interest in the “scrupulous administration of justice,” the *Franklin* court framed the question as, would continued representation by an attorney who may testify impede the integrity of the proceedings? 177 F. Supp. 2d at 464–65 (citation omitted).

360. *Id.* at 464.

proceeding is viewed as trustworthy and fair, it does not matter if the fact-finder is a jury or a judge; the concerns remain the same: to promote institutional integrity.<sup>361</sup> In addition, courts are not to engage in “hair-splitting nicety” when confronted with a motion to disqualify an attorney who may testify; it should resolve all doubts in favor of disqualification.<sup>362</sup>

Rule 1.7(a) prohibits a lawyer from representing a client if a “concurrent conflict of interest” exists. A concurrent conflict of interest includes a situation where the attorney has a personal interest affecting the client.<sup>363</sup> As observed, when a lawyer has independent knowledge concerning the client’s cause and may be called as a witness, the lawyer has a legal obligation (and therefore a personal interest under Rule 1.7) to testify objectively and truthfully.<sup>364</sup> The duty to testify objectively is fundamentally at odds with the attorney’s obligation to the client because she is required to abandon her advocacy role.

Rule 1.7(b) allows the representation to continue if the attorney reasonably believes that the client’s representation will not be adversely affected. However, the client must consent in writing after the lawyer explains the limitations of the lawyer’s personal interest in testifying objectively and truthfully.

If the Respondent in a capacity proceeding is viewed as the client, the question arises as to how the lawyer could properly obtain consent from one whose capacity is suspect. After all, one of the fundamental purposes of the proceeding is to determine if the Respondent is, in fact, incapacitated. It would be difficult to imagine a situation where the attorney could obtain consent from a putative ward. If it turns out that the Respondent is incompetent, then consent to the continuing representation would be negated.

The interests that the witness-advocate rules are designed to promote are uniquely implicated in other ways in the context of

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361. Estate of Andrews, 804 F. Supp. at n.2.

362. *Id.* at 464 (quotation omitted).

363. VA. RULES OF PROF’L CONDUCT R. 1.7(a)(2).

364. The lawyer has taken the stand and has promised to tell the truth.

a capacity proceeding. If the Respondent is viewed as the client, she has a right, like any other client, to an attorney free of conflicts. As noted, when a lawyer testifies, a conflict exists because the GAL's personal interest requires the lawyer to testify objectively and truthfully. Doing that, however, may ultimately jeopardize the Respondent's interests.

For example, take the situation where a Respondent prefers her independence; she believes she can properly take care of her estate and personal needs. If the GAL disagrees, if the GAL believes the Respondent needs to be placed in a nursing facility, it is the GAL's duty to render an opinion based on what she thinks best. On the other hand, as an advocate, the GAL has a duty to do what the Respondent wants.

The second and third areas protected by Rule 3.7 involving the adversary and institutional integrity are likewise particularly implicated in the context of the Statute. As noted a party, such as the Petitioner or Intervenor, may be reluctant to "attack" the credibility of a court-appointed lawyer/GAL. The cloak of neutrality is thick; the GAL's role is ostensibly independent, and she acts in the best interests of a putative ward. Moreover, attacking a GAL's conclusions can appear to be questioning not only the credibility of another attorney, it can also be viewed as attacking or at least questioning the court itself. After all, the court appointed the GAL.

In addition, when a GAL renders an opinion it can especially impact the advocate-witness rules. The GAL states an opinion and in the process may argue that her opinion is credible because it rests on her own testimony, which, in turn, is based on her own investigations—a court-imposed obligation. Again, the court's imprimatur kicks in. In other words, a GAL wearing her witness hat has direct personal interest in the proceedings aside from her own credibility. As counsel appointed especially to watch over the Respondent's interests, she was ordered to investigate the evidence and the Petition. She will undoubtedly represent (or testify) that she has fulfilled those obligations. As the GAL said in *D.M.*, "You have heard

my testimony.” And, as noted, it matters little if the fact-finder is a judge or jury. The proceedings appear to be tainted, not only from a public perspective, but also from the perspective of the party on the short end of the GAL’s stick.

All litigants have due process rights. Due process considerations may require additional measures when the matters before a court involve the Respondent’s freedom as well as the interests of the Respondent’s family in the outcome. As *Gilbert* accurately perceived, a GAL significantly influences the proceedings, notwithstanding the Virginia Supreme Court’s minimizing observation in *Bottoms* that a GAL’s opinion while not irrelevant, should not be disregarded. The GAL’s role is far more significant. The pronouncement in *Bottoms* ignores the GAL’s significant influence on all points touching a capacity proceeding. The court in *Gilbert* accurately recognized that the Report and the GAL’s role become the ultimate standard. Any party opposing the GAL’s conclusion is at a substantial disadvantage. If the GAL is not subject to cross-examination, there can be no meaningful confrontation. On the other hand, cross-examining the GAL means attempting to undermine a fellow bar member, one blessed by the court and clothed in her multi-colored cloak of neutrality. The GAL’s closing argument in *D.M.* bears repeating: “You have heard my testimony.”<sup>365</sup>

That says it all.

The current procedures ought not survive a due-process challenge.

## VII. PROPOSALS

Virtually every state is struggling to clarify a GAL’s role, wrestling with constitutional issues and a host of practical complications. Serious questions exist in Virginia and demand a legislative response. The courts are not equipped to restructure the systemic changes needed, nor do they have the authority. The General Assembly will not likely consider abolishing many

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365. *D.M.*, 597 A.2d at 878.



of the current practices as some have called for in other contexts because the GAL's role is firmly entrenched in Virginia. The remedies for many of the vexing issues the courts have struggled with nationally for decades lie with the General Assembly and encompass statutory changes.

Therefore, we offer the following proposals:

The Report should be submitted and filed under oath. Requiring the GAL to submit the Report's contents under oath creates a statutory incentive for greater accuracy and objectivity.

The Report should not only be filed with the Court, but there should be a requirement that it be served on all parties sufficiently in advance of the hearing. In some states the Report is required to be filed five to ten days prior. The Report, however, should be filed sufficiently in time to allow the parties to subpoena witnesses to either support or oppose the Report's contents. Even greater protections would result if a Report were treated as an expert report in civil cases where such reports are required to be filed in time to allow for depositions and responses.

The GAL should be subject to all discovery, including interrogatories, requests for production of documents, and depositions. Such a requirement would eliminate surprise at trial, and last-minute changes of opinions that often prove to be devastating to one of the parties.

Upon filing of the Petition, the court should be required to serve notice to all parties concerning the GAL's role. The notice would include the fact that the GAL is not an advocate and does not represent the Respondent or any other party in a traditional attorney-client sense. The notice should, in plain language, indicate that the GAL is required to render a personal opinion. The notice would inform all parties that a GAL advises the court, investigates, and ultimately informs the court as to what she thinks is best for the Respondent, irrespective of the Respondent's own preferences, or those of any other party.

The jury should also receive notice concerning the GAL's role, including the fact that a GAL is not an expert. In addition,

the GAL, while appointed to represent the Respondent's interest, is only giving a personal opinion, and that opinion, as well as the facts therein, must be considered together with all the other evidence presented at the hearing; the opinion is not to be given any more weight because the GAL was court-appointed or because the GAL is a lawyer.

The GAL may not participate as an advocate. The GAL cannot present evidence either directly or indirectly by cross-examining any party or witness. The GAL cannot give an opening or closing.

### VIII. CONCLUSION

There may be instances when the questions raised herein are not implicated—where the outcome in a capacity hearing is fair to all. On the other hand, it is no exaggeration to posit that latent in every case a significant possibility of manifest injustice exists. The GAL's role has evolved for centuries and without a doubt, a substantial factor contributing to the present disarray results from this haphazard evolution. Irrespective of the causes, however, these matters require resolution.

As the population ages, it is vitally important that the concerns presented herein be addressed and remedied. Moreover, the fact that Virginia courts have not considered most of the problems addressed herein does not mean they are absent in the Commonwealth.

A judicial finding that an elderly person is incapacitated results in immediate restrictions on his or her freedom. In many cases the motivation of family members in filing Petitions are highly suspect; they can be economically motivated or driven by petty family squabbles. The elderly are subject to exploitation and, as we have seen, there are now in place procedures and laws that jeopardize their protection. Because a GAL's impact is so critical, and because there are significant maladies in connection with their use, the General Assembly should review the legal panorama and act now. The suggested proposals will not "fix" everything, but they are a step in the right direction.