

## **A COLORADO CHILD'S BEST INTERESTS: EXAMINING THE *GABRIESHESKI* DECISION AND FUTURE POLICY IMPLICATIONS**

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*Children in dependency and neglect proceedings are one of the most vulnerable groups in our legal system. Nationally, their legal representation comes in many forms. In Colorado, juvenile courts assign guardians ad litem (GALs) to children in these proceedings. GALs are lawyers who represent the children's best interests. For many years, GALs faced an ethical dilemma: should confidentiality, as proscribed by the Colorado Rules of Professional Conduct, apply to the GAL-child relationship. In People v. Gabriesheski, the Colorado Supreme Court held that GALs are not their children's lawyers and, thus, confidentiality does not exist between GALs and children. While this decision made sense considering the facts of the case and the legal profession's distrust of GALs' capabilities, the holding has negative implications for the legal representation of dependent and neglected children. In particular, lack of confidentiality will damage the relationship between GALs and children because children will be less likely to disclose important information. This Casenote argues that Colorado should adopt a different approach that balances the benefits of confidentiality with the need to prevent further abuse and neglect. The*

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\* J.D. Candidate, University of Colorado Law School, 2014. Many people helped make this Casenote possible. Thank you to my family for their support. I have the most wonderful parents, Becky and Jay, and the two best siblings on the planet, Andrew and Laura. My grandmothers, Angel and Barbara, have been with me every step of the way, and I have countless aunts, uncles, and cousins who make my family truly special. I also thank Colene Robinson and the University of Colorado juvenile law clinic students from 2012–2013. Colene, my juvenile law clinic professor, has been a tremendous mentor and introduced me to this unique topic in juvenile law. The juvenile law clinic students are amazing colleagues and friends. Finally, but not least, this Casenote is dedicated to my grandfather, Jack Brand. I am blessed to have such a powerful role model and grandfather, who takes a keen interest in my life. He constantly encourages me in academics, sports, and life. I would not be in law school today without his support. I forever will look up to him as the lawyer and person I want to be.

*approach provides for confidentiality between GALs and children, but limits confidentiality when it exposes the child to high risk of probable harm. Colorado's children would be best served by GALs who can protect their confidences and keep their trust.*

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## INTRODUCTION

Juvenile Law<sup>1</sup> is its own unique field in Colorado. This fact is apparent the instant one walks into a juvenile proceeding in a dependency and neglect case. While the parties present are easily distinguishable as the plaintiff, the defendant, and their respective counsel, there are many parties and professionals present at each dependency and neglect proceeding that a layperson would struggle to identify.<sup>2</sup> One of the professionals, a guardian *ad litem* (GAL), is statutorily assigned in every case as “a person appointed by a court to act in the best interests of a [child].”<sup>3</sup> However, the GAL “do[es] not [always] have a clear mandate about the goal of representation.”<sup>4</sup> He faces a muddled ethical analysis when, in his opinion, the best interests of the child conflict with the lawyer’s duty to protect confidentiality.<sup>5</sup>

This Casenote specifically addresses the role of confidentiality between a GAL and a child in a dependency and neglect proceeding. Until the 2011 Colorado Supreme Court case *People v. Gabriesheski*,<sup>6</sup> the extent of confidentiality between a GAL and a child was unclear in Colorado. The *Gabriesheski* court decided that confidentiality does not exist between a GAL and a child because the child is not a client of

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1. Juvenile courts usually cover two types of cases: delinquency cases and dependency and neglect cases. Delinquency cases are where children are accused of criminal offenses. The proceedings are adversarial: the state brings charges against a child, who is represented by a traditional attorney. Dependency and neglect cases involve instances where a parent or guardian has allegedly abused or neglected a child and are civil in nature. Most states do not follow an adversarial process and children do not always have a lawyer as a representative. See Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U. N.H. L. REV. 97, 97–99 (2013). This Casenote addresses the dependency and neglect side of juvenile law.

2. The parties and professionals include a judge or magistrate, a county attorney, a caseworker, a parent or guardian and her attorney, and a guardian *ad litem*. Relatives and their attorneys, CASA workers, Special Respondents, and any involved children may also be present.

3. COLO. REV. STAT. § 19-1-103(59) (2013).

4. Malempati, *supra* note 1, at 101.

5. *Id.* at 126.

6. *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

the GAL in a dependency and neglect proceeding.<sup>7</sup> However, the court's holding was not the best decision for Colorado. While the holding may have been appropriate in the context of *Gabriesheski*, it harms the overall representation of a child in the dependency and neglect system. Children who find themselves in juvenile court often are part of the "least understood, least explored branch of the American legal system."<sup>8</sup> Although our society still needs to create more preventative measures to help families succeed and to avert child abuse, we should ensure that these children, who tend to be from impoverished families and face a "nightmare" of a childhood,<sup>9</sup> receive the best representation possible.

Part I introduces the concept of a guardian *ad litem* and the dependency and neglect proceedings in the juvenile court system in Colorado. It explains the statutory scheme, the Children's Code, as well as relevant cases, chief justice directives, and rules of professional conduct. Part I also addresses the history of the GAL in Colorado and nationally, and it covers other states' schemes that involve a GAL. Part II discusses and analyzes *Gabriesheski's* majority and dissenting opinions. Part III explains why *Gabriesheski* was not the best decision for Colorado. It addresses possible approaches that would balance allowing confidentiality between a GAL and a child without giving too much discretion to GALs in determining the extent of confidentiality. Part III also argues that West Virginia's approach, which provides for confidentiality between a GAL and a child but limits confidentiality when it exposes the child to high risk of probable harm, would best serve Colorado's youth.

#### I. DEPENDENCY AND NEGLECT AND COLORADO'S GAL PRE- *GABRIESHESKI*

The *Gabriesheski* court's decision is best understood with knowledge of the purposes and procedure of dependency and neglect cases and the role of the GAL prior to the decision. Part I.A. begins by discussing the procedure in Colorado's

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7. *Id.* at 655.

8. JOHN HUBNER & JILL WOLFSON, *SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES* viii (2003).

9. *Id.* at 72.

dependency and neglect cases. This Part then explains the purpose of dependency and neglect proceedings and the necessity of the GAL. Part I.B. describes the role of a GAL in dependency and neglect cases. It begins by exploring federal law governing GALs in general. It next discusses Colorado's GAL, including the history of the GAL in Colorado, the GAL's statutory role, and the ethical dilemma of confidentiality between a child and Colorado's GAL prior to *Gabriesheski*. Part I.C. articulates the other state approaches to both the role of the GAL and the issue of confidentiality between a child and a GAL. Part I.D. explains how GALs and the Colorado Supreme Court dealt with confidentiality prior to *Gabriesheski*.

*A. Procedure and Purpose of Dependency and Neglect Cases*

Dependency and neglect cases involve taking action at the first signs of abuse or neglect, seeking help for the parties who need it, and finding a permanent home for the children. Both the procedure and the purpose of dependency and neglect cases are meant to serve the child's best interests.

1. The Procedure

In Colorado, cases often begin when a reporter<sup>10</sup> contacts the Department of Human Services (the Department) to inform them that at least one child is in danger.<sup>11</sup> The Department then confirms the report<sup>12</sup> and decides whether the child will stay in her current home, usually her parents' or guardians' home, or will be removed from the home.<sup>13</sup> A court may grant temporary protective custody to the Department if the

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10. A reporter is any person, including a layperson, who notifies the Department of a possible situation where a child is abused or neglected. *See* COLO. REV. STAT. § 19-3-307 (2013). Reporters include "mandatory reporters" who are statutorily required to notify the Department of abuse or neglect. *See id.* § 19-3-304 (discussing and listing those who have a mandatory duty to report).

11. *Id.* § 19-3-307.

12. The Department confirms the report in accordance with the procedures outlined in COLO. REV. STAT. § 19-3-307.

13. *Id.* § 19-3-308(4)(b). A law enforcement officer may take a child into temporary custody without a court order based on the criteria in COLO. REV. STAT. § 19-3-401(1). This includes when the child is abandoned, lost, or seriously endangered. *Id.* § 19-3-401(1)(a).

Department removes the child from the home.<sup>14</sup> The parents or guardians are entitled to a temporary custody hearing within seventy-two hours, excluding weekends and holidays, after the Department removes a child from the home and a court grants custody to the Department.<sup>15</sup>

The different types of dependency and neglect hearings mandated by Colorado law best describe the cases' overall procedure.<sup>16</sup> At the first hearing, known as a temporary custody hearing or a shelter hearing, the court determines who will have short-term custody of the child and whether there will be emergency protective orders.<sup>17</sup> Parents and guardians who attend the temporary custody hearing are given an advisement, which articulates the rights of the parents and guardians, including the right to an attorney and the right to a trial.<sup>18</sup> Additionally, a petition must be filed within fourteen days of the Department's taking a child into custody.<sup>19</sup> The petition states the facts that show the child to be "dependent or neglected" and lists the parents and guardians as respondents.<sup>20</sup> Parents and guardians, after looking at the petition and hearing their rights during the advisement, must admit or deny the allegations in the petition.<sup>21</sup> If they admit the allegations, the next hearing is a dispositional hearing, or

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14. *Id.* § 19-3-405 (2013). Alternatively, a court may grant temporary legal custody to adult relatives. *See id.* § 19-3-403(3.6)(a)(III). Specific provisions address placement with grandparents. *See, e.g., id.* § 19-3-402(2)(a).

15. *Id.* § 19-3-403(3.5). If a law enforcement officer placed the child in a shelter or temporary holding facility not operated by the Department, a court shall hold a hearing within forty-eight hours, excluding weekends and legal holidays. *Id.* § 19-3-403(2). If the child is in a juvenile detention, a court must hold a hearing within twenty-four hours, excluding weekends and legal holidays. *Id.* § 19-3-403(2).

16. Other states follow similar procedures. *See* Malempati, *supra* note 1, at 107–08; *see also* DONALD N. DUQUETTE & ANN M. HARALAMBIE, *CHILD WELFARE LAW AND PRACTICE*, 343–61 (2d. ed. 2010).

17. *See* COLO. REV. STAT. §§ 19-3-403–05 (2013); *Id.* § 19-3-405(1) ("In addition to other powers granted to the court for the protection of children, the court may issue verbal or written temporary protective custody orders or emergency protection orders, or both. Each judicial district shall be responsible for making available a person appointed by the judge of the juvenile court, who may be the judge, a magistrate, or any other officer of the court, to be available by telephone at all times to act with the authorization and authority of the court to issue such orders.")

18. *Id.* § 19-3-202(1); § 19-3-212; § 19-3-403(3.6)(a)(1).

19. COLO. R. JUV. P. 4 (2013).

20. COLO. REV. STAT. § 19-3-502 (2013).

21. COLO. R. JUV. P. 4.2(b)–(d) (2013).

treatment plan hearing, where a treatment plan is given to each respondent and each child in the case.<sup>22</sup> If the parents or guardians deny the allegations, the case goes to adjudication, which is essentially a trial to determine whether the Department can prove the allegations in the petition by a preponderance of the evidence.<sup>23</sup> The judge dismisses the petition if the Department does not prove the allegations.<sup>24</sup> However, if the Department does prove the allegations, then the case next moves to a dispositional hearing.<sup>25</sup>

The last two types of hearings in Colorado dependency and neglect cases address the long-term situation of the child. At the first of these hearings, known as a permanency planning hearing, the court focuses on whether the treatment plans are being followed and what goal should be adopted regarding where the child will be raised.<sup>26</sup> The court usually adopts the primary goal of returning the child to the parents or guardians, but may explore alternative goals if parents or guardians are not following their treatment plans.<sup>27</sup> Finally, if the parents have not followed the treatment plan and the child should not be returned to the parents, then the court, at a termination hearing, determines by clear and convincing evidence whether to terminate the parent-child legal relationship.<sup>28</sup> A child should be in a permanent home and not in temporary custody within twelve months if the child is under six years of age.<sup>29</sup>

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22. COLO. REV. STAT. § 19-3-507 (2013).

23. *Id.* § 19-3-505(1). The adjudicatory hearing should be held within ninety days of the date of service of the petition if the child is six years old or older. The hearing should be held within sixty days if the child is under six years old. *Id.* § 19-3-505(3). Therefore, the timing is determined on a case-by-case basis, depending on the age of the children involved. *See id.*

24. *Id.* § 19-3-505(6).

25. *Id.* § 19-3-508(1) (explaining that the dispositional hearing takes place within forty-five days after the child has been adjudicated to be dependent or neglected if the child is six years old or older and within thirty days if the child is under six years of age).

26. *Id.* § 19-3-702(1) (explaining that the permanency planning hearing will take place within three months of the dispositional hearing if the child is under six years of age).

27. *See id.* (explaining that this hearing should take place within twelve months of a child's removal from home).

28. *Id.* § 19-3-604.

29. *Id.* § 19-3-703.

## 2. The Purpose

A typical dependency and neglect proceeding in Colorado includes, at minimum, a judge or magistrate, a county attorney, a caseworker, a parent or guardian and her attorney, and a GAL. Also present may be other parents and relatives and their attorneys, a CASA,<sup>30</sup> Special Respondents,<sup>31</sup> and any involved children. The purpose of juvenile cases and the interests the cases serve explain why there are so many actors in a dependency and neglect proceeding. According to the Colorado Children's Code,<sup>32</sup> Colorado's statutes dedicated to court proceedings involving children, the statutes' purposes include "secur[ing] for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society"<sup>33</sup> and "secur[ing] for any child removed from the custody of his parents the necessary care, guidance, and discipline to assist him in becoming a responsible and productive member of society."<sup>34</sup>

Overall, the purposes of the Children's Code can be summed up best with two common terms in juvenile law: "child's best interests" and "permanency."<sup>35</sup> Those two terms are fluid depending on the case and are not listed in the definitions section of the Children's Code.<sup>36</sup> The United States Department of Health and Human Services comments that there is "no standard definition of 'best interests of the child'" but that it generally means "the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to

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30. A CASA is a "[c]ourt-appointed special advocate." *Id.* § 19-1-103(34.3). CASAs are "volunteer[s] appointed by a court . . . to assist in advocacy for children." *Id.*

31. A Special Respondent "means any person who is not a parent, guardian, or legal custodian and who is involuntarily joined as a party in a dependency or neglect proceeding for the limited purposes of protective orders or inclusion in a treatment plan." *Id.* § 19-1-103(100).

32. The Children's Code begins at § 19-1-101.

33. *Id.* § 19-1-102(a).

34. *Id.* § 19-1-102(d).

35. The two terms are mentioned consistently throughout the Children's Code. The goal of a dependency and neglect case is to find permanency for the child that is in the child's best interests. *See id.* § 19-3-100.5.

36. *See id.* § 19-1-103.



take care of a child.”<sup>37</sup> Much of the determination of what is in a child’s best interest is left ultimately to the court.<sup>38</sup> Permanency planning, as defined by the Child Welfare Practice Handbook, requires “taking systematic, prompt, and decisive action to maintain a child in a permanent and stable living arrangement with his or her own family, or if that is not possible, to secure for the child a permanent living arrangement through placement with relatives or placement into an adoptive family.”<sup>39</sup> Therefore, the purpose of dependency and neglect proceedings is to serve the child, ensure that the child’s interests are protected, and find a permanent, stable home for the child as quickly as possible. The GAL plays a large role in stressing to the judge what she believes is in the child’s best interests and what will result in permanency.

### B. *GAL in Dependency and Neglect Proceedings*

Despite all the professionals present at dependency and neglect proceedings for the child, only one professional, outside of the judge or magistrate, is statutorily assigned with the task of representing the goals enumerated in the Children’s Code, mentioned above. This professional, the GAL, is “appointed by a court to act in the best interests of a [child] . . . and who, if appointed to represent a [child] in a dependency and neglect proceeding . . . shall be an attorney-at-law licensed to practice in Colorado.”<sup>40</sup> The GAL, assigned such an important task by the Children’s Code, assumes a very conflicting and difficult role.<sup>41</sup> The Children’s Code is not clear about whether the GAL represents the child as part of an attorney-client relationship and, therefore, is bound by the duty of confidentiality. Colorado did not find clarity regarding the role of a GAL until the

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37. Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP’T OF HEALTH & HUMAN SERVICES (2012), at 2, [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf).

38. *See id.* at 1.

39. COLORADO OFFICE OF THE CHILD’S REPRESENTATIVE, PERMANENCY PLANNING 2 (quoting 7:4 of the Child Welfare Practice Handbook) (on file with author).

40. COLO. REV. STAT. § 19-1-103(59) (2013).

41. Malempati, *supra* note 1, at 110 (arguing that “when lawyers are instructed to act as guardians ad litem, role confusion and ineffective lawyering occur”).

Colorado Supreme Court case *People v. Gabriesheski*,<sup>42</sup> discussed in Part II. The following Parts examine the role of a GAL federally and in Colorado, and why GALs faced ethical dilemmas prior to *Gabriesheski*.

### 1. Federal Law Defining a GAL

The concept of a GAL originates in a viewpoint that remains prevalent in dependency and neglect courts today and is inherent in the GAL model of representation in a number of states: paternalism.<sup>43</sup> Prior to the 1960s, paternalism governed both dependency and neglect proceedings and delinquency proceedings.<sup>44</sup> Courts did not give children due process rights and “did not recognize children as individuals with rights or liberty interests.”<sup>45</sup> As a result, judges decided the outcomes in juvenile cases based on their own views of what was in the child’s best interests, without any regard for the child’s rights or points of view.<sup>46</sup>

Juvenile cases began to change after the United States Supreme Court’s decision in *In re Gault*.<sup>47</sup> The Court held that juveniles in delinquency court are entitled to due process rights, including the right to counsel.<sup>48</sup> This decision dramatically changed juvenile representation nationwide.<sup>49</sup> However, the Court limited the holding to children in delinquency court, stating that a child’s due process rights are at stake in delinquency court because a delinquency proceeding could lead to imprisonment.<sup>50</sup> The Court did not address whether children in dependency and neglect cases have a parallel right to counsel.<sup>51</sup>

Congress addressed this judicial void by enacting the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.<sup>52</sup> CAPTA was the first comprehensive legislation to address the

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42. *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011).

43. Malempati, *supra* note 1, at 99.

44. *See id.* at 100.

45. *Id.*

46. *Id.*

47. 387 U.S. 1 (1967).

48. *Id.* at 41.

49. *Id.*

50. *Id.* at 27–29.

51. *See id.* at 13–14, 27.

52. *See* 42 U.S.C. §§ 5101–5119 (2013).

prevention and treatment of child abuse.<sup>53</sup> In the legislation, Congress mandated that, if a state wanted federal child abuse and prevention funding, the state must pass legislation that would provide for the appointment of a GAL in every dependency and neglect proceeding.<sup>54</sup> CAPTA left implementation of GAL requirements to the states.<sup>55</sup> Under CAPTA, a GAL may be an attorney or a layperson.<sup>56</sup> GALs must, with an understanding of the child's interests and needs, make recommendations to the court about what is in the child's best interests.<sup>57</sup> Thus, GALs in all CAPTA-participating states were assigned the role as guardians of a child's best interests, which resulted in many states adopting a paternalistic role for a GAL and that role persists.<sup>58</sup> Because CAPTA did not address whether a child in a dependency and neglect case has a right to counsel,<sup>59</sup> "the right to counsel and the role of the counsel in dependency proceedings continues to be the subject of debate" between "scholars, judges and practitioners."<sup>60</sup> Colorado, which adopted a "best interests" role for a GAL, follows the best-interests model advocated by CAPTA but requires a GAL to be an attorney.<sup>61</sup>

## 2. The GAL in Colorado

The GAL first appeared in the Colorado Revised Statutes in 1963, when a statute that has since been repealed stated that "[i]f no parent, guardian, relative, or other person is present to represent the interests of the child at the hearing, the court shall appoint a guardian ad litem to participate in the hearing on behalf of the child."<sup>62</sup> According to the first

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53. See CHILD WELFARE INFORMATION GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY (2011), available at <https://www.childwelfare.gov/pubs/factsheets/about.pdf>; 42 U.S.C. §§ 5101–5119. The Act has been amended several times, most recently in 2010.

54. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2013).

55. *Id.* § 5106a(b)(1)(B). A court appoints a GAL in every Colorado dependency and neglect case upon the filing of a petition. COLO. REV. STAT. § 19-3-203(1) (2013).

56. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2013).

57. *Id.* §§ 5106a(b)(2)(B)(xiii)(I), (II); see 45 C.F.R. § 1340.14(c) (1990).

58. See Malempati, *supra* note 1, at 104, 109–10.

59. See 45 C.F.R. § 1340.14.

60. Malempati, *supra* note 1, at 98.

61. COLO. REV. STAT. § 19-1-103(59) (2013).

62. COLO. REV. STAT. § 22-1-5(3) (1963) (repealed 1984).

statutory mention of a GAL, the GAL did not have to be a licensed attorney.<sup>63</sup> Instead, the role of the GAL was more like that of a replacement parent.<sup>64</sup> The notion that a GAL would act as a surrogate parent evolved from the traditional paternalistic view which presumed that parents act in the best interests of their children.<sup>65</sup> Despite the passage of CAPTA in 1974, the statutory definition of a GAL in Colorado did not dramatically change until 1987, when the Colorado General Assembly revised the Children's Code.<sup>66</sup> Before 1987, a GAL was defined as "a person, not necessarily an attorney-at-law, appointed by a court to act in the best interests of a person whom he is representing in the proceedings under this title."<sup>67</sup> After 1987, the Colorado General Assembly added a new requirement that GALs in dependency and neglect proceedings "be an attorney-at-law licensed to practice in Colorado."<sup>68</sup> With this addition, a question arose as to whether confidentiality exists between a GAL and a child because the Children's Code contains conflicting language on the role of a GAL.

A GAL provides different representation than most attorneys because the language in the Children's Code states that a GAL is "a person appointed by a court to act in the best interests of a [child]."<sup>69</sup> Normally, attorneys represent clients and assume a clear advocacy role. In a dependency and neglect case, the county attorney represents the Department and the respondent attorneys represent the parents. However, the language of the Children's Code is ambiguous about who or what the GAL represents. The language of section 19-1-103(59) seems to indicate that a GAL represents the child's best interests, but not the child.<sup>70</sup> While not initially apparent to

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63. *See id.*

64. *See id.*

65. Bridget Kearns, Comment, *A Warm Heart but a Cool Head: Why a Dual Guardian ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 WIS. L. REV. 699, 706 (2002).

66. One reason why the statutory definition of a GAL in Colorado did not change upon the passage of CAPTA was that Colorado had already adopted a best-interests model for a GAL. Brief of the Colorado Office of Child's Representative as Amici Curiae at 14, *People v. Gabriesheski*, 262 P.3d 653, 655 (Colo. 2011) (No. 08SC0945).

67. COLO. REV. STAT. § 19-1-103(15.5) (1986).

68. COLO. REV. STAT. § 19-1-103(59) (2013). *See also* COLO. REV. STAT. § 19-1-103(14) (1987); COLO. REV. STAT. § 19-1-111(3) (2013).

69. COLO. REV. STAT. § 19-1-103(59) (2013).

70. *Id.*

the average person, this distinction can be significant in a dependency and neglect case. An attorney representing the child's best interests, not the child herself, can completely disregard the child's wishes if, in the attorney's mind, it is in the child's best interests to not follow her wishes.

Other provisions in the Children's Code make the GAL's role even more ambiguous. For example, section 19-1-103(59) also states that a GAL is "appointed to represent a person in a dependency and neglect proceeding."<sup>71</sup> Additionally, section 19-1-111(1) mandates that "[t]he court shall appoint a guardian ad litem for the child in all dependency or neglect cases under this title," and section 19-3-203(3) states that "[t]he guardian ad litem shall be charged in general with the representation of the child's interests" and should participate in the case "to the degree necessary to adequately represent the child."<sup>72</sup> Therefore, two interpretations are plausible. A GAL under the Children's Code either (1) represents only the best interests of the child or (2) represents both the child's best interests and the child as a legal client. If the GAL represents only the child's best interests, then traditional attorneys' duties, including confidentiality and attorney-client privilege, might conflict with that representation. For example, an attorney might want to break confidentiality with a child when the child tells the attorney about recent abuse but does not want the attorney to make that information public. Such hypotheticals show that a GAL may encounter unique ethical dilemmas during practice.

### 3. Ethical Dilemmas Facing Colorado's GALs Prior to *Gabrieheski*

The unclear and unique statutory role of a GAL becomes even more complex when analyzed in conjunction with an attorney's ethical responsibilities under the Colorado Rules of Professional Conduct. Jennifer Renne, an attorney who has researched, taught, and written about legal ethics in child welfare, tackles this complexity in an article written prior to *Gabrieheski*.<sup>73</sup> She comments that a GAL's role as a lawyer,

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71. *Id.*

72. *Id.* § 19-1-111(1); § 19-3-203(3).

73. Jennifer Renne, *Ethical Issues for Guardians ad Litem Representing Children in Dependency and Neglect Cases*, 31 COLO. LAW. 43 (OCT. 2002), available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?ArticleID=1994](http://www.cobar.org/tcl/tcl_articles.cfm?ArticleID=1994).

“at best, blurred” with the traditional role of being the child’s counsel because advocating in the child’s best interests can conflict with ethical responsibilities.<sup>74</sup> As a result, she argues, GALs face ethical dilemmas because the Colorado Rules of Professional Conduct do not address the ethical responsibilities required specifically for GALs.<sup>75</sup> For example, Rule 1.2 requires a lawyer to follow a client’s decisions as to the case’s objectives,<sup>76</sup> a requirement which seems to conflict with representing the child’s best interests as opposed to the child’s expressed wishes.<sup>77</sup> Another potential conflict, and one expressly addressed in *Gabriesheski*, is the duty of confidentiality.

Rule 1.6 of the Colorado Rules of Professional Conduct requires confidentiality between attorneys and clients.<sup>78</sup> The Rule states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”<sup>79</sup> The requirements for lawyers in Rule 1.6 can conflict with the representation of a child’s best interests, including in situations where a child might describe significant abuse by a parent or guardian but does not want the GAL to divulge this information to the court. In those instances, a GAL cannot strictly follow Rule 1.6 when mentioning information to the court that is contrary to the

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74. *Id.* at 44.

75. *Id.*

76. COLO. R. PROF’L CONDUCT R. 1.2 (2013).

77. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases A-2, *Lawyer Appointed as Guardian Ad Litem* (1996) (defining a GAL as an officer of the court who protects the child’s best interests without having to follow the child’s expressed wishes).

78. COLO. R. PROF’L CONDUCT R. 1.6 (2013).

79. *Id.* Paragraph (b) provides exceptions to the confidentiality requirement. The paragraph states that attorneys may reveal information about representation of a client to the extent necessary to prevent substantial bodily harm or prevent reasonably certain death, to reveal the client’s intention to commit a crime, to prevent the client from committing fraud, to prevent damage to financial interests or property of another that might result from the client’s crime or fraud, to secure legal advice about compliance with the Colorado Rules of Professional Conduct, to establish a claim or defense in a controversy between the lawyer and the client, and to comply with other laws or court orders. However, the *Gabriesheski* court did not address a number of the exceptions, including the one for revealing information to prevent substantial bodily harm, because an earlier version of COLO. R. PROF’L CONDUCT R. 1.6 that did not include that exception applied in the case.

child's wishes but is in the child's best interests.<sup>80</sup>

### C. *State Approaches to GAL Confidentiality*

States across the country have different systems to represent children in dependency and neglect cases. Courts in approximately forty-one states appoint a GAL to represent a child's best interests, but only fifteen of those states, as of 2011, required GALs to be an attorney.<sup>81</sup> Instead, as of 2011, fourteen states require the child to have an attorney not defined as a GAL, and five states require both a non-attorney GAL and an attorney to represent the child.<sup>82</sup> Additionally, many states have approaches where CASAs<sup>83</sup> play a prominent role in dependency and neglect proceedings, including being a GAL.<sup>84</sup> Therefore, GALs in only a minority of states have the same ethical and confidentiality dilemmas as GALs in Colorado.

States where the GAL represents the child's best interests and must be an attorney have responded in multiple ways to the dilemma of confidentiality.<sup>85</sup> These approaches are the result of statutes and judicial opinions interpreting the GAL's role.<sup>86</sup> New Hampshire is a great example of a state that adapted its approach to GAL confidentiality. In 1989, New Hampshire's legislature changed the state's statute to declare that "[c]ommunications between the guardian ad litem and the child shall be privileged in the same manner as are communications between attorney and client."<sup>87</sup> The legislature adopted the approach in response to the New Hampshire Supreme Court's statement a year earlier that "none of the information the guardian gathers can be shielded from

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80. Renne, *supra* note 73, at 44–45. Although the exception for preventing substantial bodily harm might allow GALs to reveal certain information and not breach confidentiality, many instances of abuse do not involve substantial bodily harm. Therefore, the post-2008 version of COLO. R. PROF'L CONDUCT R. 1.6 would not have solved the ethical dilemma facing Colorado's GALs.

81. CHILDREN'S WELFARE INFORMATION GATEWAY, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS 2–3 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/represent.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf).

82. *Id.* at 3.

83. *See supra* note 30.

84. CHILDREN'S WELFARE INFORMATION GATEWAY, *supra* note 81, at 3–4.

85. Renne, *supra* note 73, at 45.

86. *See supra* notes 62–72.

87. N.H. REV. STAT. ANN. § 458:17-a-110 (1992).

discovery by the attorney-client privilege.”<sup>88</sup> However, the New Hampshire legislature has since repealed the statute,<sup>89</sup> leaving the decision on confidentiality to a case-by-case determination.<sup>90</sup>

While New Hampshire still struggles with GAL confidentiality, some states provide clearer direction.<sup>91</sup> These states usually relate confidentiality to the scope of the GAL’s representation of the child.<sup>92</sup> For example, a state can decide that GALs should adhere strictly to attorney-client confidentiality. In Michigan, the legislature defines the scope of a GAL representation by stating that a GAL’s “duty is to the child, and not the court.”<sup>93</sup> Because informing the court is not the GAL’s primary duty, the legislature can state that a GAL has all the “obligations of the attorney-client privilege” and serves “as the independent representative for the child’s best interests.”<sup>94</sup> Therefore, because a GAL owes her duty to the child and adheres strictly to confidentiality, Michigan’s legislature did not modify confidentiality rules in the state’s ethical rules of professional conduct to accommodate the dual nature of a GAL’s role.

Pennsylvania has its own unique approach regarding GALs. The legislature defines a GAL’s role as representing both “the legal interests and the best interests of the child,” and therefore expresses the dual nature of a GAL’s role.<sup>95</sup> However, unlike Michigan’s legislature, Pennsylvania’s legislature notes that a GAL has a duty to the court as well, and does not adopt the approach that confidentiality should always apply.<sup>96</sup> Instead, the legislature clearly articulates what a GAL should do when its recommendations do not correspond with the child’s wishes, stating that “[a] difference between the

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88. *Ross v. Gadwah*, 554 A.2d 1284, 1286 (N.H. 1988).

89. N.H. REV. STAT. ANN. § 458:17-a (2005).

90. See *In re Kalil*, 931 A.2d 1255 (N.H. 2007) (upholding a request that a child’s statements to the GAL remain confidential after the father made an oral agreement that the child’s statements would be confidential).

91. See Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 49–53 (2011).

92. *Id.*

93. MICH. COMP. LAWS § 712A.17d(1) (2012) (describing the role and duties of GALs).

94. *Id.* at § 712A.17d (1)(a)–(b).

95. 42 PA. CONS. STAT. § 6311(a) (2012).

96. *Id.* at §§ 6311(b)(7), (9).



child's wishes . . . and the [GAL's] recommendations [to the court] . . . shall not be considered a conflict of interest."<sup>97</sup> However, if a conflict of interest does exist between a child's legal interest and best interest, the court can appoint the child separate legal counsel in addition to the GAL.<sup>98</sup>

Other states take a different approach than both Michigan and Pennsylvania and explicitly modify confidentiality requirements to allow a GAL to provide information contrary to the child's wishes when the GAL's statutory duty to act in the child's best interests is implicated.<sup>99</sup> In this approach, which Wyoming adopted, the GAL represents not the child's wishes but only the child's best interests.<sup>100</sup> Wyoming's Supreme Court stated in *Clark v. Alexander* that a GAL "is not prohibited from disclosure of client communications absent the child's consent."<sup>101</sup> Therefore, the GAL should explain to the child that the GAL might mention information in court that would be confidential under traditional attorney-client confidentiality.<sup>102</sup>

Finally, absent clear authority in either direction, GALs within the same state take different approaches. Before Michigan statutorily changed a GAL's duties, an ABA survey of Michigan GALs demonstrated the different approaches GALs take absent guidance.<sup>103</sup> The survey showed that some GALs thought confidentiality applied and kept information that might not be in the child's best interests confidential, while other GALs took the approach that representing a child's best interests takes priority over confidentiality.<sup>104</sup> Jennifer Renne, mentioned above, wrote her 2002 article on GAL confidentiality in part because GALs in Colorado were practicing in ways

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97. *Id.* at § 6311(b)(7).

98. Pa.R.J.C.P. No. 1800(3).

99. Boumil, Freitas & Freitas, *supra* note 91, at 52.

100. *See Clark v. Alexander*, 953 P.2d 145, 153 (Wyo. 1998) ("Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client's expressed preferences, but by the client's best interests.").

101. *Id.* at 154.

102. *Id.* ("As legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child, if possible, that the attorney/guardian ad litem is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship."); Wyo. R. Prof. Cond. 1.2, 1.4, 1.14.

103. GARY A. LUKOWSKI & HEATHER J. DAVIES, AMERICAN BAR ASSOCIATION, A CHALLENGE FOR CHANGE: IMPLEMENTATION OF THE MICHIGAN LAWYER-GUARDIAN AD LITEM STATUTE (2002), available at [http://www.improvechildrep.org/Portals/0/PDF/A%20Challenge%20for%20Change\\_Final\\_Report.pdf](http://www.improvechildrep.org/Portals/0/PDF/A%20Challenge%20for%20Change_Final_Report.pdf).

104. *Id.* at 88.

similar to the Michigan GALs mentioned in the ABA survey.<sup>105</sup>

*D. Colorado's Approaches to Confidentiality Prior to Gabriesheski*

Before *Gabriesheski*, Colorado did not take a bright line approach in either direction on the issue of GAL confidentiality. However, many clues hinted that confidentiality might apply. As the Brief of Amicus Curiae in the *Gabriesheski* case by the National Association of Counsel of Children indicates, nothing from the Children's Code, the Colorado General Assembly, or case law mentions whether GALs are exempted from confidentiality.<sup>106</sup>

Two Colorado cases, although not dependency and neglect cases, did articulate that GALs represent the child as an advocate, and thus imply that confidentiality should apply.<sup>107</sup> The Colorado Supreme Court in *In re Marriage of Hartley*, a domestic relations case, recognized that the relationship between a GAL and a child, while different from the traditional attorney-client relationship, is one of "a child's attorney."<sup>108</sup> A GAL, according to the court, "acts both as guardian and as advocate"<sup>109</sup> and "represents the child, albeit in a manner different from the representation of an adult."<sup>110</sup> Similarly, in *In re J.C.T.*, a case involving the role of a probate court in selecting a guardian for a child, the court acknowledged that a GAL is subject to all the legal professional standards of other attorneys, including confidentiality.<sup>111</sup>

Besides cases, a 2005 Colorado chief justice directive,<sup>112</sup>

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105. See Renne, *supra* note 73, at 45.

106. Brief of the National Association of Counsel for Children as Amici Curiae at 15–16, *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011) (No. 08SC0945).

107. *In re Marriage of Hartley*, 886 P.2d 665, 671 (Colo. 1994); *In re J.C.T.*, 176 P.3d 726, 735 (Colo. 2007).

108. *In re Marriage of Hartley*, 886 P.2d at 671.

109. *Id.*

110. *Id.* at 672 (noting that the representation of a child is different from that of an adult for a number of reasons, including that representation of a child requires more objectivity than representation of an adult and that the attorney is appointed to the child because the child does not have the capacity to contract or sign a retainer agreement).

111. *In re J.C.T.*, 176 P.3d at 735 (citing both CJD 04-06 and COLO. R. PROF'L CONDUCT R. 1.14).

112. The Colorado Chief Justice, in consultation with the other Colorado Supreme Court justices, can issue chief justice directives. The Chief Justice Directives pertain to judicial administration and have the authority of Supreme

which post-dates Jennifer Renne's article, also implies that confidentiality applies to GALs. Chief Justice Directive 04-06(B) states that "[a]ll attorneys appointed as a GAL . . . shall be subject to all of the rules and standards of the legal profession, including the additional responsibilities set forth by Colorado Rule of Professional Conduct 1.14."<sup>113</sup> As already mentioned, Rule 1.6 of the Colorado Rules of Professional Conduct explicitly states that attorneys should not reveal confidential information without the client's consent, and Rule 1.14 extends this confidentiality to cover minors and others with diminished capacity.<sup>114</sup> Therefore, absent clear language, Colorado GALs seem to be attorneys for the child's best interests and advocates for the child, all subject to the confidentiality parameters set for other attorneys. However, a problem can still arise where a child does not want the GAL to disclose information to the court that might be in the child's best interests. Prior to *Gabriesheski*, GALs in Colorado had options in this scenario. The first option for GALs was to violate the confidentiality requirement in Rule 1.6 and Chief Justice Directive 04-06 and follow what they believed to be the best interests of the child. A GAL could follow the first option because there were no express confidentiality requirements in the Children's Code to accompany the ambivalent language about a GAL's role. The second option was for GALs to fulfill their duty to represent the best interests of the child to the best of their ability while obeying confidentiality and their arguable role as the child's personal attorney. Because those two options were available, Colorado GALs practiced in the various ways Michigan GALs practiced, as mentioned in the ABA survey above,<sup>115</sup> until the Colorado Supreme Court addressed the issue in *Gabriesheski*.

## II. THE *GABRIESHESKI* DECISION

Part II.A. begins with an explanation of the facts and the

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Court Rules or Orders of the Supreme Court. Leonard P. Plank & Anne Whalen Gill, § 2.6 *Supreme Court: Overview of the Court*, 18 COLO. PRAC., APPELLATE L. & PRAC. § 2.6 (2012).

113. CJD 04-06 V.B. at 6; *see also* COLO. R. PROF'L CONDUCT R. 1.14 (2013) (addressing clients with diminished capacity, including children).

114. COLO. R. PROF'L CONDUCT R. 1.14 (2013).

115. *See supra* notes 103–04.

procedural history of the *Gabriesheski* case. Part II.B. next outlines and critiques the Colorado Supreme Court's majority decision and explains possible reasons why the majority reached its decision. Part II.C. then describes and analyzes Justice Martinez's dissent.

*A. Background to the Case*

*Gabriesheski* involved a scenario in which a GAL had the choice to either strictly follow confidentiality or strictly adhere to the role of representing the child's best interests. *Gabriesheski*, a sexual assault case, dealt with the issue of confidentiality in dependency and neglect proceedings.<sup>116</sup> In the sexual assault case, Mark Gabriesheski was charged with two counts of sexual assault on his sixteen-year-old stepdaughter for inappropriately touching her breasts and penetrating her vagina on about fifteen occasions.<sup>117</sup> Additionally, a petition in a dependency and neglect case was filed in juvenile court, with Gabriesheski listed as a Special Respondent and the stepdaughter's biological mother listed as the Respondent.<sup>118</sup> Because a petition in a dependency and neglect case was filed, the court appointed the stepdaughter a GAL.<sup>119</sup> The case took an unexpected turn prior to trial when the stepdaughter, who had made the original allegations, recanted her accusations against Gabriesheski.<sup>120</sup> As a result, the prosecution gave notice that it intended to call, as witnesses, the GAL and the social worker, both from the dependency and neglect case.<sup>121</sup> The prosecution's offer of proof would show that both professionals knew that the stepdaughter's mother had pressured the stepdaughter to recant.<sup>122</sup> More specifically, the prosecution represented that the GAL would testify about a discussion in which the stepdaughter told the GAL that things would be easier for the stepdaughter if she said she was lying about the sexual abuse because it would make her mother happier.<sup>123</sup> Without this testimony, the prosecution lacked a

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116. See *People v. Gabriesheski*, 262 P.3d 653, 655 (Colo. 2011).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* The social worker acted as the caseworker in this case.

122. *Id.*

123. *Id.*

strong case against the stepfather.<sup>124</sup> The defense objected on the grounds that attorney-client privilege and the duty of confidentiality under Rule 1.6 of the Colorado Rules of Professional Conduct protected the communications between the GAL and the stepdaughter absent consent or waiver.<sup>125</sup> The district court concluded that the GAL was not permitted to testify at trial, citing Rule 1.6 and Chief Justice Directive 04-06, and stating that only the child could waive confidentiality.<sup>126</sup> As a result, the prosecution dismissed the charges against Gabriesheski due to lack of evidence, but the prosecution also filed a notice of appeal challenging the trial court's evidentiary ruling on the confidentiality issue.<sup>127</sup>

The Colorado Court of Appeals affirmed the district court.<sup>128</sup> The Court of Appeals reasoned that Chief Justice Directive 04-06 instructs GALs to follow every rule and standard for attorneys, which implies that a GAL and a child have an attorney-client relationship.<sup>129</sup> The client communications between the GAL and the stepdaughter could only be revealed in one of the limited circumstances allowed in Rules 1.6 and 1.14.<sup>130</sup> Those circumstances, from a pre-2008 version of Rule 1.6, only include when a client consents to the disclosure, when a client intends to commit a crime, and when there is a controversy between the client and the lawyer.<sup>131</sup> None of these circumstances existed in the facts of the case.<sup>132</sup> The Colorado Supreme Court granted certiorari review, and, in particular, reviewed the Court of Appeals's conclusions that communications between a child and a GAL are confidential and that ethical rules governing attorney confidentiality are strictly applied.<sup>133</sup>

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124. *See id.* at 656.

125. *Id.* at 655–56.

126. *Id.* at 656.

127. *Id.*

128. *People v. Gabriesheski*, 205 P.3d 441, 445 (Colo. App. 2008), *aff'd in part, rev'd in part*, 262 P.3d 653 (Colo. 2011).

129. *Id.*

130. *Id.*

131. *Id.* (citing COLO. R. PROF'L CONDUCT R. 1.6(a)).

132. *Id.*

133. *People v. Gabriesheski*, 262 P.3d 653, 655 (Colo. 2011).

*B. The Majority's Concern in Ensuring a Certain Outcome in the Case*

The majority of the Colorado Supreme Court, in an opinion by Justice Coats, took the opposite view from both lower courts on confidentiality and held that the attorney-client confidentiality does not protect a child's statements to a GAL in dependency and neglect proceedings.<sup>134</sup> The Supreme Court based its decision on the fact that no Colorado authority expressly states that attorney-client confidentiality exists between a GAL and a child, which creates a presumption that no confidentiality exists.<sup>135</sup> The court began by stating that the Colorado Rules of Professional Conduct and Colorado statutes are silent on whether an attorney-client relationship exists between a GAL and a child but quickly moved on to differentiate the role of a GAL from that of other attorneys by the fact that a GAL is tasked with representing the child's best interests, not the child's demands or wishes.<sup>136</sup> However, unlike the Court of Appeals, the Supreme Court interpreted Chief Justice Directive 04-06 to not address the existence of confidentiality between a GAL and a child, and articulated that a chief justice directive might not be the appropriate vehicle for creating confidentiality absent clear intent explicit in the directive.<sup>137</sup>

Next, the court examined the plain language of the term "guardian *ad litem*," with a focus on the term "guardian."<sup>138</sup> "Guardian," the court decided, has a very different meaning than "advocate."<sup>139</sup> The court cited Black's Law Dictionary to support the viewpoint that the term "advocate" implies a more traditional attorney role as counsel, something distinct from the role of a guardian.<sup>140</sup> Because the term "guardian" is used in the name of a GAL, a GAL's role should be that of a guardian "charged with representing the child's best interests," rather than an advocate "serv[ing] as counsel for the child."<sup>141</sup>

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134. *See id.* at 653, 658–60.

135. *Id.* at 658–59.

136. *Id.*

137. *Id.* at 659. The *Gabrieheski* majority did not elaborate on why CJD 04-06 did not apply.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (relying on Black's Law Dictionary (9<sup>th</sup> ed. 2009)).

The court stated that this important distinction demonstrates a policy choice on the part of the General Assembly in favor of no confidentiality between a GAL and a child.<sup>142</sup> Because the existence of an attorney-client relationship has important evidentiary consequences, such as whether communications between a GAL and a child can be used in court absent consent from the child—the court was unwilling to judicially impose confidentiality between GALs and children absent clear legislative intent.<sup>143</sup>

To further support this reasoning, the court cited a number of jurisdictions that follow a child's best interest approach and require a GAL to be an attorney but have declined to impose confidentiality between a GAL and a child.<sup>144</sup> One example is Massachusetts, which declares that the GAL's role to act in the child's best interests overrides other concerns, and, even though a GAL should follow all professional standards, confidentiality does not exist.<sup>145</sup> Another example cited by the court was the Alaska Bar Association Ethics Commission's opinion that states, "[T]he attorney is not bound by the normal duty of confidentiality, but rather should act within the context of the proceeding and be responsive to the reason for his appointment, namely the best interest of the child."<sup>146</sup> Further examples cited by the court include a statute from Rhode Island, judicial opinions from Illinois and New Hampshire, and an administrative order from Arkansas.<sup>147</sup>

In sum, the court interpreted that a GAL only represents the child's best interests in a dependency and neglect proceeding—not the child as a client.<sup>148</sup> This interpretation allowed the court to more easily conclude that an attorney-client relationship and confidentiality does not exist. The holding also removed the ethical dilemma of potentially breaching the professional duties of an attorney, as proscribed in Rules 1.6 and 1.14, when acting in the child's best interests. Because confidentiality does not apply, a GAL now does not violate confidentiality when revealing, in the child's best

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142. *Id.*

143. *Id.*

144. *See id.* at 659–60.

145. *Id.* at 660.

146. *Id.* (citing Alaska Bar Ass'n Ethics Comm., Ethics Op. 85-4 (1985)).

147. *Id.*

148. *Id.* at 655, 659.

interests, communications between the GAL and the child.

Three possible concerns might have played a major role in the majority's outcome: ensuring a certain outcome for the particular case at issue, distrust of GALs in general, and concern that confidentiality might hurt judges' reliance on GALs for recommendations.

### 1. Ensuring a Certain Outcome in the Case

The majority might have arrived at the holding— that the ethical duty of confidentiality does not apply to communications between a child and a GAL—because it permitted the use of information about the child recanting her story and the child's mother intimidating the child against testifying. Looking back to the facts in *Gabriesheski*, the majority's reasoning—which allows the GAL to testify in the sexual assault case and not violate the duty of confidentiality— leads to an outcome that values the safety of the child. In the case, the prosecution's main evidence consisted of the stepdaughter's accusations of abuse by her stepfather.<sup>149</sup> Once the stepdaughter recanted her allegations, the prosecution needed other evidence to present the sexual assault accusations. The GAL's potential testimony became the prosecution's next best option if it was not blocked by confidentiality.<sup>150</sup> Therefore, the court might have been motivated to punish the stepfather and protect the safety of the child by allowing the GAL to testify on why the stepdaughter recanted.

Furthermore, the court decided the case using the pre-2008 version of Rule 1.6 of the Colorado Rules of Professional Conduct.<sup>151</sup> The older version did not have as many exceptions to when confidentiality applies between an attorney and client, and lacked the exception for revealing information relating to the representation of a client to prevent reasonably certain death or bodily harm.<sup>152</sup> Thus, the court could not refer to the

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149. *Id.* at 655.

150. *See id.*

151. *People v. Gabriesheski*, 205 P.3d 441, 445 (Colo. App. 2008). The Colorado Court of Appeals mentions that the pre-2008 versions is applicable in this case. *Id.*

152. *See id.*; COLO. R. PROF'L CONDUCT R. 1.6(b)(1) (2013) (stating that a lawyer may reveal information relating to the representation of a client "to prevent reasonably certain death or substantial bodily harm").



Rules of Professional Conduct that the GAL had to require the GAL to testify in the case about the stepfather's abuse, because that relevant exception to confidentiality did not yet exist (and still may not have applied because there may not have been reasonably certain death or bodily harm). Without the exception, the court lacked a possible means of allowing for confidentiality to exist while ensuring the stepdaughter's safety. In reaching its holding, the court overlooked<sup>153</sup> how its precedent might impact future relationships between children and their GALs that would be subject to the post-2008 version of Rule 1.6.

## 2. Distrust of GALs

Alternatively, the majority in *Gabriesheski* might not have disregarded long-term policy but instead had serious concerns about the competence of GALs to adequately perform their statutory duties. The majority might have questioned whether GALs would have been capable of deciding whether to invoke confidentiality on behalf of the child if the court gave GALs that discretion. A GAL under Justice Martinez's suggestion would have the discretion to decide when, in the child's best interests, it is appropriate to invoke attorney-client confidentiality.<sup>154</sup> If the justices in the majority had doubts about GALs' ability to know when it is appropriate to invoke confidentiality, then it would not make sense to give GALs such discretion. The legal community's distrust of GALs, while not mentioned in the majority's opinion, is supported by three instances in the years immediately prior to *Gabriesheski* when the state took action to try to improve the quality of representation by GALs.

First, Colorado's General Assembly created the Colorado Office of the Child's Representative (OCR) in 2000<sup>155</sup> to oversee GALs with the purpose of "empower[ing] Colorado's most vulnerable children with uniform, high quality counsel."<sup>156</sup>

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153. See *Gabriesheski*, 262 P.3d 653. Justice Coats's majority opinion never addressed Justice Martinez's concerns that lack of confidentiality might hurt a GAL's ability to gain a child's trust.

154. See *id.* at 664.

155. COLO. REV. STAT. §§ 13-91-101 et seq. (2013).

156. *History*, COLO. OFFICE OF THE CHILD'S REPRESENTATIVE, <http://www.coloradochildrep.org> (last visited Oct. 13, 2013).

Before the formation of OCR, judges and other child-welfare professionals in Colorado had serious concerns about the quality of GALs in providing representation for children.<sup>157</sup> The statute that established OCR expresses concern about the representation of these vulnerable children, stating that “[t]he general assembly finds that, to date, the state has been sporadic, at best, in the provision of qualified services and financial resources to this disadvantaged and voiceless population.”<sup>158</sup> Additionally, the General Assembly declared that “it is in the best interests of the children of the state of Colorado, in order to . . . improve the quality of representation and advocacy provided to the children in the Colorado court system, that an office of the child’s representative be established in the state judicial department.”<sup>159</sup> Once established, OCR verified many of those concerns, in part by showing evidence of “high caseloads, lack of client contact, lack of independent investigation, failure to independently advocate, and attorneys who failed to appear at legal proceedings or staffings.”<sup>160</sup> Therefore, OCR quickly acted to address many of these concerns and improve the representation of children.

Second, one of the modifications OCR made was to change the way GALs are paid for their services. Before the changes, GALs in dependency and neglect cases were paid a flat fee of \$1,040 per case for two years of representation or the point at which a motion to terminate parental rights was filed.<sup>161</sup> This model of payment created a financial disincentive for GALs to provide thorough representation because GALs were paid the same amount no matter if they spent two or two hundred hours on a case.<sup>162</sup> Not surprisingly, many complaints about GALs included stories of GALs having hundreds of cases but failing to ever see the children they represented, resulting in GALs attending court with only information they gathered from the

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157. Debra Campeau, *A New Model of Service: El Paso County, Colorado Office of the Guardian ad Litem*, 24 CHILD L. PRAC. 188, 189 n.3 (2006) (“At the time [1999] there were concerns throughout the state regarding the quality of GAL representation for this special population of children.”).

158. COLO. REV. STAT. § 13-91-102(5)(1)(a) (2013).

159. *Id.* § 13-91-102(5)(1)(b).

160. Theresa Spahn & Sarah Ehrlich, *A New Model of Service: The State Agency in Colorado*, 24 CHILD L. PRAC. 157, 157 (2005).

161. Campeau, *supra* note 157, at 189 n.3.

162. *See id.*

caseworkers.<sup>163</sup> OCR studied this issue and decided to implement an hourly pay system for GALs rather than a flat fee.<sup>164</sup> This change significantly improved the quality of GALs' representations and helped OCR recruit better quality attorneys.<sup>165</sup> Additionally, the change resulted in GALs "who properly frontload services and dedicate as much time to each case as dictated by the children's needs or case issues."<sup>166</sup>

Third, Chief Justice Directive 04-06 addressed specific concerns over lack of representation by GALs. The directive lists a number of tasks that GALs should perform during the course of a dependency and neglect case, many of which would seem obvious to any outside observer.<sup>167</sup> These tasks include attending all court hearings, filing written and oral reports with the court, following statutory authority, conducting independent investigations in a timely manner, personally meeting with the child within thirty days following appointment, reviewing court files, and interviewing people involved in the child's life.<sup>168</sup>

In addition to Coloradans' suspicions about the adequacy of GALs, many people across the country have complained about GALs performing poorly.<sup>169</sup> Although not discussed in *Gabriesheski*, a 1983 study in North Carolina demonstrated that GALs spent an average of five hours per case and were "simply a presence, rather than an influence, in the courtroom."<sup>170</sup> Moreover, during the case in *G.S. v. Goodman*, complaints arose about GALs failing their duties.<sup>171</sup> Among the sixteen complaints were allegations that GALs failed to notify the children of their appointment, allowed six months to pass before communicating with their clients, explained

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163. *Id.*; see also Spahn & Ehrlich, *supra* note 160, at 158.

164. Spahn & Ehrlich, *supra* note 160, at 158.

165. *Id.*

166. *Id.*

167. Chief Justice Directive No. 04-06 at 6-9 (V)(D), Office of the Chief Justice, (Mar. 2013).

168. *Id.*

169. See Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child is My Client, But Who Am I?", 64 *FORDHAM L. REV.* 1917, 1925 (1996) (citing Robert F. Kelly & Sarah H. Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 *J. FAM. L.* 405, 407 (1982-83)).

170. *Id.*

171. *Id.* at 1926-27 n.61-62 (citing No. 86 CH 11721) (Cir. Ct. of Cook County, Ch. Div. Consent Decree entered July 13, 1988)).

unsuccessfully the process to the children and their parents, and carried caseloads numbering above four hundred.<sup>172</sup> These concerns about GALs resulted in the federal government authorizing multiple studies that concluded that many GALs provide deficient representation, including having little to no contact with the children and inadequately preparing for the proceedings.<sup>173</sup> Overall, if the justices in the *Gabriesheski* majority viewed GALs with mistrust, they were not alone.

### 3. Judges' Reliance on GALs for Recommendations

A third possible concern of the majority is that full confidentiality might hurt a judge's ability to rely on a GAL's recommendations in making a decision. Under Colorado's GAL model, and other models nationwide, a GAL acts as, or similarly to, an arm of the court.<sup>174</sup> The Children's Code tasks a GAL with "mak[ing] recommendations to the court concerning the child's welfare" and making "further investigations" to understand the facts of the case.<sup>175</sup> In other words, a GAL is a professional that the judge relies upon to find all necessary facts and present them to the court because the judge does not meet the relevant parties, discover facts, or talk to the child. If the GAL withholds information, such as information that the child wants to keep confidential, then the judge will lose possibly valuable information.

In *Gabriesheski*, the majority possibly was concerned that allowing confidentiality between a GAL and a child might erode a judge's ability to rely on the GAL for recommendations. For example, a judge surely would have liked to know why the stepdaughter in *Gabriesheski* recanted her allegations. This is especially true for any judge with a paternalistic view of the dependency and neglect system who believes that the court, with or without regard for the child's wishes, is in the best

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172. *Id.* at 1927 n. 61 (citing Class Action Complaint at 14–17, *G.S. v. Goodman* (No. 86 CH 11721)).

173. *See id.* at 1927–29. The studies included a 1988 study by CSR, Inc. called the National Evaluation of the Impact of Guardians Ad Litem in Child Abuse or Neglect Judicial Proceedings and a 1990 study directed by Congress that was also conducted by CSR, Inc. *Id.* at 1927–28. To conduct this later study, CSR subcontracted the American Bar Association Center for Children and the Law. *Id.* at 1928.

174. Malempati, *supra* note 1, at 99.

175. COLO. REV. STAT. § 19-3-203(3) (2013).

place to determine what is in the child's best interests.<sup>176</sup> A GAL who is not bound to confidentiality appeals to the judiciary because, under that approach, a GAL is free to provide any recommendation that is in the child's best interests.<sup>177</sup>

### C. Justice Martinez's Dissent

The majority's opinion in *Gabrieheski* triggered a fierce dissenting opinion by Justice Martinez, joined by Chief Justice Bender.<sup>178</sup> Justice Martinez focused the first part of his opinion on policy implications, arguing that the majority's decision "deprives children of the right to legal representation," which is "at odds with a child's fundamental right to be represented in court."<sup>179</sup> Additionally, he argued that the lack of attorney-client privilege will cause GALs to disclose information about the child even when it is not in the child's best interests, because GALs will be required to disclose communications on the stand that the GAL had with the child.<sup>180</sup> In light of these policy concerns, Justice Martinez proposed that a better approach would recognize the existence of confidentiality between the GAL and the child but allow the GAL to decide whether to exercise this confidentiality on the child's behalf.<sup>181</sup> The reason why GALs, rather than the children, might invoke attorney-client privilege under Justice Martinez's approach is that GALs are acting as proxies and guardians for their clients, the children, who do not yet have the capacity to make such decisions. Thus, Justice Martinez's approach differs from a traditional attorney-client relationship where clients exercise the right of confidentiality, not lawyers.<sup>182</sup>

Justice Martinez looked to the current trend among jurisdictions to support his viewpoint.<sup>183</sup> According to the Justice, jurisdictions have dealt with the role of confidentiality between a GAL and a child by following three different

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176. See Malempati, *supra* note 1, at 100.

177. See *id.* at 114.

178. *People v. Gabrieheski*, 262 P.3d 653, 661–67 (Colo. 2011).

179. *Id.* at 661.

180. *Id.*

181. *Id.* at 664.

182. See COLO. R. PROF'L CONDUCT R. 1.6(a) (2013).

183. *Gabrieheski*, 262 P.3d at 661–63.

approaches.<sup>184</sup> Jurisdictions have (1) required GALs to follow attorney-client confidentiality, (2) held that confidentiality does not apply and GALs can disclose communications without waiver, or (3) applied a hybrid approach where confidentiality is important but disclosure is permitted in certain situations.<sup>185</sup> While Justice Martinez recognized that there is no consensus among jurisdictions, he mentioned that the trend among scholars and practitioners is that children should have attorney representation with all the legal ethical rules attached.<sup>186</sup>

Justice Martinez argued that the Children's Code language contemplates a dual role for a GAL that includes following both traditional attorney-client confidentiality and the child's best interests standard.<sup>187</sup> He rejected the majority's approach that a GAL only represents a child's best interests and asserted that the statutory definition of a GAL includes "both someone who is appointed 'to act in the best interests' of another person and an attorney who is 'appointed to represent *a person* in a dependency and neglect proceeding."<sup>188</sup> Additionally, the Justice noted that other sections of the Children's Code mention that the GAL "shall be charged *in general* with the representation of the child's interest" and shall "participate in the proceedings to the degree necessary 'to adequately represent the child.'"<sup>189</sup>

Additionally, Justice Martinez argued that Chief Justice Directive 04-06 does not relieve a GAL from fulfilling ethical obligations imposed on all attorneys and that the majority "downplayed" the significance of the directive.<sup>190</sup> He quoted two sections of the directive that state that GALs "shall be subject to all of the rules and standards of the legal profession"<sup>191</sup> and should "[t]ake actions within the scope of [their] statutory

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184. *Id.* at 661–62.

185. *Id.*

186. *Id.* at 662 (citing Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968–69 (2006)).

187. *Id.*

188. *Id.* (quoting COLO REV. STAT. § 19-1-103(59) (2011)) (emphasis added).

189. *Id.* (quoting COLO REV. STAT. § 19-3-203(3) (2011)) (emphasis added).

190. *Id.* at 662–63.

191. *Id.* at 662 (quoting Court Appointments Through the Office of the Child's Representative, Chief Justice Directive No. 04-06 at 6–9 (V)(B), (Colo. Mar. 2013), available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-06revised3-19-13withattArev3-13.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-06revised3-19-13withattArev3-13.pdf)).

authority and *ethical obligations* necessary to represent the best interests of the child.”<sup>192</sup> He further criticized the majority for reasoning that the directive cannot be the source of the confidentiality, instead arguing that the directive only clarifies that GALs in dependency and neglect proceedings are required to follow confidentiality as stated in the Colorado Rules of Professional Conduct.<sup>193</sup>

Moreover, Justice Martinez argued that confidentiality between a GAL and a child is compatible with a GAL’s representation of the child’s best interests.<sup>194</sup> He compared the statutory language concerning a GAL’s role to the statutory language defining the role of a child’s representative and a child and family investigator (CFI) in domestic relations cases.<sup>195</sup> A child’s representative is an attorney, adheres to the Colorado Rules of Professional Conduct, provides legal representation for the child, and serves the child’s best interests.<sup>196</sup> Contrarily, a CFI is not permitted to provide legal services and does not have to follow the Colorado Rules of Professional Conduct.<sup>197</sup> Justice Martinez argued that a GAL, who more closely resembles a child’s representative than a CFI because a GAL provides legal services and has the duty to represent a child’s best interests, would logically have other similar roles as a child’s representative, including representing the child as the child’s attorney and following the Rules of Professional Conduct and confidentiality.<sup>198</sup>

Finally, Justice Martinez wrote that the ways in which a child interacts with her GAL confirm that an attorney-client relationship exists.<sup>199</sup> A GAL, reasoned the Justice, needs the child’s trust both to step into the shoes of the parents while representing the child’s best interests and to better fulfill the role of an attorney with court duties that directly affect the

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192. *Id.* at 662–63 (quoting Court Appointments Through the Office of the Child’s Representative, Chief Justice Directive No. 04-06 at 6–9 (V)(D)(1), (3), (Colo. Mar. 2013), available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/04-06revised3-19-13withattArev3-13.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-06revised3-19-13withattArev3-13.pdf)) (emphasis added).

193. *Id.* at 663.

194. *Id.* at 663–64.

195. *Id.*

196. *Id.* at 663.

197. *Id.*

198. *See id.* at 663–64.

199. *Id.* at 664.

child's situation.<sup>200</sup> Therefore, confidentiality enhances a GAL's representation because "it encourages full disclosure from the child, which may lead to the discovery of information which would not otherwise come to light."<sup>201</sup>

Overall, Justice Martinez would have held that a GAL represents both the child and the child's best interests, bound by the duty of confidentiality and the other rules of professional conduct for attorneys.<sup>202</sup> However, consistent with a hybrid position on the issue of confidentiality, a GAL would have the responsibility not to follow confidentiality if doing so would be contrary to the child's best interests.<sup>203</sup> In making such a determination, the Justice would advise GALs to consider the age and maturity level of the child, with a GAL functioning more like an attorney for an older and more mature child than for a younger and less mature child.<sup>204</sup> This approach, Justice Martinez stated, would allow a GAL to speak both for the child's legal rights and the child's best interests.<sup>205</sup>

### III. THE ERROR OF THE *GABRIESHESKI* DECISION AND A BETTER ALTERNATIVE FOR COLORADO

In this Part, Part III.A. first examines why the *Gabrieheski* decision was not best for Colorado by focusing on the role of confidentiality and the need to provide adequate representation and a voice for the child. Part III.B. analyzes alternatives to the *Gabrieheski* decision that would work within Colorado's current statutory scheme. This Part finishes by advocating that Colorado should adopt an approach that provides a limit to GAL discretion but still allows GALs the opportunity for attorney-client trust.

#### A. *Why the Gabrieheski Decision Was Wrong for Colorado*

The *Gabrieheski* decision was wrong for Colorado because the majority did not strike the right balance between

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*



confidentiality and protection of children from preventable child abuse. The importance of confidentiality is at the heart of the *Gabriesheski* decision. On the one hand, the majority reasoned that confidentiality was a barrier that needed to be broken so that the GAL could adequately represent the child's best interests. On the other hand, the dissent saw confidentiality as a means for GALs to gain the trust of the children and as a mechanism to increase the quality of representation. Clearly, each side of the argument has a different understanding of the importance of confidentiality. The best approach would find balance between the majority and dissent's positions.

1. Finding the Right Balance to Preserve Confidentiality

Finding the right balance is important because confidentiality provides valuable protections that enhance the relationship between a GAL and a child.<sup>206</sup> With this purpose in mind, the goal of confidentiality is "to encourage the free flow of communication in various favored relationships."<sup>207</sup> If confidentiality extends to the courtroom, it can take the form of a privilege, and privilege law is based on the balance between societal interests of privacy and the need for litigants to obtain evidence to prosecute or defend.<sup>208</sup>

A critical issue is to strike a balance that encourages the free flow of communication between a GAL and a child. Without the child speaking freely to the GAL, the GAL cannot adequately represent the child's best interests. Furthermore, as Justice Martinez argued in his dissent in *Gabriesheski*,<sup>209</sup> a child is less likely to trust the GAL, and thus speak openly, if the child knows that whatever she says might be revealed to other professionals or the court. However, allowing all communications to be protected between a GAL and a child would prevent a GAL from bringing up a detail or a fact essential to preventing further abuse.

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206. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 755 (Vicki Been et al. eds., 7th ed. 2011) (discussing both privilege and confidentiality).

207. *Id.*

208. *Id.*

209. *Gabriesheski*, 262 P.3d at 653–54.

## 2. Five Reasons Why Striking the Right Balance Is Important

The nature of the dependency and neglect field of juvenile law best informs the solution that strikes the right balance between a strict best interests approach and maintaining confidentiality. First, dependency and neglect cases can last for years while the parents are following treatment plans or the caseworker is trying to find a permanent situation for the child.<sup>210</sup> Even when the child is quickly returned to her parents' home, the parents might relapse into drug use, or domestic violence might resurface. As a result, new cases are opened or old cases are reopened involving the child.<sup>211</sup> The GAL might be the only constant in the child's life during this time. This reality is important for confidentiality because, while confidentiality might seem to obstruct GALs and the dependency and neglect process from acting in the child's best interests in one instance, the damage to the relationship between the child and the GAL might prevent any knowledge of abuse or neglect in future situations involving the same GAL and child.<sup>212</sup> A child may be very reluctant to tell the GAL or anybody else anything about the child's life if that information could be revealed despite the child's wishes to the contrary.<sup>213</sup>

Second, in dependency and neglect cases, the child lacks a professional in the courtroom with whom she can communicate confidentially. Unlike in delinquency cases, where a child is appointed an attorney to represent her,<sup>214</sup> the court does not appoint the child a personal attorney in dependency and neglect cases. Therefore, before *Gabriesheski*, the GAL was the only professional in the courtroom who could assume this role because all other attorneys in a dependency and neglect case

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210. See COLO. REV. STAT. § 19-3-703 (2013) (stating that a child under six years of age deemed dependent or neglected should be in a permanent home within twelve months but not giving a time constraint for older children. Also, "six-month reviews and twelve-month permanency hearings shall continue as long as the child remains in foster care.").

211. See *id.*; See *e.g.*, *People ex rel. E.C.*, 259 P.3d 1272 (Colo. App. 2010).

212. See Brief of Amicus Curiae: The National Ass'n of Counsel for Children at 27, *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011) (No. 08SC0945).

213. See Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1109 (2006).

214. COLO. REV. STAT. § 19-1-105(2) (2013).

represent other particular clients. The caseworker, doctors, and other professionals are all required by law to report knowledge or suspicion of abuse.<sup>215</sup> After *Gabriesheski*, all professionals in a case may have to reveal their communications with the child. This lack of confidentiality is troublesome because, as Chief Justice Directive 04-06 notes, these children “are possibly the most vulnerable clients represented in the legal profession.”<sup>216</sup> Now, without anybody to represent them and keep their confidences, the children might feel alienated from the process and never speak freely.<sup>217</sup>

Third, different children in dependency and neglect cases have different expectations of confidentiality. Under the Children’s Code, a child in these proceedings can range in age from a newborn to a teenager under the age of eighteen.<sup>218</sup> While it is certainly true that some children, no matter what their age, are unlikely to understand the ramifications of confidentiality, this does not mean that a GAL should not tailor her representation to fit the age of the child. For example, younger children will have little reason to expect confidentiality, and children who are too young to talk certainly cannot verbally communicate instances of abuse and neglect or even their own wishes. However, older children may have completely different expectations and may know about attorney-client confidentiality from television, personal experience, or school. This creates a potential problem with finding an appropriate level of confidentiality because effective communication depends on the amount of input children can give, which varies depending on children’s developmental stages.<sup>219</sup> Therefore, children who have the ability to give

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215. See Brief of Amicus Curiae: The National Ass’n of Counsel for Children, *supra* note 212, at 27 (citing the thirty-two professionals statutorily required to inform authorities when children tell them about instances that include child protection concerns in COLO. REV. STAT. § 19-3-304(2)).

216. CJD 04-06(VI)(B)(1) (2006).

217. See Peterson, *supra* note 213, at 1109 (warning that “if the guardian ad litem does not warn the child that what he says may be repeated, and then divulges the child’s secrets, there is a risk of psychological damage to the child from the violation of trust that could have lasting effects and impede any future therapeutic efforts”).

218. COLO. REV. STAT. § 19-1-103(18) (2013). However, a child under the legal custody of the Department of Human Services may still be part of an open case until the child reaches twenty-one years of age if the child has yet to emancipate. *Id.* § 19-3-205(1).

219. Peterson, *supra* note 213, at 1106 n.153 (referencing the Model Rules of

effective input on their cases are the children who have the most at stake because trust between them and their GALs will more likely implicate confidentiality.

Fourth, lack of confidentiality creates a barrier for GALs to adequately perform their job, and thus, best provide children with some form of representation, whether that consists of advocating for the children or their best interests. Confidentiality is the foundation of the traditional attorney-client relationship because “[w]ithout confidentiality the client cannot trust the lawyer and be completely candid,” rendering “the lawyer incapable of doing an effective job.”<sup>220</sup> One of a GAL’s biggest assets can be the trust of the child because a relationship built on trust “allows the child to honestly share his feelings.”<sup>221</sup> However, most children probably do not understand the lack of confidentiality.<sup>222</sup> As a result, a GAL faces risks in both being upfront about the lack of confidentiality and not disclosing the lack of confidentiality until it has been, or is about to be, broken.<sup>223</sup> On the one hand, if a GAL tells the child about the lack of confidentiality at the beginning of the relationship, the GAL risks the possibility that the child will not be honest or will not tell the GAL vital information.<sup>224</sup> On the other hand, if the GAL does not address confidentiality upfront and does divulge information the child believed would be confidential, then the child could experience psychological harm if the child meant for that information to be kept secret.<sup>225</sup> In either scenario, lack of trust between a GAL and a child effectively could prevent the GAL from making accurate recommendations to the court that serve the child’s best interests.

Fifth, a lack of confidentiality impairs a child’s ability to

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Professional Conduct’s Comment to Rule 1.14, which states that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”).

220. Andrea Khoury, *Children’s Right to Lawyer-Client Relationship Tested in Colorado*, 31 CHILD L. PRAC. 12, 13 (2012).

221. Peterson, *supra* note 213, at 1108.

222. *Id.* at 1109 (noting that “it is doubtful that [the] children, on their own, understand that their words might be repeated and disclosed to or used against their parents or caregivers”).

223. *Id.*

224. *Id.*

225. *Id.*

have a voice in the proceedings.<sup>226</sup> One major concern with a hybrid approach for a GAL is that she does not adequately represent children because she “is expected to act as an attorney and give voice to the child’s positions while also determining and advocating for the child’s best interests.”<sup>227</sup> While GALs in Colorado are supposed to inform the court of a child’s positions,<sup>228</sup> this only provides a child a voice in matters that the child wants the court to know. Post-*Gabriesheski*, a child does not have this opportunity when the child wants to keep certain information communicated to the GAL confidential. Lack of confidentiality between a GAL and a child erodes the child’s ability to have her voice heard and her wishes affect the course of the proceedings.

These five concerns demonstrate that the *Gabriesheski* court should have maintained some form of confidentiality between GALs and the children they represent. However, there needs to be some balance between full confidentiality and no confidentiality at all because full confidentiality could create a system that fails to prevent abuse. The balance should be maintained with the understanding that children in dependency and neglect cases have nobody else with whom to communicate confidentially and that there may need to be different levels of confidentiality depending on the age and maturity of the child.

### *B. A Better Approach for Colorado*

If the *Gabriesheski* court should have held that some type of confidentiality exists, then the next question is how much discretion GALs should have in the exercise of this confidentiality. GAL competency is still a valid concern in Colorado and most likely will continue to be as long as GALs are paid considerably less than attorneys serving in other capacities. For example, OCR compensates GALs at a rate of \$65 per hour in Colorado.<sup>229</sup> In comparison, a 2010 survey by the Colorado Bar Association showed that the mean hourly rate

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226. See Malempati, *supra* note 1, at 116.

227. *Id.* at 110.

228. CJD 04-06(V)(D)(1) (2013). The directive was amended twice after *Gabriesheski* to make this requirement clear. However, this was not a requirement prior to the amended directive. CJD 04-06(VI)(B)(1) (2006).

229. OFFICE OF THE CHILD’S REPRESENTATIVE, STRATEGIC PLAN 15 (2012).

of an associate attorney with no experience was \$153 an hour,<sup>230</sup> and the Office of the Colorado State Public Defender lists that entry-level public defenders make \$4,634 per month.<sup>231</sup> The low GAL hourly rate, which has stayed at the same rate since at least the 2009 fiscal year,<sup>232</sup> provides an incentive for GALs to acquire too many cases to ensure that they can log as many compensable hours as possible, creating a disincentive to spend quality time on each case.<sup>233</sup> Unless the hourly rate changes, some type of limiting principle will need to be applied to balance the benefits of confidentiality with the disincentives, i.e., high caseloads to provide the income to make a living, that come with providing too much discretion to GALs under the current system.

### 1. Three Potential Options

Colorado's current statutory scheme for representing children in dependency and neglect cases leaves certain options off the table because the Children's Code only requires the GAL perform the role of advocating for the child's best interest. While other schemes might allow for multiple professionals so that one can represent a child's best interests and another can represent the child, Colorado's system gives all responsibility to the GAL. The following three options would provide some level of confidentiality between a GAL and a child under Colorado's current best-interests scheme. The first option would give GALs discretion to decide when confidentiality applies, the second option provides full confidentiality, and the third option allows some confidentiality while limiting GAL discretion.

The first option is to give GALs the discretion advocated by Justice Martinez, which would allow GALs to decide whether to invoke confidentiality based on considerations such as the age and maturity of the child and the child's wishes.<sup>234</sup> GALs who are knowledgeable and invested in each of their cases are potentially worthy of this discretion. However, it may be

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230. COLORADO BAR ASSOCIATION, 2010 ECONOMIC SURVEY 31 (2010).

231. *Attorney Positions*, OFFICE OF THE COLORADO STATE PUBLIC DEFENDER (2009), [http://pdweb.coloradodefenders.us/index.php?option=com\\_content&view=section&layout=blog&id=38&Itemid=6](http://pdweb.coloradodefenders.us/index.php?option=com_content&view=section&layout=blog&id=38&Itemid=6).

232. OFFICE OF THE CHILD'S REPRESENTATIVE, STRATEGIC PLAN 13–14 (2012).

233. See Shepherd, Jr. & England, *supra* note 169, at 1926.

234. See *People v. Gabriesheski*, 262 P.3d 653, 664 (Colo. 2011).

unwise to bestow such discretion upon GALs who are only marginally attentive to their cases. With the right direction from the General Assembly and OCR, Justice Martinez's approach could be an option. However, if the quality of GAL representation does not meet expectations, this approach could backfire at the expense of the children because the decision to invoke confidentiality might not be based on case details and careful consideration of the consequences.

A second option is to statutorily or judicially mandate that confidentiality applies. A number of states that have a "best-interests" statutory scheme like Colorado apply these approaches. Michigan GALs must follow full attorney-client privilege, even when informing the court of a child's preferences.<sup>235</sup> Michigan's ethical code backs this approach and defines a GAL as an attorney who "acts as an advocate for the minor and an attorney/client relationship exists" and is "bound to abide by the Rules of Professional Conduct."<sup>236</sup> Alabama case law recognizes that an attorney-client relationship exists between GALs and the children they represent and that the "rules of ethics applicable to lawyers and the fundamental principles of due process apply to the conduct of [GALs]."<sup>237</sup>

Finally, a third option is to provide a middle ground between confidentiality and discretion. In *In re Christina W.*, the highest court in West Virginia acknowledged that an attorney-client relationship between the GAL and the child existed, but recognized that the duty of confidentiality is not absolute.<sup>238</sup> Instead, in West Virginia, "[w]here honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the [GAL] must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren]."<sup>239</sup>

## 2. Why West Virginia's Approach Is Currently the Best for Colorado

West Virginia's approach provides the best balance

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235. MICH. COMP. LAWS § 712A.17d(1)(a) (2012).

236. Mich. Eth. Op. RI-318 (Mich. Prof. Jud. Eth. Mar. 22, 2000), 2000 WL 1288356.

237. *Ex parte R.D.N.*, 918 So. 2d 100, 103-04 (Ala. 2005).

238. *In re Christina W.*, 639 S.E.2d 770, 778 (W. Va. 2006).

239. *Id.*

between full confidentiality between a GAL and a child and limiting the discretion given to GALs. Both Michigan and Alabama's systems would not solve the problem of giving potentially incompetent GALs too much discretion because they removed GAL discretion altogether by stating explicitly that GALs are bound by confidentiality. Also, Justice Martinez's approach does not provide enough of a limiting principle because "in the child's best interests" is too fluid of a concept to constrain GAL discretion.<sup>240</sup> However, West Virginia's approach poses an interesting alternative for Colorado. The West Virginia approach would narrow the discretion given to GALs in deciding when confidentiality is necessary and hopefully would make it less worrisome that unsatisfactory or overly-burdened GALs might not be exercising their duty to the child's best interests. While the GAL, not the child, would be in control of invoking confidentiality, the GAL would not have wide discretion. Instead of using the fluid concept of "child's best interests" to determine when confidentiality may be broken, as in Justice Martinez's approach,<sup>241</sup> West Virginia narrows the discretion to the more ascertainable "exposure [of a child] to a high risk of probable harm."<sup>242</sup> This standard is more concrete. It can hold GALs accountable because any information that was disclosed that did not rise to the level of a high risk of probable harm would breach confidentiality unless waived by the child.<sup>243</sup>

Additionally, West Virginia's approach would fit in seamlessly with Colorado's current statutory scheme. First, West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings define a GAL as "the attorney appointed to represent the child,"<sup>244</sup> and other sources, including West

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240. See *People v. Gabriesheski*, 262 P.3d 653, 664 (Colo. 2011).

241. *Id.*

242. *In re Christina W.*, 639 S.E.2d at 778.

243. For example, OCR has a procedure in place to investigate GALs. OCR will investigate matters when they receive formal complaints from judges, caseworkers, parents, or children, or when OCR is concerned about the quality of a GAL's representation. The investigation typically involves talking to all the parties involved and performing an audit of the GAL's work. Punishments for GAL can range from a corrective action plan to being taken off the OCR contract attorney list, which precludes them from being a GAL in Colorado. OFFICE OF THE CHILD'S REPRESENTATIVE, STRATEGIC PLAN 8-9 (2012). GALs also may face sanctions from the state ethics board. See e.g., COLO. R. PROF'L CONDUCT R. 8.4 (2013); COLO. R. CIV. P. 251.1–251.34.

244. W. VA. R. CHILD ABUSE AND NEGLECT PROC. 3(k) (2012).



Virginia case law and codes, stress that a GAL is the child's attorney.<sup>245</sup> This is consistent with Colorado Children's Code language that arguably suggests that a GAL represents both a child's best interests and the child as a client.<sup>246</sup> Second, a GAL's duties in West Virginia, like a GAL's duties in Colorado, mirror many of the responsibilities that traditional lawyers assume when representing clients.<sup>247</sup> Third, a West Virginia GAL's role, as a representative of the client, is generally compatible with the West Virginia Rules of Professional Conduct.<sup>248</sup> As Part II.C. demonstrated, Colorado's Rules of Professional Conduct also can work harmoniously with certain interpretations of the role of a GAL.<sup>249</sup>

Fourth, West Virginia, like Colorado, follows the best interests scheme for GALs. The West Virginia Supreme Court in *In re Christina W.* reasoned that GALs have to act against a child's wishes when those wishes are contrary to the child's best interests.<sup>250</sup> This situation is most clearly demonstrated when a child's preferred course of action would cause the child to be in a "high risk of probable harm."<sup>251</sup> The West Virginia court then drew the line at the "high risk of probable harm" because it "balance[s] the child's desire for confidentiality with the [GAL]'s duties to the court," such as making recommendations for the child's best interests.<sup>252</sup> Colorado also can find the right balance between complete and no confidentiality by following West Virginia's approach.<sup>253</sup>

Finally, West Virginia's approach potentially would have allowed the *Gabriesheski* court to reach the same outcome in

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245. See W. VA. CODE § 49-6-2(a) (2013); *In re Tyler D.*, 578 S.E.2d 343, 354 (W. Va. 2003); *In re Christina L.*, 460 S.E.2d 692, 699 (W. Va. 1995); *In re Scottie D.*, 406 S.E.2d 214, 221 (W. Va. 1991).

246. See *supra* Part I.B.2.

247. See generally *In re Christina W.*, 639 S.E.2d at 774; *In re Jeffrey R.L.*, 435 S.E.2d 162, 175–176 (1993) (arguing that West Virginia should adopt many of the responsibilities, including fact-finding and litigation, that Colorado requires of its GALs).

248. *In re Christina W.*, 639 S.E.2d at 775–76.

249. See *supra* Part II.C.

250. *In re Christina W.*, 639 S.E.2d at 777.

251. *Id.*

252. *Id.* at 777–78.

253. This approach may lose some of its effect if a child, after hearing a GAL explain the instances when the GAL might break confidentiality, decides not to disclose certain information. However, this is better than a GAL informing a child that no confidentiality exists or a GAL not addressing the confidentiality question altogether.

the case. If the *Gabriesheski* court followed West Virginia's approach, the court could still have stated that confidentiality does not apply between the stepdaughter and her GAL. Instead of reasoning that there was no confidentiality to begin with, the court could have held that Gabriesheski's risk to his stepdaughter exposed the stepdaughter to a high risk of probable harm. Consequently, West Virginia's approach would have alleviated the *Gabriesheski* majority's concern that preventing the GAL from testifying might harm the stepdaughter. Additionally, West Virginia's approach places a requirement to report harm, whereas the recent change to Rule 1.6 of the Colorado Rule of Professional Conduct states that lawyers *may* reveal confidences if they believe it necessary "to prevent reasonably certain death or substantial bodily harm."<sup>254</sup> A GAL following the amended version of Rule 1.6 might conclude that the abuse in the *Gabriesheski* case did not rise to the level of reasonably certain death or substantial bodily harm, or might decide not to reveal the confidences even if it did. If the GAL chooses either of those options, the information about the stepfather's abuse remains confidential. Furthermore, West Virginia's approach puts GALs in a position that resembles mandatory reporters who have a duty in Colorado to report when they "ha[ve] reasonably cause to know or suspect that a child has been subjected to abuse or neglect."<sup>255</sup> However, West Virginia's approach, which is based on a high risk of probable harm, creates a higher threshold of abuse that requires GALs to break confidentiality than the threshold that compels mandatory reporters to report.<sup>256</sup> This would preserve confidentiality in more instances than if the mandatory reporter language were adopted. GALs currently are not listed as mandatory reporters in Colorado and thus are not statutorily bound to report instances of child abuse or neglect.<sup>257</sup> Therefore, West Virginia's approach would have permitted the *Gabriesheski* court to act on its instincts to protect the stepdaughter while still providing GALs with a

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254. COLO. R. PROF'L CONDUCT R. 1.6(b)(1) (2013).

255. COLO. REV. STAT. § 19-3-304 (2013); *see also supra* text accompanying note 10.

256. COLO. REV. STAT. § 19-3-307(1) (2013). Adopting the standard for mandatory reports would leave few situations where GALs could not use discretion to break confidentiality.

257. *See id.* § 19-3-304.

solid rule on confidentiality moving forward.

### 3. Two Possibilities Outside of Colorado's Statutory Scheme

All the approaches examined so far on how Colorado could address GAL confidentiality are based on the assumption that Colorado will not change the professionals involved in a dependency and neglect proceeding. However, if Colorado chooses to abandon its current system, there are some alternatives that could still leave a professional to advocate for a child's best interests while allowing the child to maintain confidentiality with a professional.

One possibility would be to make CASAs mandatory in Colorado.<sup>258</sup> Currently, CASAs are optional in dependency and neglect cases.<sup>259</sup> CASAs could take the role of advocating for the child and making sure that the child has a representative in court, in addition to playing many of the roles currently occupied by GALs, such as making recommendations in court.<sup>260</sup> Studies have shown that children and their parents who have the support of CASAs receive more services and reach better results.<sup>261</sup>

A second possibility would be to require assignment of traditional lawyers to children in dependency and neglect cases.<sup>262</sup> These traditional lawyers would adhere to attorney-client confidentiality, providing children with a lawyer that they can trust to keep communications they want secret.<sup>263</sup> The GAL would retain the role of advocating for the child's best interests, unencumbered by confidentiality. The American Bar Association recommended this approach beginning in its August 2011 publication of *ABA Model Act on Child Representation*, which "requires that all children be appointed

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258. Although thirty-three states allow for the appointment of a CASA, Oregon is the only state that requires a CASA. CHILDREN'S WELFARE INFORMATION GATEWAY, *supra* note 81, at 3–4. Oregon, however, allows a CASA to serve as a GAL. *Id.* at 4.

259. COLO. REV. STAT. § 19-1-206 (2013) (specifying that "any judge or magistrate may appoint a CASA volunteer").

260. See Peterson, *supra* note 213, at 1100–02 (advocating for increased use in CASAs nationwide as a possible solution to problems that plague juvenile law).

261. *Id.*

262. See Khoury, *supra* note 220, at 13.

263. *Id.*

a lawyer” and “allows the judge to also appoint a best interests advocate.”<sup>264</sup> Under this approach, the GAL would not have to play a dual role.

While both of these approaches are a possibility for Colorado in the future, they do not match Colorado’s current statutory scheme. In examining the success of the dependency and neglect system, Colorado will need to see how well GALs are performing in their current role. Adopting West Virginia’s approach would allow Colorado to keep the current statutory system, while changing to one of the two possibilities above would require new statutes and would add another professional to the many players currently involved. No matter what happens, the role of a GAL is now a current topic in the legal arena in Colorado, which, in turn, means many of Colorado’s neediest children will hopefully get a better dependency and neglect system.

#### CONCLUSION

*Gabrieheski* brought about a much-needed discussion on the role of GALs and confidentiality in Colorado. While the decision in the case might have been in the best interest of that particular child, the decision did not provide the correct long-term solution to the issue of confidentiality between GALs and children. The best public policy approach would be to follow West Virginia’s “high risk of probable harm” model in the short term before adopting an approach with more GAL discretion in the long term if GAL representation improves. Children in dependency and neglect proceedings are arguably the most powerless people in the legal system.<sup>265</sup> Changing confidentiality between a GAL and a child in Colorado would be one step forward in the process of helping vulnerable children overcome bad situations and have better futures.

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264. *Id.* (arguing that the American Bar Association’s recommendation means that “[t]hese two roles are distinct and should never be played by the same person”) (emphasis in original).

265. FIRST STAR & CHILDREN’S ADVOCACY INSTITUTE OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 6 (2d ed. 2009).