

# The Importance of Guardians Ad Litem

by Marissa Mitchell



*As a local government attorney* who sees and depends on the work of guardians ad litem in both child protection and adult incapacity cases, I can attest to their importance and to the long-term impact these cases have on their clients. The guardian ad litem (“GAL”)<sup>1</sup> has the unique role of protecting and advocating for their clients’ best interest rather than advocating for their clients’ wishes. Because of GAL’s abilities to conduct independent investigations and advocate for their clients’ best interests, their recommendations are given great weight by courts and parties. Also, because GAL have open and frequent communications with the parties, there are usually no surprises in court. In fact, the work of the GAL can often help help resolve the case. While decision-making power resides with the court, GAL provide the court with vital information and often have the greatest power to influence the courts’ decisions.

Virginia has robust qualification and continuing education requirements for attorneys who serve as GAL.<sup>2</sup> To qualify as a GAL, an attorney must complete a six or seven-hour course, depending on whether they will serve children or incapacitated adults. This basic training course sets the standard for the

unique skills, abilities, and actions expected of a GAL. In addition, the attorney must demonstrate familiarity with the court system by participating in juvenile or incapacitated adult cases. The attorney must also provide a nomination certificate from either a qualified GAL whom they have assisted, or from

a judge. Finally, the attorney must submit proof to the Office of the Executive Secretary of the Supreme Court of Virginia that they have met the requirements and include the judicial districts in which the attorney wishes to accept appointments as a GAL.<sup>3</sup> Thereafter, GAL must maintain their qualification by completing six hours of continuing education every two years on topics specifically related to the representation of children or incapacitated adults.

Because of the GAL's influential role in the judicial process, it is imperative that they complete a thorough investigation and communicate with the parties frequently. Likewise, it is important for attorneys working with a GAL on a case to maintain communication, invite the GAL to meetings, and provide pertinent information. Again, the ongoing communications and sharing of information ensure there are no surprises in court and can result in an agreement in the case.

There is much that attorneys can do to assist the GAL and their case right out of the gate. For example, when filing a petition for the appointment of a guardian and/or a conservator, the petitioner should have a current medical evaluation and share it with the GAL as soon as possible. If the medical evaluation is not completed or is not current, the attorney runs the risk that the person's capacity may have changed and the GAL may recommend an updated evaluation. Because this can result in delays and dismissal of the case, a current medical evaluation should be completed before filing the petition and provided to the GAL as soon as practicable.

Attorneys can also assist a GAL who otherwise may have difficulty accessing certain records. In guardianship and conservatorship cases in particular, attorneys drafting an order appointing a GAL should include in the order a provision authorizing the GAL to access all financial, insurance, medical, and health information pertaining to the respondent. General language in an order that simply references a code section for the GAL's authority often makes it more difficult for the GAL to obtain the records.

Additionally, GAL are sometimes mistaken about their ability to access certain records.

They often do not realize that the standard GAL appointment order does not permit access to certain substance use disorder records that are protected by federal regulations. A specific court order is required to authorize the release of substance use disorder treatment records that are protected by 42 C.F.R. Part 2. Without a release from the patient, or unless the treatment is specifically court-ordered and part of the court's file, the GAL may be unable to access the records or have to jump through additional hoops to obtain these records containing substance use disorder information.

Practitioners should be aware of two bills that were before the 2018 General Assembly that could impact the work of GAL. First, HB 278 amends Virginia Code § 16.1-267 to allow the court to adjust the costs of a GAL's services for good cause shown or upon the failure by the GAL to substantially comply with the standards adopted for attorneys appointed as GAL pursuant to § 16.1-266.1. The final version passed unanimously in both the House and Senate and is awaiting the Governor's signature. Second, H B277 would have amended Virginia Code § 16.1-274 to allow the court to direct the GAL representing a child to file a written report with the clerk. The clerk would then furnish a copy to the

## Practitioners should be aware of two bills that were before the 2018 General Assembly that could impact the work of GAL.

attorneys and pro se parties in the matter prior to the trial or hearing. If the court does not require the GAL to file a written report, the GAL must inform all attorneys and pro se parties of any recommendations the GAL will make at the trial or hearing. If the GAL fails to share the report, the report would not be received by the court after the commencement of evidence in a trial or hearing unless

*GAL continued on page 36*

GAL continued from page 33

the contents are otherwise established during the proceeding. It would also require the GAL to file with the court, with a copy to all attorneys and pro se parties in the matter, a certification of compliance with the standards established under § 16.1-266.1, along with a summary of the GAL’s investigation of the matter. H B277 was carried over to 2019.

The legislative proposals and the carrying over of H B277 are a clear indication of the General Assembly’s interest in the important role of the GAL in the judicial process. GAL’s work is and will remain highly impactful. I can think of no greater service an attorney can provide than protecting the interests of vulnerable children and incapacitated adults.

Endnotes:

- 1 Throughout this article, the abbreviation “GAL” refers to either the singular or plural form, as the context requires.
- 2 The Standards To Govern the Appointment of Guardians Ad Litem for Children and Incapacitated Adults can be found at [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_performance\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf), [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal\\_standards\\_children.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf), and [http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/gal\\_standards\\_adult.pdf](http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/gal_standards_adult.pdf).
- 3 The Office of the Executive Secretary publishes a list of attorneys qualified as a GAL which is updated monthly. For GAL for children, see: <https://eapps.courts.state.va.us/GalRegistry/public/publicHome.html#!/?programType=C>. For GAL for incapacitated persons, see: <https://eapps.courts.state.va.us/GalRegistry/public/publicHome.html#!/?programType=A>.



**Marissa Mitchell** is a senior assistant county attorney in the Henrico County Attorney’s Office, where she represents various county agencies including Henrico Area Mental Health and Developmental Services, the Division of Fire, the Henrico County Department of Social Services, and Henrico County Public Libraries. She is a past president of the Henrico County Bar Association, active in the Local Government Attorneys of Virginia, and currently serves on the Virginia State Bar Council representing the 14th Judicial Circuit.

About the Cover continued from page 31

istering the trust under the will of Grace Arents and respecting any other matter that may be brought to the attention of the Court in this matter. Among the defendants were the City of Richmond, J. Marshall Coleman, in his capacity as Attorney General of Virginia, and various other necessary parties. The complainant was skillfully represented by Dennis I. Belcher, of McGuire, Woods & Battle. The judge who presided over the case was the Honorable Willard I. Walker.

Thanks to the diligence, hard work and generosity of Dennis Belcher and others, and to the wisdom of Judge Willard Walker, the case resulted in many positive results, which enabled the Lewis Ginter Botanical Garden to be established in accordance with the charitable intent of Grace Arents and to be the architectural and botanical gem that it is today—a place of peace, rest and beauty—a place in

which the seeds planted in one generation, through proper nurturing, are blooming in another. The results also enabled the establishment of a strong broad-based board of directors and management structure, the attraction of significant donations and numbers of volunteers for the garden, and effective outreach to the community.

Dennis Belcher died unexpectedly during a medical procedure on April 27, 2017. He was 65 years of age. Dennis was renowned throughout the United States for his skills, leadership, and collegiality in so many areas of the law. I believe that his most enduring legacy, which contributes so much to the enjoyment and education of so many adults and children, is in the Lewis Ginter Botanical Garden, which, has 350,000 visitors per year. The garden consists of 82 acres, four lakes, 15 distinct outdoor gardens, a

conservatory, and 5,500 unique genera of plants.

Tom Word and Bill Sanderson, long-time McGuireWoods partners of Dennis, in their In Memoriam about Dennis in the July/August 2017 issue of the *Probate & Property* magazine wrote: “Dennis had the vision for what has become the Lewis Ginter Botanical Garden, one of America’s top botanical gardens. Without his imagination, ingenuity, dedication, and leadership, it would not exist today. Dennis served as its general counsel from its inception until his death.”

There is an old saying that a person dies two times, the first time on the date of physical death, and the second time when no one remembers the person any more. We remember and thank Grace E. Arents, Dennis I. Belcher, and Judge Willard I. Walker, and in this remembering, we hope to perpetuate their memories.