Parse the issues involving guardians in legal proceedings

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Between 2001 and 2010, the percentage of people in the U.S. over the age of 65 jumped from 12.4% of the population to 15.1% of the population. According to U.S. Census reports, that segment of the population is expected to expand rapidly in the coming years as the baby boomer generation continues to age. 1 Making an even more dramatic projection, the U.S. Department of Health and Human Services Administration on Aging ("AoA") expects that by 2060, approximately 98 million Americans will be 65 or older, which is more than twice the number in 2014. 2 As a consequence of the expected growth in America's aging population, health and mental wellness issues will be pressing concerns for these Americans and those assisting them.

One of the challenges facing the advocates for the aging population is determining what to do when health and mental wellness issues interfere or are alleged to interfere with a person's effective legal representation in legal proceedings. For a practitioner, it is important to understand, assess, and prepare to address these issues both for when they arise with clients and when they arise in the context of other interested parties in legal proceedings. This issue is particularly important in contested trust and estate proceedings, where issues of capacity and mental decline are routinely at issue.

As discussed below, it is important that practitioners understand what standards govern the guardianship decision and take steps to prepare to apply those standards in the proper manner. In some cases, the determination that a person is not capable of meaningfully participating in the legal proceeding is quite clear because of pronounced limitations or disabilities. But in other instances, an interested party's ability to understand and participate may be fluid, contested, or inconclusive. Furthermore, what should the practitioner do if he or she subjectively believes the client's capacity has diminished, but the client adamantly insists no guardian is needed because the client has the practitioner who is an excellent attorney?

In short, the practitioner must do the necessary homework regarding the facts and the law to know prior to finalizing a strategy what the courts might consider and how the framing of the issue might affect the chance of obtaining or defeating a motion to appoint a guardian ad litem.

Types of assistance for adults in judicial proceedings

The first step is identifying the necessary level and type of assistance. New practitioners or lay persons sometimes confuse the need for counsel with the need for a guardian. For example, a person may find it impossible to discuss his or her legal rights or understand the details of a legal proceeding due to a variety of factors, including education level, cultural influences, language skills, learning disabilities, phobias, concentration or processing difficulties, depression, physical disabilities, and even mental illness. Yet, most courts will view such a person with these challenges as not requiring a guardian if the individual has capable counsel and a baseline ability to communicate critical facts and desired outcomes. Depriving an adult of the ultimate say in his or her own affairs is reserved for situations where an attorney is unable to get the necessary client feedback or decisions necessary to fulfill ethical obligations as counsel.

Conservatorship or general guardianship

Jurisdictions may have some differences in nomenclature, but standard terms are used for the protectors of adults in judicial proceedings. The Adult Guardianship and Protective Proceedings Jurisdiction Act Summary explains this as follows:

- States differ widely in their standard terminology for a person appointed by the court to handle another's personal and financial affairs. Under the Uniform Probate Code and in a majority of states, a "guardian" is appointed in a "guardianship proceeding" to make decisions regarding the person of a minor or an "incapacitated" adult; a "conservator" is appointed in a "protective proceeding" to manage the property of a "protected person." But in many states, only the term "guardian" is used, and the appointee is designated as either a

guardian of the person or a guardian of the estate. In a few states, the terms guardian and conservator are both used but are given different meanings. 3

New Jersey, for example, has limited guardianships, which may be akin to a guardian ad litem, and general guardianships, which may be similar to a conservatorship. 4

The terms "conservatee," "conservator," and "general guardian" are well-known to trust and estate practitioners, and in most jurisdictions a conservator's duties and powers are typically defined by statute. 5 For an adult, a conservator acts as substitute decision-maker in all or many aspects of life.

The essential question the court must answer prior to the appointment of a conservator or a general guardian is whether the adult is so incapacitated that he or she is unable to manage his or her affairs independently. 6 As the removal of one's independence involves a significant loss of liberty, the appointment process requires an invasive inquiry into the adult's life to determine whether there truly has been a loss of the basic ability of the adult to manage his or her own affairs. 7

Many states also reference the inability to resist undue influence as another factor that might justify the broader forms of guardianship for adults in judicial proceedings. For example, California's conservatorship law 8 provides that a "conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence…. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence." 9 Under the California law, for example, it may become critical to understand both the laws regarding capacity and undue influence, and the intersection of the two, to assess whether a practitioner is likely to obtain an order granting the broader guardianship power.

Although the conservatorship or general guardianship procedure arguably provides the proposed ward with the most protection, it is not advisable in many scenarios, such as where the need for assistance is limited to a specific proceeding, where the adult in question has limited capacity and opposes a complete deprivation of independence, or where the practitioner represents a party who has no personal interest in the other private affairs of the adult in question. In those cases, the appointment of a guardian ad litem (discussed in the next section) may be better suited.

The appointment of a guardian ad litem in most jurisdictions is an easier, less expensive process. Also, the due process concerns are less pronounced when the decision-making abilities are removed for a limited time and purpose. 10

Guardian ad litem (GAL)

The terms "guardian" and "GAL" are not always defined by the applicable code sections referencing the terms. 11 Statutes might also use or reference other terms to convey the same concept, such as "next friend" 12 or "advocate." 13 Some jurisdictions, such as Massachusetts, even have multiple types of GALs. 14 Whether or not a jurisdiction provides a statutory definition, the concept of a GAL is commonly used in legal proceedings to address the narrower problem of protecting the rights of adults for a specific purpose, often because the adult is unable to or having difficulty with assisting counsel.

The difference between a conservator or general guardian and a GAL is described, for example, in *Black's Law Dictionary.Black Law Dictionary* defines a "guardian" as "°ne who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability."

Black's Law Dictionary also points out that: "A general guardian is one who has the general care and control of the person and estate of a ward"; whereas a special guardian is one who has special or limited powers and duties with respect to a ward or the ward's estate. On the other hand, a GAL is defined as a guardian, usually a lawyer, "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party" often to make recommendations to the court on behalf of such party. 15

Therefore, the essential difference between a general guardian or conservator and a GAL is this: A general guardian or conservator is usually appointed to take care of the person or property of a minor or incompetent adult, not for the specific purpose of participating in a lawsuit. In contrast, a GAL is appointed specifically to prosecute or defend a suit, and may be appointed even if the minor, or adult, has a general guardian. 16 A person with a court-appointed guardian is sometimes called a "ward."

Moreover, the court's inherent power to appoint a GAL is well recognized. 17 In federal court, Federal Rule of Civil Procedure 17© provides that a "minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a [GAL] … to protect a minor or incompetent person who is unrepresented in an action." Many states have adopted similar statutes based on the Federal Rule. 18

For example, in New York, a court may appoint a GAL or special guardian for an infant or an "incompetent person," at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interests of such infant or incompetent person and fix the fees and compensation of such guardian, except when it is otherwise expressly provided by law. 19 Similarly, the Colorado GAL statute provides that at any stage of the legal proceeding, the "court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate." In California, both the California Code of Civil Procedure and California Probate Code provide their own rules for the appointment of a GAL in civil and probate matters. 20

Although many states require a GAL to be a licensed attorney, a GAL's role is different than that of an incapacitated person's lawyer. While the attorney is typically "responsible for providing legal representation that supports the wishes and position of the proposed ward or protected person," a GAL, on the other hand is to "provide an objective assessment of all circumstances surrounding the requested appointment and to advocate as to what the GAL determines to be in the best interest of the proposed ward or protected person." 21 In addition, in certain jurisdictions some GALs may have statutory investigation and reporting duties, and additional background requirements. 22

Similar sounding statutes may hold meaningful distinctions 23

Once the practitioner or opposing counsel has decided to request the appointment of a GAL for a party in a judicial proceeding, the next step is to

identify which statute or statutes may apply and develop a plan for how to meet the specific standard. Unlike with minors where the appointment is often a bright-line test based solely on age, a capacity determination for an adult is much harder because it requires an individualized analysis. Further, depending on the level of deprivation of liberty, the court must also consider the due process rights of the adult.

A common mistake made by practitioners is to assume that all statutes regarding GALs are equal, or that a particular jurisdiction has only one statute that might potentially govern the analysis. To demonstrate the subtle differences, here are examples of some common words or phrases used in the statutes.

Incompetency or incapacitation

Many statutes authorize the appointment of a guardian ad litem where the adult is "incompetent" or "incapacitated." 24 Even then, there is no one definition for incapacity. The Uniform Guardianship and Protective Proceedings Act defines an incapacitated adult as one who "is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." 25 On the other hand, the National Guardianship Association defines an incapacitated adult as one who "lacks sufficient understanding or capacity to make or communicate responsible decisions." 26

Diminished capacity

Some statutes or applicable court rules authorize the appointment of a GAL where the adult has "diminished capacity" such that the client's "capacity to make adequately considered decisions in connection with a representation is diminished." 27 Here, unlike needing to prove someone is mentally incapacitated, the "diminished capacity" standard may permit the imposition of a GAL for someone who has diminished in a more limited fashion, such as in a manner that obstructs his or her understanding of his or her rights in a legal proceeding.

Under a disability or mentally disabled or impaired or afflicted

Other statutes authorize the appointment of a GAL where the adult is "under a disability" or "mentally disabled" or "impaired" or "afflicted." 28 For example, in Virginia, a court may appoint a "competent attorney-at-law as guardian ad litem" if there is a defendant "under a disability." 29 However, the phrase "under a disability" is not defined in the Virginia code. In jurisdictions that rely on clinical or medical terms, one is more likely to need to rely on admissible expert or medical testimony to meet the statutory standard for appointment.

Insanity or unsound mind

Still other types of statutes authorize the appointment of a GAL where the adult is "insane" or of "unsound mind." The term "insanity" may mean different things in the statutory and case law of different jurisdictions. It could fall into either a disability, clinical illness, or incapacity standard. 30 For example, in West Virginia, although the statutory language uses the word "insane," cases look to the person's "nature, character and effect of one's acts, and to understand the subject matter of business transactions in which one is engaged." 31

Ability to assist counsel

Some statutes using the terms above have been interpreted to mean the inability to assist counsel or to understand the legal proceedings. 32 As discussed further below, in California, the courts consider the California Penal Code standard which focuses on the person's ability to effectively assist and understand counsel.

Example of the application of "mixed" standards

These examples show that different statutes may use different terms in considering the need for a GAL. What further complicates the landscape is that courts interpreting these terms have sometimes created additional nuances or tests. California statutes and courts provide a telling illustration of this point.

Probate courts in California have exclusive jurisdiction over trust matters, and concurrent jurisdiction over proceedings involving trustees and third parties. 33 Therefore, it is common for civil claims to be heard along with probate claims. 34 As there are parallel, but distinct, GAL appointment statutes in both the California Code of Civil Procedure and the Probate Code, however, it is not always clear which code section applies when civil and probate matters are being adjudicated in the same court.

On the one hand, the California Supreme Court has specifically held that the civil procedure code sections applicable to the appointment of a GAL do not apply to probate proceedings. 35 The court recognized the possibility that if both the probate code and the civil procedure code were to apply, "it would be possible to have two representatives" in the same proceedings, "neither of whom would be subordinate to the other." 36

Conversely, in a later case decided by the California Court of Appeals, the Estate of Corotto 37 expressly provides that the California Probate Court has the power to appoint a GAL pursuant to the non-probate GAL provision in Code of Civil Procedure §§372-373.5. While the standards for appointment are articulated differently in the two statutes, there is no statutory distinction regarding what the GAL must do once appointed, so a court seems unlikely to appoint a "civil" GAL and a "probate" GAL in a mixed probate/civil case (such as a trust contest/elder abuse action). 38

The analysis set forth by the California Court of Appeals in In re Sara D. 39 is also an instructive case because it shows the divergent evidentiary standards courts may employ to determine when the appointment of a GAL for an adult is necessary. There, the court indicated the standard for determining incompetency on a motion for appointment of a GAL is set by either California Probate Code §1801 (regarding the appointment of a conservatorship) or California Penal Code §1367, yet did not state which one was controlling. 40 Whereas the focus of the California Penal Code is on the adult's ability to assist counsel and make decisions with respect to the litigation at hand, the California Probate Code §1801 is much more expansive because it deals with the standard to appoint a representative to effectively care for the person or estate.

The California example shows that a practitioner must takes steps in any jurisdiction to understand which statute or statutes might apply, and how those statutes have been interpreted.

As previously stated, unlike situations involving minors, the appropriateness of the appointment of a GAL for an adult is much more uncertain, especially when there had not been an official adjudication or determination of diminished capacity or incompetence. Moreover, this can be especially challenging if the adult's capacity is more of a shifting continuum, depending on the time of day, the identity of the speaker, or stress, as opposed to a constant state (i.e., being a minor). Courts have recognized that this "may be because most cases in which a GAL is appointed involve consensual appointments or situations in which a GAL is required as a matter of law; e.g., when a minor is a party to a lawsuit." 41 To that end, the appointment process is a case-by-case approach that requires careful analysis of the facts in front of the court.

Preparing for the proceedings

Once the practitioner has fully investigated the applicable legal requirements, the final step is to analyze and gather the necessary evidence to support or oppose the appointment. As is discussed above, depending on the jurisdiction, various different statutes may apply regarding the appointment of a GAL, which may overlap with the rules governing the appointment of a general guardian or conservator. And, in some cases, there may be multiple GAL statutes that need to be considered. Therefore, it is important to understand which rule or rules apply and then identify any potential conflict between all of the statutes. However, there are some general tips for a practitioner to consider, and traps to avoid, when crafting the GAL legal strategy.

Issues to consider when the parties have stipulated to the appointment of a guardian

In many cases, counsel in a matter will all agree that a GAL is necessary. If the consent of the adult can be obtained, very little evidence may be required before the court will make the appointment. That does not, however, mean that the court will automatically appoint one.

In light of the due process concerns, a practitioner needs to consider what is needed in the record to support the order. If a statute requires a finding of "incapacitation," for example, a court might require sworn testimony, medical records, or other admissible evidence to support a finding of "incapacitation." Other courts, however, may be satisfied with simply speaking with the proposed ward on the record and having the judge confirm that the witness either is unable to understand the proceedings or consents to and would benefit from a guardian. In considering a plan for obtaining a non-contested appointment of a GAL, the following items should be considered:

- *Choice of guardian.* The obvious first inquiry is to ask what the proposed ward wants with respect to a guardian. In most cases, it is highly unlikely that a proposed ward would want a complete stranger handling important decisions in the litigation. The credentials of the proposed GAL may be limited in some states or in certain types of proceedings, such as jurisdictions where the GAL must be a licensed attorney. 42 Be aware if there is any statutory priority for the appointment as there are in some states with the appointment of an executor or administrator of an estate. If there are no statutory restrictions on the identity of the GAL, the practitioner should, obviously, consider what the proposed ward wants and whether the parties can come to a consensus candidate who is willing to serve and will likely be acceptable to the reviewing court. Last, but not least, the practitioner should also consider whether the proposed GAL is truly disinterested and can act in the best interest of the proposed ward. 43
- *Scope of guardianship.* It is also important from the outset to define the scope of the guardianship. In many cases where the protected adult has some capacity to act independently, the parties will agree to stipulate to the imposition of a GAL only because it is appropriately limited. Be sure to look to see if the applicable jurisdiction has restrictions or provides guidance on the scope of the appointment. For example, the Washington state courts provide the scope of a GAL's duties are limited by the court. 44 Specifically, a GAL must comply with the court's instructions as set out in the order appointing a GAL, and may not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a GAL obtains additional instruction, clarification, or expansion of the scope of such appointment.
- *Available medical evidence.* Medical records, if available, are an obvious source of critical information. If the proposed ward has a history of mental illness, mental disability, or even physical disability, all of this information is most likely to be documented by a medical professional that a court is likely to find persuasive in its GAL appointment determination. However, because issues affecting capacity may be difficult to diagnose or otherwise may go undiagnosed because the proposed ward does not regularly see a doctor, the practitioner may need to consider requesting the client submit to a mental or medical examination. The practitioner may also want to consider if there have been prior court findings that may be relevant. A practitioner should take special care to consider the privacy interests of the protected person (including statutes that might require redaction or sealing of certain information) when determining what and how materials are submitted to the court to minimize unnecessary disclosure of private medical details in the public record when possible.
- *Other sworn testimony.* Because no man is an island, other sources of critical information for the appointment of a guardian will be friends, family members, caregivers, and other counsel. Although the practitioner may speak with or meet the client often enough, these other people may have additional insight into the client's daily life and may be able to attest to changes in behavior that may convince a court a GAL is warranted. If the practitioner plans to offer testimony about his or her client, he or she should consider the privilege and ethical implications of any proposed testimony.
- *Consequences of an incapacity finding, if one is made.* One other important consideration is whether there could be any adverse consequences to the client if there is a finding of incapacity and a GAL is appointed. For example, if there are adverse parties involved in the legal proceedings, could one party use the client's incapacity determination against the client to invalidate an existing contract? Moreover, because people may be more familiar with the concept of a conservator or a general guardian, clients may run the risk of an erroneous perception that the proposed ward of a GAL appointment is unable to do tasks on his or her own outside of the judicial proceedings. In other words, although the appointment of the GAL may appear to be limited to protecting the rights of the client with respect to that specific legal proceeding, the practitioner must think broadly to protect the client's rights beyond just the issues at hand. 45 Regardless, the practitioner must counsel the client if there are any perceived risks associated with such an appointment.

Additional issues to consider when seeking a guardian ad litem

If consent is not obtained or if the party otherwise opposes such an appointment, courts will likely require more evidence or take additional steps to address due process concerns. If the applicable standard is incompetency or incapacity or mental disability, that standard may not be easily ascertained without sworn, admissible medical or other expert testimony. If the matter is time sensitive, the court may also impose a temporary GAL while permitting additional time for the party opposing the request to make his or her case that a GAL is not needed going forward.

In addition to the factors listed above, in creating a strategic plan to obtain an order appointing a GAL in a contested hearing (either by the

proposed ward or by a third party), the following issues should also be considered:

- *Notice issues.* Depending on the jurisdiction, there may be specific notice requirements, not only to the proposed ward but other interested persons as may be defined by statute.
- *Ancillary proceedings.* The location of the proposed ward is also a consideration if he or she is not in the same state or jurisdiction as the litigation at hand.
- *Seek medical or mental health records.* The practitioner should also consider seeking existing medical and mental health information. For example, in ongoing litigation a practitioner could subpoena updated medical records, particularly if capacity is already an issue in a trust contest or elder abuse matter. The attorney could also take the deposition of the proposed ward's treating physicians.
- *Create new evidence.* If the attorney is friendly to or even representing the proposed ward, he or she could ask the adult to consent to a mental examination. If the proposed ward is unwilling to consent to a mental examination, in some jurisdictions there is a means to seek a court order compelling an examination. 46 In other jurisdictions, a mental examination may be automatic once the issue of a GAL has been presented to the court. 47
- *Sworn testimony.* The practitioner should also consider whether he or she can obtain sworn testimony from friends and family providing examples of how the proposed ward is not able to protect his or her own interests in legal proceedings. Even though medical testimony is relevant, on its own it is not always conclusive and it may be difficult to obtain in jurisdictions that do not allow a forced mental examination. A practitioner seeking the appointment of a GAL should be prepared to address the argument that the proposed protected person has "good days and bad days," or "understands enough." The challenge of demonstrating that a person is incapacitated or afflicted to a sufficient degree to merit appointment may sometimes be addressed by providing declarations and sworn testimony from third parties (or non-privileged testimony from counsel) demonstrating the problem as opposed to simply offering conclusions or argument.
- *Understand the opposing party's position.* Sometimes the party opposing the appointment is doing so because of a component of the request, such as the identity of the proposed guardian or the scope of the proposed guardianship, and is actually not opposed to the idea of providing the afflicted person assistance. It is worth exploring the concerns to see if they can be addressed, as it is typically easier to obtain an order appointing a guardian via a joint request or unopposed motion rather than seeking an appointment over the objections of a party.

Opposing a motion to appoint a guardian ad litem

If the practitioner is faced with a motion to appoint a GAL and believes it should be opposed, a few additional issues should be considered, above and beyond the points discussed in the two preceding sections.

- *Due process.* Critically, the Fourteenth Amendment to the U.S. Constitution clearly guarantees that no state "deprive any person of life, liberty, or property, without due process of law." 48 As courts have recognized, the appointment of a GAL for an adult presents very serious due process concerns and requires either the consent of the adult or notice and a hearing at which it is established that the adult does not understand the nature of the proceedings and cannot assist his or her counsel in the litigation. 49 A key component of a practitioner's opposition strategy is to demonstrate how appointing a GAL will deprive the proposed protected person of his or her independence and liberty.
- *Testimony by the proposed ward.* If appropriate, the court will likely find it compelling to hear directly from the proposed ward about why he or she does not want a GAL. Generally, at the hearing, the court or counsel must explain the purpose of a GAL, why counsel believes the appointment is necessary, and what authority the individual will cede to the GAL. 50 In some states, the court may hold a hearing to appoint a GAL without any preliminary hearings or prior factual findings. 51 In other words, a court may initially determine an individual's lack of legal capacity to make decisions based on application for appointment and supporting declarations. 52 The adult's advocate opposing appointment should insist, if appropriate, that the proposed ward be given an opportunity to respond. At a minimum, however, the court should make an inquiry sufficient to satisfy it that the person is, or is not, competent; i.e., whether the person understands the nature of the proceedings and can assist the attorney in protecting his or her rights and, the court's decision should be stated on the records. 53 The failure to follow even these basic procedures can be considered a denial of the adult's due process rights. 54
- *Oppose invasive discovery or examinations.* For attorneys representing the proposed ward, a key method to thwart the unwanted imposition of a GAL is to prevent the requesting party from obtaining private information in the first place. If current capacity is not at issue in the current matter, or has not been put at issue by the proposed ward, in some jurisdictions the ward's attorney can defeat requests for medical examination and quash requests for medical records based on privacy grounds. For example, an advocate may argue that a proposed ward's current capacity (because that is all that can be determined at the time) is not relevant to the subject of the trust litigation (i.e., undue influence or lack of capacity) for past acts, and, therefore, a mere allegation regarding a need for a GAL is, by itself, insufficient grounds to invade the proposed ward's medical and personal privacy.
- *Counsel's role in safeguarding the adult.* The role of an attorney is first and foremost to be a client's advocate. It is no coincidence that guardians are sometimes referred to as "special advocates," similar to how attorneys are sometimes called advocates. Therefore, another method to defeat a motion for the appointment of a GAL is to note that the proposed ward already has an advocate who is seeking and working towards the client's best interests.

When client with diminished capacity does not want a guardian.

An attorney's seeking the appointment of a GAL for a client (especially an elderly client where diminished capacity is of increasing concern) must be balanced with the attorney's ethical duty to the client. The ABA comments to the Model Rules note that "the normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." 55 When the client suffers from diminished mental capacity, however, the rules also recognize that an ordinary attorney-client relationship is not possible. Even more, the Model Rules of Professional Conduct recognize that exigent circumstances may exist requiring the appointment of a general guardian. 56

A practitioner representing a party with some capacity must, when possible, inform the client about the role of a GAL and discuss whether the client has a position on the imposition of a GAL. Once armed with the client's position and the attorney's own view on whether a GAL is necessary,

if there is a conflict, the attorney should consult the relevant state's rules of professional conduct to make sure that he or she is representing matters to the court as an advocate in a manner consistent with his or her ethical duties.

Conclusion

When dealing with clients where capacity may be of growing concern, it is important that the practitioner understand what the GAL process entails, and how it differs both from a conservatorship/general guardianship and from the standard role as attorney. A counselor for the adult with diminished capacity or cognitive difficulties needs to both understand the statutes at play and how to strategically and ethically address the rules and evidentiary standards.

A GAL represents a serious deprivation of liberty and should not be raised with the court without first understanding what the GAL process entails and how that will affect the person the process is meant to protect. Whether seeking an appointment or defending against one, the primary concern should be for the adult over which the appointment is sought to ensure not only that his or her due process rights are protected but that the client's wishes and wants are being addressed as well.

FOOTNOTES

1 The term "baby boomers" generally refers to the demographic group born during the post-World War II era, namely the years between 1946 and 1964.
2 See "www.aoa.acl.gov/Aging_Statistics/index.aspx":www.aoa.acl.gov/Aging_Statistics/index.aspx.
3 See "www.uniformlaws.org/ActSummary.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act":www.uniformlaws.org/ActSummary.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act.
4 See N.J.S.A. 3B:12-24 and N.J.S.A. 3B:12-25.
5 See, e.g., Conn. Gen. Stat. § 45a-654 (appointment of a temporary conservator); Cal. Prob. Code §1801; Ga. Code Ann. §29-5-1 ("The court may appoint a conservator for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property."); Kan. Stat. Ann. §9-3058; Mo. Rev. Stat. §475.050; W. Va. Code §44A-2-8 ("Any person who has sufficient capacity to form a preference may at any time nominate any individual or entity to serve as his or her guardian or conservator.").
6 See, e.g., Unif. Probate Code §5-401 (Rev. Art. V), 8(III) U.L.A. 83 (2013) (requiring that the court find the respondent "is unable to manage property and business affairs....").
7 The majority of states use terms like "incapacitated" or incompetent" to refer to individuals who, by reason or mental or physical deficiency, are unable to independently manage their affairs. See Demakis, "State Statutory Definitions of Civil Incompetency/Incapacity: Issues for Psychologists," 19 Psych. Pub. Pol. and L. 331 (August 2013) (providing a chart of the definitions of incompetency or incapacity in various state statutes).
8 Cal. Prob. Code §§1800 et seq.
9 Cal. Prob. Code §1801(b).
10 Although outside the scope of this article, conservatorship procedures are often quite involved and differ from state-to-state. Special care should be taken to understand the procedures, evidentiary standards, and evidence necessary to initiate and complete the process.
11 See e.g., Cal. Prob. Code §§29 and 30; see also Poaster v. Superior Court, 20 Cal. App. 4th 948 (1993); see also N.Y. Surr. Ct. Proc. Act Law §403 (discussing the appointment of a guardian ad litem, but providing no definition of the same).
12 See, e.g., Federal Rule of Civil Procedure 17(b) and Mass. Gen. L. Ch. 190B, §1-404.
13 See, e.g., Del. Code Ann. tit. 31, §3605; Fla. Stat. Ann. §393.12; Okla. Stat. tit. 30, §3-106.1; Ind. Code Ann. §31-15-6-5.
14 A guardian ad litem may be an investigator, evaluator, or a "next friend." See Elsen, "Guardian Ad Litem," chapter 10 of Family Law Advocacy for Low and Moderate Income Litigants, 2nd edition (MassLegal Services, 2008), available at "www.masslegalservices.org/system/files/library/Chapter+10+FinalCompressedA1.pdf":www.masslegalservices.org/system/files/library
15 See also "www.maine.gov/dhhs/oads/docs/qabook.pdf":www.maine.gov/dhhs/oads/docs/qabook.pdf.
16 See, e.g., J.W. v. Superior Court, 17 Cal. App. 4th 958 (1993).
17 See, e.g., In re Interest of A.M.K., 227 Neb. 888 (1988).
18 See, e.g., Ala. Sup. Ct. 17(d), Ariz. R. C. P. 17(i), Ark. R. Civ. P. 17, Cal. Code Civ. Proc. §372, Miss. R. Civ. P. 17©, Or. R. Civ. P. 27(B).
19 See N.Y. Civ. Prac. Act §207.
20 Specifically, § 372 of the Code of Civil Procedure provides that "[w]hen a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case." The manner of appointment is governed by Code of Civil Procedure §373. Whereas, the California Probate Code actually has three specific statutes that directly or indirectly address the Probate Court's authority to appoint a GAL in legal proceedings before it. The broadest enabling statute is Probate Code §1003.
21 See "www.maine.gov/dhhs/oads/docs/qabook.pdf":www.maine.gov/dhhs/oads/docs/qabook.pdf.
22 See e.g., Wash. Rev. Code Ann. §11.88.090(5) (Listing the various duties required by a GAL, including certain investigation and reporting requirements).
23 There are also standards for the appointment of a guardian ad litem for minors in family court proceedings, which is beyond the scope of this article.
24 See, e.g., Ark. Code Ann. §28-65-101; Conn. Gen. Stat. §45a-132; Wash. Rev. Code Ann. §4.08.060; N.C. Gen. Stat. §35A-1217.
25 Demakis, supra note 7.
26 Id.
27 See, e.g., Utah Rules of Prof'l Conduct Rule 1.14 (regarding representation of clients with "diminished capacity").
28 See, e.g., Va. Code Ann. §8.01-9; Ky. Rev. Stat. § 353.330; Colo. Rev. Stat. §19-1-111.
29 Va. Code Ann. §8.01-9.
30 See, e.g., N.D. Cent. Code §28-03-04; W. Va. Code §56-4-10.
31 See also Beckley Nat'l Bank v. Boone, 115 F.2d 513 (CA-4, 1940) (Interpreting the West Virginia statute, the court note that "°ld age, weakening of the memory and understanding, and occasional strange and eccentric acts are not of themselves sufficient evidence of incapacity. The test is the ability to know the nature, character and effect of one's acts, and to understand the subject matter of business transactions in which one is engaged.")
32 See, e.g., Cal. Penal Code §1367.

33 Cal. Prob. Code §17000(b).
34 Id.
35 See Carpenter v. Superior Court of San Joaquin County, 75 Cal. 596 (1888).
36 Id.
37 125 Cal. App. 2d 314 (1954).
38 It should be noted, however, that although the Estate of Corotto has not been specifically overturned in light of the enactment of Probate Code §1003, that case was decided prior to 1991, when Probate Code §1003 became effective. The Law Revision Commission comments to Probate Code §1003 also note that these Civil Procedure Code sections do not apply in probate proceedings, given that there is a specific Probate Code section dealing with the appointment of a guardian ad litem. See also Cal. Prob. Code §1000 (providing that the general rules of the Code of Civil Procedure do not apply when there is an applicable and specific Probate Code provision).
39 87 Cal. App. 4th 661 .
40 Id. However, the standard under California Probate Code §1801, regarding the appointment of a conservator, is much more expansive.
41 In re Sara D., supra note 39.
42 Some states such as Florida, Pennsylvania, Colorado, and Wisconsin have very specific rules that in certain contests, such as proceedings involving children, the guardian ad litem must be an attorney licensed in that state. See, e.g., Wis. Stat. Ann. §757.48; 42 Pa. Cons. Stat. Ann. §6311.
43 See Tamara L.P. v. Dane County, 503 N.W.2d 333 (Wis. Ct. App. 1993) (the GAL shall function independently and in the "best interests" of the proposed ward or alleged incompetent).
44 "A guardian ad litem shall comply with the court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment." See "www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=supgalr2&pdf=1":www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=supgalr2&pdf=1.
45 Interestingly, it should also be noted, that some states, such as New York, may not even make a capacity determination when appointing a GAL, but rather focus on the belief by the judge that the person cannot protect his or her own rights or interests. See New York Housing Courts GAL Litigant Brochure at "http://nycourts.gov/courts/nyc/housing/pdfs/GAL-LitigantBrochure_EN.pdf":http://nycourts.gov/courts/nyc/housing/pdfs/GAL-LitigantBrochure_EN.pdf.
46 See e.g., Cal. Civ. Proc. Code §2032.310; Tex. Prob. Code §687(b).
47 See e.g., Miss. Code Ann. §93-13-255.
48 U.S. Constitution, amend. XIV, section 1.
49 See e.g., In re Jessica G., 93 Cal. App. 4th 1180 (2001). See, e.g., Briggs v. Briggs, 160 Cal. App. 2d 312 (1958) ("The statutes regarding appointment of guardians ad litem were enacted to protect minors and insane and incompetent persons-not to preclude them from their legal rights.").
50 Id.
51 Sarracino v. Superior Court, 13 Cal. 3d 1 (1974).
52 Id.
53 See In re Jessica G., supra note 49. See also In re Sara D., supra note 39; In re Enrique G., 140 Cal. App. 4th 676 (2006).
54 See In re Enrique G., supra note 53.
55 See "www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_dim
56 See Model Rules of Prof'l Conduct R. 1.14.