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### In re Guardianship of Jones, 139 Nev. Adv. Op. 57 (Dec. 21, 2023)

Collin Weires

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## **Summary**

The Court addressed several issues related to the appointment and compensation of a Guardian Ad Litem (GAL) for Kathleen June Jones (June). First, the Court held that June waived any claim regarding the district court’s failure to state the GAL’s hourly rate in the appointment order because she did not raise it below, and that any error was harmless. Additionally, the Court found an error in the district court’s conclusion that it was required to appoint an attorney as GAL, but found this to be harmless as well, due to the absence of any qualified nonattorney. Further, the Court declared GALs as fiduciaries, who can provide services also performed by attorneys, and introduced a factor test to determine the appropriate fee rate. Finally, the Court upheld the district court’s award of \$400 per hour, emphasizing the consideration of Brickfield’s experience, qualifications, services rendered, and the complexity of the case.

## **Background**

Robyn Friedman and Donna Simmons initially served as temporary guardians over their mother Kathleen June Jones (June). Their temporary guardianship was followed by their sister Kimberly’s appointment as guardian. During Kimberly’s guardianship, there was a substantial amount of documents and hearings conducted into the circumstances underlying the guardianship proceedings. A major issue between the parties concerned Robyn’s and Donna’s ability to obtain communication, visits, and vacation time with June. Subsequently, the District Court appointed respondent Elizabeth Brickfield, an attorney, as Guardian Ad Litem (“GAL”) for June.

The Court then directed Brickfield to schedule the opportunities for June to communicate and visit with her daughters. The Court also tasked Brickfield with addressing whether the guardian has an obligation to facilitate continued communication based on June’s current care needs. Additionally, Brickfield was asked to assist in relocating June to California. Moreover, the Court noted that each of these issues for Brickfield was interrelated and complex.

The compensation order stated that the guardian ad litem could request fees from the guardianship estate or a third party, following NRS 159.344(3). Five days after the order was filed, Brickfield filed notice of intent to seek attorney’s fees and costs, listing her hourly rate as \$400. June objected, proposing a lower hourly rate. About 6 weeks later, Brickfield submitted a report outlining her work, conclusions, and recommendations in June’s best interest. She then filed a petition seeking approval of her fees and costs—asking for \$5713.50. The Court then entered a written order approving Brickfield’s requested fees and costs.

## **Discussion**

### ***Any error in the district court’s order appointing the GAL is waived***

The issue arose from the non-compliance with NSRG 8(I), which mandates the district court to “state the hourly rate to be charged by the guardian ad litem” in the appointment order. June argued that this failure rendered the district court without the authority to grant fees to the GAL. Moreover, she argued that the district court failed to reconcile this mistake by amending

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<sup>1</sup> By Collin Weires.

its appointment order after receiving Brickfield's notice of intent to seek fees. Therefore, the awarding of Brickfield her attorney's fees was a reversible error.

In contrast, respondents asserted that June waived her argument that the order appointing the GAL does not conform with NSRG 8(I) because she failed to raise this claim below. Moreover, respondents asserted that any error in failing to state the GAL's exact rate was not prejudicial and therefore was not a reversible error. The Court accepted both of respondents' arguments.

In agreeing with respondents, the Court relied on the general rule that "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."<sup>2</sup> The Court found that June waived any argument that the district court order did not satisfy the formalities established in NSRG 8(I) when she failed to raise the issue in any oppositions or at any hearings. Moreover, the Court stated that any error in not specifying the GAL's permissible hourly rate in the order of appointment was harmless because there was not a substantial negative impact on the proceedings.

***The district court erred in concluding that it must appoint an attorney to serve as a GAL, but the error was harmless***

In addressing June's objections to Brickfield's motion for fees, the district court concluded that it could appoint a nonattorney as GAL only if a court-approved volunteer advocate program was established under NRS 159.0455. June argued that the Court erred in concluding this, while respondents argued that even if the court could have appointed a nonattorney outside of a volunteer advocate program, no other qualified person was suggested to the court and Brickfield was uniquely qualified for this position. The Court once again agreed with the respondents.

Under NRS 159.0455(3) if a court-approved volunteer advocate program for guardians ad litem has been established in a judicial district, a court may appoint a person who is not an attorney. On the other hand, NSRG 8, which governs GALs appointed pursuant to NRS 159.0455, specifies in subsection H that a guardian ad litem may be a trained volunteer from a court-approved advocate program; an attorney, or any other person that the court finds has appropriate training and experience. June argues these are in contradiction on the topic of who a court may appoint as GAL. The Court said there is no conflict because NSRG 8(H) creates a complete list of people who could be eligible to serve as GAL, while NRS 159.0455 clarifies that the court may appoint a nonattorney if a court-approved volunteer advocate program had been established.

However, the Court found that the district court erred in interpreting the statute as requiring the appointment of an attorney where there is no court-approved volunteer program because this statute does not create a necessary condition. Moreover, NSRG 8(H) provides three types of individuals: the court can appoint an attorney, a volunteer from a volunteer advocate program, and any other person that the court finds has appropriate training and experience. The district court did not talk about the last grouping and therefore erred in concluding an attorney was necessary.

Finally, this error was harmless because there was no evidence in the record that the district court was aware of any nonattorney with the appropriate training and experience to be considered as the GAL and Brickfield was specifically appointed due to the complex nature of the case and her unique qualifications for the position.

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<sup>2</sup> *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, (1981).

### ***The district court did not abuse its discretion in awarding the GAL's fees***

June argues that the district court should not have awarded Brickfield fees at her attorney rate because a GAL performs fiduciary services, not legal services. In contrast, respondents argue that the district court's fee order is supported by substantial evidence that Brickfield's fees as a GAL were appropriately paid. However, NRS 159.344(5)(g) requires a court to determine the nature of the services performed in awarding compensation by distinguishing between services that require an attorney, and fiduciary services. The Court concludes that while GALs act as fiduciaries in Nevada, the record contains substantial evidence supporting the district court's award of Brickfield's requested fees.

#### ***GALs are fiduciaries***

The Court announces that GALs are fiduciaries. A fiduciary relationship is one "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation[ship]." Restatement (Second) of Torts § 874 cmt. a (Am. Law Inst. 2008). GALs are fiduciaries because the scope of their duties are directed by the court for the benefit of the protected person. However, the Court makes clear that this distinction does not mean that a GAL cannot perform services that require an attorney.

The Court then takes the time to clarify how the GAL's actions in a guardianship proceeding bear on the type of fees they may seek. The Court adopts the holding from *Hull v. United States*, which states that the GAL's role determines whether its expenses are taxed as costs or attorney's fees. If GALs perform the type of services also performed by attorneys, and they have commensurate experience as an attorney, GALs may be compensated at an attorney rate for their work. In determining this, the court announces a factor test which looks at: (1) the experience and qualifications of the GAL, (2) the nature and complexity of the work asked of the GAL, (3) the work actually performed, (4) the result of the GAL's work, and (5) any other factors the court finds to be relevant in a particular case.

#### ***The award of Brickfield's fees at a rate of \$400 per hour is reasonable***

The Court adopted an abuse of discretion standard for an award of fees to a GAL as a fiduciary. While the district court discussed each enumerated factor in NRS 159.344(5) when evaluating Brickfield's fee request, the Court stated that this is not applied to GAL fees, but rather only to attorney's fees. And that the appropriate standard is enumerated above.

Further, June argued that the fiduciary rate was not equivalent to the attorney rate. However, the Court determines based on the factors enumerated above that the district court did not abuse its discretion in awarding Brickfield \$400 per hour. The district court did not abuse its discretion because it reviewed Brickfield's experience, her qualifications, the services she provided for June, the invoices submitted, and the benefits June received. It also repeatedly noted the complexity of the visitation petition and the need for someone with extensive guardianship experience.

### **Conclusion**

Although the district court erred in not including Brickfield's rate in the order or appointment, June waived this argument by failing to raise it below. Likewise, the district court's error in concluding that an attorney must be appointed, was harmless. Finally, Brickfield was entitled to fiduciary fees, however, the district court did not abuse its discretion in awarding her fees in an amount similar to her attorney's fees because of her unique qualifications for this complex case. The Court affirms the district court's order awarding the GAL fees.

