

IN THE SUPREME COURT FOR THE STATE OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP
OF THE PERSON AND ESTATE OF
KATHLEEN JUNE JONES, PROTECTED
PERSON.

KATHLEEN JUNE JONES,

Appellant,

vs.

ROBYN FRIEDMAN; DONNA SIMMONS;
AND ELIZABETH BRICKFIELD,
GUARDIAN AD LITEM FOR KATHLEEN
JUNE JONES,

Respondents.

Supreme Court No. 84655

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Linda Marquis, District Judge
District Court Case No. G-19-052263-A

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Kathleen June Jones, is an individual.

Legal Aid Center of Southern Nevada, Inc., appeared on Appellant's behalf in the district court, and is representing her on appeal.

Dated: September 15, 2022

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRS 159.375(5) to consider this appeal. Appellant appeals from the District Court's Findings of Fact, Conclusions of Law, and Order Granting Guardian Ad Litem Fees (hereinafter referred to as "the March 18, 2022 Order"), which awarded fees to the attorney GAL at her typical attorney rate. Notice of Entry of Order for the order appealed from was filed on March 31, 2022, and Appellant's Notice of Appeal was filed on April 28, 2022.

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises an issue of statewide importance and an issue of first impression. Namely, the issue of whether a guardian ad litem (hereinafter abbreviated as “GAL”) appointed in an adult guardianship case can collect attorney’s fees and costs at their attorney rate from the protected person’s estate for their fiduciary services as a GAL. While NRS 159.0455 provides the district court with the authority to appoint a GAL and Statewide Rules for Guardianship Rule 8 describes the scope of the GAL’s appointment, there is minimal guidance regarding the rate for fees and costs that the GAL can collect from the protected person’s estate.

STATEMENT OF THE ISSUES

1. Did the district court err when it failed to include a rate for the GAL's services in the order appointing the GAL?
2. Did the district court misinterpret and misapply NRS 159.0455 and Statewide Rules of Guardianship Rule 8?
3. Did the district court err when it awarded the GAL attorney's fees and costs at her attorney rate of \$400 per hour for her fiduciary services as a GAL?

STATEMENT OF THE CASE

The Appellant, Kathleen June Jones (hereinafter referred to as “June” or “Appellant”), appeals from the district court’s March 18, 2022 Order that awarded the GAL \$5,713.50 in fees and costs.

The catalyst for the order at issue in this case was the Verified Petition for Communication, Visits, and Vacation Time with Protected Person filed on December 30, 2020. AA 0001–34. June opposed that petition on January 25, 2021. AA0044–65. However, the district court eventually appointed a GAL. AA00146–52. The GAL filed a notice of intent to seek attorney fees and costs from June’s estate, which June opposed. AA0156–59; AA0160–66. The GAL filed her Report to the Court on March 29, 2021. AA0184–89.

Later, On October 27, 2021, the GAL filed her Petition for Approval of Guardian Ad Litem Fees and Costs, which sought \$5,710.00 in fees and \$3.50 in costs. AA0319–32. June opposed the petition, mainly because the GAL was seeking fees and costs at her attorney rate of \$400 per hour for her work as a GAL. June requested that the district court apply a lower rate in awarding fees and costs. AA 0333–43. Nonetheless, the district court awarded the GAL the full amount of her requested fees and costs.

STATEMENT OF THE FACTS

I. Procedural History

This guardianship case commenced back on September 19, 2019 when Respondents, Robyn Friedman (hereinafter referred to as “Robyn”) and Donna Simmons (hereinafter referred to as “Donna”), petitioned ex parte for guardianship over June. The district court hastily granted guardianship ex parte four days later, but once it heard from June, the district court learned that June had already executed a Power of Attorney naming her daughter Kimberly as her agent. It became clear that June preferred Kimberly assisting her rather than Robyn or Donna. But rather than terminate the guardianship for less-restrictive alternatives, the district court at least acknowledged June’s preference, removed Robyn and Donna as temporary guardians, and appointed Kimberly as successor guardian on November 25, 2019.

In the years following Kimberly’s appointment, Robyn and Donna fought to dictate June’s guardianship in many ways. This led to the Verified Petition for Communication, Visits, and Vacation Time with the Protected Person (the “Visitation Petition”) filed by Robyn and Donna on

December 30, 2020. AA0001–34. The Petition sought to dictate how and when June would communicate and visit with relatives.

Although June opposed the Petition outright and made her wishes known to the district court, the district court nonetheless eventually appointed a GAL on February 16, 2021 to issue a report regarding issues relating to the communication and visitation issue. AA0146–52. June opposed the GAL’s appointment, and therefore, also opposed the GAL seeking fees and costs from her estate. AA0160–66. The GAL, who is an attorney, filed notice that she would be seeking fees and costs at her attorney rate for her fiduciary services as a GAL on February 22, 2021. AA0156–59. On March 29, 2021, the GAL filed a four-page report with the district court after conducting one interview with June and making a couple phone calls to June’s family members. AA0184–89. Later, on October 27, 2021, the GAL requested \$5,710.00 in fees and \$3.50 in costs, which June opposed. AA0319–32. Nonetheless, the district court awarded the GAL the full amount of her requested fees and costs in the district court’s March 18, 2022 Order. AA0346–61.

II. Background and Facts

On December 30, 2020, Robyn and Donna filed their Visitation

Petition. AA0001–34. In that petition, Robyn and Donna requested that the district court set a visitation schedule or otherwise dictate visitation over June. Not only that, they also requested that the parties use Talking Parents when discussing visitation regarding June, who is an adult; that June be interviewed by and participate in mediation with someone from the Family Mediation Center; and that the district court itself canvass June regarding her wishes (even though June has court-appointed counsel who advocates for her wishes).

On January 25, 2021, June filed her opposition to The Visitation Petition. AA0044–65. In that opposition, June made clear that she did not want any restrictions on her ability to manage her personal relationships. June made clear throughout the litigation leading up to the evidentiary hearing that she simply wanted the autonomy, like any other adult, to dictate when and how family members could communicate and visit with her. The district court held a hearing on the Visitation Petition, on February 11, 2021. AA0144–45. Rather than June’s objection to *any* visitation schedule or other restrictions ending the dispute, the district court decided to, among other things, appoint a GAL for June, to which June also objected. On February 16, 2021, the district court

entered its Order Appointing Guardian Ad Litem. AA0146–52. However, that order does not specify what rate, if any, the GAL could charge for her fiduciary services. AA0146–52.

On February 22, 2021, the GAL filed her Notice of Intention to Seek Attorney’s Fees and Costs from Guardianship Estate Pursuant to NRS 159.344(3), which stated that she would be seeking her typical attorney rate of \$400.00 per hour for her services as GAL in the case. AA0156–59. Soon after, on February 26, 2021, June filed her Notice of Objection to Guardian Ad Litem’s Written Notice of Intention to Seek Attorney’s Fees and Costs from Guardianship Estate Pursuant to NRS 159.344(3). AA0160–66. June did not think that she should have to pay for a GAL that she did not want and that was appointed based on Robyn and Donna’s request. Moreover, June objected to the GAL’s \$400.00 per hour rate and argued that a lower rate was closer to the market rate for GAL fiduciary services. AA0162.

A little over a month after being appointed, the GAL filed a four-page report. AA0184–89. According to the GAL’s report, she reviewed pleadings relevant to the visitation and communication issue; met with June by telephone on February 24, 2021 and in person on March 25, 2021;

met individually with June's five children by telephone/Zoom; and held telephone calls with counsel for Kimberly, June, and Robyn/Donna. AA0186. The GAL's report included multiple conclusions that had already been expressed to the district court several times, like: June wanting to visit and communicate with her children and grandchildren, and June's children and grandchildren wanting to visit and communicate with June. AA0187. The report also concluded that June "lacks the ability to manage, initiate or plan these communications and visits," however, this appeared to only be based on the handful of times the GAL briefly observed June, and not on any new medical evidence presented to the GAL. AA0187. Finally, the report made two conclusions that were contrary to June's expressed wishes and eventually contributed to the removal of June's preferred guardian, which were: that Kimberly has not encouraged or facilitated visits and communications, and that Kimberly is unlikely to encourage and facilitate visits without court supervision and oversight. AA0187.

Following that report, the GAL attended, but minimally participated, in a few hearings, some of which had nothing to do with the visitation and communication issue to which her appointment was

limited. Later, on April 23, 2021, Robyn and Donna filed a second petition for visitation that specifically requested time with the protected person on Mother's Day of that year, to which June also objected. AA0253–73. In a desperate attempt to put an end to the visitation issue, June proposed her own visitation schedule so that she could have some say over what restrictions would put in place. AA0285–306. Rather than approve June's schedule, the district court ordered an evidentiary hearing on the visitation issue. AA0310–11. The evidentiary hearing took place on June 08, 2021 with most of the hearing consisting of the district court hearing testimony from June's family members. The GAL did not testify or meaningfully participate during the evidentiary hearing.¹

Eventually, the GAL filed her Petition for Approval of Guardian Ad Litem's Fees and Costs on October 27, 2021. AA0319–32. In that Petition, the GAL requested compensation for services provided from February 16, 2021 to October 26, 2021 totaling \$5,710.00 in fees and \$3.50 in costs.

¹Because the GAL did not testify or meaningfully participate in the evidentiary hearing, June has elected to omit the 365-page transcript for the June 08, 2021 evidentiary hearing for the sake of brevity considering that it is not relevant to the GAL's fees and costs requested, and no billing entry appears for this hearing in the GAL's petition.

The GAL requested compensation at an hourly rate of \$400.00 for her services as a GAL in the case. AA0320. The GAL's itemized billing entries alleged that she held telephone calls with each separate counsel for June, Kimberly, and Robyn and Donna; held telephone calls with some of June's family members; and conducted a visit with June. AA0329. Each of these entries is billed at a rate of \$400.00 per hour. AA0329. June objected to the GAL's request for fees with the main focus of her objection being the GAL's rate based on Statewide Rules of Guardianship Rule 8. AA0333–43. June argued that the GAL should not be compensated at her attorney rate of \$400.00 for non-attorney, fiduciary services as a GAL. AA0334. Instead, June argued that, based on information available online regarding the customary rate for GAL services, a rate from approximately \$22.00 per hour to \$48.00 per hour was more appropriate. AA0335. Moreover, June's objection pointed out that the GAL's services provided no benefit to June and were in many ways redundant because the GAL reported on June's wishes which June had already expressed through counsel multiple times.

Months later, on December 09, 2021, the district court held a hearing on the GAL's petition for fees and costs. AA0344–45. The hearing

only took about eight minutes, and concluded with the district court fully granting the GAL's request for fees and costs. AA0344–45. On March 18, 2022, the district court entered its Findings of Fact, Conclusions of Law, and Order Granting GAL Fees appealed from in this case. AA0346–61.

The district court's order begins by summarizing the procedural history of the case. AA0346–49. It then moves on to its findings of facts and conclusions of law by first discussing its discretion to appoint a GAL. The district court stated that it has the authority to appoint a non-attorney GAL “*only if* a court-approved volunteer advocate program, which provides court approved training, for Guardians Ad Litem has been established in the judicial district.” AA0349 (emphasis in original). Because there is no adult guardianship advocate program in the Eighth Judicial District Court, the district court concluded that it was not within its discretion to appoint a non-attorney GAL, so it was mandated to appoint an attorney GAL. AA0349. Then, the district court concluded that NRS 159.0455(4) does not prohibit a GAL from providing legal services to the protected person. AA0350. The district court then went on to conclude that “under Nevada law non-attorney Guardian Ad Litem's do not get paid.” AA0350. Based on that, the district court concluded that

the GAL was entitled to compensation at her attorney rate for fiduciary services that she provided as a GAL. AA0351.

The district court then spent much of its order discussing the GAL's qualification and experience as an attorney. But once the district court got around to discussing the \$400.00 per hour rate that the GAL was requesting, the district court conclusively stated that the rate was "lower than or equal to the usual and customary fee charged in [sic] by Guardian Ad Litem's in Clark County guardianship proceedings for each task performed, regardless of who actually performed the task." AA0357. However, the district court cites to nothing and does not state what evidence or information, if any, it is relying on for this conclusive finding, even though no one other than June presented anything regarding the usual and customary rate for GAL services, and the information June provided supported a rate from \$22.00 per hour to \$48.00 per hour.

After quickly glossing over the usual and customary rate for GAL services, the district court recited several factors listed in NRS 159.344, and then awarded the GAL the full amount of her fees and costs requested, which totaled \$5,710.00 in fees and \$3.50 in costs. Notice of Entry of the March 18, 2022 Order was filed on March 31, 2022. AA0362–

79. June then timely filed her Notice of Appeal on April 28, 2022.

AA0380–83.

SUMMARY OF ARGUMENT

The central issue in this appeal is whether a court-appointed GAL is entitled to fees and costs at their attorney rate for non-attorney, fiduciary services. The district court's order in this case awarded the GAL fees and costs at her attorney rate of \$400.00 for her fiduciary services as a GAL. This is despite the fact that the district court failed to include the GAL's hourly rate in its order appointing the GAL, which is required under Statewide Rules of Guardianship Rule 8(I). Moreover, the district court misinterpreted controlling law to say that it mandated that the district court appoint an attorney GAL, rather than a non-attorney GAL, and that by implication it required that the district court compensate the GAL at her attorney rate.

In addition to misinterpreting the controlling statute and court rule, the district court's order also exhibits a misunderstanding of the GAL's role. A GAL serves in a fiduciary capacity and provides fiduciary services, regardless of whether or not the GAL is an attorney. Thus, any services provided as a GAL must be characterized as non-attorney, fiduciary services, which NRS 159.344 states *shall* be compensated at a fiduciary rate. Still, the district court concluded that the GAL's services

were legal services compensable at the GAL's \$400.00 per hour attorney rate. To make matters worse, the district court did so by summarily deciding that this rate was equal to or less than the market rate for GAL services in Clark County without relying on anything to actually support that finding.

Accordingly, the district court erred as a matter of law when it awarded the GAL fees at her attorney rate of \$400.00 per hour for fiduciary GAL services, and there is no substantial evidence supporting the district court's finding that \$400.00 per hour is the customary rate for fiduciary GAL services. Therefore, this Court should reverse the district court's March 18, 2022 Order.

ARGUMENT

I. Standard of Review

Typically, a district court's award of attorney's fees is reviewed for an abuse of discretion. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 560, 429 P.3d 664, 672 (2018). However, when the district court's order involves a purely legal question, such as the interpretation of a statute or court rule, this Court's review is de novo. *See Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008) (stating that legal questions are reviewed de novo); *Johnson v. Wells Fargo Bank National Association*, 132 Nev. 704, 707, 382 P.3d 914, 916 (2016) (questions of statutory interpretation are reviewed de novo). So, when a district court's order awarding attorney fees implicates a question of law, this Court's review is de novo. *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). And no deference is owed to the lower court's legal conclusions. *Carson City Dist. Atty., Child Support Enforcement v. Ryder*, 116 Nev. 502, 505, 998 P.2d 1186, 1188 (2000).

Here, the district court's order rests on multiples errors of law regarding NRS 159.0455 and Statewide Rules of Guardianship Rule 8. These include: whether the district court even had the authority to award

fees after omitting a rate in its appointing order, whether the district court was required to appoint an attorney as the GAL, and whether the district court had the authority to award an attorney rate rather than fiduciary rate for the GAL's services.

II. The District Court Had No Authority to Award Fees and Costs Because It Failed to Specify the GAL's Rate in Its Order Appointing the GAL.

The first issue is whether the district court even had the authority to award fees to the GAL. Statewide Rules of Guardianship Rule 8 describes the scope of a GAL's representation in guardianship cases. When court rules are not in conflict with the constitution or state laws, they have the same force as statutes. *Civil Rights for Seniors v. AOC*, 129 Nev. 752, 757, 313 P.2d 216, 219 (2013) (quoting *Margold v. Eighth Judicial Dist. Court*, 109 Nev. 804, 806, 858 P.2d 33, 35 (1993)); *Roberts v. Roberts*, 63 Nev. 459, 462, 174 P.2d 611, 612 (1946). "The rules of court are intended to refine and explain the procedure set forth in the statutory scheme and have the force and effect of law and are construed in the same manner as statutes[.]" 21 C.J.S. Courts § 166 Operation of court rules.

Statewide Rules of Guardianship Rule 8 allows for both volunteer and non-volunteer GAL's. However, when a GAL serves as a non-

volunteer, there are specific requirements in order for the GAL to seek compensation. One is that the GAL must comply with the requirements set forth in NRS 159.344. *See* Statewide Rules of Guardianship Rule 8(J) (“A guardian ad litem that seeks compensation for the services provided is only entitled to compensation upon compliance with NRS 159.344 et al., and the request for payment, whether or not payment is to be from the guardianship estate or from any third party, shall be subject to the requirements and analysis set forth in NRS 159.344.”).

This is coupled with an additional requirement that “[i]f the guardian ad litem is not a volunteer and will seek compensation in the case, **the appointing order shall state the hourly rate to be charged by the guardian ad litem** and may limit the hours that may be charged by the guardian ad litem, absent further order of the court.” Statewide Rules of Guardianship Rule 8(I) (emphasis added). So, under this rule, the district court must specify in its order appointing the GAL, what rate the GAL will be charging for their services. The use of “shall” rather than “may” means that this is a mandatory part of the appointing order when the GAL is a non-volunteer who will seek compensation, so it is not within the district court’s discretion to simply omit the rate if the GAL is seeking

compensation. *See State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) (stating that “‘may’ is permissive and ‘shall’ is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature”).

Here, the district court did not include an hourly rate in its Order Appointing Guardian Ad Litem. The appointing order recites the language from Statewide Rules of Guardianship Rule 8(J) verbatim, but conveniently omits the language from Subsection I stating that the court **shall** specify the hourly rate in its appointing order. *See* AA 0148–49. Nothing regarding the GAL’s hourly rate is mentioned at all in the appointing order.² The GAL’s Notice of Intention to Seek Attorney’s Fees and Costs from Guardianship Estate Pursuant to NRS 159.344(3) was when June first discovered that the GAL would charge a rate of \$400.00 per hour, to which June promptly objected. The district court never amended its order appointing the GAL nor enter a subsequent order

² This is despite the fact that June’s counsel raised the issue of the GAL’s compensation at the February 11, 2021 hearing immediately following the district court stating that it would appoint Elizabeth Brickfield, Esq. as the GAL. AA0416. It was not until the GAL filed her notice of intent to seek fees and costs from June’s estate that June was informed the GAL would be seeking compensation.

stating that \$400.00 per hour would be the GAL's rate. It was not until the district court's March 18, 2022 Order that it for the first time specified the rate that the GAL could charge, and then simultaneously awarded the full amount of the GAL's requested fees and costs.

Because the district court's Order Appointing Guardian Ad Litem did not include the GAL's hourly rate, the district court failed to adhere to the mandate under Statewide Rules of Guardianship Rule 8(I) to include the hourly rate in the appointing order if a non-volunteer GAL is seeking compensation. Therefore, the district court had no authority to allow compensation to the GAL, and thus, it erred as a matter of law when it awarded the GAL \$5,713.50 in fees and costs from June's estate without first including the GAL's rate in the appointing order.

III. The District Court Misinterpreted NRS 159.0455 and Nevada Statewide Rule of Guardianship Rule 8 When It Concluded That It Was Required to Appoint an Attorney as the GAL.

The next issue is whether the district court was required to appoint an attorney as the GAL. While NRS 159.0455 provides the district court with the authority to appoint a GAL, it does not restrict the district court to only appointing an attorney (to be compensated at their attorney rate) unless a court-approved volunteer program is established, as the district

court concluded here.

The district court here concluded that it “has discretion to appoint a non-attorney to serve as a guardian ad litem, *only if* a court-approved volunteer program, which provides court approved training, for Guardians Ad Litem has been established in the judicial district.” *See* AA0367 (emphasis in original). However, the provision that the district court relied on simply discusses the authority to appoint volunteer GAL’s.

It states that:

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 to represent a protected person or proposed protected person as a guardian ad litem. If such a program has been established, all volunteers participating in the program must complete appropriate training, as determined by relevant national or state sources or as approved by the Supreme Court or the district court in the judicial district, before being appointed to represent a protected person or proposed protected person.

NRS 159.0455(3). This provision does not state that if a volunteer GAL is not available then the district court *must* appoint a non-volunteer attorney GAL. Still, the district court interpreted the provision’s language to mean that it must appoint an attorney to serve as a GAL if no court-approved volunteer advocate program exists.

However, that contradicts the plain language of Statewide Rules of

Guardianship Rule 8(H), which states 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.” (Emphasis added). Statewide Rules of Guardianship Rule 8(H) explicitly contemplates individuals other than court-approved volunteers or attorneys who may serve as a GAL. This court rule clarifies the procedures regarding the appointment of a GAL, and must be given the same effect as a statute. *Civil Rights for Seniors*, 129 Nev. at 757, 313 P.2d at 219. Therefore, this Court must give effect to “each sentence, phrase, and word” in the rule to ensure that no portion of it is rendered meaningless. *Coast Hotels and Casinos, Inc. v. Nevada State Labor Com’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). Moreover, this rule must be read in harmony with other rules and statutes in the guardianship scheme. *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008).

The district court wholly ignored the language in Statewide Rules of Guardianship Rule 8(H) when it determined that it could appoint a non-attorney as a GAL only if a court-approved volunteer program exists. Under Rule 8(H), it was within the district court’s discretion to appoint

“any other person” to serve as a GAL that it finds has appropriate training and experience. Instead, the district court here restrained its own discretion and concluded that it was statutorily mandated to appoint an attorney as the GAL, which itself is also an abuse of discretion.³

Additionally, the district court erred when it concluded that “under Nevada law non-attorney Guardian Ad Litem’s do not get paid,” and by implication, that an attorney GAL must be paid at their attorney rate. As previously discussed, this ignores Statewide Rules of Guardianship Rule 8(H)’s language that contemplates “any other person that the court finds has appropriate training and experience” serving as a GAL in addition to court-approved volunteers and attorneys. Neither NRS 159.0455 nor Statewide Rules of Guardianship Rule 8 state that “any other person that the court finds has appropriate training and experience” must serve without receiving compensation. Moreover, neither NRS 159.0455 nor Statewide Rules of Guardianship Rule 8 discuss the rate of compensation, other than stating that it must be

³ Legal error like this, which leads a district court to decline to exercise discretion it unquestionably has, is also an abuse of discretion. *Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011).

included in the appointing order. Thus, under both NRS 159.0455 and Statewide Rules of Guardianship Rule 8, a GAL who is a non-volunteer and non-attorney can seek compensation in an adult guardianship case.

Accordingly, the district court erred when it concluded that it was required to appoint an attorney as the GAL and when it concluded that only an attorney GAL can receive compensation under Nevada law.

IV. The District Court Erred When It Awarded the GAL Fees at Her Attorney Rate Rather Than at a Fiduciary Rate.

The final issue is whether the district court had the authority to award attorney fees and costs for the GAL's fiduciary services. Because NRS 159.344 requires that the district court award a fiduciary rate for fiduciary services, it erred when it awarded the GAL fees at her attorney rate of \$400.00 per hour. In addition to the district court's error on the law, there is nothing in the record that supports its finding that \$400 per hour is at or below the customary rate for GAL's in Clark County.

A. The district court erred because it awarded the GAL fees at her attorney rate rather than at a fiduciary rate as required under NRS 159.344(5)(g)(3).

When a GAL seeks compensation for their services in an adult guardianship case, Statewide Rule of Guardianship Rule 8(J) requires that the GAL comply with NRS 159.344.

Both NRS 159.0455 and Statewide Rules of Guardianship Rule 8 make clear that a GAL's role in the case is in a fiduciary capacity, not an attorney capacity. For instance, NRS 159.0455(4) explicitly states that the GAL is "an officer of the court" and that they "shall not offer legal advice to the protected person or proposed protected person." Similarly, Statewide Rules of Guardianship Rule 8(N) states that "[t]he role of the guardian ad litem is separate and distinct from the role of an attorney for a protected person" and that the GAL shall not serve as an attorney for the protected person or guardian. While an attorney may serve as a GAL, the services provided are distinct from legal services that an attorney typically provides. Instead, when serving as a GAL, whether attorney or not, the person is serving in a fiduciary capacity.

A fiduciary is "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship." *Fiduciary*, Black's Law Dictionary (11th ed. 2019). Under Nevada law, "[a] fiduciary relation exists 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." *Matter of Frei Irrevocable Trust dated October 29, 1996*, 133 Nev. 50, 58, 390 P.3d 646, 653 (2017)

(quoting *Stalk v. Mushkin*, 125 Nev. 21, 28, 199, P.3d 838, 843 (2009)) (internal quotation marks omitted). Like any fiduciary, a GAL within an adult guardianship case must advocate for the “best interests” of the protected person. Both NRS 159.0455 and Statewide Rule of Guardianship Rule 8 mandate as much.

Many other states have explicitly stated that a court-appointed GAL serves in a fiduciary capacity. *See Golin v. Allenby*, 118 Cal. Rptr. 762, 787 (Cal. Ct. App. 2010) (stating that in a conservatorship matter a “guardian ad litem’s powers are thus subject to both the fiduciary duties owed to the incompetent person and the requirement that court approval be obtained for certain acts”); *see also In re J.A.*, 107 A.3d 799, 814 n.19 (Penn. 2015) (stating that a GAL is a “fiduciary who is appointed to represent in legal proceedings another under legal disability”); *In re Marriage of Sorensen*, 166 P.3d 254, 258 (Colo. 2007) (stating that a “guardian ad litem serves as a fiduciary representative”); *In re Ficalora*, 771 N.Y.S.2d 300, 302 (N.Y. 2003) (describing a GAL as a “court-appointed fiduciar[y]”); *Byers-Watts v. Parker*, 18 P.3d 1265, 1268 (Ariz. 2001) (describing a GAL as a fiduciary). So, there should be no question that the GAL in June’s case was serving in a fiduciary capacity.

With that in mind, when awarding fees under NRS 159.344, an important consideration is the rate being charged by the person requesting fees. And NRS 159.344(5)(g)(3) makes clear that “[t]he court may only award . . . [c]ompensation at a **fiduciary rate** for time spent performing **fiduciary services**.” (Emphasis added). This subsection is set off separately from NRS 159.344(5)(g)(1) which only allows the district court to provide “compensation at an attorney rate for time spent performing services that require an attorney.” While the Legislature explicitly differentiated between the rates that can be charged for attorney services and fiduciary services, the district court here conflated the two and accepted the GAL’s attorney rate outright for the services provided, even though those services were fiduciary services.⁴

Because a GAL in an adult guardianship case serves in a fiduciary capacity, the district court should have only awarded fees at a fiduciary

⁴ In addressing fees when an attorney serves as a GAL, the New York Supreme Court has stated that “[a] guardian ad litem needs not be an attorney, and in fixing the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 **should not be enhanced just because an attorney does it.**” *Alias v. Olahannan*, 15 A.D.3d 424, 425 (N.Y. 2005) (internal quotation marks and alterations omitted) (emphasis added). The *Alias* court then went on to significantly reduce the district court’s fee award to the GAL.

rate for the GAL’s fiduciary services provided here.⁵ Instead, the district court accepted the GAL’s attorney rate outright, and simply recited the statutory language. *See* AA0375 (“The requested fees represent compensation: at an attorney rate for time spent performing services that require an attorney; compensation at a paralegal rate for time spent performing paralegal services; compensation at a fiduciary rate for time spent performing fiduciary services; and no compensation for time spent performing secretarial or clerical services.”).

While the March 18, 2022 Order pays lip service to the statutory language, it is clear that the district court here did not analyze the GAL’s services as exclusively fiduciary services, and did not award fees based on the customary rate for fiduciary services as a GAL, as required under

⁵ Some states even go as far as fixing a fee or capping the total that a GAL can charge. For instance, Minnesota caps GAL fees anywhere from \$500.00 to \$1,500.00 depending on the type of case. *See* Minnesota Guardian ad Litem Board, *GAL Fees*, <https://mn.gov/guardian-ad-litem/program-information/gal-fees.jsp> (last visited August 23, 2022). Virginia caps a GAL’s fees at a rate of \$55.00 per hour for out-of-court services and \$75.00 per hour for in-court services. *See* Virginia Court Appointed Counsel Procedures & Guidelines Manual, *Chapter 7 – Guidelines for Payment of Guardians Ad Litem for Children*, <https://www.vacourts.gov/courtadmin/aoc/djs/resources/manuals/ctappta/tty/chapter07.pdf> (last visited August 23, 2022).

NRS 159.344(5)(g)(3). Instead, the district court spent much of its order highlighting the fact that the GAL is an attorney, and then used that fact to accept the GAL's attorney rate outright, rather than engaging in any meaningful discussion or analysis about what constitutes a reasonable rate for the fiduciary services that the GAL provided here.

Accordingly, the district court erred as a matter of law because it awarded the GAL fees at her attorney rate of \$400.00 per hour simply because she is an attorney, and therefore, failed to meet its statutory obligation to only award compensation at a fiduciary rate for the GAL's fiduciary services.

B. There is no substantial evidence in the record supporting the district court's finding that \$400 per hour is at or below the market rate for the GAL's fiduciary services.

In addition to the district court erring as a matter of law, there is also no substantial evidence in the record that supports its finding that \$400.00 per hour is at or below the customary rate for GAL services. The district court did not assess the reasonableness of the GAL's rate based on the market rate for fiduciary GAL services within Clark County, but instead it simply considered whether the GAL's rate was a reasonable rate for attorney services. The district court here concluded that only an

attorney can receive compensation as a GAL, and then simply allowed the GAL to charge her attorney rate. However, nothing supports the district court's finding that \$400.00 per hour is anywhere near the market rate for the GAL's fiduciary services.

In awarding a reasonable fee, the district court has the discretion to award fees for non-attorney work. However, it must analyze the reasonableness of the hourly rates charged for non-attorney work. *See LVMPD v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013) (reversing a district court's order awarding attorney fees because it did not analyze the reasonableness of hourly rates charged for non-attorney work). Such rates should be calculated based on the market rates for those services within the community. *Id.* (citing *Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006)). When awarding fees, the district court must "demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 246, 416 P.3d 249, 259 (2018) (quoting *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015)). "Substantial evidence is 'that which a reasonable mind might accept as

adequate to support a conclusion.” *King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (quoting *Bacher v. Office of the State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006)).

Further, the Nevada Legislature codified the principle that the district court can only award fees based on the market rate for particular services in NRS 159.344(5)(g)(3). Under NRS 159.344(5)(g)(3), the district court only has the authority to award “[c]ompensation at a fiduciary rate for time spent performing fiduciary services.” Moreover, NRS 159.344(5)(g)(1) and NRS 159.344(5)(g)(3) differentiate between attorney rates for attorney services and fiduciary rates for fiduciary services when determining reasonable rates for any services provided.

Here, nothing was presented by the GAL, or any other party, showing that \$400.00 per hour was at or below the market rate for the fiduciary services that the GAL provided. The only information presented to the district court regarding the market rate was from June who, based on available information, argued that a rate from \$22.00 per hour to \$48.00 per hour was more appropriate. *See* AA0162. In response, the GAL only submitted a declaration stating her qualifications as an attorney, without mentioning anything regarding the market rate for

GAL services in the community. *See* AA0169–71. At neither the hearing on the GAL’s petition for fees nor in the subsequent order approving the GAL’s fees, did the district court ever state that it analyzed what the market rate in the community is for GAL fiduciary services. Instead, it just summarily stated in its order that “\$400 per hour is lower than or equal to the usual and customary hourly fee charged in [sic] by Guardian Ad Litem’s in Clark County guardianship proceedings for each task performed, regardless of who actually performed the task.” *See* AA0357.

It is not clear from the record what evidence the district court used to suddenly conclude that \$400.00 per hour was “lower than or equal to” the market rate for fiduciary services provided by GAL’s in the community. The district court cites to nothing for this assertion, and does not state anywhere in its order what it is using to conclude that this figure is the market rate. Moreover, nothing was presented to the district court by the GAL or any other party stating that \$400.00 per hour was an appropriate market rate. The only information that the district court had before it regarding the market rate was the information presented by June stating that \$22.00 per hour to \$48.00 per hour was the appropriate market rate.

Accordingly, there is nothing in the record supporting the district court's finding that \$400.00 per hour is "lower than or equal to" the market rate for GAL services, so this finding is not supported by substantial evidence. Therefore, alternatively, at the very least, this Court should reverse the March 18, 2022 Order and direct the district court to make appropriate findings regarding the market rate for fiduciary GAL services in the community.

CONCLUSION

Based on the foregoing, this Court should reverse the district court's March 18, 2022 Order and direct the district court to dismiss the GAL's petition for fees and costs because the district court failed to specify the rate of compensation for the GAL in its order appointing the GAL. Moreover, the district court's error of law in its interpretation of NRS 159.0455 and Statewide Rules of Guardianship Rule 8 provides another basis for reversing the district court's March 18, 2022 Order. Alternatively, if this Court is not inclined to reverse the March 18, 2022 Order and direct the district court to dismiss the GAL's petition for fees and costs outright, this Court, at the very least, should reverse the March 18, 2022 Order and direct the district court to analyze and make findings regarding the market rate for fiduciary GAL services within the community before concluding that \$400.00 per hour is the market rate.

Dated: September 15, 2022

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ATTORNEYS' CERTIFICATE

1. This Opening Brief complies with the formatting requirements of NRS 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the typestyle requirements of NRAP 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word in Century Schoolbook in size 14-point font.
2. I further certify that this Opening Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it contains approximately 6,430 words, which is less than the 14,000 word count available for an opening brief.
3. Finally, I certify that I have read this Opening Brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by reference to the page of the record on appeal where the matter relied upon is to be found.

CERTIFICATE OF SERVICE

I certify that on September 15, 2022, I submitted the foregoing **APPELLANT'S OPENING BRIEF** for filing through the Court's electronic filing system. Electronic notification of service will be sent to the following:

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