

Children's right to lawyer-client relationship tested in Colorado

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A recent Colorado case has touched a chord among child advocates throughout the country. *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011) raises questions about the importance of a lawyer-client relationship in child welfare proceedings.

It also challenges the notion that a guardian ad litem (GAL) can follow ethical rules and advocate a child's best interests. Read on for an overview of the case and commentary.

Facts

Mark Gabriesheski was criminally charged with sexually assaulting his 16-year-old stepdaughter. A dependency and neglect petition was filed in the juvenile court and a GAL appointed to represent the child. Before the criminal trial occurred, the child recanted her accusations.

At the trial, the prosecution called the GAL and the child's social worker to testify that the child had been pressured by the child's mother to recant her story. The defense argued the GAL could not testify because statutory attorney-client privilege attached to the GAL-child relationship and, therefore, Rule 1.6 duty of confidentiality prohibited the GAL from testifying.

The defense also argued the social worker could not testify because communications between the social worker and the mother were privileged under Colorado Revised Statute (CRS) [section] 13-90-107(1)(g) prohibiting "the examination of certain enumerated treatment professionals concerning communications or advice given to clients in the course of professional employment" and under CRS [section] 19-3-207(2) prohibiting "examination in a criminal case of professionals as to certain statements made by respondents in dependency and neglect proceedings."

Trial Court Ruling

The trial court refused to allow the GAL to testify because Colorado Rule 1.6, duty of confidentiality, applied to the GAL-client relationship and because Chief Justice Directive 04-06 imposed a duty of confidentiality on the GAL that only the child could waive. The trial court also refused to allow the social worker to testify because CRS [section] 19-3-207(2) doesn't allow examination in a criminal case of qualifying professionals about certain statements made by respondents in dependency proceedings.

Because the trial court prohibited the GAL and the social worker from testifying, the prosecution could not proceed and the trial court dismissed the charges without prejudice. The prosecution appealed the evidentiary rulings. The defense argued the appellate court did not have jurisdiction.

Appellate Court Ruling

The appellate court rejected the defense's argument that it lacked jurisdiction and upheld the trial court's ruling. The GAL was not allowed to testify because Chief Justice Directive 04-06 subjects GALs to "all of the rules and standards of the legal profession" and therefore, communications with the child fell within statutory attorney-client privilege. The social worker was also not allowed to testify because of CRS [section] 19-3-207(2) and also because the social worker-client privilege under [section] 13-90-107(1)(g) prevents licensed professionals from testifying without consent of the child or the child's mother.

The people petitioned for writ of certiorari on both appellate court rulings. The Colorado Supreme Court ordered briefs on the jurisdictional issue presented by the defense to the appellate court.

Supreme Court Ruling

Jurisdiction

The supreme court found the People could appeal the evidentiary ruling and the appellate court did have jurisdiction under CRS [section] 16-12-102(1) because public prosecutors have broad authority to appeal trial court decisions as long as they satisfy Colorado Appellate Rule 1's final judgment requirement. The supreme court construes the final judgment ruling to encompass any judgment that ends the particular action in which it is entered. In criminal cases when the charges are dismissed, as in this case, the final judgment standard is met.

GAL-Child Privilege

Before applying the Colorado Rules of Professional Conduct, there must be a determination that an attorney-client relationship exists. The Supreme Court has held that a client is "a person who employs or retains an attorney for advice or assistance on a matter relating to a legal business ... and an attorney-client relationship is established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions."

The statutes appointing a GAL in dependency cases are silent on this issue. All GALs must be licensed attorneys and have legal representation obligations. However, the GAL's ultimate responsibility is to assess and make recommendations to the court concerning the best interests of the child. While the Chief Judge's Directive does require lawyers to adhere to the Rules of Professional Conduct, it doesn't designate an attorney-client relationship. The title GAL does not suggest advocate as opposed to guardian.

For these reasons, the supreme court would not assign to the GAL-child relationship the legislatively imposed evidentiary consequences of an attorney-client relationship. Therefore, the supreme court overturned the trial court's ruling excluding the proffered testimony of the GAL as privileged under [section] 13-90-107(1) (b).

Social Worker Testimony

The trial court excluded the social worker's testimony because the court interpreted [section] 19-3-207 to bar examination in any criminal case of any professional involved in dependency and neglect proceeding unless the respondent consented. However, the supreme court interpreted [section] 19-3-207 to bar examination of certain professionals without consent of respondent only for statements that were made to comply with court treatment orders. The trial court did not determine whether the statements were made to comply with court-ordered treatment, which would have been necessary to exclude the testimony under [section] 19-3-207.

The appellate court also affirmed the exclusion because it thought exclusion was appropriate under [section] 13-90-107(1) (g). However, because the trial court did not make the necessary findings under [section] 13-90-107(1)(g), that there existed a licensed social worker-client privilege between the social worker and the mother or child, the appellate court incorrectly presumed something not in the record.

For both of those reasons, the supreme court disapproved the trial Court's reliance on [section] 19-3-207 as a basis to prohibit examining the social worker in the stepfather's prosecution.

Commentary

The situation that led to these facts and the resolution of this case are the perfect example of why a uniform standard for representing children in child welfare cases is needed in this country. The Colorado Supreme Court rightfully recognized a GAL cannot simultaneously act consistently with ethical rules while advocating what the GAL thinks is in the client's best interest. For example, a GAL cannot adhere to fundamental ethics rules such as protecting client confidentiality (Rule 1.6), following client objectives and goals (Rule 1.2), avoiding conflicts of interest (Rule 1.7), and not acting as witness (Rule 3.7).

The American Bar Association passed the ABA Model Act on Child Representation in August 2011. The Act requires that all children be appointed a lawyer and provides guidance for the lawyer that clearly defines the lawyer's role. The Act allows the judge to also appoint a best interests advocate (or a court appointed special advocate) who does not act as a lawyer but instead provides his opinion on what is in the best interests of the child. These two roles are distinct and should never be played by the same person.

In dependency, abuse, and neglect cases, children deserve the same legal benefits enjoyed by the child welfare agency/state and parents. Among a lawyer's key roles are to:

- * help level the playing field between all of the parties;
- * help the child understand the process;
- * advocate zealously for the child's position;
- * maintain confidentiality regarding client communications; and
- * be the sole voice for the child.

One of the most important benefits of having a lawyer is the confidential relationship. It is the foundation of the lawyer-client relationship. Without confidentiality the client cannot trust the lawyer and be completely candid. Without

confidentiality the lawyer is incapable of doing an effective job. Youth need the full protections of a lawyer acting in the capacity of a traditional lawyer role, which includes, at a minimum, adhering to the ethical rules that guide attorney conduct.

The sanctity of the relationship a lawyer has with his client is most important in these types of cases. Children have little trust in adults around them because of their experience in their home of origin and foster care. A lawyer who does not have a confidential relationship with his client is simply a best interest advocate and not acting in his capacity as a lawyer. The child will not trust and confide in him and the child will never have meaningful input into the process.

States that have not already should pass legislation requiring traditional lawyers to be appointed for children in abuse, neglect, and dependency cases.

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