

CUSTODY/VISITATION

Lawyers for Children in a Perfect World

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In April, 2007, during the spring meeting of the ABA Family Law Section in Monterey, California, a remarkable event occurred. Interested groups met for a full day to discuss rules for serving as a representative for children in custody, abuse and neglect cases. The meeting was necessitated by a proposed uniform rule adopted by The National Conference of Commissioners on Uniform State Laws (NCCUSL), for representation of children in these proceedings.

The dispute regarding the role of the GAL has a long history. In 1994, the American Academy of Matrimonial Lawyers adopted guidelines for representing children.¹ These guidelines prohibited a lawyer from making a recommendation on behalf of the children. Judge Patricia Curley of the Wisconsin Court of Appeals and I criticized these guidelines when they were adopted, contrasting them to the role of a GAL in Wisconsin, in an article.²

In 2003, the ABA Family Law Section adopted its own set of guidelines for lawyers representing children (I was part of the drafting committee).³ These guidelines differentiated two different models. One model is where the lawyer advocates the best interests of the child. In the other model, the lawyer advocates the wishes of the child as child-directed counsel.

The guidelines did not express a preference for one model over the other, but distinguished the nature of each role and its responsibilities. Although rejecting a hybrid of the two roles, the role of the best interests attorney was designed to require the lawyer to consider the child's objectives of representation when determining what to advocate and to present the child's objectives to the court, if the child so desires. As such, the best interest attorney contains aspects of a child's attorney, while not being bound by the child's objectives of representation.

In July, 2006, the NCCUSL adopted its own proposal for representation of children in abuse, neglect, and custody proceedings.⁴ This proposed uniform act mostly follows the ABA guidelines by differentiating between the two roles. Again, the NCCUSL model rules did not express a preference for either role, while rejecting the concept of a hybrid role.

When NCCUSL sought approval of their model rule by the ABA, the Litigation Section objected. Their objection was to the best interests role, not the advocacy role. According to the ABA Litigation Section, a lawyer serving in the best interests role was not acting as a lawyer, but rather acting as a social worker or a psychologist. The Litigation Section does not believe that

lawyers are trained or equipped to properly handle this role. While their primary objection relates to abuse and neglect cases, much of their reasoning applies to custody actions as well.

This non-lawyer role is most troubling in jurisdictions without support services in the form of social workers or other trained specialists. In those jurisdictions, the child's lawyer must perform an investigation into the best interests of the child without expert assistance. This investigation typically includes interviewing parties, witnesses, experts and may include personal investigations, like home visits. At the end, the lawyer reaches an opinion as to best interests. This investigative process is not a traditional role for a lawyer and frequently, the lawyer lacks the necessary education and training to reach this opinion. In fact, the lawyer may have no more expertise to reach this opinion than any lay person off the street.

In addition, there are problems with getting the recommendation before the court. Lawyers typically do not testify at trial

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and are not subject to cross-examination. Therefore, getting the recommendation before the court is problematic and sometimes involves multiple layers of hearsay.

Where children are old enough to express a preference and for their preference to be given credence, there is an additional problem, as most would agree, that bringing children into court is not appropriate. Deciding when the child's preference should be expressed and how, without violating the rules of evidence, is not easy.

The AAML guidelines resolved these issues by having the lawyer act solely as participant in the litigation, without having an opinion as to the results. But this role, while consistent with serving as a lawyer, does not help the parties - or the trial court - resolve issues short of litigation, which is certainly injurious to the child. Having an attorney present in court like a potted plant with no position to present solves the issue of the lawyer's role, but does nothing to help the child caught in the middle of a battle between parents.

WHAT SHOULD THE ROLE BE?

So, in a perfect universe, what should be the role of a child's lawyer in a custody proceeding? I would suggest the following:

- Every county should have a staff of social workers who perform custody and physical placement evaluations. These staffs should be sufficiently funded to avoid backlogs.
- The child's lawyer should work in tandem with the

social worker to formulate an opinion, with the social worker performing the evaluation.

- The child's lawyer should represent the social worker's opinion in court with the roles and responsibilities of a lawyer. The social worker is available as a witness to explain and, if necessary, defend the recommendation.
- Where a child is of sufficient age and maturity and desires to have his or her wishes represented, either the child's lawyer should serve in the role of advocacy counsel or ask the court to appoint advocacy counsel.
- To serve in the role of a child's lawyer, a lawyer should be required to have undertaken training which would include the role itself, child development issues, the effect of domestic violence on children, recognizing signs of abuse and cultural distinctions.
- The child's lawyer should be adequately compensated for his or her services. It is simply not right that the parents pay their lawyer substantially more than the court allows for the lawyer for the truly innocent victims of a custody trial: the children.
- Trial courts should monitor the performance of lawyers for children, by seeking feedback from lawyers and/or litigants. Lawyers for children who do not adequately perform their role should not be reappointed.

- There should be guidelines promulgated which provide a template for the services of a GAL. These guidelines should be widely available so that everyone, including the litigants, are aware of the role of the GAL.

FUNDING PROBLEM

The leading drawback to this scenario is a practical one of funding. In many cases, serving as a GAL is a form of *pro bono* work. Is it too much to ask that sufficient funds be provided for training, monitoring, social service workers and maybe additional (advocacy) counsel for children caught in the crossfire between parents? When the role is so important, one would hope the answer is no.

Absent funding, this perfect world will never happen. In the real world, of course, these funds are unlikely to be allocated since children have no lobbying voice in state legislatures. Isn't it nice, though, to imagine a world which was otherwise?

END NOTES

1. 13 J. AM. ACAD. MATRIM. LAW. 1 (1995)
2. Patricia S. Curley and Gregg Herman, Representing the Best Interests of Children: The Wisconsin Experience, 13 JAAML 1 (Summer, 1995).
3. American Bar Association, Standards of Practice for Lawyers Representing Children in Custody Cases, 37 FAM. L. Q. 129 (2003)
4. http://www.law.upenn.edu/bll/archives/ulc/rarccda/2006_finalact.htm