

REPRESENTING CHILDREN IN CHILD CUSTODY PROCEEDINGS

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A. APPOINTMENT OF COUNSEL FOR A CHILD:

When is it appropriate to have separate legal counsel for children?

Appointment considerations:

- When the issues of child custody are highly contested or protracted;
- When the child is subjected to stress as a result of the dispute;
- When child's counsel would provide information not otherwise available;
- When there are allegations of physical, emotional or sexual abuse or neglect;
- When one or both parent(s) is/are not providing a safe environment;
- When one or both parent(s) request(s) the appointment; or
- When the Court wants the objectives sought by the child to be a prominent basis for the outcome of the custody case.

B. DUTIES AND RESPONSIBILITIES OF REPRESENTING CHILDREN:

There remains uncertainty and non-uniformity surrounding the appropriate roles of counsel for a child. In order to minimize the uncertainty, courts in the United States often specify the scope of the counsel's assignment and the tasks expected to be performed by counsel in the form of a written order. In the event that a court fails to specify the parameters of an appointment, counsel's first step should be to obtain clarification from the court regarding the purposes of the appointment. Counsel should also ask the court to identify the particular tasks that they are being charged with as well as the time frames, if any, within which to complete the assigned tasks.

In many jurisdictions, the present role of the child's legal representative is to gather facts that bear on the best interest of the child and to present those facts to the court, including the child's wishes when appropriate. In other jurisdictions, counsel's role is to advocate for the outcome of the child's desires. This major rift with regard to child's counsel's role will be discussed at greater length below.

Child's counsel's duties, in either model, might include:

- Interviewing the child;
- Reviewing the court files and relevant records available to the parents including, but not limited to, school records such as progress reports, report cards, and doctor's records;
- Making any further investigations that counsel considers necessary to gather facts;

- Interviewing and/or communicating with the child's therapist(s), teachers, doctors and relatives;
- Participating in the court proceedings, including calling witnesses and presenting arguments to the court concerning the child's welfare (and/or wishes); and
- Preparing a written statement of issues, positions and statement of facts that bear on the child's best interests (and/or the child wishes).

C. LIMITATIONS ON REPRESENTING CHILDREN:

The child's counsel is not required to assume the responsibilities of a social worker, probation officer, mental health professional, child custody evaluator or mediator and is not expected to provide nonlegal services to the child. The duties of legal counsel in these types of cases call for knowledge and skills that are well outside the training and beyond the experience of most lawyers. At a minimum, counsel for a child must know how to communicate effectively with children and understand their mental and emotional states at different ages and stages of their lives.

For example, the child's counsel must interview and/or observe the child with a mind to what may be age-appropriate behaviors and circumstances for the child. The interview itself should be done in a manner and to the extent consistent with the child's age, level of maturity and ability to understand. Counsel must explain to the child, at their first meeting, counsel's role and the nature of the attorney-client relationship (including confidentiality issues). On a continuing basis, counsel must advise the child of the possible courses of action, as well as the risks and benefits thereof.

In addition to all of the legal skills of a trial lawyer, legal counsel for a child should have more than a passing knowledge of a child's developmental stages in order to communicate with the child-client and in order to identify when the child-client is showing signs of deviating from his developmental norm or is otherwise not having his needs met. For example, is their toddler-client regressing in his toileting, sleeping or eating behaviors? These might indicate that the toddler's needs for predictability, routines and structures are breaking down. Anger and other behavioral problems like baby talk and physical complaints of stomach aches and headaches might indicate undue stress on the five- to eight-year-old client. Depression and defiance might be the way in which stress would manifest in the nine- to twelve-year-old child-client.

While most of us have training and experience in interviewing children, we lawyers do not come to our profession with these skills. The child's counsel must have special training in learning to speak non- legalese or "non-lawyer" to their child-clients. The child's counsel should have communication training which includes development of the skills of reading the verbal, physical messages and cues that children are transmitting. Counsel for children need to be especially sensitive to the child's suggestibility and eagerness to please adults. While many of you have training and experience in determining when children's sexual behaviors are normal for their age and when their behaviors raise concern, we counsel need to undertake to learn which signals to look out for and which activities are healthy and normal.

There are often diversity issues encountered by child's counsel. Counsel should become "culturally competent" in order to recognize the barriers, historical struggles and economic considerations of the child's family. The greatest barrier may be the language barrier. If this is present, it will adversely impact the lawyer's investigation of facts and will most certainly add to the time devoted to an effective and appropriate representation of the child. Cultural considerations will no doubt be important to the lawyer in assessing the family's overall approach to education and to discipline.

Parents with disabilities and parenting issues for children with disabilities will require the lawyer to add another body of knowledge to her repertoire. Special education programs and community based training resources and counseling resources must be tools known to such a child's attorney in order to fashion the ultimate specific recommendations the family court will be expecting from the child's attorney.

In nearly every high-conflict case, the parents and the children will need some type of therapy.

Additionally, counsel for the child should have specialized training in conflict resolution and alternatives to adversarial dispute resolution, the impact of familial break-ups on children, and techniques for helping the parties to reduce conflict. This type of training will prepare us to protect children from the harms attendant with litigation and to facilitate expeditious resolution of the dispute in accordance with the child's interest.

D. IS CHILD'S COUNSEL'S PRIMARY DUTY TO ADVOCATE FOR THE CHILD'S BEST INTERESTS OR THE CHILD'S PREFERENCES?

As noted above, current controversy exists regarding whether or not child's counsel's primary and exclusive duty should be limited to the role of advocating for the child's preferences rather than advocating for what is in the best interest of the child.

Many child custody cases in the United States family courts are decided by judges who do not adhere to nor adopt the stated wishes or preferences of children. This is not particularly surprising since children's preferences are not necessarily to be determinative in deciding contested child custody cases. Rather, the standard employed by every state across the United States and many other countries around the world is what is deemed to be in the "best interest of the child". This standard is supposed to be applied objectively by the Judges. It is quite possible, however, that occasionally, if not often, the determination of what is in the best interest of the child may contradict and conflict with the child's stated preferences.

In the United States, a pervading myth centers around the notion that children's active and/or vocal participation in a contested child custody or visitation proceeding will cause them harm or be to their detriment. This myth has been broken and contradicted by several recent studies conducted by mental health professionals in the field. The studies have demonstrated that children want their voices to be heard and that they want to be taken seriously in child custody disputes. The caveat, however, is that although they want their voices heard, children do not want to be charged with the ultimate decision-making.

In many countries around the world, courts have begun implementing systems aimed at increasing children's participation in decision-making about their custodial placement. Children are being permitted to share their thoughts and feelings about their custodial placement. There appears to be a paradigm shift which has yet to catch hold in the United States.

The appointment of counsel for children in contested child custody proceedings is one way for a child to provide input and to be heard by judges deciding the child custody placement. Moreover, it affords the child a zealous advocacy voice without having to have direct participation in the proceedings and/or be charged with making the ultimate decision regarding the appropriate child custody placement. The appointment of counsel may also help to shield the child from the ongoing conflict between the parents. On the other hand, the appointment of counsel the children may exacerbate the tension between the parties.

Irrespective of the evolving paradigm, there remains a political and philosophical divide and controversy with respect to the proper role of counsel for the child in a disputed custody proceeding.

The present system in place in the United States centers around the appointment of child's counsel, otherwise known as minor's counsel, for the investigation of facts to aid the court in making its determination of what is in the child's best interest. It appears that the existing model permits counsel for a child to serve as the child's "*de facto* guardian". A *de facto* guardian can, as part of her appointed role, advocate a position contrary to what the child desires. By way of limited example, this situation occurs when counsel for the child recommends and/or advocates for a custodial parenting plan placement which he or she believes is in the child's best interest, but is diametrically opposed to the child's stated preferences.

"*De facto* guardian" has been replaced by the "best interests attorney," which was recently coined by the American Bar Association. This term is synonymous with a *de facto* guardian because again the attorney for the child is authorized to investigate and advocate the child's best interests based on the lawyer's individual view of what is best for the child and is not bound by the child's objectives.

The threat that this "best interests attorney" poses to the rule of law encompasses the idea that an attorney, appointed to represent a child, can promulgate his own agenda. This additional adult, who is thrown into an already contested child custody proceeding, may influence and actually affect the outcome of the proceeding without advocating on behalf of his child-client or his child-client's desires. The danger is that he may push his own personal agenda and preferred outcome at the child's expense if he believes that the best interest of the child differs from the child's stated desires. Many family lawyers believe that, as counsel for the children, we should not be given such unadulterated authority and unlimited influence.

It is disconcerting that at the present time an attorney appointed for a child, at least in the United States, may very well advocate for his personal preferred outcome in the name of the "child's best interest" rather than the child's preferences. This may well result in the child-client developing a complete distrust of his attorney and his involvement in the court process. It may harm and prejudice the child in such a way that the child-client will in the future, not want to

participate in and/or provide his input with regard to any future contested child custody proceeding. It is also possible that counsel can change the outcome of the proceeding without any assurance that the outcome is better for the child.

A contrasting and competing philosophy provides that counsel should only be appointed to represent children who can direct their own representation. This approach mirrors the traditional attorney role whereby counsel is appointed strictly to act as the client's representative and advocate for their preferences and goals. Under this model, counsel is supposed to put the child's direction above all else and articulate his preferences for custody placement irrespective of what counsel may personally believe to be in his best interest. This philosophy also places greater emphasis on the capacity of the client to effectually understand the attorney-client relationship as well as the attorney-client privilege.

This second approach provides for a more traditional attorney role and is something that lawyers are better prepared for and for which many family lawyers already have the necessary skills to undertake. The standard of advocating for the child allows counsel essentially to adhere to the notion that a lawyer is only a lawyer. Under this approach, the child-client is essentially treated identically to an adult client. A strict interpretation of counsel for a child as an advocate limits the expectations that the courts can place on counsel. It ultimately aids the Court and counsel from being deemed default or *de facto* mental health professionals and/or child custody evaluators.

Courts can and should utilize other individuals, experts, and guardians if they wish to ascertain what is in the child's best interest. Examples include the appointment of a guardian ad litem, protectors (someone to protect children from the harms associated with contested litigation); child custody evaluator or other court-appointed advisor. These guardians and court-appointed advisors are routinely asked to perform multiple functions and serve as mediators, witnesses, *de facto* decision makers and *de facto* fact finders, and monitors. These individuals can and should be appointed as experts to investigate and report information to the Court and provide guidance to the Court regarding what is in the child's best interest.

This author believes that the implementation of a system wherein counsel are limited to serving as advocates for their clients would eliminate the present confusion which exists surrounding child's counsel's roles and responsibilities.

E. THE ISSUE OF THE CHILD'S CAPACITY:

According to the American Bar Association's Model Rules of Professional Conduct, a lawyer's role and responsibility depends greatly upon the mental capacity of the client. As counsel for an unimpaired child with sufficient capacity to direct her representation, child's counsel's principal function should be to try to ensure the outcome that is consistent with what the child wants. This involves advocating for the child's preferences.

American Bar Association Rule 1.14 recognizes, however, that children may often be impaired clients with a diminished capacity, which negatively affects the client's ability to participate meaningfully in any attorney-client relationship. We know that the age of the child is not the central criterion for assessing diminished capacity. The determination of diminished capacity hinges on an examination of multiple factors including, but not limited to, the child's age, degree of maturity, intelligence, level of comprehension, and ability to communicate.

Across the board assumptions that children below a particular age automatically have diminished capacity are dangerous. The assessment of capacity should be made on a case-by-case and per child basis, particularly since children develop differentially, some faster and some slower than others. At the outset of the appointment as counsel for the child, counsel is charged with and must assess the child-client's capacity to direct his representation. It is not appropriate for the Judge or Court to determine whether or not the child-client has the appropriate capacity to make adequately considered decisions.

The child should be considered to have sufficient capacity so long as the child is able: (a) to understand the nature and circumstances of the case; (b) to appreciate the consequences of each alternative course of action; (c) to engage in a coherent conversation with the lawyer about the merits of the litigation; and (d) to express a preference that similarly situated persons might choose or that is derived from rational or logical reasoning. It is important to note that the test does not permit one to declare that the child has diminished capacity because the child's lawyer may believe the child-client has selected an option which is not in the child's best interests.

Once it is determined that the child has sufficient capacity, counsel must treat him or her similarly to other adult clients. Counsel must assist them in reaching the position that makes the most sense to the child-client. Counsel must advise them, provide them with feedback, and help them sort out the disadvantages and advantages of the choices before them. However, since they are children, the counseling component is especially vital and important, and often requires more patience.

There are also situations which arise wherein counsel may believe that a child's stated preferences reflect one or both of their parent's desires (i.e. the child is being manipulated by a parent) or when there is evidence that awarding custody in accordance with the child's preference will put the child in harm's way. Part of counsel's job is to confront the child-client with counsel's observations and concerns, and have a frank discussion with them about the implications of the child's stated preferences at a level appropriate for the child's understanding. Ultimately, however, the child-client holds the final choice of what position he or she wants counsel to advocate for on his or her behalf. Counsel is not permitted to second guess or work against the stated goals of the client.

If counsel concludes that the child-client lacks sufficient capacity, then perhaps counsel must refuse the appointment. Otherwise, there would be a conflict between counsel's duty to advocate for the client and the inability to assess the child's preferences. In the event that counsel remains appointed as counsel for a child with diminished capacity, counsel's duty then is to refrain from advocating for any outcome of the contested custody and visitation case.

The American Bar Association Model Rule 1.14(b) prohibits child's counsel to choose a position to advocate for a client with diminished capacity, even when the client is at risk of a substantial harm.

F. CONCLUDING REMARKS:

The role of child's counsel in a contested custody proceeding is one requiring more than lawyering skills, regardless of the model of counsel's role and counsel's responsibility. It calls for knowledge of childhood developmental stages and a knowledge of community resources for therapeutic and counseling tools for the family. Being child's counsel may bring the need for special knowledge of cultural or lingual differences or special appreciation for disabled parents or children and their related needs and resources. Above all, being child's counsel requires patience and caring, careful lawyering.

While there are differing views on whether the ultimate role of child's counsel is to advocate for the child's best interest or for the child's wishes and goals, counsel must never put his own concept of "best interest" above the child's goals. When a conflict arises between what is believed to be in the child's best interests and what the child's goals are for the outcome of the proceeding, counsel cannot act as an advocate against his client's wishes. If counsel questions the child's capacity to formulate a reasoned goal, counsel must either withdraw or simply abstain from urging any outcome on the Court in the proceeding.