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IDENTIFYING THE ROLES AND RESPONSIBILITIES OF A LAWYER APPOINTED TO REPRESENT A CHILD OR THE CHILD'S BEST INTERESTS IN A CONTESTED CUSTODY OR VISITATION CASE

Adopted: January 25, 2013

Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

Introduction:

This opinion is limited to an examination of the role of a lawyer appointed to represent a child in a contested custody or visitation proceeding. It does not examine other contexts in which a lawyer may be appointed to represent a child¹ such as when a child is alleged to be abused or neglected or is a party in civil litigation. To avoid confusion, the label “guardian ad litem” will not be used in this opinion when referring to a lawyer appointed to represent a child in a contested custody or visitation proceeding although a court may choose to apply this label. This opinion does not address or seek to question the authority of a court to appoint a lawyer to represent a child in a contested custody proceeding. It seeks only to assist the lawyer and the court to clarify the responsibilities of a lawyer serving in such a role.

In a contested custody or visitation proceeding—especially a “high conflict” proceeding—the court will, on occasion, appoint a lawyer to represent the child or children whose custody is at stake. Although the authority for such appointments is not clear² and may reside with the court's inherent authority to administer justice, such appointments are becoming more common as seen in recent inquiries to the Ethics Committee.³ The appointment presents a number of difficult issues of professional responsibility for the appointed lawyer. These issues cannot be resolved unless the lawyer's role is clearly designated and understood by all of the parties to the proceeding, especially the appointed lawyer and the court.

This opinion identifies the possible roles that a lawyer appointed in a contested custody case may play and recommends that the order of appointment specify the role and responsibilities of the appointed lawyer. The opinion also addresses some specific issues of professional responsibility that arise from those roles. Although there are limited references to the Rules of Professional Conduct in this opinion, identification of the client and of the lawyer's role relative to that client is fundamental to the application of the Rules.

Inquiry #1:

What are the roles for a lawyer who is appointed to represent a child in a contested custody or visitation proceeding?

Opinion #1:

Two distinct roles for a lawyer for a child are recognized: (1) “Child's Attorney” and (2) “Best Interests Attorney.”⁴ As described in the American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003)(“ABA Standards”), the Child's Attorney “provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings”; the Best Interests Attorney, on the other hand, “independently investigates, assesses, and advocates the child's best interests as a lawyer.”⁵ The former role is “client directed” in which the lawyer serves as the traditional advocate for the objectives articulated by the child and owes the child “the same duties of undivided loyalty, confidentiality, and competent representation as are due to an adult client.”⁶ The latter role is “advocate directed,”⁷ where the advocate's judgment is substituted for that of the child with “the purpose of protecting a child's best interests without being bound by the child's directives or objectives.”⁸

Because the differences in the two roles are fundamental—particularly with regard to the lawyer's relationship to the child and responsibilities to the court—a lawyer who is appointed to represent a child in a contested custody proceeding must be sure that she knows which role she has been appointed to perform.

There is another possible role for a lawyer to play. The court may appoint a non-lawyer or a lawyer to be an advisor (“court-appointed advisor”) to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter.⁹ The lawyer in such a role is not acting as an advocate or serving as counsel for either the child or the child's interests. As an

advisor to the court, the lawyer may become a witness who is subject to examination by the parties. The lawyer appointed to serve in this function should also take steps to insure that the order of appointment specifies this role and its duties.

Inquiry #2:

What are the professional responsibilities of a Child's Attorney?

Opinion #2:

A Child's Attorney serves in the traditional role of counsel for the child and must fulfill that role in accordance with the Rules of Professional Conduct. The lawyer must ascertain the child's objectives for the representation and then seek to obtain those objectives within the bounds of the Rules of Professional Conduct. Rule 1.2. The lawyer owes the duty of confidentiality to the child and her communications with the child are protected by the attorney-client privilege. See Rule 1.6. If the lawyer is appointed to represent more than one child of the dissolving marriage, the lawyer must monitor the representation for potential conflicts of interest between the children's differing objectives for the representation. See Rule 1.7. If a conflict evolves that cannot be managed, the lawyer may have to decline the representation or withdraw.¹⁰

A lawyer who is appointed a Child's Attorney must determine whether the child is sufficiently mature and articulate to participate meaningfully in the client-lawyer relationship. As permitted by Rule 1.14(a), when a client's capacity to make adequately considered decisions is diminished "because of minority," the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." However, if a child is too young to articulate his or her objectives for the representation or to make decisions about the representation, the lawyer should recommend to the court that the lawyer be appointed to serve as a Best Interests Attorney rather than a Child's Attorney.

Inquiry #3:

What are the professional responsibilities of a Best Interests Attorney?

Opinion #3:

A Best Interests Attorney is bound by the Rules of Professional Conduct "except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of [her] appointed tasks."¹¹ The lawyer must determine the child's best interests based upon objective criteria "as set forth in the law related to the purposes of the proceedings."¹² Any objectives or preferences expressed by the child are but one factor to be taken into consideration when determining the best interests of the child.

The child's communications with the Best Interests Attorney are subject to Rule 1.6, the confidentiality rule, except that "the lawyer may use the child's confidences for the purposes of the representation without disclosing them."¹³ This means that the lawyer may use confidential information received from a child to develop other evidence. The example provided in the ABA Standards is of the child who discloses a parent's drug use to the Best Interests Attorney. The lawyer may not disclose the source of the information but she may investigate and present evidence of the drug use.¹⁴

Representation of multiple children does not create a conflict of interest for a Best Interests Attorney because the lawyer is not bound, as in a traditional client-lawyer relationship, to advocate for a client's objectives. As explained in the ABA Standards, "[a] Best Interests Attorney in such a case should report the relevant views of all the children...and advocate the children's best interests..."¹⁵

Inquiry #4:

What are the professional responsibilities of a court-appointed advisor?

Opinion #4:

The court-appointed advisor is not acting as a lawyer; he is not an advocate and does not represent a client or a particular interest. Rather, the advisor serves as an investigator for the court and owes the court the duty to investigate thoroughly and impartially and to report back to the court.

As an investigator who is responsible only to the court, the lawyer has no duty of confidentiality or loyalty to any of the parties or witnesses. Moreover, it is unlikely that the attorney-client privilege will attach to the lawyer/advisor's communications with parties or witnesses. When a lawyer is serving in this role, he must disclose the capacity in which he is acting to anyone who may misunderstand his role. See, e.g., Rule 4.3(b). It is not a conflict of interest for a lawyer to serve as a court-appointed advisor if he does not represent any person appearing in the matter and he does not mislead others about his role. In particular, the lawyer must explain that communications will not be held in confidence and may be reported to the court. Since the lawyer is not representing a client in the matter, the prohibition on contact with a represented person in Rule 4.2 does not apply to his communications with represented persons. However, it is recommended that the lawyer/advisor inform the other lawyer prior to speaking to his client.

Non-lawyers, such as social workers and psychologists, who are more appropriately trained to investigate and offer opinions on issues of child welfare, may be better suited to serve in the role of court-appointed advisor. At the time of appointment, a lawyer should consider whether a non-lawyer would fulfill the role better than the lawyer and, if so, the lawyer should express this opinion to the court.

Inquiry #5:

How does an appointed lawyer know which role he is being appointed to perform?

Opinion #5:

Ideally, the order of appointment will specify which role the lawyer is to perform.¹⁶ However, because confusion about the roles is not uncommon, a lawyer who is asked to serve must help the court to articulate the lawyer's role. Standard 1.3 of the Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyers ("AAML Standards") is instructive:

Whenever a court assigns counsel for a child, the court should specify in writing the scope of the assignment and the tasks expected, preferably in the form of an order. In the event that the court does not specify these tasks at the time of appointment, the counsel's first action should be to seek clarification from the court of the tasks expected of him or her.¹⁷

Similarly, the ABA Standards state:

The lawyer should accept an appointment only with full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.¹⁸

If the order fails to identify the role and the lawyer's accompanying responsibilities, the lawyer should first request clarification. In particular, the lawyer should ask that the order articulate whether the lawyer is to be a Child's Attorney, a Best Interests Attorney (as those roles are defined above), or a court-appointed advisor. If the court indicates that the lawyer is to be a Best Interests Attorney, the lawyer should request that the order specify the duties that accompany this role. If the court indicates that the lawyer is a Child's Attorney, the lawyer should confirm that the child is capable of making decisions about important matters sufficient to establish the goals of the representation.¹⁹ If the court indicates that the lawyer is a court-appointed advisor, the lawyer should consider whether a non-lawyer would better fulfill this role and, if so, make this recommendation to the court.

To assist with the clarification of the scope of the assignment and the tasks expected, the following questions should be answered at the time of appointment (the list is not exhaustive):

Identifying the Role

- Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child's Attorney role)?
 - or to investigate, assess, and advocate for the child's best interests (the Best Interests Attorney role)?
 - or to assist the court by investigating and reporting information to the court, or by providing the court with an opinion on some matter (the court-appointed advisor)?

Child's Attorney's Assignment and Tasks

- If appointed to be the Child's Attorney, has the child's capacity to direct the representation been established?
- If appointed to be the Child's Attorney, does the court agree
 - the child will be my client;
 - I will owe the child the professional responsibilities owed to any client including the protection of confidences from unauthorized disclosure and the preservation of the attorney-client privilege; and
 - in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate and witness?
- If appointed to be the Child's Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate on behalf of the child/client in consent agreements between the parties?

Best Interests Attorney's Assignment and Tasks

- If appointed to be the Best Interests Attorney, what duty do I have to investigate and report to the court?
- If appointed to be the Best Interests Attorney, will my communications with the child be confidential but I may use the confidential information to develop other evidence?

- If appointed to be the Best Interests Attorney, does the court agree that, in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate (for the child's best interests) and witness?
 - If the court expects me to testify, does the court understand that this may subject the child's confidences to disclosure and may jeopardize my ability to gain the trust of the child and of witnesses necessary to my investigation?
- If appointed to be the Best Interests Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate in consent agreements between the parties?

Court Appointed Advisor's Assignment and Tasks

- If appointed to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter, does the court agree that I will not be serving as a lawyer and I will owe no duties of representation to any party or other person involved in the proceeding?
- If appointed to be an advisor to the court, does the court agree that I may communicate with represented persons without the consent of their lawyers as would be otherwise required by Rule 4.2?
- If appointed to be an advisor to the court, what tasks will I perform?
 - Will I submit an oral or a written report to the court?
 - Will I limit my role to investigator and report only my factual findings, or will I provide the court with an opinion on some matter?
 - Will I be a witness in the proceeding subject to testimonial examination?

Because of the potential for the roles to be confused, regardless of the specificity of the order, the judge should be reminded at the beginning of each hearing of the role of the appointed lawyer.²⁰

Inquiry #6:

Should a lawyer appointed as the Child's Attorney or a Best Interests Attorney agree to investigate and present evidence? To testify or present a written or oral report or recommendation to the court?

Opinion #6:

Regardless of the role, the appointed lawyer, like any lawyer advocating a position, should conduct independent discovery and investigation of the facts.²¹ At hearings, it is preferable that the lawyer have the authority to present and cross-examine witnesses and offer exhibits.²² However, the standards of numerous organizations agree that "[n]either kind of lawyer is a witness."²³ As noted in the ABA Standards, "[a] court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that the person is not serving as a lawyer, and is not a party."²⁴ The AAML Standards are even more adamant on this issue:

Courts may choose to appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisors." Courts may choose to appoint someone in an expert capacity to provide the court with an opinion about some contested matter. When they do so, these professionals should be called "experts." Courts may choose to appoint someone to protect children from the harms associated with the contested litigation. When they do so, these professionals should be called "protectors." There may be other reasons courts may choose to add a professional to the case.

Language matters, however. We believe that assigning any of these tasks to someone who is called counsel is unnecessary, needlessly confusing, and misleading. Whatever these professionals are called, and whether or not they happen to be members of the bar, these professionals should never be mistaken for being counsel for the child or serving in any kind of attorney role.²⁵

The potential harm from testifying as a witness is evident. If the Child's Attorney cannot assure her client that their communications are confidential and the Best Interests Attorney cannot assure the child or other witnesses of the same, the ability of a lawyer to perform in either role will be undermined.

At the time of the appointment, unless the lawyer is specifically appointed as an advisor to the court with no other role, the lawyer should recommend to the court that she not make a written or oral report to the court or testify as to her findings, particularly if the lawyer is appointed as the Child's Attorney. If the court insists that the lawyer perform these functions, the lawyer may decline the appointment.

Conclusion:

Serving as a Child's Attorney or a Best Interests Attorney in a contested custody or visitation case requires special skills, training, and experience. So much so that the AAML Standard 1.2 requires, "[t]o be eligible for appointment as counsel for a child in a custody or visitation proceeding, a person should be specially trained and designated by the local jurisdiction as competent to perform the assignment" and the comment adds, "[a]t a minimum, counsel for children must know how to communicate effectively with children and understand children's mental and emotional states at different ages and stages of their lives."²⁶

This opinion does not attempt to address all of the professional responsibilities or obligations of a lawyer appointed as a Child's Attorney, a Best Interests Attorney, or a court-appointed advisor. A lawyer who is asked to serve in any of these roles should understand the requirements of each role. Familiarity with the ABA Standards and the AAML Standards is recommended.

Endnotes

1. For example, a lawyer may be appointed, pursuant to N.C. Gen. Stat. §7B-601(a), to be an attorney-guardian ad litem for a child who is alleged to be abused, neglected, or dependent; a lawyer may be appointed guardian ad litem for a minor who is a party in civil litigation pursuant to Rule 17 of the NC Rules of Civil Procedure (see *infra* note 2); or a lawyer may be appointed for a minor child in a domestic violence action pursuant to N.C. Gen. Stat. §50B-3(a1)(3)h.
2. The NC Rules of Civil Procedure authorize the appointment of a guardian ad litem (GAL) to appear on behalf of a minor plaintiff or defendant in civil litigation. N.C. R. Civ. P. 17(b)(1) and (2). The General Rules of Practice for the Superior and District Courts provide for the appointment of a lawyer to serve as GAL for a minor who is the victim or potential witness in a criminal proceeding. N.C. Gen. R. Prac. Super. & Dist. Ct. 7.1. Neither rule authorizes the appointment of a lawyer or a GAL for a child who is a non-party to a civil proceeding.
3. The increasing call for the appointment of lawyers to represent the children in custody cases is also noted in *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyer*, p. 2, (2011) [hereinafter "AAML Standards"].
4. The terms are found in American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003)[hereinafter "ABA Standards"]. However, the distinction is recognized in other writings. See AAML Standards; National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases (2001) [hereinafter "NACC Recommendations"]; New York State Bar Assn. Committee on Children and the Law: Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings (2008)[hereinafter "NYSBA Standards"].
5. ABA Standards, *supra* note 3, at 1.
6. ABA Standards, *supra* note 3, at 2.
7. NACC Recommendations, *supra* note 3, at 4.
8. ABA Standards, *supra* note 3, at 2.
9. AAML Standards, *supra* note 2, at 26-27.
10. See ABA Standards, *supra* note 3, at 9.
11. ABA Standards, *supra* note 3, at 15.
12. ABA Standards, *supra* note 3, at 17.
13. *Id.*
14. *Id.*
15. *Id.*
16. The lawyer should urge the court to avoid the use of the designation "guardian ad litem" which adds to the confusion about the lawyer's role because of its affiliation with Rule 17 and abuse/neglect appointments. See ABA Standards, *supra* note 3, at 2 ("The role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations.")
17. AAML Standards, *supra* note 2, at 14.
18. ABA Standards, *supra* note 3, at 3.
19. Standard 2.1 of the AAML Standards states: "Court-appointed counsel must decide, on a case-by-case basis, whether their child clients possess the capacity to direct their representation. In the event that the court seeks to appoint counsel for children who lack capacity to

direct their representation, the lawyer should strive to refuse the appointment.” AAML Standards, *supra* note 2 at 15.

20. ABA Standards, *supra* note 3, at 7.

21. ABA Standards, *supra* note 3, at 5.

22. *Id.* at 6.

23. *Id.* at 2; see generally, Standard 3 of the AAML Standards, *supra* note 2 at 25; NACC Recommendations, *supra* note 3 at 10.

24. ABA Standards, *supra* note 3, at 2-3.

25. AAML Standards, *supra* note 2, at 26-27.

26. AAML Standards, *supra* note 2 at 13.