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Feature

Children and the Law
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CHILD COUNSEL: CAUGHT BETWIXT AND BETWEEN

In the last thirty years, a new form of advocacy has emerged in family law, namely, child counsel. Referred to variously as guardian ad litem, attorney for the child, child counsel, or *Nagel v. Hooks* attorney, the role of the attorney representing a child has taken on many hats and many definitions. Standards for the appointment, practice and compensation of child counsel have varied county to county, and even judge to judge. In 2003, the Maryland Judicial Conference Committee on Family Law, concerned about the confusion regarding the scope of and standards for representation, asked its Subcommittee on Custody to develop guidelines for this area of practice.

***6** The subcommittee promptly went to work, and on September 19, 2005, the Judicial Conference approved Standards of Practice for Court-Appointed Lawyers representing Children In Custody Cases ("Standards"), a nine-page document drafted by the subcommittee and posted on-line at **http:// courts.state.md.us/family/pdf/md_stds_rep_children.pdf**. Standard 1 states the general intention: "to promote good practice and consistency in the appointment and performance of lawyers for children in cases involving child access decision in Maryland courts". This article will summarize the historical development of the child counsel role in Maryland family law, review the new Standards, and discuss some of the criticisms and concerns that have surfaced, especially in light of the Court of Appeals recent decision in *Fox v. Wills*, 2006 WL 119100 (Md. Ct. of Appeals, Jan. 18, 2006).

Historical Development

The Court's discretionary authority to appoint child counsel is established by statute at Section 1-202 of the Maryland Family Law Code. Originally enacted in 1976 as Md. Cts. & Jud. Proc. Code Ann Section 3-604, the current statute provides for appointment in contested cases involving custody, visitation or support; it prohibits child counsel from representing any other party; and it authorizes the Court the award of counsel fees against either or both parents.

The first case to discuss the role of child counsel in the Maryland courts is *Lapides v. Lapides*, 50 Md. App. 248, 437 A.2d 251 (1981). There Judge Thomas H. Lowe, writing for the Court of Special Appeals, noted that child counsel should concern himself solely with the best interests of the client "so that their parents could indulge themselves in the perverse pleasure of acrimony." Id. at 254. The court noted that this child counsel had "participated in all aspects of the trial including attendance at hearings, depositions and conferences, filing pleadings, conducting interviews, and reading numerous legal documents, medical reports and other materials relevant to the case." Id. at 253.

Eight years later, Judge Rosalyn Bell, in *Levitt v. Levitt*, 79 Md. App 394, 395, 556 A.2d 1162, cert. denied, 316 Md. 549, 560 A.2d 1118 (1989), penned the quote most often attributed to child counsel: "Five-year-old Chad needs (1) parents who put his needs ahead of their own. He also needs (2) a lawyer. He has none of those. We are not able to provide him with the first, but we will furnish him the second."

The Levitt opinion focused primarily on deficiencies in fact-finding by the Master and remanded the case for further proceedings, including appointment of child counsel. Counsel was directed to "proceed expeditiously in the manner counsel deems to be in Chad's best interests." Id. at 404. Child counsel activities could include presenting Chad's perception of the parties to the court; obtaining a professional evaluation of Chad; fulfilling a *Nagel v. Hooks* role relating to a family counselor whose testimony was not offered in the hearing; and obtaining a home and school visit by an unbiased professional. Id. at 403.

The following year, the Court of Appeals expressly approved the appointment of counsel in a child support matter in *Carroll County DOSS v. Edelmann*, 320 Md. 150, 577 A.2d 14 (1990). The Court noted that Mr. Edelmann's effort to terminate his child support obligation, if successful, would have such a "dramatic and irreversible effect on the child" that failure to appoint counsel would have been an abuse of discretion. Id. At 177.

In *Jane O. v. John O.*, 90 Md. App. 406, 601 A.2d 149 (1992), the Court of Special Appeals, again Judge Rosalyn Bell writing, confronted one of the many confusions that continues to this day, namely, what is child counsel's duty when the child's clearly expressed preference conflicts with what the attorney believes is in his client's best interests? The appellate court, noting that such conflicts can occur, referred to the Comments to the Rules of Professional Conduct, Rule 1.14, and observed that "[t]he child's views are to be considered by counsel, but are not necessarily controlling." Id. at 436.

Van Schaik v. Van Schaik, 90 Md. App. 275, 603 A.2d 908 (1992) placed limits on child counsel's role by ruling there is no authority for child counsel to litigate issues relating to the client's personal property, and child counsel's report and/or communications to the Court should not be ex parte. Id. at 734-738. *Auclair v. Auclair*, 127 Md. App 1, 19, 730 A.2d 1260 (1999) ruled that children are not entitled to separate representation when their preference conflicts with the recommendation of their attorney appointed pursuant to section 1-202.

Shortly after *Van Schaik*, Judge Rosalyn Bell authored *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993). Much of the *Leary* opinion focuses on the issue raised in *Jane O., supra*, namely, the "dichotomy [that] exists between the attorney as guardian and the attorney as advocate." Id. at 41. Judge Bell also identifies the primary roles that child counsel has fulfilled: *Nagel v. Hooks* waiver, pure representation, pure investigation, or a combination. Id. at 40. Pointing to *Jane O.* again, ***7** Judge Bell noted that child counsel in that case took the middle ground by combining the role of advocate and fact-finder, id. at 46, as did counsel in *Leary*, id. at 49.

Since *Leary*, the case law has focused on issues relating to whether child counsel fees are in the nature of child support, *In re Blaemire*, 229 B.R. 665 (1999), *Goldberg v. Miller*, 371 Md. 591, 810 A.2d 947 (2002), and whether guardians ad litem have immunity when performing judicial functions. *Fox v. Wills*, 2006 WL 119100 (Jan. 18, 2006) most recently ruled that child counsel has no judicial immunity from tort claims for legal malpractice.

Standards of Practice for Court-Appointed Lawyers representing Children In Custody Cases

The Standards delineate three different roles for which child counsel may be appointed. Standard 2.1.1 addresses the Best Interest Attorney, whose duty is to make an independent assessment of what is in the child's best interests, and then advocate for that result. A Best Interest Attorney is not bound by the client's directives or objectives. This attorney may disclose confidential information in order to advocate for the best interests of the child. This creates a conflict with the advocate's ordinary duty of confidentiality, and a Best Interest Attorney should advise his or her client both at the beginning and throughout the representation that there is no confidential relationship.

Standard 2.1.2 provides for the appointment of a Child Advocate whose obligation to the client is consistent with the traditional attorney-client relationship. In that instance, the Advocate's duty to the client is undivided and confidentially remains intact.

Standard 2.1.3 is labeled "Child's Privilege Attorney." The duties of this appointment are the waiver issues presented by *Nagel v. Hooks*, 296 Md. 123, 460 A.2d 49 (1983). The change of name from *Nagel v. Hooks* attorney to Child's Privilege Attorney is intended to assist non-represented parties in comprehending what this attorney does. A Child's Privilege appointment may be combined with either a Best Interest Attorney or a Child Advocate appointment.

Considered Judgment

The first duty listed for both Child Advocates and Best Interest Attorneys is to determine whether the child has "considered judgment." The Best Interest Attorney makes that decision and, under Standard 2.2.1, regardless of whether the client has considered judgment, advocates for what counsel believes to be in the child's best interests. As for the Child Advocate, Standard 2.2.2 recommends that if the advocate determines that the child *doesn't* have considered judgment, counsel should file a petition either to have their role changed to a Best Interest Attorney or for the appointment of a separate Best Interest Attorney.

So what is considered judgment? Standard 2.1.4 states the test: if a child can express a "reasoned choice" about the issues before the Court, they have considered judgment. Sounds simple, yes? But it's not that easy. Standard 2.1.4.1 recommends focusing on the client's decision making process rather than the results.

In other words, when talking with your client, try to have them walk through their process of making decisions rather than just making conclusions. Can the client understand the risks and benefits of their decision, keeping in mind the child's developmental stage and the child's reasons for the decision? What do collateral witnesses and relevant educational, medical, and/or mental health records tell you? All this and more is discussed in Standard 2.1.4.1.

Clearly for the Child Advocate, a determination of whether the client has considered judgment must be made early in the representation, because if the client doesn't have considered judgment, the Child Advocate must petition for a role change or a Best Interest Attorney appointment, according to Standard 2.2.2. It is not clear how the Child Advocate can petition the Court for a change in the appointment or the appointment of another attorney without stating why the attorney believes the child doesn't have considered judgment, nor is it clear from the Standards how a parent would proceed if he or she wished to challenge child counsel's determination that the child did, or did not, have "considered judgment." This Standard could, on its own, generate extensive, collateral litigation.

Counsel's General Duties

Standard 2.2.1 and 2.2.2 provide virtually identical checklists of the general duties for the Best Interest Attorney and the Child Advocate to perform. The lists focus first on meeting and interviewing the client, the client's parents, and collateral witnesses. Independent witnesses, such as teachers, daycare providers, or mental health therapists are also recommended. They can be a gold mine of information that usually is not biased. These witnesses may have information on the relative parenting abilities of the parties, as well as records containing information on school attendance, grades, behavior problems, and consistent medical treatment.

***8** The Standards also recommend personal observation by visiting the child in each home and observing the child's interaction with each parent, in addition to the standard advocacy role of filing pleadings and motions, conducting discovery and participating in settlement negotiations and at trial, including calling witnesses, presenting evidence and making argument. If the client is expected to meet with the Master or Judge, or testify in open court, then counsel's role includes preparing the child for this process. The goal is to minimize the harm to the child. At the conclusion of the case, the result should be reviewed with the child, if appropriate.

Written Recommendations - 2.2.1.j

The only difference between these two checklists is an additional requirement for the Best Interest Attorney. Subpart j of Standard 2.2.1 requires the Best Interest Attorney to provide written recommendations (and a basis for the recommendations) to the parties and the court at least ten days prior to trial. Subpart j also states that the recommendations should not include hearsay.

The prohibition on hearsay has generated a great deal of concern for child counsel. Traditionally written reports and recommendations have included hearsay, especially when recounting what the child's preferences are. If child counsel can't report what the client is saying, then how is child counsel to protect the child from having to testify, either in Court or privately in the Master or Judge's chambers? In addition, the prohibition against hearsay means that the statements, recollections and perceptions of numerous independent witnesses such as doctors, day-care providers, teachers and counselors may not be included in the recommendations provided to the parties, although the information these independent witnesses have to offer could be pivotal in resolving the case.

The hearsay problem as to the child client could be corrected by allowing child counsel to succinctly state the child's preference in the written recommendations. Then if a parent wishes to challenge child counsel's statement, he or she could insist the child testify or speak with the Court. Providing the parents in advance of what testimony the attorney believes the child would give at least gives the parent notice of the child's perceptions, and could help the parents reach a settlement rather than indulging themselves in the "perverse pleasure of acrimony" recognized in *Lapides*, supra.

Advising the parents (but not the Court) in the written recommendation what testimony is expected from independent witnesses such as teachers, daycare providers and doctors would also assist the parties in moving forward to settlement. In the event settlement is not reached, it remains the duty of child counsel to make sure the witnesses have been subpoenaed to appear and provide live testimony. Such testimony, however, will then not come as a surprise to the parent.

Ethical Considerations

Standard 3 addresses Ethics and Confidentiality. It creates conflicts of its own. For example, Standard 3.1 states that attorneys appointed as Child Advocates and Child's Privilege Attorneys are bound by the Maryland Rules of Professional Responsibility "in all matters." Standard 2.1.3 provides that a Child Advocate can be appointed to also serve as a Child's Privilege Attorney. What happens if the child, who has considered judgment, insists that the mental health privilege be waived, but the Child Advocate doesn't believe the privilege should be waived? Must the advocate follow the directive of the client regardless?

And a similar conflict exists for the Best Interest Attorney with a dual appointment as Child Privilege Attorney. The Best Interest Attorney is permitted to discuss "otherwise privileged information" under Standard 3.3, but the Child's Privilege Attorney is bound by the Maryland Rules of Professional Responsibility "in all matters" under Standard 3.2. So if the therapist discloses to child counsel something the child said that is privileged, it appears that confidentiality applies under Standard 3.2. But if the child discloses the same information directly to the attorney, there is no privilege under Standard 3.3.Where does that leave the Best Interest Attorney?

Training, Qualifications and Compensation

Standards 4, 5 and 6 address issues that in the past have affected the competency and quality of those serving as child counsel. Standard 4 provides for some minimal training, primarily in non-legal areas. Standard 5 sets out qualifications and Standard 6 recommends that courts develop uniform compensation structures, ensure effective child counsel

regardless of the parties' economic status and ensure that child counsel are "compensated adequately." While these are wonderful goals, they are only aspirational. No provisions for funding are attached to this Standard.

***9 Appointment of Counsel**

The final Standard should probably be consulted first. Standard 7 addresses when to appoint child counsel, preferably "as soon as practicable." Factors for appropriate appointment include high conflict cases, cases where allegations of influence, manipulation, abuse or neglect exist, when there is a special needs child or a child of a family experiencing alcohol, substance abuse or family violence, relocation cases and "and other factor that the court considers important." Appointment Orders are referred to in Standard 7.2, and a model order has been developed to accompany the Standards.

Immunity and *Fox v. Wills*

One of the topics not covered by the Standards is child counsel's immunity from legal malpractice suits. On January 18, 2006, the Court of Appeals issues its opinion in the case of *Fox v. Wills*, supra, which disposes of this issue but leaves child counsel in a quandary.

In *Fox*, the allegations were, inter alia, that Mr. Wills, the Guardian Ad Litem, was negligent in his representation and that he abdicated his responsibilities to his client and advocated on behalf of the other parent. Wills filed a Motion to Dismiss the Complaint and raised the defense of immunity. The motion was granted. Slip Op. at 3. Although the Court of Special Appeals had affirmed the trial court's ruling, *Fox v. Wills*, 151 Md. App. 31, 822 A.2d 1289 (2003), the Court of Appeals has now ruled that an attorney appointed pursuant to 1-202 of the Family law Article has no immunity from a tort action brought by a parent on behalf of the child/former client.

The Court of Appeals' decision turns in large part on the Court's view of Section 1-202, i.e., the "only statutory function of such counsel is to represent the minor child." Slip Op. at 15. While acknowledging that several letters in the Bill File relating to the original enactment of Section 1-202 refer to the importance of protecting a child's best interests, the Court of Appeals does not appear to embrace the idea of a Best Interest Attorney.

This conflict between the Standards and the recent opinion in *Fox v. Wills* creates an ethical and financial dilemma for counsel appointed to represent children. While this work is some of the most fulfilling work a family law practitioner can perform, the decision in *Fox v. Wills* undermines child counsel's ability to advocate in any manner other than strictly as directed by the client. To do otherwise invites a malpractice claim.

Child counsel are typically dedicated practitioners willing to use their experience, training and expertise to assist children, with little, or minimal, pay for services rendered. The decision in *Fox v. Wills* unfortunately places child counsel in such a precarious position that counsel may have to withdraw from pending cases and/or refuse to take additional cases, unless and until the Legislature acts to protect these advocates from the constant threat of a malpractice action brought by a dissatisfied parent, allegedly on behalf of a former child client.

Footnotes

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