

Ethical Issues in Representing Children

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I can promise to be sincere, but not to be impartial. -- Goethe

PETAC: People for the ethical treatment of animals and children

- ▶ Law established 1874 w/ help of American Humane Society “ Cruelty to Children Act”- (indentured servitude)
 - ▶ Children not property
 - ▶ 1825- Right of social welfare agencies to remove children patterned after the Humane Society’s movement to protect cruelty to animals- designed to remove children suffering severe cruelty and exploitation
 - ▶ 1935-defintion expanded to include homeless children, and children in danger of becoming delinquents (Fagin’s boys)
 - ▶ 1960s- Child abuse expanded to include physical abuse based on years of medical findings of physically battered children



C.A.P.T.A. (U.S. Code title 42, chapter 67)

- ▶ Child Abuse Prevention and Treatment Act, 1974
- ▶ Prevention, Assessment, Investigation, Prosecution, and Treatment, Funding to States
- ▶ 1974- CAPTA required all states to appoint GALs for children
- ▶ 1996- CAPTA amended to allow attorneys to act as GALs for children
- ▶ 2002- CAPTA amended to allow states to appoint client-directed attorneys for children
- ▶ 2003- CAPTA amended to allow States to appoint a GAL in addition to a client-directed attorney for children.
- ▶ So,



Kids get Due Process, Kids have rights

- ▶ In re Gault (387 U.S. 1)
- ▶ The rights of children in their family relationships are as fundamental and compelling as those of their parents.
- ▶ Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.
- ▶ No similar decision establishing a child's right to counsel in civil proceedings exists.



Federal Constitutional Law

- ▶ The realm of personal family life is a fundamental liberty interest protected by the Fourteenth Amendment to the U.S. Constitution. (Santosky v Kramer, 455 U.S. 745, 1982)."
- ▶ A child's interest in continued companionship and society of parents is a cognizable liberty interest". (Smith v City of Fontana, 818 F.2d 1411, 9th Cir., 1987).
- ▶ These constitutional protections are based upon the integrity of the family unit which necessarily includes the child's right to be with his or her natural parent. (Stanley v. Illinois (1972), 405 U.S. 645, 652, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551, 559).
- ▶ The government's interest in the welfare of children embraces not only protecting children from abuse, but also protecting children's interest in the privacy and dignity of their homes." (Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999)).



The King is the Father

- ▶ **Parens Patriae** - literally, "parent of the country" refers to the role of the state as guardian or ultimate parent of the child.
- ▶ **Common Law** – King is the Father of the country
- ▶ **United States** – State can intervene to protect best interest of children
- ▶ **Problem:**
 - I. **Exclusion of Juveniles from the Constitutional Scheme**



Montana Returns to King's Law

- ▶ October 1, 2011, MCA 41-3-425, titled "Right to Counsel" is amended to remove that right.
- ▶ **41-3-425. Right to counsel.**
- ▶ (1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.
 - (2) Except as provided in subsection (3), the court shall immediately appoint or have counsel assigned for:
 - (a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422;
 - (b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is not appointed for the child or youth; and
 - (c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.
 - (3) When appropriate, the court may appoint or have counsel assigned for:
 - (a) a guardian ad litem or a court-appointed special advocate involved in a proceeding under a petition filed pursuant to 41-3-422;
 - (b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth.
 - (4) The court's action pursuant to subsection (2) or (3) must be to order the office of state public defender, provided for in 47-1-201, to immediately assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, pending a determination of eligibility pursuant to 47-1-111.



That's Just DN stuff, why should I care?

- ▶ Gives the Judge discretion whether a party to a civil action has a right to be represented.
- ▶ Gives a GAL/CASA the role of King.
- ▶ Violates federal and state constitutions.

Who is going to represent the rights of children?



Why does a Kid need a Lawyer in a Child Welfare Case?

- ▶ Dependency court decisions are only as good as the information upon which the decisions are based.
- ▶ In order to promote the welfare of children in dependency court (which is the goal of the child welfare system), children must be provided competent independent legal representation.

Isn't everyone looking out
for the kids' best interests?



Two models have dominated the representation of children:

The attorney/GAL -

- A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

The traditional attorney –

- A lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.



The \$ 64,000 Question: Best Interests v. Expressed Wishes

▶ Old Trend - Best Interest Model

1. Places attorney in the ethical dilemma of representing best interests, which may be contrary to the client's wishes, which attorney's are required to follow under most ethics codes.
2. Calls for attorneys to engage in substituted judgment of the client's best interests, which they may be ill equipped to do.
3. May also resulted in what has come to be known as "relaxed advocacy" where attorneys feel free to ignore their traditional duties (such as seeing their client or filing motions) because they are appointed as a GAL.

□ New Trend – Expressed Wishes Model

- (Traditional Attorney Role)



New Trend

- ▶ 40 States mandate legal representation for kids
- ▶ National Child Abuse Coalition states every child should have both an attorney and a GAL
- ▶ ABA defines child's attorney as “ owes the same duties of undivided loyalty, confidentiality and competent representation as due an adult client”
- ▶ NACC states, “The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.”



Practical Differences

- ▶ Curfew
- ▶ Donuts
- ▶ Father in Jail
- ▶ Mother on Drugs



Problems with Best Interests

- ▶ Evacuation of children during WWII
- ▶ Native American and Boarding Schools
- ▶ Lobotomies



Why the Traditional Attorney Model is Best Practice

- ▶ The December, 1995 Fordham University School of Law Conference on Ethical Issues in the Legal Representation of Children which resulted in an 800 page special law review issue by the same name;
- ▶ The adoption in February, 1996 of the *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*; and
- ▶ the publication of *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* by Yale Clinical Law Professor Jean Koh Peters In 1997.
- ▶ More recently, the National Association of Counsel for Children adopted its revised version of the *ABA Standards* in an attempt to achieve the delicate representation balance between zealous attorney advocacy and child protection.



Who is the Client: The Court or the Child?

- ▶ The child is the client and the attorney owes his duty and allegiance to his client.
- ▶ The guardian ad litem role (best interests model) - the court is really the client because the attorney must inform the court about what the attorney thinks is in the best interest of the child regardless of whether the child agrees with the attorney.
- ▶ This confusion has undoubtedly contributed to the poor quality of representation children frequently receive in our system.

1. The first duty of an attorney is independent, competent, advocacy.

2. Competent advocacy of a client's individual interests is the foundation of the attorney-client relationship.

- ▶ 3. Advocacy of the client's interests, relative to the interests of other parties' or the court, is the purpose of the attorney in the system.



What's the Big Deal?

- ▶ 1. It seems this fundamental of representation is understood in all forms of the attorney-client relationship except for the representation of children.
- ▶ 2. No jurisdiction, to my knowledge, relieves the attorney of their ethical duties when the client is a child.
- ▶ 3. Yet, attorneys frequently relieve themselves of this duty, often with the acquiescence of the court and opposing counsel.
- ▶ 4. The result is the inadequate and unethical representation of the child client.
- ▶ 5. Without an understanding of the child's attorney's role in the system, and the resulting duties, the representation is bound to be inadequate and unethical.



GAL Duties

- ▶ 1. Represents child's best interests
- ▶ 2. No duty of confidentiality with child
- ▶ 3. Makes written reports to the Court
- ▶ 4. Performs duties as directed by the Court
- ▶ 5. Testifies if called as a witness
- ▶ 6. No legal training required
- ▶ 7. Gives opinions and rely on hearsay to form opinions
- ▶ 8. If an attorney GAL, file Motions.

- ▶ M.C.A. 40-4-205 (Family Law)
M.C.A. 41-3-112 (DN Law)



A Lawyer's Ethical Duties:

What is an attorney-client relationship?

1. A lawyer asserts the client's position- Preamble
 2. A lawyer shall provide competent representation requiring legal knowledge. Rule 1.1
 3. A lawyer shall abide by the client's decisions concerning the objectives of representation. Rule 1.2
 4. A Lawyer shall not reveal information relating to the representation of a client without informed consent. Rule 1.6
 5. When a client's capacity to make adequately considered decisions is diminished (minority counts), the lawyer SHALL maintain a normal client-lawyer relationship with the client. Rule 1.14
 6. A lawyer Shall not represent a client if the representation will result in violations of the Rules of professional Conduct. Rule 1.16
 7. A lawyer shall not act as an advocate in which the lawyer is likely to be called as a witness. Rule 3.7
 8. It is professional misconduct for a lawyer to violate the rules of professional Conduct. Rule 8.4.
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The Refrigerator List

1. Assert the Client's position
2. Abide by the client's decisions
3. Duty of confidentiality
4. Maintain a normal lawyer- client relationship with kids
5. Don't represent someone if you have to violate these rules
6. Don't be a witness



Am I just a Mouthpiece?

- ▶ No, the attorney is **NOT** merely repeating what the child wants without regard to the ethical duties imposed on the lawyer by virtue of the attorney-client relationship.
- ▶ The “mouthpiece” role is in contrast to the “substituted judgment” role, in which the attorney makes the decision for the child without regard for the child's wishes.

Neither of these roles accurately describes the role of the lawyer in the ethical representation of children



What is Quality Legal Representation?

- ▶ I know it when I see it ...
- ▶ The ABA Standards comprehensively define the role of the child's attorney. **Get ABA Citation**
- ▶ The ABA Standards provide principles and guidance to lawyers who represent children in abuse and neglect cases.
- ▶ When the attorney for the child carries out her duties according to these Standards, the attorney is providing effective assistance of counsel.
- ▶ Having a lawyer capable of carrying out his or her ethical responsibility to the child and providing quality representation can make a difference in the outcome of child dependency proceedings.



How do I do that?

The child's attorney should :

- (1) obtain copies of all pleadings and relevant notices;
- (2) participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
- (3) inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child's family;
- (4) attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
- (5) counsel the child concerning the subject matter of the litigation, the child's rights, and the court system, , the lawyer's role, and what to expect in the legal process;
- (6) develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
- (7) identify appropriate family and professional resources for the child.



Recent Montana Supreme Court case

▶ **IN THE MATTER OF: R.M.T.,**

▶ *(2011 MT 164; 361 Mont. 159; 256 P.3d 935; 2011 Mont. LEXIS 204)*

▶ where a youth is subject to the termination of his or her parental rights, the trial court must appoint a GAL *and* an attorney for the child.

▶ the GAL may not function as the youth's attorney-- even if the GAL is an attorney.

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“Investigate, litigate, advocate!”

“ Great accomplishments most often result not from exceptional ability, but from ordinary ability followed through with exceptional commitment.”

- Ralph Marston