No Choice for Children

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The Memorandum and Order by the Third Department *In the Matter of Mark T. v. Joyanna U. et al*., decided and entered July 30, 2009, highlights the flaws in the New York State law guardian process governing matters of custody, visitation, and guardianship proceedings. In this case, the attorney for the child failed miserably in fulfilling his essential obligation. His actions show the need for better education and mandatory guidelines to be implemented so children will be afforded quality representation.

The current system of certification does not ensure a minimum level of competency or expertise to handle issues arising from the representation of children. This article will discuss proposed changes to the current New York State standards for representing children in custody and visitation proceedings.

The rules of the Chief Judge direct that in all proceedings other than juvenile delinquency and Person In Need of Supervision cases, the attorney for the child "must zealously advocate *the child's* position"[i] and that, in order to determine the client's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities."[ii]

The attorney must provide client-directed representation in the form of an advocate where a client's judgment is knowing, voluntary and considered.[iii] Furthermore, the rule states that "the attorney for the child should be directed by the wishes of the child, *even if the attorney for the child believes that what the child wants is not in the child's best interests*"[iv] and that the attorney "should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests."[v]

The attorney for the child is only justified in advocating a position that is contrary to the child's wishes when he "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent serious harm to the child."[vi] However, in such situations the attorney must still "inform the court of the child's articulated wishes if the child wants the attorney to do so."[vii]

The Family Court Act states that the law guardian system was designated to "help protect [children's] interests and to help them express their wishes to the court."[viii] This is the origin of many complicated issues that arise in representing children. This system encompasses three traditional roles that are often in conflict with one another: guardian ad litem, attorney as advocate, and attorney as an officer of the court.[ix]

Roles of the Attorneys

Guardian Ad Litem	Advocate	Officer of the Court
Responsible for gathering information and taking a position which represents the best interest of the child.[x]	Required to zealously advocate and argue for the client's wishes, even if those wishes are contrary to the best interests of the child.[xi]	Expected to gather relevant information about the child and investigate the legal issues and inform the court, allowing the judge to render an informed decision.[xii]

Statutorily, a law guardian is required to advocate for both the child's wishes *and* his best interests.[xiii] However, a law guardian may also be required to inform the court on relevant issues so as to allow the court to render a decision in the best interest of the child. A court may also assign this role to a separate guardian ad litem, pursuant to N.Y. C.P.L.R. 1201-02 (McKinney 1997). This role may best be served by a social worker, particularly when the child is very young. Several problems arise when law guardians assume one aspect of their role, while excluding the duties of the others. However, the current system lacks guidance or training as to how these competing roles are best balanced.

The problem with solely adopting the role of an advocate is that the child may neither be able to formulate an opinion nor express it. This could be due to the child's age, mental capacity, an internal force within the child causing

indecision, or an external force exerting pressure on the child to communicate a certain position. This possibility of incapacity requires the law guardian to determine whether the client is able to comprehend the situation and express an opinion. Clearly, there is no bright-line test for determining when a child is capable of such a task and, in the absence of statutory guidelines, the decision is left to the law guardian's personal speculation.

Further difficulties arise when judges give great weight to a child's expressed wishes. It allows the child to be in a position of control over the parties and dictate the outcome of a custody or visitation battle. While it is clear that a child's wishes should be expressed to the court if the child is capable of formulating such opinions, no decision should be based solely on the wishes of a child. This places undue pressure on a child to make a choice or the "right" decision. Furthermore, it allows parents the opportunity to influence their child. This can seriously disrupt the dynamics of a family or cause a controlling or wealthy parent to have an unfair advantage.

The problem with solely adopting the role as a guardian is that it requires the attorney for the child to superimpose his or her own personal preferences and values on to the client and make a recommendation to the court based on his personal judgment. In essence, the law guardian becomes the trier and finder of fact. This gives the law guardian a tremendous amount of power over the case.

When the attorney for the child acts as an arm of the court, his duties often overlap with the Department of Social Services, forensics experts, custodial supervisors and evaluators. These outside agencies perform objective assessments and submit reports to the court. These assessments and reports are subject to cross-examination, and the rules of evidence apply. However, attorneys for the child are not subject to cross-examination when they render their oral reports and findings to the court. This procedure hinders the adversarial nature of the proceedings, and subjects the entire process to the possibility of bias inherent in the attorney's opinion.

The attorney for the child receives inadequate guidance as to how to determine the capacity in which he should act for his client. The unique situation of the attorney for the child requires that he either advocate for the expressed interest of his client, or, if the child is determined by the attorney to be incapable of considered thought, the attorney must advocate for what they consider to be the best interest of the child. These duties are obviously quite different but are not differentiated under the law. It falls to the attorney for the child to distinguish his role as either a guardian ad litem, advocate or officer of the court.

Choice

Mark T. v. Joyanna U., No. 06053 (N.Y.2d July 30, 2009) highlights the fact that, unlike adults, children have no choice in their legal representation. This case also exposes the harm created by the attorney's failure to assume the proper role in representing his client. The lack of input by the child was clear. In the case at bar, the appellant-attorney took a position contrary to the expressed position by his 11½ year-old client, despite having never met nor spoken with him.

Children have an impossible task in expressing dissatisfaction to the court in their lawyers' services. Children are usually unable to determine if their lawyer has provided adequate representation because they are usually not present at the actual court proceedings. However, what a child does know is whether he has a working relationship- translating to whether he likes his lawyer-and if he is comfortable speaking to his lawyer. A child's reason for disliking his lawyer must be deemed irrelevant because a child should be comfortable with his representation. A child currently has no means of terminating their attorney-client relationship, and little opportunity to express their dissatisfaction to the court.

As a practicing matrimonial and family law attorney, I have come into contact with attorneys for the child who do not meet and speak to their clients. These attorneys for the child will then advocate a position that suits their personal preference. Obviously, this is a gross miscarriage of justice.

Many times, parents are the only people in the court proceeding who are able to note their child's dissatisfaction with their lawyer. Oftentimes, the parent I represent will tell me how upset their child becomes when talking to their lawyer and that their child has told them that they do not like their lawyer. The child may express their dislike of their lawyer only to their parents, and the parents may be the only persons in a unique position to notice that their child is uneasy, frustrated, or unusually quiet during or after a meeting with their lawyer. Children must be given a valid means by which they can express their dissatisfaction.

Elevated Status

The attorney for the child often has an elevated status in the courtroom. They may receive preferential treatment by the court, undermining the adversarial nature of our legal processes. Generally, the court hears the attorney for the child first, despite the fact that he is not representing either of the parties. The attorney for the child will then present his argument, which invariably includes his opinion. This opinion is not subject to cross-examination.

The attorney for the child, especially where one party is unrepresented, often assumes the role of mediator between the parties, exposing his opinion to manipulation. The reverence observed toward the opinion of the attorney for the child neglects this partiality and exposes the court to prejudice.

Qualifications

In order to be appointed as attorney for the child, attorneys in the Fourth Department must attend a two-day seminar. This program is to provide training for counsel representing minors involved in various proceedings.

While this training does address substantive issues, there is little instruction as to *how* to interact with clients. These clients are most often intellectually immature and require a special sensitivity if one is to find out what they really want. The attorney for the child is not a social worker or a psychologist and has absolutely no expertise in dealing with minors. This type of expertise cannot be achieved by attending a two-day seminar.

How Can We Improve?

A system of checks on the adequacy of the attorney for the child must be set in place. In light of the considerable room for error on the part of the attorney for the child in conjunction with the quasi-judicial protection accorded to them,[xiv] remedies must be made available to the child.

Frequency of contact

Location and frequency of meetings are very important parts in representing a child. The current rules only require an attorney for the child to meet with their client once. In prolonged cases, it is likely that the child's position may change. The attorney for the child will not know this if he does not stay in contact with his client. This problem is exacerbated by the current system's inadequacy in monitoring the attorney for the child in order to ensure that standards are followed.

It is suggested that, to ensure compliance, the court could inquire, at each appearance, what the attorney for the child has accomplished since the previous court appearance. The attorney should also be required to report the frequency, duration and location of contacts made with their client. A minimum number of meetings proportionate to court appearances between the attorney for the child and the client should also be mandated. It is suggested that the attorney for the child be required to contact the child after each court proceeding if age appropriate.

Age Standards

In our current system, the attorney for the child must assume the role of judge in two senses: the attorney must judge whether the child has the capacity to determine his interests, a psychological function in which the attorney for the child is most likely neither trained nor experienced, and secondly, the attorney for the

child must independently determine the best interests of the child. These philosophical conundrums should not be resolved by the attorney's superimposition of his own beliefs and values; this must be the realm of the court.

Under the current rules, the attorney for the child is the one who determines if his client lacks the capacity for knowing, voluntary and considered judgment. There are mandatory age standards that tell us when a person can drive, drink and join the military. Why should there be no age standards in the representation of children? The only age standard that comes to mind is that a law guardian can be appointed only up to a child's 18th birthday. However, that same person can receive child support until they are 21.

Implementing an age standard would divide the current ambiguity into two distinct categories between which the law would automatically and consistently assist the attorney for the child, instead of demanding the attorney to subjectively judge whether to act as an attorney or a guardian ad litem. Such a standard would further the objective of uniform application of due process.

Client Satisfaction

Finally, if courts made it a practice to have the child in court, or have an in-camera interview, a court could determine if the wishes of the child were correctly expressed by his lawyer, and that the child is satisfied with their lawyer. The court

meeting with a child could serve as a means to protect the child's rights and allow the court to determine if the attorney for the child has met the mandatory guidelines. This meeting would also allow for an all-important opportunity for the child to express his concerns with their representation. This opportunity to speak directly with the court would undoubtedly give a child more control over their representation. Unlike adults, who must declare their comprehension of the proceedings to the judge as well as the sufficiency of their representation, child-clients are currently without a voice before the court.

Conclusion

The attorney for the child system as it exists is flawed. The training and certification process is insufficient. Reform is needed, which requires the input of judges, attorneys and experts. Minimum standards and enforcement mechanisms must be implemented to ensure sufficient competency. It is hoped that these few suggestions will be considered to encourage reform, and assist the attorney for the child.

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[i] N.Y. COMP. CODES R. & REGS. tit. 22, §7.2 (2009) [emphasis added].
[ii] N.Y. COMP. CODES R. & REGS. tit. 22, §7.2[d][1] (2009).
[iii] N.Y. COMP. CODES R. & REGS. tit. 22, §7.2[d][3] (2009).
[iv] N.Y. COMP. CODES R. & REGS. tit. 22, §7.2[d][2] (2009) [emphasis added].
[v] *Id.*
[vi] N.Y. COMP. CODES R. & REGS. tit. 22, §7.2[d][3] (2009).
[vii] *Id.*

[viii] N.Y. FAM. CT. ACT §241 (McKinney 2008).
[ix] Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards and Case Law*, 10 TOURO L. REV. 529, (2003).
[x] *Bluntt v. O'Connor*, 737 N.Y.S.2d 471, 529 (App. Div. 2002).
[xi] *Id. at 530.*
[xii] N.Y. FAM. CT. ACT §241 (McKinney 2008).
[xiii] *Id.*
[xiv] *Bluntt v. O'Connor*, 737 N.Y.S.2d 471 (App. Div. 2002).