

Nova Law Review

Volume 36, Issue 2

2012

Article 5

Perspective: New Era in Representing Children

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PERSPECTIVE: NEW ERA IN REPRESENTING CHILDREN¹

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I. INTRODUCTION

For as long as lawyers have been representing children in New York state and elsewhere, the unfortunate backdrop for this otherwise noble and rewarding work has been an often heated debate regarding the proper role of a child’s lawyer in neglect and abuse, permanency and termination of parental rights proceedings. While a state has considerable discretion in defining that role, New York, like many other states, has provided only general guidance to children’s lawyers, who are referred to as counsel or confusingly, as “law guardians” in New York statutes. As a result, while everyone agrees that the child’s lawyer, like any other lawyer, must conduct an adequate factual investigation, communicate regularly with any verbal client and help such a client understand the proceedings and make sound decisions, and prepare for and advocate at court hearings, lawyers have been left relatively free to follow, or override in their discretion, positions taken by their young and immature clients. In other words, lawyers have been able to navigate freely between the traditional lawyer’s role—advocating for the client’s expressed interests, and a guardian ad litem role—advocating for what the guardian determines to be in the child’s interest.

On October 17, 2007, Chief Judge Judith S. Kaye, a long-time children’s rights champion, signed new section 7.2 of the Rules of the Chief Judge, which states that in juvenile delinquency and person in need of supervision proceedings, “the attorney for the child must zealously defend the child,” and that in other proceedings, the child’s attorney “should be directed by the wishes of the child” if “the child is capable of knowing, voluntary and considered judgment,” even if the attorney “believes that what the child wants is not in the child’s best interests.”

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Under Rule 7.2, the attorney “would be justified in advocating a position that is contrary to the child’s wishes” when the attorney “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.”

Rule 7.2 was promulgated shortly after the New York State Bar Association’s formal adoption of *Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings*, which strike a similar theme. Even before these developments, The Legal Aid Society’s Juvenile Rights Practice, for the first time in its forty-six-year existence, engaged its staff in a comprehensive discussion of the role of the child’s lawyer with a view towards developing formal written guidelines for juvenile rights lawyers.

Now, against the complementary backdrop created by Rule 7.2 and the state bar standards, Legal Aid’s guidelines, *Giving the Children a Meaningful Voice: The Role of the Child’s Lawyer in Child Protective, Permanency, and Termination of Parental Rights Proceedings*, have been released.²

We believe that the strength of the adversarial process lies in the full presentation and consideration of the affected parties’ points of view. The child, whose liberty interests are implicated in the proceeding, is entitled to this opportunity no less than any other party. Accordingly, like Rule 7.2 and the state bar standards, the Juvenile Rights Practice guidelines endorse the traditional lawyer’s role as advocate for the child’s wishes, while also recognizing narrow exceptions to the general rule.

Juvenile Rights Practice lawyers may, but are not required to, take positions that are inconsistent with the client’s expressed wishes only when the client “lacks the capacity to fully comprehend the nature of the proceeding and the issues raised and communicate a preference and comprehensible reasons for it,” or when arguing successfully for the result the child prefers would expose the child to a risk of “grave physical harm.”

However, we recognize the residual danger that lawyers will evaluate “capacity” using different standards. For instance, a lawyer might equate capacity with maturity, and thus believe that any child of fifteen or sixteen lacks capacity. Or, while evaluating the child’s capacity, a lawyer might treat what appears to the lawyer to be a bad decision by a child as evidence of a lack of capacity. To insure that capacity determinations will be as consistent as possible, the guidelines endorse the view that by age ten, a child usually

2. LEGAL AID SOCIETY, *GIVING THE CHILDREN A MEANINGFUL VOICE: THE ROLE OF THE CHILD’S LAWYER IN CHILD PROTECTIVE, PERMANENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS* (2008), <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf>.

has decision-making ability, and that many children ages seven through nine possess such ability.

II. EXTENSIVE RESEARCH

The Juvenile Rights Practice guidelines do not adopt this view without good reason or without exhaustive research. Before arriving at this result, the guidelines: 1) carefully analyze New York statutes, case law, and attorney ethics and practice standards, as well as other authorities, and conclude that this model of representation is permissible; 2) highlight the ways in which the effectiveness and integrity of the judicial process, and the child's confidence in that process, are enhanced when there is a lawyer who advocates in accordance with the child's unique perspective; and 3) rely on expert authority supporting the view that by age seven a child's social, language, and cognitive abilities have become more complex and sophisticated.

At the same time, however, the guidelines recognize that although many young children do possess sufficient capacity to make decisions and ought to have a loyal advocate, their deficits in experience, insight, and maturity heighten the importance of the lawyer's counseling role. Even when the lawyer is "client-directed" in that the child's wishes will prevail in the end if the lawyer and the child disagree, a lawyer's representation of a child, like a lawyer's representation of an adult, also is "lawyer-directed" in the sense that a lawyer should, without overwhelming the client's will, attempt to steer the client away from self-destructive and other ill-conceived positions and towards better ones. The guidelines also recognize that while a child has the right to make certain fundamental decisions that implicate his or her liberty interests, decisions involving litigation strategy, including the means by which to achieve the child's litigation goals, are made by the lawyer.

The guidelines also lay out a methodology for attorneys to use when making decisions on behalf of non-verbal infants and other children who lack capacity. This is often referred to as "substituted judgment" representation. The lawyer, lacking the direction provided by a client, has no alternative but to advocate in accordance with the governing legal standard.

For instance, the lawyer will look to the imminent risk standard at a removal hearing, and to the preponderance of the evidence or clear and convincing evidence standard at a fact-finding hearing. When making decisions on behalf of a child who lacks capacity in certain other contexts, for instance, a custody dispute involving non-parental custodians, the lawyer may, consistent with applicable legal standards, consider the child's best interests.

The guidelines also instruct the lawyer to give at least some weight to the wishes of a child who lacks decision-making capacity, since the child has first-hand knowledge of the home environment and even very young children

can make a substantial contribution to the decision-making process. The lawyer also should keep in mind the disparity between the lawyer's own life experiences and expectations, and those of the child. At a formal hearing, the lawyer should seek to elicit as much information as possible; although in many cases the lawyer already will have adopted at least a tentative position before the hearing commences, the lawyer cannot be certain that new information will not change his or her position.

III. CONCLUSION: WORKING WITH JUDGES

We recognize that many Family Court judges have come to expect the child's lawyer to employ a "substituted judgment" model much more broadly than is permitted by section 7.2 of the Rules of the Chief Judge or by the guidelines we now adopt, and that the judges value that model because it seems to insure that they will get as much information as possible.

There are a number of ways to address such concerns. First, if the child's lawyer engages in effective counseling, makes appropriate determinations regarding a client's incapacity and/or the risk of grave physical harm, and avoids making frivolous arguments, judges should not be faced with a child's lawyer who is advocating for a result that would place the child at risk of serious harm. In any event, the judge can choose to reject the lawyer's arguments.

Moreover, the evidence the judge requires will be presented by lawyers representing other, highly adversarial parties. If those lawyers are ineffective, the judge has the option of soliciting additional evidence; indeed, appellate courts have instructed judges to do precisely that when important evidence has not been produced. Finally, with promulgation of Rule 7.2, and adoption of the state bar standards, a new era of child advocacy in New York has officially begun, and there is no turning back.