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2-13-2023

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Cardozo Journal of Equal Rights and Social Justice

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Recommended Citation

DeBenedictis, Alexandra, "What is the Proper Role of Attorneys Representing the Child in Abuse and Neglect Cases?" (2023). *ERSJ Blog*. 45.

<https://larc.cardozo.yu.edu/ersj-blog/45>

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What is the Proper Role of Attorneys Representing the Child in Abuse and Neglect Cases?

According to the Child Abuse Prevention and Treatment Act of 1974 (CAPTA)[1], under federal law, children are required to have representation from a guardian ad litem in abuse and neglect proceedings.[2] Many jurisdictions are proponents of the “Best Interest Model,” where the attorneys are appointed to determine and serve the best interest of the child, regardless of the individual child’s wishes.[3] Other jurisdictions take the more traditional approach under the “Client-Directed Model,” where the attorney advocates for the child’s expressed wishes but also must take “into account diminished capacity such as age” of their client.[4]

The National Association of Counsel for Children (NACC) breaks down the “Best Interest Model” and the “Client-Directed Model” into components, highlighting the pros and cons, in order to “assist states in evaluating and formulating models of representation.”[5] For instance, approximately 60% of United States jurisdictions adopt the “The Attorney Guardian ad Litem Hybrid Model.”[6] This “hybrid” best interest model is structured in such a way that the role of the attorney for the child and the guardian ad litem are served by the same individual.[7] This individual must determine and represent the child’s “best interest,” which takes precedent over the child’s wishes.[8] Some states, including Florida, Hawaii and Maine use “The Lay Guardian ad Litem Model,” where the guardian ad litem and the attorney for the child are two separate individuals.[9] Complementing one another, the non-legal individual stands in the proceeding representing the best interest of the child, while the attorney provides legal counsel.[10] However, under this model, there is a risk that the child will not have legal counsel because the state statutory laws in many jurisdictions do not include the additional requirement to appoint an attorney.[11] Michigan has taken a stricter approach and has adopted the “The ‘Two Distinct Lawyer Roles’ Model.”[12] Through this Model, Michigan requires an attorney to serve as the guardian ad litem and gives the opportunity for a separate individual to serve as the attorney for the child.[13]

In contrast, some jurisdictions, such as Oregon, use a form of the “Traditional Attorney” approach, where the attorney for the child is directed by the client’s desires.[14] Although the basis of this model is to give the child “a voice and autonomy,” a guardian ad litem or Court Appointed Special Advocate (CASA) is still required in the jurisdictions that have adopted this model.[15] The ABA prescribes the role of “Child’s Attorney” in the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, and defines it as, “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.”[16] Moreover, the NACC further modified the

“Child’s Attorney” approach to recognize that not all children are capable of directing their litigation.[17]

Although this model is not currently used by any jurisdiction, proponents view the “Child’s Attorney” model, as defined by both the ABA and the NACC, as an advancement of the guardian ad litem requirement.[18]

Although it is undisputed that every child deserves to be represented by “an independent, competent, and zealous attorney, trained in the law of child protection and the art of trial advocacy, with adequate time and resources to handle the case,” a major split exists on the state level between what the “proper” role of the attorney should be in child representation, and which model should be applied within the courts.[19]

[1] 42 U.S.C.A. § 5101 (1996).

[2] Lawrence K. Furbish, *Guardian Ad Litem in Neglect and Abuse Cases*, OLR Rsch. Rep. (Apr. 23, 1998), <https://cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0648.htm> (A guardian ad litem is an individual “appointed by the court to represent the interest of a child or incompetent person in a legal proceeding.”).

[3] David Katner, Philip (Jay) McCarthy, Jr., Miriam Rollin & Marvin Ventrell, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, Nat’l Ass’n Of Couns. For Child. (Apr. 28, 2001), https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf.

[4] Noy Davis, First Star Institute, Amy Harfeld, Elisa Weichel, & The Children’s Advocacy Institute, *A National Report Card on Legal Representation for Abused & Neglected Children*, A Child’s Right To Counsel (4th ed.) (Last visited Jan. 30, 2023) <http://www.caichildlaw.org/Misc/RTC4.pdf>.

[5] Katner et al., *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] American Bar Association, *Standards of Practice for Lawyers Who Represent Children In Abuse and Neglect Cases (NACC Revised Version)*, Nat’l Ass’n Of Couns. For Child (Feb. 5, 1996), <https://isc.idaho.gov/cp/docs/ABA%20Standards%20of%20Practice%20for%20Lawyers%20who%20represent%20Children%20in%20Abuse%20and%20Neglect%20Cases.pdf>.

[17] Katner et al., *supra* note 3.

[18] Katner et al., *supra* note 3.

[19] *Id.*