ETHICAL DILEMMAS FOR LAWYERS WHO REPRESENT CHILDREN IN DYFS CASES

In conjunction with Susan C. Esquilin, Ph.D presenting on Ethical Dilemmas for Mental Health Professionals

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LEGAL UNDERPINNINGS

• Parents have a constitutional right to raise their children, but those rights are not absolute.
• Those rights must be balanced against the State’s responsibility to protect children.
• Titles 9 & 30 of the N.J. Statutes articulate the State laws protecting children.
Why is a lawyer needed for children in these cases anyway?

The stakes for children are extraordinary.

- The scope of state action in these cases can be life changing.
- When parents are alleged unfit to care for their child …… who acts in their place?
  - Paradigm for family autonomy is fractured
  - DYFS may obtain custody.
  - Family Court Judges apply the law based on a "best interests of the child" standard.
  - A Law Guardian is appointed “to help protect his interests and to help express his interests to the court.” N.J.S.A. 9:6-8.23
When a Parent is unavailable due to alleged unfitness:

- WHO SPEAKS FOR THE CHILD?
  OR IS IT …

- WHO HELPS THE CHILD SPEAK?
CONFUSING?

- ATTORNEY
- LAW GUARDIAN
- GUARDIAN AD LITEM

- GUARDIAN, LEGAL GUARDIAN
- CASA
- KINSHIP LEGAL GUARDIAN
- STAND-BY GUARDIAN
- DYFS “GUARDIANSHIP”

ROLES OF THE LAWYER

**LAW GUARDIAN (ATTORNEY)**
- Duty owed to client
  - N.J. Court Rules, Rule 5:8A
  - Appointed by court “to serve as the child’s lawyer”
  - N.J.S.A. 9:6-8.23
  - In re M.R., 135 NJ 155 (1994)
  - Rules of Professional Responsibility (RPC)

**GUARDIAN AD LITEM (GAL)**
- Duty owed to the Court
  - Usually a lawyer
  - NJ Court Rules, Rule 5:8B
  - Appointed by court for “best interests of the child”
  - Prepares report with recommendations and may testify
CASA

- APPOINTMENT OF COURT APPOINTED SPECIAL ADVOCATE
  - NJ COURT RULE 5:8C

- “…the court may…appoint a volunteer CASA who shall act on the court’s behalf … in furtherance of the child’s interests but who shall not supplant or interfere with the role either of counsel for child appointed pursuant to R. 5:8A or guardian ad litem appointed pursuant to R. 5:8B.”

SO NOW THAT’S ALL CLEARED UP ! ??

- NJSA 9:6-8.23(a) states:
  “Any minor who is the subject of a child abuse or neglect proceeding under this act must be represented by a law guardian to help protect his interests and to help him express his wishes to the court.”

- Query: Does the statute create a “hybrid” role for the law guardian: part GAL and part lawyer?
Multiple Choice Test on the Role of the Lawyer

Because children are so different from other clients, doesn’t that change the way the ethical rules apply to providing legal representation to children?

a. No
b. Maybe
c. It depends
d. All of the above

ROLE OF THE LAW GUARDIAN (ATTORNEY) IN REPRESENTING CHILDREN

• “Hybrid” lawyer role emphasizing determination of a child’s best interests is falling out of favor.
  – Determinations of what is “in the best interests of the child” is role of the court, and others in the litigation.
  – Lawyers have no special expertise and no training in deciding what’s “best”.
  – Under a best interests approach, a child’s legal position would depend on the lawyer they’re assigned

  ➢ This approach projects the lawyer’s worldview of family and values to the child
  ➢ Given the stakes and our multi-cultural pluralistic society, does that make sense?
ROLE OF THE LAW GUARDIAN (ATTORNEY) IN REPRESENTING CHILDREN (continued)

• A consensus is building: attorneys representing kids must represent client’s wishes.
• 2011 ABA Model Act Governing the Representation of Children in Abuse Neglect and Dependency Proceedings

The Dilemma of Law Guardians representing Children: Capacity of a child client to make decisions

• Acting ethically in representing children:
  – Attorneys ethical rules acknowledge capacity as a factor requiring special consideration
  – Capacity is not usually fixed, but flexible
  – Diminished capacity for some decisions may not extend for other decisions
  – Substituted judgment standard
  – Appointment of a GAL when things get sticky
More Dilemmas

• What if the lawyer disagrees with the client’s goals or decisions?

• What if the client is making a “huge mistake”?

• What if the client’s choice will put the child in serious jeopardy of immediate harm?

MOVING FROM DILEMMA TO ACTION
Factors in Assessing decision making Capacity of child clients

- Age
- Developmental age and norms
- Nature of the decision
- Consequences on the child’s life
- Ability of the client to make an informed decision on the issue being discussed
- What are the possible resulting harms?

How can we know what a child wants?

- Dr. Esquilin’s slide # 18
- Why does it matter?
  - “Competency/capacity in the law stems from respect for the autonomy of the individual.”
Getting to know the Child Client is Essential

- Insight into capacity
- Insight into values of the family of origin
- Development of rapport allowing communication and a real exchange
- Contact with others with insight into the child – family, siblings, therapists, teachers
- Use of Experts
- **NOTE:** balance long-view with the “moment in time” being played out.

Expert Evaluator as an Agent of the Child’s Attorney

- Attorney:client privilege extends to AGENTS of the attorney, including to mental health professionals they retain
- Experts supplement but never replace Attorney’s Role
- Expert witnesses subject to different witness rules
Working with Experts to Help Solve these Dilemmas

Working with Therapists

• confidentiality belongs to the client
• Law guardians enjoy court-ordered access to a child client’s records
• Therapists can provide insight into a child client’s needs, wishes, and desires
• Therapists can help to assess capacity
• Insight into risk of harm and other dangers

Working with Independent Evaluators

• Common uses
  ➢ Psychological & Psychiatric evaluations
  ➢ Bonding evaluations, incl. sibling bonds
  ➢ Assessment of treatment & placement needs
  ➢ Insight into risk of harm and other dangers
  ➢ Help in how to persuade the court from “here” to “there”.

• Less Common uses
  ➢ Assist in fashioning a viable client position
  ➢ Assess capacity
  ➢ Assist attorneys with medical, psychological, educational and other client needs or conditions
Recent Pennsylvania Study of legal representation in child welfare cases

Johnston-Walsh, L. and Kinnevy, S. et al., Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania, October 2010

- Many lawyers not complying with the mandated approach
- Despite uniform laws and rules, there exists a wide variation in practice
- "[O]ne attorney described …that he does not speak with his clients because he believes his determination of the child’s best interest would not be well informed by client contact, because most children want to return to their parents regardless of their parents' treatment of them."