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TO ASSERT CHILDREN'S LEGAL RIGHTS OR PROMOTE CHILDREN'S NEEDS: HOW TO ATTAIN BOTH GOALS

Daniella Levine*

INTRODUCTION

CHILDREN have rights, human and legal, although the extent of most of these rights has not yet been clearly enunciated by our courts and legislators. The appointment of independent representatives to speak on behalf of the child in legal proceedings that affect their interests is one such right. This right is constitutionally guaranteed for those children subject to incarceration.¹ In other areas, such as child protection, termination of parental rights, or divorce/custody proceedings, some state laws provide for child representation.² Yet the scope of and standards for this representation, including whether the representative must be an attorney, have been left largely to the discretion of individual judges. Furthermore, few state courts or legislatures have provided substantial guidance to the attorneys or lay persons appointed to represent such children.³

Child advocates and public policy specialists are eager to resolve these representation dilemmas and establish meaningful standards. Unfortunately, cogent standards for representation of children cannot be developed until we undertake a thorough qualitative evaluation and cost-benefit analysis of the many existing and potential models for representation. If child advocates fight for appointment of paid attorneys for children in all cases, without a careful consideration of the benefits of that representation and without review of more cost-effective models for representation, empty promises for our children may result: more attorneys, less effective advocacy, and less funding for

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1. *In re Gault*, 387 U.S. 1 (1967).

2. For example, Florida law provides for the appointment of a lay guardian ad litem in all the above referenced proceedings. See generally, H. Lila Hubert, Comment, *In the Child's Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings*, 49 U. Miami L. Rev. 531 (1994).

3. Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327, 332 (1993); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 J.L. Reform 341, 348 (1987).

services to address the underlying reasons why the child became involved with the legal system.

Participants in the Fordham University School of Law Conference on the Ethical Issues in the Legal Representation of Children acknowledged that all children in child abuse and neglect proceedings are entitled to representation.⁴ A distinguished and expert group of child advocates (predominantly attorneys) came together at the Conference to examine ethical issues in the "legal representation" of children. After significant deliberation, the Conference participants adopted a resolution that the child's representative in child abuse and neglect proceedings should always be an attorney.⁵ They further resolved that the attorney's ethical obligation to the client requires her to serve in the traditional attorney-client role, rather than in the "guardian *ad litem*" role, to the extent that the client is "competent" to direct the representation. The child's attorney should then determine, with input from others who have knowledge of the child, whether the child is competent, to what extent, and for what purposes.⁶

Participants devoted significant study and debate to these issues, resulting in the endorsement of several recommendations pertaining to the manner in which attorneys and judges should determine a child's competency and determine standards for the representation of the impaired and unimpaired child client.⁷ This discussion, though valuable, did not solve the issues in my view. Further study is necessary to determine who would be best suited to judge the child's competency, and, once resolved, who should be empowered to substitute his or her judgement for that of the impaired child.⁸ The Conference also did not examine whether advocacy for the competent child's wishes truly leads to best outcomes for children. This Response will not address either of these issues.

This Response seeks to reexamine the underlying premises of the Conference and to explore whether addressing some fundamental questions could enhance understanding of the above issues. Specifically, the question of who should represent the child in child welfare proceedings—an attorney, lay advocate or other professional, or some combination thereof—requires further consideration.⁹

4. This view is widely held and is codified in the federal law. Duquette & Ramsey, *supra* note 3, at 346-47.

5. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301, 1320-23 (1996).

6. *Id.* at 1312-14.

7. *Id.*

8. Children are often competent to direct their own representation. Even when children are competent, however, this does not dictate that lawyers alone are best suited to represent them.

9. Duquette & Ramsey, *supra* note 3, at 349-50.

Several studies have examined different models for representation of children in child abuse and neglect proceedings. These studies suggest that the combination of lay and attorney representation for children results in more effective advocacy than the appointment of either one in isolation. Personal experience leads me to agree that such mixed or hybrid models for child representation more frequently yield swift, thorough, satisfactory results for children who might otherwise languish in the child welfare system. We need to conduct additional studies to explore further each model, define relationships among attorneys and lay advocates, and examine client outcomes. After such a review, access to attorneys for children in all cases may prove to be unrealistic (too expensive) and ineffective (not assuring quality).

This Response also acknowledges that all children who are the subject of abuse or neglect proceedings should receive independent representation. The federal Child Abuse and Neglect Prevention and Treatment Act of 1974 ("CAPTA") imposes this requirement on states receiving federal funds under the Act.¹⁰ All fifty states have accepted funds under the Act and have enacted some scheme for providing such representation, although in eight states appointment of a guardian *ad litem* is within the discretion of the states.¹¹ I will outline some of the models currently in existence, provide some preliminary information about their effectiveness, and suggest specific areas for further study. Finally, I will provide support for my view that the combination of lay and legal representation for children ensures the best quality at the most reasonable price.

I. HISTORY AND BACKGROUND OF NONATTORNEY REPRESENTATION

The traditional representation for a child in child welfare proceedings has involved an attorney appointed to serve as guardian *ad litem*. Courts have historically made such appointments pursuant to their inherent judicial powers.¹² Commencing in 1977 in Seattle, Washington, Judge David Soukoup began using volunteer citizens as lay guardians *ad litem*. This model came to be known as "Court Appointed Special Advocates," or CASA, and has quickly established itself as the fastest growing volunteer movement in the country. Several states have established statewide programs by statute, and the National Council of Juvenile and Family Court Judges has endorsed the model.¹³ As of 1995, approximately 700 volunteer programs (operating under various names: CASA, Guardian *ad Litem* or GAL, for

10. 42 U.S.C. §§ 5101-5107 (1988 & Supp. 1994).

11. Hertz, *supra* note 3, at 332.

12. Hubert, *supra* note 2, at 537.

13. Hertz, *supra* note 3, at 336-37.

example) operate in fifty states, the District of Columbia and the U.S. Virgin Islands.¹⁴

In 1982, the National CASA Association ("NCASAA") was established "to promote, assist, and support the development, growth, and continuation of quality CASA programs."¹⁵ The federal government has provided funding for the Association, and used it to channel funds to local GAL and CASA organizations throughout the country. Association member-organizations must adhere to NCASAA standards for recruitment, training, and quality representation as prerequisites for receipt of federal grants. In addition, the NCASAA has developed extensive support and technical assistance components for member organizations, including a standardized training curriculum, along with quality publications and conferences.¹⁶

A small number of jurisdictions rely on social workers, probation officers, or court counselors to represent children by statute.¹⁷ I will refer to such statutory schemes as multidisciplinary models of representation for children.

II. STUDIES WHICH EXAMINE LAY MODELS AND ATTORNEY MODELS FOR REPRESENTATION OF CHILDREN IN CHILD WELFARE PROCEEDINGS

CASA¹⁸ and GAL programs coexist with various models for lawyer participation on behalf of children in child welfare cases. The 1993 Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian *Ad Litem* summarizes and evaluates several models.¹⁹ The 1988 reauthorization of CAPTA mandated and funded this report ("CSR Report").²⁰ The report grouped the models as follows: (1) the private attorney model, in which the court appoints an attorney in private practice to represent each child, with compensation by the court; (2) the staff attorney model, in which each county employs a staff of attorneys either directly or through contracts with law firms; and (3) the CASA model, in which the court or an independent CASA organization selects and trains lay volunteers. In practice, these models working side by side operate at cross-purposes on behalf of the child. The CSR Report provides some useful analysis

14. Rebecca H. Hertz & Irene Cooke, *CASA Volunteers and Attorneys: A Partnership That Works*, 1, 10 (Sept. 1995) (unpublished manuscript, on file with the National CASA Association).

15. Hertz, *supra* note 3, at 337 (quoting NCASAA Mission Statement).

16. *Id.* at 337.

17. *Id.* at 332.

18. Throughout this article, the generic term "CASA" denotes the lay volunteer serving in the capacity of representative or GAL for the child.

19. CSR, Inc., U.S. Dep't of Health & Human Services, Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem (1993).

20. Pub. L. 100-294, 102 Stat. 102 (1988).

and suggests that combination models be explored further. Some analysis of these hybrid or "mixed" models has been completed and will be summarized in section IV.

The major conclusions of the CSR Report can be captured by stating the benefits and drawbacks of each model. Private attorneys, the most common child representative, lack adequate training and supervision. Staff attorneys receive more training and supervision, but typically possess less experience than private attorneys assigned to represent children. CASAs have the least experience on average but dedicate two and a half hours per week per case, compared to one hour per case for each of the other two models. In addition, CASAs receive significantly more supervision and support than both attorney models.²¹

An analysis of the major GAL roles²² reveals more qualitative information. The CSR Report found the CASA model to better meet the fact finder and investigator functions than the private or staff attorney models. For example, thirty per cent of private attorneys and 17.4% of staff attorneys have no contact with their clients, compared to only 8.9% of CASAs. A majority of CASAs visit family members, while only one third of attorneys do so. The Private Attorney Model, however, provides superior quality of legal representation overall, in that a higher percentage of these advocates attend court hearings than either staff attorneys or CASAs. On the other hand, CASAs are the most likely to submit written reports at the required hearings.²³ CASAs, however, are least likely to take active steps as mediators and negotiators,²⁴ although such efforts succeed in the great majority of cases in reaching a resolution. As case monitors, the CASAs are ten times more likely to be actively involved than the attorneys in maintaining contact on matters other than specific hearing preparation. Many attorneys do not perceive this extensive contact to be part of their role.²⁵ Identifying community resources and negotiating with community service providers presents another area of confusion. Almost half of all respondents view this resource brokering as the responsibility of the caseworker and therefore avoid monitoring social service provision.²⁶

The CSR Report concludes by offering recommendations for the enhancement of each model. According to these recommendations, the private attorney model lacks the necessary resources and fees to support adequate representation. The recommendations urge more

21. CSR, Inc., *supra* note 19, at XIV.

22. Donald N. Duquette, *Advocating for the Child in Protection Proceedings* 13-16 (1990) (outlining the major GAL roles).

23. CSR, Inc., *supra* note 19, at XVI.

24. *Id.* at XVII.

25. *Id.* at XVIII.

26. *Id.*

focused training and the implementation of support structures comparable to that used in staff attorney and CASA program models. The staff attorney model suffers primarily from excessive caseloads, lack of focussed training, and inadequate reviews of staff performance. The CASA model is hampered by delay in case appointment, a need for legal representation in courtroom proceedings and negotiations.²⁷ Overall, the CSR Report concludes that mixed model representation should be explored; formal training and certification for all models should be established; formal appointment instructions outlining duties, roles, and responsibilities should be utilized; and additional resources to implement the GAL requirement under CAPTA should be appropriated.²⁸

Phase I of the CSR Report, *The National Evaluation of the Impact of Guardians Ad Litem in Child Abuse or Neglect Judicial Proceedings*, completed five years earlier in 1988, provides valuable preliminary information regarding the effectiveness of lay advocacy models.²⁹ The Report concludes that volunteer models for child representation clearly excel, especially in terms of investigation, mediation,³⁰ and interpersonal skills. The study also found that volunteers function well at resolving case difficulties when emergencies arise.³¹ Overall, despite disadvantages such as the volunteer's tendency to become excessively emotionally involved and the initial resistance to lay volunteers from caseworkers, the CASA model exceeds the other models on "quantitative best interests outcome measures."³² This measure reflects the quantity of services ordered, changes in case plans, time between hearings, and maintenance of the initial goal of reunification.³³ A smaller study conducted at a Midwestern city in which two different child representation models exist, supports these findings and concludes that lay volunteers function as well as staff attorneys on most of the variables studied.³⁴

III. HYBRID OR MIXED MODELS OF REPRESENTATION

Several key commentators have raised concerns about the potential for arbitrary decision making on the part of attorneys when represent-

27. *Id.* at XIX.

28. *Id.* at XX.

29. Heartz, *supra* note 3, at 333 n.38.

30. It is ironic that CASA volunteers excel in the use of mediation despite their relative reticence to apply it, according to the 1993 study. This may be evidence of role confusion or intimidation. Mixed models of representation may serve to empower lay advocates to more fully explore all the advocacy tools available.

31. Heartz, *supra* note 3, at 339 nn.73-74.

32. *Id.* at 339.

33. *Id.*

34. John Poertner & Allan Press, *Who Best Represents the Interests of the Child in Court?*, 69 *Child Welfare* 537 (1990).

ing incompetent child clients.³⁵ They have even suggested that attorneys are ill-suited to the fact finder role.³⁶ The studies cited in this Response show that many attorneys do not consider it their proper role to function in several capacities arguably essential to quality child advocacy.³⁷ The Conference participants, through the Recommendations, propose to confront these limitations by providing clearer guidelines for attorneys: to determine the range of possible legal options for the client, and to encourage attorneys to seek input from others—professionals and those with personal knowledge of the child—in deciding which option to promote.

I wholeheartedly support the Conference Recommendations' effort to provide more guidance to attorneys in child representation. Nonetheless, I believe the participants overlooked the demonstrated merits of hybrid representation models. Studies have demonstrated that such representation enhances quality of advocacy, as compared to that provided by attorneys working in isolation. When attorneys work in tandem with trained, supervised lay advocates or as part of a multidisciplinary team, they are more likely to access important case data. The lawyer who represents a child without such consultation and support must make difficult evaluations in each case (including whether consultation is needed) for which he or she may be ill-trained.

A. *Benefits of the Hybrid Mixed Model*

Hybrid or mixed models of child representation have evolved to help resolve or avoid some of the problems inherent in parallel representation by attorneys and nonattorneys for the same child. With two advocates on a case, the potential for conflict of a personal or professional nature increases. Where attorneys and lay advocates work simultaneously (but not together) on behalf of the child in child welfare proceedings, "an inherent balance of power" frequently favors the attorney.³⁸ Generally the attorney receives payment while the lay advocate does not. Each may hold a derogatory opinion of the other's commitment and capabilities. Their recommendations for the child may differ; consequently, they may attempt to undermine each other's efforts in the proceedings. The relationship between lawyer and non-lawyer advocates may vary from case to case with no clear definition, or may be defined only on a limited case-by-case basis.³⁹

35. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *Fordham L. Rev.* 1399, 1404 (1996); Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practice Dimensions*, 64 *Fordham L. Rev.* 1505, 1523 (1996).

36. Guggenheim, *supra* note 35, at 1415-16.

37. CSR, Inc., *supra* note 19, at XV-XVIII.

38. Heartz & Cooke, *supra* note 14, at 12.

39. *Id.*

Despite these difficulties, many examples of successful collaboration exist. Generally, such models include a well-defined relationship between the two groups of advocates. Several productive hybrid models have evolved in jurisdictions with CASA programs. The court may assign the CASA at the request of the attorney to assist on the case in performing specific functions; the CASA may be represented by a staff or pro bono attorney; or the CASA and attorney may function as a team.⁴⁰

Attorneys and lay advocates working together constitute a sword and shield approach to child advocacy. The lay advocate receives special training and ongoing support that focuses on understanding the child's need. These advocates can focus on fact-finding, relationship building, communication, and monitoring. The attorney can provide the vehicle to ensure that the lay advocate has access to necessary information, is appropriately informed of changes in the child's or family's circumstances, is provided with notice of all hearings and administrative reviews, and is recognized by the court as a key player in the decision-making process. The attorney will provide the lay advocate with an understanding of the legal parameters of the advocacy and help develop case strategies. When we add to this dynamic combination of legal expertise and dedicated individualized child advocacy, appropriate program monitoring and staff supervision, the model approaches the ideal.

Many permutations of the hybrid model are possible. Several are explored in this article; others may be developed to adapt better to the unique circumstances of individual jurisdictions. For example, in resource-rich communities, quality representation may be offered through a university-affiliated clinic or a publicly-supported child advocacy center. Where publicly-funded government agencies (e.g., court or social service agencies) exist, other models may be appropriate. The essential components of any model include access to expertise from mental health and social service providers combined with legal skill and advocacy; formal standards and procedures of operation; clarity of role and mission; and effective avenues for communication and problem resolution.

One empirical study, conducted under the auspices of the University of Michigan Law School prior to the proliferation of CASA programs, examined two distinct demonstration hybrid models. These test models involved law students and lay advocates, both of whom

40. Issues of client confidentiality are yet to be clearly resolved under these models. In the first example, the CASA is the agent of the attorney, and the confidentiality of the relationship between attorney and child may be preserved. When the attorney represents the CASA volunteer as client, the CASA cannot automatically claim a privileged relationship with the child, and thus neither can the attorney. When they function as a team, the lay advocate is free to report information deemed to be important to the court or the state for the child's well being, and the attorney may still potentially be bound and the client protected by a privilege.

received ongoing supervision by attorneys and mental health professionals. Both prototypes produced case outcomes and representation superior to that provided by a control group of private attorneys. Another demonstration group, which consisted of experienced attorneys who received the same training and support as the hybrid group (but no supervision or monitoring) also performed better than the control group.⁴¹

B. Florida Model

Extensive practice standards now guide nonattorney representation in many jurisdictions, and help to ensure consistent, quality child advocacy services. For example, the State of Florida, the first to develop a statewide CASA model program by statute,⁴² now operates a sophisticated, highly-regarded program in each judicial circuit under the supervision of the chief judge of the circuit. The State Supreme Court has promulgated and updated standards of operation. The state court budget provides funding, although inadequate to assure universal representation by advocates for children in child abuse and neglect proceedings. No provision exists in Florida law for the payment of attorney representation for children. The model of representation for children in such proceedings calls for the screened, trained, and supervised lay volunteer working in conjunction with staff and pro bono attorneys, who represent the lay volunteer, not the child. On the national level, the NCASAA has also developed model standards and promoted these through membership applications, funding opportunities, publications, and conferences. Florida adheres fully to the NCASAA standards and has received federally supported expansion grants through the NCASAA.

C. Economic Considerations

We cannot ignore economic consideration when exploring the child's needs for representation. Unfortunately, the costs of representation have not been well documented. Fees for private attorney representation vary widely from jurisdiction to jurisdiction, as do caseloads and time expended per case. Staff attorney programs often have unrealistically high caseloads resulting in poor quality representation.⁴³ Pro bono attorneys and volunteer lay advocates provide the most economical services, despite the higher costs associated with recruitment, training, supervision, and paying for in-house legal counsel. To thoroughly evaluate the cost-effectiveness of the different models requires an economic analysis combined with a quality outcome

41. Duquette & Ramsey, *supra* note 3, at 349.

42. Hertz, *supra* note 3, at 337.

43. See generally American Bar Association, *America's Children at Risk: A National Agenda for Legal Action*, (1993) (discussing a recent study on the unmet legal needs of children and their families).

study.⁴⁴ Further study of a range of models, their cost, quality, and efficiency must be undertaken. Notably, many programs do not provide representation for all eligible children. For example, only half of the children alleged to be abused or neglected receive GAL representation in the State of Florida due to staff limitations and insufficient recruitment activity. The states' commitment to representation of dependent children must be reflected in its budget priorities. In Florida, where an extremely economical hybrid model for child representation exists, that commitment has still not been fully realized.

D. Recommendations

Hybrid models of representation present many advantages for the child client. The studies, treatises, and articles cited, along with my own personal experience,⁴⁵ suggest that lawyers working alone on behalf of children are not enough. Several elements are critical to ensuring effective collaboration between the attorney and lay advocate. Clarity in role definition, frequent communication, the existence of a protocol for resolution of differences, cross-training, and detailed orders of appointment all have been found to enhance the attorney-lay advocate relationship.⁴⁶ Quality program supervision and team building can also lead to the establishment of strong relationships and understanding between the lay advocate and the attorney.⁴⁷ At the same

44. Local statistics from Dade County, Florida (the greater Miami community) demonstrate that the Guardian Ad Litem Program is extremely cost-efficient compared to the national average for programs of its kind. For example, Dade County's cost per child represented is \$224.00 per year. The national median is \$484.00. Every dollar of public money spent is calculated to buy \$14.00 worth of services which includes the value of volunteer time. Sharon Abrams, CASA Survey (Aug. 15, 1995) (unpublished survey, on file with the Administrative Office of the Courts, Eleventh Judicial Circuit, Dade County, FL).

45. I have worked in the field of child welfare for over 20 years, as an attorney, master's level social worker, researcher, public policy analyst, teacher, and author. My experience with the State of Florida Guardian Ad Litem Program began 15 years ago, as a pro bono attorney appointed as guardian *ad litem* for a dependent child. Subsequently, I became staff attorney, director, and then legal director, and helped to develop our hallmark volunteer attorney component and other innovative programs. As a member of the Supreme Court's advisory panel, I helped to revise the state standards for the program, and participated in developing training materials and conducting training for attorneys around the state. I served on committees of the NCASAA, the Florida Bar, and other organizations focusing on children and the law. We have worked diligently to establish clear, measurable objectives for the GAL Program in Florida, to monitor progress, and strive for program and overall system improvement. In my experience, the lay representation model, teamed when necessary with community volunteer attorneys, works extremely well to promote children's interests, assure safe and permanent options, and promote family reunification wherever possible. We are currently seeking funding for a comprehensive effectiveness study of our program.

46. *Id.* at 16-18.

47. The attorney and lay advocate must share a common perspective on some of the ethical dilemmas that confront child representatives. For example, the attorney and lay advocate working together must understand whether they represent the

time such supervision can help ensure swift and positive permanent outcomes for the child. The attorney or lay advocate's relative lack of experience may be offset by the greater experience of the staff supervisor. Where the lay advocate is a volunteer, as in the CASA model, citizen exposure to the child welfare system will help focus community concern on the problems and needs of an overburdened system.

CONCLUSION

The Fordham Conference provided a forum for meaningful exploration of standards in ethical legal representation of children by attorneys. This Article, written in response to the Conference proceedings, highlights areas of concern that must be explored further if child advocates are to make realistic policy decisions about models for representation of children. Specifically, are attorneys alone best suited to provide child representation, or should other models of representation be explored. I contend that mixed or hybrid models of representation, in which lay advocates or mental health professionals in a multidisciplinary team work in conjunction with attorneys, function best to promote both children's needs and legal rights. Further studies are necessary to determine which hybrid models are most cost-effective, and to tailor individual programs to local community needs and resources.

child's expressed wishes, or a more contextual best interests standard. Such a determination should be made prior to appointment of the advocates. Several possible resolutions for such role conflict exist in cases where the two advocates are not working in tandem. The CASA may request that the court appoint counsel for the child when the child's stated wishes differ from what the CASA determines to be in the child's "best interests". Or the attorney representing the child's wishes may petition the court to appoint a CASA or GAL where he or she recognizes that the child's wishes may not be consonant with the child's best interests. See Hubert, *supra* note 2, at n.49.

