

JUDICIARY COMMITTEE
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Testimony of Carolyn Signorelli
Chief Child Protection Attorney

HB 6442 SUPPORT



Commission on Child Protection
State of Connecticut

Office of the Chief Child Protection Attorney

Senator Coleman, Representative Fox and esteemed Committee Members, for the record, my name is Carolyn Signorelli, Chief Child Protection Attorney for the State of Connecticut. As many of you are aware the Commission on Child Protection and my office is responsible for the system of legal representation for children and parents in cases of abuse, neglect and termination of parental rights brought by the Department of Children and Families in Juvenile Court. It is my responsibility to ensure that children receive quality legal representation consistent with the Standards of Practice that the Commission on Child Protection has established pursuant to its enabling legislation.

I respectfully submit the following testimony in support of HB 6442, ***AN ACT CONCERNING THE APPOINTMENT OF COUNSEL AND GUARDIANS AD LITEM IN CHILD PROTECTION MATTERS, AND THE APPOINTMENT OF PERMANENT LEGAL GUARDIANS.***

My remarks will address the amendments to C.G.S. § 46b-129a designed to clarify the role of counsel for children in child protection proceedings in juvenile court, the circumstances under which a separate Guardian ad Litem may be appointed, and the responsibilities of the GAL to the court.

This amendment would eliminate the current requirement that a child receive an attorney who is required to act as attorney and guardian ad litem, it would make the standard for an attorney to take protective action on behalf of a child client consistent with the Rules of Professional Conduct for Attorneys and clarify the role of a separate Guardian ad Litem when one is deemed necessary.

As you consider this proposal you will undoubtedly here from those who do not believe children have the capacity to or should participate directly in their child protection cases and you likewise will engage in a debate similar to the discussion that has been going on in the child protection field for several years about whether and when children have the developmental ability to direct their legal representation. I ask you to keep the following in mind when considering that this bill is about the proper role for attorneys for children in child protection proceedings brought by the state against their families and what is the most effective way to ensure that the child's perspective is adequately considered by judges making decisions about the child's life, family relationships and future:

1. The capacity of all clients, adults and children, vary considerably as far as the degree to which they understand their circumstances, the legal proceedings, the role of their attorney and the long-term consequences of the choices they make and their ability to assist their attorneys in formulating litigation strategies. This does not diminish the right of each and every client to the protection of their individual rights achieved through zealous representation by an attorney who owes them the duties of communication, confidentiality and loyalty. These duties of an attorney are the cornerstone of our system of justice.
2. The Rules of Professional Conduct for lawyers addresses this diversity among clients and strives to ensure that all individuals who are parties to litigation or who require legal advocacy receive the competent, zealous and loyal representation of their legal interests and expressed wishes envisioned by the Rules.¹
3. The Rules of Professional Conduct do not except attorneys for children from owing these same duties or from following the Rules.
4. The Rules do provide for the adequate protection of clients, including children, in the event a normal attorney-client relationship cannot be maintained due the client's inability to contribute to formulating or directing the goals of the representation.

Background of C.G.S. Section 46b-129a

Also important for your consideration is the following background of our current statute, which suggests that it should never have been amended to create the dual role of attorney and guardian ad litem in one representative:

Public Act 96-246 Section 13 originally provided: "(2) *a child shall be represented by counsel* appointed by the court to represent the child whose fee shall be paid by the parents or guardian, or the estate of the child, or, if such persons are unable to pay, by the court. In all cases in which the court deems it appropriate, the court shall also appoint a person, other than the person appointed to represent the child, as guardian ad litem for such child to speak on behalf of the best interests of the child, which guardian ad litem is not required to be an attorney-at-law but shall be knowledgeable about

¹ See Rule 1.14 of the Rules of Professional Conduct attached hereto.

the needs and protection of children and whose fee, if any, shall be paid by the parents or guardian, or the estate of the child, or, if such persons are unable to pay, by the court." There was no mandate that the child's best interest be represented by his or her counsel or that a separate GAL asserting the child's best interest be appointed.

In 2001, according to the OLR Bill Analysis of P.A. 01-246 Sec. 1, because language in the 1997 Adoption and Safe Families Act required that all children receive a best interest advocate in order to avoid the potential loss of federal reimbursements, Connecticut needed to amend its statute to ensure a GAL was also appointed in every case.^{2 3} However, the need for this legislation is questionable as this was not a new requirement under federal law, since CAPTA (Child Abuse and Prevention Act of 1974) contained the same requirement since 1974 and there was no history of the state losing federal funding under the existing state statute that simply called for the appointment of counsel for the child. In 2007, my office obtained an opinion from the Health and Human Services, Administration of Families, stating that proposed legislation to grant children client-directed representation and eliminate the dual role would not run afoul of CAPTA.

National Trend among Child Protection Experts Supports the Change:

There is growing support among those practicing in the field of child protection and national advocacy organizations including the American Bar Association's Litigation Section, Children's Rights Committee and Center on Children and the Law, that children who are subject to state intervention and facing or experiencing removal from their families are better served by traditional client-directed representation.⁴

² OLR Amended Bill Analysis HB 6589: "BACKGROUND *Adoption and Safe Families Act of 1997* Among other things, the federal Adoption and Safe Families Act requires states to appoint guardians ad litem to make court recommendations about a child's best interests in all abuse and neglect cases (42 USC § 5106a(b)(2)(A)(ix)). The federal Administration on Children and Families may reduce funding to states that fail to do so.

³ As part of "ADOPTION 2002: The President's Initiative on Adoption and Foster Care," the Department of Health and Human Services issued Guidelines for Public Policy and State Legislation Governing Permanence for Children. In these guidelines, the Department noted that "the States may appoint the attorney for the child as described in 15A in fulfillment of the CAPTA requirement." Department of Health and Human Services, Guidelines for Public Policy and State Legislation Governing Permanence of Children, Part VII. Standards for Legal Representation of Children, Parents and the Child Welfare Agency, available at <http://web.archive.org/web/20030224035115/www.acf.dhhs.gov/programs/cb/publications/adopt02/>.

⁴ *A Lawyer for Every Child-Client Directed Representation in Dependency*, by the Bar-Youth Empowerment Project, ABA, Center for Children and the Law;

In 2009 the Litigation Section, Children's Rights Committee of the ABA drafted the ABA Model Act requiring that the child's lawyer form an attorney-client relationship which is "fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise."⁵

The current requirements of C.G.S. §46b-129a diverge from the Rules of Professional Conduct in that they create a dual role for children's counsel to also act as a Guardian ad litem; a role that does not include the duties of loyalty, confidentiality or zealous representation. This duality of responsibilities detracts from the important goal of ensuring that the perspective of children alleged to have been or who have been abused and neglected is adequately relayed to the judges who decide their ultimate best interest and asserted within the bureaucracy charged with their care.⁶ It also leads to confusion among courts and attorneys about the proper role of the attorney; the proper presentation of evidence, which can affect the due process rights of children and parents; and the legal status of the child in the proceedings.

For example, an attorney who is attempting to advocate on behalf of his client's expressed wishes may be asked by a Judge: "But what is your opinion of your client's best interest?" The lawyer is now put in the position of becoming a witness, possibly saying something against his or her client's wishes, thereby violating the Rules of Professional Conduct that govern lawyers, and undermining the presentation of the child's perspective to the court.

Another problematic scenario, is a lawyer, who substitutes her judgment for that of her 10 year old child client's desire to return to her mother who struggles with mental health issues and alcohol addiction because in the attorney's opinion this desire is not in her client's best interest. The attorney proceeds to act primarily as GAL for the child advocating for what the attorney wants for the child but failing to provide all the information and evidence to the court that would support a return home. Yet this child is struggling in foster care, becoming depressed and developing behavioral difficulties. Since the attorney is not strategizing in a manner consistent with the client's wishes and does not have an alternative plan to foster care, this information is not adequately presented to the court on behalf of the child to ensure that it renders the most informed decision possible.

⁵ *Report and Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 42 Fam. L.Q. 145, 147-48 (2008)

⁶ Atwood, *Uniform Representation*, *supra* note 12, at 92-93; Appell, *supra* note 12, at 599-600; 2006 UNLV Recommendations, *supra* note 20, at Introduction ("[T]hese often well-meaning professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need."); Model Act Report, *supra* note 71, at 147-48 ("Children's lawyers are not social workers or psychologists and should not be treated as such. To the extent that courts need information about what is in the child's best interest, the court should use a court appointed advisor or an expert, subject to the rules governing all court experts.")

Also problematic is the fact that the child does not have access to an advocate who owes a duty of confidentiality, preventing her from disclosing important information necessary for the attorney to fulfill his counseling function. Or if the child believes there is a confidential relationship and then shares information that the attorney ends up disclosing or acting upon against the client's wishes, the client will be prone to further distrust of adults and the system.

New York State recently passed legislation amending the term "law guardian" to "counsel for children" to clarify that children in dependency proceedings are entitled to legal representation by a lawyer advocating for their stated wishes. The Legal Aid Society which represents thousands of children in New York City had long advocated for this development and when Chief Judge Judith S. Kaye, a long-time children's rights champion, signed new §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" she paved the way for the legislature to follow.⁷

The lawyers at the Legal Aid Society of New York who are devoted to child representation in dependency proceedings prepared an article consisting of extensive research into the literature, case law and experiences around the best model of representation for children and concluded that the role of an attorney under the rules of professional conduct will adequately prevent legal advocacy on behalf of a child's expressed wishes to result in serious harm:

Given the lawyer's counseling function, her authority to develop a litigation strategy, her discretion to invoke the "seriously injurious" exception to client-directed advocacy, and the ethical proscription against frivolous arguments, cases in which the child's lawyer is advocating for a result that would place a child at risk of substantial harm should not occur. More importantly, the law guardian's (counselor to the child) representation should never undermine, and usually will enhance, the judge's ability to ascertain the facts and make well-informed decisions. When the choice is between a lawyer who merely assists the judge in arriving at a decision the judge is fully qualified to make on her own, and a lawyer who provides the judge with a window into the child's unique

⁷ Perspective: New Era in Representing Children, Tamara Steckler and Gary Solomon, New York Law Journal, October 22, 2008

perspective, the choice is a simple one. These are proceedings that can change the course of the child's life, and thus the child must be heard.⁸

I respectfully request that this committee act favorably upon this proposal. I also support the establishment of a permanent guardianship option. Thank you for this opportunity to be heard. If there are any questions, I welcome them at this time.

Respectfully Submitted

Carolyn Signorelli

⁸ "Giving The Children A Meaningful Voice: The Role Of The Child's Lawyer In Child Protective, Permanency And Termination Of Parental Rights Proceedings" by The Legal Aid Society, NYC

Rule 1.14. Client with Impaired Capacity

(Amended June 26, 2006, to take effect Jan. 1, 2007;
amended June 30, 2008, to take effect Jan. 1, 2009.)

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© Copyrighted by the Secretary of the State of Connecticut (a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client is unable to make or communicate adequately considered decisions, is likely to suffer substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a legal representative. (c) Information relating to the representation of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(P.B. 1978-1997, Rule 1.14.) (Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.)

COMMENTARY: The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or is unable to make or communicate adequately considered decisions, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. The fact that a client suffers a disability does not diminish the lawyer's obligation under these rules. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not constitute a waiver of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subsection (b), must look to the client, and not family members, to make decisions on the client's behalf. If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client only when such decisions are within the scope of the authority of the legal representative. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2 (d). **Taking Protective Action.** If a lawyer reasonably believes that a client is likely to suffer substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in subsection (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then subsection (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. In determining the extent of the client's impaired capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician. If a legal representative has not been appointed, the lawyer should consider whether appointment of a legal representative is necessary to protect the client's interests. In addition, rules of procedure in litigation sometimes provide that minors or persons with impaired capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client. **Disclosure of the Client's Condition.** Disclosure of the client's impaired capacity could adversely affect the client's interests. For example, raising the question of impaired capacity could, in some circumstances, lead to proceedings for involuntary conservatorship and/or commitment. Information relating to the representation is protected by Rule 1.6.

Therefore, unless authorized to do so by these rules or other law, the lawyer may not disclose such information. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, subsection (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. **Emergency Legal Assistance.** In an emergency where the health, safety or a financial interest of a person with impaired capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client. A lawyer who acts on behalf of a person with impaired capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

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