

## CHAPTER 9

### APPOINTING LEGAL COUNSEL FOR CHILDREN IN DOMESTIC RELATIONS AND CHILD DEPENDENCY PROCEEDINGS WHEN THERE ARE ALLEGATIONS OF CHILD SEXUAL ABUSE<sup>a</sup>

#### KEY POINTS SUMMARY

- **Child sexual abuse is a crime in all states, and may involve different courts, with different burdens of proof, and the involvement of multiple agencies thus calling for experienced counsel on behalf of child victims of abuse.**
- **Children have a right to counsel in child dependency proceedings as established by case law and statutes. Children are not generally assigned right to counsel in domestic relations proceedings and this can be disastrous where there are issues of Child Sexual Abuse (CSA).**
- **Varying standards of representation should not affect the underlying quality of legal counsel for children when CSA is alleged. Jurisdictions vary in their appointment of either a “client directed attorney” or a “best interest attorney.”**
- **Varying standards may cause confusion and controversy regarding the role of children’s counsel in CSA cases. There are also ongoing debates regarding the roles of Guardian Ad Litem and CASA appointees. Regardless of these debates, judges may pro-actively appoint effective counsel in cases where there are allegations of CSA.**
- **Judges should recognize the general qualities needed for effective child representation, such as counsels’ capacity to assess a child’s cognitive ability, emotional maturity, and understanding of the issues involving emotional and physical safety.**
- **Judges, in addition to recognizing the general qualities needed for effective child representation, should expect that counsel for children in CSA cases should have an in-depth understanding of the dynamics of CSA, the debate on children’s disclosures, cultural and language differences, and the impact of trauma and use of expert witnesses.**

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- **Counsel for children should represent to the court and parties that they are trained in CSA. The complex dynamics of CSA may require an understanding of the involvement of multi-disciplinary teams, and the issues of confidentiality. Counsel must be proactive, capable of calling witnesses and retaining experts on behalf of the child.**
- **Courts must appoint counsel for children in all CSA cases, regardless of the prevailing standard of representation. These roles cannot be confused with other roles such as court-appointed investigators, CASA volunteers or multi-disciplinary team evaluators. Courts must clearly define the expectations of other professionals involved, and ensure that these neutral and qualified professionals are invested in the process with a clear vision of their assigned roles.**

## **BACKGROUND: HISTORY OF A CHILD’S RIGHT TO LEGAL COUNSEL**

Attorneys for children are a relatively new concept in the law, and the right to counsel has not yet been afforded to children in all circumstances. Historically, the State, as *parens patriae*, would battle families over what was best for the children, with both sides arguing that they had the right and duty to make such decisions. Even after the first Juvenile Court emerged in 1899 in Cook County, Chicago, children more often than not had no voices of their own in proceedings involving them.

A child’s right to legal representation began in the United States in 1967, with the landmark Supreme Court case, *In Re Gault*.<sup>1</sup> Until the *Gault* case, courts routinely dealt with children, but the state decided what was best for the child. Because fifteen year old Gerry Gault was facing a loss of liberty by being subjected to the possibility of removal from his home and placement in a juvenile detention facility, the Court held he had a right to a lawyer at the adjudicatory stage of his delinquency proceeding. This case created the basis for the right to counsel in child abuse and neglect cases; states now require some form of representation when the state seeks to remove custody from families due to allegations of abuse or neglect.

The right to counsel that was provided to a child, subject to a delinquency case, in *Gault*, has proven to be a wellspring for children’s rights and the right to legal counsel. In addition, federal legislation under the Child Abuse and Neglect Prevention and Treatment Act, (CAPTA) requires that a Guardian Ad Litem (who may or may not be a lawyer) must be appointed to represent the best interests of the child in child abuse and neglect court cases as a condition to a state's receiving federal child welfare funds.<sup>2</sup> This provision implies that in addition to counsel, children have the right to benefit from an independent and qualified professional to serve their interests.

**a) Even in dependency courts, where children have a right to counsel, states are not providing adequate representation.**

FirstStar, a multidisciplinary public charity, has developed a report that assigns letter grades to states and delivers a national report card.<sup>3</sup> Currently, more than a dozen states are failing, and 16 states do not have statutes requiring lawyers for children in abuse and neglect proceedings.<sup>4</sup>

The appointment of lawyers is usually mandated by statute in dependency cases, but quality and availability of representation varies with the model of representation followed. Depending on the jurisdiction, the following example case could proceed differently:

*In a dependency proceeding, there are allegations that a thirteen-year-old has been sexually abused by her father. Christy acknowledges the abuse in forensic interviews. An attorney is appointed for Christy. The attorney believes it would be best for her client to have the perpetrator removed and charged prior to her return home. Christy, however, confides in her attorney that she is fearful of retribution and retracts her earlier statements. She also informs her attorney that she wishes to return home. In some states the attorney must be directed by her client's wishes; in other states the attorney's role would be to argue what is best for the child.*

If Christy's case was to be held in a court that deals with child abuse and neglect, then CAPTA mandates that Christy must have at least a guardian ad litem appointed for her.<sup>5</sup> Despite the generally accepted mandate of guardian ad litem and children's counsel from CAPTA and *Gault's* progeny, these standards are not always adhered to by many jurisdictions.

**b) Standard of representation in dependency proceedings.** Since the *Gault* case, however, children's attorneys in every jurisdiction have disagreed over how best to represent children. Courts usually appoint either a client directed attorney or a best interest attorney. Some jurisdictions employ one or both of these models and each contains safeguards to ensure child safety. The involvement of knowledgeable presiding judges, experts, and others in child sexual abuse proceedings ensure that the child is safe and receives a crucial voice in the proceedings.

**c) Effort to improve upon the quality and define the role of legal counsel in dependency proceedings.** In order to better address key understandings and improve the quality of legal representation of children, several initiatives have been ongoing to assist in improving and defining these roles. These initiatives include the American Bar Association,<sup>6</sup> the National Association of Counsel for Children (NACC)<sup>7</sup>, and National Conference of Commissioners on Uniform State Law (NCCUSL).<sup>8</sup>

## **CURRENT LEGISLATION AND CASE LAW DO NOT ACCORD CHILDREN THE RIGHT TO COUNSEL IN DOMESTIC RELATIONS PROCEEDINGS WHEN ALLEGATIONS OF CHILD SEXUAL ABUSE ARISE**

States typically do not accord children the right to counsel in domestic relations proceedings. When there are issues of CSA, this can be disastrous. Some of the issues that may arise in domestic relations courts regarding parental contact mirror those in dependency proceedings. Children may be exposed to harmful physical or emotional contact with a parent perpetrator of abuse, or may be deprived of parental contact with one or both parents. Many judges must dedicate valuable time to presiding over issues of distributions of wealth, valuation of assets and other matters in domestic relations courts. In addition, there is an expectation that they understand the complexities of child sexual abuse.

## **EFFORTS TO ADDRESS THE ISSUE OF LEGAL COUNSEL IN DOMESTIC RELATIONS COURTS WHEN ALLEGATIONS OF CHILD SEXUAL ABUSE ARISE**

Judges, lawyers and advocates have come to recognize the need for children to have legal representation in domestic relations cases. As a result, numerous initiatives have emerged. It is becoming more evident that children are deserving of quality legal counsel and advocacy in both dependency and domestic relations courts, specifically in cases where the right to safety or access to a parent may be involved.

Although children have no legal right to counsel in domestic relations cases, the standards developed by American Bar Association,<sup>9</sup> the National Association of Children's Counsel,<sup>10</sup> and most recently National Conference of Commissioners on Uniform State Law<sup>11</sup> have attempted to develop standards and protocols to address this need.

Individual states and courts can thus refer to these models a protocol when designating the duties and responsibilities for counsel in domestic relations cases involving child sexual abuse cases.

## **KEY QUALITIES NEEDED FOR EFFECTIVE REPRESENTATION OF CHILDREN WHEN ALLEGATIONS OF CHILD SEXUAL ABUSE ARISE**

**a) Use current models of legal representation of children as a strength, and not a barrier to effective legal representation.** Given the complexities and need to safeguard the child's emotional and physical well-being, it is essential to emphasize the quality of child representation in CSA cases. The child is more effectively served when courts do not engage in the long-standing debate over which standard of representation is appropriate.

As described in the earlier example, here are some possible results:

*Without any physical evidence of the abuse, the Court must rely solely on Christy's initial statements, which she has since retracted. In a client-directed state, if her attorney argues successfully Christy's position, the state may have a difficult time meeting its burden, and could this could ultimately lead in allowing Christy to return home to an abusive father.*

Some may argue that a "best interest/ guardian ad litem model" would yield a better and safer result, as the attorney's role would be to argue what is best for the child and the child's statement to the GAL would be admissible to the Court. The GAL should also vociferously specify the child's wishes to the court ensuring that the child is heard.

In a "client directed" model, the lawyer should assure the child that anything the child tells her is confidential under the attorney-client privilege. This is standard practice for all client-lawyer relationships. The attorney however, in this model, also serves as counsel to the child, and can either request that a Guardian Ad Litem be appointed, or counsel the child client to seek safety and support.

Regardless of the model employed, counsel for the child serves the important purpose of giving voice to a traumatized child. The child would thus be assured that her voice and opinion would be heard, even if seemingly unpopular and unsafe, i.e., wanting to return to an abusive home, would at least be considered and heard by the judge. It is expected that a child sexual abuse proceeding would involve specialized clinical teams and experts in child sexual abuse, and that the child's attorney would not be the only professional able to assess the nature and quality of CSA disclosures and recantations.

**b) Specialized training in the dynamics of child sexual abuse.** Any attorney or advocate representing children in CSA must be well trained in the areas of child development, suggestibility, and the dynamics of abuse disclosure and use of expert witnesses. Just as child protection workers, law enforcement and judicial personnel have been increasingly called upon to increase expertise in this area, it is important that law students and lawyers be trained in these crucial dynamics to take on this challenging role.<sup>12</sup>

The dynamics of CSA are challenging, not only to trained clinical psychologists but especially confusing and at times shocking for legal professionals representing children. Clinical psychologist Annie Rogers, who was sexually abused as a child, speaks for all abused children when she says "*And, even now, that does not cancel out my mother's love, or all her efforts to be a good mother.*"<sup>13</sup>

**c) Understand and work within the context of a multi-disciplinary team.** In order to protect a child's interest, counsel must be prepared to call on and work with other disciplines such as experts in child sexual abuse, court clinics, and law enforcement. Moreover, counsel for the child can prove invaluable in locating trained experts in CSA and proactively seek evaluation by these trained clinicians and teams. Counsel for a child can also proactively seek removal of an expert who is not well trained, biased, or incapable of rendering a thorough evaluation of the child.<sup>14</sup>

Counsel for children are typically called upon to assess a child's capacity to make informed or considered decisions, based on two primary considerations, age and maturity. The child may be chronologically old enough to make an informed decision, as many jurisdictions state a child over twelve to be, but the child must also be capable of making choices, and consulting with attorneys. The child, however, may be experiencing severe trauma and emotional distress relating to the abuse and the aftermath of disclosure. Knowledgeable legal counsel, with an understanding in child sexual abuse could better assess a child's cognitive ability, emotional maturity, and language development by calling on the assistance of a qualified clinical professional.

**d) Understand cultural and language differences.** The advocate should be aware of cultural and language differences. There are numerous publications and experts able to address both issues relating to child sexual abuse as well as "cultural misunderstandings" ( i.e. the propensity to diminish the severity of child abuse because deemed a "cultural" issue), as well as provide broad understandings about various cultural aspects in a child's life, for example, that may be a barrier to disclosing abuse. (See Chapter IV culturally diverse family in court on issues of child sexual abuse.)

**e) Understand trauma and the "language of abuse".** The trauma of sexual abuse may result in coded signs and symptoms, a "language" that conventional psychotherapy may not reveal. According to Annie Rogers, this "language", the "Unsayable" may be the key to unlocking and helping young incest survivors to heal.<sup>15</sup> Although attorneys for children are not expected to attain the expertise of a trained psychologist and beyond, they must be familiar with the subtleties and complexities of child sexual abuse.

**f) Willingness to actively participate in the proceedings.** All too often, counsel for children will simply defer to court-appointed experts, without pro-actively assessing their qualifications, calling witnesses, screening for bias, and failing to request that a child-client be entitled to an expert of their own. This practice is not only formidable advocacy on behalf of the child, but also ensures that needed expertise reaches the Court.

## **THE NEED FOR ROLE RECONCILIATION OF COURT APPOINTED PROFESSIONALS IN CHILD SEXUAL ABUSE PROCEEDINGS**

a) **Define and reconcile role of counsel or advocate.** The primary purpose of role reconciliation is to ensure that the best interest of the child takes precedence, and that the child receives the best possible professional resources available for assessment and treatment. Judges presiding in CSA cases in domestic relations cases can be doubly confused. Despite the myriad of proposed rules and the statutory mandates there is still ongoing debate over the role of counsel for children, the role of Guardian Ad Litem as investigator or evaluator, and the use of Court Appointed Special Advocates.<sup>16</sup>

By defining, and reconciling the role of counsel or advocate, judges can highlight, expand or limit the scope of duties expected from the court appointment, even to request that the child's advocate work within a team environment.

**b) Utilize appointed counsel or advocate as a key toward orchestrating a team approach in its case management of child sexual abuse cases.** Judges have broad discretion in appointing legal counsel and may request that the advocate or GAL work within a team environment, or specify that the attorney or GAL retain the services of a hospital or university center (See Chapter 6 – Multi-disciplinary Teams and Child Sexual Abuse Evaluations: Best Practices in Civil/Criminal and Judicial Coordination) . Judges presiding over cases of CSA will thus be able to ensure that individual ideological preferences and lack of expertise do not take precedence over child safety and emotional needs.

For example, child’s counsel or advocates would be actively involved in the process by assisting in the procurement of appropriate experts in CSA and family violence. These advocates could also ensure that the appropriate legal safeguards are maintained, express the child’s voice, and challenge experts when appropriate. At times, a lawyer’s familiarity with the legal process and fact-finding may ease his or her access to police, court or child abuse/protection records. However, additional team members could provide additional investigative and evaluative roles in the process. A mental health clinician with expertise in child development, CSA and training on appropriate evaluative techniques would be better qualified to obtain information from younger children.

Courts must also be reminded that a “diagnosis” of a party’s or a child’s mental health status requires a highly particular expertise. Any competent investigator could collect and report the information, but only a qualified specialist or mental health professional would be qualified to conclude from given information that the child, for example, is, or might be, suffering from emotional harm and post-traumatic stress disorder. A qualified sexual abuse evaluator could offer expert testimony regarding a child’s need for emotional and physical safety. These trained professionals, working within a team environment, could be in charge of information gathering, interpreting information and reporting of findings to the court.

## ***CONCLUSION***

Judges should be aware, in all CSA cases, as to what constitutes exemplary counsel, regardless of the standard, and appoint the type of advocate he or she feels is best suited to the case, in both dependency and domestic relations courts. Most importantly and perhaps easiest to monitor from the court’s perspective are the requirements that legal counsel be trained in child sexual abuse, engage in ongoing education in CSA, in the involvement and participation in multi-disciplinary teams. Finally, the advocate should be able and willing to participate in the proceedings, such as calling witnesses and retaining experts.

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

2 42 U.S.C. § 5106a (b) (A)(ix) (West Supp. 2000)

3 FirstStar, *A Child's Right to Counsel: First Star's National Report Card on Legal Representation for Children* (2007), available at: <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf>.

4 In most states lacking mandated legal representation, a non-attorney GAL, charged with advocating an outcome considered to be in the best interest of the child, carries out representation. Most of these states allow for legal representation in situations where extreme conflict between the child's expressed wishes and the child's best interest, but some do not require the disclosure of the child's wishes to the court. First Star National Report Card on Legal Representation for Children, (2007), available at: <http://www.firststar.org/documents/FIRSTSTARReportCard07.pdf>.

5 42 U.S. C. § 5106(b)(2)(A)(xiii) (2000).

6 The ABA standards for lawyers who represent children in abuse and neglect cases define the child's attorney as one 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. *A-1, The Child's Attorney, American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, February 1996*. If, according to these standards, the child client is under a "disability" pursuant to the rules of professional conduct as to any aspect of the representation (keeping in mind that a child may understand parts of the case but not others), the attorney should determine and then advocate the child's preferences and legal interests or request the appointment of a guardian ad litem. ABA, *Standards of practice for lawyers who represent children in abuse and neglect cases, Address Before the House of Delegates* (February 5, 1996), available at: [http://www.abanet.org/family/reports/standards\\_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf).

7 The National Association of Counsel for Children (NACC) provides that counsel for the child will be a traditional attorney who addresses the needs of the young child through the application of a best interests test in some situations. The attorney takes on the traditional role of advocate, but because some children are not capable of meaningfully participating in the formulation of a position, the NACC recommends a GAL type judgment using objective criteria, and requires the attorney to request the appointment of a separate GAL, when the child's wishes are considered to be harmful. Proponents believe this is the best blending of the traditional attorney and attorney / GAL, providing the best of both options. While there are varying standards and controversy regarding the role of children's counsel, judges can appoint effective counsel in cases where there are allegations of CSA. Clear roles do not exist, especially in CSA, but courts could define these roles. Judges in all CSA cases, child welfare, domestic relations and criminal, could ensure that children receive capable legal representation by appointing advocates with a clear defined role. That is really what this debate is all about, from the child's point of view. The National Association of Counsel for Children, <http://www.naccchildlaw.org/> (last visited Feb. 2008.).

8 **National Conference of Commissioners on Uniform State Law (NCCUSL).** In July 2005, the National Conference of Commissioners on Uniform State Law (NCCUSL) proposed a draft uniform act for the representation of children in child protective proceedings. The draft act defines three possible roles:

- 1.) child's attorney who is client-directed,
- 2.) a best interests attorney who assists the court in determining the best interests of the child, and
- 3.) a court advisor who has the same duty as the best interests attorney but is a volunteer.

According to the draft act, a court must appoint either a child's attorney or a best interest attorney in all abuse and neglect proceedings; the court may appoint a court advisor at its discretion. The act also proposes several factors—age and maturity seem to be the most significant—a court should consider in choosing between a child's attorney and a best interests attorney.

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9 ABA, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003), available at [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf)

10 The National Association of Counsel for Children, <http://www.naccchildlaw.org/> (last visited Feb. 2008.)

11 The National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org> (last visited February 2008.)

12 Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years*, Journal of Aggression, Maltreatment & Trauma (forthcoming 2004), available at <http://www.untothethirdgeneration.com/>.

13 Annie G. Rogers, Ph.D., *The Unsayable, The Hidden Language of Trauma*, 27, Ballantine Books (2007.)

14 *Id.*

15 *Id.*, xiii.

16 Court Appointed Special Advocates for Children, [www.nationalcasa.org](http://www.nationalcasa.org) (last visited March 2008)

### ***SUGGESTED READINGS***

ABA, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (2003), available at [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf).

ABA, Standards of practice for lawyers who represent children in abuse and neglect cases, Address Before the House of Delegates (February 5, 1996), available at [http://www.abanet.org/family/reports/standards\\_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf).

American Bar Association Center on Children and the Law, <http://www.abanet.org/child>

American Bar Association Commission on Domestic Violence, <http://www.abanet.org/domviol>

American Professional Society on the Abuse of Children, <http://www.apsac.org/mc/page.doc>

American Bar Association Center on Children and the Law, <http://www.abanet.org/child>

First Star, <http://www.firststar.org>

National Counsel of Juvenile and Family Court Judges, <http://www.ncjfcj.org>

Representing Children Worldwide (2005), <http://www.law.yale.edu/rcw>