

Children's Attorneys—Should They Be Advocates or Champions?

The Role of Counsel for Children in Massachusetts

By The Honorable Jay D. Blitzman & Paula Kaldis Dickinson, Esq.

Attorneys for children are a relatively new concept in the law. Historically, the State, as *parens patriae*, would battle parents 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. For the next century and even today, children's attorneys in every jurisdiction have disagreed over how best to represent children.

Suppose you represent a 13-year-old child who has been sexually abused by her father. You feel it would be best for her if she resided in a safe foster home, but she insists that she wants to return home. Without any physical evidence of the abuse, the State must rely solely on your client's initial statements, which she has since retracted. You could argue successfully that this evidence is inadmissible, so that the State would have a difficult time meeting its burden of clear and convincing evidence. This could ultimately result in allowing her to return home to an abusive father, as is her wish. But is this the role you should assume? Are you her advocate, arguing for what she wants, or her champion, arguing for what is best for her?

The Georgette Case—A Resolution?

This year, children's attorneys in Massachusetts

anxiously awaited the decision of *Care & Protection of Georgette*,¹ hoping to get some guidance from the Supreme Judicial Court (SJC) concerning the proper role of counsel for children. On March 21, 2003, the SJC affirmed the Juvenile Court's order below denying two of the children in this case, Georgette and Lucy, their motion for a new trial. The motion was based on two claims of ineffective assistance of trial counsel: (1) failing to advocate their return to their father's custody; and (2) representing five siblings with differing interests.

The good news is that the SJC recognized that the role of counsel for children needs clarification. The Court did not conclusively resolve the issue, however, especially in cases where the child client is incompetent or cannot clearly articulate his or her preferences and wishes. Instead, its standing advisory committee on the rules of professional conduct will study, and, hopefully, formulate more definitive standards for Massachusetts attorneys. The committee is studying briefs, local and national standards, and soliciting views of interested parties, such as the Department of Social Services (DSS), the Committee for Public Counsel Services (CPCS), attorneys, judges, and staff members who handle these cases. For now, the SJC said, attorneys who handle these cases must follow the 1999 CPCS performance standards that apply to appointed counsel in State intervention cases.²

¹ *Care and Protection of Georgette*, 439 Mass. 28 (2003) [hereinafter *Georgette II*].

² Rule 1.6, *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, Committee for Public Counsel Services (2003). "Determining and Advocating the Child Client's Position. (a) Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance. (b) If counsel reasonably determines that the child is able to make an adequately considered decision with

respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter. (c) If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation. (d) If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b)

Facts of Georgette

When DSS filed a care and protection petition for the five children involved in this case, the Juvenile Court appointed one attorney to represent all five. Georgette and Lucy, then ages 13 and 11, wanted to be returned to their father. The attorney for the children informed the judge at trial of their expressed preferences but advocated that neither be returned to their father because he (the attorney) believed that reunification with the father was not in their best interests. The father not only neglected the children but also sexually abused Lucy and another sister, Michele, physically abused the mother and children, had 15 209A orders taken out against him, and had been arrested for welfare fraud and drunk-driving offenses.

After trial, the Juvenile Court dispensed with the need for parental consent to adopt two of the children and granted permanent custody of the other three (including Georgette and Lucy) to DSS. Thirteen months after judgment, Georgette and Lucy, through their appellate counsel, filed a motion for new trial, arguing that they were denied effective assistance of counsel because their attorney's position was contrary to their own, and that their attorney's representation of all five children with differing interests constituted a conflict of interest. The Juvenile Court denied the motion, stating that trial counsel's representation was in the best interests of Georgette and Lucy and was in conflict with neither counsel's obligations to them nor to any of the five siblings. Georgette and Lucy appealed the Juvenile Court's denial of the motion for a new trial. The Massachusetts Appeals Court affirmed the Juvenile Court's order in all respects,³ a decision

the SJC subsequently affirmed.

The Standard for Judging Effectiveness of Children's Trial Counsel

In *Georgette*, the SJC applied the two-part *Safarian* standard, determining whether counsel's performance fell below what might be expected from an ordinary fallible lawyer, and, whether this substandard performance deprived the children of an available, substantial argument which would have made a difference in the outcome.⁴ The SJC, agreeing with the Appeals Court, stated that if trial counsel for the children had taken "positions diametrically opposed to theirs" and set "himself squarely against their goals and objectives," he would have violated the ethical standards.⁵ The SJC, as did the Appeals Court, continued its analysis and affirmed the denial of the new trial motion on the basis that the second prong of the *Safarian* test had not been met. Essentially, the Court held that any failings on the part of counsel in this instance did not affect the outcome where the evidence of the father's unfitness was so overwhelming.⁶

Thus, by avoiding a determination of whether counsel had violated his duties toward Lucy (Georgette had turned 18 in the interim), the SJC conveniently side-stepped the question. Instead, it focused on the "grievous shortcomings" of the father, agreeing with the Appeals Court catalogue of the father's "shortcomings, deficits, and misdeeds."⁷ Indeed, the Appeals Court said that because Georgette and Lucy failed to establish the second prong of *Safarian*, the deprivation of an otherwise substantial and available argument, it did not have to decide the "novel and difficult

above, that the child is not able to make an adequately considered decision regarding the matter and if representing the child's expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child's expressed preferences. If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child's expressed preferences would place the child at risk of substantial harm, counsel may choose one of the following options: (i) represent the child's expressed preferences regarding the matter; (ii) represent the child's expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child; (iii)

inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or (iv) inform the court of the child's expressed preferences and determine what the child's preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination."

³ *Care and Protection of Georgette*, 54 Mass. App. 778 (2002) [hereinafter *Georgette I*].

⁴ *Commonwealth v. Safarian*, 366 Mass. 89 (1974).

⁵ *Georgette I*, 54 Mass. App. at 778.

⁶ *Georgette II*, 439 Mass. at 33.

⁷ *Id.*

issue" of whether counsel's performance was below that of an ordinary fallible lawyer."⁸

Conflict of Interest

The SJC also disagreed with Lucy's argument that her trial counsel's representation of all five children constituted a conflict of interest. There were seven children originally involved in this case. Bruce and Michele were dismissed before trial as they had turned 18. The remaining five children were Rena, born July 20, 1983; Georgette, born September 20, 1984; Lucy, born September 26, 1986; Beth, born February 17, 1989; and Judith, born June 17, 1990. The Juvenile Court adjudicated these five children to be in need of care and protection, terminated the father's right to consent to adoption for Beth and Judith, and placed Rena, Georgette, and Lucy in the permanent custody of DSS. Georgette and Lucy's motion for a new trial did not state any conflict of interest regarding their attorney's additional representation of Beth and Judith. Rather, the motion focused on the fact that Rena did not wish to return to her father at the time of trial, a position diametrically opposed to their own. The SJC, however, noted that custody of Rena, who had decided to remain in foster care, was not contested by the father at trial. Based on these facts, the SJC reasoned that their attorney's representation of both Rena and Lucy did not constitute an "actual" conflict of interest.⁹

What the Court seemed to overlook was that the attorney in this case had represented two children (Georgette and Lucy) who wished to return to their father, while at the same time representing another child (Rena) who did not wish to do so. Rule 1.7 of the Massachusetts Rules of Professional Conduct mandates that a lawyer shall not represent a client if the representation would be adverse to another client or if the lawyer's responsibilities to the client are materially limited because of his responsibilities to another client, third person, or his own interests.¹⁰ The only exceptions are if the lawyer reasonably believes the representation will not be adversely affected, or if the clients consent.¹¹ In *Georgette*, the SJC concluded that trial counsel's representation

of either Lucy or Rena was neither "directly adverse" to the other nor "materially limited" by counsel's duties to the other child.¹² It therefore refused to find that there was a conflict of interest and thus ineffective assistance of counsel on this point.

What is difficult for some children's attorneys (or maybe many) to fathom, however, is *any* situation in which representing children with differing interests is acceptable conduct for an attorney, especially those at issue in *Georgette* where one child wants parental custody and the other prefers State custody. Is the attorney's joint representation of Rena and Lucy any different from the simultaneous representation of two different defendants on identical assault and battery charges where one takes a plea and the other insists on going to trial and contesting the allegations against him? How is the representation in *Georgette* any less directly adverse each to the other, and how is the representation not materially limited by the attorney's duties to the other? The only difference is that adults can freely decide to allow such a simultaneous representation, while most children really cannot understand the issue enough to waive it.

The Role of Children's Counsel

Having decided the instant controversy of whether the children's trial counsel in this case acted ineffectively, the SJC went on to discuss what it called the "larger issue":

[W]hat are the obligations of trial counsel in circumstances such as the present when counsel represents siblings of various ages, competency and understanding; faces a care and protection or termination of parental rights case . . . that presents compelling evidence demonstrating parental unfitness and the likely risk of harm to the children if returned to the unfit parent; and one or more of the clients (the children) want counsel to advocate for return to the parent.¹³

The 1993 CPCS standards in effect at the time of the *Georgette* trial stated that the role of counsel when the child was of "sufficient age and ability to

⁸ *Georgette I*, 54 Mass. App. at 792.

⁹ *Id.* at 35.

¹⁰ Mass. Code Prof. Conduct R. 1.7 (2003).

¹¹ *Id.*

¹² *Georgette II*, 439 Mass. at 35-36.

¹³ *Id.* at 36.

formulate an informed position of his/her own," should be to "advocate that position."¹⁴ The SJC in *Georgette* interpreted these standards to allow attorneys to argue for their child clients' "best" interests "when the child was unable to make an informed judgment."¹⁵ For support, the SJC cited a 1976 Massachusetts Bar Association opinion stating that a lawyer for a child in need of services (CHINS) can argue for a disposition in the best interests of his client.¹⁶ While that old opinion espoused a "best interest" role, although in the context of a CHINS proceeding rather than a care and protection matter like *Georgette*, the SJC acknowledged that a later revised opinion advised attorneys who represent incompetent children in care and protection cases to use a "substituted judgment" approach, making decisions on the basis of what the child would desire if he or she were competent.¹⁷ This is really the crux of the children's counsel issue—should, or can, a child's attorney act in children's best interests, ever?

Consequently, in a situation like the *Georgette* case, where a child client is unable to make a competent decision, is the proper role a best interest or a substituted judgment approach? The SJC noted that Lucy's trial counsel followed both the professional rules and the CPCS standards then in effect.¹⁸ But if he represented the *best interests* of *Georgette* and Lucy, as the SJC suggests, there is no support for this position in Massachusetts other than the 1976 MBA opinion in the CHINS case, which has since been modified. There is a case in which the SJC noted that "the law is

unclear as to whether the attorney is always bound by her minor client's decision when the attorney feels that the child's decision is not in her own best interest."¹⁹ That case, however, was decided prior to the adoption of the Massachusetts Rules of Professional Conduct. Rule 1.14 of the Rules of Professional Conduct states that counsel must maintain as normal an attorney-client relationship as possible towards incompetent clients. The CPCS performance standards are also close to a normal attorney-client relationship as they focus on what the child would want, not what the attorney feels is best for the child. The SJC statement about *Georgette*'s trial counsel not being ineffective if he took a best interest approach is confusing, because, if one takes a best interest approach, he or she is not trying to figure out what the child would want if she were competent (as in substituted judgment). Rather, one is imposing one's own view as to what is best for that child even though that may conflict with what the child wants.

The National Consensus

The SJC, in arriving at its decision to have the problem of children's counsel studied in Massachusetts, pointed out various national standards from organizations such as the American Bar Association (ABA), the National Association of Counsel for Children (NACC), the American Law Institute (ALI), and others. "The child is an individual with independent views," says the commentary to the ABA's Family Law Standards

¹⁴ Standard 1, *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, Committee for Public Counsel Services (1993).

¹⁵ *Georgette II*, 439 Mass. at 38.

¹⁶ *Id.* at 38-39 & n.12. A lawyer representing a child in need of services who "is unable to make an informed judgment as to what is in his or her own best interest," has "an obligation to the child to advocate to the court that disposition of the case which the lawyer believes to be in the best interests of the child, even if such disposition of the case is not consistent with the expressed wishes of the child. In any such case, however, we believe the lawyer should inform the court of the contrary views of the child on the matter, and should state his or her own reasons for believing that the disposition of the case desired by the child is not in the best interests of the child." Mass. Bar Assoc. Ethical Opin. 76-1 (1976).

¹⁷ Where a minor client instructs her lawyer to pursue a course of action in a care and protection proceeding which is not in accordance with the opinion

of the lawyer and other professionals as to what is in the minor's best interests, the lawyer must follow the minor client's direction unless he determines that she is incapable of making a considered judgment on her own behalf, and therefore 'incompetent.' If the lawyer believes his client to be competent but he is unable to zealously represent his client's stated position, the lawyer may also attempt to withdraw from the representation. If the lawyer determines that the client's lack of maturity reaches a level of 'incompetence,' he may make some decisions on behalf of the client. The lawyer should make these decisions, however, on the basis of what the child would desire if she were competent to understand her options and express her wishes. Alternatively, a lawyer may seek the appointment of a guardian ad litem for the child but should first discuss the appointment with the child." Mass. Bar Assoc. Ethical Opin. 93-6 (1993).

¹⁸ *Georgette II*, 439 Mass. at 38.

¹⁹ *Adoption of Erica*, 426 Mass. at 64 n. 9 (1997).

for lawyers representing children in custody cases.²⁰ These standards describe two kinds of children's lawyers, the "Child's Attorney," providing legal representation in a traditional attorney-client relationship, ensuring that the child has a voice in the proceedings, and the "Best Interests Attorney," advocating the child's best interest. The Child's Attorney advocates the child's wishes, and if the child cannot or will not express wishes, then the Child's Attorney should determine and advocate the child's legal interests or request the appointment of a Best Interests Attorney.

Some earlier ABA standards specifically for lawyers who represent children in abuse and neglect cases defines 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."²¹ 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.

The National Association of Counsel for Children (NACC) favors a model that places the attorney in a traditional role and 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. The NACC model is criticized for giving the lawyer too much discretion identifying the goals of the child—the same sort of unbridled discretion that critics complain about in the best interests advocate directed

model.²²

A View from the Bench

The Honorable Jay Blitzman Weighs In

Rule 1.14 of the Rules of Professional Conduct is consistent with the CPCS performance standards as amended in 1999 for the representation of children in state intervention cases.²³ These standards are clear in favoring a client directed versus guardian ad litem directed advocacy.²⁴ Adoption of this model is prudent. If everyone is invested in opining about "best interests," who will actually speak for the child, and can the child become enfranchised or empowered in the process? This concern is exacerbated by the reality that in many, if not most, child welfare cases, the child does not appear after being identified and rarely will be asked to testify. It is beyond the scope of this article to reach a position as to whether or not children should participate in cases that affect them in a more direct fashion. There are often sound clinical reasons for children not to testify in such emotionally charged cases, such as creating the perception that they are deciding if they are playing a key role in the termination of a parent's rights or determining where they will live. A child in this circumstance would face a perverse Sophie's choice that could result in significant psychological trauma.

Given this landscape it is important to consider role definition, and for counsel to differentiate between the quality of the decision being made, as opposed to the capacity to express or "verbalize" a position. The SJC has told us in *Georgette* that "There is no question that . . . children are entitled to counsel, that their autonomy and rights to be heard on issues affecting their interest should be respected, and that their position, based on mature expression, are entitled to weight in custody proceedings (although not determinative) . . ."²⁵ But how do we hear from children in these cases? Some attorneys are understandably concerned that advocating a position that they believe is deleterious to a child's best interest is not ten-

²⁰ *Standards of Practice for Lawyers Representing Children in Custody Cases*. ABA Section of Family Law (Aug. 2003).

²¹ A-1 *The Child's Attorney*. *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*. ABA (Feb. 1996).

²² *Recommendations for Representation of Children in*

Abuse and Neglect Cases. National Association of Counsel for Children (2001).

²³ Mass. Code Prof. Conduct R. 1.14 (2003).

²⁴ *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, Committee for Public Counsel Services (2003).

able. Such concerns can be ameliorated if counsel assumes a counseling role as contemplated by the Rules of Professional Responsibility.²⁶ The counseling role, however, is derivative of the Rule 1 obligation of zealous advocacy.²⁷ An attorney will not be in the position of robotically repeating what a client says if he or she has earned the child's trust by developing a strong attorney-client relationship.

Mass. R. Professional Conduct Rule 1.14, effective as of January 1, 1998, several days after the *Georgette* trial concluded, permits departure from the general rule requiring the maintenance of a normal client-lawyer relationship in cases in which a lawyer reasonably believes that the client has become incompetent or that a normal client-lawyer relationship cannot be maintained because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation *and* (emphasis provided) if the lawyer reasonably believes that the client is at risk of substantial harm.²⁸ The CPCS guidelines are similar and ordinarily require an attorney to report a client's expressed wishes if he or she is capable of verbalizing a preference. It is not enough that a child be deemed to be incapable of making an "adequately considered decision"; it must also be shown that the lack of such capacity is likely to result in substantial harm to the child.²⁹ The problem posed by the inherently subjective nature of whether a lawyer "reasonably believes" that his or her client is incapable of making an "adequately considered decision" is obviated to a degree by requiring counsel to report a child's expressed wishes if the child is capable of verbalizing a preference.

If a child is incapable of making an "adequately considered decision," and if such capacity exposes the child to substantial harm, the rules allow for an attorney to request the appointment of a guardian ad litem to direct the advocacy or to give the court a best interest recommendation. Counsel may also exercise "substituted judgment" on behalf of the client. Attorneys may also ask to withdraw from the representation.³⁰ The disadvantage of the guardian ad litem approach is the

signal it sends to the court regarding the soundness of the child's decision. Seeking to be relieved from the representation also raises this concern. Substituted judgment is an attractive option in cases of immaturity. In cases involving cognitive impairment or dysfunction, requesting a G.A.L. might be considered, but information relating to the disability is likely to be presented from other sources already involved in the case, such as a court investigator, court clinician, or guardian ad litem appointed on the issue of waiver of therapeutic privilege. For these reasons, exercising "substituted judgment" is a prudent course of action.

In considering the issue of how to hear from children in custody cases, it is useful to re-visit *In re Gault*, which created the right to counsel in delinquency proceedings and emphasized the importance of due process and the right to be heard.³¹ Can it be said that we are hearing from children who are so directly affected by decisions regarding their custody if we adopt ethical standards that allow counsel to make subjective determinations as to what they believe is in their clients' best interests without accurately conveying what a child is saying? In the delinquency arena, the ethical obligations of zealous attorney-directed counsel are clear. Although there are obvious differences in delinquency and abuse and neglect proceedings, a case can be made that the ethical responsibilities regarding the representation of children are similar. We should be as concerned about accurately presenting the position of children who are the subjects of state intervention in child welfare cases as we are about protecting the due process rights of juveniles accused of violating the law.

Conclusion

There are those attorneys who wish to be champions, acting in the best interest of their incompetent child clients, and are against arguing a position at trial that is obvious to them to be motivated by unsound, immature, and ill-considered judgment. They take the position that we owe more than that to our child clients. They argue that, while our

²⁵ *Georgette II*, 439 Mass. at 36 (citing *Adoption of Erica*, 426 Mass. 55 (1977)).

²⁶ Mass. Code Prof. Conduct R. 2 (2003).

²⁷ Mass. Code Prof. Conduct R. 1 (2003).

²⁸ Mass. Code Prof. Conduct R. 1.14 (2003).

²⁹ *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, Committee for Public Counsel Services (2003).

³⁰ *Id.*

³¹ *In re Gault*, 387 U.S. 1 (1967).

child clients rely on us to be sure that their voices are not lost in the court proceeding, children also rely on us to do right by them in the total, long-term sense. We cannot be reduced to stand before the court and argue and press for all of the whims and demands of children, they would say, essentially turning the attorneys into 14- and 15-year-olds before the court, making arguments like: "My client wants to go to the DSS foster home because all of his friends live in that neighborhood." "My client wants to return home to live with his sexually abusive mother, because he misses his dog and his bedroom and all of his things."

Attorneys for children, however—if they really wish to be attorneys and not guardian-ad-litem—should *never* have the job of trying to protect children or further their best interests, because then the court will NEVER really hear the child's position, as unsound or immature as we may think it is. Child's counsel may very well have to use a trial strategy that involves trying to keep the abused child at home because he wants to be with his toys, or his dog, or his friends—if we don't do this for this child, who will? We cannot be champions, much as we would want to be, for children who are in all kinds of pain. And much as we would want to protect them from pain, our independent action in this regard would violate their trust in us. As one child client said: "I can't trust him because he's not on my side."³² That is really what this debate is all about, from the child's point of view. Whose side are you on? ■

Jay Blitzman is an associate justice in the juvenile court department of Massachusetts. He teaches Juvenile Justice at MSL, and he is the editor of the 2003 revised edition of MCLE's Massachusetts Juvenile Court Bench Book.

Paula Kaldis Dickinson is a professor of law

at MSL. She teaches Juvenile Law, the Family Law Advocacy Clinic, Moot Court, and Research & Writing II. She also serves as director of the Research & Writing program.

³² Jinanne Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 Boston Bar Journal 6 (Feb. 1991).