



Commission On Child Protection
State of Connecticut

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Memorandum in Support of Senate Bill 1057
An Act Concerning Appointment of Counsel and Guardians Ad Litem
in Certain Juvenile Matters

Senate Bill 1057 is an initiative by the Commission on Child Protection to improve the legal representation children who are the subject of neglect, abuse and termination of parental rights petitions filed by DCF with the Superior Court for Juvenile Matters receive. The bill provides in pertinent part as follows:

“Counsel for a child seven years of age or older shall act solely as attorney for the child.”(S.B. 1057, Sec. 1, l. 14).

The current law contained in C.G.S. § 46b-129a provides that all children subject to child protection proceedings in juvenile court are assigned an attorney. The attorney is required to act as both an attorney and as a guardian ad litem. These dual roles create an immediate conflict of interest in the representation and are inconsistent with the Rules of Professional Conduct applicable to attorneys, as well as diminish the rights of children as parties in these proceedings.

While the best interest of a child encompasses a catholic concern with the child’s human needs regarding his or her psychological, emotional, and physical well-being, the representation of a child’s legal interests requires vigilance over the child’s legal rights. Those legal rights have been enumerated as the right to be a party to a legal proceeding, the right to be heard at that hearing and the right to be represented by a lawyer.

In Re Christina M., 280 Conn. 474, 492 (2006), citing *In re Tayquon H.*, *supra* 706-707.

Attorneys are subject to the following ethical rules when entering into an attorney-client relationship:

Client-Directed Representation: Rule 1.2(a) provides: “Subject to subsections (c) and (d), a lawyer *shall* abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

Attorney-Client Privilege/Confidentiality: Rule 1.6 regarding confidentiality requires: “A lawyer *shall not reveal information relating to representation* of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).”

Protective Action Requires a Potential for Substantial Harm: Rule 1.14 guides attorneys on how to comply with Rule 1.2 if the client appears to be impaired: “When a client’s capacity to make or communicate adequately considered decision 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.” The criteria for an attorney to deviate from a normal client-lawyer relationship and take “protective action”, such as requesting a GAL, is “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 ...”.¹

The above framework of loyalty and confidentiality is the cornerstone of not only the attorney-client relationship, but of our system of justice whereby each party to a legal action is entitled to expect from his or her attorney effective and zealous representation of his or her individual rights and interests. The commentary to Rule 1.2 points out that “Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval.” There are no exceptions contained in the Rules of Professional Conduct that render these principles inapplicable solely by virtue of a client’s minority. Nor do they do they suggest that children are not owed the same duties of loyalty, confidentiality and zealous advocacy of their expressed wishes simply because their goals might vary from what certain adults believe is best for them.²

¹ Elizabeth Laffitte, “Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered - How To Determine The Capacity Of Children” *17 Geo. J. Legal Ethics* 313, 330-331 (Winter 2004).

“One of the most prominent issues is how one should really determine the capacity of a child to make a decision. The comment to Model Rule 1.14 offers that “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.”

¹⁰⁰ Other research offers seven as the defining age: “taken as a whole, the research indicates that in general most children under the age of seven would probably lack the ability to make decision.” ¹⁰¹

Jean Piaget’s study of cognitive development of a child offers interesting insight into a child’s decision-making abilities. ¹⁰² At ages six and seven Piaget found that children become capable of logical thought. ¹⁰³ At ages six through ten, children can understand past and future to some extent, along with cause and effect and symbolic drawings. ¹⁰⁴ At the age of seven, children can understand verbal explanations presented in concrete terms and their memory pattern has changed to rely on words rather than sensory-motor. ¹⁰⁵ However, one must remember that children mature and develop at different ages and at different rates. For example, the Fordham Recommendations consider age irrelevant in this determination of a child’s capacity. Thus some simply argue that the age seven is more likely than not the age at which a child can handle decisions, but that the age of seven should not be determinative in all cases. ¹⁰⁶

Some scholars argue that “adopting the Peters Model would minimize the individual discretion of the lawyer while substituting distinct criteria for the lawyer to follow throughout the course of representation.” ¹⁰⁷ This pattern of thought is fashioned after Jean Kohn Peters Model of Child Representation. This model requires that the attorney develop a “thickly detailed” understanding of the “child-in-context.” ¹⁰⁸ The first step is to meet with the child in hopes to build a rapport; this step is called the relationship default. ¹⁰⁹ Next is the competency default, where the attorney begins to determine the child’s competency along a spectrum. ¹¹⁰ The third and final default is the advocacy default which requires counsel to give deference to the child’s expressed wishes unless the client is incapable of doing so in his or her own interest. ¹¹¹ Additionally, Peters urges lawyers to keep in mind three underlying directives: (1) get to know the child, (2) respect the child, and (3) get to know the child’s world. ¹¹² “

² See, Jinnane S.J. Elder, *The Role of counsel for Children: A Proposal for Addressing a Troubling Question*, Boston B.J., Jan.-Feb. 1991 at 9: “A lawyer who defines and serves as the proponent of each child’s unique perspective necessarily challenges the system and increases the opportunity for it to respond and serve the interests and needs of children before it.”

A Guardian ad Litem has no duty of loyalty or confidentiality:

A Guardian ad Litem's role on the other hand is to represent what he or she determines to be in the client's best interest and there is no expectation of confidentiality of communications between the GAL and the client or ward. The duties of the guardian ad litem have been delineated by Connecticut's Appellate Court to include investigating and making the court aware of all the facts, making a determination of the child's best interest, providing recommendations to the court, frequently communicating with the child and the court, and offering evidence as a sworn witness, subject to cross-examination through testimony. *In re Tavquon H.*, 76 Conn. App. 693, 704-705 (2003). The language of C.G.S. § 46b-129a as currently applied, allows an attorney acting as GAL to substitute his or her judgment regarding what is in the minor client's best interest and advocate for that position in place of the child's expressed wishes. In essence, the above-described role and duties, renders the Guardian ad Litem an interim fact finder and arbiter of the ultimate determination on the case.³ This is a responsibility that should be left in the hands of the judicial authority.

C.G.S. § 46b-129a Creates and Inherent Conflict and Diminishes the Legal Advocacy Provided to Children:

Connecticut's current policy of having all children who are the subject of neglect, abuse or termination proceedings assigned an attorney that serves in the dual capacity as attorney and GAL creates an inherent conflict for the attorney that cannot be corrected by a subsequent appointment of a separate GAL. From the very inception of the attorney's representation of the client a conflict exists between the duties of confidentiality and loyalty to the client's expressed wishes owed by an attorney versus the duty of the GAL to determine what the GAL believes is in the child's best interest and to share all information gathered as well as his or her opinion regarding best interest with the court.

Under the Rules of Professional Conduct an attorney cannot ethically enter into an attorney-client relationship with a child when the attorney knows from the commencement of the representation that the attorney must, independent of the client's goals, assess the client's best interest, formulate his or her own opinion about best interest and, if the attorney agrees that the child's wishes coincide with his or her best interest, act as an attorney and GAL before the court. Under this scenario, where there is no perceived conflict between the attorney's opinion and the child's wishes, attorneys often act more as GAL, sharing all information and confidences, in an effort to influence the court to adopt the attorney's view of the child's best interest. Equally problematic is when the attorney believes that the child's expressed wishes do not promote his or her best interest. Under current law, the attorney is obligated to seek the appointment of a GAL who may advocate a position contrary to that of the client even though there has been no determination that the client is incapable of making adequately considered decisions or that the client's wishes, if achieved, would cause substantial harm.

In struggling with this conflict, "[i]ncreasingly, the academic literature reveals a growing consensus that the proper role of an attorney for a child is to represent the client's wishes (as opposed to the attorney's conception of the minor's best interests) consistent with the minor's

³ See, Wu, Christopher, "Conflicts of Interest in the Representation of Children in Dependency Cases." 64 *Fordham Law Review* 1857, 1861 (1996): "...in what way is the advocate who adopts a best interest approach really functioning as a lawyer? More specifically in the context of dependency cases, how does the attorney's function differ from that of a judge, social worker, or if one exists, the Court Appointed Special Advocate?"

age and cognitive ability.”⁴ Ten other states have adopted a model of representation where the child is entitled to an attorney governed by the traditional rules of an attorney-client relationship.⁵

Traditional Client-Directed Representation is in a Child’s Best Interest:

Children who have attorneys that take the time to establish a trusting attorney-client relationship with them; that listen to them and try to understand their background, experiences, needs and desires; that include them in the decision-making process; and that take steps to make sure their voice and wishes are heard by the court, feel less disenfranchised, more confident, effective, and hopeful.⁶ Even when children’s attorneys do not obtain the results their clients want, children in foster care report a sense of satisfaction from having their options and consequences explained to them, from being asked their position, and from knowing that they were given an opportunity to be heard either in court themselves or through their attorney’s advocacy. Youth who were represented by lawyers who did not treat them like a client, deserving of respect, time and attention, or as capable of participating in formulating case goals, report a sense of confusion about their circumstances and powerlessness to affect their own lives.⁷

Children and youth who are removed from their families and encounter the child welfare system are likely to be traumatized and to feel powerless and discouraged. Attorneys who act in a traditional client-directed capacity, to the full extent possible under the Rules of Professional Conduct, provide their clients with a meaningful voice in those proceedings that profoundly affect their lives and their futures. The sense of empowerment that a child can achieve by having a legal representative committed to zealously advocating for his or her expressed wishes can only serve to counteract the other life experiences that lead to mistrust and hopelessness. When our system of justice fails to ensure that the core canons of legal representation, loyalty, confidentiality and zealous advocacy, are provided to children, that system compounds the very neglect and trauma from which it seeks to protect them.

CONCLUSION:

The Connecticut Legislature by establishing the Commission on Child Protection acknowledged the need to improve the representation of children in child abuse and neglect proceedings and in so doing took a tremendous step towards ensuring that children receive knowledgeable, skilled and zealous legal advocacy. C.G.S. § 46b-129a requires that every child in a child protection proceeding receive an attorney, yet by requiring that attorney to serve in a dual capacity, it inhibits the attorney’s ability and obligation to provide the ardent legal representation that the Professional Rules of Conduct require.⁸

Senate Bill 1057 is an important next step to ensuring that the attorneys assigned to advocate for children whose lives have been disrupted by neglect or abuse and DCF intervention,

⁴ Christopher Wu, “Conflicts of Interest in the Representation of Children in Dependency Cases” 64 *Fordham Law Review* 1857, 1859 (1996).

⁵ Report of First Star: “Child Representation in Abuse/Neglect Proceedings” <http://www.firststar.org/research/representation.asp>

⁶ Janet Chaplan, “Youth Perspectives on Lawyer’s Ethics: A Report of Seven Interviews”, 64 *Fordham L. Rev.* 1763 (1996).

⁷ Discussions by the author, Carolyn Signorelli, with youth in and formerly in foster care.

⁸ *In re A.T.*, 744 N.W.2d 657, 665-666 (2007): “The potential conflicts between a guardian ad litem’s statutory duty to the court and a lawyer’s duty to his client are blurred ... The fundamental duty of the guardian ad litem conflicts with the traditional role of the lawyer Only by the appointment of an attorney can the child’s wishes be effectively presented

approach that representation with the same ethical compass and zealous loyalty that any other client deserves under our system of justice. The Iowa Court of Appeals appropriately applied the reasoning from the seminal juvenile case, *Application of Gault*, 387 U.S. 1, 38, 87 S. Ct. 1428, 1449, 18 L. Ed. 2d 527, 552 n.65 (1967) to child protection matters in an appeal from a termination of parental rights case where the trial court failed to appoint a separate attorney to advocate for the child's expressed wishes:

The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.

In re A.T., 744 N.W.2d 657, 666 (2007).

In light of the above, I urge this Committee to act favorably on Senate Bill 1057 and, thereby, help the Commission on Child Protection to ensure that the children it serves receive the most effective legal advocacy possible.

Respectfully Submitted,

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