A Child's Right To Counsel in Maltreatment Cases

by Alan Rosenfeld, JD

APSAC has been asked to join as an Amicus Curae in support of a case pending before the California Court of Appeals, which raises the question of what standard of practice, if any, should be required of attorneys appointed to represent minor children in custody/visitation cases.[1] I believe that APSAC should join with the National Association of Counsel for Children and other public interest groups who support the protection of children from abuse and the importance of guaranteeing the right to counsel for all litigants, in urging the Court to adopt as law the evolving standard of practice which would require attorneys for competent children to act as real attorneys and vigorously represent the interests of the children while following the informed instructions of their clients.

Four professional associations have recently promulgated standards of ethical practice for attorneys who represent minors in civil proceedings: the American Bar Association, the National Association of Counsel for Children, the Fordham Conference on Ethical Issues in Legal Representation of Children, and the American Academy of Matrimonial Lawyers. Each of them would guarantee to competent minor clients the same right to zealous advocacy from their attorneys as adult clients.[2] None of these proposed standards are as yet binding on attorneys appointed to represent children.

The reasons for these evolving standards are both philosophical and practical. The goal of our child protection system is to achieve the best possible result for the children involved. Determination of the ultimate best interests of the children should be made based upon the evidence presented to the judge and not on the whim or bias of another non-expert adult. As the drafters of the American Association of Matrimonial Lawyers Standards explain in their commentary :

> The most serious threat to the role of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests. The danger is that this additional adult will make a difference in the outcome of the proceeding without any assurance that the outcome is "better" (that is, without an assurance that the outcome serves the child's best interests). (Comment to A.A.M.L. Standards sect.2.7)

APSAC should join as an Amicus Curae in this case because this is a critical issue in the field of child protection that will ultimately have a profound effect—for better or worse—on how cases of alleged child abuse are handled in courts, and ultimately on the chances of achieving justice and protection for abused children. It should be one of APSAC's roles to participate in informed debates, in whatever forums, that will be deciding policy that will affect our ability to protect children from abuse. This case offers an opportunity to establish controlling standards of practice for attorneys who are appointed to represent children in child maltreatment cases.

The California case presents the kind of stark facts that make a decision on the ultimate question of law critical and inevitable. At the time of trial, a 12-year-old girl had been living with her mother, who had sole custody, and her extended family which included a stepfather and three younger siblings. Her father had residual visitation rights that he had voluntarily not exercised for almost a year and a half. According to the testimony of her psychologist, the child was "healthier than most children ... whatever is happening in her life I would encourage more of it because she's doing very well."

The family was in court (after a long history of litigation that began with allegations that the father had sexually abused the child ten years earlier) because the child's mother had filed a motion seeking permission to relocate with her family from Southern California to Oregon. The child's father opposed the motion, and the Court appointed an attorney to represent the minor child at the upcoming hearing. Compelling evidence was offered that she was mature and emotionally competent to understand the implications of the legal action that involved her.

The child's expressed position was clear. She told her attorney, she told her psychologist, and she ultimately told the Court in her testimony. She wanted to move to Oregon with her family. She was angry at her father for trying to stop her from moving. She wanted nothing to do with her father and would not agree to visit with him. If forced to be with him, she would "keep running away until he got the idea."

The court-appointed lawyer, however, had opinions of his own. He asked the Court to exclude his client from the courtroom, and, contrary to clear instructions from his client, filed a motion to transfer full custody to the father. The child returned to court with her own lawyer and attempted to argue that she had a constitutional right to be heard by a lawyer of her choice who would act like a traditional lawyer. The original court-appointed lawyer refused to be removed and argued that he was not bound to follow his client's instructions, no matter how clearly they were articulated.

The minor child asked the Court to appoint a different lawyer or otherwise let her be represented by the volunteer lawyer she had retained. The Trial Court refused to remove the appointed lawyer, and ultimately granted that lawyer's motion and transferred full custody to the father. True to her word, the child followed through on her threat to run away and has not been seen or heard from since January 1997.

The issues on appeal raise the question of what standard of practice is to be required of attorneys appointed to represent minor children in custody cases. Currently there is no rule of law or binding standard of practice for attorneys representing children in custody cases in which there are allegations of child sexual abuse.[3]

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Lawyers for children commonly behave in ways that would warrant disbarment and guarantee judgments for malpractice if these acts were committed on behalf of adult clients. Among the common problems are:

1) lawyers who see themselves as mediators between the parents in cases of child sexual abuse, rather than advocates for the protection of the children.
2) lawyers who bring their own biases into their work and refuse to believe allegations of sexual abuse, despite strong and compelling evidence supporting the claim
3) lawyers who take a passive role in the trial on the issues of child protection, either because they lack the trial skills or knowledge of the special scientific or child development issues that are necessary to try cases of child sexual abuse.

In each of the above examples, an attorney whose client was one of the parents in a child abuse case clearly would have violated the basic canons of the legal profession. There is no excuse for allowing such malpractice to be inflicted upon the most vulnerable parties in custody cases.

In arguing against allowing children involved in contested custody cases the right to be represented by a real lawyer who follows their directions, some point to the many decisions that children are not allowed to make for themselves (including consenting to sexual relations or entering binding contracts). This is essentially a "straw man" argument. No one is suggesting that children should control the outcome of custody decisions. That remains the ultimate responsibility of the court.

It is also not suggested that an attorney for a competent child should merely be a "robot" who follows instructions with no input. That image would violate the full scope of the responsibility of lawyers to their adult clients. Lawyers must develop a trusting relationship with their clients so that ultimately they can advise their clients. Competent lawyers help their clients understand their choices, and the implications and risks of those choices, and thereby help their clients to make better choices. Lawyers for children owe their clients no less a responsibility than lawyers for adults. An attorney's responsibilities should be greater, rather than lesser, when the client is a minor.

Children do not necessarily know what is best for them, but they may still be competent to give instructions to an attorney in an informed attempt to achieve their wishes. This case on appeal is particularly compelling because the child was twelve years old and evidence was offered to show her competence to understand the nature of the proceedings that involved her. She was competent by the same standards that are required of adults. Adult clients do not have to prove that they know what is best for them, merely that they understand the nature of the proceedings and the issues.

It should be the responsibility of the judge to determine the best interests of the child based upon the judge's training and wisdom and upon the weight of the admissible evidence presented in court. Too often, however, judges rely upon the opinion of the child's attorney or guardian ad litem. Accepting the recommendations of a presumably "neutral" adult may make the process easier for judges but does not increase the chances of achieving justice for children at risk.

When lawyers are permitted to offer their own opinions on the child's best interests, rather than being required to use the testimony of expert witnesses, they are not subject to cross examination that might educate the judge on the lawyer's biases or reliance on scientifically invalid theories. We are all aware of expert witnesses who base their opinions on unreliable and false theories, such as Parental Alienation Syndrome. How will we protect the children when those false opinions are offered by children's lawyers rather than "hired gun" experts?

It is important for all parties in court proceedings to remember the responsibilities and limitations of their roles. Witnesses are supposed to tell the truth. Experts are supposed to testify within the scope of their knowledge. Judges are supposed to judge. Lawyers are supposed to advise and advocate for their clients.

I believe the Court will have the strongest chance of ultimately determining the truth and reaching the best interests of the child if all the evidence is presented and examined as thoroughly and competently as possible. Appointment of a competent, specially trained attorney, who will act as a real attorney for children involved in difficult child custody and child protection cases, will dramatically increase the number of children whose interests are protected rather than threatened by the legal process.

The APSAC Legal Committee is currently considering a request to join the case as an Amicus Curae. Comments should be sent to the Legal Committee, c/o Tom Lyon, University of Southern California Law Center, Los Angeles, CA. Readers who are interested in a more thorough discussion of these issues are referred to the special section on Children's Legal Representation in volume 2, number 3 of *Child Maltreatment*.

Alan Rosenfeld, JD, was a founding member and past president of the Northern New England APSAC Chapter. He has recently relocated to Boulder, Colorado.

[1]The author is the attorney for the mother in the case.

[2]An APSAC Task Force on Standards of Practice for Attorneys for Children is still at work. Although the task force has not yet formally adopted any guidelines, all of the participants at a recent task force meeting held at the Fifth Colloquium in Miami agreed that at the minimum they would support standards of practice that would prohibit conduct similar to that inflicted upon the minor child in the case in question

[3]This case only involves the role of appointed counsel for minors in custody cases, but might theoretically also be applied to dependency cases. Some states including California. do have specific statutes defining the role of counsel for children in dependency cases.