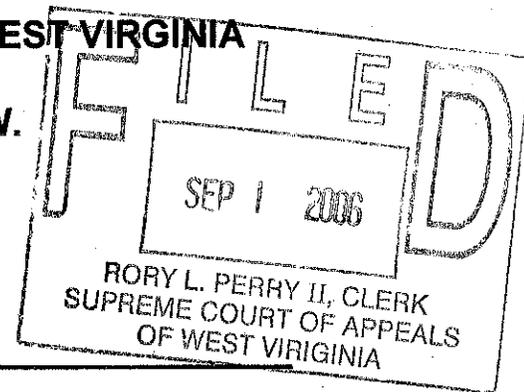


NO. 33133

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF CHRISTINA W.
SISSY W.
LISA W.



RESPONSE OF THE GUARDIAN AD LITEM TO THE
BRIEF OF APPELLANT
STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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GUARDIAN AD LITEM

DATED: August 31, 2006

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DEPARTMENT OF HEALTH AND HUMAN RESOURCES

KIND OF PROCEEDINGS AND NATURE OF RULINGS
IN THE LOWER TRIBUNAL

The West Virginia Department of Health and Human Resources (hereinafter "DHHR") filed an abuse and neglect petition on September 21, 2005 against Linda H. and her boyfriend, James B. The petition was based upon domestic violence and allegations of sexual abuse by James perpetrated against Christina W., Linda's eldest daughter.¹ The children, Christina, Sissy and Lisa, were removed from the home and placed in shelter care.

A preliminary hearing was held in the Circuit Court of Mercer County on September 30, 2005, at which time both respondents, as well as witnesses for the state, testified. The Court found probable cause to believe the allegations made out in the petition, requested a continuing investigation, and ordered that custody of the children remain with the state. An amended petition was filed alleging abuse by Larry W., the father of the three children.

At the adjudicatory hearing held on November 18, 2005, Linda H. and James B. stipulated to the allegations in the petition and the children were

¹ At the time the petition was filed Christina was fifteen years old; she turned sixteen in March 2006.

adjudged neglected. A post-adjudicatory improvement period was granted to the mother and custodial boyfriend. The Court set the matter for review on February 17, 2006. On February 13, 2006, DHHR filed a report with the Court in which it requested the removal of the Guardian Ad Litem (hereinafter "GAL") due to conflict. At the February 17, 2006 hearing, the Circuit Court of Mercer County denied DHHR's motion and DHHR subsequently filed an interlocutory appeal to this Court.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On September 17, 2005, a domestic dispute erupted between Linda H. and her boyfriend James B. Law enforcement, child protective service (CPS) workers, and the family's in-home service provider all responded to this incident. Christina W. disclosed to Deputy Parks of the Mercer County Sheriff's Department that James B. had been touching her inappropriately. Her mother, Linda H., told Deputy Parks that the fight began over Linda's anger that James took Christina places instead of her and that he bought Christina expensive gifts. Linda reported that during the altercation James began to choke her, prompting Christina to intervene. Christina proceeded to hit James with a broom while yelling, "let go of my mother or I will tell on you for touching me". Linda also reported this statement to Angela Robbins, the in-home service provider. Christina later came into DHHR and recanted her statement that James B. had inappropriately touched her. However, she did reaffirm that she had threatened him with allegations of inappropriate touching during the fight between he and her mother.

CPS gave Linda the option of leaving James in order to maintain custody of her children. Linda chose not to take this alternative, which led to DHHR's decision to file an abuse and neglect petition based upon the domestic violence in the home, as well as the allegations of sexual misconduct by James against Christina. Linda's three daughters were placed in shelter care and the matter was scheduled for a preliminary hearing.

At the time of the preliminary hearing, Christina continued to assert that no inappropriate touching occurred and stated a desire to visit with James as well as her mother. She and her sisters adamantly asserted that they be allowed to return home as soon as possible. At the preliminary hearing on September 25, 2005, the Court found that the children remained at risk because of the domestic violence, but made no finding regarding sexual misconduct by James. The Court indicated that this issue required further investigation.

On October 25, 2005, the GAL visited Christina and her sisters at the Paul Miller Shelter. The GAL asked to speak with Christina individually and confronted her about the allegations and subsequent recantation of inappropriate touching by James. After requesting and obtaining information regarding the attorney/client privilege, as well as assurances from the GAL that none of the information she provided would be divulged, Christina informed the GAL that James had in fact been touching her inappropriately. Christina reported that she was "okay" and reiterated her wish to go home to her mother. She further stated that she would not testify regarding inappropriate touching by James. The GAL

advised Christina that she needed to discuss these events with a counselor.² Christina replied that she just wanted her mother to "leave James" so that she would not have to talk about it.

The multi-disciplinary treatment team (MDT) met on October 25, 2006 and agreed upon a family case plan that addressed the issues of domestic violence and poor family communication. The MDT agreed to a non-custodial improvement period that would include the following services: in-home parenting instruction for Linda and James, participation in counseling for anger management, a victim support group for Linda, and a Batterer's Intervention Program for James. It was agreed upon that both Linda and James would receive weekly daytime visits with the three children.

On November 11, 2005, the GAL again spoke with Christina. That conversation primarily concerned allegations made by Linda and James of sexual misconduct by Christina's foster father. Christina denied any such misconduct. The GAL once again stated the importance of speaking with a counselor about the inappropriate touching by James. Christina repeated her desire to return home and assured the GAL that she was "okay" with being around James during visits.

In January 2006, the three children were moved to a new foster home to accommodate visitation and a MDT meeting was scheduled for the following month. Prior to the MDT meeting, the GAL was advised by the on-going case

² Earlier that day, at a multi-disciplinary treatment team (MDT) meeting, the GAL requested a psychological evaluation of both Christina and her sister Lisa. [A recent psychological evaluation of Sissy was already available.] At the time of the February 13, 2006 MDT these evaluations had not been completed.

worker, Stacy Cockerham, that Christina told her and the foster care agency worker, Nancy Silvazi, about James' sexually inappropriate behavior. Christina also informed them that she had previously revealed this information to her GAL.

On February 13, 2006, a MDT meeting was held at which time Linda and James were confronted with Christina's recent statements. Both of them denied the allegations and called Christina a liar. Linda stated that she did not want her daughters back and would relinquish her parental rights. Following this MDT meeting, DHHR filed a report with the Court requesting the removal of the GAL from the case due to conflict. On February 16, 2006, the GAL had another meeting with her clients. All three children continued to express a strong desire that their mother leave James so that they could be re-unified with her.

A hearing was held before the Circuit Court of Mercer County on February 17, 2006 reviewing the post-adjudicatory improvement periods of Linda and James and considering DHHR's motion for removal of the GAL. The Court denied DHHR's motion and found the client-lawyer privilege applicable to the relationship between the child and the GAL. DHHR filed this appeal seeking reversal of the Circuit Court's order upholding confidentiality between the child and the GAL.

STANDARD OF REVIEW

Findings of fact and conclusions of law as to whether a child has been abused or neglected cannot be set aside by a reviewing court unless clearly erroneous. In re Stephen Tyler R., 213 W. Va. 725, 731 (2003); In re Tiffany Marie S., 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996). However,

conclusions of law reached by a circuit court, such as the one on appeal herein, are subject to *de novo* review. "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995). See also In re Bobby Lee B., No. 32771, 2006 W. Va. LEXIS 8 at *5 (2006).

ASSIGNMENTS OF ERROR

- I. The decision by the Circuit Court of Mercer County denying DHHR's motion to remove the GAL should be upheld because West Virginia Code, Rules of Professional Conduct, and case law support the finding that a client's right to confidentiality extends to the client-lawyer relationship between children and their GAL.
 - A. Children are entitled to assert a right to confidentiality that an attorney serving as a GAL has a duty to honor under the West Virginia Rules of Professional Conduct.
 1. Rule 1.6 of the West Virginia Rules of Professional Conduct applies to attorneys serving as GAL.

West Virginia Code § 49-6-2(a) provides, in relevant part, that every child who is the subject of an abuse and neglect proceeding "shall have the right to be represented by counsel at every stage of the proceedings" and that "[a]ny attorney appointed pursuant to this section shall perform all duties required as an attorney licensed to practice law in the State of West Virginia." An attorney that represents a child in an abuse and neglect proceeding serves as the child's guardian ad litem. In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993). In that opinion, this Court explicated the duties required of a GAL. Specifically, this Court held that the West Virginia Rules of Professional Conduct apply to GALs and noted that the Guidelines adopted therein are "in harmony with the

applicable provisions of . . . the West Virginia Rules of Professional Conduct.” *Id.* at 39. West Virginia law clearly contemplates that children in abuse and neglect proceedings be represented by **an attorney**, an individual ethically bound by the W. Va. Rules of Professional Conduct.³

The Rules of Professional Conduct provide the ethical framework within which attorneys practice their profession. Rule 1.6 of the W. Va. Rules of Professional Conduct strictly prohibits the revelation of information relating to the representation of a client without the client’s express consent.⁴ The Comment to Rule 1.6 goes on to elaborate:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. (emphasis added)

Thus, the purpose behind Rule 1.6 is to allow for open communication between an attorney and client in order to enhance the attorney’s representation by developing a complete knowledge of the relevant facts and circumstances.

Children who find themselves, through no fault or conduct of their own, thrust into the bureaucracy of the child welfare system possess a particularly compelling need to have a GAL with whom he or she can freely communicate.

³ Not only does West Virginia law mandate representation by a lawyer, it further requires that attorneys practicing in child abuse and neglect cases receive specialized training in this specific area of the law.

W. Va. Code §49-6-2(a) provides:

Any attorney appointed pursuant to this section shall . . . receive a minimum of three hours of continuing legal education training on representation of children, child abuse and neglect: *Provided, however,* That where no attorney who has completed this training is available for such appointment, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent the child.

⁴ Rule 1.6 provides that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents . . .”

These children are at the mercy of what often appears to be a confusing and complex judicial process. For many children in these proceedings, the GAL constitutes the lone source of information and explanation in a chaotic time in the child's life. In order for the GAL to make informed decisions about the direction of representation, the GAL must initially develop an adequate understanding of the child, including delving into the past experiences of the child, as well as the child's subjective views. It becomes vital for the GAL to establish at the outset a context for the representation that includes an awareness about the child's views concerning his or her privacy.

In this case, Christina's GAL undertook to meet and get to know her client and to explore Christina's ability to contribute to the representation. Their meetings included the GAL explaining the Guardian's role and answering questions about the legal system and the state bureaucracy in which Christina found herself entangled. It also involved an inquiry into Christina's history, relationships and current concerns.

Christina's desire to be reunited with her mother and her equally strong wish that her mother separate from James became immediately apparent to the GAL. In the context of those desires, Christina asserted that James had in fact been sexually inappropriate with her. She also rigorously asserted her right not to have those statements disclosed by her attorney. Christina feared the repercussions of disclosing the sexual misconduct. Specifically, she believed it would preclude reunification of herself and her two younger sisters with their

mother.⁵ Her conversation with the GAL revealed that she had done a cost-benefit analysis of the various outcomes and understood that by refusing to disclose the inappropriate touching, James would be allowed to participate in visits with her. It was also clear that she hoped in time her mother would leave James.

Furthermore, the GAL was not the only person to whom Christina had spoken about James' behaviors. The disclosure had already been made to Detective Parks and had been made known to the Court through the testimony of both CPS investigator Shannon Miller and in-home service provider Angela Robbins. Without Christina's corroboration, the GAL's recitation of Christina's statement could not have been used as evidence by the Court. Christina had recanted these statements once and appeared perfectly willing to do so again if it appeared that they might interfere with her ability to see her mother. Thus the issue for the GAL's consideration was not one of ensuring no further contact between Christina and the alleged abuser, but of alienating her client and further eroding her credibility when (or if) Christina felt ready to publicly disclose the abuse.

2. West Virginia Code, Rules of Professional Conduct and case law recognize the ability of competent children to direct their legal representation; this includes, by implication, the competent child's assertion of confidentiality.

Rule 1.14 of the W. Va. Rules of Professional Conduct provides that "when a client's ability to make adequately considered decisions in connection with the representation is impaired . . . the lawyer shall, as far as reasonably

⁵ In this case, Christina's fears were warranted as her mother disbelieved the allegations and expressed the desire to relinquish her rights toward all of her children.

possible, maintain a normal client-lawyer relationship with the client."⁶ The

Comment to Rule 1.14 explicates:

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 . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects. . . Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. 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.

Rule 1.14, and particularly the Comment quoted above, emphasizes the varying degrees of competence and the impact which that competence has on the extent to which an attorney maintains a "normal client-lawyer relationship". Rule 1.14 indicates that minority, in and of itself, does not constitute an impairment that encroaches upon the ability of a client to direct his or her representation, even as to significant matters. Rather, Rule 1.14 recognizes the competence of children, even relatively young children, to assert opinions that go to the very heart of the lawyer's representation of that child.

Various West Virginia statutes bolster the principle set out in Rule 1.14. W. Va. Code § 49-6-5(a)(6) provides that "the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." In the context of allocation of custody between parents, W. Va.

⁶ Rule 1.14(b) further provides:

A lawyer may seek the appointment of a guardian . . . **only when** the lawyer reasonably believes that the client cannot adequately act in the client's own interest (emphasis added).

Code § 48-9-206(a)(2) provides that the court shall “accommodate the firm and reasonable preferences of a child who is fourteen years of age or older, and with regard to children under fourteen years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference such weight as circumstances warrant”. Furthermore, W. Va. Code § 44-10-4 allows minors above the age of fourteen the right to nominate their guardian.⁷

This Court has repeatedly interpreted these sections of the W. Va. Code as giving great weight to the child’s opinion. See J.B. v. A.B., 161 W. Va. 332, 340, 242 S.E. 2d 248, 253 (1978) (“[A]n infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not . . . Between the two extremes are children who are more or less capable of expressing a preference concerning their custody”); David M. v. Margaret M., 182 W. Va. 57, 64, 385 S.E. 2d 912, 920 (1989) (“[C]hildren between six and fourteen . . . can usually articulate a preference regarding custody arrangements and explain their reasons. By the age of fourteen a child takes on many qualities of an adult; in most cases . . . a child over fourteen will decide for himself or herself the parent with whom he or she wants to live, regardless of what a court says”); Judith R. v. Hey, 185 W. Va. 117, 120, 405 S.E. 2d 447, 450 (1991) (finding the parental preference of a child over the age of fourteen to be a “relevant, if not dispositive factor in our decision”); S. H. v. R. L. H., 169 W. Va. 550, 555, 289 S.E. 2d 186,

⁷ W. Va. Code § 44-10-4 provides:

If the minor is above the age of fourteen years, he or she may in the presence of the circuit or family court, or in writing acknowledged before any officer authorized to take the acknowledgement of a deed, nominate his or her own guardian, who, if approved by the court, shall be appointed accordingly.

189 (1982) (finding the statute to be "evidence of the legislature's conclusion concerning the age at which an adolescent should be given some substantial say in his own affairs").

Clearly, the W. Va. Rules of Professional Conduct, the W. Va. Code, and case law demonstrate a recognition of the right and the ability of children fourteen years old (and younger) to make and direct decisions that will have a substantial impact upon their lives. This includes the right to direct his or her legal representation. Nowhere is that right more important than in a client's right to assert confidentiality and to expect his or her attorney to maintain that confidentiality. While Rule 1.14 suggests that an attorney may evaluate the competence of the client in determining the scope of representation, there is no legal support for abridging the duty of confidentiality solely based upon a client's minority. By implication, a competent child may assert confidentiality of information during the course of legal representation and the child's attorney is ethically bound by the W. Va. Rules of Professional Conduct to preserve that confidentiality.

3. Mandatory reporting of child abuse does not abrogate an attorney's duty of confidentiality.

Beginning in 1965, the West Virginia legislature has required that people engaged in occupations that bring them into contact with children who suspect that a child has been abused or neglected must report their concerns to CPS. W. Va. Code § 49-6A-1. That law has been repeatedly amended to include more and more categories of people required to report suspected abuse or neglect. Recent amendments have expanded the mandated reporter list to include circuit

and family court judges and employees of the division of juvenile services.⁸ Furthermore, W. Va. Code § 49-6A-7 provides that the "privileged quality of communication between . . . any professional person and his patient or his client, **except that between attorney and client**, is hereby abrogated in situations involving suspected or known child abuse or neglect" (emphasis added).

Significantly, the list of mandated reporters does not include attorneys or GALs.⁹ This exhaustive list comprises virtually any individual who comes into contact with children and might be privy to knowledge about abuse and/or neglect. The absence of attorneys and GALs reflects a conscious decision on the part of the legislature to omit these individuals from the list. Furthermore, § 49-6A-7 clearly contemplates that communications between a child and his or her attorney are privileged. The legislature does not abrogate that confidentiality, even in the case of knowledge or information regarding abuse and/or neglect.

B. The Circuit Court of Mercer County was correct in denying DHHR's motion to remove the GAL.

1. The GAL was not negligent in her ethical or GAL duties by maintaining confidentiality as requested by her client.

Appellant argues that by not disclosing confidential information revealed by the child client the GAL was negligent in her duties as GAL. Appellant's

⁸ W. Va. Code § 49-6A-2 provides:

When any medical, dental or mental health professional, Christian science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services personnel, peace officer or law-enforcement official, member of the clergy, circuit court judge, family law master, employee of the division of juvenile services or magistrate has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately . . . report the circumstances or cause a report to be made to the state department of human services".

⁹ A review of mandated reporters across the country revealed that only two states, Maine and Montana, name guardians ad litem as mandated reporters.

argument is twofold: first, that Jeffrey R. L. directs GALs to form an independent judgment and act in the child's best interest; second, that the role and duties of a GAL differs from that of a typical attorney-client relationship.¹⁰ According to Appellant, by upholding a client's assertion of confidentiality, the GAL neglected her obligation to shape an independent judgment and advocate for the child's best interest.

Appellant's argument fails to recognize and appreciate the enormous difference between the stated wishes or desires of a child regarding various outcomes in the course of legal proceedings and the request for confidentiality by a child to his or her attorney. A competent child's assertion of confidentiality constitutes much more than merely a wish or desire of the child that a GAL can disregard in favor of a best interests analysis. Rather, confidentiality goes to the heart of a lawyer's duties and obligations towards a client and cannot be overridden absent carefully constructed and narrowly drawn exceptions. See W. Va. Rules of Professional Conduct R. 1.6.

Further, Appellant argues that the GAL violated her ethical duties by not being candid with the court about the confidences disclosed by her client. Although not explicitly stated, Appellant appears to rely on W. Va. Rules of Professional Conduct Rule 3.3 for legal support of this argument.

¹⁰ Appellant relies upon In re: Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991) to support the second part of this argument. Appellant's reliance on this case is misguided; In re Scottie D. stated that "a guardian ad litem has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian ad litem were in a normal lawyer-client relationship." Id. at 198. The Court was merely making the argument that GALs have a duty to represent a child as zealously and professionally as he or she would a typical client. It does not stand for the proposition that there is a distinction between attorneys and GALs, per se.

Appellant's reliance on Rule 3.3 is without merit. Rule 3.3 provides that "[a] lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal **when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client**" (emphasis added). The rule is drawn very narrowly and encompasses only limited occasions of applicability; occasions that the current facts very clearly do not fall within. Furthermore, if Appellant truly believed that by maintaining client confidences the GAL violated her ethical duties as an attorney, than Appellant had a professional obligation to file an ethics complaint against the GAL, a recourse that Appellant has not pursued.

2. By maintaining her client's confidentiality, the GAL did not act in a manner that was contrary to her client's best interest.

A GAL, unlike an attorney in a traditional attorney-client relationship, has the responsibility of "making a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the Court". See W. Va. Rules for Trial Courts of Record R. XIII. This Court set forth the above rule in Jeffrey R. L., *supra*, and explained, "[b]y adopting the proposed guidelines in this case, we are providing Guardians Ad Litem with fairly comprehensive standards which they can follow so that they may conduct an independent investigation of the case and present the child's position to the Court."

Although the Court in Jeffrey R. L. did not contemplate the possibility of conflict occurring between the role of GAL and that of a typical attorney and client, other cases and jurisdictions have examined this issue. Justice Workman,

in a dissenting opinion in In the Matter of Lindsey C., 196 W. Va. 395, 413, 473

S.E. 2d 110, 128 (1995) asserts:

The majority hypothesizes that conflicts could emerge between the roles of guardian ad litem and counsel for the adult, yet deftly dismisses even the possibility that such conflicts could also occur in the roles of guardian ad litem and counsel for the child. If the majority believes an adult may be entitled to both appointed counsel and a guardian ad litem, how can they blithely presume that an individual can always operate in both capacities simultaneously for a child?

Justice Workman goes on to examine several jurisdictions that confronted and resolved this issue by allowing for the appointment of both a guardian ad litem and counsel for the child in the event of a conflict.¹¹ Justice Workman correctly identifies children as rights-based individuals owed the same legal privileges, including the right to assert confidentiality, as their adult counterparts. He states that "there is a far greater potential for a conflict in the representation of a child than in the representation of an adult in an abuse and neglect case . . . the rights of the children must be the foremost, preeminent responsibility." Id. at 130.

Furthermore, both the American Bar Association (ABA) and the National Association of Council for Children (NACC) have established standards of practice for attorneys who represent children in abuse and neglect cases.

Standard B-2 of the ABA Standards of Practice provides that:

¹¹ See In re: Baby Girl Baxter, 17 Ohio St. 3d 229, 479 N.E. 2d 257 (1985) ("If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian."); In re: Shaffer, 213 Mich. App. 429, 540 N.W. 2d 706 (1995) (holding that in the case of a conflict between the role of attorney for the child and guardian ad litem for the child, a guardian ad litem may be appointed in addition to counsel for the child); Newman v. Newman, 235 Conn. 82, 663 A. 2d 980 (1995) ("the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests . . . the attorney should honor the strongly articulated preference . . . of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests).

[I]f a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both the role of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem, requesting appointment of a guardian ad litem, without revealing the basis of the request.

In this case, the GAL did not act in a manner that was contrary to her client's best interests by maintaining her client's assertion of confidentiality. By honoring Christina's request to maintain confidentiality, the GAL was able to gain her client's trust while advocating for her best interest. The GAL advised Christina to disclose the abuse, requested a psychological evaluation (which DHHR did not provide), and opposed an increase in visits between she and James.

If the GAL perceived a conflict and requested appointment of a GAL to represent Christina's best interest, while she remained as attorney for Christina, it would have been apparent to Christina that she would not have the same relationship with the GAL as with her attorney. It is unlikely that she would have divulged the information to her new GAL (much as she lied to the social workers about the abuse) that she had confided in her attorney, making it improbable that the Court would become aware of her reassertion that abuse occurred even with the appointment of a GAL to ostensibly represent her best interests.

Here, as the case progressed and Christina and her siblings had daytime visits with their mother and James, he once again initiated inappropriate relations with Christina (by giving her money and cigarettes). At that point, Christina felt empowered to disclose this and past behavior. Once *she* made these issues known to the caseworker, it was possible for the MDT and the court to take

appropriate steps to intervene in the relationship between Christina and James. If Linda and James had completed the improvement period and the Court was facing reunification, it would have been appropriate for the GAL to re-evaluate her position. If at that point Christina was still not able to assert the allegations of inappropriate touching by James, it would have been proper and prudent for the GAL to assert the conflict and request appointment of a guardian ad litem to advocate for Christina's best interests.¹²

- II. The Court should clarify the role of West Virginia attorneys who serve as GAL for children in abuse and neglect proceedings.

W. Va. Code §§ 49-6-1 and 2 provide that a child has the right to be "represented by counsel at every stage of the proceedings" in cases of abuse and neglect. This legislative mandate has been endorsed and amplified by case law. "A guardian ad litem appointed pursuant to § 49-6-2(a) must exercise reasonable diligence in carrying out the responsibility of protecting the **rights** of the children." In re: Scottie D., 185 W. Va. 191, 198, 406 S.E. 2d 214, 221 (1991) (emphasis added); See also State v. Scritchfield, 167 W. Va. 683, 280 S.E. 2d 315 (1981). However, the attorney who represents children in abuse and neglect proceedings has repeatedly been referred to as "guardian ad litem"¹³ and charged with different duties than those of a traditional attorney. Specifically, this Court has enunciated that "the child's wishes should be considered by the GAL,

¹² Although that is the recommended course of action, the GAL doubts, as a practical matter, that it would have made a difference in the outcome had Christina continued to maintain that the sexual misconduct never took place. The reason she disclosed to the GAL was because she received reassurances that it would be kept confidential. It strikes the GAL as highly unlikely that she would have confided this information to another GAL without a similar assurance.

¹³ In 1974, Congress passed the Child Abuse Prevention Treatment Act (CAPTA) requiring that a representative be appointed on behalf of a child in abuse and neglect proceedings. CAPTA does not specify that the representative be an attorney. See generally 42 U.S.C. §§ 5105 to 5107.

but need not be adopted by the GAL unless doing so serves the child's best interests." Jeffrey R. L. at 38.

In West Virginia, attorneys serving as GAL in abuse and neglect proceedings are required to serve both the child client and child's best interest. While Jeffrey R. L. provides direction in the responsibilities of the guardian ad litem, it does not offer any guidance as to what "best interest" means or a principled way of determining the best interest for any given child. As articulated by Robert Mnookin:

Deciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself. Should the decision-maker be primarily concerned with the child's happiness or with the child's spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life found in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is one to look for the set of values that should guide decisions concerning what is best for the child?

Robert H. Mnookin, In the Interests of Children: Law Reform and Public Policy 18 (1985).

The duties and expectations of an attorney charged with representing a child in an abuse and neglect case is at best confusing and contradictory. It is unclear whether the lawyer has an obligation to advocate zealously for the child's objectives or whether the GAL, as an agent of the court, has a primary duty to make recommendations based on the child's best interests, regardless of whether they conflict with the child's expressed wishes.

Other jurisdictions also wrestle with this dilemma. The executive summary of the NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001) states:

Unlike more traditional areas of practice where the model of representation and the lawyer code of conduct are essentially uniform from state to state, the practice of law for children has no commonly accepted uniform model or code, and many states provide inadequate guidance for attorney's doing this work.

Many writers have addressed the perceived conflict between "best interest representation" and "direct or 'wishes' representation". As one author noted, "[t]he lack of guidance has led many attorneys to rely on their own best judgment about a child client's interests. Often the result of this dynamic is an imposition of the personal values of the attorney on the attorney/client relationship, and this dynamic diverges from a core understanding of what it means to represent someone legally." Jessica M. Eames, Comment: Seen But Not Heard: Advocating for the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia, 48 Emory L. J. 1431, 1437 (1999). The debate additionally contemplates whether "independent legal counsel empowers children to their detriment, or whether attorneys serving as guardian ad litem ultimately serve the state and not the child's interests." Marvin Ventrell, Symposium Article: The Practice of Law for Children, 66 Mont. L. Rev. 1, 2 (2005). It has been noted that "[a]n instruction to lawyers to act in accordance with the child's best interests does not provide counsel with a meaningful mandate or clearly defined standards of conduct. Such a vague instruction to counsel merely invites inconsistent behavior, and

virtually ensures non-uniformity of professional conduct." Martin Guggenheim, Conference on Ethical Issues in the Legal Representation of Children in Illinois: Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings, 29 Loy. U. Chi. L.J. 299,306-7 (1998). See also Emily Buss, "You're my What?" The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 Fordham L. Rev. 1699 (1996); Roy T. Stuckey, Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L. Rev. 1785 (1996); Janet Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System, 52 U. Miami L. Rev. 79 (1997).

States have tackled the issue using different paradigms. One compelling model is to develop two sets of standards for attorneys who represent children: one for the traditional attorney-client relationship and another for the best interests guardian ad litem. See Donald N. Duquette, Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required, 34 Fam. L.Q. 441 (2000). In making the argument for this model, the author draws heavily from the Michigan statute which provides for a "client-directed attorney role and a best interests lawyer-guardian ad litem role".¹⁴ *Id.* at 444. This model offers a more nuanced approach to the practice of law for children than is generally contemplated as it accounts for the varying degrees of competence

¹⁴ "The statute . . . requires appointment of a lawyer-GAL in every child protection case, but permits the court to appoint an attorney for the child, in addition to the lawyer-GAL, where the child and lawyer-GAL are in conflict about identification of the child's interests. The statute also establishes aggressive duties for the lawyer-GAL, **provides for attorney-client privilege**, requires the lawyer-GAL to present the wishes of the child even if inconsistent with the lawyer-GAL's views of best interest, and requires the lawyer-GAL to weigh the child's wishes in making the best interests determination according to the age and maturity of the child." (emphasis added) *Id.*

among children while still recognizing children as rights-based citizens entitled to the full scope of legal representation. It is also consistent with Justice Workman's position in his dissenting opinion in Lindsey C., *supra*.

Significant developments have occurred in this country and in West Virginia since this Court adopted Guidelines for Guardians Ad Litem in 1993. The ABA and NACC have adopted Standards of Practice. Child welfare law has been accredited as a newly defined specialty of law. The West Virginia legislature has created the ability for family courts to appoint attorneys and/or GALs for children in custody proceedings. This Court provided timely guidance to attorneys in abuse and neglect proceedings in the case of Jeffrey R. L., *supra*. However, thirteen years have passed since this Court last visited the issue and confusion still exists around the precise parameters required of attorneys in child protection proceedings. Specifically, the issue raised by Appellant as to the duty of confidentiality touches upon an area that remains gray to attorneys practicing child welfare law in West Virginia: does the attorney have a duty to represent the child's best interest, however that is defined, or does the attorney advocate zealously for the expressed desires of the child? It is time for the Court to revisit the role of attorneys in child protection proceedings to clarify the responsibilities of representation.

CONCLUSION

The facts in this case raise a myriad of complex issues, for counsel, for social workers, and for the court. What is the appropriate response when a child alleges sexual misconduct and then recants? How is a child's capacity to direct

his or her representation determined? How should "best interest" be defined? Who should determine if a conflict of interest exists? The Circuit Court of Mercer County was asked to determine if the GAL should be removed for failing to disclose her client's statements of sexual misconduct when the client asserted her right to confidentiality. The trial court correctly answered that question in the negative. This Court should uphold the lower court's decision and provide additional guidance to trial courts and counsel on the role of attorneys who represent children in abuse and neglect proceedings.

PRAYER FOR RELIEF

Wherefore, the Guardian Ad Litem, prays that this Court uphold the trial court's ruling below and provide guidance to all counsel who serve as guardians ad litem to children in child protection proceedings.

Respectfully submitted



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