

Forum

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Judges Should Appoint Kids' Counsel Only in Extreme Cases

By Fred Silberberg

There's a growing trend in our family law courts, and it involves the appointment of counsel for children in custody disputes.

Rarely employed years ago, such appointments are not only common but also excessive.

The appointment of children's counsel within such a loose framework does not necessarily serve the interests of children or justice itself and can lead to needless complications in custody litigation.

Children's counsel should be appointed only in extreme cases and for the purpose of providing the court very limited information that it may not obtain through other means.

Originally the appointment of children's counsel provided an advocate who could argue for the children's best interests from the point of view of the children as opposed to either parent.

In high-conflict divorce situations, parents are often so polarized that the true needs and desires of children are lost in the crossfire.

Children's counsel also gave children who were old enough to express a preference in custody the ability to have their voices heard, without being brought into court and questioned by a judicial officer.

Section 20.5 of the state Standards for Judicial Administration sets forth specific guidelines that a court is supposed to consider in making a decision to appoint a minor counsel.

The guidelines include such factors as whether the appointment will furnish the court with information that is not otherwise available, whether there are allegations of abuse or neglect, and whether the child is subjected to extreme stress as a result of the custodial dispute.

The guidelines do not however, set forth the specific parameters of what children's counsel may or may not do in carrying out its function.

Moreover, the guidelines fail to address the specific function of children's counsel, which should be to advocate a child's best interest without making recommendations to the court concerning custody and visitation.

In current practice, courts appoint counsel even when such factors are not met. Often, they are appointed for the purpose of making recommendations to the court concerning custody, a function that should be reserved for mental health practitioners, not for lawyers.

Appointments of children's counsel can be dangerous waters to navigate. Court orders rarely specify what counsel is or is not permitted to do.

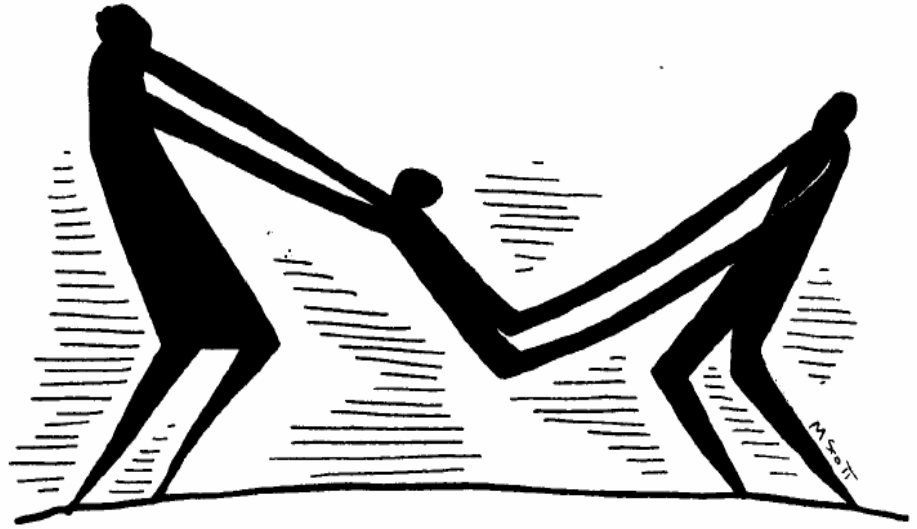
Without structure, attorneys who are appointed often run with the ball, conducting as many interviews as they can, scheduling appointments with the child and third parties, demanding that the parents appear at meetings that sometimes are scheduled with insufficient notice. Last-minute demands for paperwork and meetings are common.

Counsel appointed for the child often prepare reports and submit them to the court on the day of the hearing, denying either party the opportunity to consider what counsel is going to advocate and preventing sufficient opportunity to respond.

These reports frequently make recommendations on custodial arrangements, as opposed to expressing a child's needs and concerns.

The biggest danger is in the outcome. Making recommendations to the court sometimes involves fingerprinting at a particular parent or painting that parent in a bad light, claiming he or she did not respond to inquiries that may have been made with a very short or no turnaround.

The recommendations often unfairly include a child's expressed preference for a particular custodial arrangement, even if the child is not of a capacity to make a



decision that is in his or her best interests.

Such recommendations have the potential of suddenly bringing to light unverified hearsay information and, unfortunately, making it part of the court record.

Of equally serious concern is the fact that children's counsel sometimes can act as de facto child custody evaluators without the appropriate qualifications to do so.

In the course of a court-ordered custody evaluation, the evaluator typically interviews the parties, the children and collateral witnesses and conducts psychological testing.

Counsel appointed for children often interview the parties, the children and collateral witnesses and make recommendations to the court without the benefit of any expertise in the field of mental health.

Most disconcerting about this process, though, is the lack of guidelines for children's counsel and the lack of controls over what children's counsel can and cannot do.

There are prohibitions against ex-party communications with one side or the other, such as there are with custody evaluators.

Children's counsel can, and often do, communicate with parties as frequently as they want and, with this lack of controls, may become unduly influenced in favor of one party or the other.

While some children should have a voice in custody litigation, the present practice of appointing counsel for children does not provide that voice with appropriate safeguards.

The court may benefit from hearing first hand what a child or children think or are concerned about. If children's counsel is supposed to act as a voice for the child caught in the middle, then it should act as that voice and only as that voice.

The point of this type of representation, as contemplated by the state Rules of Court, is to assist the court in obtaining information it may not otherwise have access to.

If that information is the opinion or wishes of children, then the court should specify that counsel will have access to the children, not necessarily to the parties.

Under the current procedure, the powers of counsel for the children are way too open-ended.

Counsel may or may not advocate the child's position. More often than not, what gets advocated instead is counsel's own opinion, which may not be consistent with the best interests of the child.

Often, the appointment of children's counsel is tempting because of financial considerations. Child cus-

tody evaluations can be prohibitively expensive, running in excess of \$10,000 per case.

Children's counsel can be appointed at a substantially reduced cost. In some instances, the court has the ability to order the county to pay (i.e. fees of the lawyer. Children's counsel usually can act more quickly than can a court-appointed custody evaluator.

But this procedure has another problem. If a child-custody evaluation is conducted, the parties have the opportunity to depose or cross-examine the evaluator and to point out potential errors made in the course of the evaluation.

With the appointment of counsel, there is no opportunity to cross-examine the very person who is making recommendations on the custody issues.

There is no way to subpoena the file of counsel as there is with a custody evaluator, many of these documents would be covered by the attorney-client privilege.

Children's counsel are being appointed under the guise of providing representation to the children with the dual function of making recommendations to the court.

Yet they are not subject to the same checks and balances that an expert is subject to under Evidence Code Section 730.

Judges need to rethink the use of this process. While it may be tempting to appoint a lawyer under the theory that he or she will cost less and act more rapidly than a custody evaluator, the pitfalls could far outweigh the savings in cash and time.

The Standards for Judicial Administration need to be revamped in order to impose strict controls that limit both the power of children's counsel and the scope of what they do.

The Legislature should enact statutes that dictate the specific circumstances under which children's counsel can be appointed.

Until that time, judges should refrain from appointing counsel for children except when absolutely necessary.

If a judge decides to exercise the power to appoint, the court also must issue very specific orders preventing counsel from running away with a case to the detriment of both parties and, most important, to the detriment of the very people they are appointed to represent.

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