

IN THE SUPREME COURT

STATE OF GEORGIA

IN RE:

SUPREME COURT

Formal Advisory Opinion No. 10-2

DOCKET NUMBER

S11U0730

BRIEF OF STATE BAR OF GEORGIA

SUBMITTED, this 18th day of April, 2011,

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COMES NOW the State Bar of Georgia (hereinafter “State Bar”), and files its Brief in support of Formal Advisory Opinion No. 10-2 (hereinafter “FAO 10-2” or “Opinion”). In response to the Brief of Jane Okrasinski, Executive Director of the Georgia Association of Counsel for Children, and the Amicus Brief of the Barton Child Law and Policy Center at Emory University School of Law, the State Bar shows this Court the following:

I.

FACTS

On September 9, 2009, Ms. Jane Okrasinski, Executive Director of the Georgia Association of Counsel for Children requested a formal advisory opinion on the following question:

“An attorney has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case. Consistent with the Georgia Rules of Professional Conduct, what should the attorney do if the attorney believes termination is in the child’s best interest, but the child has directed the attorney to oppose termination?”

The Formal Advisory Opinion Board (hereinafter “Board”) accepted the request and began to research and draft an opinion. The Board reframed the question as follows:

“May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child’s objection?”

The summary answer provided by the Board is as follows:

“When it becomes clear that there is an irreconcilable conflict between the child’s wishes and the attorney’s considered opinion of the child’s best interests, the attorney must withdraw from his or her role as the child’s guardian ad litem.”

After the first publication, the Board received three comments. The Barton Child Law and Policy Center at Emory University (which also

submitted an Amicus Brief in this matter) submitted comments suggesting that the roles of attorney and guardian ad litem are inherently in conflict. The Center requested that the Opinion be expanded to find that a lawyer for a child should never serve as the guardian ad litem. Ms. Trenny Stovall, Director of the DeKalb County Child Advocacy Center requested that the Opinion provide more specificity as to when a child is reasonably able to direct the attorney to advocate for his or her legal interests. The Honorable Robert V. Rodatus, Presiding Judge for the Gwinnett Circuit Juvenile Court argued that the draft Opinion was an incorrect statement of current Georgia Law and that Georgia was a “hybrid” state where the roles of guardian ad litem and attorney are not inherently in conflict because both the guardian ad litem’s and the attorney’s duty would always be to protect the best interests of the child regardless of how the child perceived them.

After reviewing the comments, the Board decided to issue the Opinion as drafted. It was filed with this Court on January 26, 2011. The Requestor of the Opinion file a Petition for Discretionary Review, which this Court granted on March 7, 2011. The requestor’s Brief was filed March 28, 2011. By order of March 25, 2011, this Court granted the Bar’s Request for an Extension of Time to file its Brief. A copy of the Order is attached as “Exhibit A”

II.

ARGUMENT AND CITATION OF AUTHORITIES

There is no actual opposition to the Opinion filed with this Court. Both the brief by the requestor and the amicus brief agree with the Opinion; but argue that this Court should use this review to expand the Opinion to hold that the roles of attorney and guardian ad litem for the same child are inherently incompatible. The State Bar takes no position regarding the merits of these arguments, but would suggest that, because no notice has been provided that this question would be considered, and neither the legal profession, the judiciary, or the public have had an opportunity to respond or comment, this issue should not be considered by this Court. In fact, the Board specifically rejected resolving this issue, stating in the Opinion that “we need not address whether or not the dual representation...results in an inherent conflict of interest.”

In considering the merits of FAO 10-2, and limiting the discussion to the specific issue addressed by the Opinion, the State Bar believes that the Formal Advisory Opinion Board reached the correct conclusion under the Georgia Rules of Professional Conduct. Georgia statutory law clearly permits an attorney for a child to also serve as guardian ad litem in a

termination of parental rights hearing. O.C.G.A. § 15-11-98 (a) states as follows:

“(a) In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court shall appoint an attorney to represent the child as the child's counsel and may appoint a separate guardian ad litem or a guardian ad litem who may be the same person as the child's counsel.”

Under Georgia law and the Georgia Rules of Professional Conduct, these two positions have differing responsibilities. The guardian ad litem has a dual duty. The guardian has a responsibility to determine the *best interests* of the child, and a duty to report his or her findings regarding the best interests of the child to the Court. *See, Uniform Superior Court Rule 24.9 (3)* (“The GAL shall represent the best interests of the child.”) *and Padilla v. Melendez*, 228 Ga.App. 460, 461; 491 S.E.2d 905 (1997) (“The role of the guardian ad litem is to protect the interests of the child and to investigate and present evidence to the court on the child’s behalf...”). Under Rule 1.2 of the Georgia Rules of Professional Conduct, the duty of the attorney is to abide by the client’s determination of the objectives of representation, even if the attorney does not believe they are necessarily in the client’s “best” interests. *See, Rule 1.2 Georgia Rules of Professional Conduct, Scope of Representation*, (“A lawyer shall abide by the client’s decisions concerning the objectives of representation...”). In addition, under Rule 1.6 of the

Georgia Rules of Professional Conduct an attorney has a duty to maintain the confidences and secrets of his or her client which may conflict with the guardian ad litem's duty to report to the Court regarding the best interests of the child.

There will inevitably be times when these two roles conflict when representing children in a termination proceeding—most dramatically when a child who is able to reasonably articulate his or her “objectives of representation” instructs the lawyer to oppose termination of parental rights when the attorney, as guardian ad litem, believes the best interests of the child require termination. The Opinion specifically addresses the narrow issue.

Rule 1.14 of the Georgia Rules of Professional Conduct, Client Under a Disability, states that the lawyer “*shall*, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” [emphasis added] Comment [1] to the Rule states 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.” Under Rule 1.2, it would be the responsibility of the lawyer to advocate for the opinion of the child regarding the objective of the

representation, despite what the lawyer may believe are the “best interests” of the child.

The attorney’s duty to the child and the court as guardian ad litem would be in direct conflict with the lawyer’s duty, *qua* lawyer, to the child under the Georgia Rules of Professional Conduct. The Board correctly determined that the only plausible course of conduct under the express language of the Georgia Rules of Professional Conduct would be for the attorney to withdraw from his or her role as the child’s guardian ad litem.

Further supporting this conclusion is Rule 1.6 of the Georgia Rules of Professional Conduct, Confidentiality of Information. Under this Rule, the lawyer is bound to maintain the client’s confidential information. When the lawyer and a child are in agreement as to the child’s best interests, this is seldom a problem, since the child would consent to the lawyer informing the Court of information which would help the court reach the conclusion both seek. But when the child’s interests seem adverse to what the lawyer believes is the child’s best interests, the lawyer might be required by Rule 1.6 to maintain as confidential information which as guardian ad litem he or she would be required to disclose. Again, under the Georgia Rules of Professional Conduct, withdrawal would be required.

Perhaps the most persuasive authority supporting the Board's Opinion 10-2 is the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996) (hereinafter "Standards").¹ These Standards have been called "a decisive step toward clarifying and strengthening the role of an attorney appointed to represent a child in abuse and neglect cases."² Standard B-2 (1), Conflict Situations states:

"If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles 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. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request."

The commentary to the Standard makes clear that "[t]he primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests." The ABA Standards are in full agreement with FAO 10-2.

Finally, despite there being no opposition filed with this Court to the Opinion of the Board, there was opposition to the Opinion filed with the

¹ The Standards may be found at:
http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.pdf.

² Eames, Jessica Matthews; *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, 1446 (1999).

Board by The Honorable Robert V. Rodatus, Presiding Judge for the Gwinnett Circuit Juvenile Court. The State Bar believes Judge Rodatus raised a substantial matter which should be brought to this Court's attention, as there is case law to support his position. Judge Rodatus argued that Georgia is a "hybrid" state regarding this issue. In hybrid states, a lawyer is permitted to represent the child as both attorney and guardian ad litem without conflict. In such states, the duty of the attorney is to represent the best interests of the child, not the child's expressed wishes. In effect, Rule 1.2 is abrogated in the representation of a child at a parental termination hearing, allowing the attorney to ignore the child's opinion if the lawyer determines it is not in the child's best interests. The attorney's only duty regarding the child's wishes is to inform the court of the child's desires, and why the attorney disagrees with them.

In support of this position, Judge Rodatus cites three Georgia cases: *Dawley v. Butts County Department of Family and Children Services*, 148 Ga.App. 815, 253 S.E.2d 235 (1979); *In the Interest of A.M.A.*, 270 Ga.App. 769, 607 S.E.2d 916 (2004); and, *In the Interest of A.P.*, 291 Ga.App.2d 690, 662 S.E.2d 739 (2008). In *Dawley* and *In the Interest of AMA*, there was no allegation of an actual conflict. The issue on appeal in both cases was the claim that there was an inherent conflict in the positions

of attorney and guardian ad litem requiring reversal. The opinions can both be read as the Court of Appeals rejecting the argument that such an inherent conflicts exists.

The third case, however, seems directly on point, and contrary to FAO 10-2. The court describes the issue to be decided as follows:

“[T]he mother claims that this dual appointment was inappropriate because the roles had an inherent conflict of interest. This alleged problem resulted from the attorney’s obligation to advocate for the children’s *expressed desire to be returned to their mother, which conflicted with the requirement that the guardian ad litem advocate in the best interests of the children.*” [emphasis added]

In the Interest of A.P., 291 Ga.App. 690, 691; 662 S.E.2d 739, 740 (2008).

The Court of Appeals upholds the dual appointment by first citing the statute permitting such appointments, O.C.G.A. § 15-11-98 (a), and then holding:

“Contrary to the mother’s assertions, such a dual appointment is possible precisely because it involves no conflict of interest. As this Court has recognized, the fundamental duty of *both* a guardian ad litem and an attorney is *to act in the best interest of the party whom they represent.*” [emphasis added]

Id., at 691, 740. The opinion supports Judge Rodatus’ assertion that Georgia is a hybrid state; however, the State Bar believes the Court of Appeals holding in this case is incorrect for three reasons.

First, the holding is contrary to Rule 1.2, Scope of Representation, of the Georgia Rules of Professional Conduct. As shown above, Rule 1.2 makes expressly clear that the lawyer must abide by the client's decision regarding the objectives of the representation, even if the lawyer disagrees with them. Comment [3] expressly states that "representing a client does not constitute approval of the client's views or activities." This comment would be unnecessary if the attorney must always advocate for the client's best interests as determined by the attorney. The guardian ad litem, however, must determine the client's best interests, not the client's wishes or objectives. The Court of Appeals is wrong, therefore, in its assertion that the fundamental duty of the attorney and guardian ad litem is always the same.

Another problem with the opinion in *In the Interest of A.P.* is its citation to and reliance on the case of *Paul v. Smith, Gambrell & Russell*, 267 Ga.App. 107, 599 S.E.2d 206 (2004). The holding in *Paul* seems contrary to the court's conclusion in *In the Interest of A.P.* that the duties of an attorney and guardian ad litem are the same. In *Paul*, the court, quoting *Georgia State Board of Pharmacy v. Lovvorn*, 225, Ga. 259, 263 (1985) states:

“'[A] lawyer should always act in a manner consistent with the best interests of his client.' It is a proud hallmark of the legal profession that an attorney owes *undivided loyalty to*

his client—undiluted by conflicting or contrariant obligations and undiminished by interests of himself or of others.”

Paul v. Smith, Gambrell & Russell, 267 Ga.App. 107, 110; 599 S.E.2d 206, 209 (2004). In using the term “best interests” in this context, the court was not arguing that the attorney must determine the client’s best interest, but rather that the attorney would violate acting in the client’s interest if the attorney had a conflict, i.e. a competing loyalty or duty. The case actually would require that an attorney not act as guardian ad litem if it caused “conflicting or contrariant obligations.” Therefore, the Court of Appeals reliance on this case in support of its holding in *In the Interest of A.P.* is misplaced.

The third reason *In the Interest of A.P.* is incorrect is that it is contrary to the holding of the Court of Appeals in *In re J.S.C.*, 182 Ga.App. 721, 356 S.E.2d 754 (1987). In *In re J.S.C.* the juvenile court appointed a guardian ad litem for the child in a deprivation action, where the father was accused (and later convicted) of shooting the child. The guardian ad litem then filed a termination petition seeking to terminate the father’s parental rights in the child. The juvenile court ordered the termination of the father’s parental rights, and the Court of Appeals reversed. The Court stated:

“To begin with, the function of a guardian ad litem is to protect the interests of the child in all matters relating to the litigation.

[cits. omitted] Here, the best interests of the child may or may not have been served by termination of the father's rights; that was the primary issue. [The guardian ad litem], by initiating termination proceedings, had de facto *taken the position of advocate* for ending the father's parental rights."

In re J.S.C., 182 Ga.App. 721, 723; 356 S.E.2d 754, 756 (1987). In other words, the Court of Appeals was concerned that the guardian ad litem was acting in the role of a lawyer—i.e. an advocate. The Court of Appeals goes on to state that “[t]he advocate for the termination is not a proper guardian ad litem.” *Id.*, at 723. While it may not have analyzed it in the terms of a conflict of interest, it is apparent that these issues of the conflicting duties of advocate/lawyer and guardian ad litem were behind the court's decision.


For these reasons, the State Bar believes that the holding in *In the Interests of A.P.* is mistaken, and that FAO 10-2 is correct.

III.

CONCLUSION

As shown above, the conclusions reached by the Formal Advisory Opinion Board in FAO 10-2 are well reasoned and correct. Therefore, the State Bar of Georgia requests that this Court adopt the opinion in its entirety.

RESPECTFULLY SUBMITTED, this 18th day of April, 2011.


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SUPREME COURT OF GEORGIA
Case No. S11U0730

Atlanta, March 25, 2011

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

IN RE: FORMAL ADVISORY OPINION NO. 10-2

The request for an extension of time to file the brief of appellant in the above case is granted, you are given an extension until April 18, 2011.

Failure to do so may subject you to the sanctions of Rules 7 and 10 of this Court.

Appellee's brief shall be filed 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed. No extensions requesting oral argument will be granted. Rule 50 (3).

A copy of this order MUST be attached as an exhibit to the document for which appellant received this extension.

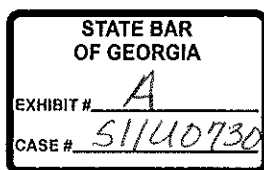
SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from
minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court
hereto affixed the day and year last above written.

Theresa A. Barnes, Clerk



STATE BAR
OF GEORGIA
EXHIBIT # A
CASE # S11U0730

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day mailed, by first class mail with sufficient postage affixed thereon, a true and accurate copy of the foregoing pleading entitled BRIEF OF STATE BAR OF GEORGIA to the other parties herein as follows:

Stephen M. Reba
Barton Child Law and Policy Center
1301 Clifton Road
Atlanta, GA 30322

and

Jane Okrasinski, Executive Director
Georgia Association of Counsel for Children
145 Three Oaks Drive
Athens, Georgia 30607

This 18th day of April, 2011.



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