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The Use of Next Friends to Seek Appointment of Counsel for Dependent Children Who Are Incapable or Unable to Request Appointment of Counsel

by Sarah J. Campbell and Robin L. Rosenberg

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Matthew is three.¹ He has curly brown hair, a creamy olive complexion, and a crooked smile that gives way to a pair of perfectly placed dimples every time he grins. Matthew doesn't grin often enough. Sharon, his mother, has struggled with chemical dependency for most of Matthew's young life. Matthew has been in and out of foster care his whole life, bouncing from one house to the next while Sharon "gets her life together." Unable to get her life on track, Sharon finally agreed to surrender her parental rights when Matthew was two, with the understanding that her son would be adopted by her cousin, Brad. Matthew went to live with Brad when he was 18 months old. Brad cared for Matthew as his own son, and aside from Sharon, Brad is the only parental figure Matthew has ever known.

For a moment, Matthew was lucky; he had hope and a future with Brad. But a homestudy revealed some areas of concern. Brad's background check brought to light criminal charges for retail theft and concerns about his employment. Without notice to Brad about the subject of the hearing, the court held a modification of placement hearing, and Matthew was summarily removed from Brad's care without the opportunity to say goodbye or get his worldly possessions. Matthew was picked up from day care that afternoon, driven across the state, and placed with an unfamiliar relative — someone Matthew barely knew. With the stroke of a pen and bang of the gavel, Matthew's relationship with Brad was instantaneously severed. Although present at the hearing, the Guardian ad Litem program took no action to prevent the abrupt removal of Matthew from his "daddy," his home, and everything familiar to him.

Desperate, Brad attempted to get an attorney to represent Matthew, in hopes that an attorney would be able to reunify Matthew with his family — or at least provide for a reasonable transition for Matthew. A legal services attorney agreed to directly represent Matthew, and the Department of Children and Families (DCF), a party to the action, moved for the appointment of counsel for Matthew. The court denied the motion, and neither DCF nor the Guardian ad Litem Program appealed.² As a caregiver, Brad was a participant to the dependency proceeding, but did not have legal standing to appeal the denial of counsel. Matthew, a three-year-old now living hundreds of miles from his home, had no ability to tell the court that he wanted a lawyer to help him see his "daddy," or to get his favorite toys and clothes, still sitting in Brad's home.

Florida Is Failing in its Provision of Representation to Foster Children

Matthew's story reveals a sad truth: Florida is failing in its provision of representation to children in the state's care. In a 2007 study of child representation nationwide, First Star, a foster youth advocacy organization, graded state modes of representation for children in dependency proceedings. Five states earned highest marks, or "A's."³ Florida received an "F."⁴ First Star's second study in 2009 showed some widespread improvement, as the number of states requiring client-directed attorney representation for foster youth in dependency proceedings increased.⁵ Florida was not among those states.⁶ First Star

awarded Florida another "F."⁷

Advocacy groups and legislators have made a concerted effort in recent years to close the gap between Florida and other states with regard to representation of child victims in foster care proceedings. In 2008, The Florida Bar's Legal Needs of Children Committee began developing proposed legislation to provide counsel to children in some dependency and termination of parental rights (TPR) cases.⁸ Their subsequent 2010 bill provided that children would be represented by attorneys in certain articulated cases, including children who have been in and out of home care for more than two years and in whose cases no TPR petition has been filed, children with developmental disabilities, and children prescribed psychotropic medication.⁹ The bill died when it reached the Committee on Children, Families, and Elder Affairs. Today children in Florida still have no statutory right to independent legal representation.

Existing System Fails to Ensure All Children Who Need Counsel Receive Counsel

Some may argue that legislation providing representation for dependent youth is unnecessary as outlets for representation of youth in state care still exist. Many people believe that the legal needs of dependent children are adequately handled by the Guardian ad Litem (GAL) program. Unfortunately, the GAL program has never been able to represent all the children it is supposed to represent. Currently, the program estimates that it represents only 70 percent of the dependent children who are entitled to a GAL.¹⁰ Moreover, in some cases like Matthew's, the child's legal interests are not always asserted by the GAL program, which is mandated to only make "best interest recommendations" to the court.

Others may assert that a statutory right to representation is unnecessary because the court on its own motion, or any party to a dependency action, may request the court appoint an attorney to represent the child.¹¹ Parties to the case include the Department of Children and Families, the Guardian ad Litem representative, the parents, and the child.¹² In other words, Florida law indirectly complies with First Star principles and allows dependent youth, as party "to pursue legal remedies, to initiate legal proceedings ... and to express him- or herself, with the assistance of counsel, to the court or hearing officer."¹³ In short, as parties, children in foster care can ask the court to appoint an attorney to help them better express themselves to the court, thus, alleviating the need for automatic representation of all dependent youth and reserving counsel for instances when the child really needs help advocating for his or her interests.

In reality, few youth know that they have the right to ask for counsel. Upon entry into state care, all children are supposed to be provided with a copy of the "Goals for Dependent Children," which includes the goal of having an attorney appointed "where appropriate."¹⁴ There is no requirement, however, that children be specifically advised of their right to ask for appointment of an attorney, and it is rarely, if ever, done. Moreover, even this option offers little reprieve for youth in state care who, like Matthew, are preverbal, nonverbal, disabled, or otherwise struggle communicating their wants and desires to a large and often foreboding courtroom. Nor does the right to ask for an attorney assist children who are more mature, but have no understanding that they have unmet legal needs. What options are available to these children? Who will speak for them? Where will they find their voice?

Courts Should Permit Knowledgeable and Concerned Adults to Serve as "Next Friends"

The solution is simple. The court should allow a well-informed and capable *next friend* to voluntarily come alongside the child solely for the purposes of moving for the appointment of counsel for the child. The use of a *next friend* for this purpose is consistent with the current law and practice in civil proceedings outside of juvenile and family court. Under the Florida Rules of Civil Procedure, the court has the obligation to either appoint a representative¹⁵ for a minor or incompetent person not otherwise represented in an action or make an order as it deems proper for the protection of the minor or incompetent person.¹⁶ When a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person.¹⁷ A minor or incompetent person who does *not* have a duly appointed representative may sue by *next friend* or by a guardian ad litem.

It is important to note that the term guardian ad litem has multiple meanings in Florida law. Unlike the guardian ad litem described in Fla. R. Civ. P. 1.210 (b), a GAL appointed under Ch. 39 does not have the standing to sue or defend on behalf of a minor and cannot, therefore, be considered a dependent child's "duly appointed representative."¹⁸ A guardian ad litem in dependency court is an actual party to the dependency action¹⁹ who is charged with representing the best interests (rather than the express interests) of the child, another party to the action, in that dependency case. For purposes of seeking appointment of counsel, the Ch. 39 GAL does not need the right or capacity of a "duly appointed representative," as the GAL need only file a motion on his or her own behalf as a party. In those cases when there is no GAL, or the GAL chooses not to seek appointment of counsel, any other well-informed adult in the child's life should be able to step in for the purpose of assisting the youth move the court for appointment of an attorney, finally giving children, like Matthew, a voice.

As noted by the Florida Rules of Civil Procedure, a *next friend* in most civil cases is someone who appears in court in place of another who is not competent to do so, usually because they are minors or are considered incompetent.²⁰ The *next friend* is a person of reasonable judgment and integrity who conducts litigation for the minor.²¹ Often the role is filled by a parent or other relative, but it can be any legally competent person whose interests do not run counter to those of the person on whose behalf they are acting.²² The *next friend* is not a party to the proceeding, nor is he or she a formally appointed guardian.²³ Instead, they are considered agents of the court with the role of protecting the rights of the incompetent person.²⁴

Within the realm of the dependency court, a *next friend's* role would be slightly more unique. The *next friend* to a child in dependency proceedings would not require any particular training or extensive education. A child's next friend could be a pediatrician, day care worker, nurse, neighbor, foster parent, relative, teacher, or other member of the community who maintains a close relationship with the child, is well versed on the child's circumstances, and is willing to step into a courtroom and move that an attorney be appointed to the child. In this case, the *next friend* would be standing in the child's shoes, giving the child a party, a voice, and asking for the court to appoint an attorney to represent the child's interests. A *next friend's* role is fulfilled upon appointment of counsel, unless the need to appeal the denial of appointment arises. In short, the dependency *next friend* is a legal means for a nonparty who believes a child needs a lawyer to get the matter heard in court.

Ethical and Logistical Considerations Do Not Preclude Use of *Next Friend*

As simple as it seems to permit a *next friend* to help a child in the dependency system move for the appointment of counsel, certain ethical and logistical concerns are sure to be raised. First, would a *next friend* be responsible for paying for the representation of the minor? Under Florida law, in civil matters the *next friend* of a minor has power to act on that minor's behalf and, when necessary, to conduct litigation to enforce the claims of a ward.²⁵ However, the *next friend* in a dependency case involving a youth in dependency would only be responsible for helping the young person ask the court for an attorney, most likely a pro bono or legal aid attorney, who would not require payment for their services.²⁶ Once the *next friend* was able to locate adequate counsel for the youth, then the attorney could file a motion for appointment on behalf of the *next friend*, securing representation of the child.

Closely related to payment of attorneys' fees is the issue of whether a *next friend* would direct the representation of the child. At first glance it may seem like a very young child or a young person with a cognitive disability might have a tough time directing the scope of the representation by counsel, and the *next friend* might be needed to step in and navigate the attorney/client relationship for the child. Conversely, depending on the facts and circumstances of the case, an attorney, when representing a nonverbal or disabled foster youth, may feel compelled to disregard widely accepted ethical norms and impose his or her own beliefs of right or wrong and save the client, or the *next friend*, from making a dangerous decision. Neither scenario is compelled by, nor comports with, the attorney's ethical obligations to the child client. The *next friend's* role in this scenario is limited to helping the foster youth speak in a court and ask for an attorney. Once the attorney is appointed, the *next friend* is released, and the legal relationship between the foster youth and the *next friend* ceases to exist.

Moreover, the Florida Rules of Professional Conduct are clear and contemplate the relationship between the attorney, the client, and the client's guardian or *next friend*. Rule 4-1.14 insists that the lawyer, as far as reasonably possible, maintain a normal client-lawyer relationship with the client despite the client's minority, disability, or other inability to adequately consider decisions in connection with their representation.²⁷

A comment to Rule 4-1.14 further explains that although 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, sometimes a client suffers from such a disability that maintaining the ordinary client-lawyer relationship may not be possible in all respects.²⁸ Nevertheless, the law is increasingly recognizing intermediate competence²⁹ and acknowledging that a client who lacks legal competence still often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.³⁰ Most importantly "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."³¹ Simply put: "[e]ven if the person does have a [*next friend*], the lawyer should as far as possible accord the represented person [and not the next friend] the status of client"³²

Finally, some have raised concerns about the motivations of nonparties who seek to obtain representation for dependent children. It is true that nonparties may be personally or politically motivated to obtain counsel for a child. A grandmother, foster parent, or other caregiver may seek counsel for a child in the hopes that their personal position will be asserted. Political motivation was suspected when the president and general counsel of the Florida Family Policy Council appeared in dependency court on behalf of Rifqa Bary, a teenager who ran away from her parents in Ohio claiming that she feared harm based on her conversion from Islam to Christianity.³³ But the specter of improper motivation should not preclude the use of *next friends* to help children in state care obtain counsel. The existing ethical rules and practice are more than adequate to address such concerns. All Florida lawyers owe their clients a duty of undivided loyalty, regardless of who found them or is paying their fees.³⁴ The Florida Rules of Professional Conduct clearly outline and define "conflict of interest"³⁵ and continually reiterate the need for the attorney to "abide by a client's decisions concerning the objectives of representation...."³⁶ Any party to a proceeding who believes that another party's counsel has a conflict of interest may move to disqualify counsel on that basis. But lawyers who routinely represent dependent children in court, such as those who work for legal services programs or law school clinics and the pro bono volunteers identified with those legal service providers, should be given the same presumption of conflict-free representation as every other counsel in dependency proceedings.

Bottom Line

Until such time as Florida provides all children in state care with meaningful and effective representation, the adults who know and care about children like Matthew must be empowered to seek the appointment of counsel. It's time to remove the gags from those caring adults and break the silence.

¹ Matthew's story is based on a real case in which Florida's Children First was asked to find counsel for a child. The names and other nonessential facts have been changed to protect the identity of the child and his caregiver.

² Although her standing was precarious, the legal services attorney petitioned for certiorari. The petition was denied without an opinion.

³ FirstStar.org, *A Child's Right to Counsel, First Star's National Report Card of Legal Representation for Children* at 10 (2006), <http://www.firststar.org/research/documents/FIRSTSTARReportCard07.pdf>.

⁴ *Id.*

⁵ See Children's Advocacy Inst. & First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 7 (2009), http://www.cachildlaw.org/misc/final_rtc_2nd_edition_lr.pdf. Since First Star's first report in 2007, 17 states improved their state laws governing children client-directed legal representation for child victims in dependency court and foster care proceedings. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Fla. Comm. on Fla. Children First for the Fla. Bar Standing Comm. on the Legal Needs of Children, Ch. 39.820 (proposed draft of July 18, 2008).

⁹ S.B. 1860 2010 Leg. (Fla. 2010) (died in Comm. on Children, Families & Elder Affairs Apr. 30, 2010).

¹⁰ Florida Guardian ad Litem Program, *2011 Annual Report* at 5 (2012), <http://www.guardianadlitem.org/documents/GALAnnualReport2011.pdf>.

¹¹ Fla. R. Juv. P. 8.217 (a) (2010).

¹² Fla. Stat. §39.01(51) (2008).

¹³ Firststar.org, A Child's Right to Council, <http://www.firststar.org/policy-legislation/first-star-right-to-counsel-principles.aspx>. Principle V states that "(a) child involved in a child protective, foster care or dependency proceeding shall be considered a party to that proceeding, having the right to pursue legal remedies, to initiate legal proceedings in a court of competent jurisdiction and to express him- or herself, with the assistance of counsel, to the court or hearing officer." *Id.*

¹⁴ Fla. Stat. §39.4085 (20) (2011).

¹⁵ Fla. R. Civ. P. 1.210 (b) (2011). The Florida Rules of Civil Procedure usually identify this person as a guardian ad litem. See Fla. R. Civ. P. 1.210 (b).

¹⁶ Fla. R. Civ. P. 1.210 (b).

¹⁷ Fla. R. Civ. P. 1.210 (b).

¹⁸ The role and responsibilities of the guardian ad litem are set forth in Fla. Stat. §39.822 (2011) and Fla. R. Juv. P. 8.215 (2011).

¹⁹ See Fla. Stat. §39.01 (51) (2011).

²⁰ See Fla. R. Civ. P. 1.210 (b) (2011).

²¹ *Garner v. I.E. Schilling Co.*, 174 So. 837 (Fla. 1937).

²² *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990). Potential candidates could include a child's mental

health provider, physician, teacher, school counselor, foster parent, etc.

²³ *Id.*

²⁴ *Id.*

²⁵ *Garner v. Schilling*, 174 So. 837 (Fla. 1937). See also *Phillips v. Nationwide Mut. Ins. Co.*, 347 So. 2d 465 (Fla. 2d D.C.A. 1977). In *Phillips*, a father, as *next friend* representing his injured daughter, entered into a contingency fee arrangement with a personal injury attorney on behalf of his daughter. *Id.* at 467. The attorney represented the child in an action to recover damages for the injuries the child sustained in an accident. *Id.* at 466. The child was not a party to the contingency fee agreement, and a court had not approved the contingency fee agreement with respect to this minor prior to this accident. *Id.* The district court determined that a contingency fee arrangement, such as the one entered into on behalf of a minor in *Phillips*, will be binding on the minor if the trial court determines that the fee was reasonably necessary to employ an attorney on behalf of the minor and that the contract by which the attorney was employed was fair and reasonable at the time it was entered into. *Id.* at 467-67.

²⁶ The obligation of the government to pay attorneys for children in dependency proceedings is not part of the scope of this article.

²⁷ Fla. R. Prof'l Conduct R. 4-1.14 (2011).

²⁸ Fla. R. Prof'l Conduct R. 4-1.14, Comment [1].

²⁹ For example, children as young as five or six years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. Fla. R. Prof'l Conduct R. 4-1.14, Comment [1].

³⁰ Fla. R. Prof'l Conduct R. 4-1.14, Comment [1].

³¹ Fla. R. Prof'l Conduct R. 4-1.14, Comment [2].

³² Fla. R. Prof'l Conduct R. 4-1.14, Comment [2].

³³ See Joshua Rhett Miller, *Attorney Targets Alleged Terror Ties in Case of Runaway Girl*, Fox News, Aug. 31, 2009, <http://www.foxnews.com/us/2009/08/31/attorney-targets-alleged-terror-ties-case-runaway-girl>. John Stemberger was hired to represent Ms. Bary, a 17-year-old girl who fled to Florida after converting from Islam to Christianity, in her dependency case. *Id.* A Christian, pro-life, and pro-family advocate, it has been argued that Stemberger's actions in Ms. Bary's case were motivated by his political and religious agenda, rather than his client's interests. Cf. The Stemberger Legal Defense Fund, <http://stembergerdefense.com>.

³⁴ Fla. R. Prof'l Conduct R. 4-1.8(f) (2011).

³⁵ See generally Fla. R. Prof'l Conduct R. 1.7-1.9 (2011).

³⁶ Fla. R. Prof'l Conduct R. 4-1.2(a) (2011).

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