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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| CASEN C.,<br><br>Petitioner,<br><br>v.<br><br>HON. PETER HOCHULI, Judge Pro Tempore of the Superior Court of the State of Arizona, in and for the County of Pima,<br><br>Respondent,<br><br>and<br><br>ARIZONA DEPARTMENT OF ECONOMIC SECURITY and RONALD C.,<br><br>Real Parties in Interest. | 2 CA-SA 2012-0069<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

SPECIAL ACTION PROCEEDING

Pima County Cause No. J201946

JURISDICTION ACCEPTED; RELIEF GRANTED

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K E L L Y, Judge.

**¶1** In this special action, Casen C. challenges the respondent judge's order removing Laura Belous as his counsel in his dependency action against his father Ronald C., appointing new counsel, and appointing Belous as his guardian ad litem. We accept jurisdiction and grant relief.

**¶2** Casen, born August 2009, was taken into temporary custody by the Arizona Department of Economic Security (ADES) in June 2012 after Ronald fatally shot Casen's mother. ADES filed a dependency petition in July 2012 alleging Casen was dependent as to his father due to "abuse and/or neglect" based on the mother's death and Ronald's psychiatric hospitalization, substance abuse, criminal history, and domestic-violence history.

**¶3** On the day set for the contested dependency hearing, ADES informed the respondent judge that it did not wish to proceed with the hearing because it had "reached an understanding" with Ronald and "believe[d] a dependency petition [wa]s no longer necessary." ADES informed the respondent it intended to keep the dependency open for thirty days to transition Casen back to Ronald's care, at which time it would dismiss the petition if appropriate. ADES further noted it believed Casen wished to proceed with the dependency and had no objection to his doing so.

**¶4** Ronald objected to Casen being substituted as petitioner, arguing he lacked notice and would be prejudiced by the change. He further asserted that, by seeking to proceed with the dependency, Belous was acting as guardian ad litem for Casen and therefore could not remain as his counsel due to an "inherent conflict" that Casen "cannot waive."[1] The respondent judge determined he would permit Casen "to substitute in as the petitioner." The respondent also inquired of Belous whether she saw "a need for me to . . . appoint a separate [guardian ad litem] or a separate attorney" for Casen. Belous stated that, "[a]t this point," she did not believe either appointment was necessary.

**¶5** The respondent judge ultimately determined that, "because of [Casen's] age, . . . he's really not in a position to make it clear one way or another" whether he wished to proceed with the dependency and, thus, Belous was "definitely acting as a Guardian Ad Litem looking out for what [she] believe[d] to be his best interest." The respondent designated Belous as Casen's guardian ad litem and appointed new counsel to represent Casen "from the legal standpoint." This petition for special action followed.

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[1]We question whether Ronald has standing to assert that Belous has a conflict requiring her removal as Casen's counsel. *See In re Pima Cnty. Juv. Sev. Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993) (concluding parent "has no standing" to assert conflict by children's counsel). Although Arizona law recognizes that a party may "be allowed to interfere with the attorney-client relationship of his opponent" "in extreme circumstances," *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984), because standing is subject to waiver, *see State v. B Bar Enters.*, 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982), and the issue was not raised below we need not resolve this issue. We emphasize, however, that challenges to opposing party's counsel are disfavored. *See Alexander*, 141 Ariz. at 161, 685 P.2d at 1313. Indeed, the potential for abuse inherent in such challenges in the dependency context strongly suggests a parent should not be permitted to request disqualification of a child's attorney.

**¶6** Our exercise of jurisdiction is appropriate because Casen has no equally plain, speedy, and adequate remedy by appeal. *See Foulke v. Knuck*, 162 Ariz. 517, 519, 784 P.2d 723, 725 (App. 1989) (objection to denial of motion for disqualification of counsel properly brought by special action); *see also* Ariz. R. P. Spec. Actions 1(a). We review disqualification of counsel for an abuse of discretion. *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, ¶ 19, 93 P.3d 1086, 1092 (App. 2004). A trial court abuses its discretion if it commits an error of law, disregards the evidence, or lacks a substantial basis for its decision. *See Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). To the extent the respondent judge's determination depends on the interpretation of statutes or court rules, our review is de novo. *Cranmer v. State*, 204 Ariz. 299, ¶ 8, 63 P.3d 1036, 1038 (App. 2003).

**¶7** Casen argues the respondent judge erred in presuming that, by seeking to proceed with the dependency, Belous had created a conflict of interest between her and her client. He asserts that a child's attorney's role in a dependency action is "distinct from a guardian ad litem" and that the attorney's relationship with the child client must be treated as a "traditional . . . lawyer-client relationship." Casen further argues that "in any case in which a minor's attorney is taking a position adverse to a parent, that parent can" seek to disqualify that attorney on the basis of a bare allegation "that the attorney is disregarding the child's wishes." Thus, he concludes, because "the attorney cannot defend the accusation by revealing confidential communications" and therefore cannot

demonstrate "that no conflict of interest or other impropriety exists," a juvenile court cannot disqualify a child's attorney based on "a mere appearance of impropriety."

**¶8** We agree with Casen that Belous's simple request to substitute Casen as petitioner did not permit the respondent judge to remove her as Casen's counsel. Rule 40.1, Ariz. R. P. Juv. Ct., defines the duties and responsibilities of counsel appointed to represent a child in a dependency proceeding. Those duties include the obligation to "develop the child's position for each hearing." Ariz. R. P. Juv. Ct. 40.1(C). And, because a child may file a petition for termination of parental rights, *see In re Pima Cnty. Juv. Sev. Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993), it stands to reason that a child similarly can pursue a dependency petition pursuant to A.R.S. § 8-841. We see no difference between when an attorney represents a child in a private dependency proceeding and when ADES is the petitioner. In both circumstances, the duties of counsel are the same—to represent the child in light of the child's wishes. *See* ER 1.2(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."); *cf.* ER 1.14(a) (lawyer "shall, as far as reasonably possible, maintain normal client-lawyer relationship with . . . client" having diminished capacity); Am. Bar Ass'n, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* § A-1 (1st ed. 1996) ("*ABA*

*Standards*") (child's attorney "provides legal services for a child and . . . owes the same duties . . . to the child as is due an adult client").[2]

**¶9** An attorney appointed to represent a child in a dependency proceeding has an ethical obligation to seek appointment of a guardian ad litem if the child cannot express a preference or if that expressed preference would injure the child. *See* ER 1.14(b); *ABA Standards* § B-4(1), (3). A guardian ad litem, unlike appointed counsel, may make decisions in the child's best interests irrespective of the child's expressed wishes. *See* Ariz. R. P. Juv. Ct. 40(A) (guardian ad litem appointed "to protect the interests of the child"); *ABA Standards* § A-2 (guardian ad litem "is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences"). Thus, the respondent could not presume Belous had acted as a guardian ad litem by requesting Casen's substitution as petitioner when ADES opted not to pursue the dependency. Assuming it was Casen's position that the dependency should continue and he was competent to make that determination, Belous's conduct was entirely consistent with her role as his attorney.

**¶10** The respondent judge, however, also concluded that, due to Casen's age, he was not competent to direct Belous to proceed with the dependency, leading to the

[2]The comment to Rule 40.1 notes the Arizona Supreme Court relied on the *ABA Standards* and other national standards "[i]n developing the Standards on which this rule is based" and further directs "attorneys and guardians ad litem [to] be familiar with and consult these national standards and references." We therefore consider those standards instructive in determining the role of counsel and guardians ad litem in dependency actions and in our interpretation of the rules applicable in this case. *Cf. Aksamit v. Krahn*, 224 Ariz. 68, ¶ 14, 227 P.3d 475, 478-79 (App. 2010) (relying on *ABA Standards* in interpretation of family law rules).

respondent's conclusion that Belous was acting as a guardian ad litem. We recognize that Casen's youth may support, in part, an inference that he is unable to make an intelligent and informed choice whether he wanted the dependency to proceed. But nothing in the statutes or rules governing a dependency proceeding permits a juvenile court to presume a child's age, standing alone, means the child is unable to make that determination.[3] Indeed, the comment to *ABA Standards* § B-3 expressly rejects "the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation."[4] Arizona law similarly has rejected presumptive incompetence in other areas, such as competency to be a witness. *See, e.g.*, A.R.S. § 12-

[3]Ronald stated below that he would present testimony relevant to "where [Casen] wants to live" and, in his response to Casen's petition for review, provides an affidavit by Casen's new counsel avowing Casen had "made himself quite clear that he wanted to be with his father." This affidavit was not presented to the respondent judge; accordingly, we do not consider it. Absent that affidavit, there is no evidence suggesting that Belous acted contrary to Casen's wishes by requesting that he be substituted as the petitioner. In any event, such evidence would not justify Belous's removal as counsel unless Belous was aware of Casen's wishes and had disregarded them without good cause. *See* ER 1.2(a); *ABA Standards* §§ A-1, B-4(1), (3).

[4]Ronald suggests that we acknowledged in *Xavier R. v. Joseph R.*, 230 Ariz. 96, 280 P.3d 640 (App. 2012), that it was "impossible" for a very young child to provide meaningful direction to an attorney concerning the decision whether to appeal. There, we determined that "in most circumstances it is appropriate for counsel to file a notice of appeal on behalf of his or her client who is too young to engage in the discussion required by Rule 104(B), [Ariz. R. P. Juv. Ct.]" *Xavier*, 230 Ariz. 96, ¶ 8, 280 P.3d at 643. Ronald misinterprets our reasoning in that decision. We noted that "[s]ome children . . . may be too young to understand the proceedings and . . . a discussion [regarding the merits of an appeal] essentially will be impossible." *Id.* But we further stated that "[a]t what age this occurs is difficult to pinpoint given the different rates at which children develop" and we therefore relied on counsel's avowal that the children "could not understand" the merits of an appeal, *id.* n.1; we did not presume the children were unable to understand due to their youth.

2202(2) (excluding as witnesses "[c]hildren under ten years of age who appear incapable of receiving just impressions of the facts . . . or of relating them truly"); *State v. Schossow*, 145 Ariz. 504, 507, 703 P.2d 448, 451 (1985) (noting "common law has retreated from the rule of absolute disqualification of young witnesses at any fixed age").

**¶11** Moreover, even if Casen's age permitted a presumption that he could not determine his position intelligently, the proper course of action was not to remove Belous as his counsel and appoint her as guardian ad litem but instead to appoint another individual as guardian ad litem. Section B-4(1) of the *ABA Standards* requires a child's attorney to seek appointment of a guardian ad litem if the child is unable to express a preference as to whether or how litigation should proceed. And § B-2 requires an attorney who is acting both as attorney for the child and as guardian ad litem to withdraw as guardian ad litem if "there is a conflict caused by performing both roles." The commentary to that section explains that, because communications between the guardian ad litem and the child may not be confidential, "[o]nce a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem." *See also* ER 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is [otherwise] permitted or required.").

**¶12** We summarily reject Ronald's suggestion that the respondent judge removed Belous as counsel as a "sanction" for failing to identify "potential and actual

conflicts of interest" as required by Rule 40.1(H). First, Ronald has identified no potential or actual conflict of interest beyond the speculative possibility that Casen may not wish to pursue the dependency or lacks the capacity to make that decision. As we noted above, Belous had an ethical obligation to seek appointment of a guardian ad litem if appropriate, and she informed the court no such appointment was necessary. *See* ER 1.14(b); *ABA Standards* § B-4(1), (3). We will not presume Belous disregarded that obligation. *Cf. Manuel v. Salisbury*, 446 F.2d 453, 455-56 (6th Cir. 1971) ("[T]he courts must indulge every reasonable presumption that lawyers for criminal defendants will behave in a lawful, ethical manner and in good faith."). In any event, the respondent did not indicate it was sanctioning Belous, and there is no basis in the record for it to have done so.

**¶13** We also reject Ronald's argument that disqualification was appropriate because Belous failed to confer with Casen before seeking to substitute him as the petitioner. Although Ronald is correct that Rule 40.1(D) required Belous to consult with Casen "before every substantive hearing" and "inform the court as to [his] position concerning pending issues," there is no evidence Belous failed to consult with Casen. The parties clearly were aware before the date of the hearing that ADES was considering not proceeding with the dependency. Again, there is simply no basis to conclude Belous disregarded her ethical obligation to carry out Casen's wishes should ADES abandon the dependency. *Cf. id.*

**¶14** For the reasons stated, we accept jurisdiction and grant relief. We therefore vacate the respondent judge's order removing Belous as Casen's counsel, appointing new counsel, and appointing Belous as his guardian ad litem.[5]

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.

[5]We express no opinion whether the respondent judge should appoint a guardian ad litem here. We observe, however, that A.R.S. § 8-221(I) requires the appointment of a guardian ad litem "[i]n all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected."