

Comment,  
WHOSE ROLE IS IT ANYWAY?  
DECIPHERING THE ROLE, FUNCTIONS,  
AND RESPONSIBILITIES OF  
REPRESENTING CHILDREN IN CUSTODY  
MATTERS

The extensive history involving haphazard processes and piecemeal legislation regarding the representation of children dictates advocating for the development of uniform statewide standards that reflect the best practices for custody proceedings across the United States in support of “promoting society’s interest in protecting children [and families] from the traumas commonly associated with divorce and custody disputes.”<sup>1</sup> Part one of this Comment reviews the current qualifications and duties of a Guardian ad Litem in custody matters. Part two advocates for uniform statewide standards for the representation of children. Part three outlines previously proposed legislation and then Part four synthesizes the benefits provided by the separate model standards. Part five offers examples of inconsistencies in the roles and definitions utilized for the representation of children under the subjective umbrella of the best interest of the child<sup>2</sup> standard.

In family law cases involving custody or visitation in the United States, often a representative, referred to as a Guardian ad Litem (“GAL”) is assigned by the court. States permit the appointment of an attorney or lay person as the GAL to represent children in cases involving custody.<sup>3</sup> The statutory laws of most states in the context of private custody disputes authorize courts as a matter of discretion to appoint a GAL for the minor

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<sup>1</sup> *Perez v. Perez*, 769 So. 2d 389, 393 (Fla. Dist. Ct. App. 1999).

<sup>2</sup> See generally Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 117 and n.19 (2009) (noting that every state now has a best interests of the child statute); see also Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 373 (2008) (noting that the best interests of the child standard often does not give the judge any guidance for her ruling and therefore the judge’s decision-making process is often “unbridled” and “subjective”).

<sup>3</sup> See ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* ch. 4 § 26 (Dec, 2018).

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child.<sup>4</sup> A few states require the appointment of a GAL or a representative when custody is contested.<sup>5</sup>

Regardless of the label, the representative's role typically is to assist the court in protecting a minor child's rights, to advocate for his or her best interests,<sup>6</sup> and, at times, to express the child's wishes. In recognition that a judge making a custody determination is limited by the evidence presented, a fully informed custody decision is essential to the court's ability to make one of the most impactful decisions for a family.

Generally, a GAL is appointed to investigate issues so that the court, with as much information as possible, can safeguard the best interests of the minor child. The court is tasked with determining the child's best interests<sup>7</sup> while at the same time ensuring fundamentally fair proceedings for the parties involved. Family courts are frequently becoming enmeshed in contentious disputes over custody and visitation with children, as the innocent bystanders, caught in a tug-of-war of uncertainty. Especially in cases involving custody disputes or relocation, optimistically, a GAL is regarded as an invaluable foot soldier<sup>8</sup> who both zealously advocates for the child and assists the court in obtaining a more complete and impartial perspective.<sup>9</sup>

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<sup>4</sup> See Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 *FAM. L.Q.* 105, 115 (2003).

<sup>5</sup> See generally *WIS. STAT.* § 767.407(1) (2009) (requiring, with limited exceptions, appointment of a GAL if custody is contested or if the court has reason for special concern as to the welfare of a minor children).

<sup>6</sup> *Id.* at § 767.407 (“[t]he court shall appoint a guardian ad litem for a minor child in any action affecting the family.”) See also *WASH. REV. CODE ANN.* § 26.10.070 (2016) (“[t]he court may appoint an attorney to represent the interests of a minor or dependent child with respect to custody, support, and visitation.”).

<sup>7</sup> See *supra* text at note 2.

<sup>8</sup> *Franklin & Criscuolo/Lienor v. Etter*, 924 So. 2d 947, 949 (Fla. Dist. Ct. App. 2006).

<sup>9</sup> See Elrod, *supra* note 4, at 112 (many state statutes do not specifically provide for the appointment of an attorney in high conflict custody scenarios; however, the 2003 ABA publication suggests that the role is not only allowed, but is particularly important for the judge when conducting a best interests analysis).

## I. The Qualifications and Duties of a Guardian ad Litem in Custody Matters

When a court assigns a lawyer or a lay representative as the GAL to investigate custody issues and or make recommendations for the resolution of a dispute, the terms of her responsibilities can encompass many different obligations such as a parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator, or an advocate.<sup>10</sup> The GAL's role differs depending on each state's governing rules. "Statutory provisions and procedural rules for children's lawyers and guardians ad litem vary dramatically from state to state."<sup>11</sup>

Each state has its individualized statute or local rule that creates the parameters within which GALs may conduct themselves and even who can qualify for the job.<sup>12</sup> The term guardian

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<sup>10</sup> American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 126, 129 (2003), [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf) [hereinafter ABA Modified Standards].

<sup>11</sup> Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 65 (2008).

<sup>12</sup> See, e.g., ALA. CODE § 12-15-304 (2010); ALASKA STAT. § 47.10.050 (2010); ARIZ. R. JUV. P. 70 (2010); ARK. CODE ANN. § 16-61-108 (2010); CAL. CIV. PROC. CODE § 372 (West 2010); COLO. REV. STAT. ANN. § 19-1-111 (West 2010); CONN. GEN. STAT. ANN. § 45A-132 (West 2010); DEL. CODE ANN. tit. 12, § 3902 (West 2010); D.C. CODE § 20-108 (2010); FLA. STAT. § 39.822 (2010); GA. CODE ANN. § 15-11-9 (2010); HAW. REV. STAT. § 587-34 (West 2010); IDAHO CODE ANN. § 5-306 (West 2010); 755 ILL. COMP. STAT. ANN. 5/6-12 (2010); IND. CODE ANN. § 31-15-6-1 (West 2010); IOWA CODE ANN. § 633A.6306 (West 2010); KAN. STAT. ANN. § 38-2205 (West 2009); KY. REV. STAT. ANN. § 387.305 (West 2010); LA. REV. STAT. ANN. § 9:345 (2010); ME. REV. STAT. ANN. tit. 19A, § 1507 (2010); MD. CODE ANN., FAM. LAW § 1-202 (2010); MASS. GEN. LAWS ANN. ch. 190B, § 1-404 (West 2010); MICH. COMP. LAWS ANN. § 722.27 (West 2010); MINN. STAT. § 518.165 (2009); MISS. CODE ANN. § 93-5-13 (2009); MO. REV. STAT. § 211.462 (2009); MONT. CODE ANN., § 41-3-112 (2009); NEB. REV. STAT. § 43-265 (2009); NEV. REV. STAT. ANN. § 12.050 (West 2009); N.H. REV. STAT. ANN. § 461-A:16 (2009); N.J. REV. STAT. § 3B:12-4 (2009); N.M. STAT. ANN. § 40-4-8 (2009); N.Y. C.P.L.R. 1202 (Consol. 2009); N.C. GEN. STAT. § 7B-1108 (2009); N.D. CENT. CODE § 14-09-06.4 (2009); OHIO REV. CODE ANN. § 2111.23 (West 2009); OKLA. STAT. tit. 10 § 7003-3.7 (2010); OR. REV. STAT. ANN. § 107.425 (2009); 42 PA. CONS. STAT. § 6311 (2009); R.I. GEN. LAWS § 34-15-11 (2009); S.C. CODE ANN. § 63-9-720 (2008); S.D. CODIFIED LAWS § 26-8A-20 (2009); TENN. CODE ANN. § 36-4-132

“is very much a chameleon;”<sup>13</sup> some states view the GAL as a court appointed investigator of facts for the court, while other states view the GAL as an independent reporter and require a recommendation of their findings to the court.<sup>14</sup> The “term [Guardian ad Litem] is employed in all of the United States fifty-six jurisdictions, but in no two of them does it have exactly the same meaning.”<sup>15</sup> To add further to the confusion, when the GAL is an attorney, some courts expect a “best interests” recommendation<sup>16</sup> rather than necessarily taking client direction, while some courts see the GAL only as an advocate for the child and the child’s wishes with no duty owed to the court.

This broad notion of what a GAL’s role may encompass creates problems in custody proceedings due to the uncertainty about which of those roles is and should be invoked. Frequently the parties and their legal representative do not understand the true role of the GAL and, more surprisingly, neither does the attorney in the role of the GAL.

## II. Uniform Statewide Standards Needed for the Representation of Children

This lack of uniformity in the standards defining the role of a GAL leads to ambiguity and inconsistency regarding parents’ and children’s fundamental liberty rights in custody matters.<sup>17</sup> “The liberty interest . . . of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental

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(2009); TEX. FAM. CODE ANN. § 107.002 (West 2009); UTAH CODE ANN. § 78A-2-227 (West 2009); Vt. R. Fam. Proceedings 6.1 (2009); VA. CODE ANN. § 16.1-266 (2009); WASH. REV. CODE ANN. § 13.34.100 (2010); W. VA. CODE § 56-4-10(2009); WIS. STAT. § 767.407 (2009); WYO. STAT. ANN. § 14-2-312 (2009).

<sup>13</sup> *Morgan v. Getter*, 441 S.W.3d 94, 106 (Ky. 2014).

<sup>14</sup> *See, e.g.*, ALA. CODE § 12-15-304 (2010); ALASKA STAT. §§ 25.24.310, 47.10.050 (2009); ARIZ. REV. STAT. ANN. § 25-321 (2009); ARIZ. R. Juv. P. 70 (2010); ARK. CODE ANN. § 16-61-108 (2010); CAL. CIV. PROC. CODE § 372 (2010) CAL. FAM. CODE § 3150 (2009).

<sup>15</sup> *Morgan*, 441 S.W.3d at 106, quoting Katherine Hunt Federle, *The Curious Case of the Guardian ad Litem*, 36 U. DAYTON L. REV. 337, 348 (2011).

<sup>16</sup> *See* ALASKA STAT. § 25.24.310 (2009); ARIZ. REV. STAT. ANN. § 25-321 (2009); CAL. FAM. CODE § 3150 (2009).

<sup>17</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

liberty interests recognized.”<sup>18</sup> A uniform code is needed to identify and make recommendations on the specific role and responsibilities that a GAL holds in contested custody and visitation proceedings. States already follow uniform codes in governing other areas of domestic law<sup>19</sup> such as jurisdiction and custody. Over the last two decades, there has been an ongoing national debate about the proper role, responsibilities, and duties a GAL<sup>20</sup> can and should play. The laws governing the representation of children in many states “contain inherent confusion for any lawyer playing the role of representative.”<sup>21</sup> The development of uniform statewide standards that reflect best practices for the representation of children will ensure quality, uniformity, professionalism, and predictability in the often emotional playing field of family law.

Clarifying the standards for a GAL would also create accountability and transparency within the family law courts and help all parties involved to have more reasonable expectations of custody proceedings. The ongoing confusion in defining the role of the GAL statewide is evidenced by lawmakers, judges, and child advocates who are unable to agree on the core functions of child representatives.<sup>22</sup> This is confirmed in the commentary by the American Bar Association’s *Standards of Practice for Lawyers Representing Children in Custody Cases*.

The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator, and advocate. Asking one Guardian ad Litem to

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<sup>18</sup> *Id.*

<sup>19</sup> The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), (uniform code developed to address significant areas of confusion from state to state pertaining to domestic law jurisdiction and custody. Jurisdiction and custody in all states (except Massachusetts) is now governed through each state’s adoption and codification of the UCCJEA). *See also* ALM GL Pt. II, Title III, Ch. 209B (explaining even though Massachusetts has not adopted the UCCJEA, it does pattern its Child Custody Jurisdiction and Enforcement statute after the UCCJEA).

<sup>20</sup> Atwood, *supra* note 11, at 65.

<sup>21</sup> *Id.* at 63.

<sup>22</sup> *Id.* at 66.

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perform several roles at once, to be all things to all people, is a messy, ineffective expedient.<sup>23</sup>

The uncertainty in defining the duties and expectations of a GAL across the United States is not a new issue<sup>24</sup> and has created the need for a uniform law to implement and create such standards.<sup>25</sup> To fill this need, various professional associations focused on domestic law in the United States have crafted their own recommended best practice standards for the representation of children.

### III. Historical Background and Prior Proposed Legislation

For the past half century, judges, government officials, and child advocacy groups have made efforts to clarify the role of a child's representative in various legal proceedings in the United States. In 1967, the U.S. Supreme Court in *In re Gault*<sup>26</sup> held that children have the constitutionally guaranteed due process right to be provided counsel in cases where their liberty interests are at stake.<sup>27</sup> As a result, children are now provided counsel during the adjudication phase of delinquency proceedings to ensure protection of their liberty rights. However, in the context of private custody in family law,<sup>28</sup> where children most frequently appear in court, *Gault* did not extend this automatic right of traditional counsel to children. Despite *Gault's* recognition that children are entitled to representation in criminal proceedings, it took more than two decades for this acknowledgment to come to fruition in civil court proceedings.

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<sup>23</sup> See ABA Modified Standards, *supra* note 10, at § V(F)(3).

<sup>24</sup> See JEAN K. PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 40-41 (3d ed. 2007); See also Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 386-403 (2011); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing To Do*, 27 PACE L. REV. 869, 876-85 (2007).

<sup>25</sup> Atwood, *supra* note 11, at 77.

<sup>26</sup> *In re Gault*, 387 U.S. 1, 81(1967).

<sup>27</sup> *Id.* at 57.

<sup>28</sup> Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 DUKE J. CONST. L. & PUB. POL'Y 179, 180 (2016).

In 1988, the U.S. Department of Health and Human Services, through the Administration for Children and Families, codified guidelines for states conditioning their federal funding of state child protective systems on the provision of a GAL to represent a child's best interests. The published guidelines<sup>29</sup> included a brief explanation of the role of a child's representative under the Child Abuse Prevention and Treatment Act. The Act states "that in every case involving an abused or neglected child which results in a judicial proceeding, a GAL who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed."<sup>30</sup>

Starting in 1995, child advocacy organizations, seeing the need for clarification on the role of a GAL, began to weigh in to ensure consistent standards for court-appointed lawyers and lay representatives for children. The three organizations and their model acts detailed below are the most prominent and most cited in creating model legislation. Additionally, state courts, when attempting to sift through their own competing<sup>31</sup> visions of children's advocacy rules and statutes on the appointment of a representative for a child, regularly reference these model acts.

#### A. *The American Academy of Matrimonial Lawyers Custody Standards*

Focusing on civil domestic law, the American Academy of Matrimonial Lawyers ("AAML") in 1995<sup>32</sup> and subsequent modifications of 2006, and revisions in 2009,<sup>33</sup> was the first organization to promulgate Standards for Attorneys and GALs in

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<sup>29</sup> See Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified in part at 42 U.S.C. §§ 5101-5107 (1988)).

<sup>30</sup> *Id.*

<sup>31</sup> See Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251, 259 (2009); See also *Morgan*, 441 S.W.3d at 106.

<sup>32</sup> American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter AAML Standards 1995].

<sup>33</sup> American Academy of Matrimonial Lawyers, *Revised Standards for Attorneys for Children in Custody or Visitation Proceedings*, 22 J. AM. ACAD. MATRIM. LAW. 227, 236 (2009) [hereinafter AAML Revised Standards].

Custody and Visitation Proceedings (“AAML Custody Standards”).<sup>34</sup> The goal of the AAML was to set a standard that governed the behavior of lawyers by barring attorneys from taking actions based on their own personal beliefs or values under the guise of what is in the minor’s best interests.<sup>35</sup> The AAML specifically wished to avoid the risk of “inviting arbitrary role behavior” of lawyers that creates a “serious threat to the rule of law posed by the assignment of lawyers for children to be the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child’s best interests.”<sup>36</sup> The conference on Ethical Issues in the Legal Representation of Children agreed on this key issue, explaining, “the profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including best interests determinations.”<sup>37</sup>

The 1995 AAML Custody Standards<sup>38</sup> created three categories of children representatives for courts to appoint: (1) Counsel for Unimpaired Child (minors age 12 and older), (2) Counsel for Impaired Child (children unable or unwilling to direct counsel or a child below the age of 12),<sup>39</sup> and (3) a Guardian ad Litem. Counsel for Unimpaired Children were to perform the same traditional client-centered role as when representing an adult client. The AAML Custody Standards placed restrictions on Counsel for Impaired Children and Guardians ad Litem, explaining that counsel should not be appointed if the child is deemed impaired due to being unable or unwilling to direct counsel or is a child below the age of 12.<sup>40</sup>

The AAML, realizing its three categories of child-client representation could easily be misconstrued regarding the proper scope available for an attorney representing a child, modified

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<sup>34</sup> See Guggenheim, *supra* note 31, at 251.

<sup>35</sup> *Id.* at 253.

<sup>36</sup> *Id.* at 255.

<sup>37</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1309 (1996).

<sup>38</sup> Guggenheim, *supra* note 31, at 253.

<sup>39</sup> *Id.* The Standards used a rebuttable presumption that a child age 12 or above is unimpaired.

<sup>40</sup> See American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys for Children in Custody of Visitation Proceedings With Commentary*, 22 *J. AM. ACAD. MATRIM. LAW.* 227, 241 (2009).

those standards in 2006 and subsequently revised them in 2009, to streamline the kinds of child-client representatives the courts could appoint down to just two categories. Now the AAML Custody Standards for a child-client representative permit only the appointment of (1) Counsel for the Child, a licensed member of the bar assigned to represent a minor who is the subject of the proceeding, and a (2) Court-Appointed Professional, other than the Counsel for the Child. The Court-Appointed Professional need not be a licensed attorney or any specific professional, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.

The AAML Custody Standards now require a court seeking expert or lay opinion testimony, written reports, or other non-traditional services to appoint an individual for that specific purpose but not a lawyer.<sup>41</sup> Additionally, the AAML Custody Standards now make clear that the individuals providing expert or lay opinions can only be a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity, and not a party to the case.<sup>42</sup>

The modified AAML Custody Standards now provide the child-client with only one kind of attorney, the Counsel for the Child. This attorney for the child provides competent legal representation for a child-client just as the attorney would for an adult client. The Counsel for the Child owes the same duty of undivided loyalty and confidentiality as that attorney would to any other client. “The principal purpose of the assignment is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation’s objectives as established by the client.”<sup>43</sup> In reality the 2006 modification and 2009 revisions to the AAML Custody Standards simplified but stayed consistent to their principal message while providing the same end result as the previous three categories of representation.

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<sup>41</sup> *Id.* at 248 (referencing in combination, the AAML Custody Standards in 1995, subsequent modifications in 2006, and 2009 Revised Standards).

<sup>42</sup> *Id.* at 247-48.

<sup>43</sup> Guggenheim, *supra* note 31, at 265.

### B. *The American Bar Association Custody Standards*

In 2003, the American Bar Association (“ABA”) promulgated the Standards of Practice for Lawyers Representing Children in Custody Cases (“ABA Custody Standards”).<sup>44</sup> The ABA Custody Standards identify two distinct roles for attorneys who represent children:<sup>45</sup> (1) Child’s Attorney, who is in a traditional attorney-client relationship (analogous to Counsel for the Child (AAML)) and (2) the Best Interest Attorney, who advocates for a position that the attorney determines to be in the child’s best interests<sup>46</sup> but is not “barred by the child directive or objectives.”<sup>47</sup>

The Best Interest Attorney is appointed to protect the minor child in cases where the child’s rights or interest are directly conflicting with the interest of one or both of the parents (by this standard, any disputed custody case could qualify). The Best Interest Attorney is then prohibited from acting as witnesses in cases (in theory but not actually<sup>48</sup> due to the qualified immunity exception detailed below). Instead, the Best Interest Attorney must serve in the same manner as any other lawyer representing a client *except* that she must present what she believes is in the best interests<sup>49</sup> of the child.

The Best Interest Attorney must inform the court if her view is different than that of the child’s and is not bound by the child’s wishes. The Best Interest Attorney, according to the ABA, is fur-

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<sup>44</sup> ABA Modified Standards, *supra* note 10, at § II-A.

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*; *see also* Kohm, *supra* note 2, at 373.

<sup>47</sup> *Id.* Standards, at § B-4(2). The Standards explicitly require that “[t]o the extent that a child does not or will not express a preference about particular issues, the child’s attorney should determine and advocate the child’s legal interests.” [www.abanet.org/child/childrep.html](http://www.abanet.org/child/childrep.html) (last visited Mar. 12, 2018).

<sup>48</sup> *Paulson v. Paulson*, 694 N.W.2d 681, 685 (N.D. 2005) (the GAL after testifying was also granted immunity even though the parties agreed to have the court appoint one person to act as both custody investigator and GAL for the child); *see also* *Dickson v. Gorski*, 100 N.E.3d 857, 860 (Ohio Ct. App. 2017) (“A guardian ad litem is entitled to absolute immunity against a collateral attack on her performance of the duties as a matter of law”; affirming that the GAL enjoys absolute immunity from tort actions arising out of service as guardian ad litem).

<sup>49</sup> Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 203 (2005).

ther directed to apply the facts of the child's specific circumstances, including the child's wants, to the objective legal standards, relevant statutes, and cases to then advocate for a disposition that would serve the child's best interests.<sup>50</sup> The definition alone is contradictory<sup>51</sup> but does reflect the legislative reality in state statutes and cases in that all states currently utilize the best interests approach is determining child custody.<sup>52</sup>

### C. *The Uniform Representation of Children Act*

In 2006, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission ("ULC")), authored the Uniform Representation of Children in Abuse, Neglect, and Child Custody Proceedings Act ("ULC Act"). The model ULC Act states that its goal is to "improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children's representatives and by providing guidelines to courts in appointing representatives."<sup>53</sup> The ULC concluded that the 2003 ABA Custody Standards on the issue of children's representation needed to be modified.

The major contribution of the ULC Act was the addition of a third entity to the ABA Custody Standards. To accomplish its goal, the ULC kept generally to the ABA's previous two distinct roles for attorneys who represent children, and then added a third category of representation, the Lay Best Interest Advocate.

This new category encompasses client-driven<sup>54</sup> representation. The Lay Best Interest Advocate is someone akin to a

<sup>50</sup> Elrod, *supra* note 24, at 873.

<sup>51</sup> See Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine Guardians Ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103, 2104 (2010). See also Atwood, *supra* note 24, at 386-403.

<sup>52</sup> See Atwood, *supra* note 11, at 67-68 (noting that all fifty states currently use the best interest standard in domestic custody matters); See also *Morgan*, 441 S.W.3d at 126.

<sup>53</sup> Unif. Representation of Children in Abuse, Neglect, and Custody Proceedings Act, 9C U.L.A. 26 (Supp. 2010), <https://my.uniformlaws.org/committees/community-home?CommunityKey=1de8829e-e723-4d1b-97b9-94622cf68269> [hereinafter ULC Act].

<sup>54</sup> See Atwood, *supra* note 11, at 67-68; But see Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Repre-*

CASA<sup>55</sup> volunteer, not functioning as an attorney, but able to be appointed to assist the court in determining the best interests of a child-client when children cannot meaningfully participate in proceedings or definitively express their opinion.<sup>56</sup> This person's judgment is to be based on objective criteria and the Lay Best Interest Advocate would be barred from functioning as an attorney even if this individual is a member of the bar.<sup>57</sup>

Additionally, the ULC added to the ABA's definition of the Child's Attorney, now requiring the Child's Attorney, who is in a traditional attorney-client relationship, to request the appointment of a separate GAL, if after unsuccessful attempts at counseling the child, "the child's wishes are considered to be seriously injurious to the child."<sup>58</sup>

#### **IV. The Synthesized Benefit of the Three Model Standards**

In combination, the standards and recommendations by all three organizations offer a working understanding of the basic obligations of an attorney to a child-client and provide a structured course for an attorney to determine and then to represent the child's legal interests.<sup>59</sup> These standards preserve the client-child's attorney's role in filing motions, speaking to the child's wishes, presenting evidence, and examining witnesses, but not becoming a witness by taking the stand or filing a report.

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*sentation of Children in Abuse, Neglect and Custody Proceedings Act*, 42 FAM. L.Q. 103 (2008) (arguing that a child has a right to a client-directed lawyer).

<sup>55</sup> Court-Appointed Volunteer Advocacy Program for Abused or Neglected Children in the United States, [http://www.casaforchildren.org/atf/cf/%7B9928cf18-ede9-4aeb-9b1b3faa416a6c7b%7D/ncasa\\_brochure\\_110218.PDF](http://www.casaforchildren.org/atf/cf/%7B9928cf18-ede9-4aeb-9b1b3faa416a6c7b%7D/ncasa_brochure_110218.PDF) (last visited on Jan 1, 2019).

<sup>56</sup> See Elrod, *supra* note 24, at 873.

<sup>57</sup> *Id.* (analogous to the 2006 modified AAML Custody Standards for a Court-Appointed Professional).

<sup>58</sup> See National Association of Counsel for Children, <http://www.naccchildlaw.org/training/standards.html> (last visited Dec 18, 2018) (noting although the ULC Act was amended and reviewed by the ABA and is widely regarded and cited, the act was never voted in by the ABA. The ULC Act failed to get to a vote in the ABA because of opposition from child advocates who wanted an attorney appointed for the child, not a Best Interest Attorney).

<sup>59</sup> Referring to Counsel for the Child(AAML) and the Child's Attorney(ABA&ULC).

All three organizations agree on the duties and obligations outlined for the non-attorney representation of children.<sup>60</sup> All recognize that courts, children, and all of the parties involved, may benefit from adding a non-attorney professional whose function is to investigate, report, and even make a recommendation to the court on the ultimate disposition of the case.

All three standards also clarify that an attorney should not serve a child-client as both Counsel for the Child (AAML)/Child's Attorney(ABA/ULC) and at the same time as the Court Appointed Professional(AAML)/Lay Best Interest Advocate(ABA/ULC), who writes reports and testifies as a witness or quasi-witness<sup>61</sup> when representing the child-client.

The three advocacy groups' corresponding recommendations for the Court Appointed Professional (AAML)/Lay Best Interest Advocate(ABA/ULC) seek to make a wide variety of tools available to the court through the non-attorney representation of a child-client. The flexibility to appoint various non-attorney professionals provides the court with the best and most accurate information available to obtain a fuller picture of the family circumstances. Non-attorney court-appointed professionals can spend more time with a family and have direct contact with the children outside the courtroom. This exposure to the family through an intermediary helps to equip the court with valuable information that is important in enabling judges to make more fully-informed custody determinations.

The AAML Custody Standards, ABA Custody Standards, and the ULC Act all reject the hybrid attorney/GAL model because of the confusion and ethical tensions inherent in the blended professional roles.<sup>62</sup> This is a clearly agreed-upon delineation from many states' current practices.<sup>63</sup> One person

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<sup>60</sup> Referring to Court-Appointed Professional(AAML)/Lay Best Interest Advocate(ABA/ULC).

<sup>61</sup> *Lindsey v. Willard*, 111 So. 3d 1260 (Miss. Ct. App. 2013) (finding that the chancellor did not rubber stamp a GAL's unverified report but reached the same conclusions based on his own analysis); *McCarty v. McCarty*, 52 So. 3d 1221 (Miss. Ct. App. 2011) (noting that the GAL testified as to the evidentiary nature of the report and the chancellor conducted an independent analysis of custody factors).

<sup>62</sup> See Guggenheim, *supra* note 31, at 255; See also ABA Modified Standards, *supra* note 10, at § V-E.

<sup>63</sup> AAML Revised Standards, *supra* note 33, at 236.

should not serve multiple child-client roles due to the likelihood of materially limiting the ability to recommend or advocate all possible positions.<sup>64</sup>

To reconcile the multiple and at times competing visions of these three organizations dedicated to children's advocacy, an understanding of the similarities and differences in the working definitions are detailed below.

A. *Counsel for the Child (AAML) and the Child's Attorney (ABA&ULC)*

Counsel for the Child and the Child's Attorney is a licensed member of the bar assigned to represent a minor who is the subject of the proceeding. An attorney participating in either of these capacities operates in the traditional client-centered role providing the same legal services and competent representation to a child-client as to an adult client and owes the same duty of undivided loyalty and confidentiality. The AAML Custody Standards are similar in part to both the ABA Custody Standards and the ULC Act in that they agree children can have lawyers when the purpose of giving them legal representation seeks the outcome chosen by the child.<sup>65</sup>

The defined role for Counsel for the Child and the Child's Attorney only works if the child-client has the ability to direct an attorney as to a specific course of action that is best for them as a minor. The core issue for the Counsel for the Child and the Child's Attorney only works under the presumption that the child has the ability to consult with and then provide voluntary, knowing, and intelligent input and or directions to their attorney.

If the child-client takes a position that would be contrary to his or her interests but may not necessarily put the child in harm's way, then the Counsel for the Child and the Child's Attorney must counsel the child, just as she would with any other client, so that the child is able to make informed, meaningful decisions about his or her wishes.<sup>66</sup> The Counsel for The Child and the Child's Attorney for the child can provide timely and reliable

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<sup>64</sup> *Id.*

<sup>65</sup> See AAML Revised Standards, *supra* note 33, at 236 (AAML fully supports the principle that if a court is to assign a lawyer to represent a child, the lawyer properly should seek the outcome desired by the child).

<sup>66</sup> Halbrot, *supra* note 28, at 193-92.

information to the judge about the child's wishes so that the best result for the child's custody placement is achieved, since every jurisdiction in the country supports the substantive rule that custody cases should be decided based on a child's best interests.<sup>67</sup>

The Counsel for the Child and the Child's Attorney have a fiduciary duty to take and argue positions as expressed by their clients, unless the child's stated preference is a position that would "seriously endanger" the child-client<sup>68</sup> or the child lacks the capacity to make a reasoned choice. At this juncture, the roles of the Counsel for the Child and the Child's Attorney conflict because the Child's Attorney is required to advocate for the result sought by the child-client, so long as the client, in the lawyer's judgment, is capable of making adequate decisions.

In most states, representation of the Counsel for the Child and the Child's Attorney requires the court's appointment order to specifically identify the Counsel for the Child and the Child's Attorney's roles and responsibilities throughout the litigation. Additionally, the Child's Attorney, per the ABA,<sup>69</sup> is obligated to alert the court to the need for a Best Interest Attorney for the child if the court finds that the child's best interests are not adequately protected by the parties and that a separate representation of the child's best interests is necessary.

#### B. *The Best Interest Attorney (ABA/ULC) Is not Bound by the Child's Wishes*

Trial courts presiding over a custody proceeding can also authorize the appointment of a Best Interest Attorney as a GAL<sup>70</sup> when the court finds that the children's best interests are not ade-

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<sup>67</sup> See D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes - A Comparative Exploration*, 39 FAM. L.Q. 247, 247 (2005) ("The custody law in every state in the United States also embraces the 'best interests' standard.").

<sup>68</sup> See AAML Revised Standards, *supra* note 33 at 236 (AAML fully supports the principle that if a court is to assign a lawyer to represent a child, the lawyer properly should seek the outcome desired by the child). See also ABA Modified Standards, *supra* note 10, at § IV-C-3.

<sup>69</sup> ABA Modified Standards, *supra* note 10, at § IV-C-3.

<sup>70</sup> *Runyon v. Zacharias*, 556 S.W.3d 732, 735 (Tenn. Ct. App. 2018) (referring to Tenn. Sup. Ct. R. 40A, § 3(a) and Tenn. Sup. Ct. R. 40A, § 1(c) (the rule defines a GAL to mean a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding)).

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quately protected by the parties and that separate representation<sup>71</sup> of the children's best interests is necessary.

A Best Interest Attorney, as distinguished from the Child's Attorney, is *not* bound by the child's wishes. Instead, the Best Interest Attorney advocates for positions that are in line with what the attorney deems is the best interests of the child,<sup>72</sup> *even if* the child disagrees or articulates an entirely opposite position. The Best Interest Attorney can also write reports and testify as a witness or quasi-witness.<sup>73</sup> This category of representation modifies the traditional ethical restrictions on the attorney-client relationship<sup>74</sup> to permit the Best Interest Attorney to breach confidentiality in order to advocate for a client's best interests in making recommendations but barring the Best Interest Attorney from testifying as a fact witness.

1) *Immunity for the Best Interest Attorney*

The ABA warns against The Best Interest Attorney merely relying upon her own "personal values, philosophies, and experiences" in making a best interests determination.<sup>75</sup> Yet, many states allow and some states statutorily require the attorney in a GAL position to function as a witness in court. Obvious ethical problems surround the issue of to whom the attorney owes her

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<sup>71</sup> *Id.*; See also ABA Modified Standards, *supra* note 10, at § IV-C-3.

<sup>72</sup> See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 40 (2005) ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out."); June Carbone, *Child Custody and the Best Interests of Children - A Review of From Father's Property To Children's Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 723 (1995) (reviewing Mary Ann Mason's book, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (1994)) ("Even putting aside the possibility of judicial bias, judges lack a basis on which to evaluate the best interests of a particular child in the absence of guiding principles.").

<sup>73</sup> Halbrook, *supra* note 28, at 94.

<sup>74</sup> See *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998) (addressing these ethical tensions); See also *Atwood*, *supra* note 11, at 205 (discussing case law that addresses ethical limitations on attorneys that conflict with the role of a GAL).

<sup>75</sup> See AAML Revised Standards, *supra* note 33, at § V. E.

duty and confidentiality<sup>76</sup> when acting as a child-representative in a case and at the same time functioning as a witness for the court.

Absolute quasi-judicial immunity is the mechanism created to protect attorneys in this questionable blending of roles, responsibilities, and duties. Quasi-judicial immunity can create an antagonistic, lack of due process rights<sup>77</sup> exception for child representatives. The reasoning and language used in support of this widely used exception is that an individual appointed by the court is entitled to be free from negligence.<sup>78</sup> An attorney in the role of a GAL assigned by the court has a higher “substantial likelihood that personal liability will expose them to sufficient harassment or intimidation to interfere with the performance of their duties.”<sup>79</sup> The threat of litigation from a disgruntled parent, unhappy with the position advocated by the attorney for the minor child in a custody action, would likely interfere with the independent decision making required by the appointed position and also deter qualified individuals from accepting the appointment.

Advocates for quasi-judicial immunity tout sufficient procedural safeguards in the system to protect against improper conduct by an attorney to the minor child and her family.<sup>80</sup> These so-called safeguards on which the advocates rely are merely the fact that the attorney is appointed by the court and thus subject to the court’s discretion and *may* be removed by the court at any time. Additionally, the attorney for the minor child, similar to any

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<sup>76</sup> Halbrook, *supra* note 28, at 115 (contending that guardians ad litem have too much discretion and are given too much deference by courts in determining children’s best interests).

<sup>77</sup> Fleming v. Asbill, 42 F.3d 886, 888-89 (4th Cir. 1994) (finding that even if the GAL lied to the judge in open court, she was entitled to quasi-judicial immunity as a GAL); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) (declaring that the GAL “shared in the family court judge’s absolute immunity”); Bird v. Weinstock, 864 S.W.2d 376, 385-86 (Mo. Ct. App. 1993) (recognizing absolute quasi-judicial immunity for GALs).

<sup>78</sup> See Carrubba v. Moskowitz, 877 A.2d 773, 781 (Conn. 2005) (GAL testified as to the evidentiary nature of report and the chancellor conducted an independent analysis of custody factors).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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other attorney, is subject to discipline for violations of the Code of Professional Conduct.<sup>81</sup>

The end result of applying quasi-judicial immunity to individuals appointed by the court is that a GAL in many states can only be sued for the alleged misconduct if her actions were found to be “clearly and completely outside the scope of their appointment.”<sup>82</sup>

Furthermore, an attorney GAL’s quasi-judicial immunity is reinforced through all fifty states governing their civil domestic law under the invisibility cloak standard of the best interests<sup>83</sup> of the child. It is precisely this subjective best interests<sup>84</sup> standard that many jurisdictions use as a vehicle to justify a GAL’s over-reaching deference to minors and their families.<sup>85</sup> Thus, the attorney GAL’s behavior viewed through the best interests standard rarely will fall *clearly and completely outside the scope of the GAL’s appointment*. This circular reasoning used by many states blocks any availability of checks and balances on an attorney acting as a GAL.<sup>86</sup> This unfettered discretion granted to a GAL through the subjective veil in determining a child’s best interest creates the basis for a parent’s objections.

Adding insult to injury, many courts hold that a parent who just by questioning the intent of a GAL’s actions proves the parent’s interests are adverse to those of the child,<sup>87</sup> thus reinforcing the court’s reasoning as to why the court appointed the Best Interest Attorney in the first place.

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<sup>81</sup> MODERN CHILD CUSTODY PRACTICE ch. 2, § 14-13A (2018); *Carrubba*, 877 A.2d at 781.

<sup>82</sup> *Id.*

<sup>83</sup> See generally GUGGENHEIM, *supra* note 72, (contending that guardians ad litem have too much discretion and are given too much deference by courts in determining children’s best interests).

<sup>84</sup> *Id.* see also Kohm, *supra* note 2, at 373.

<sup>85</sup> *Bullock v. Huster*, 554 N.W.2d 47, 49 (Mich. Ct. App. 1996) (holding that the state legislature included GALs within the immunity shield if their acts fell within the scope of their authority); See also *Kimbrell v. Kimbrell*, 331 P.3d 915, 916 (N.M. 2014) (holding that a parent did not have standing to sue a GAL appointed in a custody proceeding on behalf of the child).

<sup>86</sup> *Carrubba*, 877 A.2d 773 (contending that GALs have too much discretion and are given too much deference by courts in determining children’s best interests).

<sup>87</sup> *Id.*

Under the same line of reasoning, a court can hold that a parent lacks standing to bring an action against a GAL or assert their rights regarding competent representation<sup>88</sup> altogether. Because the parent is not the GAL's client and the court appointed attorney only owes a duty to the court and to the child, a parent may lack standing to make a claim against a court appointed attorney who was assigned to represent the best interests of a minor child during a divorce proceeding.<sup>89</sup>

C. *Court-Appointed Professional (AAML), Lay Best Interest Advocate(ABA/ULC) Is not Bound by the Child's Wishes*

The court may also appoint a Court-Appointed Professional, Lay Best Interest Advocate, which is a lay volunteer advocate, like a CASA volunteer. The individual need not be a licensed attorney or any specific professional who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case. This representative is not obligated to and should not perform any lawyer-related functions and often investigates the specific child's circumstances, writes reports to the court about her observations, and can testify.

The Lay Representative is allowed to testify about what she believes to be best for the child, even if the child may have an entirely different position about where he or she is to be placed and/or with whom. Using lay volunteers, such as CASA, as fact investigators, courts are able to call upon court-assigned professionals to investigate and report on the children involved in the case without the constraints ordinarily associated with limiting

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<sup>88</sup> See *Bluntt v. O'Connor*, 291 A.D.2d 106, 113, 114, 737 N.Y.S.2d 471 (N.Y. App. Div. 2002) (holding that a mother lacked standing to bring a claim either on behalf of a child or individually against the GAL because such a suit would interfere with the GAL's appointment and create a conflict of interest).

<sup>89</sup> Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT'L. L. 106 (2002) (The ABA Custody Standard grants qualified immunity only to the best interests advocate with a bracketed option for states wishing to grant immunity to best interests attorneys); See also *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998) (modifying traditional ethical restrictions on the attorney-client relationship to permit the attorney/GAL to breach confidentiality in order to advocate for a client's best interests but barring the attorney/GAL from testifying as a fact witness).

litigation.<sup>90</sup> The added benefit of a non-attorney Best Interest Advocate is that generally conflict is avoided because the professional is not “representing” the child in a legal capacity.

## V. States’ Inconsistencies in the Role, Authority, and Functions of the GAL

The role of the GAL has become muddled as various states and districts hold differing expectations, authorizing competing quasi-judicial authorities and functions.<sup>91</sup> Many states have been appointing attorneys to represent children in custody proceedings for years and have quite well-developed and effective systems, while other states do not and end up abdicating their judicial authority.

### A. Kentucky

In *Morgan v. Getter*<sup>92</sup> the Kentucky Supreme Court outlined its understanding of the role and responsibilities the state assigns to an attorney in a GAL capacity and a lay representative that are very much in line with the definitions given for the Best Interest Attorney and the Court-Appointed Professional/Best Interest Advocate. Explaining that for the attorney assigned in a GAL capacity, when conflicting views arise between a GAL and child in the context of a custody dispute:

[it is] especially important for the court both to hear the evidence that has persuaded the attorney and to be informed of the conflicting views of [the] attorney and [the] child. Because in those cases the court is made aware of the child’s contrary wishes, the child’s interests will not be unduly impaired if the [attorney] GAL representation is limited to the best interest.<sup>93</sup>

The *Morgan* court further deciphered what an attorney GAL’s duties and responsibilities encompass as opposed to those of a lay representative for a child. The court explained that a “*de facto* friend of the court . . . . investigates, reports, and makes

<sup>90</sup> Guggenheim, *supra* note 31, at 233.

<sup>91</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families*, 6 *NEV. L.J.* 592 (2006).

<sup>92</sup> *Morgan*, 441 S.W.3d 94.

<sup>93</sup> *Id.*

custodial recommendations on behalf of the court, and is subject to cross-examination.”<sup>94</sup> This is also in line with the definitions given for the Court-Appointed Professional/Best Interest Advocate.

The Kentucky Appeals court in *Hoskins v. Hoskins*<sup>95</sup> also recognized that the authority of attorney GALs can include requesting evaluations or discovery as part of their investigation, but was careful to point out that the duties and responsibilities of the attorney GAL “do not coexist to those of an attorney.”<sup>96</sup> The court in *Hoskins* again made clear that the GAL attorney must act in the best interests of the child even if the GAL’s actions are against the child’s wishes.

Additionally, the court in *Hoskins* reiterated its understanding of the role of the GAL attorney for the child as “counseling the-child and representing them in the course of proceedings by engaging in discovery, motion practice, and presentation of the case at the final hearing.”<sup>97</sup> Those role delineations reinforce that GALs are not permitted to testify (by filing a report or otherwise) nor are they subject to cross-examination.<sup>98</sup>

## B. Michigan

In Michigan, the role of the GAL is divided into two categories, the GAL and the Lawyer Guardian ad Litem (“LGAL”). While an LGAL must be an attorney,<sup>99</sup> a GAL is not required to be an attorney. After conducting an independent investigation, the GAL and LGAL “shall make a report in open court or file a written report of the investigation and recommendations.”<sup>100</sup> The LGAL serves the same basic function as a GAL, “independently investigating, determining, and representing the child’s best in-

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<sup>94</sup> *Id.*

<sup>95</sup> *Hoskins v. Hoskins*, NO. 2013-CA-001748-ME, 2015 WL 222177, at \*5-\*6 (Ky. Ct. App. 2015), *review denied* (Aug. 12, 2015).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*8.

<sup>98</sup> *Id.*

<sup>99</sup> MICH. COMP. L. ANN. § 712.A.17d (2004) (prescribing duties of a lawyer-GAL).

<sup>100</sup> *Id.*

terests,”<sup>101</sup> but an LGAL must serve this purpose differently than a GAL. An LGAL is not tasked with simply assisting the court in determining the child’s best interests, but rather is tasked with the duty to make “a determination regarding the child’s best interests and advocate for those best interests.”<sup>102</sup> The LGAL is also obligated to serve as the “independent representative for the child’s best interests.”<sup>103</sup> LGALs, in fulfilling their duties, ultimately embody many of the intentionally divided categories of attorney representation outlined by all three model standards.

Though the Michigan statute dictates that the LGAL’s duty is to the child, the definition does not correspond to the Counsel for the Child (AAML) or the Child’s Attorney (ABA/ULC) because the LGAL’s duty is not just to the child but also to the court, because they are required to make an independent recommendation for the child’s best interests to the court.<sup>104</sup> The LGAL’s duty of loyalty could easily materially interfere with the attorney’s “independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”<sup>105</sup>

The LGAL, by definition, is equivalent to the Best Interest Attorney except that the Best Interest Attorney is prohibited from making a recommendation regarding custody or even making a written or oral report to the court on the same issue. The ABA standards require a Best Interest Attorney to “offer traditional evidence-based legal arguments such as other lawyers make”<sup>106</sup> and to make a determination from objective criteria concerning the child’s needs and interests. This differs substantially from the subjective best interest determination outlined for the LGAL.

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<sup>101</sup> See *Farris v. McKaig*, 920 N.W.2d 377(Mich. Ct. App. 2018) (citing *King v. Emmons*, 277 N.W. 851 (Mich. 1938), for the history and context in which LGALs were created).

<sup>102</sup> MICH. COMP. L. § 700.5213(4).

<sup>103</sup> *Id.*

<sup>104</sup> MICH. COMP. L. §§ 712A.17d(1)(b) and (g) and (i).

<sup>105</sup> *Id.*

<sup>106</sup> See ABA Modified Standards, *supra* note 10, at § III-B-3.

The Michigan statutory law in domestic custody matters<sup>107</sup> defines the delegation of judicial authority for both the GAL and the LGAL and provides both with broad investigatory powers that extend to qualified immunity. Additionally, qualified immunity permits the LGAL to have “full and active participation in all aspects of the litigation.”<sup>108</sup>

The statutory language in Michigan for the GAL and LGAL in reality creates a hybrid role embodying multiple competing definitions. Michigan wants its cake and to eat it, too. All three model legislations warn against and agree that a GAL attorney who writes reports and testifies as a witnesses or quasi-witness<sup>109</sup> should not be a lawyer who also represents the child-client. As detailed earlier, the AAML Custody Standards, ABA Custody Standards, and the ULC Act all reject the hybrid attorney/GAL model because of the confusion and inherent ethical tensions in the blended professional roles that the dual representation calls into question.

### C. Virginia

In Virginia, domestic decisions based on the statutory law define the delegation of judicial authority in child custody matters. Giving broad, often vague, judicial authority in a custody order to a GAL is a regular occurrence and is binding.<sup>110</sup> It is a common part of custody proceedings and orders in Virginia to provide for the “extraordinarily discretionary nature of custody matters and the statutory use of [a] GAL.”<sup>111</sup>

In 2016, the Virginia court of appeals in *Bonhotel v. Watts*<sup>112</sup> made a profound statement to ensure a parent’s constitutional due process rights are upheld. This outlier case was a windfall for the parents of Virginia because the decision overturned the circuit court’s orders for parents to obey a third party’s (GAL’s)

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<sup>107</sup> MICH. COMP. L. § 712.A.17d (2004) (prescribing duties of a lawyer-GAL).

<sup>108</sup> MICH. COMP. L. § 712A.17d(1)(b).

<sup>109</sup> MICH. COMP. L. § 712A.13a(f); See ABA Modified Standards, *supra* note 10, at § V-E; see also AAML Revised Standards, *supra* note 33, at 236.

<sup>110</sup> Dale Margolin Cecka, *Improper Delegation of Judicial Authority in Child Custody Cases: Finally Overturned*, 52 U. RICH. L. REV. 181, 182 (2017).

<sup>111</sup> *Id.* at 187.

<sup>112</sup> *Bonhotel v. Watts*, No. 0040-16-3, 2016 Va. App. LEXIS 327, at \*9 (Ct. App. Dec. 6, 2016)(unpublished decision).

recommendations due to the lack of limitation in the order's language. The father appealed the ambiguous aspect of the court's order, arguing that the trial court erred in delegating to the child's counselor "unlimited, unfettered discretion over any and all parenting decisions to which both parents have to adhere or be subject to the contempt power of the court."<sup>113</sup>

The *Bonhotel* court agreed, explaining that "[w]hen a court fails to draw limits on the circumstances under which a parent must follow a third party's [GAL's] recommendations, those recommendations become orders themselves."<sup>114</sup> The ability of a GAL in Virginia to make decisions that infringe on parent's due process rights to govern their children is unconstitutional. The appeals court, calling the custody order "overly broad,"<sup>115</sup> further explained that it "impinges upon parenting decisions protected by the Due Process Clause of the Fourteenth Amendment."<sup>116</sup> The court decided it must place limits on arduous demands where compliance is mandated because "without imposing some parameters, a court risks delegating its unique authority."<sup>117</sup>

Riding the coattails of *Bonhotel*, in *Reilly v. Reilly*,<sup>118</sup> a mother argued that the circuit court gave sole discretion to the GAL by "determining visitation between [the] mother and the children."<sup>119</sup> The court of appeals agreed with the mother and said that the plain language of the order giving the GAL "authority to alter supervision without a ruling from or any hearing in the circuit court"<sup>120</sup> granted the GAL "total discretion to decide [the] mother's visitation without providing judicial review."<sup>121</sup> The circuit court order stated that the "Mother shall enjoy Supervised Visitation. . . . [which] can be altered *in writing* by the Guardian ad Litem based upon [the] Mother's strict com-

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<sup>113</sup> *Id.* at \*8.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*8.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 1369-15-2, 2016 Va. App. LEXIS 343, at 15-16 (Ct. App. Dec. 13, 2016) (unpublished decision).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 16-17.

<sup>121</sup> *Id.* at 16.

pliance with the conditions and other provisions set forth in this Order.”<sup>122</sup>

Unfortunately, trial court judges in Virginia and in many other jurisdictions frequently give discretion to a GAL to determine issues such as the frequency, length, and substance of parent-child visitation.<sup>123</sup> The trial court orders that were overturned in *Bonhotel* and in *Reilly* are not unusual and highlight the common practice for a GAL, not a judge, in the United States to make “post-decretal custody decisions.”<sup>124</sup>

## VII. Conclusion

In custody and visitation proceedings, there is an increased recognition of the need for clarity on the role of the court appointed child representative. All jurisdictions use the best interests of the child standard to govern custody matters. It is well understood that the best interests standard is subjective<sup>125</sup> giving little guidance for a judge to make a well-informed ruling especially in private custody disputes without more information provided by a court-appointed professional. Child advocacy groups responding to this need developed model uniform state legislation that lay out the duty a child representative or GAL has and to whom they owe that duty. “Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case.”<sup>126</sup> Few states have proscribed procedures for the potential conflict in private custody disputes that can arise when the child’s

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<sup>122</sup> *Id.*

<sup>123</sup> State *ex rel.* Bird v. Weinstock, 864 S.W.2d 376, 380 (Mo. Ct. App. 1993). The *Bird* court made a detailed analysis, explaining the appointment of a guardian ad litem in a custody case supersedes a parent’s natural guardianship in a custody disputes; *see also* Paulson v. Paulson, 694 N.W.2d 681, 686 (N.D. 2005) (the trial court the allowed the delegation of its authority, allowing the GAL and the therapist to set the visitation schedule); Cecka, *supra*, note 110, at 186.

<sup>124</sup> *Id.*

<sup>125</sup> *See* Kohm, *supra* note 2, at 373.

<sup>126</sup> ABA Modified Standards, *supra* note 10, at 126.

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preferences diverge from the attorney's perception of the child's best interests.<sup>127</sup>

The ubiquitous designation of a GAL can apply to a variety of functions in child custody cases across the United States.<sup>128</sup> Clarity is critical to ensure that court-appointed professionals do not exceed their authority or wield undue influence. Standards will help dispel the uncertainty about the child representative's role for children, their parents, parents' attorneys, judges, and even children's representatives.

Elizabeth R. Ellis

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<sup>127</sup> Rule 10, Ariz. R. Fam. L. Proc.; ARIZ. REV. STAT. ANN. § 17B (2006) (describing duties and powers of a child's attorney, a best interests attorney, and a court-appointed advisor).

<sup>128</sup> See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002); NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); *AAML Revised Standards*, *supra* note 32, at 236; ABA Modified Standards, *supra* note 10, at 126. ABA Modified Standards, *supra* note 10, at § V-E; see also *AAML Revised Standards*, *supra* note 33, at 236.