

Representing Children: The Ongoing Search for Clear and Workable Standards

By
Barbara Ann Atwood*

In a dependency proceeding, a lawyer is appointed to represent a five-year-old child in foster care. The nature of the lawyer's role is not spelled out in the order of appointment. Over a period of months, the lawyer establishes a relationship of trust and confidence with the child, and the child comes to expect the lawyer to advocate for his wishes— to be returned to his mother. At the same time, the lawyer fears that such a result might expose the child to significant harm because of the mother's past alcohol abuse and her volatile relationship with a boyfriend. The child has told the lawyer of several experiences indicating that the mother has been intoxicated when caring for her son. In a quandary as to her obligations as legal counsel for this young child, the lawyer finds little guidance in law.¹

In the scenario described above, should the lawyer represent her client's wishes as if the client were an adult? Would the lawyer be justified in advocating against the client's desires? Conversely, should the lawyer simply present the court with evidence of the boy's circumstances without taking a position on the ultimate outcome? Should the lawyer disclose any information she has received from the child? Little in the way of consensus exists among child advocates as to these questions. The role of children's representatives in legal proceedings has been the topic of

* Mary Anne Richey Professor of Law, University of Arizona James E. Rogers College of Law. I thank my colleague Paul Bennett and my friend Ann Haralambie for helping me understand more clearly the challenges facing children's lawyers.

¹ This illustration is based on the author's supervision of a dependency proceeding in the Spring Term of 2005 at the Pima County Juvenile Court, Tucson, Arizona, handled by students with the Child Advocacy Clinic at the University of Arizona James E. Rogers College of Law.

widespread debate across the United States² and within the international community.³ While many courts and commentators

² Some of the more prominent contributions to the literature governing the responsibilities of children's lawyers include ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY* (1993) (proposing that a child's attorney should advocate the child's wishes unless they are potentially harmful to the child, but suggesting that the attorney can minimize ethical dilemmas by paying more attention to counseling of child); JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (2d ed. 2001) (recommending that attorneys should develop a sensitive, contextual relationship with child clients over time and interpret children's wishes through the lens of the children's individualized circumstances); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *CORNELL L. REV.* 895 (1999) (examining children's limited cognitive and emotional capacity to direct counsel); Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 *FAM. L.Q.* 441 (2000) (arguing that no single role will fit the needs of all children and proposing that children's evolving capacities require separate standards for a client-directed attorney and a best interests guardian ad litem); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655 (1996) (suggesting that a lawyer can empower a child client by greater advocacy of the child's wishes); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996) (advocating that a lawyer for a young child should focus on enforcing the child's legal rights rather than on carrying out the child's expressed objectives); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-making Capacity*, 17 *FAM. L.Q.* 287, 316 (1983) (recommending representation of a child's expressed wishes when the child is "capable of making a considered decision").

³ The United Nations Convention on the Rights of the Child (CRC) provides that children are entitled to participate, directly or through a representative, in judicial or administrative proceedings affecting their interests. See Article 12 of the CONVENTION ON THE RIGHTS OF THE CHILD, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at art. 1, U.N. doc. A/Res/44/25 (1989), available at 28 I.L.M. 1448 (1989). In light of the child's right of participation, courts and scholars from other nations have explored the role of children's counsel in a variety of contexts. See, e.g., Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 *ST. THOMAS L. REV.* 1, 63 (1993) (discussing efforts in European Union to give children greater roles in divorce proceedings as a mandate of CRC); Hon. Claire L'Heureux-Dube, *A Response to Remarks by Dr. Judith Wallerstein on the Long-Term Impact of Divorce on Children*, 36 *FAM. & CONCILIATION CTS. REV.* 384 (1998) (reporting on efforts in Canada to enhance children's voices in family law cases under CRC); Nicholas Bala, *Child Representation in Alberta: Role & Responsibilities of Counsel for the Child*, Legal Education Society of Alberta, *Child Representation Training*, Edmonton,

agree that children should have a “voice” in proceedings affecting their interests, the meaning of the child’s voice is fraught with ambiguity. The lack of clear guidance for children’s representatives, in turn, can produce frustration among child advocates⁴ and poor representation for children.⁵

Disagreements focus on such fundamental questions as whether a child is entitled to a representative under any circumstance and, if so, whether that representative should be an attorney, a guardian ad litem, or some combination of the two. When an attorney is appointed for a child, no clear consensus exists as to the standards governing that attorney’s representation.⁶ In particular, courts have questioned whether children’s attorneys have the same ethical duties to pursue their clients’ wishes and to maintain client confidentiality that ordinarily inhere in the lawyer-client relationship.⁷ The chameleon designation of “guardian ad litem” has given rise to rampant confusion.⁸ Moreover, when an attorney functions both as a lawyer and a guardian ad litem,

April 1-3, 2005 (manuscript on file with author)(assessing professional role of children’s counsel under law of Alberta).

⁴ See Sharon S. England & Robert E. Shepherd, “*I Know the Child is My Client, but Who Am I?*” 64 *FORDHAM L. REV.* 1917 (1996); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 *LOY. U. CHI. L.J.* 299 (1998); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 *LOY. U. CHI. L.J.* 1 (2000).

⁵ See ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY*, 140-43 (2004) (describing the need for clearer standards for guardians ad litem and lawyers for children).

⁶ See HARALAMBIE, *supra* note 2, at 2 (“No uniformity exists with respect to what it means to be appointed to represent a child.”).

⁷ See, e.g., *Leary v. Leary*, 627 A.2d 30 (Md. Ct. Spec. App. 1993) (describing differing roles for children’s attorneys). See generally Linda Elrod, *Counsel for the Child: The Time Is Now*, 26 *FAM. L.Q.* 53 (1992).

⁸ See, e.g., *Jacobsen v. Thomas*, 100 P.3d 106 (Mont. 2004) (holding that guardians ad litem for children ordinarily may testify and be cross-examined and should not function as attorneys unless explicitly directed to do so in the order of appointment). See generally Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 *LOY. J. PUB. INT. L.* 106 (2002).

disagreements abound as to the ethical obligations of that hybrid role.⁹

Children's representatives appear in a variety of settings, including child custody disputes, abuse and neglect proceedings, contested adoptions, civil commitment, procedures for obtaining judicial consent for abortion, and, of course, juvenile delinquency cases. This article will describe the most prominent approaches to child representation within the United States, with a focus on the legal representation of children in abuse and neglect proceedings and private custody disputes. To illustrate the range of approaches currently in place across the United States, Part I highlights differences in the laws of several states regarding children's attorneys and guardians ad litem. In some states, legislatures have codified guidelines for children's representatives in an effort to bring clarity and predictability to this area of the law. In other states, courts have announced principles governing lawyers and guardians ad litem on an ad hoc basis. The various approaches, while often contrasting markedly one from another, generally reflect policy choices about what best protects children. Part II analyzes a few of the key ethical issues that can arise in the course of a lawyer's representation of a child client. Ethical tensions have driven many of the proposals regarding children's attorneys, and courts have resolved these tensions differently. Part III summarizes the competing proposals governing children's representatives that have emerged within the United States, with particular attention to the American Academy of Matrimonial Lawyers' ("AAML") guidelines for lawyers representing children in custody disputes and the contrasting American Bar Association ("ABA") proposed standards of practice for children's attorneys.

Throughout this analysis, I offer reflections on the relative merits of the competing models of children's representatives, emphasizing the points of agreement as well as the points of contention. The passion with which children's advocates defend their positions has convinced me that universal consensus is unlikely to be achieved soon. On the other hand, the very existence of

⁹ See, e.g., *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998) (determining that an attorney/guardian ad litem is bound by a child's best interests rather than a child's preferences and may disclose confidential client communications to the court).

the debate can be seen as a positive development. As we move into the twenty-first century, I find hope and promise in the fact that child advocates, professional associations, legislatures, and courts are engaged in a conversation about how best to speak for our most vulnerable population.

I. Current Approaches to Representation of Children

A. *The Appointment of a Representative—Mandatory or Discretionary*

Although the Supreme Court held that children have a due process right to counsel at the adjudication phase of juvenile delinquency proceedings in *In re Gault*,¹⁰ the Court has not recognized a comparable right to counsel for children in other civil contexts. Nevertheless, the trend across the United States does seem to be toward greater recognition of the value of legal counsel for children in a variety of settings. Because children's fundamental interests are at stake in child welfare cases, child advocates have long argued that every child involved in an abuse or neglect proceeding should be represented by counsel,¹¹ and a few state courts have endorsed the right to counsel in that context as a matter of due process.¹² Moreover, a federal district court recently held that foster children have a constitutional right to counsel as a matter of state constitutional law in dependency cases and termination of parental rights proceedings. In *Kenny*

¹⁰ 387 U.S. 1 (1967) (children are "persons" within meaning of the Fourteenth Amendment and are entitled to counsel in proceedings where their liberty interests are at stake).

¹¹ See generally *American Bar Association, Proposed Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 375-76 (1995) (explaining the historical support for appointment of attorneys for children in abuse and neglect proceedings); Jacob E. Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Proceedings*, 37 FAM. L. Q. 485, 486-87 (2003) (arguing that children have a due process right to counsel in child welfare cases).

¹² See, e.g., *In re Jamie TT*, 599 N.Y.S. 2d 892 (N.Y. App. Div. 1993) (holding that a child is entitled to effective legal representation as matter of due process in child abuse proceeding); *contra In re D.B. and D.S.*, 385 So.2d 83 (Fla. 1980) (deciding that a child does not have a constitutional right to counsel in abuse and neglect proceedings).

A. ex rel. Winn v. Perdue,¹³ a Georgia federal court recognized that the children had profound liberty interests in their own safety, health, and well-being as well as interests in maintaining the integrity of the family unit and a relationship with their birth parents. An erroneous decision to terminate parental rights would unnecessarily destroy the child's family relationships, while an erroneous decision not to terminate might subject the child to the risk of abuse or extended impermanency. In light of the strength of the child's interests and the serious risk of error, the court concluded that "only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings."¹⁴ The court pointed out that neither citizen review panels nor court-appointed special advocates could engage in adequate investigation to effectively represent the child.¹⁵ The potential fiscal burden of appointment of counsel, in the court's view, was far outweighed by the state's *parens patriae* obligation to protect the child and the child's fundamental interests.

The *Kenny* court's holding, while based on state constitutional law, rests on the importance of the children's interests at stake in child protective proceedings and the effectiveness of lawyers in helping courts avoid error. Moreover, *Kenny* did not rely on any unique features of Georgia's state constitution in analyzing the due process claim but instead employed the familiar due process framework from *Matthews v. Eldridge*.¹⁶ Thus, the case is an important recent precedent for those who have argued that children have a right to counsel in child welfare cases as a matter of federal constitutional law.

Constitutional entitlement aside, children have statutory rights to representation under federal and state law in defined circumstances. The federal Child Abuse Prevention and Treat-

¹³ 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

¹⁴ *Id.* at 1361.

¹⁵ According to the court, "[j]udges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances. . . . CASAs are also volunteers who do not provide legal representation to a child." *Id.*

¹⁶ 424 U.S. 319, 335 (1976) (stating that due process analysis requires consideration of the private interest that will be affected by official action, the risk of erroneous deprivation of such interest and the probable value of additional procedures, and the government's interest).

ment Act (“CAPTA”) requires the appointment of a “guardian ad litem” for every child involved in an abuse or neglect case as a condition of receiving federal CAPTA funding.¹⁷ According to CAPTA,

a guardian ad litem, 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 to represent the child . . . (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.¹⁸

Thus, while the statute does not specify the nature of the representative, it does provide that the guardian may be “an attorney or a court appointed special advocate”¹⁹ charged with representing the best interests of the child. In response to CAPTA, almost all states now require some form of child representation in abuse and neglect proceedings,²⁰ but the role of the representative varies widely. In a few states, the federal CAPTA requirement may be deemed satisfied through the highly economical court appointed special advocate (“CASA”) program.²¹ Although

¹⁷ See 42 U.S.C. § 5106a(b) (2) (A) (xiii) (2000).

¹⁸ *Id.* (emphasis added).

¹⁹ The court appointed special advocate, or CASA, is a lay volunteer whose duties generally include investigation of a child’s circumstances and making recommendations to the court based on the child’s best interests. The National CASA Association was formed in 1984, and today CASA programs exist in almost every state. See Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER CHILD. & CTS 63 (1999) (describing the history and success of CASA programs). Federal law authorizes the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, to enter into cooperative agreements with the National CASA Association to expand CASA programs throughout the nation. See 42 U.S.C. § 13013 (2000) (authorizing grants for qualifying CASA programs).

²⁰ See Howard Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L.Q. 765, 768-69 (1999). Indiana is alone among the states in not mandating the appointment of a guardian ad litem in all abuse and neglect cases. See IND. CODE § 31-34-10-3 (2004) (permitting but not requiring the appointment of a guardian ad litem or court appointed special advocate for many categories of abuse and neglect proceedings).

²¹ See, e.g., N.H. REV. STAT. ANN. § 169-C:10(I) (2004) (court shall appoint a guardian ad litem or a court-appointed special advocate guardian ad litem); OHIO REV. CODE ANN. § 151.281(J) (1) (West 2004) (court shall appoint

CASAs are often a valuable source of information about the child, exclusive reliance on a lay volunteer in child protection proceedings would seem inadequate. CASAs generally do not possess specialized expertise in the social sciences or mental health fields and thus may not have the requisite professional expertise to competently evaluate a proposed placement for a child. Moreover, CASAs generally are not appointed as attorneys and therefore may be ineffective in bringing relevant evidence to the attention of the court and in protecting the child's legal rights.²² Thus, a court's exclusive reliance on a CASA would give short shrift to advocacy of the child's wishes.²³

Although CAPTA explicitly permits the guardian to be a lawyer, the statutory reference to the duty "to make recommendations to the court concerning the best interests of the child" is a function ordinarily associated with non-lawyers. As a result, many states routinely appoint lawyers as guardians ad litem, without careful delineation of the distinctions between the ethical responsibilities of a lawyer as a zealous advocate for the client's position and the professional obligations of the guardian ad litem as a best interests witness for the court.²⁴ In some states, however, statutory provisions identify situations in which the lawyer should function in the role of legal counsel for the child.²⁵

Wholly apart from CAPTA, some states have independently required appointment of legal counsel for children in proceedings to terminate parental rights. In Ohio, for example, the

a qualified volunteer as guardian ad litem when one is available and the appointment is appropriate).

²² See Bridget Kearns, Comment, *A Warm Heart but a Cool Head: Why a Dual GAL System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 WIS. L. REV. 699 (suggesting that a volunteer advocate acting without counsel lacks legal expertise to adequately protect a child's legal rights).

²³ See generally Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 436-40 (2000) (arguing that legal advocacy of a child's views would empower the child).

²⁴ See, e.g., ALA. CODE § 12-15-1 (2004) (guardian ad litem must be licensed attorney appointed by court); N.Y. FAM. CT. ACT § 242 (2004) (law guardian must be attorney). See Federle, *supra* note 23, at 424-34.

²⁵ See, e.g., WASH. REV. CODE ANN. § 13.34.100(6) (West 2004) (the court may appoint counsel for children age twelve or older at the child's request); N.C. GEN. STAT. § 7A-586(a) (2004) (if a non-attorney is appointed as guardian ad litem, the court shall appoint a lawyer for the child).

courts have reasoned that the child's status as a party to such proceedings under Ohio statutory law requires that he or she be represented by counsel.²⁶ Moreover, although a guardian ad litem who is a lawyer may in some situations function as legal counsel in the Ohio scheme, a separate lawyer must be appointed if the guardian ad litem recommends a position that is contrary to the child's expressed wishes.²⁷ At the same time, the Ohio courts have recognized that counsel's role may vary, depending on the maturity of the child and other circumstances of the case.²⁸ Wisconsin takes a somewhat different approach by statute, tying the right to legal counsel to the child's age: under Wisconsin law, a child twelve years old or older must be provided an attorney in abuse and neglect proceedings, while a child under the age of twelve is entitled to a guardian ad litem.²⁹ At the same time, every guardian ad litem in Wisconsin is required to be a lawyer.³⁰

Outside the context of abuse and neglect and termination of parental rights, state law varies widely on the question of children's representatives. A few states require the appointment of representatives for children in select proceedings, such as contested paternity determinations,³¹ contested adoptions,³² and

²⁶ In re Williams, 805 N.E.2d 1110 (Ohio 2004).

²⁷ The court noted that there may be a "fundamental conflict" between the guardian ad litem's duty to recommend whatever the GAL determines to be in the child's best interests and the duty of a lawyer to advocate the client's wishes. *Id.* at 1114.

²⁸ *Id.*

²⁹ See WIS. STAT. ANN. § 48.23 (2004).

³⁰ See WIS. STAT. ANN. § 48.235 (2004) (the guardian ad litem shall be an attorney whose duty is to advocate for the child's best interests).

³¹ See, e.g., IOWA CODE ANN. § 598.21 (2004) (requiring appointment of a guardian ad litem in a contested paternity action); KAN. STAT. ANN. § 38-1125 (2003) (requiring appointment of a guardian ad litem for the child in a paternity action if the interests of the child and the petitioner differ); ME. REV. STAT. ANN. tit. 18-A, § 9-201(f) (2004) (requiring appointment of an attorney for the child in paternity action); MONT. CODE ANN. § 40-6-110 (2004) (requiring appointment of a guardian or guardian ad litem for the child in a paternity action); UNIF. PARENTAGE ACT § 612 (2000) (requiring appointment of an "attorney ad litem" if the child is a party or the child's interests are not adequately represented).

³² See, e.g., MISS. CODE ANN. § 93-17-8 (West 2004) (requiring appointment of an attorney as a guardian ad litem for the child in a contested adoption); OKLA. ST. ANN. § 7505-1.2 (2004) (requiring appointment of an attorney for the child in a contested adoption and a guardian ad litem if requested); S.

civil commitment proceedings.³³ In contrast, in the context of custody disputes—arguably the category of proceedings most likely to impact children today—most states grant full discretion to courts in deciding whether to appoint a representative for the child.³⁴ The Uniform Marriage and Divorce Act has served as a model in this area, providing that courts may appoint “an attorney to represent the interests of a child” with respect to support, custody, and visitation.³⁵ In contrast, about ten states require the appointment of a representative for a child in custody actions under certain circumstances, such as where there are allegations of abuse.³⁶ In Minnesota, for example, a guardian ad litem is mandatory if there are allegations of abuse or neglect that are not being litigated in another court.³⁷ Placing more emphasis on the child’s right of autonomy, Oregon requires the appointment of an attorney if the child requests it.³⁸ In Wisconsin, on the other hand, a guardian ad litem for the child is viewed as mandatory in all contested custody disputes.³⁹

In sum, both federal and state law impact the appointment of children’s representatives, and the rules vary across the United States. Because of CAPTA, almost every state guarantees that children involved in abuse and neglect proceedings will have a

Car. Code § 20-7-1732 (requiring appointment of a guardian ad litem for the child in an adoption proceeding); UNIF. ADOPTION ACT § 3-201 (1994) (requiring appointment of a guardian ad litem in a contested adoption).

³³ See, e.g., ARIZ. REV. STAT. § 8-221 (2004) (requiring appointment of an attorney for the child in a commitment proceeding unless the right is waived); FLA. STAT. ANN. § 39.407(5) (2004) (requiring appointment of a guardian ad litem for the child in a proceeding for residential mental health treatment).

³⁴ According to a recent ABA survey, thirty-nine states leave appointment of representatives for children to the complete discretion of the court. See ABA CHILD CUSTODY PRO BONO PROJECT, APPOINTMENT LAWS IN DIVORCE CASES (Aug. 2003), reprinted at Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105, 126-29 (2003) (Appendix)[hereinafter “ABA Survey”].

³⁵ UNIF. MARRIAGE & DIVORCE ACT § 310, 9A U.L.A. 13 (1998).

³⁶ See ABA Survey, *supra* note 34.

³⁷ See MINN. STAT. ANN. § 518.165 (2004).

³⁸ See OR. REV. STAT. § 107.425(6) (2004).

³⁹ See WIS. STAT. ANN. § 767.045 (2005). In *Lofthus v. Lofthus*, 678 N.W.2d 393 (Wis. Ct. App. 2004), the court held that appointment of a guardian ad litem for the children was required in a proceeding to modify physical custody.

representative, although the nature of that representative ranges from a legal advocate to a lay guardian or CASA. In court proceedings not governed by CAPTA, wide variation exists but the majority approach is for states to leave the question of children's representatives to the discretion of the family court judges.

B. *The Representative's Role*

Just as no uniformity exists with respect to the discretionary or mandatory appointment of representatives for children, a similar lack of uniformity surfaces with respect to the professional role of children's representatives. Although people often view children's representatives as occupying two competing camps,⁴⁰ the representative's professional roles might be better framed as falling on a continuum, with the lay guardian ad litem committed to protecting the child's interests at one end of the spectrum, the zealous attorney committed to advocating the child's wishes at the opposite end, and various hybrid models falling at different points in between. Those who endorse the guardian ad litem model of children's representation emphasize the unique vulnerability of children and their need for adults to protect them and to make decisions for them concerning their welfare. Most fundamentally, those who are responsible for deciding a child's future placement want the assurance that they will be informed of potential harms to the child. If a child's lawyer is committed only to advocating the child's expressed wishes, a judge may worry that the lawyer's presentation is incomplete or deliberately slanted to achieve the child's goal. As Judge Debra Lehrmann asks,

Does the child's interest in directing the actions of counsel outweigh the child's interest in being assured that all evidence bearing on his or her welfare is presented to the court? . . . Do we truly have the best interests of children at heart or are we caught up in an image of our-

⁴⁰ See Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1699 (1996) (describing competing models as "best interests" and "expressed interests"); Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice* (1999) (reporting that attorney/guardian ad litem and traditional attorney are the models that have dominated representation of children).

selves that precludes acknowledgment of the need for a protective approach to family law?⁴¹

Others point to the risk for children of too much autonomy. Robert Emery, for example, worries that placing undue emphasis on a child's wishes may shift decision-making responsibility from the adults to the child for emotionally charged issues like child custody. "Rights and responsibilities," he explains, "go hand-in-hand, and many of our well-intentioned efforts to increase children's rights have, unfortunately, burdened children with adult responsibilities."⁴² Similarly, many commentators have recognized that children may suffer loyalty conflicts if they are forced to articulate a preference in custody disputes.⁴³

In contrast, those who endorse a child's attorney model emphasize the child's basic right to have his or her wishes presented by a zealous advocate.⁴⁴ Proponents emphasize the child client's autonomy and the value to the child and to the court of the child's participation in the proceedings.⁴⁵ Under this approach, the child's dignity interests are served when the child has a representative committed to advocating the child's preferences. Professor Katherine Hunt Federle has argued that children have a basic right to "empowerment" and that children's lawyers should

⁴¹ Debra H. Lehrmann, *Who Are We Protecting?* 63 TEX. B.J. 122, 126 (2000).

⁴² Robert E. Emery, *Hearing Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 622 (2003).

⁴³ See, e.g., MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 162 (2005); FLORENCE W. KASLOW & LITA LINZER SCHWARTZ, THE DYNAMICS OF DIVORCE: A LIFE CYCLE PERSPECTIVE 162 (1987); Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 407 (1991).

⁴⁴ An article by Professor Martin Guggenheim has been identified as starting a "paradigm shift" toward the view that children capable of directing a lawyer should have counsel committed to pursuing the child's legal objectives. See PETERS, *supra* note 2, at 47-48, citing Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) [hereinafter Guggenheim, *The Right to Be Represented But Not Heard*] (suggesting that children over age of seven should be deemed responsible for directing their attorneys and that younger children should be deemed incapable). Guggenheim, it should be noted, has revised his thinking in this area to more carefully tie the attorney's role to the substantive rights that children have in particular substantive areas. See Guggenheim, *Paradigm for Determining Role of Counsel*, *supra* note 2, at 1420-21.

⁴⁵ See Federle, *supra* note 2, at 1680.

enable their clients to make choices and to participate in the legal system.⁴⁶ In her view, children involved in child welfare proceedings would benefit if the courts were to emphasize their status as “powerful, rights-bearing individuals” rather than focusing on their vulnerabilities and dependence. She also maintains that the child-directed lawyer can ensure that other adults in the proceeding take the child’s view seriously.⁴⁷ Others have insisted that even young children should be deemed competent to make legal choices. Professor Randy Kandel, for instance, argues that children as young as seven or eight years of age have the requisite cognitive and emotional maturity to choose their custodians.⁴⁸ In addition, children may benefit emotionally from knowing that their views were considered by the decision maker, even if the ultimate result is not in line with their preferences.⁴⁹ Of course, a child’s attorney who is determined to represent the client’s wishes may face an inherent tension if the child’s position appears to the attorney to be contrary to the child’s best interests. Moreover, a child’s attorney must decide what action to take when the child cannot or will not direct the attorney as to a particular issue. These ethical dilemmas and alternative resolutions are addressed in Part II.

Although wide variations in the role of children’s representatives exist, some broad generalizations are possible. In the abuse and neglect context, due in part to the federal mandate of CAPTA,⁵⁰ children’s representatives are more likely to be appointed as guardians ad litem, or lawyers functioning as guardi-

⁴⁶ *Id.* at 1695-96.

⁴⁷ Federle, *supra* note 23, at 439-40 (suggesting that empowering children to participate in proceedings affecting their relationships with their parents might lead to more accurate and just determinations).

⁴⁸ Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children’s Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994).

⁴⁹ I have explored this topic elsewhere. See Barbara Ann Atwood, *The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 660-62 (2003) (describing intangible “dignity value” and mental health benefits of children’s participation in custody disputes). Similarly, the Pew Commission on Children in Foster Care has recommended that foster children have an informed voice in decisions that are made about their lives. See The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-being for Children in Foster Care* (May 18, 2004), available at <http://pewfostercare.org>.

⁵⁰ See notes 17-25 *supra* and accompanying text.

ans ad litem, than as children's attorneys.⁵¹ As such, the child's representative generally is appointed to assist the court in determining a resolution that will be in the child's best interests and is not bound by the child's wishes. Indeed, while many states require the guardian to report the child's expressed wishes to the court,⁵² some do not explicitly impose such a duty on the guardian.⁵³ Moreover, the role of the guardian ad litem varies from state to state. While courts often refer to the guardian ad litem as "the arm of the court,"⁵⁴ the guardian's role may encompass acting as expert witness or mediator as well as investigator and court advisor.⁵⁵ In states where the duties of guardians ad litem are spelled out by statute or court rule, they often include investigation of the case, interviews with parties and others knowledgeable about the child, review of relevant records, participation in court proceedings and settlement discussions, and reporting of findings and recommendations to the court.⁵⁶

In the context of child custody disputes, the statutory law of most states authorizes courts to appoint an attorney or a guardian ad litem for the child.⁵⁷ Regardless of label, the representa-

⁵¹ See Federle, *supra* note 23, at 424-26 (noting that at least forty-one states mandate or permit the appointment of a guardian ad litem in abuse and neglect proceedings).

⁵² See, e.g., ME. REV. STAT. ANN, tit. 22, § 4005(1) (E) (West 2004) (guardian ad litem must make child's expressed wishes known to court); 42 PA. . CONSOL. STAT. ANN. § 6311(b) (9) (2004) (guardian ad litem must advise court of child's wishes; conflict between guardian's recommendation and child's wishes shall not be considered conflict of interest). See Federle, *supra* note 23, at 427-28.

⁵³ See, e.g., R.I. GEN. LAWS § 40-11-14 (2004) (requiring court to appoint "a guardian ad litem and/or a court-appointed special advocate" without specifying duties).

⁵⁴ See, e.g., Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (stating that the traditional role of a guardian ad litem is to serve as an "arm of court"); Collins v. Tabet, 806 P.2d 40 (N.M. 1991) (holding that a guardian ad litem functioning as an "arm of the court" is entitled to absolute quasi-judicial immunity).

⁵⁵ See Raven C Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998).

⁵⁶ See, e.g., MINN. STAT. § 518.165 (2004) (enumerating a broad range of duties for guardians ad litem in custody cases); ARIZ. REV. STAT. § 8-522 (2003) (listing duties of "special advocates" in dependency actions).

⁵⁷ See ABA Survey, *supra* note 34.

tive's role generally is to assist the court in protecting the child's best interests rather than to advocate the child's wishes.⁵⁸ A statute's terminology can give rise to confusion about the appropriate professional role for the representative, especially if the appointed representative is a lawyer.⁵⁹ Section 310 of the Uniform Marriage and Divorce Act ("UMDA"), for example, provides for the discretionary appointment of "an attorney to represent the interests of a minor or dependent child," and the Comment explains that "[t]he attorney is not a guardian ad litem for the child, but an advocate *whose role is to represent the child's interests*."⁶⁰ Although some commentators have read this to mean "expressed interests,"⁶¹ the choice of the term "interests" seems ambiguous. The drafters of the UMDA knew to use "child's wishes" when that was their intent.⁶² Moreover, by stating that the attorney is not a guardian ad litem, the drafters could have been clarifying that the representative was supposed to function as a lawyer rather than as a witness. Thus, appointments that simply incorporate the language of the UMDA could certainly give rise to confusion. In any event, to the extent that state law requires the attorney for the child to represent the child's best interests, the attorney is functioning in an unusual capacity—one, however, that several proposed standards of practice have endorsed.⁶³ The expectation is that the lawyer will advocate for the child's interests in court, whether or not those interests coincide with the child's expressed wishes. A few states have tried to address the potential conflict when the child's preferences conflict with the attorney's perception of the child's interests.⁶⁴ Most states, however, have simply left the potential

⁵⁸ *Id.*

⁵⁹ *Id.* See also Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109 (2002) (reporting that in most states guardians ad litem fill the role of children's legal representatives in custody cases).

⁶⁰ UNIF. MARRIAGE & DIVORCE ACT § 310 (emphasis added).

⁶¹ See HARALAMBIE, *supra* note 2, at 2-3 (stating that an attorney may assume an appointment under the UMDA is to represent a child's expressed interests).

⁶² See UNIF. MARRIAGE & DIVORCE ACT § 402(2).

⁶³ See *infra* notes 146-58 and accompanying text.

⁶⁴ See *infra* notes 86-96 and accompanying text.

conflict for resolution by the representative on a case-by-case basis.

The widespread use of guardians ad litem in custody disputes has come under sharp attack in recent years.⁶⁵ Critics argue that courts give too much weight to recommendations by guardians ad litem and that reliance on the recommendations amounts to an abdication of judicial responsibility.⁶⁶ Also, serious due process concerns are present when guardians' reports and recommendations have been considered by courts without an opportunity for cross examination by the parties.⁶⁷ Moreover, the common use of the hybrid attorney/guardian ad litem model has been questioned, with many critics emphasizing that lawyers lack the professional expertise to offer opinions and recommendations on a child's best interests.⁶⁸ Similarly, commentators worry that the absence of clear standards for guardians ad litem permits them to act on the basis of subjective, unconstrained bias.⁶⁹ Although views about the utility of guardians ad litem

⁶⁵ See, e.g., Ducote, *supra* note 59; Raven C Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998) (arguing that the confusing term "guardian ad litem" should be discarded altogether and recommending that courts designate representatives by role, such as investigator, mediator, or expert witness).

⁶⁶ See Comment to Standard 3.2, *AAML Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* (1995) (stating that the standard prohibiting guardians ad litem from making recommendation on contested issues "avoids the serious danger of abdication of judicial responsibility").

⁶⁷ A number of state courts have upheld due process challenges based on trial judges' reliance on reports or recommendations by guardians ad litem. See, e.g., *Ex parte R.D.N.*, ___ So.2d ___, 2005 WL 503568 (Ala. 2005) (holding that a father's due process rights were violated when the trial court adopted a guardian ad litem's ex parte custody recommendation); *In re Marriage of De Bates*, 819 N.E.2d 714 (Ill. 2004) (holding that a mother's due process rights were violated when she was not permitted to cross-examine the child's representative but finding the error was harmless); *Pirayesh v. Pirayesh*, 596 S.E.2d 505 (S.C. App. 2004) (reversing a custody order based on a guardian ad litem's biased and incomplete investigation).

⁶⁸ See Ducote, *supra* note 59.

⁶⁹ See Lidman & Hollingsworth, *supra* note 65.

differ, the overwhelming consensus among commentators and courts is that clearer guidelines are needed.⁷⁰

II. Ethical Issues in Children's Representation

When lawyers act as children's representatives, whether in the capacity of attorney/guardian ad litem or as a client-directed attorney for the child, ethical dilemmas can arise with uncomfortable frequency. The focus here will be the role of children's lawyers in custody disputes, although similar ethical issues also arise in child protective proceedings. At the outset it should be emphasized that very few states have promulgated ethical rules directly addressing the child's lawyer or the attorney/guardian ad litem hybrid role. Although bar organizations in a few states are beginning to direct attention to this important area, ethical questions for the most part have been analyzed by reference to the general rules applicable to adult clients or impaired clients. Since children's lawyers often face unique ethical quandaries, the lack of clear guidelines is a disservice to the lawyers, their clients, and the public.

A. *The Attorney/Guardian Ad Litem Model*

A lawyer who is functioning as a guardian ad litem is generally appointed to assist the court in protecting the child's best interests and, as such, may not only investigate the facts of the case but also be expected to submit findings and recommendations to the court or advocate a particular result that the lawyer has determined will best serve the child's interests.⁷¹ At the same time, the lawyer may be entitled to engage in discovery, introduce evidence, cross-examine witnesses, and otherwise continue to perform tasks that are the province of licensed attorneys.

⁷⁰ See, e.g., *In re Tayquon H.*, 821 A.2d 796 (Conn. App. Ct. 2003) (decrying the lack of standards and attempting to differentiate between the roles of guardian ad litem and attorney for child). Several states have recently promulgated guardian ad litem guidelines, and the ABA Family Law Section has formed a committee to draw up proposed standards of practice for guardians ad litem in private custody disputes. See Margaret Graham Tebo, *The Most Vulnerable Clients: Attorneys Must Deal With Special Issues When Kids Come Into Contact With the Courts*, 89 A.B.A. J. 48, 51-52 (2003).

⁷¹ See, e.g., *Jacobsen v. Thomas*, 100 P.3d 106 (Mont. 2004); Martin Guggenheim, *The Right to Be Represented but Not Heard*, *supra* note 44, at 94.

Many courts have recognized that the hybrid attorney-guardian ad litem is inherently problematic.⁷² When attorneys are appointed as guardians ad litem, courts have struggled to articulate the representatives' duties, especially in light of the ethical requirements that lawyers pursue their client's expressed wishes,⁷³ maintain client confidentiality,⁷⁴ and refrain from testifying in cases in which they are also advocates.⁷⁵ In *Clark v. Alexander*,⁷⁶ for example, the Wyoming Supreme Court addressed each of these concerns in attempting to define the role of the hybrid attorney/guardian ad litem. In *Clark*, an attorney/guardian ad litem had testified against the mother in a custody modification hearing, and the trial court ultimately denied the mother's request for modification. On appeal, the mother argued that because the guardian ad litem had actively participated in the case as the children's attorney, it was improper to allow her to testify in the proceedings. The court found that the role of the attorney/guardian ad litem was central to the disposition of the case. Although the court recognized that "the juxtaposition of the separate roles of attorney and guardian ad litem into one 'attorney/guardian ad litem,' appears especially problematic,"⁷⁷ the court did not require a bifurcation of the two roles. In that regard, the

⁷² See, e.g., *S.S. v. D.M.*, 597 A.2d 870 (D.C. 1991) (determining that an attorney/guardian ad litem who acts as an advocate for a child should not also be permitted to testify as a witness in a neglect proceeding); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004) (stating that when a guardian ad litem is also a child's attorney in a proceeding for termination of parental rights, the court must appoint independent counsel to represent the child if the child's wishes differ from the guardian's position); *Jacobsen*, 100 P.3d 106 (attorney/guardian ad litem should not act as attorney for child but should objectively aid court in determining best interests of child); *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998) (ethical rules requiring attorneys to represent client's wishes and to respect client confidences are modified for attorneys functioning as attorney/guardian ad litem).

⁷³ See MODEL RULES OF PROF'L CONDUCT RULE 1.2 (2002) [hereinafter MODEL RULES] (lawyer shall abide by client's decisions concerning objectives of representation).

⁷⁴ See MODEL RULE 1.6 (lawyer shall not reveal information relating to representation of client unless client consents).

⁷⁵ See MODEL RULE 3.7 (lawyer shall not act as advocate at trial in which lawyer is likely to be witness).

⁷⁶ 953 P.2d 145 (Wyo. 1998).

⁷⁷ *Id.* at 151.

court noted that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive.⁷⁸ Concluding that the hybrid model was an economic necessity, the Wyoming court altered the traditional ethical requirements to fit the model.

In the court's view, the attorney/guardian ad litem is not bound by the client's expressed preferences but by the client's best interests. To that extent, the traditional duty of a lawyer to pursue the client's objectives is modified. Nevertheless, where the child's wishes and the guardian's view of best interests diverge, the Wyoming court did require that the guardian ad litem present the child's wishes to the court and explain the disagreement.⁷⁹ As to confidentiality, the court again modified the traditional rules "to the extent that relevant information provided by the child may be brought to the [trial] court's attention."⁸⁰ Moreover, the attorney/guardian ad litem would also be obligated to tell the child that information may be provided to the court that would otherwise be protected. According to *Clark*, these modifications of the traditional ethical rules were necessary to carry out the dual roles of attorney and guardian ad litem.

In contrast, the court was less willing to compromise on the question of whether the attorney/guardian ad litem should be permitted to testify. As to that issue, the court held that an attorney/guardian ad litem may not be a fact witness at a custody hearing.⁸¹ In line with the policy underlying the ethical prohibition, the holding avoids the conflicts that might arise if the lawyer's credibility were at issue. At the same time, however, the court permitted the guardian to offer recommendations to the court in closing arguments based on the evidence received,⁸² an approach that is more consistent with the role of attorney but is

⁷⁸ *Id.* at 153 ("We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process.").

⁷⁹ *Id.* at 153-54.

⁸⁰ *Id.* at 154.

⁸¹ *Id.* Although the trial court erred in permitting the guardian ad litem to testify, the supreme court found ample support in the record for the trial court's conclusions as to the child's best interests and thus did not reverse the custody decree. *Id.* at 155.

⁸² *Id.* at 154.

itself troubling. By barring the guardian ad litem from testifying as a witness but still allowing her to make recommendations in closing arguments, the court may have opened the door to a separate due process problem.⁸³ The parent who is disfavored by the guardian ad litem's recommendation will not have the opportunity to cross-examine the guardian ad litem and will therefore be deprived of an important means of challenging the recommendation.⁸⁴

The Wyoming Supreme Court has subsequently fleshed out the duties expected of the hybrid attorney/guardian ad litem. According to the court, the two central admonitions of *Clark* are that the Rules of Professional Conduct, as modified, apply to the attorney/guardian ad litem, and the attorney/guardian ad litem may not appear as a fact witness.⁸⁵ The court went on to summarize the responsibilities inherent in the hybrid role, including comprehensive fact investigation, full presentation of evidence to the court, and development of recommendations based on the facts and expert testimony, if any. To at least partially address due process concerns, the court announced a prophylactic rule:

[The attorney/guardian ad litem] should communicate with the parents' counsel, preferably in writing, regarding the proposed recommendations sufficiently in advance of trial to allow them to prepare evidence in response to the recommendations. If the parties agree, those recommendations should be provided to the court prior to trial. . . . Finally, guardians ad litem should present their recommendations to the court in the form of closing argument and not through personal testimony.⁸⁶

Thus, Wyoming endorses a blend of responsibilities that acknowledges the dual roles performed by the attorney/guardian

⁸³ See Ducote, *supra* note 59, at 128-30 ("While the *Clark* court bars the GAL from serving as a fact witness, her role as an un-cross-examined, un-qualified expert witness appears intact.").

⁸⁴ The Wyoming court later rejected a due process challenge of just this nature. In *In the Interest of "H" Children*, 79 P.3d 997 (Wyo. 2003), the attorney/guardian ad litem in a child dependency proceeding had recommended that the juvenile court make a finding of child neglect. The mother argued that she had been denied due process of law because of the hybrid nature of her children's representative. The court rejected the argument, reasoning that the attorney/guardian ad litem remained within the boundaries set by *Clark*. *Id.* at 1004-08.

⁸⁵ *Pace v. Pace*, 22 P.3d 861, 868 (Wyo. 2001).

⁸⁶ *Id.* at 870.

ad litem, and the court's acceptance of the hybrid role seems driven by practical concerns about cost. For those who worry about the great weight that courts often place on guardian's recommendations and the lack of opportunity for cross examination, the Wyoming court's suggestion that the guardian ad litem should share her recommendations with the parties before trial may be a woefully inadequate safeguard.

On occasion, states have tried to address the conflicts within the hybrid role by statute. In Pennsylvania, for example, legislation requires courts to appoint attorneys as guardians ad litem to represent the best interests of children in child welfare cases.⁸⁷ The statute details the duties of the attorney/guardian ad litem and includes the duty to determine what the child wants if the child is old enough to speak. If the guardian ad litem believes the child has capacity, the statute requires the guardian to advocate the child's position as well as the guardian's position. Interestingly, the statute declares that "[a] difference between the child's wishes . . . and the recommendations [of the guardian ad litem] shall not be considered a conflict of interest for the guardian ad litem."⁸⁸ While the legislative declaration may protect the attorney/guardian ad litem from disciplinary action, it leaves the child's voice in a tenuous status. The court may never learn of the child's position if the guardian ad litem decides that the child lacks capacity to formulate a preference. Moreover, even if the guardian informs the court of the child's position, the weight that any court may give to the child's position will inevitably be diminished if the guardian ad litem argues a position contrary to the child's.⁸⁹

Michigan, on the other hand, requires the "lawyer-guardian ad litem" to inform the court of the child's wishes when they differ from the lawyer-guardian ad litem's determination of the child's interests.⁹⁰ Under the Michigan statute, the lawyer-guardian ad litem is an advocate for the child's interests but remains a lawyer who cannot be called to testify, whose files are not subject

⁸⁷ 42 PA. CONS. STAT. § 6311 (2004).

⁸⁸ *Id.* at 6311(b) (9).

⁸⁹ Michelle Markowitz, *Note, Is a Lawyer Who Represents the "Best Interests" Really the Best for Pennsylvania's Children?*, 64 U. PITT. L. REV. 615, 629-30 (2003).

⁹⁰ *See* MICH. COMP. LAWS ANN. § 712A.17(d) (West 2004).

to discovery, and who must act consistently with the attorney-client privilege. The appointment of a separate attorney for the child is left to the discretion of the court in light of “the child’s age and maturity and the nature of the inconsistency between the child’s and the lawyer-guardian ad litem’s identification of the child’s interests.”⁹¹ The Michigan statute thus clarifies the role of the lawyer-guardian ad litem and tries to provide guidance for that representative by requiring him or her to give due weight to the child’s stated preferences in light of the child’s age and maturity.

In some states, the ethical quandaries posed by the hybrid attorney/guardian ad litem model have been resolved differently, with courts or legislatures showing less willingness to endorse the hybrid role. In *Jacobsen v. Thomas*,⁹² for example, the Montana Supreme Court flatly declared that a guardian ad litem in a custody dispute “is not to act as an attorney.” Because the guardian was required by statute to testify in court concerning her investigation and be subject to cross-examination, the court reasoned that the guardian could not ethically function also as the attorney for the child. Similarly, in *In re Williams*,⁹³ the Ohio Supreme Court addressed the role of an attorney/guardian ad litem in a proceeding for termination of parental rights. Because the child was a party to the proceeding under Ohio law, the court held that the child had a right to independent counsel if the guardian’s recommendations conflicted with the child’s wishes.⁹⁴ Thus, rather than forcing a hybrid role on a single representative, Ohio respects the child’s voice by requiring the appointment of separate counsel to advocate the child’s wishes in cases of conflict.

In most states the appointment of a separate attorney for the child is discretionary rather than mandatory. In Utah, for example, in cases involving the custody or visitation of a minor, the “attorney guardian ad litem” must represent the best interests of the child, and, as in Pennsylvania, state law explicitly provides that a difference between the child’s wishes and the attorney’s determination of the child’s best interests is not sufficient to cre-

⁹¹ *Id.* § 712A.17(d) (2).

⁹² 100 P.3d 106, 111 (Mont. 2004).

⁹³ 805 N.E.2d 1110 (Ohio 2004).

⁹⁴ *Id.* at 1113-16.

ate a conflict of interest.⁹⁵ The Utah statute, however, requires the attorney/guardian ad litem to tell the court of the child's wishes and permits the court to appoint an attorney for the child.⁹⁶ Appointing separate counsel for the child does impose additional expense—one that is generally borne by the parents in divorce and custody cases. On the other hand, in some circumstances the cost may be justified by the benefit to the child and the court in having a separate advocate for the child's voice.

As can be seen, the hybrid role of attorney/guardian ad litem is not easily reconciled with the traditional ethical rules governing an attorney's conduct. Unless ethical guidelines can be fashioned to govern this widely-used model, lawyers and courts will continue to struggle to fit round pegs into square holes. In a few states, ethical rules have been promulgated to clarify the unique role of the attorney/guardian ad litem by providing that the lawyer functioning as guardian ad litem represents the child's best interests and not the child's wishes.⁹⁷ These additions to rules of professional conduct are a worthwhile but incomplete step. They define the responsibilities of the attorney/guardian ad litem for participants in the legal system, and they also provide a much-needed measure for determining whether the representative has carried out the role she has accepted.⁹⁸ At the same time, however, under such rules the wishes of the child may never be made known to the court. In effect, an attorney/guardian ad litem so defined may silence the child's voice as a means of protecting the child's interests.⁹⁹

⁹⁵ See UTAH CODE ANN. § 78-7-45 (2002).

⁹⁶ See *id.* at (4) (a).

⁹⁷ In Iowa, the Supreme Court modified the Rules of Professional Conduct to authorize guardians ad litem to advocate best interests in opposition to a child's wishes. In Wyoming, a recent proposed amendment to the Model Rules clarifies that the guardian ad litem is not bound by the client's preferences. See JENNIFER L. RENNE, *LEGAL ETHICS IN CHILD WELFARE CASES*, 85 (2004). Similarly, in Wisconsin, the Wisconsin Ethics 2000 Committee has proposed adding a guardian ad litem rule providing that a lawyer appointed as guardian ad litem represents the child's best interests. See Hannah C. Dugan, *GAL Professional Conduct*, 77 WIS. LAW. 40 (Dec. 2004).

⁹⁸ See Dugan, *supra* note 96 (explaining that professional conduct rules are particularly necessary to monitor the guardian ad litem's conduct, in light of a guardian's quasi-judicial immunity from tort liability).

⁹⁹ Significantly, courts are more likely to grant immunity to a child's representative whose primary function is to protect the child's best interests than

B. *The Client-Directed Model*

A lawyer who is appointed as attorney for the child—to represent the child’s wishes—also may encounter ethical tensions simply by virtue of the client’s status as a child. Children’s advocates contend that children are owed the same duties of loyalty, confidentiality, and zealous representation from their lawyers as are adults—with a just a few modifications.¹⁰⁰ Within the normal lawyer-client relationship, the lawyer assumes that the client can make decisions about important matters. When the client is a child, the client may be able to formulate objectives as to certain matters and not as to others. As a matter of practical reality, the older the child, the more the lawyer-client relationship will resemble that between an attorney and a competent adult client.¹⁰¹ For the many children who are verbal but still far from adulthood, the lawyer may conclude that the child’s wishes are clearly counter to the child’s best interests and may be uncomfortable advocating the child’s preferences to a court. In that scenario, the lawyer’s ethical duties are unclear.

Several options are possible, and each has their proponents. The lawyer can inform the court of the child’s wishes and either implicitly or explicitly communicate the lawyer’s disagreement to the court. In this manner, the lawyer would be acting on behalf of the child’s best interests, similar to the role of a guardian ad litem. Alternatively, the lawyer can continue to advocate the child’s wishes but also seek the appointment of a guardian ad litem.¹⁰²

to a representative whose function is to advocate the child’s wishes. *See, e.g., Carruba v. Moskowitz*, 877 A.2d 773 (Conn. 2005)(child’s attorney entitled to absolute immunity in malpractice action where overarching goal of attorney’s representation was to secure best interests of child rather than advocate child’s wishes).

¹⁰⁰ HARALAMBIE, *supra* note 2, at 12.

¹⁰¹ For a very young or pre-verbal child, the client-directed lawyer model may simply be unworkable because the child is not capable of directing a lawyer in any sense. For those children, attorneys typically operate in a guardian ad litem “best interests” capacity. A debate exists as to whether lawyers should have any role in representing such children. *See infra* notes 118-32 and accompanying text.

¹⁰² HARALAMBIE, *supra* note 2, at 34-35. The latter alternative is recommended by Haralambie and is the required ethical response according to at least one ethics opinion. *See Ariz. Ethics Op. No. 86-13* (1986).

Some children's counsel have argued that a lawyer who has been appointed attorney for the child should remain in that role rather than sabotage the client by arguing against the client's wishes.¹⁰³ Mindful of the vulnerability of the child, these advocates endorse the appointment of a separate guardian ad litem to present information to the court regarding the child's best interests. A difficult issue in that context is whether an attorney for the child may divulge client confidences to alert the court or the guardian ad litem to the risk of harm to the child. The new Model Rules provide a framework by analogy. When an adult client's capacity is impaired, Model Rule 1.14 permits the lawyer to take protective action, including asking for the appointment of a guardian ad litem, if the client is at risk of substantial harm.¹⁰⁴ At the same time, the Rule requires that the lawyer maintain as normal a lawyer-client relationship as possible.¹⁰⁵ This includes the obligation to respect client confidentiality. The lawyer for the impaired client, however, is impliedly authorized under Model Rule 1.6(a) to reveal information about the client to the extent necessary to protect the client's interests.¹⁰⁶ Moreover, the lawyer for the adult client may reveal client confidences when necessary to prevent serious injury or death. Although the rule was drafted to prevent harm to third parties and not the client, it makes sense to provide the limited inroad on client confidentiality to prevent serious harm to children. Thus, children's attorneys can fulfill their ethical responsibilities by continuing to function as an independent representative for the child's voice while still taking measures to protect the child from the risks of harmful choices.

Experienced child advocates have also emphasized that the lawyer's counseling function can be of enormous importance in helping a child understand the consequences of unreasonable

¹⁰³ HARALAMBIE, *supra* note 2, at 13.

¹⁰⁴ MODEL RULE 1.14(b) provides:

when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action including . . . in appropriate cases, seeking the appointment of a guardian ad litem . . . MODEL RULE 1.14(b).

¹⁰⁵ MODEL RULE 1.14(a).

¹⁰⁶ MODEL RULE 1.6(a).

choices.¹⁰⁷ Professor Jean Koh Peters urges lawyers to build relationships with their child clients so that decisions made by the lawyer in the course of the representation are tailored to the individual child. She would like to move beyond the debate between the two competing models of child representation. The child's attorney, according to Peters, "whether assigned to represent a child's wishes or her best interests, must ground her representation in a thickly textured understanding of the child's world and the child's point of view."¹⁰⁸ On the other hand, the unique impressionability of children means that lawyers may override the will of their child clients more easily than that of adult clients. Thus, many child advocates have cautioned that lawyers should be careful not to silence a child's individual voice through the guise of "counseling."¹⁰⁹

A final ethical quandary involves the representation of a very young or pre-verbal child. Unlike the impaired adult client who may have established an identity that can serve as a guide for an attorney, the very young child client may offer only a blank slate with no historical framework for the exercise of substituted judgment.¹¹⁰ In that circumstance, traditional ethical rules offer little guidance. Child advocates passionately disagree over whether the lawyer should try to advocate a position that will best serve the child's interests or refrain from advocating any position whatsoever when the child is incapable of directing the representation. Framed most simply, those who favor the concept of a best interests lawyer insist that even the youngest children deserve an advocate or champion in a proceeding directly

¹⁰⁷ HARALAMBIE, *supra* note 2, at 32 (attorney should explain, commensurate with the child's ability to understand, why the child's position is untenable); PETERS, *supra* note 2, at 85-86 (lawyer and child should make decisions together after full counseling).

¹⁰⁸ PETERS, *supra* note 2, at 50.

¹⁰⁹ See, e.g., *id.* at 349 ("Because children are even more likely than adults to be cowed by a lawyer's strong recommendation, the lawyer must approach a child client's choice with particular restraint."); Ramsey, *supra* note 2, at 321-23 (child's lawyer must be sensitive to risk of exercising too much control over client and usurping client's authority).

¹¹⁰ See Guggenheim, *supra* note 2, at 1400-01.

affecting their welfare.¹¹¹ In contrast, other child advocates believe that “best interests lawyers” lack the necessary expertise to assess and evaluate a child’s welfare and will base their advocacy on subjective bias and unconstrained discretion. Instead, the lawyer’s role should be to minimize the harm to the child and ensure that the child’s legal rights are protected.¹¹² In their view, a qualified guardian ad litem can protect the child and can, if necessary, be represented by counsel to ensure the full presentation of evidence. As will be seen in the next section, the debate has shaped the competing proposals for standards governing children’s representatives.

III. The Competing Proposals from the AAML, ABA, NACC, and ALI

The ongoing debate over the proper role for children’s representatives has informed the competing proposals from various professional groups in recent years.¹¹³ The driving force behind each of the models is the recognition that the lack of clear standards for children’s representatives ultimately hurts children. Nevertheless, although the models share a common goal of advancing the welfare of children, they take contrasting approaches to achieving that goal.

¹¹¹ See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 J. AM. ACAD. MATRIMONIAL LAW. 57 (1995).

¹¹² See Guggenheim, *supra* note 2, at 1430-31; Comment, Standard 2.7, 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 Custody Standards*].

¹¹³ See *AAML Custody Standards*, *supra* note 112; American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995) [hereinafter *ABA Abuse and Neglect Standards*]; National Association of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1996) [hereinafter *NACC Revised Version*]; American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 126, 129 (2003) (*ABA Custody Standards*); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002) [hereinafter *ALI PRINCIPLES*].

In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards for lawyers representing children in custody and visitation disputes. The standards were the result of a deliberative process within the AAML, but they also show the thoughtful influence of the reporter, Professor Martin Guggenheim.¹¹⁴ The AAML Standards begin by emphasizing that the appointment of a representative for a child in a custody dispute ought to be a rarity. Recognizing that children's lawyers and guardians ad litem could easily exacerbate the adversarial atmosphere as well as the cost of divorce litigation, the AAML recommends that courts make specific findings in any case as to why an appointment is appropriate.¹¹⁵ Assuming an appointment is warranted, the role of a lawyer under the AAML guidelines largely depends on whether the child is "impaired" or "unimpaired." Significantly, the standards provide that children aged twelve or older are presumptively unimpaired—that is, capable of directing a lawyer—and children younger than twelve are presumptive impaired.¹¹⁶ The role of a lawyer for an "unimpaired" child closely parallels the role of a lawyer for an unimpaired adult client¹¹⁷—the lawyer must zealously pursue his or her client's objectives and otherwise maintain an ordinary lawyer-client relationship.¹¹⁸ According to the AAML model, the only permissible divergence from the client's goals is when the lawyer considers the client's

¹¹⁴ In an early article, Professor Guggenheim proposed a somewhat similar scheme for the representation of children. See Guggenheim, *The Right to Be Represented But Not Heard*, *supra* note 44 (suggesting that children over age of seven should be deemed responsible for directing their attorneys and that younger children should be deemed incapable). He revised his thinking later to link the role of the child's lawyer to the particular legal context involved, focusing on the rights afforded to the child in various areas of the law. See *supra* note 44.

¹¹⁵ Standard 1.1, *AAML Custody Standards*, *supra* note 112. The Comment explains that appointments might be appropriate where the evidence is inadequate because of exceptional acrimony between the parties or other circumstances.

¹¹⁶ *Id.* at Standard 2.2.

¹¹⁷ *Id.* at Standard 2.3. The only variation in role that is linked to the client's status as a child is the requirement that counsel try to expedite the proceedings and encourage settlement to protect the child from the harm that is caused by the litigation itself. See Standard 2.6.

¹¹⁸ *Id.* at Standard 2.4 (lawyer should counsel child but lawyer must seek to attain child's objectives, even if unwise).

goals to be “repugnant or imprudent.” In that event, the lawyer may seek to withdraw.¹¹⁹ Thus, the Standards seem to reject any form of substituted judgment for child clients that is not available for adult clients.

In contrast, for the representation of impaired children—children incapable of directing a lawyer because of age, immaturity, or other cause—the AAML prescribes a very narrow role for lawyers. The lawyer for the impaired child is not to advocate a position on the outcome of the proceeding or on contested issues but is to merely develop facts that the decision-maker should consider.¹²⁰ In the AAML’s view, “[t]he most serious threat to the rule of law posed by the assignment of counsel for children is 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.”¹²¹ The AAML thus rejects an approach that would give attorneys for impaired children the unfettered power to advocate a result they prefer in the guise of beneficence. In lieu of the traditional advocate’s role, the AAML has tried to define an objective alternative role of presenter of evidence and counselor.¹²²

The AAML also included standards for guardians ad litem. In a move that breaks with the majority approach across the United States, the AAML Standards reject the hybrid attorney/guardian ad litem model, reasoning that the two roles are fundamentally inconsistent.¹²³ Moreover, even for the non-attorney guardian ad litem, the AAML Standards prohibit the guardian from making recommendations on contested issues.¹²⁴ This bar

¹¹⁹ *Id.* at Standard 2.4, Comment. The AAML relied on former MODEL RULE 1.16(b), MODEL RULES OF PROFESSIONAL CONDUCT, for this “escape.”

¹²⁰ *Id.* at Standard 2.12.

¹²¹ *Id.* at Standard 2.7, Comment.

¹²² The lawyer for the impaired child remains a lawyer and therefore should “maintain a normal attorney-client relationship” to the greatest extent feasible. *See id.* at Standard 2.8.

¹²³ *Id.* at Standard 3.1. The Comment explains that the hybrid arrangement is unacceptable because the attorney/guardian ad litem functions as an attorney to advocate positions held by the guardian – in effect making decisions for the child.

¹²⁴ *Id.* at Standard 3.2. The rationale for this limitation is apparent in the Comment: “Guardians ad litem can be useful in these proceedings but they should not be encouraged to permit their own ideas about child rearing or children’s best interests to make a difference in how the case is decided.”

reflects the AAML's opposition to unconstrained discretion. It also derives from the organization's sense that judges too often defer to the "independent" best interests assessment.

As others have noted, the AAML's goal of eliminating a lawyer's subjectivity may be unrealistic. Even in the circumscribed role for lawyers that the AAML Standards envision, a lawyer's decision making about which facts to bring to the court's attention and which facts to emphasize will inevitably involve preliminary judgments about the merits of the case. More fundamentally, the AAML approach leaves the younger child without a legal advocate. As Ann Haralambie put it, "the diminished role of attorneys for 'impaired' children . . . deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney."¹²⁵

Contemporaneous with the AAML's consideration of its Custody Standards, the Family Law Section of the American Bar Association proposed a set of Standards for children's lawyers in abuse and neglect cases,¹²⁶ agreeing with the AAML on certain fundamental themes but taking a different approach on several questions. Of course, the legal context for each set of standards is different and gives rise to differences regarding the appointment of any representative. Indeed, the ABA recommends that a lawyer be appointed for every child in an abuse and neglect proceeding, a view endorsed by other child advocacy groups.¹²⁷ Like the AAML, the ABA recognizes that the lack of standards for children's lawyers seriously harms the quality of children's representation, and both groups recommend that states establish guidelines to improve the professional competence and performance of children's lawyers.¹²⁸ The points of disagreement between the AAML and the ABA concern the role of the lawyer for the child. Unlike the AAML Custody Standards, the ABA Abuse and Neglect Standards reject the idea that children of cer-

¹²⁵ Haralambie & Glaser, *supra* note 111, at 57.

¹²⁶ *ABA Abuse and Neglect Standards*, *supra* note 113.

¹²⁷ *See id.*, Preface.

¹²⁸ *See AAML Custody Standards*, *supra* note 112, at Introduction (stating that the Standards are designed to achieve more effective representation for children); Preface, *ABA Abuse and Neglect Standards*, *supra* note 113 (observing that the Standards are intended to improve the quality of legal representation for children).

tain ages are “impaired” or “incompetent.” Instead, the Standards take the position that a child’s disability from immaturity is “contextual, incremental, and may be intermittent.”¹²⁹ Thus, a child may be capable of directing counsel for some issues in a case and not others, depending on the circumstances of the child and the issue in question. Under the ABA approach, a global determination of a child’s competency to direct counsel or an absolute age limitation would deprive children of the opportunity to contribute to a determination of their position.¹³⁰

To the extent that a child is able to direct counsel, the ABA Standards parallel the AAML Standards by instructing the attorney generally to advocate the child’s expressed preferences throughout the litigation.¹³¹ Also, the ABA Abuse and Neglect Standards similarly address the problem presented when a child’s wishes pose a risk of serious harm. Going into greater detail than the AAML, the ABA Standards permit the lawyer to request appointment of a guardian ad litem and continue to represent the child’s expressed preferences, unless the child’s position is prohibited by law or without any factual foundation.¹³² In this regard, lawyers are encouraged to counsel a child about why particular choices may be dangerous or unattainable under the law.¹³³

The ABA departs most clearly from the AAML with respect to the child who cannot or does not express a position as to a particular issue. In that circumstance, the ABA Standards instruct the lawyer to continue to represent the child’s “legal interests” while also permitting the lawyer to request the appointment of a guardian ad litem.¹³⁴ “Legal interests,” in turn, are to be determined with reference to “objective criteria” established by law, based on the child’s needs and interests and not merely the lawyer’s personal values and experiences.¹³⁵ Thus, the ABA Standards envision a role for legal counsel even for the pre-ver-

¹²⁹ *ABA Abuse and Neglect Standards*, *supra* note 113, at Standard B-3, Comment.

¹³⁰ For a thoughtful framework for determining children’s competency to direct counsel, see Ramsey, *supra* note 2.

¹³¹ *Id.* at Standard B-4.

¹³² *Id.* at Standard B-4(3).

¹³³ *Id.*, Comment.

¹³⁴ *Id.* at Standard B-4(1), (2).

¹³⁵ *Id.* at Standard B-5 and Comment.

bal child. The commentary reveals a concern, similar to that of the AAML, about the risk of lawyers' acting on personal bias, but the ABA's approach is to constrain lawyers by limiting their advocacy role, not by eliminating that role altogether.

The ABA Standards differ from the AAML approach in another important respect. The ABA Standards accept, albeit reluctantly, the attorney/guardian ad litem model. A lawyer appointed as guardian ad litem is "appointed to protect the child's interests without being bound by the child's expressed preferences."¹³⁶ At the same time, the ABA Standards recognize the problematic nature of the dual role and express a clear preference for appointments of a child's attorney. Under the Standards, if there is a conflict in the role of guardian ad litem and child's attorney—such as where the child's expressed wishes differ from what the lawyer believes to be in the child's best interests—the lawyer is directed to continue to perform as the child's attorney and withdraw as guardian ad litem.¹³⁷ The philosophy of the ABA Standards is that a child has a right to confidentiality and advocacy of his or her position, and that the child's attorney should never abandon this role.¹³⁸

Interestingly, the National Association of Counsel for Children ("NACC") adopted the ABA Abuse and Neglect Standards in 1996 but expressed reservations as to the Standard imposing a duty on the child's lawyer to advocate the child's wishes throughout the litigation. Drawing on the work of Professor Peters and the Fordham conference,¹³⁹ the NACC tried to achieve an appro-

¹³⁶ *Id.* at Standard A-2.

¹³⁷ *Id.* at Standard B-2(1).

¹³⁸ *Id.*, Comment.

¹³⁹ A conference on Ethical Issues in the Legal Representation of Children was held at Fordham Law School in 1996. This conference examined the principles set out in the standards proposed by the ABA and, under the leadership of Professor Jean Koh Peters, offered various refinements. See *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference*, 64 *FORDHAM L. REV.* 1301 (1996) (recommending that an attorney must follow a child's expressed preferences and attempt to discern the child's wishes in context in developmentally appropriate ways if the child is incapable of expressing a viewpoint). The conference also generated an entire volume of scholarship on the subject. See Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1281-2132 (1996).

priate blend of the values of autonomy and beneficence. As NACC Executive Director Marvin Ventrell has explained, the NACC aimed for a “delicate representation balance between zealous attorney advocacy and child protection”¹⁴⁰ by emphasizing the counseling function of the child’s lawyer.¹⁴¹ Under the NACC Revised Version, the child’s attorney does not owe “robotic allegiance” to each directive of the child. Instead, the child’s lawyer may exercise a degree of substituted judgment to present a position that will serve the child’s interests when the child cannot meaningfully participate in the formulation of the client’s position.¹⁴² Fully aware of the problems of unconstrained bias and subjectivity, the NACC Revised Version requires the child’s lawyer to adhere to objective criteria in the determination of the child’s interests.¹⁴³

The American Law Institute (“ALI”) added its views with the publication of the Principles of the Law of Family Dissolution in 2002.¹⁴⁴ The ALI recommends that courts be given broad discretion in private custody disputes to appoint either a guardian with investigatory or advocacy capacity or a lawyer for the child if the child is competent to direct the terms of the representation.¹⁴⁵ Like the AAML, the ALI Principles caution against unnecessary appointments of counsel for children, since an advocate can create “undesirable and inappropriate intrusions on the authority of parents.”¹⁴⁶ The ALI also shares the AAML position that a court should appoint a lawyer for a child “only if the

¹⁴⁰ Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children’s Law Manual Series (1999).

¹⁴¹ *NACC Revised Version*, *supra* note 113, Standard B-4

¹⁴² *Id.* at Standard B-4 (2).

¹⁴³ The criteria include a full investigation of the child’s circumstances, an individualized assessment of the child at the moment of the determination, consideration of the child welfare paradigms of psychological parent and family network, and the use of experts. *See id.* These criteria were drawn from Jean Koh Peters, *The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1507 (1996).

¹⁴⁴ ALI PRINCIPLES, *supra* note 113, at § 2.13.

¹⁴⁵ *Id.* at § 2.13, at 316. For an argument that appointment of independent counsel for children ought to be mandatory in high conflict divorces, see Catherine Ross, *From Vulnerability to Voice: Appointing Counsel For Children In Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1579 (1996).

¹⁴⁶ *Id.* at Comment b, at 317.

court finds that the child is competent to direct the terms of the representation.”¹⁴⁷ Under the ALI approach, however, a child may be competent but “impaired,” permitting the lawyer to continue to represent the child while taking protective measures.¹⁴⁸

Most recently, the ABA itself adopted practice standards for children’s lawyers in custody disputes.¹⁴⁹ Like the AAML, the ABA recognizes that not all custody disputes require the appointment of a representative for a child, but the ABA Custody Standards are decidedly more positive about the usefulness of children’s lawyers.¹⁵⁰ Significantly, the ABA Standards recognize two categories of lawyers for children: the “child’s attorney,” who is in a traditional attorney-client relationship with the child, and the non-traditional “best interests attorney,” who represents the child’s best interests as a lawyer.¹⁵¹ In either capacity, the Standards take the view that a lawyer should remain a lawyer, whether representing a child’s directives or a child’s best interests. Thus, neither lawyer may serve as a witness.¹⁵² The ABA Custody Standards, like the AAML Custody Standards, reject the dual role attorney/guardian ad litem because of the inherent conflicts in that hybrid category and the ambiguity surrounding the term “guardian ad litem.”¹⁵³

In setting out the duties of the child’s attorney, the ABA Custody Standards endorse the view embodied in the earlier Abuse and Neglect Standards—that a child’s capacity to direct representation is “contextual, incremental, and may be intermit-

¹⁴⁷ *Id.* at Comment e, at 319.

¹⁴⁸ *Id.*

¹⁴⁹ See *ABA Custody Standards*, *supra* note 113. The process of “collaboration, compromise, and consensus building” that led to the Standards is described by the Reporter, Linda D. Elrod, in *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 *FAM. L.Q.* 105, 107-14 (2003).

¹⁵⁰ In particular, the Commentary suggests that children’s lawyers can provide a child-focused framing of the issues to ensure more informed decision making by courts. Also, children’s lawyers can help protect children from collateral damage from litigation. See *id.* at Standard VI. 2. and Commentary.

¹⁵¹ *Id.* at Standard II(B). Under the Standard, the best interests attorney “provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.”

¹⁵² *Id.* at Standard II. B., Commentary.

¹⁵³ See Elrod, *supra* note 148, at 115-17.

tent.”¹⁵⁴ Similar to the Abuse and Neglect Standards, the Custody Standards provide that the child’s attorney should advocate the child’s objectives within ordinary ethical parameters. If a child’s wishes would put the child at risk of substantial harm, the ABA Custody Standards permit the child’s attorney to request the appointment of a best interests attorney while still observing client confidentiality.¹⁵⁵ Moreover, if there is substantial danger of injury or death, the child’s attorney should take the minimum steps necessary to ensure the child’s safety even if that means disclosing client confidences.¹⁵⁶ At the same time, the child’s attorney may continue to advocate the child’s wishes unless they are not grounded in fact or warranted by law.¹⁵⁷ As with the Abuse and Neglect Standards, the Custody Standards emphasize that most ethical conflicts can be avoided through the lawyer’s counseling function.¹⁵⁸

The non-traditional “best interests attorney” may be the most controversial feature of the ABA Custody Standards. This representative investigates and advocates the child’s best interests without being bound by the child’s wishes. In an effort to constrain the lawyer’s personal biases, the Standards require the best interests attorney to use “objective criteria set forth in the

¹⁵⁴ *ABA Custody Standards*, *supra* note 113, at Standard C. 1., Commentary.

¹⁵⁵ *See id.* at Standard C. 3. This controversial Standard provides:

If the Child’s Attorney determines that pursuing the child’s expressed objective would put the child at risk of substantial physical, financial, or other harm, and is not merely contrary to the lawyer’s opinion of the child’s interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child’s expressed position, unless the child’s position is prohibited by law or without any factual foundation.

The Child’s Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child’s position, unless such disclosure is authorized by ethics rule on confidentiality that is in force in the state.

In the structure of the Standard, the ABA has tracked the guidelines of Model Rule 1.14 on clients with diminished capacity.

¹⁵⁶ *Id.* at Standard C. 3., Commentary (explaining that this exception to client confidentiality is consistent with Model Rules 1.14 and 1.6(a)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

law related to the purposes of the proceeding.”¹⁵⁹ The Commentary states that determining a child’s best interests is “a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them.” The hope is that the determination will be child-specific, based on the child’s individual needs in the context of the relevant law. In another break from the traditional role of attorney, the best interests attorney is authorized under the Standards to use the child’s confidences without disclosing them.¹⁶⁰ Importantly, best interests attorneys must explain their role to their child-clients, including the possibility of using information received from the child.¹⁶¹

The ABA Custody Standards contrast sharply with the earlier AAML Custody Standards, and good arguments exist to support each approach. The AAML Standards may be more consistent with the traditional lawyer-client relationship by ensuring that children’s lawyers advocate only the objectives expressed by their clients. When clients are “impaired” and incapable of directing the representation, the AAML limits the lawyer to a non-advocacy role. By such constraints, the AAML seeks to prevent courts from relying on the biased and subjective recommendations from counsel as to a child’s best interests. The novel “best interests attorney” introduced in the ABA Custody Standards allows lawyers to engage in legal advocacy without being bound by their client’s wishes. Moreover, under the ABA Custody Standards, it is possible to have two attorneys appointed for the same child—potentially advocating for different outcomes. Very few courts or litigants would welcome the prospect of a costly dual appointment for a child in private divorce litigation.

On balance, however, the ABA Custody Standards have much to recommend them. The Standards recognize that giving meaning to the voice of the child may require not only presentation of facts by a lawyer but also legal advocacy. The young pre-verbal client caught in a bitter custody contest deserves more than a fact investigator. Since the other parties in the litigation can advocate their positions directly or through counsel, under

¹⁵⁹ *Id.* at Standard V. F.

¹⁶⁰ *Id.* at Standard V. B.

¹⁶¹ *Id.* at Standard V. D.

the AAML approach only the child is left without a voice.¹⁶² The ABA's best interests lawyer, having formed a relationship with the child-client and investigated the facts of the case, is in a unique position to organize and interpret the evidence and to advocate for a particular resolution, according to objective criteria. In contrast, the AAML approach is unlikely to accomplish the desired result of eliminating subjective advocacy by lawyers for impaired children, since subjectivity and bias can surely operate even where lawyers are merely presenting evidence. Moreover, the "novelty" of the best interests lawyer is questionable. For years, lawyers for children have advocated for their clients' best interests and have not seen themselves as bound by their clients' expressed directives.¹⁶³ To the extent that the ABA Custody Standards are innovative, it is in clearly defining the best interests lawyer's responsibilities and distinguishing the lawyer's role from that of a guardian ad litem. Also, if the ABA's "best interests attorney" operates in a non-traditional role, the muffled lawyer for the impaired child under the AAML's approach is equally unusual.

If the AAML guidelines are driven by the fear of excessive deference to children's lawyers, the remedy would seem to be in educating judges, not in eliminating the advocacy function of lawyers.¹⁶⁴ The court is the ultimate decision maker and should never rely exclusively on the position of either the child's attorney or best interests attorney. In short, although the role of counsel may vary depending on the developmental level of the child and other factors, the ABA's Custody Standards rest on the solid premise that legal representation for children can help courts achieve accurate, informed, and sensitive assessments of the child's wishes and circumstances.¹⁶⁵

¹⁶² See Haralambie & Glaser, *supra* note 111, at 93.

¹⁶³ See, e.g., Ramsey, *supra* note 2, at 320-21 (noting that children's lawyers had operated historically in a paternalistic manner to protect their child-clients' best interests and recommending that lawyers redefine their roles toward greater advocacy of their clients' wishes).

¹⁶⁴ See Haralambie & Glaser, *supra* note 111, at 92-93.

¹⁶⁵ In the interest of full disclosure, the current draft of the proposed Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act, for which this author is the reporter, largely integrates the principles underlying the ABA Abuse and Neglect Standards and the ABA Custody Standards. The current draft is available at www.nccusl.org.

IV. Conclusion

Defining appropriate standards for children's representatives poses difficult questions of policy and ethical responsibility, and the answers that have been provided in court decisions, statutes, and model standards vary markedly. Nevertheless, the proverbial "laboratory" of experimentation provided by the fifty states is always a valuable resource. Some closing thoughts on the relative merits of existing and proposed approaches may be helpful.

First, context matters. The nature of the legal proceeding in which the child is involved and the child's legal rights within that proceeding should inform a court's decision whether to appoint a representative for the child. The appointment of representatives for children in private custody disputes, for example, properly remains a discretionary matter under the law of most states and under the standards proposed by both the AAML and the ABA. In contrast, the mandatory appointment of legal counsel for every child involved in abuse and neglect proceedings is an ideal, partially driven by CAPTA,¹⁶⁶ that is gradually becoming the norm across the nation. The profound impact that a child protective proceeding may have on the life of a child warrants the appointment of legal counsel, at public expense, to ensure informed and sensitive decision-making.

Second, children are vulnerable yet deserving of respect, and the value to the child of having a lawyer advocate his or her wishes should not be underestimated. In the introductory fact pattern, the lawyer for the child finally chose to follow her five-year-old client's directions but also asked the court to appoint a guardian ad litem without revealing the nature of her concerns to the court. The lawyer's strong sense that she should not betray the trust of her vulnerable, traumatized client persuaded her to advocate for his expressed objective. Although most people would consider a five-year-old much too young to direct representation, the lawyer had developed a "thickly textured understanding"¹⁶⁷ of that particular child's world and felt obligated to champion the child's viewpoint. At the same time, the lawyer took precautionary measures to protect the child. In this man-

¹⁶⁶ See notes 17-24 *supra* and accompanying text.

¹⁶⁷ See PETERS, *supra* note 2, at 50.

ner, the lawyer tried to ensure that the judge would consider the child's strong desire to return home, as well as facts weighing against a return, in the ultimate disposition. In contrast, under an age-based presumption such as that recommended by the AAML and others,¹⁶⁸ the lawyer would be unlikely to advocate for the child's wishes. Instead, she would be relegated to the role of investigator and monitor. Even in that constrained mode, however, the lawyer might work against the child's stated objectives by shading the introduction of evidence to block the child's return. From the child's perspective, a lawyer's failure to advocate his views might be one more betrayal by the adult world, one more insult to dignity. Although the AAML's age-linked presumption would lend certainty and predictability to the representative's role, it would likely exclude many children who are capable of directing at least some aspect of their representation. Moreover, even where a client-directed model is inappropriate, guidelines ought to require the child's representative—whether a best interests lawyer or a guardian ad litem—to communicate the child's views to the court unless the child objects. Otherwise, the voice of the person whose welfare is most at stake is effectively silenced.

Third, even very young children who cannot direct a lawyer in any sense still deserve a legal advocate under certain circumstances. Decision-makers look to children's representatives for guidance, and it seems both unrealistic and misguided to bar lawyers for young children from advocating a particular resolution for their clients. Moreover, the development of objective criteria to guide the determination of a child's best interests can help reduce the risk of unconstrained discretion (on the part of both best interests lawyers and guardians ad litem).

Fourth, the widespread use of the hybrid attorney/guardian ad litem model is inherently problematic. The range of responses to the ethical tensions within that hybrid role shows that there is

¹⁶⁸ The AAML Custody Standards do not apply to abuse and neglect proceedings, but the use of the child's age as a proxy for capacity can be found in the statutory law of a few states in the abuse and neglect context. *See, e.g.*, WASH. REV. CODE. ANN. § 13.34 (West 2004) (child twelve years of age or older may request legal counsel rather than guardian ad litem); WIS. STAT. ANN. § 48.23 (2004) (child twelve years of age or older entitled to legal counsel while younger child entitled to attorney/guardian ad litem).

no easy resolution. Instead, the better approach seems to be a separation of the function of attorney from that of guardian ad litem—a position that has been endorsed by a few states and by both the AAML and the ABA. On the other hand, if the attorney/guardian ad litem is retained as an essential (or economically efficient) means of serving children's interests, then rules of professional conduct need to be developed to govern the conduct of such representatives in their attorney capacity.

Child advocacy is a growing field of law and is receiving more attention today than ever before.¹⁶⁹ Across the nation, a consensus exists that children deserve better quality representation, whether by attorneys, guardians ad litem, or the dual attorney/guardian ad litem model. State legislatures, courts, and bar associations could bring much needed clarity to this area by adopting standards of practice. At this point in time they have a number of different models from which to choose, each resting on legitimate policy choices. While many heartfelt disagreements exist among law reformers, there is no doubt that the law governing children's representatives is being "reformed." Children can only benefit from the ongoing efforts to improve the performance of those who speak for them.

¹⁶⁹ See generally Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005) (describing children's law as emerging legal specialty, with marked increase in professional organizations, development of standards of practice, and law school curricular offerings).