



Copyright (c) 2000 American Bar Association  
Family Law Quarterly

Fall, 2000

*34 Fam. L.Q. 441*

**LENGTH:** 11122 words

NEW PERSPECTIVES ON CHILD PROTECTION

LEGAL REPRESENTATION FOR CHILDREN IN PROTECTION PROCEEDINGS: TWO DISTINCT LAWYER ROLES ARE REQUIRED

Donald N. Duquette \*

\* Clinical Professor of Law and Director, Child Advocacy Law Clinic, University of Michigan Law School.

**TEXT:**

**[\*441] I. Introduction**

The thesis of this article is that it is a mistake to try to develop a single lawyer role for children in protection cases which tries to accommodate their developing capacities from infants to articulate teens. Sometimes a child needs a traditional attorney; sometimes a best interests advocate. We should adopt different standards for the different lawyer roles. Trying to define a single lawyer role for children of all ages and all capacities is an impossible task. This article argues that we should resolve the ambivalence *not* by adopting a *client-directed* or a *best interests* approach, but by having two sets of standards--one for the client-directed attorney role and one for a best interests guardian ad litem (GAL). Both roles should be clearly established, aggressive, active, and the court should appoint either one or the other, or both, under certain circumstances as set out in law. Legal principles can guide the GAL's best interests determination to limit the unrestrained discretion so properly complained about by legal scholars. This article criticizes the current *client-directed* models because they contain within themselves the sort of unrestrained and unreviewed discretion that the proponents complain about in the best interests model.

State courts nearly always appoint a separate legal representative of the child in child protection cases where parents are accused of child abuse or neglect. n1 Federal law requires the appointment of a *guardian* [\*442] *ad litem* to represent the *best interests* of the child in child abuse and neglect court cases as a condition to a state's receiving federal child welfare funds. n2 Nearly all states require appointment of a best interests GAL. n3

n1 SHIRLEY A. DOBBIN ET AL., CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (1998); *see also* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 30 (1997). I would like to thank Clinical Professor Jean Koh Peters of Yale Law School for her

masterful and insightful book. Professor Peters not only articulates a vision for the legal representation of children, but she also gathers together the relevant scholarly literature and state laws. She hopes that her work might be useful to other scholars in the area; it certainly has been of critical help to me.

n2 Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a (b)(A)(ix) (West Supp. 2000). The *guardian ad litem* may or may not be a lawyer.

n3 A 1998 survey by the National Council of Juvenile and Family Court Judges determined that 40 states appoint counsel for children in child abuse and neglect cases. In 30 states an "attorney-guardian ad litem" is typically appointed who serves a dual function of representing both the best interests and the wishes of the child. In the ten other states that appoint counsel for a child, a guardian ad litem is appointed in addition to the attorney so that the attorneys perform the single role of representing the child (i.e., the child's wishes). In ten states the NCJFCJ reported that an attorney is usually *not* appointed for the child but in nine of those states a non-attorney guardian ad litem is appointed for the child. DOBBIN ET AL., *supra* note 1.

The great weight of academic and professional opinion, however, falls on the side of requiring the child's lawyer to be *client-directed*. That is, the lawyer for the child would advocate the *wishes* of a competent, generally older child, but should *not* advocate for the lawyer's view of the best interests of the impaired younger child. One premise of the client-directed model is that lawyers lack sufficient training and expertise to make some of the decisions required in these cases, and thus exercise too much discretion in the lives of their young clients. In this view, lawyers should not be trusted to represent the best interests of the young impaired child because the lawyer, without the discipline of a client's direction, will merely substitute the lawyer's values for those of the child. n4 In February 1996, consistent with the view that lawyers should be discouraged from representing the "best interests of the child," the American Bar Association (ABA) adopted *Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases* (ABA Standards). The ABA Standards express a clear preference in favor of appointing an "attorney" for the child, as opposed to a GAL, and includes a recommendation that the child's attorney "should represent the child's expressed preferences and follow the child's direction throughout the course of the litigation." n5 Similarly, the influential *Conference [\*443] on Ethical Issues in the Legal Representation of Children*, held in December 1995 at Fordham University School of Law, also recommended against a lawyer serving as the child's GAL, i.e., as advocate for the child's best interests (hereinafter Fordham Recommendations). The Fordham Recommendations are also based on the premise that lawyers currently exercise too much discretion on behalf of their clients in determining "best interests," and that there are currently few principles to guide their choices among the myriad of possible outcomes for their clients. n6 In October 1996, the National Association of Counsel for Children (NACC) also adopted the ABA Standards, but with reservations as to Standard B-4 dealing with determining and advocating the child's preferences. In April 1999, the NACC passed its own revised version of Standard B-4 that gives the attorney some flexibility as to whether to follow the child's expressed preferences and permits the attorney to substitute his or her judgment for the child's under certain circumstances. All three of these leading *client-directed* models have in common the admonition that the attorney for the child should rely on objective criteria as much as possible, and not solely on the life experiences or values of the attorney in determining the best interests of the child.

n4 See Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); *Recommendations of the Conference on Ethical Issues In the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Recommendations*].

n5 AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES B-4 (1996) [hereinafter ABA STANDARDS]. Also available online at <<http://www.abanet.org/child/childrep.html>>.

n6 *Proceedings of the Conference on Ethical Issues In the Legal Representation of Children*, 64

*FORDHAM L. REV. 1281 (March 1996)*, at 1309.

The ABA/NACC Standards and the Fordham Recommendations would have lawyers for the impaired child, i.e., the young incompetent child, limit their advocacy to the "legal interests" of the child. "Legal interests" are those interests set out in objective sources of law such as legislation, case law, and standards of attorney conduct, and are in contrast to an imposition of the lawyer's personal views of the child's interests unguided by any outside authority. n7

n7 *See also* ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN VII-21 (1999) [hereinafter PRESIDENT'S INITIATIVE GUIDELINES]. Also available online at <<http://www.acf.dhhs.gov/programs/cb/special/02final.htm>>.

Yet, despite the widespread support of many academics and our leading professional organizations, federal law and the majority of state laws continue to require the appointment of a GAL to represent the child's best interests. Which shall it be? Is the legal representative to advocate for the child's stated *wishes* or for the position that the lawyer thinks is in the child's *best interests*? Can lawyers be guided sufficiently by law so that a "best interests" judgment is not a mere substitute of [\*444] the lawyer's values for the child's? How should legislatures codify this unique role as lawyer for a child?

Section II, while ratifying the importance of independent legal representation for children in child protection proceedings, sets out the failures of a best interests or a client-directed approach to meet the needs of children across the broad spectrum of age and capacity to direct counsel. In Section III, the article addresses the leading client-directed models of the ABA, the NACC, and the Fordham Recommendations, and points out that these so-called client-directed models actually contain within themselves serious opportunities for lawyers to exercise unfettered and unreviewed discretion in representing children. This discretion is even more serious than that complained about under the pure best interests approach because the latitude permitted in the client-directed models is more private and less reviewable by a court and other litigants than is the best interests discretion. Section III concludes by saying that a single role definition for the child's legal representative is not possible; some children need a best interest advocate and some need a straight-up attorney with the traditional zealous advocacy duties.

Section IV sets out the national consensus that children should be aggressively represented in protection cases no matter who determines the child's goals and interests in the case. It urges that the law define two distinct roles--a *client-directed* attorney role where the attorney has the same duties of zealous advocacy due to an adult client, and a *best interests* lawyer-GAL. Creation of this new and unique lawyer role is discussed using the 1998 Michigan lawyer-GAL statute as an example.

In 1998, the Michigan lawyer-GAL statute passed both houses of the Michigan legislature unanimously, thanks in large part to the leadership of then Lieutenant-Governor Connie Binsfeld. The Michigan statute codifies two roles for the child's legal advocate--a client-directed *attorney* role and a best interests *lawyer-guardian ad litem* role. The statute, set out in part as Appendix A, requires appointment of a lawyer-GAL in every child protection case, but permits the court to appoint an attorney for the child, in addition to the lawyer-GAL, where the child and lawyer-GAL are in conflict about identification of the child's interests. n8 The statute also establishes aggressive duties for the lawyer-GAL, provides for attorney-client privilege, requires the lawyer-GAL to present the wishes of the child even if inconsistent with the lawyer-GAL's [\*445] views of best interests, and requires the lawyer-GAL to weigh the child's wishes in making the best interests determination according to the age and maturity of the child.

n8 MICH. COMP. LAWS § 712A.17d (West 1998); MICH. STAT. ANN. § 27.3178 (598.17d) (1998).

## **II. The Pure Forms of the Current Models Are Deficient When Applied to All Children**

### A. Premise for Independent Representation

When federal law in the Child Abuse Prevention and Treatment Act (CAPTA) required children to be represented by a GAL in protection proceedings, it transplanted the concept of guardian ad litem from the English common law and the feudal property system. n9 The common law concept was embellished in congressional testimony related to CAPTA by Brian Fraser, then staff attorney for the National Center for the Prevention of Child Abuse and Neglect at the University of Colorado. n10 States have incorporated the GAL requirement into their laws. Beyond the appeal to federal and state law and the evolved traditions of the common law, independent representation of the child in protection proceedings also rests on a fundamental common sense premise. Whenever a child's legal interests are at stake or whenever the child is depending upon a complex, potentially clumsy bureaucracy, like a hospital, a school--or a child welfare system--the child needs someone to safeguard his or her interests and to guide him or her through the process. Anyone who has ever had a child hospitalized or in need of special attention in a large school system knows that even a well-meaning bureaucracy can fail to meet the needs of a child.

n9 PETERS, *supra* note 1, at 31.

n10 Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W. L. REV. 16 (1976).

American law presumes that a parent should be the one who assesses a child's best interests and makes significant choices for the child, including speaking for a child in legal proceedings. Under certain circumstances, however, where a parent is unwilling or unable to sufficiently protect the child's interests, a court may appoint an independent legal representative for the child. In a child protection proceeding, where the parent is accused of child abuse or neglect and the suitability of the parents to care for the child is the central question, parents cannot be depended upon to protect the best interests of the child. In those cases the child needs an independent advocate to stand in the place of the parent.

[\*446] There is a great deal at stake for the child in the protection proceeding. He or she could lose mother, father, sister, brother, extended family, school, or community. On the other hand, the child faces the prospect of harm at the hands of an unfit caretaker, or of systemic indecision by government agencies or the court as to what ought to happen to him or her. Children lack the capacity and sophistication to speak for and take care of themselves in these instances and someone else needs to speak and act on the child's behalf.

In the past courts have relied on other participants in the child protection process, such as the judge or child welfare agency, to look out for the child's interests. Despite good intentions, however, these other participants have divided loyalties and interests and may not be committed to ferreting out and promoting the interests of the child alone. A judge has the responsibility to do justice among all the competing interests. The child welfare agency has responsibility for the entire family and often must allocate scarce and inadequate resources to many children and families. Neither the judge nor the child welfare agencies are continuously available to the child all the time and over time. For the same reasons an adult would not face a serious criminal or civil legal case without counsel, or want one's own child hospitalized without a parent available to monitor the medical and nursing care, the children caught up in the legal child protection process need an advocate to protect their interests. That advocate ought to be a competent and knowing professional who is able to pursue the child's rights and interests in whatever forums are required. Since these are legal court proceedings, the child's advocate ought to be a lawyer. In jurisdictions where the court appoints a volunteer CASA (Court Appointed Special Advocate) for the child, there should also be a lawyer appointed to represent the child. n11

n11 PRESIDENT'S INITIATIVE GUIDELINES, *supra* note 8, at VII-22. The position that a CASA is not a substitute for legal representation of the child is consistent with the policies of the National CASA Association. *See also* The National CASA website <<http://www.nationalcasa.org>>.

Once the premise is established that the child needs an independent advocate separate from his parents, we get to

the question of how that advocate should determine the child's interests in these proceedings. When using an *in loco parentis* analogy, as we have here, it is a logical next step to expect the advocate to determine and then represent the child's best interests. The best interests approach, however, does not fully address the needs of all children.

**[\*447]** *B. The Pure "Best Interests" Model Is Deficient When Applied to All Children*

The pure "best interests" approach has at least two serious flaws. The first is that the older, mature child deserves to have his or her voice heard and advocated, whether or not the child's view of his best interests is consistent with the lawyer's view. Even the most paternalistic among us can envision a juvenile who is as capable of considered judgment as any adult and for whom it would be inappropriate (and perhaps unconstitutional) to deny full legal representation given the fundamental interests at stake. It is a lonely voice in this debate that urges that such an older unimpaired child does not warrant the same zealous representation of his or her wishes as would an adult. Presenting the issue that way begs the question, however. We shall return to the questions of who is the "competent" child and how the lawyer determines whether the child client has sufficient maturity and competence to make reasonable decisions.

The second major flaw of the pure "best interests" approach is that it allows the lawyer for the child unfettered discretion in determining the goals of the litigation and thus, without the discipline of an active client, permits the lawyer to substitute her or his values for the child's. How is one to determine the best interests of the child anyway? Robert Mnookin's classic statement still holds true today:

Deciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself. Should the decision-maker be primarily concerned with the child's happiness or with the child's spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life found in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is one to look for the set of values that should guide decisions concerning what is best for the child? . . . If one looks to society at large, one finds neither a clear consensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. n12

n12 ROBERT. H. MNOOKIN, IN THE INTERESTS OF CHILDREN: LAW REFORM AND PUBLIC POLICY 18 (1985).

The best interests model is too broad, too indeterminate, to meet the needs of all children caught up in the child protection system. It may inappropriately substitute the values and judgment of a lawyer for the older competent child so that the "wrong person" ends up deciding the [\*448] goals and objectives of the advocacy. And, with an infant or young child, the pure best interests approach fails to set out principles to guide the advocate's discretion in identifying the child's best interests.

*C. The Pure Client-Directed/Wishes of the Child Model Is Deficient When Applied to All Children*

Consider the seven or eight year old beaten by a parent. When the lawyer asks, "Where do you want to live?" the child inevitably says, "with my Mom" or "with my Dad." The child commonly wants to go home with the familiar parent--albeit the one who just inflicted the abuse. Many lawyers say they do not wish to use their legal skills to put a child in continued danger. Similarly, the client-directed model runs the risk of re-victimizing the child when we ask him or her to shoulder the adult-like burden of decision-making and directing the lawyer. n13 Children may be under tremendous strain to misidentify and/or misarticulate their own interests because of pressure from their families, the court process, and the circumstances leading to the court process. n14

n13 PRESIDENT'S INITIATIVE GUIDELINES, *supra* note 7, at VII-18-19.

n14 *Id.*; see also Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1702, 1703 (1996).

The pure client directed model has another major flaw in that it does not give sufficient direction for the representation of the very young clients who may be nonverbal or lack the developmental capacity to make reasoned decisions and give guidance to the attorney. n15 Among the responses to this quandary is the urge that very young children not be represented by lawyers at all, n16 for the lawyer to take no position on behalf of the client but rather simply be sure the court is fully informed of the important issues, or to have the lawyer limit his or her advocacy to the "legal interests" of the child. n17 However, focusing on the so-called "legal interests" is very unsatisfactory. The child has a variety of legal interests, many of which are inconsistent with one another. For example, a child has a legal interest in being free from physical and mental harm, but is that interest served by continuing to separate the [\*449] child from a parent who injured the child in the past, or by seeking a quick reunification of the child with the parent to whom he or she is attached under terms and conditions calculated to make the home safe? (See the discussion at Part III.A.5, Determining the Interests of the Impaired Child.)

n15 Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955, 1957 (1996).

n16 Guggenheim, *supra* note 4.

n17 Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1411 (1996).

Thus paradoxically, the pure "wishes or client directed" model has deficiencies that parallel those of the pure "best interests" model. Like the "best interests" model, the "wishes" model is too broad to meet the needs of all children caught up in the child protection process considering the broad range of youthful competencies--from infants to teens. Like the "best interests" model, the "wrong person" may decide the goals and objectives of the advocacy because under the client-directed model, the stated wishes of a less than capable child may be substituted over the judgment of the lawyer with little or no mediation of the childish wishes by an adult. The client-directed/wishes model, as articulated by the ABA/NACC Standards and the Fordham Recommendations, also fails to set forth principles to guide the advocate's discretion in making important decisions such as determining the competence of the client or the interests of the very young child.

### **III. The Leading Client-Directed Models Set Out an Attorney Approach--But Then Water Down the Role**

#### *A. Client-Directed Models Do Not Eliminate Unreviewed Idiosyncratic Lawyer Discretion*

One premise of the client-directed model is that lawyers lack sufficient training and expertise to make some of the decisions required in children's cases and merely impose the lawyer's values on their young clients, unguided by law. n18 Despite that premise, the so-called client-directed models have not eliminated unreviewed, ad hoc, and potentially idiosyncratic lawyer discretion. The ABA/NACC Standards and Fordham Recommendations merely move that unfettered discretion to other parts of the process--parts not as easily open to review as the ultimate best interests determination. The ABA/NACC and the Fordham approaches aspire to be pure attorney models, but pull their punches in various ways. They create so many points of discretion and so many loopholes that they provide little guidance to the practicing [\*450] lawyer. Five of the discretionary decisions required of lawyers under the *client-directed* model, are discussed here.

n18 ABA STANDARDS, *supra* note 5, at B-4; *Fordham Recommendations*, *supra* note 4, at 1309.

## 1. DISCRETIONARY EXCEPTION IS BUILT INTO CLIENT-DIRECTED MODEL

Even though the ABA Standards require the attorney to represent the child's expressed preferences and follow the child's direction throughout the course of the litigation, n19 the ABA Standards water down and confuse the attorney's duty. Standard B-4(1) says that the default position for attorneys representing children is client-directed except that "there will be occasions when the client directed model cannot serve the client and exceptions must be made." The NACC modifications to the ABA Standards go even further in muddling the attorney role by saying, "Client directed representation does not include 'robotic allegiance' to each directive of the client. . . . The goal of the relationship is an outcome which serves the client, *mutually arrived upon by attorney and client*, following exploration of all available options." n20 (Emphasis added.) NACC Standards go on to elucidate the assessment process of the attorney, but the bottom line is that the decision whether to remain in a client-directed mode depends upon the subjective judgment of the attorney on a case-by-case basis. "While the default position for attorneys representing children under these standards is a client directed model, there will be occasions when the client directed model cannot serve the client and exceptions must be made." n21 There is no outside judicial or supervising attorney review and no guidance from the ABA/NACC Standards themselves as to when it would be appropriate to depart from the client-directed mode.

n19 ABA STANDARDS, *supra* note 5, at B-4.

n20 NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, REVISED VERSION OF ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES B-4 (1999) [hereinafter NACC STANDARDS].

n21 *Id.*; ABA STANDARDS, *supra* note 5, at B-4(1).

So, are we attorneys, or not? Are we to be directed by our clients, or not? These broad and discretionary exceptions amount to the much maligned "wink and a nod" approach to child representation where we are only pretending to represent the child's wishes. Although attempting to avoid the broad discretion of the best interests judgment, these exceptions merely encourage unregulated lawyer discretion in another form.

## 2. DISCRETION WHERE CHILD'S PREFERENCE WOULD BE "SERIOUSLY INJURIOUS"

The ABA/NACC Standards anticipate circumstances in which the child's attorney would request appointment of a GAL if the attorney [\*451] determines that the child's expressed preference would be "*seriously injurious*." n22 But, what is meant by "seriously injurious?" Does the term refer to physical injury? Mental or emotional harm? Deprivation of proper education or religious opportunity? Psychological harm from seeing or living with an unstable parent? Psychological harm from *not* seeing or living with a parent?

n22 ABA STANDARDS, *supra* note 5, at B-4(3); NACC STANDARDS, *supra* note 20, at B-4(4).

"Seriously injurious" is not defined in either the ABA or the NACC Standards and is thus left to the individual judgment and discretion of the attorney. Asking for appointment of a GAL where the child's attorney determines that the child's stated position is "seriously injurious" requires a judgment of the child's competence based on the position that child takes. Although the ABA Standard B-4(3) admonishes that the child's attorney determination of "seriously injurious" is to be distinguished from "merely being contrary to the lawyer's opinion of what would be in the child's interests," this is a discipline of mind too fine to be practical. The approach comes dangerously and unavoidably close to the position, "If this kid disagrees with me, he must be incompetent." This individual, ad hoc and standardless decision-making is just the sort of unfettered discretion that the proponents of the client-directed model were trying to avoid.

### 3. DISCRETION IN SEEKING APPOINTMENT OF A GUARDIAN AD LITEM

Consider the additional layer of unguided discretion in determining whether the child would receive a GAL. In the face of a child's expressed preference that is "seriously injurious" (according to the attorney's personal sensibilities), the attorney operating under the ABA Standards is not *required* to seek appointment of a GAL, but *may* request appointment of a GAL. n23 The ABA Standards give no further guidance as to the circumstances under which an attorney should ask for a GAL and when not to ask. The attorney, after seeking appointment of a GAL who would likely argue against the child's wishes, would then continue to represent the child's expressed preferences.

n23 ABA STANDARDS, *supra* note 5, at B-4(3).

Thus, the ABA Standard B-4(3) is also unsatisfactory because the attorney is asked to take a step, recommending appointment of a GAL, which is almost always going to be adverse to the child's stated goals. Logically this is a flawed approach. The attorney ends up asking for a GAL under circumstances where the GAL is almost certainly going to [\*452] argue against the child-client's position. For an attorney to seek a GAL who most certainly will argue against his client's position seems inconsistent with the attorney's duty of loyalty and zealous advocacy. It seems far more harmonious with settled attorney-client duties of loyalty to move in the other direction. That is, rather than require or permit the attorney to ask for a GAL, the law should require a GAL to ask for an attorney. Aggressive advocacy for a youngster's wishes is likely an element of and consistent with a child's "best interests." Aggressive advocacy for the youngster's stated position is probably salutary to a young client. He or she would feel heard, fully represented, and fairly treated, even if the court does not ultimately rule as the youngster wishes. The NACC Standards avoid this point of lawyer discretion by *requiring* the attorney to request appointment of a GAL if counseling the young client does not resolve the conflict. n24

n24 NACC STANDARDS, *supra* note 20, at B-4(4).

What, then, is the role of the court? If the attorney requests appointment of a GAL, what criteria does the court use in acceding to the request? Should the appointment be automatic upon request of the attorney? Should the court have a duty, either fiscal or legal, to inquire into the situation? What should the criteria be for appointment of a GAL as a second legal representative for the child? The ABA/NACC Standards do not provide any guidance to the court. Thus, the court's decision is also fraught with unguided discretion.

### 4. DISCRETION IN DETERMINING WHETHER THE CHILD IS "IMPAIRED"

The client-directed models require the attorney to determine whether the child is impaired and thus unable to direct the attorney. These models all create a presumption that the child is competent to direct the attorney, but then require the lawyer to determine whether his or her client is "under a disability" within the meaning of Model Rule 1.14. n25 The ABA Standards have advanced the field considerably by articulating that a child may be competent to make and participate in some decisions, but not others. The NACC Standards point out that a child may be incapable of meaningful participation in the litigation during the beginning of a case, but develop and mature into a child capable of participation before the end of the case. n26 Peter's articulation of a "child-in-context" is very helpful in understanding the richness of a child's life that can inform the attorney's advocacy.

n25 ABA STANDARDS, *supra* note 5, at B-3; NACC STANDARDS, *supra* note 20, at B-3.

n26 NACC STANDARDS, *supra* note 20, at B-4(3).

[\*453] Nonetheless, the client-directed models require the attorney to make a determination as to whether their client is "impaired." The ABA Standards reject the idea that children of a certain age are impaired and instead note that

a child's disability may be "contextual, incremental, and may be intermittent." n27 The Fordham Recommendations give practice guidelines for determining whether a verbal child is capable of directing the representation, and recommends training to help attorneys make this important judgment. n28 At the end of the day, however, an individual lawyer makes an individual decision about a child's impairment. That decision is not reviewed by any court and is not based on objective and reviewable criteria. Again, unfettered lawyer discretion enters into the lawyer-child client relationship.

n27 ABA STANDARDS, *supra* note 5, at B-3; NACC STANDARDS, *supra* note 20, at B-3.

n28 FORDHAM RECOMMENDATIONS, *supra* note 4, at 1312, 1313.

## 5. DISCRETION IN DETERMINING THE INTERESTS OF THE IMPAIRED CHILD

One of the most serious shortcomings of the client-directed approach is that it fails to provide sufficient direction for representation of the very young child. n29 The Fordham Recommendations reflect the common view that nothing about legal training or traditional legal roles equips lawyers to make decisions on behalf of children. In order to guide and control the lawyer's discretion, the Fordham Recommendations urge that the lawyer for the child represent the child's *legal interests* and then sets out a complex process for identifying those legal interests. n30 For example, a legal interest is defined as any interest that the legal proceeding has authority to address. A child's legal interests could include a child's right to "appropriate education," "least restrictive alternative," "least detrimental alternative," as well as a child's interest in procedural rights. n31 Similarly, the ABA Standards require that the attorney for the impaired child represent the child's legal interest and admonish the idea that the legal interests should be determined by objective criteria concerning the child's needs and interests and not merely on the lawyer's personal values, philosophies, and experiences. n32 The NACC Standards differ in that they articulate additional criteria for objectively determining the child's legal interests, n33 as discussed below.

n29 Appell, *supra* note 15.

n30 FORDHAM RECOMMENDATIONS, *supra* note 4, at 1309.

n31 *Id.* at 1310.

n32 ABA STANDARDS, *supra* note 5, at B-4(2), B-5, Commentary.

n33 NACC STANDARDS, *supra* note 20, at B-4(2).

[\*454] Focusing on the child's so-called "legal interests" is quite unsatisfactory because the principle is ambiguous, unreviewable, and does not limit lawyer discretion. The legal interests of a child may be unclear because courts do not always apply constitutional doctrine consistently as applied to children's rights, while arguable constitutional protections may also be inconsistent with existing statutory and other substantive law. n34 Even the clearly defined legal interests of the child may conflict. For example, a child has a right to be a part of his or her family of origin, but also has an interest in being protected from abusive or neglectful parents. n35 The child has a "legal interest" in permanency, but the question is whether that interest is best served by reunification with the biological parents, by adoption with an extended family member, by permanent guardianship, or by adoption outside the extended family? Peters' articulation of knowing the "child-in-context" n36 is very helpful in this regard, but it still does not resolve the ambiguity and leaves a great amount of unreviewed discretion to the lawyer.

n34 Appell, *supra* note 15, at 1963.

n35 *Id.*

n36 PETERS, *supra* note 1 at 31.

Appell proposes a multidisciplinary system where specialized social workers or trained lay advocates serving as GALs would determine the interests of the very young child while the attorney would advocate for these goals. n37 The team of GAL and attorney is used in North Carolina, South Carolina, and other states, and is the system relied upon in England. n38 Although such a team potentially has the advantage of increased psychological expertise, the social workers and lay guardians would also bring their own values to the decision-making. Social workers, psychologists, and lay advocates are no more immune from imposing their personal values and experiences in making a decision for a child than are lawyers.

n37 Appell, *supra* note 15, at 1971, 1972.

n38 Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239 (1992).

Thus, even though objectivity in determining the interests of the child where the child is too young or too immature to provide direction is the lawyer's ideal, the client-directed models fail to achieve that gold standard with respect to the young, impaired child.

#### *B. A Single Role for Child Legal Representation Fails*

The ABA/NACC Standards and Fordham Recommendations reflect the difficulty of insulating child advocacy from the influence of the [\*455] lawyer's personal values. They fail as legal standards because they are not predictable, reviewable, consistently applied over many attorneys, and sure to treat similar children similarly. Although premised on the proper concern that lawyers exercise too much discretion when representing the best interests of the child, unfettered and unreviewed lawyer discretion creeps into the so-called client-directed models, too. Despite the best efforts of scholars and practitioners, no approach is free from some level of lawyer discretion.

The client-directed models retain considerable lawyer discretion in identifying the interests of the infant, the toddler, and the very young child. Even the wishes of the older child can be ignored or modified under the client-directed models if the child's preference would be "seriously injurious," or if the lawyer decides not to pay "robotic allegiance" to a client's directive. Furthermore, that discretion, unlike the ultimate best interests judgment, is exercised in private and unreviewable settings, such as the lawyer's determination of a child's competence to make one judgment or another or the determination that the child's requested goal would be "seriously injurious." At least the discretion of the "best interests" lawyer is exercised in open court where other participants in the process may challenge the conclusions.

One virtue of the best interests approach to child representation, assuming the lawyer is guided by statute, the court, training, and other factors, is that the best interests judgment will eventually be tested in open court. The attorneys for the agency or the parents will present other views of the child's best interests. They can even point out the personal bias in the lawyer-GAL's position or failures in meeting the statutory duties, such as not meeting with the child, talking with foster parents, or not reviewing agency files and other history. The court, however, ultimately makes the best interest judgment. Thus the discretionary judgment of the best interests lawyer, while not eliminated, is not hidden and can be reviewed and challenged in court.

Trying to define a single lawyer role for children of all ages and capacities is not possible. The client-directed models compromise the older and mature child's personal right to zealous advocacy to accommodate the fact that some children are not capable of directing their counsel. There is an ambivalence in these proposals about extending legal rights to youth that mirror the general ambivalence toward children in American society. We should be clear and either extend aggressive attorney representation to children--or not. These compromises merely erode the interests of children by allowing attorney discretion to creep in where it is not reviewable.

[\*456] If the child's representative is a traditional client-directed attorney, she or he can draw upon the well-established law governing the attorney role in the Model Code and elsewhere, and give children the same representation that adults would get. The attorney should not be pulling punches or compromising the zealotry of advocacy merely because the client is a child or because the attorney thinks the expressed preference might harm the child. The client determines the objectives of the representation, period.

The difficulty arises because some children are not competent to instruct counsel, but nonetheless need the aggressive and sophisticated advocacy that only lawyers can provide. A different lawyer role to complement the attorney role that has not traditionally been articulated in American jurisprudence is required. This different lawyer role must be such that lawyer discretion is reduced so that ". . . the danger that the case will be contaminated by the lawyer's values are minimized." n39 The alternative must also be aggressive, economically feasible, and practical to implement and administer.

n39 Guggenheim, *supra* note 17, at 1432.

#### **IV. The Alternative: Two Distinct Roles--Attorney *or* Lawyer-Guardian Ad Litem**

##### *A. Beyond the Dichotomy*

Some have valiantly moved the discussion beyond the dichotomy between wishes and best interests to focus on the vast common ground between the best interest and client directed models. n40 All commentators and professional groups have urged aggressive and active involvement of the lawyer for the child, no matter who determines the goals of the advocacy. *The Guidelines for Public Policy and State Legislation* from President Clinton's Adoption 2002 Initiative on Adoption and Foster Care (*Guidelines*) attempts to capture the consensus formed around what the legal representative of the child ought to *do* on behalf of the child, separate from the question of who should determine the goals and objectives of the advocacy.

No matter how the goals of advocacy are identified, however, the attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should communicate the child's wishes and preferences to the court. Even if a child is not competent to direct the attorney and even if the role of [\*457] the attorney is defined as other than purely client directed . . . , the wishes and preferences are always relevant and should be communicated to the court unless limited by privilege. The lawyer also has a duty to explain to the child in a developmentally appropriate way information that will help the child have maximum input in determination of the particular position at issue. According to the child's ability to understand, the lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. n41

n40 See PETERS, *supra* note 1, at 40; PRESIDENT'S INITIATIVE GUIDELINES, *supra* note 8, at VII-19.

n41 PRESIDENT'S INITIATIVE GUIDELINES, *supra* note 7, at VII-13.

The *Guidelines* go on to recommend that states adopt enforceable standards defining the duties of the child's lawyer that incorporate the recommendations as set out in the ABA/NACC Standards. n42 Standard B-1 of the ABA/NACC Standards identifies the basic obligations of the child's lawyer. n43 The *Guidelines* recommend that these duties apply to attorneys and lawyer-GALs. This articulation of duties is consistent with the Fordham Recommendations.

n42 *Id.* at VII-12.

n43 Duties are further specified in Sections C, Actions to Be Taken; Section D, Hearings; Section E, Post-hearing; and Section F, Appeal.

Therefore, regardless of how the ultimate advocacy goals of the child's lawyer are determined, whether by the child's wishes or by a substituted best interests judgment, there is a great consensus that the child's lawyer should be very involved, active, and professional. The *Guidelines* did not reach a consensus on the wishes/best interests debate and instead offers two alternative options to state legislatures. These recommendations are also flawed. We should resolve the ambivalence inherent in this debate, not by choosing the client directed *or* the best interests approach, but by yielding to both sides--by developing one set of standards for children's attorneys *and* separate standards for lawyer-GALs. Courts should appoint a lawyer-GAL *or* an attorney (and under rare conditions, both), according to criteria set out in law.

If legislatures recognize that the conflict between the two lawyer roles is unresolvable and that two distinct lawyer roles for the child--*client-directed* attorney and the *best interests* lawyer-GAL--are necessary, the discussion can move to a new set of issues. Defining the attorney role for the competent child is easy and will be discussed next. The best interest lawyer-GAL role, however, is unique and evolving. Policymakers and legislators, as they frame this new creature, will want to consider:

- [\*458] 1. How should the aggressive representation of the best interests of the child be codified?  
 2. Should lawyer-client privilege be extended to the child and his or her lawyer-GAL?  
 3. Under what circumstances should the court appoint a lawyer-GAL and when an attorney?  
 4. What should the lawyer-GAL do (and what should the court do) in case of conflict between the lawyer-GAL view of the child's interests and the mature child's?  
 5. Under what circumstances should the court appoint both a lawyer-GAL *and* an attorney?  
 6. Finally, the big question: What legal guidance is appropriate to assist the lawyer-GAL in identifying the best interests of the child?

### *B. Attorney Standards*

Defining pure client-directed attorney standards for certain children is pretty easy as a drafting matter. The ABA/NACC Standards define "attorney" as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." n44 The Michigan statute borrows heavily from the ABA/NACC Standards and defines "attorney" in child protection proceedings as one "serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subsection owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client." n45

n44 ABA STANDARDS, *supra* note 5, at A-1; NACC STANDARDS, *supra* note 20, at A-1.

n45 MICH. COMP. LAWS § 712A.13a(1)(b) (West 1998); MICH. STAT. ANN. § 27.3178(598.13d) (1998).

The Michigan statute does not codify the duties of the child's attorney as specifically as the ABA Standards would. It seems that the legislature concluded that the rich tradition of zealous attorney representation did not need further elaboration. Another legislature may conclude differently, but once one elaborates on the traditional duties as they apply to children, there is a risk that the child's attorney could be seen as different from an attorney for an adult. This is not the appropriate message.

[\*459] *C. Lawyer-Guardian Ad Litem Standards*

## 1. AGGRESSIVE REPRESENTATION OF THE BEST INTERESTS OF THE CHILD

The lawyer-GAL should be charged with representing the best interests of the child as determined by the lawyer. n46 The role should be aggressive, ambitious, and include the duties recommended in the ABA Standards and the *Guidelines*. Much of the past opposition to the GAL role was because people linked it to inadequate, passive representation where the legal representative of the child was a cipher or chair warmer.

n46 See Section IV(D), *infra* for further discussion on identifying the best interests of the child.

The Michigan statute (Appendix A), articulates the lawyer-GAL role somewhat differently and less fully than the ABA Standards, but the two are consistent. Under the Michigan scheme, the lawyer-GAL's duty is to the child, not to the court. He or she is to be a full and active participant in all aspects of the litigation and can file all necessary pleadings, including a petition to terminate parental rights. As a lawyer, he or she cannot testify, but may call witnesses on the child's behalf and otherwise introduce evidence. He or she has an obligation to conduct an independent investigation and has a right to all relevant information regarding the child. Before each hearing, the lawyer-GAL is to meet with and observe the child and assess the child's needs, including consulting with the child's parents, guardians, and foster parents--consistent with the rules of professional responsibility. The advocate is to explain to the child, in a developmentally appropriate way, the lawyer-GAL role and elicit the child's wishes and preferences. The lawyer-GAL is to communicate the child's wishes to the court, whether or not those wishes are consistent with the lawyer-GAL's view of the child's best interests, unless the child wants them kept secret.

Nonadversarial problem-solving is recognized as important and, consistent with rules of professional responsibility, the lawyer-GAL is to identify common interests among the parties and promote a cooperative resolution. The lawyer-GAL's duties extend beyond the courtroom. He or she is to monitor the implementation of case plans and court orders and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and accomplishing their purpose. Often there are other legal matters relevant to the child protection case in which a lawyer could help, such as with education, Social Security, and other benefits, and paternity or child custody matters [\*460] related to divorce. With the court's permission, the lawyer-GAL may pursue those issues on the child's behalf.

The lawyer-GAL is to elicit the child's wishes and weigh them in coming to a best interest determination "according to the child's competence and maturity." Thus, the statute attempts to codify the notion that a young person's wishes should be given greater weight according to their age and competence, and that a child may be competent for some decisions but not for others. "Competency, in this context, is a dimmer switch: the client can shed light on some aspects of the representation, even though she cannot participate in all of it." n47 Professor Peter's metaphor of a "dimmer switch" is influential here in that the legislature recognized the fact that competence is not an "on or off" phenomenon where a child was either capable of directing the lawyer or not. Rather, competence is a broader spectrum where children may be able to contribute various amounts to guide the representation if the lawyer properly incorporates the child's unique individuality.

n47 See PETERS, *supra* note 1, at 53, 54.

## 2. RETAIN LAWYER-CLIENT PRIVILEGE WITH THE CHILD

The unfettered duty of confidentiality running to the child may be troublesome. The Michigan choice was that children needed someone to confide in since they have no one else, typically not even a therapist, who is permitted by law to keep their secrets if those secrets include a suspicion of harm or risk of harm to the children. The parade of horrors of children disclosing abuse to their lawyers who could not report the abuse without the child's permission was

thought remediable or worth the cost. Through the lawyer-child counseling process, the lawyer-GAL might obtain the child's permission to disclose the secret or encourage the child to talk with and disclose to others.

### 3. WHEN SHOULD THE COURT APPOINT A LAWYER-GUARDIAN AD LITEM OR AN ATTORNEY?

The Michigan statute opts for a default where the lawyer-GAL is appointed for each and every child, while an attorney should be appointed only in cases of conflict. Of course this is a sharp departure from the "competency default" of the client-directed models. Another reasonable choice would be to require that at a certain age, say twelve or fourteen, the court should appoint an attorney for the child instead of a lawyer-GAL. n48

n48 DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR COURT APPOINTED SPECIAL ADVOCATES* 150 (1990).

[\*461] The Michigan legislature reasoned that disagreements between the child and the legal representative regarding the goals of the litigation would likely be few. However, only experience will tell as there are no surveys yet. Because the lawyer-GAL's assessment of the child's best interest would give weight to the child's stated wishes and would weigh the stated wishes more heavily according to the increased age and capacity of the child, the wishes of the child may be completely considered--and accommodated in many, if not most cases--with an ease and simplicity of administration. The practical aspects of implementing a scheme of child representation, including costs, complexity, and ease of administration, were important considerations to the courts, the state child welfare agency and the Michigan legislature. Extending a best interests advocate to all children clearly complies with the requirements of CAPTA and thus does not threaten the federal financial participation for the state. The CAPTA compliance question did not play an important role in the legislative decision-making, however.

In the event that the lawyer-GAL determined that an attorney should be appointed in addition to the GAL, it seemed consistent with the best interest duty of the lawyer-GAL to ask for an attorney since a full expression of the child's wishes could be seen as in the child's best interests. Being heard is salutary. In contrast, an attorney who asks for a GAL may be working to the disadvantage of the client's wishes by bringing in another advocate who will most certainly argue against her own client.

### 4. ADDRESSING CONFLICT BETWEEN THE CHILD AND ADVOCATE

The Michigan statute provides for a circumstance in which the lawyer-GAL's view of what is in the best interests may differ from that of the child. Especially in the case of the older child, such conflicts are to be taken seriously. Consistent with the attorney-client privilege, which applies to the lawyer-GAL, the lawyer-GAL is to communicate the wishes of all children, no matter how young, to the court. n49 Depending on the age and maturity of the child and the nature of the conflict between the lawyer-GAL and the child, the court may appoint a separate lawyer to represent the wishes of the child.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests [\*462] as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering 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, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem. n50

n49 Occasionally a child does not want his preferences told to the court. The lawyer-GAL may rely on the

child's preferences, however, in making recommendations to the court, but without disclosing the child's stated preferences.

n50 MICH. COMP. LAWS § 712A.17d(2) (West 1998); MICH. STAT. ANN. § 27.3178 (598.17d) (1998).

This approach expects that the lawyer-GAL will always inform the court as to the child's wishes unless doing so is inconsistent with the duty of confidentiality, e.g., the child says, "Don't tell my Mom that I want to stay with Grandma--but I do." Where there is a conflict between the child's and lawyer-GAL's view of the child's best interests and the child is mature, the court may appoint an attorney. Although the statute does not impose a duty on the lawyer-GAL to ask for appointment of an attorney, but rather leaves it to the court's discretion, the better practice is for the lawyer-GAL to recommend appointment of an attorney where there is a conflict on a serious matter with a mature child. Another approach would be to *require* the court to appoint an attorney in the case of a conflict not resolved by counseling, where the child is a certain age, say twelve or fourteen.

##### 5. UNDER WHAT CIRCUMSTANCES DOES THE COURT APPOINT TWO REPRESENTATIVES FOR THE CHILD?

If the court considers the appointment appropriate considering the child's age, maturity, and the nature of the inconsistency between the child's and the lawyer-GAL's identification of the child's interests, the court *may* appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-GAL. n51 The court retains considerable discretion in making the attorney appointment under the Michigan scheme. The reasons behind that legislative choice include fiscal control and administrative convenience. There is a risk that attorneys will rarely be appointed even in the face of conflict. On the other hand, the codified "sliding scale" or "dimmer switch" could result in lawyer-GALs advocating fully for the older competent child's wishes with rarely a need for an attorney appointment.

n51 MICH. COMP. LAWS § 712A.17d (West 1998); MICH. STAT. ANN. § 27.3178 (598.17d) (1998).

[\*463] An alternative is for the statute to require the appointment of an attorney upon meeting some legal standard, perhaps the certification of the lawyer-GAL that there is a conflict. In discussions during the bill-drafting process, those concerned about the fiscal implications pointed out that some experience with the new model would address the fiscal questions but that it would be financially irresponsible to open up the possibility of dual representation of most Michigan children in protection proceedings. The court remains the gatekeeper and early experience is that attorneys are being appointed for children, but not in large numbers.

The financial burden of paying two lawyers for a child, an attorney and lawyer-GAL, could also be addressed by always appointing an attorney and *not* a lawyer-GAL for children over a certain age, unless the child is developmentally or emotionally disabled.

##### *D. Identifying the Best Interests of the Child*

Appointment of a lawyer-GAL with a best interests mandate carries a risk that the lawyer-GAL will reflect his or her own values and not those of the child. The response to this risk should not be to eliminate the best interests role, but to guide it under law. Much of the scholarly work discussed above, the ABA/NACC Standards and the Fordham Recommendations provide a basis for guiding lawyers in representing the impaired child in a best interests mode. Certainly lawyers should be cautious in making value judgments for their young clients and do so carefully. The major criticism of the current client-directed models is that they hide the discretion in points that are not fully reviewable. A major line of discussion and scholarship is called for on this point to develop means of identifying the best interests of a child when serving as a lawyer-GAL.

Devices that can reduce the risk of unfettered and unguided lawyer discretion in representing the best interests of

the child include the following. Legal standards set out in statutes, court rulings, or state supreme court orders, can articulate a process of preparing and handling a case as recommended by the ABA/NACC Standards and codified in Michigan. The training of lawyer-GALs should include guidance on substituted judgment and cultural competence, giving weight to the child's expressed wishes on some issues if not all. Lawyer training can include eliciting a child's preference in a developmentally appropriate manner, explaining the lawyer role to a child, and counseling a young [\*464] child. Perhaps the best interests judgment can be guided by statutory factors as has been done in child custody decision-making.

## V. Conclusion

Some have said that the best interests GAL role has outlived its usefulness. n52 The concern that unfettered and unguided lawyer discretion will inappropriately determine the goals of the child advocate has led to a widespread challenge to best interests advocacy for even the youngest children. Yet the so-called client-directed models carry with them their own forms of unfettered lawyer discretion.

n52 Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1507 (1996).

From this rich discussion of legal representation of children has come some broad consensus on what the lawyer should *do* in that representation. It should be an active and aggressive role, no matter whether the goals of the litigation are set by the articulate child or determined by the legal advocate. This article urges that the dichotomy between wishes/client-directed and best interests advocacy be resolved, not by choosing one or the other, but by recognizing that the range of capacities of children, from infants to teens, requires two separate and distinct lawyer roles. We should adopt different standards for the different lawyer roles. This article uses a Michigan statute, passed unanimously by both houses of the Michigan legislature in 1998, as an example of a scheme that defines separate roles for a best interests lawyer-GAL and a client-directed attorney. The Michigan model sets out some legislative principles for the best interests advocate and thus narrows the scope of discretion. Continued discussion and scholarship is called for so as to develop consistent means of carefully identifying the best interests of a child in protection cases when serving as lawyer-GAL.

## [\*465] APPENDIX A

Excerpts from Michigan Compiled Laws

M.C.L. 712A.13a(1)(b): "Attorney" means [in child protection proceedings] an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child as governed by the Michigan rules of professional conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's express wishes as the attorney would to an adult client.

M.C.L. 712A.17d(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

- (a) The obligations of the attorney-client privilege.
- (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
- (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information.
- (d) Before each proceeding or hearing, to meet with and observe the child, assess the child's needs and

wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the child's parents, foster care providers, guardians, and caseworkers.

(e) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(f) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(g) To attend all hearings and substitute representation for the child only with court approval.

(h) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(i) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the [\*466] court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(j) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

(k) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering 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, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.