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Recommended Citation

Merril Sobie, Representing the Child in Child Protective Proceedings: Toward A New Paradigm, 28 Widener Commonwealth L. Rev. 169 (2019), <https://digitalcommons.pace.edu/lawfaculty/1130/>

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REPRESENTING THE CHILD IN CHILD PROTECTIVE PROCEEDINGS: TOWARD A NEW PARADIGM

Prof. Merrill Sobie*

The American Child Protective System, incorporating the then embryotic causes of action we now call child neglect, dependency and termination of parental rights, was first established in the late nineteenth century.¹ The underlying premise was the common law *parens patriae* doctrine, a judicial mechanism whereby the state assumes the role of a parent who has erred by maltreating or abandoning her child.² Given the seemingly benevolent doctrine, early child protective proponents perceived no need for legal representation.³ Adjudication was swift, pursued solely for the benefit of maltreated children. Accordingly, for almost one century thereafter, children and their parents were not afforded mandated legal representation.⁴

By the mid-twentieth century, the system's informality and lack of procedural due process began to be challenged.⁵ In 1962, New York mandated the appointment of a "law guardian" in every child protective case.⁶ The statute defined a "law guardian" as an attorney who represented a child.⁷ One generation later, most states

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¹ See, e.g., N.Y. Law 1877, C. 428.

² "Parens Patria" ... refers traditionally to role of State as sovereign and guardian of persons under legal disability, such as juveniles ..." Black Law Dictionary, 6th Edition. One of the earliest applications was *Ex Parte Crouse*, 4 Wharton 9 (Pa. 1839).

³ Naomi Cahn, *State Representation of Children's Interests*, 40 *Fam. L.Q.* 109 (2006).

⁴ *Id.*

⁵ See, e.g., Gellhorn, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY*, Dodd Mead, 1954; also Gellhorn Hyman & Asch, *CHILDREN AND FAMILIES IF THE COURT OF NEW YORK CITY*, 103 U.P. LR 444 (1954)

⁶ Family Court Act, ch. 686, 1962 N.Y. Laws (codified as N.Y. Fam. Ct. Act § 241).

⁷ *Id.*

had enacted statutes providing for some form of representation, although not necessarily legal representation.⁸

Today, most children who have become enmeshed in dependency or other protective cases are represented by an attorney.⁹ In a few states, courts have held that the child is constitutionally entitled to counsel, a principle which cements the right and mandates, as a constitutional right, “effective representation.”¹⁰

Although the child’s right to legal representation has expanded exponentially, the role of counsel remains controversial. Just what is the hapless child’s attorney supposed to do? Is he to assume a traditional client-based advocacy approach? Is he to be guided by her perception of the child’s “best interests”? To what extent is the age of the represented youngster relevant? Should representation be based upon one underlying principle, or alternatively, a complex set of criteria?

Dozens of articles, bar association standards, and law school symposia have addressed this important issue. However, a consensus appears to be as elusive as ever. In fact, the further we have proceeded down the representation road, the more complexity and diversity has entered the system. As a nation, we are tied up in knots, unable to construct a viable consensus model. As noted in one recent publication:

⁸ The Federal Child Abuse Prevention and Treatment Act (P.L.No 93-247), enacted in 1974, requires that a child be “represented,” without specifying legal representation, the measure encouraged but did not require representation by an attorney.

⁹ The exact number or percentage is impossible to calculate; a clear majority of states have enacted laws which require representation, but in several other states, representation is either totally discretionary, dependent upon the child’s age, or is triggered by a specific request.

¹⁰ See *Kenny v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005); *In re S.W.*, 856 P. 2d. 286 (Okla 1993); see also *In re Dependency of MSR*, 174 Wash. 2d 1, 271 P. 3d 234 (Sup. Ct. Wash. 2012) (where the court held in a rather confusing opinion that the right to appointed counsel is not “universal.”). To this author, it is surprising that the constitutional right to counsel has been pursued in only a few states.

law defining child representation is quite unsettled. The variations across jurisdictions may decrease the quality of representation and create confusion ... A 2005 survey indicated that there are at least fifty-six variations in child representation models among the fifty states.¹¹

Astoundingly, the number of representation models exceeds the number of states.¹² That may constitute a unique phenomenon in American jurisprudence, but surely cannot be viewed as a beneficial or even a workable guide to the bar or the bench. There must be a better approach.

This article will attempt a new approach, one based on an analysis of the child's interests in a child protective proceeding. As will be discussed in Part 1, most interests are surprisingly overlooked or barely articulated in the representation debate. Part 2 will summarize the statutes and case law governing the role of the child's counsel in the child protective litigation continuum. The frequently lengthy process may range from initiation by a child protective agency to the achievement of family reunification or other permanency goal. For children, the continuum of sequential proceeding may span years or decades. Finally, Part 3 will outline a possible solution to the present complex, inconsistent, and frequently incoherent paradigm, one grounded upon traditional representation, as applied to the multiple child interests at stake in every child protective case.

PART 1: THE CHILD'S LEGAL INTERESTS

Child protective proceedings deeply affect multiple aspects of family life. The impact is extremely profound when a child or children are removed from their home, temporarily or

¹¹ Donald N. Duquette, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.J.87, at 116-117 (2012)

¹² *Id.*

permanently.¹³ When removal is not requested or court ordered, the repercussions may be less profound, but nevertheless substantial. Further, child protective administrative and judicial procedures are inherently intimidating and frightening to young persons. Children need a guiding legal hand to protect their multiple interests embedded in the legal and social service labyrinth, and are entitled to assurances that their desires will be addressed and their autonomy respected.

The myriad and occasionally conflicting interests are listed below. Not every legal interest is relevant to each case. For example, parental visitation becomes relevant only when the child has been removed or custody has been transferred to a non-parent or a social services agency. Nevertheless, most of the following legal rights and interests are present in every child protective case:

1. The right to safety and protection.
2. The child's right to autonomy and privacy.
3. The right to be consulted and advised of the legal proceedings and their ramifications.
4. Inclusion in the legal process through consultation, participation, and consent.
5. Mandated governmental services to help the child.
6. Services available or mandated for the parent and the family.
7. The right to request or to seek the modification or termination of temporary or permanent court orders.
8. Educational rights which may be ordered or modified by the court.
9. Knowledge of the elements of dependency, permanency hearing, or termination of parental rights proceedings.
10. When relevant, immigration issues.
11. When placed, parental-child visitation.

¹³ See Lawrence M. Berger et. al., *Estimating the "Impact" of Out-of-Home Placement on Child Well-Being: Approaching the Problem of Selection Bias*, 60 CHILD DEVELOPMENT, 1856 (2009)

12. Possible kinship placement or other extended family involvement, such as supervision by a relative.
13. When placed, the specific placement home and geographic location.
14. Relationships with siblings, including possible joint placement or sibling visitation.
15. When placed, knowledge and input in determining the permanency goal.

Several legal interests are generic, implicit in every type of litigation, civil or criminal. For that matter, most are applicable to non-litigation attorney-client endeavors. When a lawyer is negotiating an employment contract, the client obviously has the right to be consulted and participate in the negotiations and discussions.¹⁴ A tort attorney knows that one of his responsibilities is to protect the autonomy and privacy of his client.¹⁵ Every attorney determines the goal or goals he should attempt to achieve, establishing those goals through advice, consultation, legal research, and discussions with the client.¹⁶ Lawyers generally know that they can determine strategy and the tactical aspects of litigation or negotiations, but that a substantive resolution of the dispute requires client consent.¹⁷ We hardly need remind attorneys of the legal issues, which they confront in a specific case, or the allocation of attorney and client rights and responsibilities.

More accurately, we hardly need remind attorneys, except lawyers assigned to represent children. Of course, many children's attorneys acknowledge and ensure that their client's generic legal interests are advocated and protected. For example, in one case the attorney for the child argued successfully that a statutory mandated invasive, albeit unnecessary, medical examination would violate her constitutional right to privacy.¹⁸ Nevertheless, at best the

¹⁴ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009).

¹⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

¹⁶ Attorney-client discussions may become difficult or acrimonious, but that does not preclude client involvement.

¹⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009).

¹⁸ *Matter of Shernise C. (Rhonda R.)*, 91 A.D.3d 26 (N.Y. App. Div. 2011).

adherence to the customary attorney-client responsibilities are inconsistent.

To be sure, several of the above enumerated legal interests are unique to child protective cases. For example, children are not in danger of being removed from their homes and placed in an alien foster home in any other proceeding. However, the same could be said if one enumerated the legal issues, generic and specific, in a tort or a contracts case. Every lawyer determines the generic and specific relevant issues when representing a client; for experienced counsel the determination is virtually automatic.

A few child protective legal issues, such as the right to safety and protection, are well known. Children's attorneys almost always address those issues, while simultaneously failing to address other essential issues, such as consultation with the client, client participation in the proceedings, educational and welfare rights, or the protection of client autonomy.¹⁹ As noted in one recent article discussing the "best interests" legal doctrine:

The traditional best interests standard therefore does not address children's interests as persons or their own right ... To the extent it does have substance, the standard's conception of "best interests" tends to be defined in relation to children's developmental needs and parental rights. Children's interests beyond dependency and autonomy remain largely unarticulated and unexamined.²⁰

Just why are many of the child's legal interests unacknowledged or overlooked? One possible factor is the child's age, which may range from infancy to majority or, in some cases, post majority.²¹ One cannot consult with an infant, and a very young child's possible participation is indeed limited. However, most children are of sufficient age to at least become partially engaged,

¹⁹ Dailey and Rosenbury, *The New Law of the Child* – 127 *Yale L.J.* 1449 at 1470 – (2018).

²⁰ *Id.*

²¹ *Id.*

and many adolescents can be fully engaged. Treating a two-year-old one way does not excuse similar treatment to a twelve-year-old.

A greater factor may be the seemingly unending debate and conflicts concerning whether the attorney for the child should espouse her conclusions regarding the child's "best interest", or alternatively advocate the child's wishes. The controversy will be delineated in Part 2 of this article. Suffice to say at this point that the child's wishes versus her best interests issue has dominated the cases and literature, to the virtual exclusion of the child's attorney's essential role in protecting and advocating most of the numerous specific legal rights of his client.

Underscoring the limited "only placement or non-placement matters" approach, the case law and scholarly emphasis has focused on the attorney's position regarding the removal of the child client from the parental home. Should the youngster remain at home, perhaps with appropriate supervision and services, or should she be placed in foster care or in the custody of a relative or other suitable person? That is indeed the pivotal issue in a significant number of cases. However, most children involved in dependency or child neglect proceedings are not placed outside of their home or family milieu. In those proceedings the pivotal issues may include parental supervision, possible protective orders, family services, parental rehabilitation, and participation by the child. Placement is a non-issue.

Further, the child's legal interests in autonomy, extended family relationships, consultation, and participation are present in every case. Those interests need legal advocacy, bolstered by relevant evidence, regardless of whether the state is seeking placement. Those interests are, for the most part, not dependent on whether the attorney is guided by a "best interest" or a "child's wishes" perspective.

The only forums in which multiple legal interest have been addressed are national and state bar association standards for representing children. The 1999 American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse

and Neglect Cases articulates a full range.²² Similarly, several state bar association standards encompass the full range of legal interests.²³ Although important, the standards have in practice been applied only intermittently. Of greater significance, the case law, which focuses on the “best interests” or “child’s wishes” role of the attorney for the child, has rarely addressed compliance or held counsel accountable for violating or overlooking the multiple specific responsibilities delineated by organized bar standards.

PART 2: THE CASE LAW QUAGMIRE

The national history of confusion regarding the role of an attorney for the child began with the federal 1974 Child Abuse Prevention and Treatment Act (CAPTA).²⁴ The Act required the states to provide a guardian ad litem (GAL) for children involved in child protective proceedings.²⁵ However, CAPTA did not prescribe the qualifications or the legal responsibilities of the mandated GAL.²⁶ In 1996, Congress reauthorized CAPTA, permitting, *inter alia*, the appointment of an attorney as GAL; the attorney “would make recommendations to the court concerning the best interests of the child.”²⁷ Congress suggested, if not mandated, that the child’s counsel would not forge a traditional attorney-client relationship with her young client.²⁸ CAPTA was, again, reauthorized in 2010, retaining the earlier language.²⁹ The state judiciaries, however,

²² ABA Standards for Lawyers who Represent Children in Abuse and Negligent Cases (1999).

²³ See, e.g. N.Y. State Bar Association, Committee on Children and the Law, Standards for Attorneys Representing Children in NY Child Protective Foster Care and Termination of Parental Rights Proceedings, 2007, Standards A-2 and B-1.

²⁴ The Federal Child Abuse Prevention and Treatment Act, codified as 42 U.S.C. §§ 5101 et seq.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063 (1996).

²⁸ See 42 USC. § 5106a (H (2). (A) (xiii)).

²⁹ Child Abuse Prevention and Treatment Reauthorization Act of 2010 (P.L. 111-320).

remained free to chart their own course. Although several have opted for a client directed model, with some exception, most adhere to a guardian ad litem paradigm, or a complicated list of rules which blend attorney and GAL responsibilities.³⁰

Guardians ad Litem are not unique to child protective cases. For example, when a child is injured in an automobile accident the court will frequently appoint a GAL. The GAL then assumes the role of the client in the ensuing negligence tort action, and in that capacity directs the attorney who represents the young plaintiff. Thus, the GAL authorizes discovery, becomes the de facto party in motion practice, and, most notably, is required to agree to a settlement or demand a trial.³¹ The role, developed over centuries, is fundamentally clear, and the guardian ad litem is rarely an attorney, although an attorney is not excluded from appointment.³²

The role of a GAL, however, is far from clear when appointed in a dependency or neglect proceeding. As noted in a recent child custody case, where the GAL's role is similar to a child protective case:

As commentators have noted a 'guardian ad litem' has been variously defined as (1) the person appointed by the court to serve as an investigator to gather information about the parents and the children and report back to the court ... (2) the lawyer appointed to represent the children; (3) an advocate for the "best interests" of the children; (4) a facilitator/mediator; and (5) some combination of the above and more.³³

³⁰ See, e.g., *Matter of Brian S. (Scott S.)*, 141 A.D. 3d 1145 (N.Y. App. Div. 2016).

³¹ See *Nicholas v. Fahrenkamp*, K FL. App. 15th 160316 12018 W.L. 3357808 (FL App. Ct. 2018) (a tort case where the child initiated a malpractice action against the GAL).

³² See NYCPLR §§ 1201-1202, West's General Laws of Rhode Island, § 9-1-3.1.

³³ *Morgan v. Getter*, 441 S.W.3d 94, 106 (Ky. 2014).

The definitional contradictions, conflicts, and ambiguities embedded in the brief quote are startling. The frustrations the court experienced in attempting to rationalize the GAL's role are explicit.

The issue has been further confused by the appointment in several states of an "attorney guardian ad litem." The inherent ambiguities in the title are, for example, highlighted by a North Carolina statute which requires that a GAL be appointed, but further mandates that, if the GAL is not an attorney, a lawyer also be assigned to represent the child.³⁴ Perhaps in the interests of economy, the North Carolina courts tend to appoint an attorney to serve as "attorney guardian ad litem." Combining multiple titles in one appointment confuses the purpose and responsibilities of the attorney assigned to represent the child. In fact, the North Carolina Supreme Court, evading the issue, has held that "if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate."³⁵ The fact that the two distinct roles present a potential if not actual conflict seemingly eluded the court.

Another practice in several states is to appoint a GAL in every case, thereby complying with CAPTA, but subsequently assign an attorney to represent the child when he expressly desires a result with which the GAL disagrees. In other words, when the GAL's "best interests" position conflicts with the child's position, the child is entitled to legal representation. The rule seems fair but has proven virtually impossible to implement. For example, the question of when a conflict exists to trigger the assignment of an attorney was litigated extensively in the Ohio case of *In re [D.IV]*. The applicable standard states:

Generally, the appointment of independent counsel is warranted when a child has 'repeatedly expressed a desire' to remain or be reunited with a parent but the child's guardian ad litem believes it is in the child's best interest that permanent custody of the child be granted to the state.³⁶

³⁴ N.C. Gen. Stat. § 7B-601.

³⁵ *In re J.H.K.*, 711 S.E. 2d 118 (N.C. 2011).

³⁶ *In re [D.N.]*, 2011 WL 4064491 (Ohio Ct. App. 2011).

In *D.IV*, the trial court's decision to decline assignment of an attorney was upheld because the GAL had reported that the fifteen-year-old had little attachment to either parent and had not "repeatedly expressed a desire."³⁷ Note also that the court limited the assignment of independent counsel to cases in which the conflict involved only "permanent custody."³⁸ A "temporary" removal, which may endure for months or years, was excluded.³⁹

In another Ohio case, the GAL had reported that the children, although old enough to state their wishes, had been ambivalent; specifically, they had "gone back and forth" and been "all over the map."⁴⁰ Their alleged ambivalence was sufficient to deny appointment.⁴¹

In both cases the court relied solely on statements by the GAL. In both cases, the court did not solicit the children's views through an in-camera interview or independent evidence.⁴² Further, there was no indication that the GAL had attempted to resolve the children's ambiguities through discussions with the youngsters, or had attempted to resolve the GAL-client differences through other mechanisms, such as the engagement of a social worker.⁴³

Basing the decision solely on a GAL's representations is questionable, regardless of the specific circumstances. After all, had the GAL reported a conflict between her and the children, the required assigned attorney would probably have taken a position which contradicted the GAL. One is not usually motivated to request the involvement of an adversary, particularly a legal adversary who, unlike the GAL, may file motions, file briefs, call witnesses and cross-examine witnesses, including the GAL.⁴⁴

³⁷ *In re* [D.N.], 2011 WL 4064491 (how repetitious the young person might be before triggering appointment is not determined).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *In re* L.J., 2016 WL 1615542 (Ohio Ct. of Appeals 2016).

⁴¹ *Id.*

⁴² *See In re* [D.N.], 2011 WL 4064491, *In re* L.J., 2016 WL 1615542.

⁴³ *Id.*

⁴⁴ Adding to the dilemma, most courts have held that the GAL in child protective cases, unlike other GALS, is entitled to immunity. *See* *Farris v.*

Of greater significance, the Ohio courts, trial and appellate, focused solely on the issue of placement versus reunification.⁴⁵ The only fact relevant to the courts was whether the children wanted to be placed or, alternatively remain at home.⁴⁶ No other legal right of the child was noted in the lengthy opinions.⁴⁷ Yet, the specific placement, such as possible kinship foster placement, the scope of parental visitation, rehabilitation services, the children's participation, and their autonomy rights, to mention only a few of the myriad child legal interests, were absent in the appellate opinions.⁴⁸ The decision to appoint GAL versus an attorney, *i.e.*, the American dilemma in child protective proceedings, overshadowed any other consideration.

In *Morgan v. Getter*, a custody case, the Kentucky courts grappled with a somewhat different dilemma.⁴⁹ The relevant statute authorized the appointment of a GAL for the child and required the GAL to be an attorney.⁵⁰ Given the inherent duality of a GAL and counsel rolled into one individual, specifically child advocacy versus "best interests," the court coined a new phrase, "de facto friend of the court."⁵¹ The novel unprecedented "de facto friend of the court" was described as follows:

Importantly, the guardian ad litem should not be confused with the de facto friend of the court. Whereas the friend of the court investigates, reports, and makes custodian recommendations on behalf of the court, and is subject to cross-examination, the guardian ad litem is a lawyer for the child, counseling

McKaig, 920 NW 2d 377, (Mich. Ct. Appeals 2018) (The child or an affected parent cannot obtain relief for malpractice.).

⁴⁵ See *In re [D.N.]*, 2011 WL 4064491, *In re L.J.*, 2016 WL 1615542.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Morgan v. Getter*, 441 S.W.3d 94, 119 (Ky. 2014).

⁵⁰ *Morgan*, 441 S.W.3d at 119.

⁵¹ *Id.*

the child and representing him or her in the course of the proceedings.⁵²

The upshot: The GAL attorney is really the client-directed child's counsel, while the newly minted "de facto friend of the court" appears indistinguishable from the traditional GAL.

Given the case law, is it possible to add even further confusion to the important issue?⁵³ The dual often conflicting roles is illustrated in *In re J 'K.M.*, where the GAL and the 16 year old child had diametrically opposed positions.⁵⁴ The appellate court resolved the dispute by holding that a second GAL should have been appointed.⁵⁵ The result: Two GAL's appointed to assume two contradictory positions.

Finally, child protective cases are frequently appealed, usually by the parent or, alternatively, the state. In many states, the child also maintains standing to appeal. Suppose an attorney has been appointed as GAL by the trial court. Since the attorney GAL is not acting as a lawyer, at least in the usual sense, he has no discernable role in the appeal. Ergo, GALs cannot appeal or, alternatively, defend an appeal. Even bar membership cannot convert the attorney GAL into legal counsel. In effect, the lawyer who assumes a GAL status is disarmed, unable to present legal arguments, engage in motion practice, or examine witnesses. Given the limitations, in the Tennessee case of *Toms v. Toms*, the trial court granted the attorney GAL's motion to appoint a separate attorney to represent the attorney GAL; the decision was upheld by the appeals court.⁵⁶ The case represents just one additional manifestation of the perils confronting the GAL, a peril which may be avoided only by providing straight attorney representation.

For the remainder of this article, I shall assume that an attorney represents the child, regardless of the role the specific

⁵² *Morgan*, 441 S.W.3d at 119.

⁵³ The confusion is frequently compounded by state statutes which authorize an attorney GAL to accomplish the impossible, represent both child's legal and best interests: *See e.g.*, 42 Pa C.S. § 6311(a) (2019).

⁵⁴ *In re J'K.M.*, 191 A.D. 3d 907 (Pa. Super. Ct. 2018)

⁵⁵ *Id.*

⁵⁶ *Toms v. Toms*, 209 S.W. 3d 76, (Tenn. Ct. App. 2005).

attorney is mandated by state law to assume or, perhaps, elects to pursue. Most children are represented by lawyers, as opposed to a non-lawyer GAL, and the widespread scholarly and organized bar practice guidelines endorse the legal representation model.⁵⁷ The question which has confounded the case law and legal literature is whether the attorney should advocate and pursue the child's wishes or, on the other hand, advocate and pursue the child's "best interests."

The granddaddy statute, enacted by New York in 1962 and still in effect in 2018, stipulates that children "often require the assistance of counsel to help protect their interests and help them express their wishes to the court."⁵⁸ The focus on the child's wishes and "interests" represent traditional attorney responsibilities. Significantly, the statute does not mention the child's "best interests", a different concept than "interests": Every client in every type of proceeding has "interests" to protect, as opposed to a lawyer's unilateral determination of the client's "best interests". A large body of case law supports the child's "wishes" model in child protective cases.⁵⁹ But the case law is virtually silent in discussing the child's legal interests.⁶⁰

In any event, just how should counsel determine the child's wishes and thereby tailor her advocacy? Attorneys formulate that determination in every type of case and do so in collaboration with the client. Perhaps two hypotheticals in other fields of law, one civil and the other criminal, may prove helpful.

Assume that an attorney is retained to represent the plaintiff in an automobile negligence case. The client understandably wants

⁵⁷ See, e.g., the U.S. Dept. of Health and Human Services, Administration for Children and Families publication, subject "High Quality Legal Representation for all parties in child welfare proceedings (2017), which states, at pp. 3-4 that "while CAPTA allows for the appointment of an attorney and/or a court appointed special advocate (CAS), there is widespread agreement in the field that children require legal representation in child welfare proceedings."

⁵⁸ N.Y. Fam. Ct. Act § 241 (2019).

⁵⁹ See, e.g., *Div. of Youth and Family Servs. v. Robert M.*, 788 A. 2d 888 (N.J. Super. Ct. 2002), *In re Adoption/Guardian No. 629 70003*, 731 A. 3d 467 (Md. Ct. Spec. App. 1999), *Carroll v. Superior Court*, 124 Cal. Repr. 2d 891 (Cal. Ct. App. 2002).

⁶⁰ *Id.*

to recoup maximum damages and tells counsel “I want to recover \$150,000”. Counsel’s response may be to first explain the applicable rules of law, including comparative negligence, proceed by outlining the likely evidence, and then say: “Given the evidence, the applicable rules, and my expertise, I believe that after pre-trial motions followed by negotiations, your case is likely to settle for between \$50,000 and \$80,000. If we demand \$150,000, I fear the defense attorney will not seriously negotiate. I therefore suggest we request \$100,000, which is a credible position, and we’ll try to negotiate a settlement reasonably close to that demand.” In most cases the client will agree to counsel’s professional recommendation, perhaps after further attorney-client discussions (if he insists on his original position the attorney is obligated to pursue his wish of adamantly demanding \$150,000 or withdraw from the case, but that scenario is relatively rare). In short, counsel does not pursue his client’s unrealistic wish, but, rather, achieves an attorney-client consensus. The consensus, express or implied, may encompass a range of legal interests, such as discovery, client autonomy, and requests for interim relief.

Similarly, in virtually every criminal case the client’s wish is to be exonerated. That does not mean that defense counsel will tell the court that the defendant wants dismissal and then adhere to that position until the defendant is found guilty after trial and sentenced to a lengthy period of incarceration. Instead, the attorney may first attempt to secure a dismissal and, when that effort fails, as it usually does, negotiate a plea to a reduced charge and sentence. Of course, counsel does that with the client’s consent, frequently obtained following privileged discussions concerning the evidence and the legal parameters.⁶¹ The negotiated disposition may not be the “wish” of the defendant but instead the reality he accepts to avoid a more punitive outcome.

Why the statutes, case law, and practice in the child protective world focus almost exclusively on the raw unmediated “wishes” of the child-client is puzzling. In other words, why is a child protective case deemed to be different than any other form of litigation? What would constitute unacceptable lawyering in other proceedings has become the norm, at least in a significant majority

⁶¹ See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2009).

of child protective cases. A better approach is needed, one which will be discussed in Part 3 of this article.

The opposing child protective attorney paradigm to “child wishes” is to advocate for the child’s “best interests.” However, the “best interests” prescription is equally problematic. A glaring “best interests” model deficiency is its inherent subjectivity. As noted earlier, courts cannot even agree on a definition. At best, it is an opinion by the attorney, who, unlike a forensic or other expert witness, cannot be tested through the crucible of cross-examination. Lawyers are good at determining legal interests – that is what they are trained to do—but cannot readily determine “best interests” in the abstract.

Further, “best interests” is the legal standard which the court applies in determining a child protective disposition. Accordingly, the standard shapes each advocate’s argument and conclusions. The petitioning social services agency attorney argues “best interests,” ditto the parents’ counsel, and so too the child’s attorney. Each may articulate a radically different position, but each attempts to persuade the court that his position equates with “best interests.”

Hence a child’s attorney, whether she is guided solely by her client’s desires, or has developed a position collaboratively with the child, will assert that her position is consistent with the youngster’s “best interests.” In short, one does not need to be a “best interests” lawyer to argue vehemently that his argument is consistent with “best interests.”

It is, thus, not surprising that the case law is inconsistent. Neither “best interest” nor “child’s wishes” suffice. Moreover, neither polarized doctrines effectively or even marginally incorporates the myriad legal interests of the child. The rather primitive and conflicting formulas should be abandoned, replaced by a more sophisticated legal interests centered paradigm—in short, an approach which is far more mainstream in America jurisprudence.

PART 3: A NEW PARADIGM

The first step in forgoing a typical attorney-client relationship is ascertaining the client’s interests, desires, and legal rights. Counsel usually commences by analyzing legal documents.

In a child protective case the pertinent papers include the petition or complaint, supporting documentation, child protective service reports, relevant prior cases or reports, and legal documents which may have been filed by the respondent parent. Lawyers customarily commence representation by reading relevant documents, thereby gaining a preliminary sense of the dispute.

The initial client interview follows. The client will, in most cases, inform counsel of facts which are not apparent in the written material, answer specific factual questions, and articulate his goals or desires—often merging facts, thoughts, and desires. A client's goals may be realistic, unrealistic, or a combination of the achievable and the unachievable. At that point, however, counsel usually just listens patiently and asks questions in a non-confrontational manner.

At the initial interview, the client almost always asks questions relating to substantive and procedural laws. People need counsel for knowledge and advice. They solicit guidance, regardless of age, and are dependent on their chosen or assigned representative. At that point there is no clear distinction between legal interests and client wishes.

Instead, the attorney and the client are exchanging information. The client's legal position is developed thereafter, perhaps, at the same meeting or perhaps at a later meeting. That position is based on a blended matrix of legal interests, substantive law, and client goals, as developed through counsel's expertise and attorney-client discussions.

The above primer is, unfortunately, needed only because the paradigm is far from typical when representing children. Note that there should be no formal barrier between legal interests and the client's wishes. The needless conflict between "wishes" and "best interests" does not exist. If, when representing children, we erase the silly and largely unworkable word "best," concentrating instead on "legal" interests, we can merge the two contradictory and endlessly arguable principles of "best interests" versus "wishes." By the time the case's merits have been reached, the child's wishes should have been modified through counsel's realistic assessment and advice. The process should mimic the process when a lawyer is representing the youngster's adult peers. Simultaneously, the child should

comprehend and agree to the legal interests his attorney will advocate and protect.

Had the attorney acted alone without client involvement, as do many children's lawyers, her advocacy may have been different, but representation means just as the word suggests.⁶² An attorney guides, advises, and often diplomatically debates a position with her client, but never usurps the attorney-client relationship.⁶³

Exceptions to Conventional Representation

The child protective world includes children of every age, from newborns to seventeen-year-old near adults.⁶⁴ When representing the preverbal child, counsel has no choice but to independently evaluate the case and advocate the client's perceived interests, thereby deviating from traditional representation. For some legal interests, the task may be relatively easy. If the child needs specialized services, such as medical care, counsel's position is clear. If the preverbal youngster has been abandoned or seriously hurt, perhaps a viable kinship arrangement is possible. If the parent needs rehabilitation services, it is surely in the child's interest to insure implementation through advocacy. Other cases may necessitate tough choices for the very young child, but that, under the present system, cannot be avoided.

Of course, most represented children in child protective cases are neither preverbal nor of limited cognitive ability. Further, abuse, neglect, and dependency proceedings frequently have lengthy time spans. As the case continues through often lengthy proceedings the child becomes increasingly mature. Hence the child

⁶² An incisive case which analysis is the role of the child's attorney and the necessary engagement of the child is the Canadian decision of B.J.G. and D.L.G., 2010 YKSC 44 (2010).

⁶³ Of course, other factors may interfere with the standard model of representation. One is the speed of necessary judicial determinations, particularly when the child has been subjected to a temporary removal from home. A second is the large and sometimes overwhelming caseload of assigned counsel; but the solution to a high caseload should be governmental financial augmentation rather than client compromise.

⁶⁴ Placement can also be extended until age 21 through foster placement or guardianship.

is increasingly capable of collaborating with counsel. And the position should be articulated to the court in accord with the legal standard, to wit “best interest.” As cogently advanced a generation ago by Jean Koh Peters:

[A]ny child advocate must become adept at translating her proposals to the court into the language of ‘best interests.’ Just as a tort attorney must translate a client’s story into the legal language of fault and negligence, children’s attorneys must often translate their clients’ desires and goals into the framework of ‘best interests.’ Like any attorney who respects the client’s right to make her own informed decision, the attorney may be in the odd position of advocating a result which, personally, the lawyer believes is not in the child’s best interests. Thus, a lawyer should be prepared to make an argument that a client’s desire is in her best interests as long as the lawyer can do so in good faith. The lawyer should press herself to make those arguments even when they conflict with her personal assessment of the client’s ‘best interests.’⁶⁵

One additional dilemma arises when the child insists on maintaining a position that poses an imminent grave risk to her life or health. Children usually want to remain home even when they have been seriously abused or their parent is drug addicted. When engaged in a collaborative lawyer-client relationship, counsel can reason with the child-client, suggesting at least temporary alternatives, such as kinship placement and rehabilitative services for the parent. The attorney can also realistically advise the child that the court is very unlikely to concur with his wish to remain at home and further advise that placement is not permanent, but will be reviewed, with the child’s input, every six months.⁶⁶

⁶⁵ Jean Koh Peters, *The Rules and Context of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1515 (1996).

⁶⁶ As required under the Federal “permanency” act.

Experienced child lawyers agree that their clients may initially request, but rarely persist in demanding, a resolution which places them in imminent danger. After all, no one wants to be hurt. In exceptional situations, the attorney may decline to advocate the legally frivolous position, and instead advocate a position which comes closest to the child's wishes without crossing the "imminent danger" threshold.⁶⁷ Further, most of the child's legal interests, such as autonomy, the maintenance of family relationships, and needed medical or social services, are not affected by the question of placement. For those important interests, attorney-child client conflicts are rare. The case law obsession with out of the home placement versus non-placement is like the tail wagging the dog. There is a lot more to a child protective case.

CONCLUSION

The representation of children in child protective cases has expanded and evolved in the past half century. Today, most children, almost all of whom are involuntarily involved, are represented by attorneys or, more accurately, persons who possess law degrees. The representation models include traditional client representation, guardian ad litem representation, and a confusing blend of traditional representation, guardian ad litem, and esoteric unquantifiable roles such as "friend of the court."

Simultaneously, the statutory framework, case law, bar association standards, and scholarship, have focused almost exclusively on whether the child's representative, whatever the appellation, should advocate the child's wishes or the child's best interests. The case law development, truncated by the wishes and best interests' debate, have largely ignored the multiple additional legal interests of the child. Further, by obsessing over that sole aspect, which is ironically absent in the majority of the cases where the state does not seek to place the child outside her home, the child's important rights are ignored.

This article proposes a new paradigm, one grounded largely on a traditional client-attorney relationship. The time-honored rules which define the role in counsel, from property to contract, to

⁶⁷ Attorneys frequently ameliorate their client's extreme or frivolous requests.

whatever the cause of action, is with little exception appropriate and feasible when representing a youth. It is time to jettison the absurd and paternalistic current paradigm, created in the past few decades, and substitute a different paradigm—one which has been successfully applied for centuries throughout the legal system.