A RESPONSE TO THE RECOMMENDATIONS OF THE UNLV CONFERENCE: ANOTHER LOOK AT THE ATTORNEY/GUARDIAN *AD LITEM* Model

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The *UNLV Conference* provided the opportunity for child welfare advocates across the country to meet and discuss issues surrounding the representation of children in the child welfare system. Many thoughtful recommendations were made about raising the quality of representation that children are receiving. The Office of the Cook County Public Guardian strongly agrees that children should have an attorney in abuse, neglect, delinquency and other proceedings, however, we do not agree with the recommendation that the role of counsel be limited to a client-directed model. While the *Recommendations* recognize that younger children may not have the capacity to direct the course of the representation, the conference's finding that children older than seven would usually have the capacity to direct the litigation is not supported by the experience and knowledge that the Office of the Public Guardian has gained over the last twenty years.[1] In our experience, the functions of the guardian *ad litem* are a crucial component of representing children, in order to ensure that the best interests of the child are advanced. Moreover, an absolute age rule does not recognize the uniqueness of every child and the uniqueness of each child's situation.

Representing children in child protection cases is as rewarding as it is difficult. The attorney-client relationship may last for years as the children's cases wind through the court system. Over the years, the children and the issues affecting their lives change. Because children's capacity changes with their age, their life experiences, their education, and the nature of the decisions that they are being asked to consider, the role of their attorney must also change. Every case is not only unique, but also constantly changing with the child, and lawyers must be able to adapt and serve accordingly. The attorney/

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[1] The Office of the Public Guardian represents more than 10,000 children as both attorney and guardian *ad litem*. Its multidisciplinary juvenile division staff includes more than 120 attorneys, as well as numerous social workers, paralegals, investigators, former educators, a nurse, and a clinical psychologist. The office is also a training site for child psychiatry interns. The office also has a domestic relations division, a disabled adults division, an appeals unit, and an impact litigation unit.

guardian *ad litem* model allows the attorney the needed discretion to serve the individual needs of the child client. This article is a brief review of child developmental and legal bases for the model as well as a description of the model.

I. Children's Cognitive Competence

The development of cognitive competence in children and adolescents proceeds in a complex manner. It would be a mistake to assume that all children at a given age or ability level perceive, reason, and perform in the same way in a particular decision-making situation. Current information-processing theories of cognitive development suggest that competencies emerge in specific situations at different times as a result of the different processing demands of various tasks, and individual differences in experiences.[2]

However, age is an important factor. Research has consistently shown that compared to preschoolers, school-aged children increasingly think in a more organized and logical fashion about concrete information. But school-aged children generally cannot sort out evidence pertaining to more than two variables at once, and they have great difficulty reasoning from circumstances that contradict reality or their own beliefs.[3] Adolescents can generally think more abstractly and competently than middle-school-aged children on cognitive tasks. However, they often feel overwhelmed by choices, and consequently may resort to impulsive actions, immature responses, or indecision.[4] Therefore, although a child may be able to verbalize a preference, the child may not have the capacity to direct the course of representation.

Given children's immaturity in cognitive functioning and the many influences that drive their decision-making, an attorney representing children must have the discretion to use a best interest analysis in their representation. Although the tendency is to "force the fit" of representing children to representing adults, there is a necessity, based upon the uniqueness of each child and the cognitive limitations of children generally, to represent children differently.

II. Children's Capacity Addressed in Other Legal Areas

Limitations in children's ability to understand information that is highly significant for their lives, and the limitations even in adolescents to make competent decisions in important areas, are reflected in the law. There are several areas of the law where scholars agree that juveniles lack the same capacity as adults, and should therefore be treated as a distinct group. Criminal law is one of those areas.

In the past, a criminal defendant's competence to stand trial did not come into question unless there was reason to believe that the defendant was mentally ill or mentally retarded. In the last decade, however, scholars began to suggest

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[2] *See generally* David F. Bjorklund, Children's Thinking (2004); Laura E. Berk, Child Development (2006).

[3] *See* Berk, *supra* note 3.

[4] *Id.*

that "developmental immaturity also may render juveniles incompetent."[5] Advocates began to write about this in the area of criminal law in reaction to a trend across the nation in which more and more juveniles were being prosecuted in adult criminal courts. This trend was a result of a significant increase in the number of violent crimes committed by juveniles in the late 1980s and early 1990s.[6]

There is widespread agreement with the view that juvenile offenders are less culpable than adult offenders, even for a comparable crime. C. Antoinette Clarke asserts that adolescents make judgments about involvement in crimes less maturely than adults do, and thus adolescents warrant differential treatment if found accountable.[7] Barry C. Feld argues that younger offenders are not as blameworthy as adults because they have not yet fully internalized moral norms, or learned to control their actions.[8] Juvenile justice advocates also argue that because of their diminished culpability, young offenders should not be eligible for the death penalty. Feld observes that because of their inexperience and immature judgment, juveniles are treated differently from adults in numerous legal areas, including their ability to serve on juries, vote, marry, drive, and drink. He reasons that "[i]t would be inconsistent and cruelly ironic to find juveniles' culpability and criminal capacity equivalent to that of adults for purposes of capital punishment."[9]

The United States Supreme Court agreed with the view that juvenile offenders should not be eligible for the death penalty in its decision in *Roper v. Simmons*,[10] which was delivered by Justice Kennedy. The Court compared adolescents to mentally retarded adults and concluded that juveniles' immaturity and irresponsibility prohibit the imposition of the death penalty on them. Justice Kennedy wrote that the differences between adults and juveniles "render suspect any conclusion that a juvenile falls among the worst offenders .... From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[11] The Supreme Court has therefore given credence to juvenile justice advocates' contention that age renders youthful offenders less culpable in the area of criminal law.

Other areas of the law where juveniles are treated as a separate group are divorce proceedings and other custody cases. For example, children may or may not have a preference concerning which of their divorcing parents should be custodial. But there are several views on the wisdom of even asking children to express a preference.[12] Courts have noted the pressures involved in asking children to make decisions about which parent should have custody.

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[5] Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 524 (2003).
[6] *See id.* at 522.
[7] C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 KAN. L. REV. 659, 696 (2005).
[8] Feld, *supra* note 5, at 502.
[9] *Id.* at 480.
[10] 543 U.S. 551 (2005).
[11] *Id.* at 570.
[12] Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After* Troxel, 2003 WIS. L. REV. 115, 119-43.

The Illinois Appellate Court, in *In re Marriage of Hefer*, stated that "[t]he more sensitive courts do not specifically ask a child whether he prefers to live with his father or his mother."[13] The court in *Hefer* reversed the trial court's award of custody of two children to the father, even though both children, then thirteen and nine years old, had expressed, *in camera*, a preference for living with their father. The court found their expressed preference to be more hopeful than reality-based, as they had spent very little time with their father in the years before he was awarded custody.

The American Bar Association Section of Family Law, in its *Standards of Practice for Lawyers Representing Children in Custody Cases* (2003), has indicated that all attorneys for children in custody cases should "elicit and assess the child's views."[14] However, in doing so, the lawyer may need to work with other professionals in order to assess the child's developmental abilities and to interpret the child's responses.[15] The lawyer must also exercise caution because the child's views may change over time and may be the result of intimidation and manipulation.[16]

On the other hand, some authors counsel against interviewing pre-adolescent children at all about their preferences regarding placement or visitation, on the grounds that the children will feel responsible for whatever arrangement is established after the interview, and that children of this age are vulnerable to parental coaching.[17] They believe it may be wise not to pose such questions to children who cannot understand that their wishes will be only one of the pieces of information considered by the court.[18] Similarly, Goldstein et al. believe that children by definition need adult caregivers who determine what is best for them.[19] They also believe that counsel appointed by the court may seek information from child clients and their parents, but should not seek instructions from them, because the attorney's guidance should come from relevant statutes and the court.

While the Office of the Public Guardian does not agree with the view that children should never be asked to express a preference or be allowed to provide instructions, it is certainly true that great caution should be exercised in this area, even when interviewing older children. Skilled interviewing of children will elicit important information to be used in advocating for them, beyond information about their preferences. Information such as activities and routines involving the parents, the identity of adults the children would seek help from, and the child's hopes for the future, are important when acting as a child's advocate.

Assuming that asking children to express a preference for the custodial parent is the correct approach, there is evidence that a child's age alone should

[13] *In re* Marriage of Hefer, 667 N.E. 2d 1094, 1097 (Ill. App. Ct. 1996).

[14] ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases pt. III.E (2003).

[15] *Id.* at cmt.

[16] *Id.*

[17] *See, e.g.*, G. Andrew H. Benjamin & Jackie K. Gollan, Family Evaluation In Custody Litigation 86 (2003).

[18] *Id.* at 87.

[19] Joseph Goldstein et al., The Best Interests of the Child: The Least Detrimental Alternative 144 (1996).

not determine the weight given to that preference. Even adolescents may be significantly more suggestible than adults, and, like younger children, they may experience divided loyalties that make it difficult for them to express a clear preference.[20] Although it may be expedient to draw a bright line based on age, even commentators who advance the bright line idea differ on where the age line should be drawn: one says age six, another age twelve, yet another age ten.[21] This disagreement about the "old-enough" age suggests that any age may be arbitrary, that "developmental psychology does not offer what lawyers would most like: definitive, fixed information upon which to ground simple, age-based rules."[22]

III. Children Should Have a Due Process Right to Counsel at All Stages of a Child Protection Proceeding

At the heart of every stage in a child protection proceeding is the child. Throughout the process, judges render decisions pertaining to the placement of the child, visitation with parents and siblings, and the long-term goal for the child. For example, a judge in a particular proceeding may order a child placed in a restrictive residential treatment facility to meet the child's severe mental health issues, or decide not-to-not remove a child from an allegedly abusive foster home. Each of these pivotal decisions implicates the child's liberty interests.[23] As such, fundamental fairness dictates that children must be represented by an attorney at all stages and at all ages to protect their due process rights.

While many states have enacted legislation mandating that an attorney be appointed for all children subject to a child protection proceeding,[24] other states have merely mandated the appointment of a non-lawyer advocate. While a non-lawyer advocate can provide the court with valuable information about the child, a non-lawyer cannot sufficiently represent the child's interests or desires

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[20] Starnes, *supra* note 12, at 132.

[21] *Id.* at 132-34.

[22] *Id.* at 134 (quoting Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 Cornell L. Rev. 895, 919 (1999)).

[23] *See* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

> [C]hildren have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents . . . . Furthermore, a child's liberty interests continue to be at stake even after the child is placed in state custody. At that point, a 'special relationship' is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.

Id.; Marvin Ventrell, *The Practice of Law for Children*, 66 Mont. L. Rev. 1, 2 (2005) ("For many of these children, the legal proceedings in which they are involved determine the course of their lives and may be a matter of life and death."); Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 Fam. L.Q. 485, 493-94 (2003) ("Dependency proceedings implicate a child's liberty interest because at stake for the child is his safety, his familial relationships, his 'emotional and social interests,' and his interest in a 'stable and permanent home.'") (citation omitted).

[24] The following is an illustrative, non-exhaustive list of state statutes that provide an attorney for all children involved in child protection proceedings: Ala. Code § 12-15-1 (1975); Cal. Welf. & Inst. Code § 317 (Deering 2006); 705 Ill. Comp. Stat. 405/1-5(1) (West 2004); N.C. Gen. Stat. § 7B-600 (2004); N.Y. Fam. Ct. Act § 242 (McKinney 2004).

in such proceedings.[25] Children must be appointed their own attorneys with full party rights to navigate the court system, file motions, present independent evidence, and cross-examine witnesses. Only a lawyer entrusted to represent a child can ensure that the child's interests are properly represented. All other parties, from the attorneys representing the state to the parents' attorneys, have interests and motivations other than what is in the child's best interests.[26]

In early 2005, a federal district court in Georgia squarely addressed the issue of whether foster children have a due process right to counsel in child protection proceedings. The court in *Kenny A.* held that a child's right to counsel in a child protection proceeding is guaranteed under the Due Process Clause of Georgia's State Constitution.[27] The court utilized the three-part federal test enunciated in *Mathews v. Eldridge*.[28] Nothing in the court's analysis was unique to any provisions of the Georgia State Constitution as distinguished from the Fourteenth Amendment to the United States Constitution. Hopefully, the court's decision in *Kenny A.* portends a nationwide recognition of a child's constitutional due process right to counsel in child protection proceedings.

IV. The Role of Best Interest and the Description of an Attorney/Guardian *Ad Litem* Model

In Chicago and the surrounding Cook County suburbs, thousands of children in child protection proceedings are zealously, effectively and ethically represented by attorneys/guardians *ad litem* in the Office of the Public Guardian. Our appointment as attorney and guardian *ad litem* allows us to advance our clients' best interests as well as act as their lawyers. While this dual capacity presents challenges, it allows for the most effective and efficient representation of children in child protection proceedings. The two roles inform each other, and only rarely present unmanageable conflicts, as discussed below.

One of our cases that demonstrates the complexity of the situations facing an attorney/guardian *ad litem* involves an eleven-year-old named "Carmela." Carmela presented in the emergency room three times in two months with a severe diabetic crisis. After she nearly died, the doctors opined that her diabe-

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[25] *See Kenny A.*, 356 F. Supp. 2d at 1361 (holding that "only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings"); Bridget Kearns, *Comment, A Warm Heart But a Cool Head: Why a Dual Guardian Ad Litem System Best Protects Families Involved in Abused and Neglected Proceedings*, 2002 Wis. L. Rev. 699, 726; Shari Shink, *Justice for Our Children: Justice for a Change*, 82 Denv. U. L. Rev. 629, 644 (2005) ("Absent the assistance of legal representation, a child has no realistic prospect of successfully navigating the complexities of the court system.").

[26] *See Kenny A.*, 356 F. Supp. 2d at 1358-59; Smiles, *supra* note 23, at 492-93; Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 Fam. L.Q. 441, 446 (2000).

> 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 . . . . Since these are legal court proceedings, the child's advocate ought to be a lawyer.

Id.

[27] *Kenny A.*, 356 F. Supp. 2d at 1353.

[28] 424 U.S. 319, 334-35 (1976).

tes was being poorly managed at home. Carmela is an honor student in regular education classes. Her mother and grandmother appear to have significant cognitive deficits, but assisted Carmela with daily insulin shots and twice-daily monitoring of her blood sugar. Carmela is very attached to her mother and wants to be immediately returned home, but the physicians involved with her care fear that she will die without adequate management of her diabetes. It is likely that the mother will continue to have considerable difficulty understanding how to manage her diabetes, and it is suspected that Carmela easily manipulates her mother to obtain excessive amounts of sugar. Carmela not only worries about managing her diabetes, she also worries about her intellectually limited mother. Within a few days, she will likely be ready for discharge from the hospital. The state has filed a petition for temporary custody. The court has appointed the Office of the Public Guardian to represent Carmela.

While advocating for intensive home-based services in order to send Carmela home may seem like the easy answer, adequate home-based services to maintain her in the home are not currently available. The risks for diabetic coma and death are considerable. An attorney in a strictly client-directed lawyer role may have to argue for return home to a situation that has a high probability of failing and causing the client's death. Carmela's attorney/guardian *ad litem* is able to advocate for the provision of extensive services prior to her return home that will ensure her safety as well as a successful reunification. Unlike the client-directed model of representation, the attorney/guardian *ad litem* model does not treat client capacity as "an either/or proposition."[29] The better practice is to take on the more difficult task of assessing and considering capacity as a continuum,[30] which requires an in-depth understanding of the child clients in order to effectively advocate the position that is in their best interest while presenting their preferences.

The need for a child advocate who will represent the best interest of the child is well recognized, and input from that child advocate is necessary for the court to make an informed determination in a child protection proceeding. Without the ability of a guardian *ad litem* to present best interest evidence to the judge, it may not be presented. Moreover, the Child Abuse Prevention and Treatment Act of 1974 ("CAPTA") requires the appointment of a guardian *ad litem*, who must obtain a first-hand understanding of the situation and needs of a child. The guardian *ad litem* is required to present recommendations to the court concerning the best interests of the child.[31] Given what is known about child development, these CAPTA requirements continue to be very beneficial for children in child abuse and neglect proceedings.

A best interest standard takes into account that a child's capacity is one of degree, and therefore strikes the best balance between providing a voice to the child and ensuring the child's safety and welfare.[32] An attorney who is also a

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[29] Jennifer Renne, *Representing a Client with Diminished Capacity*, 23 ABA CHILD LAW PRAC. 1, 8 (2004).

[30] *Id.*

[31] 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2005).

[32] Duquette, *supra* note 26, at 460.

> '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.' Professor Peter's metaphor of a

guardian *ad litem* for a child often is in the best position to present an informed picture of the child's life, needs, wishes, strengths and interests. The attorney/guardian *ad litem* should collaborate with a multi-disciplinary team of professionals and conduct a thorough, individualized investigation into the child's life before making any best interest determination. The ultimate determination of the position that serves the child's best interest must strongly weigh the child's wishes and desires. However, the child's preference must be examined in the context of the child's age, degree of capacity, emotional functioning, and family circumstances, as well as the particular situation.

Even in a best interest analysis, a child's preference can influence the course of the litigation. As an example, "Jamie" is a six-year-old boy who wants to return to his mother's care, despite spending the majority of his life in a pre-adoptive home with foster parents with whom he is well bonded. Furthermore, he is well bonded to his siblings who live with maternal relatives and whom he visits with on a weekly basis. The foster parents have a tenuous relationship with the relatives and have cut off visits previously. The mother only recently engaged in services and has had only occasional visits with Jamie. His therapist recommends that he live with maternal relatives. However, a team of clinicians (social workers and a psychologist hired to do a best interest analysis of whether to terminate parental rights) and the state child welfare agency recommend termination of parental rights and adoption as the best permanency plan.

Jamie may lack the capacity to direct the course of the litigation. But while there may be strong best interest evidence for the attorney/guardian *ad litem* to proceed with the termination of parental rights, it may not be in his best interest. Jamie does not want to be adopted. It would be contrary to his best interest to summarily disregard his preferences. The attorney/guardian *ad litem* will have to work in concert with clinicians (and/or seek out further clinical experts) to determine when, if ever, termination would be in his best interest. As this example illustrates, the effective attorney/guardian *ad litem* cannot exercise "relaxed advocacy."[33] Although the child is under seven, the attorney/guardian *ad litem* not only must seek out all relevant information to formulate a position, but then must aggressively advocate for the child.

Critics of the attorney/guardian *ad litem* model argue that "best interests" is too amorphous a standard, leaving overly broad discretion to the lawyer. Advocates for the client-directed model fear that if children's lawyers are allowed to advocate a best interests position, lawyers will substitute their uninformed, personal, and value-laden judgment about what is best for the children. However, the best interests standard, when appropriately used, should never equate with a lawyer's biased "substituted" judgment. Furthermore, the child-

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> '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.

Id. (internal citation omitted). *See also* Jean Koh Peters, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 53-54 (1997).

[33] *See* Ventrell, *supra* note 23.

directed model of representation itself leaves substantial room for lawyers to substitute their judgments and exercise "unfettered discretion." As Donald Duquette noted:

> [T]hese 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.[34]

At this juncture all states and territories in the U.S. have adopted some form of best interests standard for their courts to employ in making decisions about custody, placement, and/or the termination of parental rights.[35] However, states vary widely in the amount of guidance their statutes give when defining best interests. Some statutes list extensive best interest factors relating to the child-in-context that provide sufficient direction to prevent lawyers from exercising unbridled discretion. These statutes also leave lawyers enough flexibility to meet the unique needs of individual children.[36]

Surprisingly, as of 2003, fewer than twenty-five percent of state statutes listed the child's wishes/desires as a factor to be considered in the best interest analysis. Many of the statutes that listed this factor limited it to "reasonable preferences" or preferences of children of a certain age or degree of maturity.[37] To help provide guidance and limit the degree of subjective discretion involved in applying the best interests standard, national guidelines should clearly delineate factors to consider in the best interest analysis. Those national guidelines should include the child's preferences as a factor. At a minimum, practitioners must be aware of the appropriate factors to be used when determining the best interest of the child. Bright-line age limits should be avoided to ensure focus on the uniqueness of the individual child.

Regardless of whether a client-directed model, guardian *ad litem* model, or an attorney/guardian *ad litem* model of representation is utilized, an attorney

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[34] *See* Duquette, *supra* note 26, at 444.

[35] *See* U.S. DEPT. OF HEALTH AND HUMAN SVCS.: NAT'L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., STATE STATUTES SERIES: DETERMINING THE BEST INTERESTS OF THE CHILD (2005), http://nccanch.acf.hhs.gov/general/legal/statutes/best_interest.pdf.

[36] See for example, 705 Ill. Comp. Stat. § 405/1-3 (4.05) (West 2004), which provides:

> Whenever a "best interest" determination is required, the following factors shall be considered in the context of the child's age and developmental needs: (a) the physical safety and welfare of the child, including food, shelter, health, and clothing; (b) the development of the child's identity; (c) the child's background and ties, including familial, cultural, and religious; (d) the child's sense of attachments, including: (i) where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel such love, attachment, and a sense of being valued); (ii) the child's sense of security; (iii) the child's sense of familiarity; (iv) continuity of affection for the child; (v) the least disruptive placement alternative for the child; (e) the child's wishes and long-term goals; (f) the child's community ties, including church, school, and friends; (g) the child's need for permanence which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives; (h) the uniqueness of every family and child; (i) the risks attendant to entering and being in substitute care; and (j) the preferences of the persons available to care for the child.

[37] *See* state statutes described in U.S. DEPT. OF HEALTH AND HUMAN SVCS., 2003 CHILD ABUSE AND NEGLECT STATE STATUTES SERIES READY REFERENCE, PERMANENCY PLANNING: BEST INTEREST OF THE CHILD (2003).

should in all circumstances convey the child's wishes to the court.[38] Children's preferences deserve to be heard even when lawyers determine that the children's wishes are not in their best interest, and therefore advocate for a different, best-interest-based result.

As in Carmela's case, forming and consulting with a multidisciplinary team, made up of child welfare professionals, interested adults and family familiar with a child client, is critical to providing high quality ethical representation as an attorney/guardian *ad litem.* It is difficult for a single attorney to master all of the fields (social work, psychology, medicine, education, etc.) that serve children in child protection cases. Best practice should include a multidisciplinary team comprised of those fields. Whether the team is maintained in house or relied upon outside of the attorney's office, this is a necessary part of representation. Additionally, input and recommendations should be elicited from experts providing services to the children and their families. An important goal for an attorney/guardian *ad litem* is to be an educated consumer of information obtained from other child welfare professionals. Central to best practice standards is the duty of the attorney/guardian *ad litem* to play an active role in convening and maintaining a multidisciplinary team.

Also, an effective and ethical attorney/guardian *ad litem* must have adequate training, support and experience in representing children. An attorney/guardian *ad litem* must seek out ongoing training or education in key areas, such as child development, developmentally appropriate counseling techniques, mental health, addictions and cultural competency. As in any field of law, the lawyer must keep abreast of legal and ethical issues that affect the field. In the developing child law field, there are organizations, such as the National Association of Counsel for Children and the American Bar Association, that can provide support and assistance to the lawyer. And of course, the lawyer in an attorney/guardian *ad litem* model must have an in-depth understanding of the client. Attorneys must be aware of their child clients' life situations, level of functioning and preferences in order to define their role as the children's counsel.

A question that is often asked of the attorney/guardian *ad litem* model is: when do clients have the right to make their own bad decisions? The answer could be very complex, depending on the child's unique characteristics, and the decision in question. However, in general, the role of the guardian *ad litem* diminishes as children increase in their capacity to make decisions; the attorney role predominates as children approach their majority (depending on each child's unique situation). The guardian *ad litem* role may eventually become unnecessary because the child fully attains the capacity to make decisions. As an even more pragmatic matter, it is almost impossible to force teens or young adults to do something that they do not want to do.

There are times when attorneys in this model must split their roles. This splitting of roles most frequently occurs when children are in their middle

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[38] *See* Duquette, *supra* note 26, at 456-57 (*quoting* ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE GUIDELINES FOR CHILDREN VII-21 (1999)) ("Even if a child is not competent to direct the attorney and even if the role of 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").

years, eight to twelve, and are taking a position, after extensive counseling by their attorney/guardian *ad litem*, that is contrary to their best interest and that could place them at substantial risk of harm. When advocating, the attorney must clearly state their child clients' wishes and reasoning, as well as point out the clients' strengths. As guardian *ad litem*, a lawyer must present the reason(s) that a child's position may not be in the child's best interest. The focus in the representation is to obtain as much relevant information as possible, then present the information to the court and advocate for the child.

Although the roles may need to be split in the attorney/guardian *ad litem* model, this does not mean that there is an inherent conflict in the roles. The Illinois Appellate Court recently addressed the issue of whether a *per se* conflict exists when an attorney acts as both defense counsel and guardian *ad litem*.[39] The court concluded that a *per se* conflict does not exist merely because an attorney also acts as guardian *ad litem* on the same case. The court concluded that it was both "financially and functionally prudent" to appoint a single attorney to serve in both capacities.[40] This conclusion was based on the court's opinion that, in many cases, no significant conflict exists.

Conflicts between the attorney and guardian *ad litem* roles do arise, and the role conflict may in rare cases become unmanageable. As the ABA and NACC standards recognize, attorneys can and should counsel their clients to seek a better course of action.[41] Counseling a client regarding a better course of action often works to help the client make good decisions. This is especially effective when the attorney and client have established a good relationship. Sometimes the child client's wishes may be contrary to the law, or impossible to satisfy in view of the facts in a case, and the attorney is prohibited from bringing a frivolous claim.[42] For example, a child may be seeking return to a parent who is unwilling to accept the child back into the home. If the client persists in this position after counseling by the attorney, the attorney still cannot seek an order for that placement. There is no good-faith-based factual argument for the position. The attorney/guardian *ad litem* would instead seek appropriate family reunification services.

If the role conflict is not resolved, attorneys may have to seek to withdraw from one or both of their roles and have another lawyer appointed, or the child may seek to discharge the attorney. Additionally, as in any other attorney/client relationship, there may be a breakdown in the relationship between the child client and the attorney/guardian *ad litem*. But the court and the parties must be informed of the child's position regardless of the attorney/guardian *ad litem's* position, because in every model, the child's wishes are a crucial factor in the best interest determination.

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[39] *In re* B.K., 833 N.E.2d 945 (Ill. App. Ct. 2005); *see also In re* J.D. 815 N.E.2d 13 (Ill. App. Ct. 2004) (holding that there was no conflict where an attorney appointed to represent a 2-year-old child in child protection proceedings was also appointed to represent the child's non-attorney guardian *ad litem*).

[40] *In re* B.K., 833 N.E.2d at 952.

[41] ABA, Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, § B-4(3) & cmt. (1996); NACC, Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases §§ B-4 and B-4(4) (1999).

[42] Model Rules Of Prof'l Conduct R. 3.1, 3.3 (2002).

V. Conclusion

Representing children in child protection cases presents numerous challenges. The representation may occur over a period of years crossing a number of developmental stages. Representing children presents different challenges and constraints than representing adults. The different legal and psychological standard for representing children is based upon the limitations in their cognitive capacity, and society's duty to recognize children's limitations. It is not for the faint-hearted, and the lawyer representing a child must be prepared to tackle difficult and complex issues. The dilemmas presented by representing children while maintaining appropriate legal ethics must be resolved within fiscal reality. It is difficult to financially justify the appointment of two people to represent one child because of a vague potential for a conflict of interest, and such appointments are not necessary. It is clear that children in child protection proceedings have a right to counsel. Their limited capacity and the need to present best interest evidence require the appointment of a guardian *ad litem* as well. A sophisticated attorney/guardian *ad litem* model has the flexibility to effectively address both children's rights and their needs.