

## Role of the Lawyer – Discussion Paper

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### I. Background

While the issue of roles and responsibilities of lawyers appointed to represent children has been the subject of considerable debate in many other jurisdictions for some time, including New Zealand, New South Wales in Australia, and with the American Bar Association, attention on this in Alberta has been sporadic.<sup>1</sup> Indeed, with the implementation of the Legal Representation for Children and Youth service (“LRCY”) in April 2006, the topic has assumed more prominence in academic, legal, and judicial conversations.

The focus of this discussion paper is on what should be the role of counsel who represent children in child protection proceedings.<sup>2</sup> Currently, there are no firm guidelines or rules in Alberta as to the role of children’s counsel in this context and lawyers are guided primarily by professional opinion and judgment which may result in disparate outcomes in the nature and quality of representation. While there are many policy and ethical agendas that justify a meaningful debate of this question, for instance, advancement of the rights of children, LRCY is motivated primarily by the need to ensure quality and consistent legal representation of children for whom LRCY appoints counsel.

The purpose of this discussion paper is threefold:

- the first objective is to identify and canvass the issues that are central to the discussion of the role of counsel;
- the second objective is to establish a foundation for thoughtful consideration and debate of those issues; and
- the third objective of this paper is to establish a springboard for policy recommendations as to the role of counsel appointed by LRCY.

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<sup>1</sup> Two authors who have helped to bring the subject to the forefront are Dale Hensley, “*Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner’s Perspective and a Response to Professor Bala*” (2006) 43 Alta.L.Rev. 871 [hereinafter Hensley]; and Nicholas Bala, “*Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings*” (2006) 43 Alta. L. Rev. 845 [hereinafter Bala].

<sup>2</sup> Dale Hensley would disagree with this characterization of the question. Instead, she states: “[t]o some degree, then, the debate about roles is really a debate about values and about whether one recognizes children as having rights. This debate is confounded by the constraints and strictures imposed by traditional legal processes, such as the means by which evidence is provided to the court and the traditional rules prohibiting a lawyer from being both a witness and a lawyer for one of the participants,” *ibid* at para. 16. For the purpose of this paper, we have simplified the discussion by presuming that children are rights bearing individuals who are capable of advocacy based representation.

## II. Presumptions

### 1) **Lawyers appointed to represent children have the legal authority to take instructions from a minor, where appropriate**

This paper advances on the presumption that a lawyer who is appointed to represent a minor has both the legal authority and an ethical obligation to take instructions from that minor where the requisite capacity to instruct exists.<sup>3</sup> The Alberta *Code of Professional Conduct* indirectly addresses the representation of minors in its Commentary where it states: “it may be proper in some circumstances to accept instructions from a minor or from a client who appears or has been adjudged to lack capacity in certain circumstances.”<sup>4</sup> While this Commentary appears to suggest, on its face, a restricted or exceptional role for children in legal proceedings, this reading distorts current views about the rights of the child. Presumably, the failure of the *Code* to address representation of children in contexts where their rights are directly affected, such as family proceedings and youth criminal justice proceedings, reveals a gap in the *Code* regarding generally held views on the rights of the child,<sup>5</sup> rather than a deliberate expression of the profession’s values regarding the representation of children. The Law Society of Alberta itself has taken this position and will be undertaking a comprehensive consultation process to update the *Code* in relation to the role and responsibilities of lawyers who represent children.<sup>6</sup>

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<sup>3</sup> Nick Bala purports that counsel is obliged to advocate based on the instructions of a client with capacity: Bala, *supra* note 1 at 1.

<sup>4</sup> The Law Society of Alberta, *Code of Professional Conduct* (April 2008), c. 9, C. 7.1 (online at: [www.lawsocietyalberta.com/files/code.pdf](http://www.lawsocietyalberta.com/files/code.pdf)) [hereinafter the *Code*].

See, for instance, United Nations, *Convention on the Rights of the Child*, (1989) 28 I.L.M. 1456 at art. 12 which states:

1. Parties shall assure to the child who is capable of forming his or her own views that right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>6</sup> The Law Society of Alberta Practice Advisor (North), Ross McLeod, has indicated that the Joint subcommittee of Professional Responsibility and Family Law Advisory of the Law Society will be undertaking an extensive consultation process in 2008/09 regarding the representation of children with the intention of revising and updating the Code of Professional Conduct accordingly following that consultation process. With respect to LRCY policies on the role of counsel, Mr. McLeod encouraged LRCY to proceed in establishing internal policies and proposed that reconciliation of those policies with the Code, if required, could be tended to in the future. Without detracting from the broader objectives of the Law Society initiative, the purpose of this consultation process is to establish specific policies that will guide and govern only those lawyers appointed by LRCY to represent children and youth because the current gaps in the Code in relation to child representation have resulted in a lack of guidance and clarity for lawyers who function in this critical role.

There is case law which confirms the authority for the lawyer to assume a traditional advocacy role in the representation of a child or youth. For instance, Judge Abella (as she was then) in *Re W* held that counsel appointed to represent the interests of a child should adopt the advocate role. She noted that:

...essentially the role of the lawyer for the child is no different from the role of the lawyer for any other party; he or she is there to represent a client by protecting the client's interests and carrying out the client's instructions...<sup>7</sup>

In *M.F. v. JL* the Quebec Court of Appeal also confirmed that counsel is expected to adopt an advocate's role if the child has the capacity to express wishes and is expressing a clear preference:

...if a child is sufficiently mature to express himself on a vital question such as custody or access by his parents, then he has the right to be heard on that question and the right to have his wishes fairly put in evidence before the court.<sup>8</sup>

Thus, there is no legal or ethical dispute that a lawyer who is appointed to represent a child or youth in protection proceedings can and should assume a traditional advocacy role whenever possible. To that end, the *Code's* silence on the role and responsibilities of counsel appointed to represent children must be interpreted permissively rather than restrictively to accord with this presumption.

## 2) The meaning of “traditional solicitor-client relationship”<sup>9</sup>

What is meant by “traditional solicitor-client” relationship? The *Code* provides that “a lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.”<sup>10</sup> Thus, a central feature of the traditional solicitor-client relationship is the ability for the client to give instructions, and the requirement that the lawyer seek instructions.

The American Bar Association has explicitly outlined the role of the lawyer in the context of child representation in abuse and neglect cases. It defines the “child’s 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.”<sup>11</sup> With respect to the general authority and duties of the child’s attorney, the ABA further provides that “[t]he child’s attorney should elicit the child’s preferences in a developmentally appropriate manner, advise the child, and provide

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<sup>7</sup> (1980), 27 OR (3d) 314 (Prov. Ct).

<sup>8</sup> [2002] JQ 480 (CA), leave to appeal to SCC dismissed without reasons [2002] CSC 218.

<sup>9</sup> For the purpose of this discussion, the terms “traditional solicitor-client relationship”, “traditional advocate” and “advocacy role” will be used interchangeably.

<sup>10</sup> The *Code*, *supra* note 4 at c. 9, Rule 5.

<sup>11</sup> American Bar Association, Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, Approved by the ABA House of Delegates, February 1996 at A-1 (online at: [www.abanet.org/child/repstandwhole.pdf](http://www.abanet.org/child/repstandwhole.pdf)) [hereinafter ABA Standards].

guidance. The child’s attorney should represent the child’s expressed preferences and follow the child’s direction throughout the course of the litigation.”<sup>12</sup> Notably, there is no reference to “instructions” although the standard does require the attorney to “represent...expressed preferences” and “follow the child’s direction.”

According to Nicholas Bala, when counsel adopts the role of a traditional advocate, “it is ultimately for the child to make decisions about his or her life and give counsel instructions about how to protect the child’s interests and rights.”<sup>13</sup> Dale Hensley writes that “[m]ost importantly, counsel’s responsibility is to listen to the young person, understand and advocate from the young person’s perspective and position, if they hold one, and assist others to understand them.”<sup>14</sup> While there is no uniform definition of what it means to assume an advocacy role with a child, the role implies that a lawyer will ascertain the child client’s preferences and represent his/her legal interests and/or position.

### III. Issues

There are three main issues that will be canvassed in this discussion paper:

- 1. What factors should be considered in determining whether a lawyer should assume the role of traditional advocate in representing a particular child? Put another way, what factors or threshold should be used to determine whether a child or youth has the “capacity to instruct” counsel in any given case? Should age be used as a presumptive guideline?**
- 2. Is the appointed lawyer the best suited person to make the determination of whether a child/youth meets the threshold test for capacity to instruct?**
- 3. In cases where it is determined that the child/youth does not have capacity to instruct counsel, what *model of representation* should be employed in representing that child/youth?**

#### Issue #1

**What are the factors to be considered in determining whether a lawyer should assume the role of traditional advocate in representing a particular child? Put another way, what factors or threshold should be used to determine whether a child or youth has the “capacity to instruct” counsel in any given case? Should age be used as a presumptive guideline?**

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<sup>12</sup> *Ibid* at at B-4.

<sup>13</sup> Bala, *supra* note 1 at para 14.

<sup>14</sup> Hensley, *supra* note 1 at para 24.

There may be some circumstances where it will not be possible for counsel to assume the role of a traditional advocate with a child, for instance, in cases involving pre-verbal children or cases where a child/youth is developmentally disabled or unwilling to express his/her wishes. It is these circumstances that form the basis for this discussion paper. For ease of discussion, this paper will address the specific issue of how to determine whether a child has “capacity to instruct”.

**a) Age as a presumptive guideline**

In terms of assessing a child’s capacity, there is much controversy as to whether the child’s age provides a reliable indicator. The *Youth Criminal Justice Act*<sup>15</sup> establishes twelve as the minimum age for criminal responsibility, while the *Child, Youth and Family Enhancement Act*<sup>16</sup> provides that a child of twelve and older should receive notice of a protection application and consent of children over twelve is required in numerous applications. Under these statutory regimes a child becomes responsible and presumptively acquires capacity at the age of 12.

LRCY Policies also establish several rebuttable presumptions based on age. For instance, LRCY policies provide generally that youth over the age of 12 may request specific counsel, refuse the appointment of counsel, and dismiss counsel, while children under 12 may not.<sup>17</sup> These presumptions may be rebutted if a youth over 12 appears to *lack* the ability to make informed decisions regarding legal representation, or if a child under 12 appears to *have* the ability to make informed decisions. While these policies do not presume capacity or incapacity vis-à-vis the role of counsel, they do provide an example of age being used as a guideline for the purpose of determining whether a child should or should not have specific rights and responsibilities.

Nick Bala takes the position that in family proceedings there should not be any age-based presumption in regard to capacity to instruct counsel. Instead, he advocates that counsel appointed for a child in family proceedings should make an individualized assessment in each case.<sup>18</sup> In contrast, Jeffrey Leon proposes the adoption of a rebuttable presumption about a child’s capacity to instruct based on age. As a general rule, he suggests that children under 6 years do not have the necessary capacity to instruct counsel, but for children over 12 years a rebuttable presumption would exist that they can competently instruct counsel. For the category of children between ages 6-12, he states that counsel should reach an independent determination of the child’s interests in light of their preferences.<sup>19</sup> Lastly, the American Academy of Matrimonial Lawyers has adopted standards for lawyers representing children in custody and visitation disputes which

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<sup>15</sup> S.C. 2002, c. 1.

<sup>16</sup> R.S.A. 2000, c. C-12 [hereinafter *Enhancement Act*].

<sup>17</sup> LRCY Policy Manual at sections 2.4, 3.2.1, and 3.2.5 (online at: <http://advocate.gov.ab.ca/496.html>).

<sup>18</sup> Bala, *supra* note 1 at para 44.

<sup>19</sup> Jeffrey S. Leon, “Recent Developments in Legal Representation of Children: A Growing Concern with the Concept of Capacity” (1978) 1 Can. J. Fam. L. 375 [hereinafter Leon].

provide that children aged twelve or older are presumptively unimpaired – that is, capable of directing a lawyer – and children younger than twelve are presumptive impaired.<sup>20</sup>

**b) Test/threshold for establishing whether a lawyer should act as a traditional advocate**

Outside of age, there are a number of other tests and factors that can and should be considered when determining whether a child has capacity to instruct for the purpose of establishing the role of the child's counsel. Depending on the factors considered, the standard will either reflect a lower or higher threshold.

Judge Nasmith, a former judge of the Ontario Supreme Court, argues for a low standard. He proposes a rule that where the child communicates a custodial preference, his lawyer should bring that forward and support it. In other words, if a child is able to communicate views about the matters at issue, these views should guide counsel and that there is no good reason to permit individual lawyers, with or without clinical advice, to decide whether their client's stated preference will be part of the case to be presented.<sup>21</sup> To that end, he argues for a rebuttable presumption of capacity to instruct counsel as soon as the child can communicate (from age 4 or 5 unless the child is developmentally delayed) because this will promote and increase the likelihood of a child's stated preference being heard.<sup>22</sup> Judge Nasmith argues that instructions should not be second-guessed or sabotaged by a rationalization that they are not really instructions. To do so because of the lawyer's own idea about the child's best interests is to misconstrue the lawyer's role and to confuse it with the role of a protection agency, or a child's legal guardian, or the opposing party, or the court.<sup>23</sup> Thus, fundamental to protecting a child's rights is the importance of treating a child's stated custodial preference as being *very* close to the same thing as a child's instructions of counsel. The wider the gap, the greater is the likelihood of a diminution of the child's right to be heard.<sup>24</sup> He suggests that departure from the normal (mouthpiece) function of a legal advocate should only occur when the child is unable or unwilling to state a custodial preference.<sup>25</sup>

**Nasmith Threshold: Ability to communicate a custodial preference; presumed from age 4 or 5 unless the child is developmentally delayed.**

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<sup>20</sup> American Academy of Matrimonial Lawyers, "Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings" (1995) 13 J. Am. Acad. Matrim. Law 1 at Standard 2.7, cited at fn 112 in Barbara Ann Atwood, "Representing Children: The Ongoing Search for Clear and Workable Standards" (2005) 19(2) J. Am. Acad. Matrim. Law 183 [hereinafter AAML Standards].

<sup>21</sup> Judge A.P. Nasmith "The Incoherent Voice" 8 C.F.L.Q. 43 at 54-55 [hereinafter Nasmith].

<sup>22</sup> Nasmith, *ibid.* at 60.

<sup>23</sup> Nasmith, *ibid.* at 54.

<sup>24</sup> Nasmith, *ibid.* at 45.

<sup>25</sup> Nasmith, *ibid.* at 49.

Nick Bala purports that when assessing whether a child has capacity to instruct, counsel must determine whether the child has the cognitive and psychological ability to make a judgment, and is not being influenced by an adult so that the judgment is really not that of the child. Further, counsel should be satisfied that the child has made a reasonable choice; counsel does not need to be satisfied that the child is making a decision that accords with counsel's view of the child's best interests, but should be satisfied that there is not a significant risk of serious harm in the desired plan. If a child is frequently changing his or her mind, or if the child's instructions are confusing or inconsistent, counsel should conclude that the child lacks the legal capacity to instruct counsel.<sup>26</sup>.

**Bala Threshold: The child is capable of making a “reasonable choice”; no significant risk of serious harm.**

In contrast, Jeffrey Leon argues for a high standard regarding the capacity to instruct counsel. He suggests that a child must be “able to appreciate the nature and purpose of the proceedings, the alternatives available to the court, the risks to him if he is permitted to remain at home, and...[have] sufficient maturity to weigh these factors with a reasonable degree of objectivity.”<sup>27</sup>

**Leon Threshold: Ability to appreciate the nature and purpose of proceedings, alternatives, risks, and be able to weigh factors with reasonable objectivity.**

Dale Hensley approaches the role of advocacy more broadly. Hensley does not propose a traditional solicitor-client relationship whereby the lawyer assumes a role as “mouthpiece for the child”. Instead, she proposes that counsel should represent a child's interests by presenting issues and information to the court that reflect the young person's place in the world and what is important to that young person—what they have an interest in doing, what they are about as well as their legal interests.<sup>28</sup> For the most part, Hensley echoes Judge Nasmith and suggests that an advocacy role is possible from the time a child is able to express his views and or preferences. She also specifies that there will be circumstances when an advocacy role is not appropriate, even if the client is competent, if the child is subject to intense pressure, manipulation, lobbying or influence by parents or others.

**Hensley Threshold: If the child is capable of expressing views and/or preferences, counsel should advocate for the child's *interests*, unless the child is subject to the intense pressure or manipulation from of others.**

The American Bar Association has adopted a presumptive scheme regarding the role of counsel. As a general rule, the child's attorney has the duty to represent the child's expressed preferences and follow the child's direction throughout the course of the

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<sup>26</sup> Bala, *supra* note 1 at para 44.

<sup>27</sup> Leon, *supra* note 19 at 411, quoting from J. Dick, “the Role of Counsel in Neglect and Dependency Proceedings, in *Juvenile Courts in Transition – A Workshop*”, 49<sup>th</sup> Annual Legal Aid And Defender Conference, 5 Nov. 1971 (Denver, Colo.).

<sup>28</sup> Hensley, *supra* note 1 at para 31.

litigation *unless* the child is under a disability.<sup>29</sup> Even then, the attorney has a duty to determine whether the child is under a disability with respect to each issue which the child is called upon to direct the representation.<sup>30</sup> These standards reject the idea that children of certain age are “impaired”, “disabled”, “incompetent” or lack capacity to determine their position in litigation. They also reject the notion that disability must be globally determined. Instead, the child’s ability to contribute to a determination of his position is functional, depending on the particular position and circumstances at the prevailing time. This is consistent with the approach generally taken when assessing capacity of adults with respect to decision making for property and personal care.<sup>31</sup> Under this scheme, a child may be able to determine some positions in the case but not others, and a child may be able to direct the lawyer with respect to a particular issue at one time but not another. Lastly, in determining whether to act on the child’s instruction, the attorney ensures the child’s ability to provide directions by structuring communications to account for the child’s age, education, cultural context and degree of language acquisition.

**ABA Threshold:** **A child’s attorney shall follow the child’s direction and represent the child’s expressed preferences *unless* the child is under a disability. “Disability” is not globally determined and the lawyer must assess whether a disability exists with respect to each issue requiring direction from the child.**

A number of American jurisdictions have implemented child representation programs and services in protection and custody and access proceedings. In keeping with the ABA Standards, each jurisdiction has established a standard or test for the purpose of determining whether the attorney should depart from the default role of traditional advocate.

For instance, the Child and Family Law Program in Massachusetts established a presumptive role for counsel whereby the lawyer must represent the child’s expressed preferences regarding a matter. A lawyer may only deviate from this role if he/she determines that the child is incapable of making an “adequately considered decision” with respect to the matter in connection with the representation. In assessing whether a child is able to make an adequately considered decision, it is the *quality* of the child’s decision-making, not the *wisdom* of the child’s decision that is determinative. Counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. Counsel should not confuse *inability* to express a preference with *unwillingness* to express a preference.<sup>32</sup>

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<sup>29</sup> ABA Standards, *supra* note 11 at B-3 and B-4.

<sup>30</sup> ABA Standards, *ibid.* at B-3. Whether a child is “under a disability” must be determined pursuant to Rule 1.14 of the American Bar Association, Model Rules of Professional Conduct (online at: [http://www.abanet.org/cpr/mrpc/rule\\_1\\_14.html](http://www.abanet.org/cpr/mrpc/rule_1_14.html) ) (Oddly, Rule 1.1.4 refers to clients with “diminished capacity”—not “clients under a disability”).

<sup>31</sup> See unpublished paper by Judith Wahl of the Advocacy Centre for the Elderly entitled “Capacity and Capacity Assessment in Ontario” (online at: [www.practicepro.ca/practice/PDF/Backup\\_Capacity.pdf](http://www.practicepro.ca/practice/PDF/Backup_Capacity.pdf)).

<sup>32</sup> Committee for Public Counsel Services, Child and Family Law (CAFL) Program, “Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases.” (online at:

**CAFL Threshold:** Attorney must represent the child’s expressed preferences regarding a matter unless he determines that the child is incapable of making an *adequately considered decision*. *Inability to express a preference is distinguished from unwillingness for the purpose of establishing the attorney’s role.*

Similarly, the Maryland Judiciary’s Foster Care Court Improvement Project,<sup>33</sup> has adopted the test of “ability to make a reasoned choice” instead of the “capacity to instruct” test. The Maryland model establishes that the attorney should advocate the position of the child unless the attorney reasonably concludes that the child is unable to express a *reasoned choice* about issues that are relevant to the particular purpose for which the attorney is representing the child. If the child has the ability to express a reasoned choice, the child is regarded as having *considered judgment*.

To determine whether the child has *considered judgment*, the attorney should focus on the child’s decision-making process, rather than the child’s decision. The attorney should determine whether the child can understand the risks and benefits of the child’s legal position and whether the child can reasonably communicate the child’s wishes. A child may be capable of considered judgment even though the child has a significant cognitive or emotional disability.

**Maryland Threshold:** Attorney should advocate the position of the child *unless the child is unable to make a reasoned choice with respect to the matter at issue. If the child has the ability to express a reasoned choice, the child is regarded as having considered judgment.*

## Issue #2

**Is the appointed lawyer best suited to make the determination of whether a child/youth meets the threshold test for capacity to instruct?**

Most child representation programs require the appointed lawyer to exercise professional judgment to make a determination of whether a child or youth has capacity to instruct counsel for the purpose of determining the appropriate role of counsel. While it is generally presumed that counsel should exercise this judgment, this discussion paper grapples with unconventional (and perhaps unpopular) question of whether the lawyer is best suited to make this determination.

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[http://www.publiccounsel.net/Private\\_Counsel\\_Manual/chapter\\_four.html](http://www.publiccounsel.net/Private_Counsel_Manual/chapter_four.html) [hereinafter CAFL Program Standards].

<sup>33</sup> Maryland Administrative Office of the Courts, “Guidelines of Advocacy for Attorneys Representing Children in CINA (Child In Need of Assistance) and Related TPR (Termination of Parental Rights) and Adoption Proceedings” (2001).

**a) The lawyer as capacity assessor**

The vast majority of stakeholders in the world of child representation would presume that the appointed lawyer is the only person who can effectively and practically assess a child's capacity for the purpose of determining the lawyer's role. Indeed, the American Bar Association and most American child representation programs charge the appointed lawyer with the duty to assess, on an ongoing basis, whether the child whom they represent is capable of giving direction for the purpose of direct representation.<sup>34</sup> Given that most programs require on-going assessment of a child's capacity in relation to each matter in the proceeding, it appears that the lawyer is not only the most appropriate person to make the determination, but also the only individual situated to do so.

Within the Canadian context, Nicholas Bala states that that counsel for children must make their own decisions about the role that they will adopt, depending on the specific circumstances of each case.<sup>35</sup> Rather than argue this position, however, Bala assumes that counsel should make this determination. This position is reinforced by Justice Veit in *Young v. Young* where she states that in the absence of specific guidance from the court, counsel are charged with the obligation of deciding, through the exercise of professional judgment, whether the child has the capacity to instruct counsel or not.<sup>36</sup> Notably, while *Young v. Young* gives lawyers authority to make such determinations, it does not mandate that a lawyer must do so in every case.

While it appears self-evident that the acting lawyer is the most appropriate person to determine counsel's role for the purpose of representation, if one considers the issue from the flip-side, namely who is best suited to determine whether a child meets the designated threshold for capacity to instruct, compelling reasons to the contrary emerge. First, some proponents argue that lawyers lack the necessary background and training to determine whether a child has capacity or not. In *Re W*, Judge Abella (as she was then) noted the following:

There is a tendency to assume that the quintessential legal representative for the child is, or should be, a paragon of legal, psychological, and sociological expertise. This is unrealistic. Lawyers generally have only legal skills, the proper utilization of which may undoubtedly involve some direct or indirect familiarity with or reliance upon other disciplines...Lawyers for children can therefore be expected to do no more and no less than any other party's lawyer in the adversarial process...<sup>37</sup>

While these comments were made in the context of establishing whether a lawyer should ever assume the role of best interests representative, they are also applicable to the discussion of whether a lawyer is the most suitable person to assess the capacity of a child to instruct.

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<sup>34</sup> See generally the ABA Standards, *supra* note 11, and the CAFL Standards, *supra* note 32.

<sup>35</sup> Bala, *supra* note 1 at para.3.

<sup>36</sup> [1985] AJ No.22(Alta QB).

<sup>37</sup> (1980), 27 OR (3d) 314 (Prov. Ct).

Considered from this perspective, it may be argued that other persons are more qualified or better situated to make this decision. The question that begs to be answered, then, is if the appointed lawyer does not make the determination as to role, who should?

### Issue #3

**In cases where it is determined that the child/youth does not have capacity to instruct counsel, what *model of representation* should be employed in representing that child/youth?**

Depending on the response to the first issue, there will be circumstances where the lawyer cannot assume the role of traditional advocate in representing a child/youth because the child/youth lacks the requisite capacity to instruct counsel. In those cases, what role should the lawyer assume? Currently, in Alberta, most lawyers appointed to represent children in protection proceedings will assume a best interests role when an advocacy role is not possible. The purpose of this section is to explore the range of roles that a lawyer can assume and to determine which role should be adopted.

#### a) **Best interests approach**

There are different versions of what it means to assume a “best interests approach” in child representation. Bala characterizes it as a guardian role which involves adducing evidence about the child and advocating a position based on their own assessment of the child’s best interests. From his perspective, lawyers who assume this role must ensure that evidence about the child’s views and wishes is placed before the court, often through a social worker or other witness, but counsel is not bound by any “instructions” the child may give. While counsel may advocate for an outcome desired by the child, counsel will generally only do so if satisfied that this will advance the child’s best interests, or at least not harm the child. Although counsel adopting the best interests guardian role meets with the child, what is said is not confidential (as in the case of a traditional advocate role), and counsel does not advocate on behalf of the child.<sup>38</sup>

Some jurisdictions in Australia and New Zealand have also adopted the “best interests” role for counsel in care and protection proceedings where a child lacks the capacity to instruct. One example is the Law Society of the Australian Capital Territory. There, if a lawyer in care and protection proceedings is not satisfied that a young client is capable of giving instructions, he or she must act and make representations to the Court in the ‘best interests’ of the child or young person.<sup>39</sup> The LSACT Guidelines provide that the primary duty of a best interests representative is to ensure that all relevant evidence regarding the child’s or young person’s welfare is placed before the Court, whether or not such evidence supports the representative’s case. Further, a best interest representative

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<sup>38</sup> Bala, *supra* note 1 at para 11.

<sup>39</sup> The Law Society of the Australian Capital Territory, “Guidelines for Lawyers Representing Children and Young People in Care & Protection Matters in the ACT Children’s Court” (2004) at 1E [hereinafter LSACT Guidelines].

must act impartially by making submissions to the Court based on evidence gathered from sources which include, but are not limited to, the child's or young person's wishes. Thus, it is possible that the submissions of a best interest representative will conflict with the wishes of the client.<sup>40</sup> Lastly, all submissions by the lawyer must be objectively based on consideration of this evidence, not the lawyer's subjective opinion of what is best for the child or young person.<sup>41</sup>

Critics of the best interests role argue that a lawyer is not qualified to develop and express his/her own views about the best interests of the child because counsel is simply advocating based on their own personal opinions about what is best for the child. Some critics also worry that counsel in this role may be too influential both with judges, who may be tempted to effectively delegate responsibility for difficult decisions to counsel for the child, as well as with the parties, who may be unduly influenced by this counsel in their settlement discussions. Lastly, some also argue that if counsel for the child is not advocating based on any expressed wishes, the child is denied the right to be heard in proceedings that will profoundly affect the child's life.<sup>42</sup>

#### **b) Appointment of a *Guardian ad litem***

A *guardian ad litem* in Alberta (and Australia) means an adult who is appointed by the court to stand in for a minor and give instructions to the lawyer. The *guardian ad litem* (often referred to as next friend) is often used in situations when a young person's financial matters are at issue and an adult, often a parent, is appointed by the court to protect and further the young person's interests. Arguably, this same model is applicable to children in protection proceedings who lack the capacity to instruct, although clearly it would not be appropriate to designate a parent as the GaL. The appointment of a GaL in situations where a child or youth lacks capacity to instruct counsel accords with the current reading of the *Code* which stipulates that if a client does not have capacity to give instructions, a lawyer must cause the appointment of a surrogate who can.<sup>43</sup> Under this model, the appointed lawyer's role would be restricted to one of advocacy and the lawyer would take instructions from the child's GaL who would be the lawyer's client. The appointment of a litigation guardian in situations where the child lacks capacity to instruct counsel might remedy a number of criticisms of the best interests approach to representation.

A *guardian ad litem* model of representation is outlined in the ABA Standards. Under this model, there are two types of GaLs who may be appointed: 1) GaLs may be appointed to assist (i.e. instruct) an attorney in the representation of a child who *cannot* express a preference;<sup>44</sup> or 2) in cases where the child's attorney determines that the

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<sup>40</sup> LSACT Guidelines, *ibid.* at 1E.

<sup>41</sup> *Ibid.* at 5A.

<sup>42</sup> See Nasmith, *supra* note 21.

<sup>43</sup> The *Code*, *supra* note 4 at c. 9, Rule 7.1. Recall the proposition above, however, under Part II - Presumptions, which suggests that the *Code* is outdated and incomplete in regard to the representation of children, and that the LSA is currently undertaking a consultation and review of the *Code* in that context.

<sup>44</sup> ABA Standards, *supra* note 11 at B-4(1).

child's expressed preference would be seriously injurious to the child, the lawyer may request appointment of a separate GaL (another lawyer) to represent the interests of a child and continue to represent the child's expressed preference.<sup>45</sup> Appointment of a GaL in the latter capacity is tantamount to the "interests approach" to representation by a lawyer and is discussed in detail below.

This model is also reflected in the CAFL Program Standards. In this program, if counsel determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child's expressed preferences regarding that matter, even if the attorney believes the child's position to be unwise or not in the child's best interest. However, if a child is *incapable* of verbalizing a preference, counsel have two choices: 1) she may make a substituted judgment determination (i.e. determine what the child would decide if he was capable of making an adequately reasoned decision and represent the child accordingly); or 2) counsel may ask for the appointment of a GaL to make a substituted judgment determination and provide direction to counsel concerning the representation.<sup>46</sup>

Both the ABA and CAFL Program Standards clearly specify that counsel should not confuse *inability* to express a preference with *unwillingness* to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, counsel should determine if the child wishes the attorney to take no position, or if the child wishes the attorney or someone else to make the decision for him. It is only in situations where the child is incapable of expressing an opinion that the lawyer should cause the appointment of a *guardian ad litem*.

The American Academy of Matrimonial Lawyers strenuously objects to the hybrid attorney/GaL model adopted by the ABA on the basis that the two roles are fundamentally inconsistent. Moreover, even for the non-attorney GaL, the AAML Standards would prohibit the guardian from making recommendations on any contested issues.<sup>47</sup>

### c) **Interests approach**

An "interests" approach to advocacy has been adopted by the American Bar Association in the ABA Standards. In specific circumstances, for instance where the child is capable of expressing a preference, but the preference expressed would be seriously injurious to the child, a traditional advocate may cause the appointment of another lawyer as *guardian ad litem*. In these cases, lawyers are officers of the court appointed to protect a child's interests without being bound by the child's expressed preferences.<sup>48</sup> This is a non-traditional role because the lawyer determines the position to be advocated independently of the client. That being said, the position adopted by the lawyer must be based on objective criteria concerning the child's needs and interests, and not merely on

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<sup>45</sup> ABA Standards, *ibid.* at B-4(3).

<sup>46</sup> CAFL Program Standards, *supra* note 32

<sup>47</sup> AAML Standards, *supra* note 20.

<sup>48</sup> ABA Standards, *supra* note 11 at A-2.

the lawyer's personal values, philosophies and experiences.<sup>49</sup> Arguably, the "interests approach" adopted by the ABA is akin to an objective best interests approach adopted by the Law Society of the Australian Capital Territory.

The National Association of Counsel for Children have proposed amendments to the ABA Standards which would relax the role of traditional advocate in many cases to that of an "interests advocate". They suggest that even in cases where the attorney is representing the child's preferences, the lawyer should not be robotic in taking instructions. Instead, the NACC Revised Standards propose a standard which would provide that, to the extent that a child cannot meaningfully participate in the formulation of the client's position (either because the child is preverbal, very young or for some other reason is incapable of judgment and meaningful communication), the attorney shall substitute his/her judgment for the child's and formulate and present a position which serves the child's interests. Such formulation must be accomplished through the use of objective criteria, rather than solely the life experience or instinct of the attorney.<sup>50</sup>

#### **d) Ontario Children's Lawyer Approach – the Child's Legal Representative**

Ontario has an approach to child representation both similar to and dramatically different from the interests approach to representation. The Ontario Children's Lawyer (OCL) represents the child's legal interests and advocates a position on behalf of the child. Notably, however, the OCL never acts on the child's instructions, regardless of whether the child has capacity to instruct or not. Instead, the OCL takes a position on behalf of the child advises the court of the child's views and preferences. In taking a position on behalf of the child, counsel will ascertain the child's views and preferences, if any, and will consider: a) the independence, strength & consistency of the child's view and preferences, b) the circumstances surrounding the child's views and preferences, and c) all other relevant evidence about the child's interests.

#### **e) *Amicus curiae* (friend of the court) approach**

According to Nicholas Bala, counsel who adopt the role of *amicus curiae* are expected to assist the court by ensuring that all the relevant evidence is placed before the court and by providing information to the court about legal issues that may arise. In this capacity, the focus of counsel's efforts is on ensuring that all feasible options for the care of the child are investigated and that any relevant evidence which the parties have not introduced is brought before the court. Counsel who adopt this role should explain the court process to

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<sup>49</sup> *Ibid.* at B-5 Commentary.

<sup>50</sup> National Association of Counsel for Children (NACC), American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), NACC Revised Version with revisions October 12, 1996 & April 21, 1999 [hereinafter NACC Revised Standards]. NACC adopted the ABA Standards with reservation as to Standard B-4 because of "concerns about the availability to the court of information about the interests of the child." The NACC Board of Directors subsequently revised the ABA Standards and adopted the "NACC Version". The NACC version is not approved or adopted by the ABA.

the child, if the child is old enough to understand, and should ensure that the wishes of the child, if expressed, are introduced in evidence, but counsel is not expected to make submissions about what outcome resolution would be in the best interests of the child. Counsel adopting a friend of the court role may also have a neutral meditative role, attempting to facilitate a settlement.<sup>51</sup>

Judge Nasmith also firmly supported the *amicus curiae* function in cases where instructions are not forthcoming.<sup>52</sup> Lastly, the American Academy of Matrimonial Lawyers advocates an *amicus curiae* approach when representing impaired children. They argue that the lawyer for the impaired child is not to advocate a position on the outcome of the proceeding or to contest issues but is to merely develop facts that the decision-maker should consider.<sup>53</sup>

While there are clearly cases in which the friend of the court role may be appropriate, many critics of the *amicus curiae* role argue that counsel will often be able to do much more to benefit a child and the court than simply put forward evidence about the child. In particular, Dale Hensley argues that neither the *amicus curiae* nor the best interests advocate can be considered a child's representative or child's counsel because their role really is to assist the court in its decision making responsibilities.<sup>54</sup> She argues that lawyers are specially trained in advocacy, not home assessments, investigation, risk assessment, counseling, social work or psychology and that there are other more appropriate, less expensive, professionals who are better qualified to function in that role.<sup>55</sup>

#### IV. Questions to Answer

**Question #1: Should the lawyer's role as traditional advocate be presumptive (lawyer acts as traditional advocate unless child unable to instruct)?**

**Question #2: Should age be used as a presumptive guideline for determining whether a lawyer adopts the role of traditional advocate in any given case?**

**Question #3: What should be the test/threshold for determining whether a lawyer should assume/maintain the role of traditional advocate?**

- A high threshold
- A low threshold

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<sup>51</sup> Bala, *supra* note 1 at paras 7-8.

<sup>52</sup> See Nasmith, *supra* note 21.

<sup>53</sup> AAML, *supra* note 20.

<sup>54</sup> Hensley, *supra* note 1 at para 38.

<sup>55</sup> *Ibid.* at para 39.

**Questions #4: Is the appointed lawyer the best suited person to make the determination of whether or not a child/youth meets the threshold test for capacity to instruct?**

**Question #5: If the lawyer does not assume the role of traditional advocate, what model of representation should be employed?**

- The best interests approach
- The litigation guardian approach
- The interests approach
- The approach of Ontario Children's Lawyer – Children's Representative
- The *amicus curiae* approach