

Role of Counsel – Summary Report

Prepared for LRCY by Sheryl Pearson, LL.B, M.S.W., R.S.W

1. Purpose of Consultation Process

Currently, there are no standards or rules in place in Alberta regarding the role of counsel in representing children and youth. The *Professional Code of Conduct* provides little guidance in relation to the representation of minors and the Law Society of Alberta acknowledges there are gaps in the *Code*. In the absence of regulation by the profession, LRCY has undertaken to establish a framework of guidelines. A consultation process was initiated in April 2008 to solicit feedback on what should be the role of counsel appointed by LRCY to represent children and youth. The feedback was solicited to enable LRCY to develop policy guidelines for the purpose of ensuring quality and consistent legal representation of children involved in child protection proceedings.

2. Overview of Consultation Process

A discussion paper was prepared which highlighted and canvassed several issues. The discussion paper was widely distributed and posted on LRCY's website. LRCY stakeholders, including Judges, lawyers and social workers were invited to provide comments on the issues identified. Consultation meetings were also held with the following stakeholders:

- Roster Lawyers (consultation sessions were held in Calgary and Edmonton)
- Child and Youth Advocates from the north office
- Lawyers with Alberta Justice, Family Law Branch (North and South)
- Enhancement Act caseworkers
- Lawyers with Children's Services Legal Services
- Youth represented by LRCY roster lawyers
- Anna Loparco (legal counsel for LRCY)

This Final Report summarizes the comments received during the consultation process, makes policy recommendations based on those comments, and proposes practice guidelines for lawyers to use in the context of their LRCY appointment.

3. Summary of Discussion Paper

The discussion paper was based on the presumption that counsel appointed to represent children and youth can, and should, act on the instructions of a minor where appropriate. While there are some members of the legal community who take the position that children, by virtue of being minors, lack capacity to instruct counsel, the discussion paper proceeds on the basis that a traditional advocacy role is the preferred role of counsel, where possible, when representing children. While the meaning of traditional advocacy is not clearly defined anywhere, specifically in relation to children, for our purposes it

implies that a lawyer will *ascertain* a child/youth's preferences or opinion and *represent* a position only with the child/youth's *consent*. For the purpose of this discussion paper, this will be referred to as "instructional advocacy". While not part of the purpose of the consultations, there was clearly interest from the legal community and other stakeholders in additional training and exploration of instructional advocacy vis-à-vis children and youth.

With the role of "instructional advocacy" established as the preferred role of counsel, the discussion paper then delved into two related issues: first, how is counsel to determine when this role is appropriate and when it is not; and second, what alternate role should counsel assume when it is not. In dealing with the first issue, several options were canvassed regarding whether or not a child/youth has the capacity to instruct, as well as what might be the appropriate legal threshold for determining capacity. With respect to the second issue, the paper looked at the various options for what role a lawyer could and should assume when a child/youth is not capable of providing instructions.

4. Issues

Specifically, the following issues were discussed:

- 1) What are the factors to be considered in determining whether a lawyer should assume a traditional advocacy role (instructional advocacy) in representing a particular child?
 - a) Should a lawyer's instructional advocacy role be presumptive?
 - b) Should age be used as a presumptive guideline for determining whether a lawyer adopts an instructional advocacy role in any given case?
 - c) What should be the test or threshold for determining whether a lawyer should assume/maintain an instructional advocacy role?
 - A low threshold for capacity?
 - A high threshold for capacity?
 - A specific test?
- 2) In cases where it is determined that instruction based advocacy is not possible, what model of representation should be employed in representing that child/youth?

5. Summary of Recommendations

RECOMMENDATION #1

- Adopt a presumptive guideline which provides that counsel appointed by LRCY shall assume an instructional advocacy role when representing children and youth *unless* there is a specified reason not to.

RECOMMENDATION #2

- Do not specify age alone as a guideline in the presumptive scheme for the role of counsel.

RECOMMENDATION #3

- Lawyers should assess each child/youth individually to determine whether there are conditions present (such as easily apparent low cognitive functioning, mental impairment due to illness, intoxication, etc.) that would preclude a lawyer from assuming the role of an instructional advocate.

RECOMMENDATION #4

- Interest based instructional advocacy is the preferred model of representation for children and youth who are able and willing to articulate a preference, opinion, or position.

RECOMMENDATION #5

- Child's counsel should be more than a mouthpiece for the child and has an obligation to determine the interests of his/her client based on the stated preference, opinion, or position of the child.

RECOMMENDATION #6

- A child's interests may include the maintenance of stable relationships, preservation of the family unit, preservation of cultural identity, etc. Once the interests have been identified by counsel and the child/youth has given instructions to proceed, counsel must advocate those interests on behalf of the child/youth and later report back to the child/youth on this.

RECOMMENDATION #7

- LRCY should not specify a particular role for counsel to adopt when instructional advocacy is not possible.

RECOMMENDATION #8

- Adopt guidelines that encourage lawyers to satisfy the following aspects of representation where instructional advocacy is not possible:
 - i. ensure the role is that of independent legal representation for the child/youth, therefore not aligning or appearing to advance another parties' position.
 - ii. test the evidence, ensure it supports the application, and ensure the appropriateness of the order being sought.
 - iii. ensure that all relevant evidence is before the court and assist the court in understanding the evidence.
 - iv. ensure that any position taken on behalf of a child or youth adequately advances the child or youth's substantive and procedural rights (for instance, any *Charter* rights engaged, aboriginal rights, procedural rights, or rights under the section 2 of the *Enhancement Act*); and
 - v. advise the court (and other parties) of the role being taken so the court can weigh counsel's arguments accordingly.

6. Discussion of Issues and Responses

Issue 1a) Should a lawyer's instructional advocacy role be presumptive?

Background

With respect to the traditional advocacy role, LRCY takes the policy position that it can and should be adopted where possible. The expression of this policy can take one of two forms: it can be stated presumptively or conditionally. A presumptive guideline would stipulate that counsel shall assume a traditional advocacy role *unless* there is a specified reason not to. In other words, traditional advocacy would be the default rule and exceptions to the rule would be carved out. Conversely, a conditional guideline would imply that some contingency must first be met and that counsel would assume the role of traditional advocate only *if* specified criteria are established.

Responses

With the exception of a few respondents, most stakeholders favoured the adoption of an presumptive guideline that counsel will assume the role of a traditional advocate unless certain criteria are established. While there was disagreement as to what the specific criteria should be, there was little opposition to the general proposition that counsel should represent a child/youth's position and/or interests. The youth who responded also commented that the lawyer is there to defend what they want and, while the lawyer can give his opinion, he should still say what the youth wants. The respondents who disagreed with a presumptive guideline questioned the merit of prescribing any particular approach to representing children and youth and advocated that lawyers need to have complete flexibility to respond to each situation based on their own professional judgment.

Proposed Policy Position

A fundamental premise of child representation is to ensure the child's voice is heard. It is important to establish a starting point that assumes each child and youth is entitled to have his preferences and opinion advocated on his behalf as any other party unless there is a reason not to.

RECOMMENDATION #1

- **Adopt a presumptive guideline which provides that counsel appointed by LRCY shall assume an instructional advocacy role when representing children and youth *unless* there is a specified reason not to.**

Issue 1b) Should age be used as a presumptive guideline for determining whether a lawyer adopts an instructional advocacy role in any given case?

Background

Another option considered in the consultation process was whether age should be integrated to the presumptive scheme for the traditional advocacy role. This means the guidelines would establish a rebuttable presumption vis-à-vis the role of counsel based on age and then carve out exceptions to the rule. For instance, counsel appointed for children and youth over 6 years of age could presumptively adopt a traditional advocacy role unless some specified criteria was not met (e.g. the child was unable to articulate a preference).

Responses

Without exception, none of the respondents favoured specifying any particular age as part of the presumptive scheme. Generally speaking, all of the stakeholders were of the opinion that while age may be relevant to a child's capacity to instruct, it is not a reliable indicator. Instead, most respondents were of the opinion that lawyers should assess each child/youth individually to determine whether there are specific conditions present (eg: low cognitive functioning, mental impairment due to illness, intoxication) that would preclude a counsel from assuming the role of traditional advocate. One stakeholder, however, was very opposed to the lawyer being in the position to make a determination of the child's capacity to instruct. She argued that lawyers are not trained to deal with complex psychological and sociological issues and it could lead to uncertainty, unfairness, and a subjective assessment resulting in inconsistent results. The same respondent was of the opinion that the assessment of capacity role should be removed from the role of counsel and an independent third party should be appointed to make those assessments.

Proposed Policy Position

Age is not a reliable indicator of a child's ability to express a preference or opinion. Rather than defer to a presumptive age, lawyers should individually assess each child and youth and provide the support necessary to enable each child to express his preference or opinion.

RECOMMENDATION #2

- **Do not specify age alone as a guideline in the presumptive scheme for the role of counsel.**

RECOMMENDATION #3

- **Lawyers should assess each child/youth individually to determine whether there are conditions present (such as easily apparent low cognitive functioning, mental impairment due to illness, intoxication, etc.) that would preclude a lawyer from assuming the role of ~~traditional~~ an instructional advocate.**

Issue 1c)**What should be the test or threshold for determining whether a lawyer should maintain an instructional advocacy role?****Background**

At the heart of this issue is consideration of what factors or criteria might justify departing from an instruction based advocacy role of counsel whereby the client gives instructions and the lawyer acts on those instructions. In other words, what circumstances would justify departing from the default role of instructional advocacy?

Initially, this issue was framed in terms of a “threshold” for capacity. The question asked was whether the threshold for a child should be high, meaning a significant degree of cognitive ability and verbal reasoning, or low, meaning a minimal ability to reason and verbalize. For instance, a high threshold might imply that the child be “able to appreciate the nature and purpose of the proceedings, the alternatives available to the court...and [have] sufficient maturity to weigh these factors with a reasonable degree of objectivity.” Alternatively, a low threshold might imply that a child is simply able to communicate a custodial preference. This means that a child as young as 4 or 5 years of age could, to some degree, instruct counsel. Respondents were also canvassed on several specific tests for a threshold, such as: 1) whether a child is incapable of making an adequately considered decision; and 2) whether the child is unable to make a reasoned choice about issues that are relevant to the particular purpose for which the lawyer is representing the child. Notably, both of these tests reflect a presumption that the child has capacity unless otherwise established.

Responses

In contrast to the first two issues, the responses on the threshold issue varied, not only *between* groups of respondents, but also *within* groups of respondents. For instance, while some of the roster lawyers thought the threshold should be high, others thought it should be low. Similarly, some caseworkers thought it should be low, while others were less concerned with the threshold level and more concerned with the safety of the child. In formulating his support for a low threshold, one lawyer from Alberta Justice noted that the *Enhancement Act* is clear that if the child is capable of forming an opinion it should be put before the court. That same lawyer qualified his comment by noting that a traditional advocacy role with a child looks different than it does with an adult because the lawyer must relay the child/youth’s preferences in context. He argued that the children’s lawyer is tremendously influential with the court and if the lawyer simply acts as a mouthpiece for the child (low threshold) then the lawyer will lose credibility with the court.

One respondent offered an altogether different position on the capacity question. This respondent argued that lawyers are not trained to deal with complex social and psychological issues and that the decisions related to a child’s capacity should be removed from the role of counsel. In her opinion, those decisions could and should be the designated responsibility of a guardian who is specifically appointed to make such

decisions. This position is a springboard for the broader proposition that counsel should not assume any role other than an instruction based advocacy role when representing children and that a *guardian ad litem* should be appointed when the child lacks capacity to instruct. This approach is discussed in more detail, below.

In addition to the respondents being divided on the issue of whether the threshold should be high or low, there was also mixed support for the idea of a safety loophole. Some questioned whether or not a lawyer should be obliged to take instructions from a child, regardless of the degree of capacity, if there is a substantial risk of harm in the child's position. In other words, many respondents believed that an "escape hatch" for safety concerns should be built into to any given threshold which would enable the lawyer to deviate from the instruction based advocacy role. This is the case, for instance, with the Nick Bala threshold presented in the discussion paper which provides that when assessing a child's capacity to instruct, counsel should be satisfied the child has made a reasonable choice and must be satisfied that there is no significant risk of serious harm in the desired plan. Several lawyers took comfort in there being an escape hatch in the traditional advocacy role, particularly if a lower threshold for capacity is adopted. This would enable them to extricate themselves from the risky or uncomfortable position of having to advocate an untenable or unsafe position on behalf of a child who may or may not appreciate the risks associated with his plan.

While several lawyers supported the idea of an escape hatch, one lawyer from Alberta Justice Family Law Branch expressed opposition to a "risk of harm exception." In his opinion, lawyers are often required to deal with thorny situations and if the child's preference is problematic or dangerous, it is the lawyer's challenge to represent the child while not putting him in at risk. He compared this challenge to the criminal context where, for instance, a client admits guilt and then expects the lawyer to lead alibi evidence. In these cases lawyers do not have the benefit of an escape hatch—they are expected to creatively navigate the situation. He does not think there should be a simple way out of dealing with complicated situations regarding safety because children will just become astute as to what information can and cannot be shared.

In comparison to the lawyers consulted, the children's advocates who were consulted unanimously supported a low threshold for capacity and most of them were opposed to the idea of an escape hatch for dangerous or safety related situations. They suggested that it is up to the lawyer to determine the interests of their client and advocate those interests in court, even when the position being taken appears unreasonable or not in the child's best interests. In the end, the judge will make the decision based on the evidence presented and the youth's case should not be softened because others think that position is unsafe and not in the child's best interest. Another advocate asked: why would a child want a lawyer if the lawyer is not going to represent his/her position/view points? Stated another way, if the lawyer does not represent the child's views and preferences, who will?

Reframing the Issue

As it has been framed above, the discussion easily becomes polarized and is reduced to a philosophical debate; either a) the child/youth is seen as an autonomous party whose perspective should be represented in court regardless of the wisdom of that position, or b) the child is seen as a party whose position needs to be screened and filtered through the wisdom of counsel before it can be advocated to the court. The polarization of the issue makes any particular policy position or guideline difficult to justify. Framed another way, however, the issue can be stated neutrally so that there need not be a divisive policy stand. For instance, guidelines could be stated in terms of counsel's obligation to represent a child/youth's interests (for instance, a child's interests may include the maintenance of stable relationships, preservation of the family unit, preservation of cultural identity, or cultivation of independence). When the objective of advocacy is to ensure the child/youth's interests, rather than her positions, are put before the court, the need to adopt a particular threshold for determining capacity, or an escape hatch for risky instructions, becomes less pressing.

If counsel is charged with the task of determining the interests of a child client based on the child's stated preference or position, then it is of little significance whether the child is simply able to articulate a custodial preference, or whether the child actually appreciates the nature and purpose of the proceedings. In either case, counsel must first take steps to identify the interests that underpin the child's stated preference, opinion, or position, and second, effectively advocate those interests to the court. As part of identifying those interests, counsel must ensure the child/youth is in accord with the interests as they have been identified. Stated another way, counsel must obtain instructions from the child/youth before advocating those interests to the court. If the child/youth does not agree with the interests as stated, then counsel should not advocate them.

There was significant support for interests based advocacy among the respondents. Among the caseworkers, there was a general consensus that it is important for lawyers to develop a relationship with the child/youth and interests based advocacy will promote this because the lawyer has to take the time to find out what is important to the child/youth. The Children's Advocate also agreed that the traditional advocacy role of the lawyer should be interests based and tied back to the matters to be considered in section 2 of the *Child, Youth and Family Enhancement Act*. In representing the child's interests the *Enhancement Act* is clear that if the child is capable of forming an opinion, it must be put before the court.

While some lawyers from Alberta Justice Family Law Branch were opposed to interests based advocacy because of the concern that some lawyers do not have the skill to unearth the interests beneath positions, the Children's Advocates took the opposite position. One children's advocate commented that lawyers are professionals and it is their responsibility to grapple with the challenges of representing a child's views and preferences (even if they appear unreasonable) by getting at the interests that underpin those views. For example, a child may take a position of wanting to return home, even though it may be unrealistic or unsafe given the evidence. In this situation, the lawyer

would explore with the child the reasons behind why he wants to return home which may include interests such as protecting his mother from an abusive father, ensuring the maintenance of a meaningful relationship with siblings/friends, or attending the same school.

Proposed Policy Position

Lawyers have both the professional capacity and responsibility to look beneath a child's position and be more than a mouthpiece of the child. When counsel assumes the role of advocating interests rather than positions, the issues of establishing a specific test for capacity to instruct and of creating an escape clause for cases where the child's preference may result in risk of harm move from the forefront to the background, while the need to identify interests and obtain instructions related to those interests become the paramount objectives. By advocating interests, the need to establish a legal threshold for determining capacity also becomes unnecessary. Lastly, while other professionals may be better suited and more skilled to determine capacity of children, lawyers are the best situated and most realistic candidates for this process.

RECOMMENDATION #4

- **Interest based instructional advocacy is the preferred model of representation for children and youth who are able and willing to articulate a preference, opinion, or position.**

RECOMMENDATION #5

- **Child's counsel should be more than a mouthpiece for the child and has an obligation to determine the interests of his/her client based on the stated preference, opinion, or position of the child.**

RECOMMENDATION #6

- **A child's interests may include the maintenance of stable relationships, preservation of the family unit, preservation of cultural identity, etc. Once the interests have been identified by counsel and the child/youth has given instructions to proceed, counsel must advocate those interests on behalf of the child/youth and later report back to the child/youth on this.**

Issue 2: In cases where instructional advocacy is not possible, what model of representation should be employed in representing that child/youth?

Background

When a child/youth is able and willing to articulate a preference, opinion, or position, then interests based instructional advocacy is conceivable. What is to be done, however, when a child or youth cannot, or will not, articulate his preference or opinion? Or what if the lawyer cannot obtain instructions or permission to proceed in representing the child or youth's interests? Stated another way, if counsel is unable to identify the child's interests because of the child's inability or unwillingness to state a preference or position, or the child is unable or unwilling to give instructions to proceed, how should that child be represented?

In Alberta, most lawyers appointed to represent children and youth in protection proceedings assume a best interests role when instructions cannot be obtained. In the discussion paper, several models of representation were canvassed and considered as alternatives to instructional advocacy. They included:

- a) the objective best interests approach
 - ensure that all relevant evidence regarding the child or youth's welfare is placed before the court; all submissions of 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.
- b) the subjective best interests approach
 - counsel advocate a position based on their own assessment of the child's best interests.
- c) the appointment of a *guardian ad litem*
 - an guardian could be appointed to stand in for the child/youth and give instructions to the lawyer where the child cannot/will not express a preference; the lawyer's role is then restricted to one of advocacy and the lawyer would take instructions from the *guardian ad litem*
- d) the interests approach
 - even when a child cannot articulate a preference or opinion, the lawyer may still undertake interests based advocacy by ensuring the child's procedural rights and substantive rights (for instance *Charter* rights and rights ascribed pursuant to the *Enhancement Act*).
- e) the Ontario Children's Lawyer approach
 - adopt a position on behalf of the child after considering a) the independence, strength, and consistency of the child's views and preferences; b) the

- circumstances surrounding the child's views and preferences; and c) all other relevant information about the child's interests;
 - advocate on behalf of the child and advise the court of the child's views and preferences but need not act on the child's instructions
- f) the *amicus curiae* (friend of the court) approach
- assist the court by ensuring that all the relevant evidence is placed before the court and provide information to the court about legal issues that may arise; neutral role

Responses

At the Edmonton Roster lawyer consultation, support for alternate roles when the child is unable to articulate a preference or opinion was evenly split between a neutral *amicus* role and an objective best interests role, with only marginal support for the appointment of a *guardian ad litem*. In contrast, support at the Calgary Roster lawyer consultation was more broadly split amongst the subjective best interests role, objective best interests role, *amicus curiae* role, and appointment of a *guardian ad litem*.

Some of the lawyers from Alberta Justice were inclined to say that when a child's position is untenable or cannot be determined, the child's counsel should draw back from an advocacy position and assume a neutral role or a hybrid role, meaning that the lawyer should advise the court whether the child appreciates the circumstances around their position, but should never substitute his own position for that of the child's position. One lawyer from Alberta Justice expressed concern about collapsing an objective best interests role with a subjective best interests role because it could result in a child's lawyer becoming aligned with the parent's counsel or ignoring evidence because of personal values and views. The same lawyer suggested that when counsel cannot get instructions from the child or youth he should adopt an objective best interests role by pointing out relevant evidence and advocating a position based on that evidence. Regardless of the role adopted, however, the lawyer must be fair and honest and ensure that all relevant evidence is before the court.

Another lawyer from Alberta Justice questioned whether there is a meaningful distinction between a best interests role for the child's counsel and the best interests role of director's counsel. She suggested that if the child cannot instruct counsel, perhaps there is no place for the child to be represented in the first place. Two arguments arose in response to this comment: first, one lawyer disputed the merit of this position by noting that the *Charter* has been interpreted as guaranteeing a child's right to counsel. Second, the best interests perspective of child's counsel is clearly different from that of director's counsel because the lawyer is coming from the child's position while the director is coming from the state's position. Child's counsel is there to represent only the child's interest—not the director or parent's interest—and the children's lawyer need not consider the institutional, political or strategic.

In contrast to most of the lawyers who responded, the Children's Advocates took the position that lawyers are generally not qualified to determine the best interests of a child.

For this reason, when the child cannot instruct counsel, the Advocates suggested the default role for counsel should be an interests role, based on the matters to be considered enumerated in section 2 of the *Enhancement Act*. None of the youth who were consulted thought that the lawyer should tell the judge what is best for the youth. In their opinion, it is the lawyer's job to get what the youth wants.

Yet another expressed position is that it is neither practical nor desirable to specify a particular role for counsel because the approach taken necessarily depends on the situation. In her opinion, each case is unique in terms of counsel's role and lawyers need to have the flexibility to respond as the situation calls for. This same respondent is strongly opposed to a *guardian ad litem* model because it will result scheduling delays for hearings, it will be costly, and because the appointed guardians would not likely possess any more skill to determine the best interests of children and youth than the appointed lawyer would. Some of the same concerns were echoed by others who felt that appointing a *guardian ad litem* would result in a deferral of counsel's responsibility and unnecessary delays.

While many of the lawyer stakeholders clearly opposed the litigation guardian model as an alternative to instruction based advocacy, one respondent preferred this model as the default option when a child is unable or unwilling to give instructions. In her opinion, the best interests approach is fundamentally at odds with the representation of "infants" (persons under age 18) in any other civil action. She reasons that the best interests approach blurs the boundaries between the traditional role of counsel and the role of a litigation guardian because counsel is instructing herself on what the best interests of the child are. She further notes that lawyers are ill suited to make a determination regarding the child's best interests because they do not have the necessary educational training in the fields of psychology or social work. As a result, she concludes that the appointed lawyer's role should be restricted to one of advocacy and the lawyer should take instructions from the child's guardian. In the event that a litigation guardian model is rejected, she argues that the next best option is one which requires counsel to ensure that all relevant evidence is placed before the court.

It is noteworthy that in spite of the varying degrees of support among respondents for the various roles of counsel, there was consensus that each lawyer should identify his chosen role to the court so that the court can weigh counsel's advocacy accordingly.

Proposed Policy Position

On one hand, each lawyer must be able to adopt an approach that is consistent with his/her style of lawyering and have the flexibility to respond to the unique circumstances of each case. On the other hand, by virtue of being charged with the responsibility and authority to administer a legal representation appointment service, LRCY has the legal obligation to ensure minimum standards are met in the quality and consistency of that representation. As a result, parameters on the role of counsel must be established when there is a departure from instruction based advocacy. While prescribing a standard model of representation is not the preferred option, appointed lawyers should be required to satisfy certain aspects of representation where instructional advocacy is not possible:

RECOMMENDATION #7

- LRCY should not specify a particular role for counsel to adopt when instructional advocacy is not possible.

RECOMMENDATION #8

- Adopt guidelines that encourage lawyers to satisfy the following aspects of representation where instructional advocacy is not possible:
 - i. ensure the role is that of independent legal representation for the child/youth, therefore not aligning or appearing to advance another parties' position.
 - ii. test the evidence, ensure it supports the application, and ensure the appropriateness of the order being sought.
 - iii. ensure that all relevant evidence is before the court and assist the court in understanding the evidence
 - iv. ensure that any position taken on behalf of a child or youth adequately advances the child or youth's substantive and procedural rights (for instance, any *Charter* rights engaged, aboriginal rights, procedural rights, or rights under the section 2 of the *Enhancement Act*); and
 - v. advise the court (and other parties) of the role being taken so the court can weigh counsel's arguments accordingly.