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The Hybrid Guardian Ad Litem: Adopting Standards of Practice to Improve the Quality of Representation for Children in Custody Cases

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THE HYBRID GUARDIAN AD LITEM: ADOPTING STANDARDS OF PRACTICE TO IMPROVE THE QUALITY OF REPRESENTATION FOR CHILDREN IN CUSTODY CASES

Dona Playton*

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I. INTRODUCTION

Family law encompasses various case types and issues, including divorce, separation, custody and visitation, paternity, and post-decree modification and enforcement actions. A significant number of family law cases involve child custody issues. Moreover, family law cases are unique because resolution and enforcement of the terms require going to court for a judicial determination or approval of a negotiated resolution. As a result, these types of cases represent a high percentage of civil legal actions filed in state district courts. While a vast majority of family law cases filed are uncontested and result in a settlement, contested cases, especially those involving child custody disputes, can be particularly challenging for courts. In cases where the parents can't agree on child custody, courts have to make critical decisions, often with little guidance on the best way to do so. While the administrative burden of family law issues on courts is not...
always adequately reflected in court statistics and data collection,\(^8\) research on family law case management confirms that the available court remedies and processes are often inadequate to meet the needs of families seeking relief, particularly for parenting issues.\(^9\)

Since 1965, there have been revolutionary changes in family law and legal standards relating to custody.\(^10\) The dramatic shifts in families’ social, economic, and cultural contexts require courts to explore, develop, and implement more effective methods and standards for court services and resources.\(^11\) As efforts to improve the court processes for families have evolved, so have courts’ willingness to appoint lawyers for children in child custody cases.\(^12\) In Wyoming, an attorney appointed to represent a child in a legal proceeding is commonly referred to as a “guardian ad litem” (GAL). Recently, more courts are attempting to manage the caseloads and promote the interests of families and children in various ways,\(^13\) including by appointing guardians ad litem (GALs) for the children in custody cases. Yet, unlike juvenile court cases that mandate the appointment of a GAL in child abuse and neglect cases, few states, including Wyoming, have adopted statutory criteria

\(^7\) Id.

\(^8\) Id. at 333; see also Domestic Relations Cases in State Courts, supra note 1, at i (finding inadequacies and importance of data quality in the management of family court cases). In Wyoming, “domestic relations” cases may be entered by the Clerk of Court as Custody/Parental Visitation, Grandparental Visitation, Paternity, Child Support/Parental Contribution, Child Support w/ Paternity, or UIFSA w/Paternity, UIFSA, Dom Register Foreign Judgment, TPR State/DFS, or TPR Family/Private with no guarantees of consistency essentially nullifying the data for case-type classification. Wyo. Sup. Ct., Civil Cover Sheet, https://www.courts.state.wy.us/wp-content/uploads/2017/04/ECVSP05.pdf [https://perma.cc/7NCT-4CGQ] (last visited Nov. 19, 2021). A “Civil Cover Sheet” is required when filing a civil action in Wyoming. Id. According to this form, for domestic relations subtypes “[a] petition containing a child support action should be labeled a child support case even if other actions (i.e., custody, visitation, paternity) are included in the petition.” Id.

\(^9\) See Domestic Relations Cases in State Courts, supra note 1, at 29 ("By confirming much of the conventional wisdom about family court cases and court processes, the findings from this study raise questions not only of how domestic relations cases should be managed, but also whether the judicial branch is still the most appropriate forum for such cases.").

\(^10\) Neubauer & Meinhold, supra note 2, at 334.

\(^11\) Domestic Relations Cases in State Courts, supra note 1, at 28.

\(^12\) Am. Acad. of Matrim. Laws., Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary, 22 J. Am. Acad. Matrim. Laws., 227, 227 (2009) [hereinafter AAML 2009 Standards] (“To an important extent, the growing call for greater use of lawyers for children in custody cases is based on an implicit criticism of how such cases are being processed. We believe making such criticisms explicit is useful before addressing when to encourage using children’s lawyers and before defining what their roles should be. Although both the ABA Standards and the NCCUSL Act discuss the various roles children’s lawyers might perform, neither addresses the critical initial analysis of determining whether and, if so, how current matrimonial practice fails adequately to resolve familial disputes.”); see also Neubauer & Meinhold, supra note 2, at 194 (explaining that courts lack the guidance necessary to incorporate “diagnostic adjudication” for decision-making in contested divorces where spouses can’t agree on child custody).

specific for when and whom to appoint as a GAL in custody cases. Instead, the appointment of an attorney for a child in a custody case is left to the judge's discretion. As a result, when a judge appoints an attorney to represent a child in a custody case, there often is no consensus concerning the scope of the attorney's duties and obligations. This is particularly true when the attorney is expected to fulfill more than one role. As a result, there is a general frustration concerning the lack of clearly defined roles for attorneys acting as GALs.

Clarifying and raising the standard of practice for GALs in child custody cases will require a deliberate disruption of the status quo. As early as 1998, the Wyoming Supreme Court recognized the need to establish improved standards, rules, or guidelines for GALs in custody cases by urging "our courts, legislators, professionals, and concerned citizens to undertake a consolidated effort to address the appointment of counsel and guardians ad litem for Wyoming's children." Despite the efforts of lawyers and judges, inefficient case management and a lack of resources for family law cases result in "[o]vercrowded dockets and delays, . . . the absence of counsel for many parties, too little time devoted to each case that

family_justice_initiative_principles.pdf [https://perma.cc/X2BZ-MGZ9] ("Where children are involved, the relationship between the parties continues well beyond the resolution of the case. Given the far-ranging and long-term impacts that judicial decisions have on parents and children, the court system has substantial reason to encourage parties to reach resolution themselves, with careful attention to the safety of the parties, rather than undergo a full adversarial proceeding and receive a determination by the judge.").


2 Jeff Atkinson, Modern Child Custody Practice § 14-2 (2d ed. 2020).


is heard in court, and a general feeling of dissatisfaction by the parties as to how their cases are handled . . . .”

An essential consideration for effective case management recognizes that not all families require the same level of court involvement. For example, some cases require the court’s protective function, including domestic violence cases and those where children’s safety is at stake. However, many more family law cases only need access to the court’s administrative function of entering a final order. Consequently, the adversarial court process is often at odds with families separating or divorcing who wish to do so in a way that avoids conflicts, promotes problem-solving, and supports children. Fortunately, there is renewed attention on the administration of justice related to resolving child custody cases. Nonetheless, a paradox remains between increasing appointments of GALs in custody cases and efforts to make the legal system more “just, speedy, and inexpensive.”

While the appointment of a competent GAL can be a valuable contribution to a custody case, when the parties or their attorneys focus on the child’s best interests, the appointment is often unnecessary. As a result, the routine appointment of GALs in custody cases threatens to duplicate the efforts of the other attorneys in the case or needlessly delay the proceeding. Courts should instead tailor resources

18 AAML 2009 Standards, supra note 12, at 229.
20 Rebecca Love Kourlis et al., IAAL’s Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce, 51 Fam. Ct. Rev. 351, 354 (2013) (“In order to determine what functions are needed and dispense those functions as fairly and efficiently as possible, family cases must be triaged so that the protection and enforcement cases can be prioritized and given their full due. Shrinking resources demand that court services be deployed efficiently, effectively, and only where necessary.”).
22 See AAML 2009 Standards, supra note 12, at 228–30; see also Castellow v. Pettengil, 2021 WY 88, ¶¶ 17–30, 492 P.3d 894, 901–04 (Wyo. 2021) (Kautz, J., specially concurring, in which Davis, C.J., joined). Chief Justice Davis and Justice Kautz, the only two justices on the Wyoming Supreme Court at the time who previously served as district court judges presiding over family law cases, observed that the “legally uncomplicated custody matter took over 2 years to get to trial,” and the district court judge took over a year to issue an order for shared custody. Id. at ¶ 1, 23, 492 P.3d at 896, 902.
24 See de Montigny v. de Montigny, 233 N.W.2d 463, 470 (1975) (Beilfuss, J., concurring) (stating that the participation of a GAL “can be cumulative and redundant and a source of substantial costs and fees that parties can ill afford”); ATKINSON, supra note 15, at § 14-3.
to the specific circumstances of the case and the parties.\textsuperscript{26} Unfortunately, case law, rules of professional conduct,\textsuperscript{27} and legislation have fallen short of delineating when a GAL is appropriate and the responsibilities inherent in such an appointment.\textsuperscript{28}

To avoid confusion, this article focuses on the appointment of lawyers for children in family law child custody and visitation proceedings, not in juvenile court child abuse and neglect cases. There are critical distinctions between the case types. In child abuse and neglect cases, there are strict rules of law that limit courts and lawyers from making decisions based on what they perceive to be in a child’s best interests.\textsuperscript{29} Yet in custody and divorce cases, “judges are \textit{required} to decide the case based on what they believe will further the child’s best interests.”\textsuperscript{30} The attorney’s role when representing children in private child custody cases has long been the subject of confusion and debate.\textsuperscript{31} Complaints and disagreements focus on inadequate training, GAL bias, and a lack of accountability, oversight, or relief if parents have legitimate concerns with the GAL’s investigation.\textsuperscript{32} Although the practice of appointing attorneys as GALs has increased in many courts in the state, the same standards governing oversight, training, and resources available for

\begin{footnotesize}
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\item[27] See generally John M. Burman, \textit{A Lawyer as a Representative Part IVb: Guardians Ad Litem, Wyo. Law.}, Aug. 2014, at 50, 53 [hereinafter Burman, \textit{Guardians Ad Litem}] (noting the changes to Wyoming’s Rules of Professional Conduct “do not fully answer the many issues about how and what a lawyer/GAL should do”).
\item[29] See Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (“So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”); \textit{In re Guardianship of MEO}, 2006 WY 87, ¶¶ 50–52, 138 P.3d 1145, 1159–60 (Wyo. 2006) (“The district court’s determination that a guardianship was warranted was based solely upon an analysis of MEO’s best interests. However, courts have denounced use of the best interests standard as the sole justification for altering a family unit, finding it at odds with a parent’s rights.”).
\item[32] Richard Ducote, \textit{Guardians Ad Litem in Private Custody Litigation: The Case for Abolition}, 3 \textit{Loy. J. Pub. Int. L.} 106, 112 (2002) (referring to Minnesota’s Office of the Legislative Auditor, Program Evaluation Division, report on that state’s guardian ad litem program). See also Lemus v. Martinez, 2021 WY 66, ¶ 30, 486 P.3d 1000, 1011 (Wyo. 2021) (holding father had no right to a guardian ad litem who was not biased against him); Hays v. Martin, 2021 WY 107, ¶ 17, 495 P.3d 905, 909–10 (Wyo. 2021) (“Mother only claims that the GAL was biased against her. Applying \textit{Lemus}, Mother had no right to an unbiased GAL.”).
\end{itemize}
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GALs in juvenile court are not available or uniformly ascribed to by lawyers or judges for GALs in child custody cases.33

For decades, efforts to improve the professional practice of attorneys representing children have received increased attention from courts, legislators, and policymakers.34 A study conducted by the U.S. Department of Health and Human Services confirmed that “a lack of legislative guidance and disagreement among and within States regarding how best to provide this representation has resulted in a chaotic and inconsistent system of GAL representation.”35 Nonetheless, few jurisdictions have clear standards or policies directing when or why a child may be appointed an attorney or precisely what the attorney should do in child custody cases.36 Without well-defined standards and direction, it is not uncommon for everyone involved in the case to have a different impression or understanding of the role of the GAL, including the GAL.37

In Wyoming, there is an Office of Guardian Litem that oversees the mandatory appointments of attorney GALs in juvenile court cases.38 Originally, to comply with federal mandates and to address disparities throughout the state in the appointment of GALs, Wyoming adopted a district court rule to implement standards, caseload maximums, qualifications, pay standardization, and increase training for GALs in juvenile court proceedings.39 A later amendment added a complaint process for children or other stakeholders to report concerns with the GAL’s representation.40 Today, the Wyoming Office of Guardian ad Litem has a governor-appointed director and a robust program that provides oversight, training, and a state-funded


37 Ellis, supra note 31, at 556.


compensation mechanism for attorney guardians ad litem in juvenile court cases. The standards include caseload limits, rules, and an administrative process for the timely and appropriate appointment of qualified attorneys for children in juvenile court cases.

While there are some inherent differences between juvenile and family court child custody cases, children involved in either type deserve the same high-quality representation supported by training, qualifications, and oversight. There is an urgent need for the state to adopt standards for Wyoming attorneys representing children in child custody cases requiring adequate training and experience to discharge their duties with competence. Training requirements should include, but not be limited to, understanding applicable statutory law, case law, and court procedures, including those relevant to divorce, child custody, visitation, and child support. In addition, all lawyers representing children should be well-versed in current literature and studies on child development, mental health and substance abuse, education law, domestic violence, and non-adversarial case resolution. The adoption of standards is necessary to bridge the gap between available court-ordered processes and the needs of the families seeking relief, especially concerning parenting issues.

II. A Brief History of Legal Representation for Children

The history of legal representation for children provides context and guidance for policies and solutions moving forward. Historically, state intervention in the family was limited to situations where the child’s health, safety, or welfare was jeopardized or threatened, confirming the broad deference of parents to control their children. At common law, the duty and obligation of raising and caring for


\[46\] See Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (noting “the natural duty of the parent to give his children education suitable to their station in life” and holding that the “right of the parents to engage [the teacher] so to instruct their children” implicated the Fourteenth
children belongs first with the parents. While not unlimited, the extent to which the state may limit parental authority in the parent-child relationship has been greatly restricted. There usually is no reason to question the ability of a parent to make the best decisions concerning their children, so long as that parent adequately cares for their children and is otherwise “fit.” In other words, parents are assumed to act in the best interest of their children. On the other hand, it is well-established that when parents are determined to be “unfit,” the state has the right to intervene to protect children under the doctrine of parens patriae.

A. State Intervention in the Family and the Introduction of Child Advocacy

American law recognized the parens patriae doctrine early. The doctrine served as the driving force behind protecting children from abuse and neglect. In the late nineteenth century, social reformers known as “child savers” embarked on a mission to “save” children from abuse, neglect, or abandonment, mainly brought on by poverty. When a parent’s conduct or circumstances fell below what some determined to be a minimum allowable threshold, the children were “saved” by removing them from their parents, either temporarily or permanently. The child-saving movement eventually led to child labor laws, compulsory education, and the first statewide juvenile court. While perhaps well-intentioned, the child savers’ Amendment of the United States Constitution and by banning German language instruction, this right was violated).

47 Id. at 399 (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); see also Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

48 See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . .”). But see Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing parental rights but emphasizing that they are not “beyond limitation” and that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare . . . ”).


50 See Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401, 2453 (1995) (“Although generally not described in these terms, the parent-child relationship is regulated by a variety of interactive mechanisms that function to encourage parents to serve their children’s interests better.”).

51 See Santosky, 455 U.S. at 766. The doctrine of the parens patriae interest derive from English common law, linked to the idea that the King has the right to intervene in the biological family on behalf of the child. LG Display Co. v. Madigan, 665 F.3d 768, 771 (7th Cir. 2011).

52 NACC, CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 210–11 (Donald N. Duquette et al. eds., 3d ed. 2016) [hereinafter CHILD WELFARE LAW AND PRACTICE].

53 Id. at 217–18.

54 Id. at 219.

methods were often paternalistic and authoritarian. Child savers substituted what they believed was best for children without affording due process to either the parents or the children.\textsuperscript{56} Although it is unlikely the unbridled discretion of child savers would withstand modern scrutiny, their activism sparked the child advocacy movement in child protection and delinquency cases we see today.\textsuperscript{57}

It was not until 1967, in the landmark case \textit{In re Gault},\textsuperscript{58} that children were declared to have essentially the same constitutional right to counsel as adults.\textsuperscript{59} \textit{Gault} focused on the need for due process safeguards for children charged with delinquent offenses.\textsuperscript{60} \textit{Gault}, however, did not address the representation of children in cases other than delinquency, including child abuse and neglect or family law cases.\textsuperscript{61} Nor did the Court provide an indication of a minimum age requirement that triggered a child’s right to counsel.\textsuperscript{62} In the years since \textit{Gault}, views of children as autonomous rights holders “entitled to ‘justice’ have become pervasive.”\textsuperscript{63} As a result, children today receive legal representation in a variety of legal proceedings.

\textbf{B. The Child Abuse Prevention and Treatment Act (CAPTA) and The Right to Representation for Children in Child Abuse and Neglect Cases}

The role of the child’s attorney is relatively new. Unlike delinquency law, which mandates independent counsel for juveniles,\textsuperscript{64} there is no constitutional mandate for the appointment of attorneys for children in other case types, including child abuse or neglect cases.\textsuperscript{65} In 1974, however, the federal Child Abuse Prevention
and Treatment Act (CAPTA) took a bold step to improve outcomes for children in child abuse and neglect cases.\textsuperscript{66} CAPTA mandates that a GAL be appointed to represent a child’s best interests in every case of abuse or neglect that results in a judicial proceeding.\textsuperscript{67} Under CAPTA, the representative does not have to be a lawyer. As a result, many children receive lay GALs or court-appointed special advocates (CASAs).\textsuperscript{68}

Initially, under CAPTA’s framework, attorneys appointed to the role of GAL in child welfare proceedings struggled to understand the scope of their duties and obligations. In response, states began to pass statutes authorizing specific roles for attorneys representing children in juvenile dependency cases.\textsuperscript{69} The different approaches generally fall into one of three categories:

(i) Best Interest Model: where “best interest attorneys” are appointed to determine and make recommendations to the court as to the child’s best interest;

(ii) Client-Directed Model: (also called direct attorney model or expressed wishes representation) most closely approximates the adult-client model where the attorney counsels his/her client and advocates for the client’s


\textsuperscript{67} 42 U.S.C.A. § 5106a(b)(2)(B)(xiii) (2021) (requiring that “a guardian ad litem . . . who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in [child protection] proceedings”). But see Kim Dvorchak, NACC Urges Senate HELP Committee to Provide Legal Representation for Children in CAPTA, NACC (Sep. 13, 2019), https://www.naccchildlaw.org/news/469677/NACC-urges-Senate-HELP-Committee-to-Provide-Legal-Representation-for-Children-in-CAPTA-.htm#_ftn5 [https://perma.cc/B3DU-K5YH] (criticizing the language in CAPTA for confusing and conflating the distinct functions of a lawyer and a lay advocate as if these roles were interchangeable and lets states decide between two vastly different roles).

\textsuperscript{68} Child Welfare Law and Practice, supra note 52, at 284. See also CASA/GAL Model, Nat’l CASA/GAL Ass’n for Child., https://nationalcasagal.org/our-work/the-casa-gal-model/ [https://perma.cc/25D3-L9DU] (last visited Nov. 2, 2021) (“CASA/GAL volunteers are appointed by judges to advocate for children’s best interests. They stay with each case until it is closed and the child is in a safe, permanent home.”).

position, but takes into account diminished capacity such as age as set forth in the ABA Model Act; and

(iii) Hybrid Approaches: with legal representation in both a best interest and a client-directed manner, either through a two-attorney model or where one attorney performs both roles, sometimes only until a conflict between the roles triggers a request for additional counsel.70

CAPTA’s goal sought to ensure that every child involved in an abuse or neglect judicial proceeding initiated by the state was appointed a trained representative able to obtain a first-hand understanding of the child’s situation and needs.71 As courts complied with the mandatory appointment of GALs in juvenile court cases, the attention turned to the training necessary to accept an appointment. For example, to address concerns that there were “more and more cases where an appointed guardian ad litem has no contact with the child and makes uninformed recommendations to the court,”72 CAPTA was amended to require that representatives receive appropriate training for the role before being appointed, including “training in early childhood, child, and adolescent development.”73

Recent research reinforces the necessity of specialized child-centered knowledge for the competent, effective, and quality legal representation of children.74 Further, in conformity with CAPTA, Wyoming mandates that children in juvenile court legal proceedings be appointed well-trained representatives.75 Due to CAPTA’s training mandate, professional family and child advocacy organizations urged states to incorporate training into their standards for attorneys appointed to represent children in custody cases.76 Such training includes guidance into child development, and legal, medical, and psychological family dynamics.77 Without a mandate, however, states do not uniformly apply training requirements for GALs in custody cases.

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70 Id. at 8. For a full description of “diminished capacity” under the ABA Model Act, see ABA Model Act, supra note 16, § 7(e) cmt., at 11–13.


77 Id.
CAPTA further requires states to establish a plan for appointing GALs and document in their state plan provisions for when and whom to appoint as a GAL in every child abuse or neglect case resulting in a judicial proceeding. As a result, Wyoming created a statewide office that administers a program overseeing GALs in juvenile court proceedings. Finally, while CAPTA does not provide substantial guidance or direction concerning the role, responsibilities, or the minimum qualifications necessary for GALs in juvenile court cases, it does require that the GAL protect the rights and best interests of the child. Since the passage of CAPTA, the practice of appointing GALs to represent the best interests of children has dramatically increased, including in child custody cases.

C. The Best Interest Standard: An Insufficient Substitute for Standards of Practice in Child Custody Cases

In 1970, the Uniform Marriage and Divorce Act (UMDA) introduced the “best interest of the child” standard into family law. Accordingly, many states began to pass legislation rejecting any presumptions of preferences for mothers in custody cases and toward the less well-defined “best interest of the child” standard. Without further guidance on determining this new, vague standard of the child's

To be eligible for funding under CAPTA, a state is required to submit to the Secretary of the U.S. Department of Health and Human Services a written plan for improving the state’s child protective services system. The plan must include an assurance that the state has in effect laws, policies, or procedures that address specific issues required by CAPTA. 42 U.S.C.A. § 5106a(b).


Id. § 14-12-101(a). The Wyoming legislature included statutory requirements for the office of guardian ad litem:

The program shall employ or contract with, supervise and manage attorneys providing legal representation as guardians ad litem in the following cases and actions: (i) Child protection cases under W.S. 14-3-101 through 14-3-440; (ii) Children in need of supervision cases under W.S. 14-6-401 through 14-6-440, to the extent an attorney has been appointed to serve only as a guardian ad litem; (iii) Delinquency cases under W.S. 14-6-201 through 14-6-252, to the extent an attorney has been appointed to serve only as a guardian ad litem; (iv) Termination of parental rights actions under W.S. 14-2-308 through 14-2-319, brought as a result of a child protection, child in need of supervision or delinquency action; (v) Interstate Compact on Juveniles proceedings under W.S. 14-6-102, when requested by the juvenile or the court; (vi) Appeals to the Wyoming supreme court in the cases or actions specified in this subsection.

Id.

See 45 C.F.R. §1340.3(g); 42 U.S.C. §§ 5101–5108.


Joan B. Kelly, The Determination of Child Custody, The Future of Child., Spring 1994, at 121, 122 [hereinafter Kelly, Determination of Child Custody]. The UMDAs original five gender-neutral standards for making custody decisions are: (a) the wishes of the child’s parents; (b) the desires of the child; (c) the interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child’s best interests; (d) the child’s adjustment to the child’s home, school, and community; and (e) the mental and physical health of all parties). Joan B. Kelly, The Best Interests of the Child: A Concept in Search of Meaning, 35 Fam. & Conciliation Cts. Rev. 377, 379 (1997) [hereinafter Kelly, Best Interests of the Child].

Kelly, Determination of Child Custody, supra note 83, at 122.
best interest, however, lawyers and judges increasingly substituted their own values or looked to social and behavioral health providers for help deciding the child's best interest.\textsuperscript{85}

Though GALs and judges who appoint them in child custody cases rely on the best interest of the child standard as a sufficiently comprehensive legal rule for resolving child custody cases, it is not. While the purpose of replacing presumptions with the “best interest” standard is to require consideration of individual children’s developmental and psychological needs,\textsuperscript{86} in practice, it continues to be an indeterminate and unpredictable legal standard.\textsuperscript{87} Unfortunately, while the best interest standard is remarkably durable, it is at times difficult to describe without using general and ambiguous descriptions.

Often, with little more than a directive to advocate for the child’s best interests, GALs are left to their own accord to determine the best way to do so. Consequently, many professional organizations’ proposed standards of practice for attorneys for children in custody cases advocate for courts to move away from appointing lawyers who advocate for the child’s best interests.\textsuperscript{88} Instead, the standards propose moving toward “a lawyer to provide traditional client-based representation that empowers a child as a ‘rights holder’ whose wishes are presented and considered by the court.”\textsuperscript{89}

Combining the roles of attorney for the child and best interests attorney into a hybrid model is also not a viable solution.\textsuperscript{90} Even in cases where rules allow a GAL to substitute their opinion of the child’s best interest for the child’s wishes, there must still be an effective solution for communicating the child’s wishes to the court.\textsuperscript{91} The distinct difference in decision-making authority between a GAL and


\textsuperscript{86} See Kelly, Best Interests of the Child, supra note 83, at 384 (noting that the lack of scientific knowledge of the decision maker may result in a custody decision based on personal experience and beliefs of the judge).

\textsuperscript{87} Elrod & Dale, supra note 85, at 392.


\textsuperscript{89} Elrod & Dale, supra note 85, at 405–06.

\textsuperscript{90} See Guggenheim, AAML’s Revised Standards, supra note 30, at 256; AAML 2009 Standards, supra note 12, Standard 3.1 & cmt., at 247–48 (rejecting the use of a hybrid attorney/guardian ad litem model because when one person functions as both the attorney and the guardian for a ward, the attorney gets to make the decisions for the client).

\textsuperscript{91} See Guggenheim, AAML’s Revised Standards, supra note 30, at 260 n.46 (“Like the ABA, the Model Act believes the problems associated with freeing randomly assigned members of the Bar to choose the objectives to seek for a child are sufficiently cabined by advising that the best interests attorney should carry out a child-centered representation according to applicable law and should never formulate a position on the basis of personal bias.”).
an attorney is at the core of the debate over whether children should be entitled to an attorney or a GAL best interest attorney in custody cases.92

Prominent scholars Professor Barbara Atwood and Professor Linda Elrod have written frequently about the need to persuasively advocate for the child’s voice to be heard in judicial proceedings that affect their lives.93 Professor Barbara Atwood seeks to “affirm the dignity of each child through more individuated decision-making.”94 Similarly, Professor Linda Elrod has recommended significant substantive changes in child custody dispute resolution calculated to deepen the meaning of the “best interests” test.95 According to Elrod, “[t]he judge must seek and hear the child’s perspective; presume the child is capable of participation, and craft a plan that is developmentally appropriate for each child.”96 Unfortunately, courts continue to appoint GALs without clear directives on their roles, duties, obligations, and qualifications in many instances. Too often, the result is courts are attributing to the GAL and their opinion of what is in a child’s best interest “a level of competence, validity, wisdom, credibility, and objectivity richly undeserved.”97

III. Guardians ad Litem in Wyoming

A. From Juvenile Court to Family Court

Wyoming law requires the court to appoint “counsel” to represent any child alleged to be abused or neglected.98 An attorney in an abuse or neglect proceeding is also “charged with representation of the child’s best interest.”99 That is, “unless a guardian ad litem has been appointed by the court,” the attorney should serve as both the attorney and the GAL.100 Accordingly, an attorney for a child in an abuse or neglect case may assume one of three roles: an attorney for the child, a hybrid attorney for the child and the child’s best interests, or a GAL.101
In the 1991 Wyoming case, *Moore v. Moore*, without a corresponding statute for the role of an attorney representing a child in a family law custody case, the Wyoming Supreme Court turned to the child protection (abuse or neglect) statutes for guidance. *Moore* confronted the issue of *ex parte* communication between a GAL for the child and the judge. The Court declared that a GAL in a divorce case is “the attorney for the minor whom he is appointed to serve” and “participates in the proceedings as an advocate.” Accordingly, the Court determined “it to be unequivocal that the guardian *ad litem* has the same ethical responsibilities in the proceeding as any other attorney.” Nevertheless, despite finding the conduct constituted an ethical violation, the Court affirmed the judge’s decision to award custody of the child to the father.

When an attorney GAL fails to comply with the rules of conduct for attorneys, including engaging in *ex parte* communication with a judge, it adversely impacts the child’s interest to have “a full and fair airing at the trial by the presentation of competent and relevant evidence.” While frequently cited for the proposition that a GAL may not have ex parte communication with the judge, the take away from *Moore* is the court recognized an attorney appointed as a GAL for a child in a divorce action serves as the *attorney* for the child, subject to the same rules of professional conduct as an attorney for any other client.

**B. The Making of a Hybrid Attorney Guardian ad Litem**

Generally, an attorney may be involved in a legal proceeding on behalf of a child in one of four different ways. First, an attorney may represent the child in a traditional, direct client relationship and advocate for the child’s wishes. Second, a “best interest attorney” may communicate and advocate for what the attorney believes is in the child’s best interest. Third, there may be two attorneys: one...
direct attorney and one best interest attorney. Finally, an attorney may be tasked with serving both as a direct attorney, and best interest attorney, also referred to as a “hybrid guardian ad litem.”

The hybrid attorney/guardian ad litem role is the most often assumed by attorneys representing children in Wyoming. It is also the most controversial role because it “require[s] attorneys to assume dual and potentially inconsistent roles.” Unsurprisingly, many lawyers, judges, and GALs acknowledge the difficulty of explaining to parents and children their role and function. According to the American Bar Association’s Standards of Practice for Lawyers in Child Custody Cases,

The role of ‘guardian ad litem’ has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient.

In a 1998 case, Clark v. Alexander, the Wyoming Supreme Court defined the role of a GAL in a child custody case. Clark recognized “many areas of chronic confusion in the appointment of a guardian ad litem, e.g., when an appointment is necessary, the necessary qualifications to serve as guardian ad litem, and the timeliness of the court’s communication of the specific duties expected by the court.” Moreover, “the costs attending the appointment of both an attorney and a guardian ad litem . . . would in every case conscript family resources better directed to the children’s needs outside the litigation process.” Therefore, recognizing no clear statutory guidance for the role of attorneys for children in custody cases, the court defined a GAL in a child custody case as one acting in a hybrid role, as both a traditional GAL and an attorney for the child. The decision was not without

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112 See Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998) (acknowledging that a guardian ad litem in a custody case acts both as a traditional guardian ad litem and as an attorney for the child and, therefore, is subject to ethical constraints of the Rules of Professional Conduct as modified to accommodate the hybrid nature of the role of attorney-guardian ad litem).

113 Id.


116 ABA CUSTODY STANDARDS, supra note 16, Standard II(B) cmt., at 2.

117 Clark, 953 P.2d at 152.

118 Id. at 151 n.2.

119 Id. at 153.

120 Id.
difficulty as the court acknowledged “the juxtaposition of the separate roles of attorney and guardian ad litem into one ‘attorney/guardian ad litem,’ appears especially problematic.”

Clark reiterated that the attorney/guardian ad litem advocates for the child’s best interests and actively participates in the proceedings. In contravention of the ethical rules, however, the Clark court declared, “[i]f the attorney/guardian ad litem determines that the child’s expressed preference is not in the best interests of the child, both the child’s wishes and the basis for the attorney/guardian ad litem’s disagreement must be presented to the court.” In particular, Clark excused an attorney’s strict adherence to the child client’s expressed preferences and modified the confidentiality requirement.

Recognizing potential conflicts between the hybrid role and the Rules of Professional Conduct, the Clark court advised that when possible, attorneys appointed to represent a child in a custody case should maintain a normal client-lawyer relationship with the child and “abide by a client’s decisions concerning the objectives of representation.”

Representing a child client is similar to representing an adult in many ways. The “child’s attorney” owes their clients “the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.” Generally, “when a client disagrees with the attorney’s advice, a presumption of incompetency does not automatically follow.” Instead, “the lawyer must ‘abide by a client’s decision,’” including when representing a minor child. However, unlike adult clients, the presumption of incompetency for children enables attorneys to substitute their views when the child’s wishes differ from their own. Consequently, a “best interests attorney” or GAL is not bound by the child’s

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121 Id. at 151. For evidence that the Court was aware, at the time of the Clark decision, of the ongoing debate raging regarding the appropriate roles for attorneys for children in child custody cases and of the almost certain difficulty that would arise from the hybrid model of child representation. See id. at 151 n.3.
122 Id. at 153; see also Pace v. Pace, 22 P.3d 861, 868 (Wyo. 2001).
123 Clark, 953 P.2d at 153–54.
124 Id. at 154.
125 Id. at 152. Specifically, an attorney/guardian ad litem is not bound by the child’s preference. Wyo. Rules Pro. Conduct r. 1.14(d) (2021).
127 Lidman & Hollingsworth, supra note 115, at 265.
128 Id.
129 See id. at 264–65.
130 Cf. id. at 265 (“Normally, when a client disagrees with the attorney’s advice, a presumption of incompetency does not automatically follow. The lawyer must not substitute his judgment for that of the client.”).
directives or objectives. The result of directing attorneys for children to act in a “hybrid” role, as both the attorney and the guardian ad litem, clearly necessitated a modified application of the Rules of Professional Conduct for Attorneys at Law.

To address the ongoing conflict between a GAL’s role as an advocate for the best interests of a child and a lawyer’s duty to represent their client’s desires, modifications were made to Wyoming’s Rules of Professional Conduct, including Rule 1.2(e):

> When a lawyer is appointed to act as a guardian ad litem, the lawyer shall represent what he or she reasonably believes to be in the best interests of the individual. The lawyer shall not, therefore, be bound by the individual’s objectives for the representation. The lawyer shall, however, consult with the individual, in a manner appropriate to the age and/or abilities of the individual, as to the objectives the lawyer intends to pursue, as well as the means by which those objectives will be pursued.

Although Wyoming amended its Rules of Professional Conduct to account for the ethical obligations of a lawyer appointed as a GAL, in practice, the role of the GAL remains challenging to define. The Preamble to the Wyoming Rules of Professional Conduct (“Rules”) “articulate a fundamental difference between a lawyer as a GAL and a lawyer playing a traditional role of advisor, advocate, negotiator, or evaluator.” Accordingly, rather than pursuing objectives established by the client, the GAL instead represents “the best interests of the individual for whom the lawyer has been appointed to act . . . .” The amendment “indicates that a lawyer appointed as a GAL has different ethical responsibilities.” As a result, Wyoming’s revisions significantly altered specific traditional rules of professional conduct for lawyers serving as guardians ad litem.

The Rules account for the different roles by stating that the ethical obligations of a lawyer acting as a GAL “shift accordingly.” Unfortunately, it is not always clear how the roles shift. For example, whether a GAL should represent the child’s

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131 ABA Custody Standards, supra note 16, Standard II(B)(2), at 2.
132 See generally Wyo. Rules of Pro. Conduct r. 1.2(a).
133 Id. r. 1.2(e) (emphasis added).
135 Id.
136 Id. (quoting Wyo. Rules of Pro. Conduct pmbl.).
137 Burman, Guardians Ad Litem, supra note 27, at 50.
138 See generally John M. Burman, Recent Amendments to the Wyoming Rules of Professional Conduct: Part II Rules for Guardians Ad Litem, Wyo. Law., Apr., 2003, at 48 (responding to the Wyoming Supreme Court’s call for clarification of footnote 2 in Clark for the appropriate scope and requirements for attorney guardians ad litem).
best interests as determined by the lawyer (guardian ad litem) or be directed by the child's expressed wishes after counseling by the lawyer continues to be a source of debate. The hybrid lawyer-guardian ad litem role allowed by the Wyoming Rules requires a GAL to “make a determination regarding the child’s best interests and advocate for those best interests according to the guardian ad litem’s understanding of those best interests, regardless of whether the attorney guardian ad litem’s determination reflects the child’s wishes.”\textsuperscript{140} Thus, the lawyer-guardian ad litem is no longer limited to act “independently on behalf of the client and represent the best interest of the client \textit{as perceived by the client}.”\textsuperscript{141}

However, Wyoming’s Rules of Professional Conduct 1.14(a) addresses an attorney’s ethical duties towards a child or other client with diminished capacity and provides that “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”\textsuperscript{142} Rule 1.14(d) states, “[a] lawyer appointed to act as a guardian ad litem represents the best interests of that individual, and shall act in the individual’s best interests even if doing so is contrary to the individual’s wishes. To the extent possible, however, the lawyer shall comply with paragraph (a) of this rule.”\textsuperscript{143} Moreover, Comment 1 to Rule 1.14 notes that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”\textsuperscript{144}

The rules remain unclear how to navigate conflicts between the child’s wishes and the GAL’s determination of the child’s best interests and to communicate the conflict in a way that gives “due weight to the child’s preferences in the face of an able lawyer striving to persuade the judge to decide the case in favor of the child’s wishes.”\textsuperscript{145} Certain professional standards advocate that so long as the child has the ability to consult with and provide voluntary, knowing, and intelligent input and directions to their attorney, the attorney should treat the child like she does other clients and advocate for the child’s wishes.\textsuperscript{146}

\textsuperscript{140} Boumil et al., \textit{supra} note 82, at 52 n.62 (2011) (quoting Mich. Comp. Laws § 712A.12d(1)(d)(i) (2009)).
\textsuperscript{141} Lidman & Hollingsworth, \textit{supra} note 115, at 264 (“Once the client has directed the lawyer, the lawyer must act independently on behalf of the client and represent the best interest of the client \textit{as perceived by the client}.”).
\textsuperscript{142} Wyo. Rules of Prof. Conduct r. 1.14(a).
\textsuperscript{143} Id. r. 1.14(d).
\textsuperscript{144} Id. r. 1.14 cmt. 1. \textit{See also} id. r. 1.7 cmt. 6 (“Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent.”); Sup. Ct. of Ga., FAO 16-2 (Dec. 2017) (finding the question also involves Rule 1.2 (Scope of Representation), Rule 1.7 (Governing Conflicts of Interest), and “implicates Rule 3.7, the lawyer as a witness, to the extent that the guardian ad litem must testify and may need to advise the court of the conflict between the child’s expressed wishes and what he deems the best interests of the child . . . Rule 1.6, Confidentiality of Information, may also be violated if the attorney presents the disagreement to the Court”).
\textsuperscript{145} See Guggenheim, AAML’s Revised Standards, \textit{supra} note 30, at 256.
\textsuperscript{146} ABA Custody Standards, \textit{supra} note 16, Standard III(E) cmt., at 4 (“While the lawyer
The inherent conflict of taking a position contrary to the client’s wishes has been raised by scholars as a significant source of disagreement between the two roles.¹⁴⁷ The Georgia Supreme Court issued an advisory opinion on whether an attorney GAL may advocate for termination of parental rights over a child’s objection:

When it becomes clear that there is an irreconcilable conflict between the child’s wishes and the attorney’s considered opinion of the child’s best interests, the attorney must withdraw from his or her role as the child’s guardian ad litem . . . . The attorney may not withdraw as the child’s counsel and then seek appointment as the child’s guardian ad litem, as the child would then be a former client to whom the former attorney/guardian ad litem would owe a continuing duty of confidentiality. . . . If the conflict between the attorney’s view of the child’s best interests and the child’s view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16(b)(3).¹⁴⁸

In other words, if, after appropriate investigation and communication, the child does not accept the advice of the lawyer concerning the child’s best interests, “the lawyer would be ethically bound to advocate for the client’s position or withdraw.”¹⁴⁹

Combining the functions and modifying the rules of professional conduct¹⁵⁰ has encouraged some lawyers to advocate recommendations based on their personal values or beliefs in the name of the child’s best interests.¹⁵¹ Unfortunately, a potential “unintended consequence” of rule modifications is that they may actually reduce the likelihood that a determination in a contested child custody case will be decided based on what is best for the children.¹⁵² Combining the two roles into one attorney/guardian ad litem has not made the model any less confusing. As a result, the hybrid role of GAL in child custody cases continues to be a source of “chronic confusion” for lawyers, judges, parents, and children.¹⁵³ Because of the confusion and ethical tensions inherent in the blended professional roles—client-
directed and best interest representation—model child representation standards proposed by professional organizations like the American Academy of Matrimonial Lawyers and the American Bar Association summarily reject the hybrid attorney/GAL model.\footnote{154}

\section*{IV. Comparing Professional Model Standards of Practices for Inspiration}

Professional organizations, including the American Academy of Matrimonial Lawyers (AAML), the American Bar Association (ABA), and the National Association of Counsel for Children (NACC), have contributed substantially to the national conversation over standards of practice for children's representation.\footnote{155} While a common goal of the standards is to improve and give guidance to attorneys representing children, the obligations and parameters of the various models of child representation differ.\footnote{156}

The following standards, including those focused on attorneys in juvenile court and custody cases, should be carefully considered and understood before drafting standards for consideration in Wyoming. Many of the ethical quandaries faced by attorneys serving as GALs in the state, including how to manage confidentiality, the appropriate scope of the investigation, required action in pretrial and trial litigation, and how to promote resolutions that reduce adversity between parties and improve outcomes for children, are the result of trying to maneuver the role of the GAL without standards. While the following standards are not identical, there are common concerns with the hybrid attorney/guardian ad litem role that are necessary to consider to improve the quality of representation for children in custody cases and reject the status quo.

\textit{Ad Litem: Wyoming Creates a Hybrid, But Is It A Formula for Malpractice?}, 34 LAND & WATER L. REV. 381 (1999); ABA CUSTODY STANDARDS, supra note 16, Standard IV(C)(3), at 12–13 (“If the Child's Attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. The Child's Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child's position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.”).

\footnote{154}{Ellis, \textit{supra} note 31, at 545.}

\footnote{155}{See Atwood, \textit{Bridging the Divide}, \textit{supra} note 34, at 77; Proposed Abuse and Neglect Standards, \textit{supra} note 16, at 380–81 (recommending client-directed representation for child capable of directing counsel and representation of child’s “legal interests” for child lacking that capacity); NACC Revised ABA Standards, \textit{supra} note 16, Standard B-4(2), at 9 (recommending client-directed representation, but permitting representation of child’s interests when child cannot meaningfully formulate position); ABA Abuse and Neglect Standards, \textit{supra} note 16, at 1 (proposing two models of representation, child's attorney and best interests attorney). The American Law Institute has also weighed in on the role of attorneys in private custody disputes. See ALI Law of Family Dissolution, \textit{supra} note 16, § 2.13 (proposing client-directed representation for child competent to direct terms of representation and appointment of guardian ad litem for child lacking competence).}

\footnote{156}{See generally Atwood, \textit{Bridging the Divide}, \textit{supra} note 34, at 65–66.}
A. American Bar Association (ABA), Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases

The American Bar Association (ABA) Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("ABA Abuse and Neglect Standards") articulate standards for a traditional client-directed attorney (child's attorney) and an attorney guardian ad litem (GAL). The standards apply only to lawyers and take the position that "although a lawyer may accept appointment in the dual capacity of a 'lawyer/guardian ad litem,' the lawyer's primary duty must still be focused on the protection of the legal rights of the child client." Therefore, the GAL should "perform all the functions of a 'child's attorney,' except as otherwise noted." The difference between the roles is that a child's attorney has "the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." Yet, "a lawyer appointed as 'guardian ad litem' for a child is an officer of the court, appointed to protect the child's interests without being bound by the child's expressed preferences." This dichotomy creates a relationship difficult to navigate:

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The ABA Abuse and Neglect Standards address the inherent conflicts of GAL's dual roles. They direct that when there is a conflict caused by "performing both roles of GAL and child's attorney, the lawyer should continue to perform as the child's attorney" and "request [the] appointment of a [GAL] without revealing the basis for the request." The standards further reject that a child has diminished capacity solely due to age.

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157 See generally ABA Abuse and Neglect Standards, supra note 16.
158 Id. at 1–2.
159 Id. at 1.
160 Id.
161 Id. Standard A.1, at 1.
163 Id. Standard B-2 cmt., at 3.
164 Id. Standard B-2, at 3.
165 Id.
166 Id. Standards B-3 cmt., B-4 cmt., at 4–5 ("There are circumstances in which a child
Several other aspects of the standards should be included in standards of practice for lawyers in child custody cases. These include the actions the lawyer or GAL should take, a preference for negotiated settlements, and the attorney’s role leading up to, during, and after court hearings. Though the ABA Abuse and Neglect Standards address both attorney for the child and hybrid GAL roles, they emphasize a *clear preference* for a client-directed attorney for the child over a guardian ad litem.

**B. Recommendations of the Fordham Conference**

Not long after the publication of the ABA Abuse and Neglect Standards, Fordham Law School hosted the Fordham Conference on Ethical Issues in the Legal Representation of Children (Fordham Conference Recommendations) and subsequently published their own set of recommendations. The key takeaway from this gathering is that for children to receive ethical and competent legal representation, lawyers should only elect to serve in the role of attorney for the child and should *not* act as the child’s GAL.

Acknowledging the role of the child’s lawyer will vary depending on the child’s competency to direct the representation, the Fordham Conference Recommendations provide a detailed roadmap for attorneys for “preverbal and impaired children” to “arrive in a principled way at a position or a range of positions which they may present to the fact-finder or decision-maker.” The guidelines aim to limit the permissible discretion that attorneys representing children may exercise on behalf of their clients. The Fordham Conference Recommendations recognized other issues remained unresolved:

> [T]he profession has reached a consensus that lawyers for children currently exercise too much discretion in making decisions on behalf of their clients including “best interests” determinations. Practitioners have found also that

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168 *Id.* Standard C-6, at 10.
169 *Id.* Standard D, at 11.
170 *Id.* at 1–2.
172 *See id.* § I(A)(1)–(2), at 1301–02.
173 *Id.* § IV, at 1308–09.
174 *Id.*
there are currently few principles guiding their choices among a myriad of possible legal outcomes for their clients in any given case.\textsuperscript{175}

The Conference reiterated the view that the manner in which the representative of the child engages in the representation is more important than the title of attorney for the child or GAL. Consequently, a lawyer appointed or retained for a child in a legal proceeding should serve only as the child’s lawyer, regardless of the label, be it as GAL, hybrid attorney/guardian ad litem, or other.\textsuperscript{176} “To accomplish the standard of practice recommended from the conference, “laws currently authorizing the appointment of a lawyer to serve in a legal proceeding as a child’s guardian \textit{ad litem} should be amended to authorize instead the appointment of a lawyer to represent the child in the proceeding.”\textsuperscript{177}

\textit{C. ABA Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings}

In 2011, after a concerted effort to clarify and improve standards of practice for attorneys representing children in abuse and neglect cases, the ABA adopted the \textit{Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings (ABA Model Act)}.\textsuperscript{178} The Act proposes only two potential roles for child representatives. An attorney for a child should be either a “child’s lawyer,” defined as a client-directed lawyer in a traditional attorney-client relationship with the child, or a “best interests advocate” whose role is not to function as the child’s lawyer and who is not bound by the child’s expressed wishes.\textsuperscript{179} The best interest advocate may be a lawyer or a layperson.\textsuperscript{180} Similar to a GAL, the best interest advocate assists the court in determining the best interests of a child. Although this role performs many functions formerly attributable to GALs, the best interest advocate does not function as the child’s lawyer.\textsuperscript{181}

Most lawyers and judges prefer to keep the best interest model available for children who are unable to direct their representation in a meaningful way. Once a child is mature enough to direct their representation, however, their voice is a powerful factor to be considered in driving the future outcomes for the child and their family.\textsuperscript{182} This \textit{ABA Model Act} goes well beyond the CAPTA requirements by providing an ambitious framework to raise the quality of children’s attorneys

\textsuperscript{175} \textit{Id.} § IV(B)(1), at 1309.

\textsuperscript{176} \textit{Id.} § IV(B), at 1308–09.

\textsuperscript{177} \textit{Id.} § I(A), at 1301.

\textsuperscript{178} See generally ABA Model Act, supra note 16 (incorporating similar language of provisions from the NCCUSL Representation of Children in Abuse, Neglect, and Custody Proceedings Act).

\textsuperscript{179} \textit{Id.} § 1(d), at 2.

\textsuperscript{180} See \textit{id.}

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} See Wyo. Rules of Pro. Conduct r. 1.14 cmt. 1 (“[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, children as young as five or six years of age, and certainly
in “training, qualifications, performance, caseloads, and ethics standards to ensure best practice in the field.”

D. The American Academy of Matrimonial Lawyers Revised Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings

The American Academy of Matrimonial Lawyers (AAML) is considered one of the leading professional organizations with expertise in family law, including child custody issues. The AAML released its first set of standards for attorneys and GALs in custody cases in 1994 and later revised them in 2009. The AAML acknowledges the “myriad of problems” associated with accessibility to the courts. The AAML recognizes the increasing number of people unable to afford legal counsel and delays in the administration of justice that adversely impact the resolution of custody cases. According to the AAML, wealthy clients “take up a disproportionate share of court time,” resulting in a kind of “second-class justice” for others. While identifying the need for significant changes in the legal system, the AAML rejects the view that appointing attorneys or GALs for children is a solution.

When the issue becomes how to guarantee children a voice in their parent’s custody and visitation case, the AAML believes “there are less expensive and more efficient means other than appointing lawyers for children.” While not determinative in deciding a case, a child’s preference should be an essential consideration for a judge to consider when making an objective decision of what is in a child’s best interest. The AAML disagrees that the appointment of lawyers for children in custody cases is the answer to improving legitimate concerns with those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

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184 See About the AAML, Am. Acad. Matrim. Laws. (Jan. 25, 2020), https://aaml.org/page/about-aaml [https://perma.cc/8QSU-RBKJ] (stating that the AAML has over 1,650 members in 50 states with a shared mission “[t]o provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law.”).


186 Id. at 229–30.

187 Id. at 229.

188 See id. at 230–31.

189 Id. (“A simpler and far less costly means to ensure that children’s voices are heard by judges before cases are decided is to require that judges interview children. Alternatively, courts might require that children be interviewed by well-trained and certified court-appointed professionals . . . who would be directed to ascertain the wishes of children. If these routes were taken regularly, judges would be made aware of what children want before deciding the case.”).

190 See id. at 231.
custody litigation. Nevertheless, the AAML acknowledges that there need to be standards addressing "when appointments of counsel for children should be made, the training persons eligible for appointments should have, and the first steps courts making the appointments and the person who is appointed should take." 

The crucial and distinct foundation of the AAML Standards is lawyers should never accept appointments to act in the hybrid attorney/GAL role. The only role a licensed lawyer should serve on behalf of a child is that of "counsel for the child." The AAML agrees with the ABA that involving a professional whose function is to investigate and report, or perhaps even recommend the ultimate disposition, can be beneficial for children and families. For the AAML, the issue is that the professional not be a lawyer. Put simply, substituting their judgment for their client's wishes is not what lawyers do. According to the AAML, the role of the representative should be as neutral as possible, only striving to make the judge aware of all the factors that should be considered, including the child's preference, without advocating for a particular result.

For this reason, the AAML regards the introduction of an adult, especially a lawyer, who is free to advocate their preferred outcome in the name of the child's best interests “the most serious threat to the rule of law posed by the assignment of lawyers for children.” The AAML warns against judges abdicating their judicial responsibility by authorizing a GAL to make a recommendation concerning the best interests of the child. The outcome in a case should not be determined because someone was introduced into the case with authority to recommend an outcome "without any assurance that the outcome is 'better' than if no representative had joined the case." Further, "when one person functions as

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191 Id. at 230.
192 Id. Standards 1.1–1.3, at 233.
193 See Guggenheim, AAML’s Revised Standards, supra note 30, at 254.
194 AAML 2009 Standards, supra note 12, at 234 (“Counsel for the child”: A licensed member of the relevant state Bar assigned by the Court to represent a minor who is the subject of the proceeding. The principal purpose of assigning such counsel is, to the maximum extent feasible in accordance with the applicable Rules of Professional Conduct, to further the traditional role of counsel and seek the litigation's objectives as established by the client. Counsel for the child is presumptively the client's agent and the client is the principal.”).
195 Id. (“Court-Appointed Professionals Other than Counsel for the Child”: Any person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case.”).
196 See Guggenheim, AAML’s Revised Standards, supra note 30, at 268.
197 Id. at 254.
198 AAML 2009 Standards, supra note 12, Standard 2.2 cmt., at 244.
199 Id. Standard 3.1 cmt., at 247–48 (acknowledging reluctantly that courts may choose to appoint someone to investigate and report information to the court, the AAML is clear the tasks should not be assigned to someone who is called counsel because is it confusing and misleading).
200 Id. Standard 2.2 cmt., at 244.
both attorney and the guardian for a ward, the attorney gets to make the decisions for the client." To provide children a voice, the AAML believes that an attorney for the child should function as a traditional lawyer—skillfully and forcefully advocate for the child’s wishes.

E. The American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases

In 2003, the American Bar Association (ABA) released its Custody Standards. The standards acknowledge some of the AAML’s concerns regarding the dangers associated with involving an attorney empowered to independently decide what position to take in a custody case, yet the ABA Standards allow for the same autonomous decision-making. Similar to the AAML, however, the ABA explicitly rejects the term “Guardian Ad Litem,” and the hybrid attorney/guardian ad litem model as “a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate.” Instead, the ABA Custody Standards define only two roles for attorneys, either the “child’s attorney” or the “best interests attorney.”

Accordingly, differentiating between the two roles is more likely to promote “quality control, professionalism, clarity, uniformity and predictability.” Further, differentiation allows the attorney’s roles and duties to be “tailored to the reasons for the appointment and the needs of the child.” It also provides attorneys the authority to decline any appointment that may conflict with the Rules of Professional Conduct. Judges can contribute to improved outcomes by issuing orders appointing attorneys that establish the reasons for the appointment. The Order should establish whether the appointment is mandatory or discretion and the grounds warranting the appointment.

201 Guggenheim, AAML’s Revised Standards, supra note 30, at 255 (pointing out that while ethical rules permit attorneys representing young children to recommend an outcome, they do not require attorneys to do so). Likewise, in 2006 the Uniform Law Commission (ULC) drafted its own Model Act, the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, making clear that “[a] child’s attorney may not refuse to advocate the child’s wishes simply because the attorney disagrees with the child’s view or believes the child’s objectives will not further the child’s best interests.” Id. at 251, 258. Importantly, ULC Act created the ‘third entity—the ‘best interests advocate.’ This is someone, not functioning as an attorney, who is appointed to assist the court in determining the best interests of a child.” Id. at 260.

202 See ABA CUSTODY STANDARDS, supra note 16, at 1.


204 See ABA CUSTODY STANDARDS, supra note 16, at 1.

205 Id. Standard II cmt., at 2; see also Boumil et al., supra note 69, 45.

206 ABA CUSTODY STANDARDS, supra note 16, Standards II(B)(1)–(2), at 2.

207 Id. Standard I, at 1.

208 Id. Standard II cmt., at 2.

209 The Order should establish whether the appointment is mandatory or discretion and the grounds warranting the appointment.
nature of the appointment, the expectations, deadlines, compensation, and the scope of access to confidential information. These are the standards that Wyoming can most easily adapt and modify if necessary.

The ABA Standards “promote quality control, professionalism, clarity, uniformity, and predictability.” They require that: “(1) all participants in a case know the duties, powers, and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions.” Clarity is critical “to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance.”

V. Conclusion

Children deserve high-quality legal representation from attorneys who understand their roles regardless of the case type. Adopting standards of practice is essential to inform the duties, powers, and limitations of the appointed role of attorneys for children in child custody cases. Analyzing the extensive deliberations of professional organizations like the American Bar Association (ABA) and the American Academy of Matrimonial Lawyers (AAML), and recognizing the ideological philosophies behind the adoption of model standards can inspire necessary and acceptable reforms for all stakeholders in a family law case. Reviewing the research and existing model standards is a first step to adopting the long overdue improvements within a framework that supports ongoing excellence.

It is incumbent on lawyers and judges to take steps to continually improve the effectiveness and accountability of the legal system and profession. Embarking on systemic change will require attorneys and judges to step back from individual experiences and personal theories that perpetuate the existing system of GAL

210 See ABA Custody Standards, supra note 16, app. A, at 27–28 (“A Best Interests Attorney investigates and advocates the child’s best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.”).

211 Id. Standard VI(C) cmt., at 24–25 (“These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers’ fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.”).

212 Id. Standard V(B), at 15–16 (“A child’s communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child’s confidences for the purposes of the representation without disclosing them.”).

213 Id. Standard I, at 1.

214 Id.


216 See id. at 1.
practice in Wyoming and toward practices that better meet the needs of courts and the families they serve. When poised for change, leadership and a detailed plan is essential for guiding the adoption of standards of practice. Innovation also requires exploration of what exists and consideration of how to develop new approaches likely to garner the support necessary for implementation.

As for the hybrid guardian ad litem role, adopting standards may not entirely resolve or eliminate the inherent ethical and practical contradictions that arise from such appointments nor provide a complete substitute code of ethics for those accepting appointments. Instead, standards of practice will improve effectiveness and efficiency by offering substantial guidance for quality control, professionalism, uniformity, and predictability for attorneys and judges. While there is not an easy solution to address the complicated and varied issues that drive the necessity for legal representation for children in certain family law matters, there are resources that can be synthesized to improve the practice of GALs in the state. By committing to ongoing improvement and implementation of best practices, practical solutions for maximizing beneficial outcomes in child custody cases are within reach.