Protecting Our Children in Custody Cases: The Wyoming Legislature Should Create an Attorney/Guardian Ad Litem Who Represents the Best Interests of the Child and Can Give the Child the Benefit of Limited Confidentiality

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Comment


I. INTRODUCTION

Marriage dissolution is always a somber event, but it can be especially traumatic for children involved in the divorce proceedings.1 Divorce is disruptive and alters the child’s life financially, physically, and emotionally.2 Courts are obligated to determine which parent is best able to provide a healthy living environment for the child.3 To meet this obligation many courts have enlisted the help of guardians ad litem.4

The term guardian ad litem (GAL) is easy to define but difficult to understand.5 Black’s defines a guardian ad litem as a “special guardian appointed by the court to represent an infant, ward, or unborn person in a particular litigation, and the appointment lasts only as long as the particular litigation.”6 While this definition states the duration of the appointment and generally outlines the legal responsibilities of the GAL, it is void of any


2. "Children, the ones often most affected by a divorce, are the ones least able to affect the proceedings. Judges and parents make decisions about their living arrangements, future access to parents, grandparents, friends, and others, as well as their religion and primary through college education." William D. Horn, Mandating Appointment of an Attorney for Children in Divorce, 27 FAM. L.Q. 473, 473 (1993).


4. The national trend is moving toward requiring that independent counsel be appointed for a child in contested custody cases. Linda D. Elrod, Counsel for the Child in Custody Disputes: The Time is Now, 26 FAM. L. Q. 53, 53 (1993).

5. "While many people have strongly held opinions about GALs, most people admit they do not have a clear understanding of what one is." Raven Lidman & Betsy Hollingsworth, Rethinking the Roles of Guardians Ad Litem in Dissolutions, WASH. ST. B. NEWS, Dec. 1997, at 22. The “most frequent characterizations of the role of a guardian ad litem are that of investigator, champion, and monitor.” Tara Lea Muhlhauser, From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem, 66 N.D. L. REV. 633, 638 & nn.24-26 (1990).

practical guidance on how a GAL should fulfill those legal responsibilities.\(^\text{7}\)

The Wyoming Legislature has similarly failed to give any meaningful guidance on the role that a child's representative should play in a custody proceeding. The Wyoming Supreme Court responded to this lack of guidance in Clark v. Alexander, holding that the child's representative should be an attorney/GAL, that the attorney/GAL should represent the best interests of the child, and that the attorney-client confidentiality relationship should be modified to allow the attorney/GAL to disclose communications that were previously privileged under Wyoming's rules of professional conduct.\(^\text{8}\)

In Clark the Wyoming Supreme Court acknowledged that the role of a GAL can be especially problematic.\(^\text{9}\)

Our decision here does not address many areas of chronic confusion in the appointment of a guardian ad litem . . . . [I]n recognition of the need for clarification and the lack of uniformity throughout our state, we urge our courts, legislators, professionals, and concerned citizens to undertake a consolidated effort to address the appointment of counsel and GALs for Wyoming's children.\(^\text{10}\)

This comment responds to the Wyoming Supreme Court's request by examining the role of the attorney/GAL in contested custody cases. This comment examines two primary issues: 1) whether the attorney/GAL should represent the best interests of the child or the child's preferences,\(^\text{11}\) and 2) what degree of confidentiality, if any, should exist between the attorney/GAL and the child.\(^\text{12}\) After comparing the approaches taken in other jurisdictions, this comment concludes that the Wyoming Legislature should adopt a statute that allows the GAL to represent the best interests of the

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10. Clark, 953 P.2d at 152 n.2.
11. Id.
12. Generally, attorneys are bound by the rules of professional conduct in their jurisdiction. For example, Wyoming attorneys are bound by the Wyoming rules of professional conduct which are based on the Model Rules of Professional Conduct. See the following model rules for guidelines on how an attorney is to represent a client: Model Rules of Professional Conduct Preamble 2 (1983) (stating that an attorney is to zealously assert the client's position); Model Rules of Professional Conduct Rule 1.2(a) (1983) (stating that a lawyer should abide by his client's wishes concerning representation); Model Rules of Professional Conduct Rule 1.4(a) (1983) (stating that a lawyer should keep her client informed about the status of his case and that the lawyer is to promptly give her client information when the client requests it).
child and that provides a limited confidentiality privilege. Finally, this comment proposes legislation that clearly states the qualifications and duties of the GAL in Wyoming, and defines the scope of the confidentiality privilege GALs should invoke on behalf of their clients.

II. BACKGROUND

Jurisdictions take three general approaches when appointing a representative for a child; the representative is either an attorney, a GAL, or an attorney/GAL.14 An attorney for the child generally represents the child's preferences, can participate fully in court proceedings, and is bound confidentiality obligations.15 A GAL, on the other hand, generally represents the best interests of the child, has a limited or nonexistent role in court proceedings, and is not bound by confidentiality obligations in any way.16 Finally, an attorney/GAL is a relatively new concept that combines aspects of both attorney and GAL.17

There are two types of confidentiality—an ethical obligation and an evidentiary privilege.18 A lawyer’s ethical obligation to keep a client’s information confidential is covered by Rule 1.6 of the Wyoming rules of professional conduct.19 Under Wyoming’s confidentiality rule a lawyer cannot “reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.”20 The exception to this rule is that an attorney can reveal information to prevent the client from committing a future crime and “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.”21 The evidentiary privilege refers to a statutory privilege which prevents a lawyer from testifying in court, absent the client’s consent, concerning communica-

14. Other jurisdictions require the child’s representative to perform in additional capacities, such as mediator and investigator, when representing a child. See Raven C. Lidman & Betsy R. Hollingsworth, The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 GEO. MASON L. REV. 255 (1998). The evaluation of these other child-representatives is beyond the scope of this comment.
15. Id.
16. See FLA. STAT. ANN. § 61.401 (West 1997). Although a GAL may have a limited role in court, this should not mean that the GAL’s role is unimportant. A GAL’s findings are usually very persuasive evidence for the court because the GAL is, theoretically, the most informed person regarding the best interests of the child.
17. In re J.P.B., 419 N.W.2d 387, 392 (Iowa 1988) (stating that the hybrid role allows the GAL to act as an advocate in court proceedings but instead of advocating for the child’s preferences the attorney/GAL advocates for the best interests of the child).
19. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6.
20. Id.
21. Id.
tions with a client.22

While reading the following sections consider this hypothetical: You are appointed to represent an eight-year-old child in a custody dispute. In your meetings with the child you learn that the mother’s boyfriend consumes large quantities of alcohol. The child is afraid that his mother and her boyfriend will be angry with him if they learn he has told anyone of the boyfriend’s drinking problem. The father, on the other hand, appears to be drug and alcohol free. However, the father must commute one hour each way to work, making his workday ten hours long, while the mother works only part-time. The child’s preference is to live with his mother. You believe it is in the child’s best interest to live with the father. What information can you tell the court? Do you have a duty to keep your discussions with the child confidential? Should you advocate for the child’s preferences or what you believe is in the child’s best interests? Abbreviated answers to these questions appear at the end of each of the following sections.

A. The Child’s Representative is an Attorney for the Child

Normally, an attorney advocates for her client’s wishes23 and is bound by complete confidentiality.24 In contrast, an attorney serving as a GAL may advocate for the child’s wishes, or she may be bound by statute or case law to advocate for the child’s best interests.25 The attorney may choose not to advocate for the child’s preference if the child is considered a client under a disability.26 An attorney representing a child client must follow her jurisdiction’s rules of professional conduct, and, under these rules, the child might be considered a client with a disability, a distinct possibility in the case of some children, depending on the jurisdiction’s professional conduct rules.27


The following persons shall not testify in certain respects: (i) An attorney or a physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject[.]


25. See FLA. STAT. ANN. § 61.401 (West 1997) (“[GAL] act[s] as next friend of the child, investigator or evaluator, not as attorney or advocate.”)


27. An impaired client is defined as follows:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
The comments to Wyoming’s rule of professional conduct 1.14 indicate that a normal attorney-client relationship should be maintained to the extent possible and that children as young as five or six “are entitled to weight in legal proceedings concerning their custody.” The comments also acknowledge that maintaining an ordinary attorney-client relationship may not be possible in all respects. The attorney should seek the appointment of a legal representative for the child if doing so would serve the client’s best interests. However, if the appointment would prove to be too costly or traumatic for the child, then the lawyer need not appoint a representative.

Statutes that expressly require an attorney to represent the child vary dramatically. Some statutes clearly define the role that confidentiality plays in the relationship, while others merely rely on the rules of professional responsibility. When the child’s representative is an attorney, she may choose to advocate for the child’s wishes, or for his best interests and an attorney-client privilege exists. As legal counsel, the attorney actively participates in hearings, cross-examines witnesses, and files briefs on behalf of the child.

An answer to the proposed hypothetical might be as follows: first, an attorney representing the child would have an ethical duty to keep her conversations with the child confidential. The attorney would not be required to inform the court of the boyfriend’s drinking problem. An attorney for the child would advocate for the child’s preferences (unless the child was considered to be a client under a disability). Therefore, the attorney would advocate for the child to live with his mother.

B. The Child’s Representative is a Guardian Ad Litem

In contested custody cases, courts often have the power to appoint a

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(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

Id.
28. Id. at cmt. 1.
29. Id.
30. Id. at cmt. 3.
31. Id.
GAL.\textsuperscript{37} GALs generally assume an objective role, representing the child’s best interests,\textsuperscript{38} and are not bound by the ethical duty or statutory privilege of confidentiality.\textsuperscript{39} GALs can either be: an attorney,\textsuperscript{40} a non-lawyer,\textsuperscript{41} or a combination of the attorney and non-lawyer roles—the hybrid.\textsuperscript{42} The type of GAL appointed is important for determining whether there is confidentiality between the child and his GAL, and whose interests are being advocated.

1. An Attorney

Statutes that require the GAL to be an attorney generally fail to define the role.\textsuperscript{43} In these jurisdictions, courts must decide what the GAL’s responsibilities are. Whether the GAL is to represent the child’s wishes or the best interests of the child and whether there is confidentiality (ethical or statutory) is a decision left to the courts.\textsuperscript{44} The case of Veazey v. Veazey is a good example of how courts deal with a statute requiring GALs to be attorneys.\textsuperscript{45} The seminal case in the area of offering guidance to GALs, Veazey has been cited numerous times by other courts, and the guidelines stated in the decision are now codified in Alaska law.\textsuperscript{46}

When the Alaska Supreme Court decided Veazey, the Alaska statute granted “the trial court discretion to appoint an attorney or guardian ad litem for a child in a proceeding with respect to his custody, support, and visitation or in any other legal proceeding involving his welfare.”\textsuperscript{47} The statute lacked any further guidance. The Veazey court held that “a guardian ad li-

\begin{itemize}
  \item 38. Recently, commentators have proposed discarding the term “guardian ad litem” altogether. See Lidman & Hollingsworth, supra note 14, at 260. At least one state has adopted this approach. See COLO. REV. STAT. ANN. § 14-10-116 (West 1997).
  \item 42. See generally Clark v. Alexander, 953 P.2d 145 (Wyo. 1998); In re J.P.B., 419 N.W. 2d 387 (Iowa 1988).
  \item 43. See, e.g., N.M. STAT. ANN. § 40-4-8 (Michie 1994). Indeed, often the only requirement is that the GAL be an attorney. See, e.g., id.; OKLA. STAT. ANN. tit. 43, § 107.3 (West Supp. 1998).
  \item 44. See Clayton v. Trotter, 796 P.2d 262 (N.M. Cl. App. 1990) (stating that the best interest of the child is controlling).
  \item 45. 560 P.2d 382 (Alaska 1977).
  \item 46. ALASKA STAT. § 25.24.310 (Michie 1992).
  \item 47. Veazey, 560 P.2d at 385. See generally ALASKA STAT. § 09.65.130 (Michie 1977).
\end{itemize}
tem . . . is in every sense the child’s attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability. 74A Veazey went on to state that the GAL had the power to cross examine and subpoena witnesses and offer testimony.49 An attorney acting as a GAL was not to abide by the child’s wishes, but should zealously represent the best interests of the child.50

The Alaska court failed to address, as do most jurisdictions, whether the GAL is bound by the ethical or statutory duties of confidentiality. Thus, individual courts in Alaska can decide whether to grant the GAL confidentiality with her client. Generally, an attorney acting as a GAL must rely on the rules of professional conduct and the statutory exception from testifying in order to avoid violating the child’s confidences. However, some jurisdictions may have stripped the benefit of confidentiality from the GAL via case precedent or codified law.51

An answer to the proposed hypothetical might be as follows: an attorney acting as GAL must first determine whether he is in a jurisdiction that has a statute for a GAL. If there is no GAL statute then the attorney acting as a GAL should treat the child client as an attorney would. If there is codified law or case law on the topic, the attorney acting as a GAL would most likely be instructed to represent the best interests of the child. Therefore, the GAL would probably advocate for the child living with his father. Whether an attorney acting as a GAL must disclose the boyfriend’s drinking problem to the court is dependent upon whether the jurisdiction has imposed any confidentiality obligation on the GAL.

2. A Non-Lawyer

Some jurisdictions do not require the GAL to be an attorney; that is, the GAL is defined as a non-lawyer.52 In these jurisdictions, discussions between the GAL and the child generally are not confidential.53 As is the

49. Id.
50. Id. A GAL appointed in Alaska “should exercise his best professional judgment on what disposition would further the best interest of the child, his client, and at the hearing vigorously advocate that position before the court.” Id. See also Bawidamann v. Bawidamann, 580 N.E.2d 15, 23 (Ohio 1989) (noting that when there is a conflict between the roles of the GAL and the duty of the lawyer to his client, he should petition the court to withdraw as guardian and the court should grant such request.)
53. See Ross v. Gadwah, 554 A.2d 1284, 1286 (N.H. 1989). The court held that the GAL had two roles: (1) to represent the ward and (2) to assist the court. Id. at 1285. The court accepted the Due Process argument that the parents have the right to confront the facts which are in dispute to allow the GAL to reveal what the child had told her. Id. Thus, the court reasoned, the communications between a GAL and a minor child in New Hampshire are not privileged. Id. See also De Los Santos v. Superior Court of
case with all the different types of statutes, the laws in these jurisdictions either state the GAL’s role and duties clearly or merely give the court the power to appoint a GAL and allow the court to determine the GAL’s role in the proceedings. Still other jurisdictions replace or alter the duties of the guardian ad litem with an investigator, mediator, or friend of the court. In these jurisdictions courts may require non-lawyers to report findings to the court or even testify in a hearing.

An answer to the proposed hypothetical might be as follows: a non-lawyer guardian ad litem representing the child would inform the court of all relevant information and as a result there would be no confidentiality. The GAL must tell the court of the boyfriend’s drinking problem. The GAL would argue for the child’s best interests, in this case, probably that the child should live with his father.

C. The Hybrid—GAL’s Role of Attorney and Non-Lawyer Combined

Jurisdictions that use the hybrid approach combine the role of an attorney with the role of a champion for the child, creating the attorney/GAL. A hybrid state merges these roles by requiring an attorney to advocate zealously for the child’s best interests.

As should be clear by now, lack of guidance is often a major obstacle facing a child’s representative in a custody dispute. The case of Marriage of Rolfe is a good illustration of how one court resolved this problem and created the hybrid approach. By modifying the traditional attorney-client relationship, the Montana Supreme Court accommodated the child-client by

Los Angeles County, 613 P.2d 233, 237 (Cal. 1980) (holding that disclosure to a GAL is necessary for accomplishing the purpose for which the GAL was appointed and is therefore protected).
54. See FLA. STAT. ANN. § 61.403 (West 1997).
55. See TENN. CODE ANN. § 36-6-208 (1998).
56. See OR. REV. STAT. § 107.765 (1990 & Supp. 1998) (stating that if “custody, parenting time or visitation of a child, are contested, the court shall refer the matter for mediation of the contested issues.”). See also N.D. CENT. CODE § 14-09.1-01 to 14-09.1-08 (Michie 1997); S.D. CODED LAWS §§ 25-4-56 to 25-4-62 (Michie Supp. 1998).
57. See HAW. REV. STAT. ANN. § 571-46(4) (Michie 1997) (“Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare, and custody of any minor child of the parties.”). See also KY. REV. STAT. ANN. § 403.300 (Michie 1984); MONT. CODE ANN. § 40-4-215 (Smith 1997); KAN. STAT. ANN. § 60-1615 (1994).
58. See WASH. REV. CODE ANN. § 26.12 (West 1997); IND. CODE ANN. § 31-17-6-1 (Michie 1998).
59. A GAL who is not an attorney obviously cannot invoke the statutory attorney-client privilege.
60. “Champion” is defined as “[o]ne who acts or speaks in behalf of a person, or a cause; defender; an advocate.” BLACK’S LAW DICTIONARY 231 (6th ed. 1990).
62. In re Marriage of Rolfe, 699 P.2d at 86-87; In re J.P.B., 419 N.W.2d at 387; Clark, 953 P.2d at 145.
64. This case has been cited by other courts when switching to the hybrid approach. See, e.g., Clark,
recognizing the importance of the ethical question of whether the attorney was “to advocate the child’s wishes or to advocate the child’s best interests.” In resolving this question, the court looked at Montana’s Code of Professional Ethics.

When the Montana Supreme Court decided Marriage of Rolfe, the Montana statute read: “The court may appoint an attorney to represent the interests of a minor dependent child with respect to his support, custody, and visitation.” The Montana court determined that the “interests” for which the attorney must advocate are the child’s best interests. Thus, the court modified the attorney-client relationship and allowed the attorney to advocate for the best interests of the child rather than the child’s wishes. The court placed one limitation on the attorney: “If the court-appointed attorney concludes that the child’s expressed wishes are not in his best interest, the attorney must disclose this to the court.” The court did not examine the confidentiality issues beyond this cryptic statement. Therefore, the attorney/GAL is left largely uninformed about whether he can be compelled to testify and whether he has a duty of confidentiality to his child-client.

What becomes clear in Marriage of Rolfe is that hybrid jurisdictions must modify both the traditional attorney-client relationship and their rules of professional conduct to accommodate the attorney/GAL. In addition, these jurisdictions should go further than the Montana court and decide whether to grant ethical or statutory confidentiality to the attorney/GAL and his child-client.

An answer to the proposed hypothetical might be as follows: a hybrid attorney/GAL representing the child would decide what to disclose to the court. The attorney/GAL could inform the court of the boyfriend’s drinking problem if she believes it is necessary to protect the child’s best interests. However, if the attorney/GAL believes that informing the court of the boyfriend’s drinking problem would be harmful, then she need not inform the court. In other words, if there is a less traumatic way of advocating that the child live with his father, then the attorney/GAL could pursue it without fear

953 P.2d at 154; In re J.P.B., 419 N.W.2d, at 391-92.
65. In re Marriage of Rolfe, 699 P.2d at 85.
66. Id. The court discussed representing a client zealously and clients under a disability. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983).
67. In re Marriage of Rolfe, 699 P.2d at 86 (citing MONT. CODE ANN. § 40-4-205 (Smith 1997)).
68. Id.
69. Id.
70. Id. at 87.
71. Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998); In re Marriage of Rolfe, 699 P.2d at 86-87. If the rules of professional conduct were not modified, then the attorney would not be able to disclose to the court what the attorney feels the court should know. The rules of professional conduct, in the unmodified form, disallow an attorney to disclose important information to the court.
of violating her duties.

An attorney/GAL argues for the child’s best interests. However, the attorney/GAL must consider the child’s preference and must inform the court when the child’s preference does not coincide with the attorney/GAL’s opinion of the best interests of the child. Therefore, the attorney/GAL most likely would advocate for the child living with his father.

D. The Role of the Guardian Ad Litem as Defined By the Wyoming Supreme Court

The Wyoming Supreme Court, in Clark v. Alexander, adopted the hybrid approach. The court chose the hybrid role for the GAL because “the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children’s needs outside the litigation process.” The court acknowledged that an attorney’s ethical duties may conflict with the duties expected of a GAL and contrasted the GAL’s role (“investigator, monitor, and champion for the child”) with the role of an attorney (“advisor, advocate, negotiator, and intermediary”) to further explain how the roles conflict. Notwithstanding the conflicts and confusion created by its holding, the court found that Wyoming is a “hybrid jurisdiction” and, as such, modification of the ethical rules of representation and confidentiality were necessary.

According to the Clark court, an attorney/GAL acting in a hybrid jurisdiction “is not bound by the client’s expressed preferences, but by the client’s best interests.” The rules of ethical confidentiality were also altered so that “relevant information provided by the child can be disclosed in court.” Following the hybrid role laid out in Marriage of Rolfe, the Clark court closely examined the confidential relationship between the child and the child’s representative. The court held that the attorney/GAL must explain to the child that she is charged with protecting the child’s best inter-

72. Clark, 953 P.2d at 153. Wyoming calls the hybrid role “attorney/guardian ad litem” which indicates that only an attorney may serve in as an attorney/GAL in Wyoming. Id. For a thorough discussion of the Clark case, see Hanft, supra note 9.
73. Clark, 953 P.2d at 153.
74. Id.
75. Id. at 152-53.
76. Id. at 153.
77. Id.
78. Id. at 154. The Wyoming Supreme Court also stated that “an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child’s consent.” Id. The Wyoming Supreme Court did not directly address the statutory privilege of confidentiality.
79. Id. See supra notes 63-70 and accompanying text.
80. Clark, 953 P.2d at 154.
ests, and that any information provided to the GAL may also be presented to the court.\textsuperscript{81} Moreover, the court in Clark held that the attorney/GAL may not be a fact witness at a custody hearing;\textsuperscript{82} instead the attorney/GAL may submit a written report of her findings to the parties.\textsuperscript{83}

III. ANALYSIS

Combining the roles of the attorney and the GAL adds to the confusion that plagues the representation of children in contested custody cases. Should an attorney discard her ethical duty of confidentiality when representing a child?\textsuperscript{84} Should the child be taken out of the decision-making process by putting the attorney’s perception of the child’s best interests ahead of the child’s own preference?\textsuperscript{85} The Clark court held that the attorney/GAL is to represent the best interests of the child.\textsuperscript{86} The Wyoming Legislature should codify the hybrid role, solidifying the principle that the attorney/GAL represents the best interests of the child, but should do so with more clear guidance to attorney/GALs about how to determine what the best interests of the child are.\textsuperscript{87}

What constitutes the best interests of the child can be a vague concept.\textsuperscript{88}

\footnotesize{81. Id. Having the GAL perform a dual purpose means that communications between the child and the GAL are no longer confidential. Thus, the child may be reluctant to discuss personal issues out of fear. The child may fear getting a parent in trouble, getting himself in trouble with a parent, or even getting himself in trouble with the court.}

\footnotesize{82. Id. at 154}

\footnotesize{83. Id. This written report is received into evidence only after the express agreement of the parties. Id. This rule seems unrealistic since the GAL’s report will most likely contain statements which are unfavorable to at least one of the parents; as a result that parent may object to receiving the report into evidence.}

\footnotesize{84. A GAL representing the best interests of the child in most jurisdictions means that there is no confidentiality between the child and his GAL. See supra notes 37-59 and accompanying text.}

\footnotesize{85. In other words, should courts be operating from the premise that “children need to be protected from their own bad decision making, and from the bad actors in their lives, whom they may be unwilling to betray.” Emily Bush, “You’re My What?” The Problem of Children’s Misperceptions of Their Lawyers’ Roles, 64 FORDHAM L. REV. 1699, 1731 (1996). See also, Guidelines for Child Custody Evaluations in Divorce Proceedings, AM. PSY., July 1994 at 677, 677-78. This article provides guidance to the psychologists conducting child custody evaluations specifically within the context of divorce. Providing a stable and loving home is one of the factors to be considered when determining parenting capacity. Id.}

\footnotesize{86. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.14. An attorney may seek the appointment of a guardian when he believes that the client cannot act in the client’s own interest. The attorney should look to the representative for decisions on behalf of the client. Id. cmt. 3.}

\footnotesize{87. “Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client’s expressed preferences, but by the client’s best interests.” Clark, 953 P.2d at 153. See also In re Marriage of Rolf, 699 P.2d 79, 86 (Mont. 1985). Both of these hybrid cases state that the best interests of the child, not the child’s preferences are to be controlling.}

\footnotesize{88. “[T]he language of custody law is so vague that judges often base decisions on their personal beliefs about motherhood, fatherhood and what the American family should be like. Because most judges are elderly, white men, their opinions are often criticized for being relentlessly conventional.” Danece Day Koenigs & Kimberly A. Harris, Comment, Child Custody Arrangements: Say What You Mean, Mean What You Say, 31 LAND & WATER L. REV. 591, 596 (1996) (quoting Deborah Anna Luepnitz, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE 2 (1982)).}
Without guidance from the Wyoming, the trial courts will be able to base their decisions on personal beliefs and biases, giving them nearly unfettered discretion.99 Thus, unless the legislature acts an attorney/GAL aiding a Wyoming court in a custody decision will be on his own when it comes to discerning the best interests of the child.

The Wyoming Supreme Court, in Clark, modified the confidentiality relationship so that "relevant information provided by the child may be brought to the district court's attention. While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child's consent."90 This is surely more than mere modification of the confidentiality privilege. The modification allows information obtained by the GAL to be reported to the mother, father, and the court, without permission from the child-client. Thus, the Wyoming Supreme Court has stripped the GAL of her most vital tool—the ability to gain the child's confidences.91

"Confidentiality issues present two questions: whether guardians ad litem are permitted to disclose secrets of their wards and whether guardians ad litem may be compelled to disclose secrets of their wards."92 Confidentiality is an essential tool for zealous representation of a client.93 It protects against the publication of a client's secrets and prevents the lawyer from using confidential information in a way that is damaging to the client's interests.94 Although the attorney/GAL retains the legal power to present evidence and represent the child, Wyoming's hybrid role strips the GAL of her right to speak confidentially with the child she is representing. An attorney/GAL in Wyoming no longer has the protection of the rules of professional conduct.95 By limiting the attorney/GAL's ability to keep information confidential, Wyoming now treats an attorney/GAL appointed in a custody case as a mere investigator.

89. Id. at 591 n.7. "The Wyoming statute [Wyo. Stat. Ann. § 20-2-113] simply states that child custody determinations should be made in the best interests of the child. ... The statute allows judges great discretion to make determinations which affect the lives of those involved, but offers no guidance as to how such determinations should be made." Id.
90. Clark, 953 P.2d at 154. In general, a child who is in the turmoil of a divorce and custody proceedings may be less likely to disclose private information to a stranger. This is especially true when the GAL has just finished explaining that communications between the child and the GAL may be disclosed to the court and the parents.
91. The Clark court held that "an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child's consent." Id.
94. Buss, supra note 86, at 1738.
Clark collaterally addressed the statutory privilege that an attorney has with a client.\textsuperscript{96} The Wyoming Supreme Court protected an attorney/GAL from being a fact witness at a custody hearing.\textsuperscript{97} However, it remains unclear whether an attorney/GAL could be compelled to testify in other settings.\textsuperscript{98} An attorney/GAL who represents the child’s wishes has the benefit of confidentiality; an attorney/GAL, or GAL, who represents the best interests of the child does not.\textsuperscript{99} Confidentiality is important enough for an adult, in legal proceedings, to warrant an ethical rule\textsuperscript{100} and a statutory exemption.\textsuperscript{101} Why deny a child the right of confidentiality simply because he is not of sufficient age?

The Wyoming Legislature can address confidentiality in three possible ways: 1) by providing the attorney/GAL with complete confidentiality towards the client; 2) by stripping the attorney/GAL of any confidentiality; and 3) by providing the attorney/GAL with limited confidentiality.

\textit{A. Complete Confidentiality}

The Wyoming Legislature could provide complete confidentiality for the attorney/GAL. In this situation, the child would determine what should be presented to the court. Because confidentiality provides for open communication, the child would be more likely to disclose personal information to the attorney/GAL. Armed with full information the attorney/GAL would advocate for the child’s best interests while saving the child and the parents from unnecessary fear, anger, and embarrassment.

However, other considerations counsel against complete confidentiality. For example, the GAL must be free to pursue the best interests of the child, and the GAL cannot do this with the strict confidentiality rule in place. In addition, children are generally not competent to determine what is in their best interests.\textsuperscript{102} As a result, an attorney/GAL would be put in the awkward position of advocating for what she thinks is in the child’s best interest without the benefit of determining what information to present to the court. The child might have a different idea about what is in his best interest and could restrict the attorney/GAL from disclosing certain infor-
mation. Finally, allowing the GAL to determine what to present to the court will relieve the child of the pressures of making that decision on his own and allow the GAL to take over as the protector of the child’s best interests.103

B. No Confidentiality

The Wyoming Legislature could decide to deny the attorney/GAL any privilege or duty of confidentiality, just as the Wyoming Supreme Court did in Clark.104 This would mean that an attorney/GAL in Wyoming would have to report his client’s statements to the court. Judges would make the decisions as to what facts were important for determining the best interests of the child. This approach would put a strain on attorney/GALs. An attorney representing a child is bound by her jurisdiction’s rules of professional conduct and by her state’s statute preventing an attorney from testifying in court.105 When privileged information is requested by the court, the attorney/GAL can either provide the information and violate her ethical duties to her child client, or refuse to provide the information and risk being held in contempt of court.

Moreover, a court holding that the GAL, acting as the child’s attorney, represents the child’s best interests and not the child’s preferences causes a shift in who the attorney represents.106 Now, the client is not the child but rather the “child’s best interests.” As a result, “[t]he GAL owes her duty of loyalty not to the child’s view of his interests, but to her own.”107 Under this analysis the child does not have the ethical protection of confidentiality because he lacks the status of “client” that would entitle him to these protections.108

Another problem with the no-confidentiality rule is that it discourages open communication between the child and the GAL. If the child knows the GAL will be representing his best interests as the lawyer perceives them, he

103. Buss, supra note 86, at 1739.
104. Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998). Emily Buss states that “[t]he GAL in service to her client (the child’s best interests as she sees them) will disclose every relevant detail about the child (whether gained through communications with the child or other sources) to the highest authority over the best interest abstraction—namely the court.” Buss, supra note 85, at 1739.
105. The Clark court combined the GAL’s role, informing the court of all relevant information, with the attorney’s role, informing the court of the child’s viewpoint. Clark, 953 P.2d at 153. Normally an attorney would decide what information to disclose to the court in order to further her client’s case. According to Clark the attorney/GAL must disclose all relevant information, even if the child wants the information to remain private.
106. Buss, supra note 86, at 1734.
107. Id.
108. Id.
may choose to be quite strategic about when he speaks to his lawyer.\textsuperscript{109} The child might restrict the information he shares with his attorney/GAL in an attempt to shape the lawyer's view to fit his own view of his best interests.\textsuperscript{110} This could cause the child to refrain from revealing important information, and the court might not make an informed decision.

\textbf{C. Limited Confidentiality}

Finally, the Wyoming Legislature could provide for limited confidentiality for the attorney/GAL. Allowing confidential communications, at least in a limited capacity, between the child and the attorney/GAL will encourage open communication.\textsuperscript{111} With this approach, the attorney/GAL would only disclose information to the court if she believed the disclosure was necessary to protect the best interests of the child. This responsibility should be left to the attorney/GAL. The attorney/GAL is in the best position to decide what disclosures are necessary. The attorney/GAL has had more contact with the child than the presiding judge and as a result is the most informed person in court about what is best for the child. Moreover, the attorney/GAL has talked with the child in a private setting in an attempt to determine the best interests of the child. In addition, the attorney/GAL can best explain to the child the necessity of the disclosure, lessening the impact of having "secrets" disclosed in the courtroom.\textsuperscript{112} All other communications would remain confidential.

For the reasons stated above, the best way to resolve confidentiality issues is to create a limited privilege for communications between the child and his attorney/GAL.\textsuperscript{113} Allowing the attorney/GAL a limited confidential privilege will encourage open communication, while still protecting the best

\textsuperscript{109} \textit{Id.} at 1713.

\textsuperscript{110} \textit{Id.} However, the \textit{Clark} court did provide that "[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." Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998)

\textsuperscript{111} This is not suggesting that these communications are completely protected as with attorney-client privilege. There will be some limitations on the extent of the protection.

\textsuperscript{112} The attorney/GAL should disclose confidences to the court only when it is clear that the disclosure is necessary to protect the child. "While children expect their legal representatives to keep their secrets, they believe that there is a higher duty to protect the children, especially from abuse and neglect." Stuecky, \textit{supra} note 93, at 1809. Evidence of this expectation is explained in Janet A. Chaplan, \textit{Youth Perspectives on Lawyers' Ethics: A Report of Seven Interviews}, 64 FORDHAM L. REV. 1763, 1778-80 (1996). Six of the seven youths that Chaplan spoke with believed that a lawyer's highest duty is to protect the client even if that meant that the lawyer had to violate their confidentiality. \textit{Id.}

\textsuperscript{113} Stuecky applied the four fundamental conditions for recognizing a GAL-child privilege: (1) the communications must originate in a confidence that they will not be disclosed; (2) the first condition must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would insure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal for the litigation. Stuecky, \textit{supra} note 93, at 1808-11.
interests of the child.\textsuperscript{114}

IV. PROPOSED STATUTE—GUIDANCE FOR THE GUARDIAN AD LITEM

Currently, most states have statutes that allow the court to appoint a guardian ad litem or an attorney to represent the best interests of the child.\textsuperscript{115} However, these statutes usually do not provide guidance on how the GAL is to fulfill this role.\textsuperscript{116} While some statutes list the duties or define the role of the guardian ad litem,\textsuperscript{117} these statutes are continually flawed because they do not protect the most basic aspect of the relationship between a child and his representative—confidentiality.\textsuperscript{118} If Wyoming is to employ an attorney/GAL in contested custody proceedings, then this portion of the relationship must be protected.\textsuperscript{119}

The Wyoming Legislature should statutes from sister states as a model and adopt a GAL statute with guidelines on how to perform the role of a GAL. At the forefront of this statute should be a section which protects the confidentiality privilege between the GAL and the child.\textsuperscript{120}

V. CONCLUSION

Combining the roles of attorney and guardian ad litem into the hybrid attorney/GAL adds another layer of confusion to the representation of children in contested custody cases. However, clarification of the duties and

\textsuperscript{114} Buss suggests that society should want to encourage the child to be part of the decisionmaking process. A GAL that represents only the child's best interests is alienating the child from the decisionmaking process, thus the child will be less likely to talk freely with the GAL. Buss, supra note 86, at 1732-39.

\textsuperscript{115} See ALASKA STAT. § 25.24.310 (Michie 1992); ARIZ. REV. STAT. ANN. § 8-535(D); ME. REV. STAT. ANN. tit. 19-A, § 1507 (West 1998).


\textsuperscript{118} There is one exception, IDAHO CODE § 9-203.7 (West 1990) provides that:

Any parent, guardian or legal custodian shall not be forced to disclosed any communication made by their minor child or ward to them concerning matter [sic] in any civil or criminal action to which such child or ward is a party. [T]his section [does not] apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

\textsuperscript{119} "Preservation of the child's confidences furthers the important goal of giving the child a voice in the control over legal processes in which she has a compelling interest." Bruce Boyer, Report of the Working Group on Confidentiality, 64 FORDHAM L. REV. 1367, 1369 (1996).

\textsuperscript{120} Chaplin, supra note 112, at 1778-89.
Confidentiality privilege can make the child’s representation by an attorney/GAL successful.

In Clark the Wyoming Supreme Court stated its preference for the hybrid model. The Wyoming Legislature should codify this choice, making clear that an attorney/GAL in Wyoming is to represent the best interests of the child. Finally, the Wyoming Legislature should define the duties and powers of an attorney/GAL and provide limited confidentiality to an attorney/GAL and the child-client. The key to this new type of confidentiality is making sure that the child understands that what is said to the attorney/GAL is protected except when it is clear to the attorney/GAL that disclosure is needed to protect the child.

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Appendix

PROPOSED LEGISLATION FOR THE USE OF AN ATTORNEY/GUARDIAN AD LITEM IN CONTESTED CUSTODY CASES

I. Definitions.
A. "Attorney/Guardian ad litem" means a lawyer who is appointed by the court to represent the best interests of a minor child.123
B. "Minor child" means an unemancipated child under the age of eighteen.124
C. "Parent" means the natural or adoptive parent, the stepparent or foster parent, guardian or other adult having legal responsibility for the minor child.125
D. "Communication" means any expression by words, oral, written, or sign language or express acts intended to convey a meaning or message to another.126
E. "Confidential communication" consists of information relating to the child acquired by the attorney/guardian ad litem in the course of or as the result of representing the child, other than information that is generally known.127

II. Minimum Qualifications of the Attorney/Guardian Ad Litem
Before a person may serve as an attorney/guardian ad litem the person must be a licensed attorney in Wyoming with the following additional training:128
1. Complete as part of the person’s annual continuing legal education requirement not fewer than three hours in family law issues;129 and
2. Meet other requirements as determined by the Wyoming Supreme Court in the Wyoming Court Rules.

III. Duties and Responsibilities of the Attorney/Guardian Ad Litem.
A. The attorney/guardian ad litem shall promote the best interests of the child. In determining the best interest of the child the attorney/guardian ad litem shall consider the following factors:130

123. See Stuckey, supra note 93, at 1811-15. According to Clark, the duties that the attorney/GAL will perform are legal. Thus, the attorney/GAL should be a lawyer since he will be called upon to perform as legal counsel for the child. Clark, 933 P.2d at 154.
124. See Stucky, supra note 93, at 1813.
125. Id.
126. Id.
129. Id.
130. Koenigs & Harris, supra note 88, at 613.
1. The child’s preference;
2. Whether the child has established a close relationship with each parent;\textsuperscript{131}
3. Whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child’s care by others as needed;\textsuperscript{132}
4. The fitness of each parent;\textsuperscript{133}
5. Whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;\textsuperscript{134}
6. How the child can best maintain and strengthen a relationship with both parents;\textsuperscript{135} and
7. The current physical and mental ability of each parent to care for the child.\textsuperscript{136}

B. The attorney/guardian ad litem shall report any instance of child abuse as required under WYO. STAT. ANN. § 14-3-205;\textsuperscript{137}

C. The attorney/guardian ad litem shall exercise independent judgment, gather information and monitor the case which activities must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child’s wishes as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case;\textsuperscript{138} and

D. The attorney/guardian ad litem shall, as appropriate to the case, make written and/or oral reports to the court regarding the best interests of the child including conclusions and recommendations and the facts upon which they are based.\textsuperscript{139}

\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} WYO. STAT. ANN. § 14-3-205 (Michie 1997) states:

Any person who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, shall immediately report it to the child protect agency or local law enforcement agency or cause a report to be made.

\textsuperscript{138} MO. ANN. STAT. § 452.423 (West 1997 & Supp. 1999).
\textsuperscript{139} Id. The Clark court held that a report by the attorney/GAL stating the relevant facts and the basis of the attorney/GAL’s recommendation may be presented to the court. Clark v. Alexander, 953 P.2d 145, 154 (Wyo. 1998). “However, the report shall not be filed with the court or received into evidence with-
IV. Responsibilities upon Appointment with Respect to Children.

An attorney/guardian ad litem should carefully explain to the child the extent to which their conversations are not confidential and under which circumstances they are allowed, or may be compelled, to disclose secrets and confidences told to them by the children. 140

V. Confidentiality.

An attorney/guardian ad litem should strive to protect communications with his or her ward. An attorney/guardian ad litem should only disclose confidential communications when it is in the best interests of the child to do so, and then only in relation to the proceedings for which the attorney/guardian ad litem is appointed. 141 The confidentiality privilege for an attorney/guardian ad litem shall supersede Wyoming Rule of Professional Conduct 1.6. Confidential communications can be disclosed by the attorney/guardian ad litem when it is in the best interests of the child. 142

VI. Privilege. 143

A attorney/guardian ad litem has a privilege to refuse to disclose and to prevent any other person except the minor child from disclosing confidential communications which were: 144

A. Made by a minor child represented by the attorney/guardian ad litem; 145 and

B. Made within the context of such representation. 146

A presumption of confidentiality attaches to all communications between a child and an attorney/guardian ad litem, and the opponent of the privilege has the burden of proving that the relevant communication is not privileged or that compelling reasons exist to require out the express agreement of the parties." Id. This holding is flawed. The decision to receive an attorney/GAL's report into evidence should not reside with the child's parents and counsel. Allowing either side to refuse to allow the report into evidence indicates that if the mother or father disagrees with the report it will not be allowed into court. The court's access to this information should be based on the attorney/GAL's decision.

140. Boyer, supra note 119, at 1373.
141. Stuckey, supra note 93, at 1813-14.
142. "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession." WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6 cmt. 20. There is a need for supersession. An attorney serving as a GAL will follow the rule of confidentiality and will be able to reveal information which would otherwise be protected under WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6. See also Clark, 953 P.2d at 153.
143. WYOMING RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.6. "Evidentiary privilege should be recognized which will permit guardians ad litem to refuse to repeat what their wards have told them in confidence, absent compelling circumstances." Stuckey, supra note 93, at 1787.
144. Stuckey, supra note 93, at 1814.
145. Id.
146. Id.
disclosure.

VII. When Disclosure Is Allowed.
An attorney/guardian ad litem may reveal confidential communications to the extent the attorney/guardian ad litem believes necessary:

A. To promote or defend the child's interests;

B. To prevent the child or someone else from committing a criminal or fraudulent act;

C. To prevent the child from engaging in conduct likely to result in imminent death or substantial bodily harm to the child; however, the attorney/guardian ad litem may reveal only the minimum information needed to prevent the harm, and shall do so in a manner designed to limit the disclosure to the people who reasonably need to know such information;

D. To rectify the consequences of the child client's criminal or fraudulent act in the commission of which the attorney/guardian ad litem's services were used;

E. To establish a claim or defense on behalf of an attorney/guardian ad litem in a controversy between the attorney/guardian ad litem and the child, or to establish a defense to criminal charge or civil claim against the attorney/guardian ad litem based upon conduct in which the child was involved;

F. To comply with the orders of a court or the rules of law.

However, if appropriate under the circumstances and to the extent possible in light of a child's age and maturity, an attorney/guardian ad litem should discuss with the minor child any intention to disclose a confidential communication and the reasons for doing so, and the attorney/guardian ad litem should give appropriate deference to the wishes of the child in making this decision, absent a good reason for doing otherwise.

147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id. This provision is crucial. Discussing whether to reveal confidential information with the child involves the child in the decision making process, thus, empowering the child by reducing confusion and alienation caused by the litigation.
VIII. When an Attorney/Guardian Ad Litem's Obligations End

A. The appointment of an attorney/guardian ad litem terminates upon the entry of the court's final order or upon the termination of any appeal in which the attorney/guardian ad litem participates. If an appeal is taken by any party the attorney/guardian ad litem may choose not to participate in that appeal and must file with the appellate court a statement of reasons for not participating. However, the appellate court may order the attorney/guardian ad litem to participate in the appeal. 155

B. At any time, the attorney/guardian ad litem, any party or the child whom the attorney/guardian ad litem is representing may request in writing that the court terminate the appointment or reappointment. 156

C. The court may extend the appointment or reappoint an attorney/guardian ad litem, after the final order or after the termination of the appeal, but the court shall specifically state the scope of the responsibilities of the attorney/guardian ad litem during the period of that extension or reappointment. 157

IX. Compensation for Services Provided by the Attorney/Guardian Ad Litem 158

Any costs associated with the appointment of an attorney/guardian ad litem shall be apportioned among the parties as the court deems just, taking into consideration the parties' ability to pay. When the parties' ability to pay is limited, the court shall attempt to secure

155. WIS. STAT. ANN. § 767.045 (West 1993).
156. Id.
157. Id.
158. One of the main arguments against appointing an attorney/GAL is that it will cost more money and not be efficient. See Clark v. Alexander, 953 P.2d 145, 153 (Wyo. 1998). Other states have allocated the GAL's fees evenly to the parents. See COLO. REV. STAT. ANN. § 14-10-116 (West 1997). This makes the most sense since it is the parents who cannot come to an agreement as to custody. Other statutes provide different solutions:

Payment for the service of the attorney/guardian ad litem is the responsibility of the parties, as ordered by the court. In determining the responsibility for payment, the court shall consider:

A. The income of the parties;
B. The marital and nonmarital assets of the parties;
C. The division of property mad as part of the final divorce;
D. Which party requested appointment of a guardian ad litem; and
E. Other relevant factors.

ME. REV. STAT. ANN. tit. 19-A §1507 7 (West 1998). See also MO. STAT. ANN. 452.423 4 (West 1997). Alaska has an interesting approach to the payment of fees. "The court shall, if possible, avoid assigning cost to only one party by ordering that costs of the minor's legal representation or other services be paid from proceeds derived from a sale of property belonging jointly or individually to both parties, before a division of property is made." ALASKA STAT. §25.24.310(b) (Michie 1997).
proper representation without compensation.159