

Depriving Children of a Voice is Not Harmless Error: An Argument for Improving Children's Representation in Massachusetts Through Statutory Reform

*"There is considerable ongoing discussion among lawyers, judges, and other children's advocates about the appropriate role for a lawyer to assume when representing child clients. In particular, a range of views exists about the extent to which lawyers should take direction from their child clients. For the most part, States have provided inadequate guidance to lawyers for children about their proper role and, as a result, each lawyer makes her or his own decision. This ad hoc approach produces confusion among clients, other involved individuals, and the courts. It also has the effect, overall, of reducing the quality of legal representation. In order for children to be well served by the court process, it is essential that each State clearly articulate the role the child's lawyer is expected to play."*¹

I. INTRODUCTION

A lawyer representing a child finds himself in a serious ethical and legal dilemma when the child-client voices a position that the lawyer believes is incorrect and potentially harmful to the child.² When representing an adult, the lawyer must follow the client's objective even when he feels the position is unsuitable, but the rules are less clear when the client is a child.³

1. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, Guideline VII(14) cmt. (2001), available at <http://www.acf.dhhs.gov/programs/cb/publications/adopt02/>.

2. Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1282 (1996) (suggesting lack of consensus and guidance leaves large possibility of professional irresponsibility for all); Robert E. Shepherd, Jr. & Sharon S. England, *"I Know the Child is My Client, But Who Am I?"*, 64 FORDHAM L. REV. 1917, 1918 (1996) (noting difficulty of children's representation and lack of defined role for attorney); Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 281 (1995) (stressing immense difficulty of job and need for attorney to understand role); see AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, § B-3 cmt. (1996) [hereinafter ABUSE & NEGLECT STANDARDS] (discussing lawyer's predicament and possible reasons for child's decision to return to dangerous situation).

3. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (mandating lawyer follow client's objectives for representation as long as not criminal or fraudulent); *id.* R. 1.14 (authorizing lawyer to determine competency of client); David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103, 103 (2000) (cautioning state ethics codes appropriate for representation of adults but not representation of children);

The legal community is divided over the proper role for the attorney, some advocating for a best interests of the child approach, and others for a traditional client-directed approach.⁴ Many organizations and associations have enacted model standards to provide guidance and create uniformity in practice; however, the different model standards vary greatly, and no state has yet adopted one of the model standards.⁵ This lack of consensus continues to produce considerable confusion and debate surrounding the lawyer's role in children's representation.⁶

Massachusetts recently confronted this issue in *In re Georgette*.⁷ In *Georgette*, two sisters motioned for a new trial, contending ineffective assistance of counsel after their court-appointed attorney advocated against their expressed preference of returning to their father's custody.⁸ The Massachusetts Appeals Court applied the test for ineffective counsel set forth in *Commonwealth v. Saferian*,⁹ and denied the sisters' motion.¹⁰ The appeals court did not decide whether counsel's conduct was unreasonable, but instead found there was no prejudice to the sisters because the father's overwhelming unfitness prevented the court from granting custody.¹¹ The Massachusetts

Ventrell, *supra* note 2, at 270 (stating many lawyers do not follow Model Rules of Professional Conduct with child-clients); Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857, 1861 (1996) (demonstrating uniqueness of children's law by showing zealous advocacy against client's position often found acceptable).

4. NAT'L ASS'N FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 4 (2001), available at http://www.naccchildlaw.org/documents/nacc_recommendations.doc [hereinafter NACC RECOMMENDATIONS] (recognizing debate over form of representation); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 939-40 (1995) [hereinafter Haralambie, *The Role of the Child's Attorney*] (noting proper role of attorney often unclear in practice, case law, and statutory law).

5. See Katner, *supra* note 3, at 111-12 (promoting ABA standards, but noting new standards not adopted by any jurisdiction); see, e.g., ABUSE & NEGLECT STANDARDS, *supra* note 2, at 1 (preferring pure attorney role, but allowing attorney GAL hybrid); NACC RECOMMENDATIONS, *supra* note 4, at 4 (approving both best interests and client-directed approaches to representation); Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (With Commentary)*, 13 J. AM. ACAD. MATRIM. LAW. 1, 1-22 (1995) (setting forth standards for combined attorney-GAL).

6. NACC RECOMMENDATIONS, *supra* note 4, at 4 (describing lack of accepted uniform code of conduct in children's law).

7. 785 N.E.2d 356 (Mass. 2003).

8. *Id.* at 358, 361 (noting clients consistently changed preference and father abused clients in past).

9. 315 N.E.2d 878 (Mass. 1974).

10. *Georgette*, 785 N.E.2d at 361 (stating no prejudice to sisters because father's unfitness prevented court from awarding custody to father). The Massachusetts Supreme Judicial Court held that the *Saferian* ineffective counsel test applied to care and protection cases in *In re Stephen*. *In re Stephen*, 514 N.E.2d 1087, 1091 (Mass. 1987). The *Saferian* test is a two-part test, and a plaintiff must meet both prongs of the test for the court to find ineffective assistance of counsel. *Georgette*, 785 N.E.2d at 361. The plaintiff must show that "behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer," and, if so . . . "whether [counsel's conduct] has likely" prejudiced the plaintiff. *Id.* (quoting *Saferian*, 315 N.E.2d at 883). In *Georgette*, the appeals court focused on the gross unfitness of the father in holding that counsel did not prejudice the sisters. *Id.* at 360.

11. *In re Georgette*, 768 N.E.2d 549, 560 (Mass. App. Ct. 2002) (stressing two necessary parts to *Saferian*

Supreme Judicial Court affirmed the appeals court's decision, citing the severe unfitness of the father as grounds for denying the sisters' motion.¹² The Supreme Judicial Court also noted the variety of conflicting standards for children's representation and requested new rules for Massachusetts.¹³

Georgette is significant because it exposes persisting problems in children's representation both in Massachusetts and on a national scale.¹⁴ First, if the Massachusetts courts apply the *Saferian* test each time an attorney disagrees with his client's preferences, then the child-clients will largely be left without a voice in the court system.¹⁵ Second, the opinion rejects both past and present standards of conduct in Massachusetts, indicating that the Commonwealth has not found an effective approach.¹⁶ Third, by ordering the creation of new rules rather than clarifying existing rules or adopting rules from another state or model code, the Massachusetts Supreme Judicial Court demonstrated that the lack of national consensus for the proper method of children's representation continues to create confusion for individual states and warrants additional study.¹⁷ The case also highlights the problem that fuels the best interests versus client-directed debate: children merit a voice, but children also benefit from guidance.¹⁸

test), *aff'd*, 785 N.E.2d 356 (Mass. 2003).

12. *Georgette*, 785 N.E.2d at 361 (stating no amount of advocacy could have changed court's decision because father's unfitness so severe).

13. *In re Georgette*, 785 N.E.2d 356, 365-68 (Mass. 2003) (surveying model codes and different practice standards). The court held that counsel should follow the Committee for Public Counsel Services (CPCS) 1999 Performance Standards until the court announced new rules. *Id.* at 368. The court acknowledged that a predecessor of the 1999 Standards existed at the time of the trial, stating "[t]he standards in effect at the time of this trial were adopted by CPCS apparently in 1993." *Id.* at 363.

14. *Id.* at 367 (citing multitude of conflicting current and model standards).

15. See *supra* note 10 and accompanying text (discussing *Saferian* two-prong test and burden of proof); see also *infra* note 16 and accompanying text (stating *Saferian* test defeats motion for new trial despite court's acknowledgement of attorney's ethical misconduct); *infra* notes 107-108 and accompanying text (noting court's denial of motion functions as tacit approval of attorney's conduct).

16. *Georgette*, 785 N.E.2d at 360, 367-68 (discussing past use of best interests and substituted judgment approaches, and critiques of current standards). The CPCS authored the 1999 CPCS Standards, which are the current standards, under authority from the Massachusetts Legislature. See MASS. GEN. LAWS ch. 211D, § 9 (2004); COMMITTEE FOR PUBLIC COUNSEL SERVICES, COMMONWEALTH OF MASS., PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES (1999), available at <http://www.state.ma.us/cpcs/CAFL/perfsthd.htm> [hereinafter CPCS STANDARDS] (stating attorneys must abide by standards and attorney conduct evaluated against standards). The appeals court upheld *Georgette*'s attorney's conduct using the *Saferian* test, but noted advocacy against expressed opinion qualifies as ethical misconduct. *Georgette*, 785 N.E.2d at 360. The *Georgette* court held that the attorney did not commit an ethical violation because the children's expressed preference was not clear. *Id.* The court included the 1999 CPCS Standard 1.6 text, but did not discuss whether application of this standard would have affected the outcome of the case. *Id.* at 363-65.

17. See *Georgette*, 785 N.E.2d at 367-68 (requesting new standards based on study of existing national and local standards); see also Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 940-41 (admitting years of debate have not produced consensus regarding proper role for child's attorney).

18. See Ann M. Haralambie, *In Whose Best Interest?*, 34 TRIAL 42, 43 (1998) [hereinafter Haralambie, *In Whose Best Interest?*] (acknowledging movement toward client-directed model while noting special obligations lawyers owe to child-clients); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 945-46 (noting

This Note explores the development of children's representation, and the best interests versus client-directed debate as it applies to adolescent clients.¹⁹ Additionally, this Note examines the various practice standards utilized by several states and analyzes their successes and shortcomings.²⁰ Finally, this Note suggests that Massachusetts requires more than revised rules to guarantee effective representation for children, and proposes that Massachusetts enact a statute solely devoted to children's representation which clearly delineates the attorney's role.²¹ While *Georgette* may first appear to be a rare case, evidence reveals that a child is abused or neglected every sixteen minutes in Massachusetts, and nationally, dependency and parental termination cases represent the fastest growing category of cases requiring appointed counsel.²² Appointed counsel and their child-clients deserve a system of representation and guidelines that are not only effective when the attorney and child-client agree, but also in the extreme cases where the attorney feels the child-client's expressed preference may endanger the child.²³

II. HISTORY OF CHILDREN'S REPRESENTATION

The advancement of children's law began with *In re Gault*,²⁴ when the United States Supreme Court granted children the right to counsel in

children capable decision-makers, but abused child may suffer impaired ability regarding family decisions); Ventrell, *supra* note 2, at 272-73 (recognizing special considerations associated with child advocacy); *see also* Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 430-31 (1993) (addressing dangers of client-directed approach when child desires to return to abusive home); Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 IND. L.J. 605, 611-12 (1998) (indicating society must guide children and encourage autonomy, but legal representation polarizes these two needs); *cf.* Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441, 441 (2000) (proposing two lawyer roles and rejecting adoption of single client-directed or best interests approach).

19. *See infra* Part II (describing advocacy models and highlighting debated issues). Representation of pre-verbal children is beyond the scope of this Note.

20. *See infra* Part III (surveying selection of current practice standards codified by state statutes and proposed model standards). The state approaches analyzed in this Note are illustrative of current practice standards, but do not include all the current practice standards, as each state has its own particularities.

21. *See infra* Part IV (recommending Massachusetts enact children's representation statute incorporating aspects of current Massachusetts, Michigan, and Connecticut systems).

22. *See* THE SPANGENBERG GROUP, WESTERN MASSACHUSETTS CHILD WELFARE CASES: THE COURT-APPOINTED COUNSEL SYSTEM IN CRISIS 4 (2003) (citing increasing number of dependency and termination of parental rights cases and discussing associated problems); Ventrell, *supra* note 2, at 268 (noting most representation of children occurs in abuse, neglect, and dependency cases); *see also* Krista Zanin, *Gala Proves to Be an Inspiring Evening*, MASS. B. ASS'N LAW. J., Feb. 2004, at 9 (citing abuse and neglect statistics announced by keynote speaker during address on children's law).

23. *See supra* note 2 and accompanying text (describing attorney's quandary when he disagrees with child and fears consequences of child's preference); *infra* text accompanying notes 164-166 (noting lack of clear guidelines and discussing range of options available when representation becomes difficult).

24. 387 U.S. 1 (1967).

delinquency proceedings.²⁵ Following *Gault*, children's law developed on a state-by-state basis, resulting in a lack of uniformity of practice.²⁶ As states developed the role of counsel in dependency proceedings, most states assigned attorneys the role of guardian ad litem (GAL), charged with determining and advocating the child's best interests.²⁷ Over the past thirty years, there has been a significant movement towards the client-directed approach, creating much debate regarding the proper role of the attorney.²⁸ The debate focuses on the problem that although children are clients who deserve representation, they simultaneously may need guidance.²⁹ The need for guidance is most acute in dependency and parental termination proceedings, where the parent cannot fill the traditional role of guiding the child.³⁰

A. Overview of the Best Interests Models

The best interests models seek to fill the parental void by using the attorney

25. *Id.* at 13 (holding minors entitled to traditional model of legal representation); Martin Guggenheim, *The Right to be Represented, But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 90 (1984) (explaining if child mature enough to receive punishment, also mature enough to direct counsel).

26. NACC RECOMMENDATIONS, *supra* note 4, at 4 (distinguishing children's law from other practice areas enjoying uniform representation in all states); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1573, 1576 (1996) (noting lack of consensus among states and number of states without statutory right to counsel); Ventrell, *supra* note 2, at 260-61 (criticizing America for neglecting children's needs and not developing children's law).

27. See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1507 (1996) (explaining limitations of employing attorney as GAL in child protection proceedings); see also Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 682-83 (1987) (detailing presumed disability of minors); cf. Ventrell, *supra* note 2, at 260-61 (noting history of children's law actually history of parental rights). Prior to the nineteenth century, children were the property of their parents and subject to complete parental control. Ventrell, *supra* note 2, at 261. During the nineteenth century, children's law began to develop, but the laws were created to guide the state, not to recognize the rights of children. *Id.* at 262. The laws gave the state the right to act as a parent to the child, presuming and codifying that the child was inherently disabled. *Id.* at 262, 264.

28. See Duquette, *supra* note 18, at 442-43 (contrasting scholars' preference of client-directed model with government's preference of appointing GAL); Haralambie, *In Whose Best Interest?*, *supra* note 18, at 43, 47 (noting popular switch from best interests to client-directed approach); Hill, *supra* note 18, at 612 (acknowledging increase in number of client-directed approach proponents); Wu, *supra* note 3, at 1859-60 (citing and promoting trend towards client-directed representation).

29. See Green & Dohrn, *supra* note 2, at 1285-86 (emphasizing importance of representation for children in judicial proceedings because child cannot represent herself); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 953 (declaring child deserves direct participation in proceedings if desired); Lyon, *supra* note 27, at 693-94 (arguing child needs representative to voice her position, not simply to counsel her); see also Duquette, *supra* note 18, at 446 (observing child deserves representation because much for child to lose in protection proceedings). But see Hafén, *supra* note 18, at 431 (contending some children cannot see long-term interests and choose self-injurious objectives).

30. See Duquette, *supra* note 18, at 445 (stating child needs independent advocate when parents cannot protect child's best interests); Hafén, *supra* note 18, at 424-26 (citing attorney granted deference when he replaces parent as decision-maker for child).

to determine the best interests of the child.³¹ Proponents reason that the child must be protected from poor choices and should not bear the weight of their choice.³² Opponents contend, however, that this approach denies the child effective representation because the attorney is an agent of the court and therefore has no duty of loyalty to the child.³³ Opponents fear the best interests attorney will not consider the subjective needs and fears of the child, but will instead substitute his point of view, leaving the child without a voice.³⁴

B. Overview of the Client-Directed Model

The client-directed model follows the Model Rules of Professional Conduct (Model Rules), enabling the child-client to decide the objectives of representation unless the attorney deems the child cannot make an adequately considered decision.³⁵ Although Rule 1.14 of the Model Rules requires the attorney to maintain a relationship with the child-client that is as normal as possible, the Rule also allows the attorney to seek protective action when he reasonably believes that the client lacks the capacity to direct the

31. See Hafen, *supra* note 18, at 424-26 (describing wide latitude granted to attorney and calling for increased guidance). *But see* Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, 35 BOSTON B.J. 6, 9 (Feb. 1991) (contending best interests model ignores child's values and makes attorney judge of child); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 958 (concluding attorney most effectively represents child through advocacy, not by becoming therapist or social worker); Katner, *supra* note 3, at 107-108 (stating child's need for independent representation not satisfied by attorney with GAL discretion); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1301 (1996) (recommending lawyer function as traditional lawyer and not serve any role inconsistent with lawyer responsibilities); Ross, *supra* note 26, at 1585 (contending well-meaning state guardians cannot always properly speak for child).

32. ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-4 cmt. (speculating choice of dangerous situation because child desires familiarity and fears blame or threats); NACC RECOMMENDATIONS, *supra* note 4, at 13 (reporting critics fear young child cannot direct attorney or older child may misdirect attorney); Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 636, 642 (2003) (observing judges fear children suffer regret over expressed position after proceedings).

33. NACC RECOMMENDATIONS, *supra* note 4, at 10 (listing critiques of best interests approach); *see also* Ventrell, *supra* note 2, at 260 (arguing Constitution guarantees children zealous advocacy because children recognized as persons); Wu, *supra* note 3, at 1871 (highlighting importance of attorney-client privilege because judges rule based on perceived best interests).

34. See Shepherd & England, *supra* note 2, at 1942 (stressing importance to child of having voice heard, even where adults find view irrational); *see also* Ventrell, *supra* note 2, at 269 (stating GALs decide position based on own subjective determination of best interests); Wu, *supra* note 3, at 1860 (arguing best interests permits attorney to trump any conflict contrary to idea of legal representation). Professors Shepherd and England stress that the attorney is the only adult who will voice the child's opinion, and thus, he should articulate that view, even if it sounds irrational. Shepherd & England, *supra* note 2, at 1942. The attorney should not champion the best interests of the child as he sees them, rather he should request a GAL to fill that role. *Id.*

35. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (stating lawyer must adhere to client's objectives of representation); *id.* R. 1.14 (recognizing client with diminished capacity alters attorney-client relationship); Peters, *supra* note 27, at 1509, 1513 (suggesting lawyer begin with traditional attorney-client relationship and defer to child where possible); Ventrell, *supra* note 2, at 268 (referencing Model Rule 1.14 as evidence lawyer owes child same duties as he owes adult).

representation.³⁶ The Model Rules, however, do not outline an approach for determining the client's capacity.³⁷ Proponents of the client-directed model stress a legal presumption of capacity, and direct the attorney to formally determine capacity only when the attorney reasonably questions the child's capacity.³⁸ Under this approach, the attorney should not question capacity based on the child's expressed preference, but rather when independent evidence suggests the child cannot make a well-reasoned decision.³⁹

Proponents of the client-directed approach also argue that the child deserves a voice because the child is involved in a life-changing custody proceeding.⁴⁰ Additionally, proponents maintain that an attorney should not deviate from the traditional role of advocating the client's objective.⁴¹

Opponents of the client-directed approach fear harm to the child through both the child's own judgment and through unreviewable discretion of the attorney who determines the child's capacity.⁴² Opponents further contend that adhering to the attorney-client privilege may harm the child by preventing the

36. MODEL RULES OF PROF'L CONDUCT R. 1.14 (listing minority, mental impairment, or other reason as instances of diminished capacity); *see also* Ventrell, *supra* note 2, at 273 (stressing attorney must understand child development to properly determine client's capacity).

37. MODEL RULES OF PROF'L CONDUCT R. 1.14 (stating lawyer must reasonably believe client's capacity diminished, but does not prescribe method for determination). The Model Rules acknowledge that children have relevant opinions, and suggest that five-year-olds may be able to contribute and ten to twelve-year-olds certainly can contribute to their representation. *Id.* R. 1.14 cmt.

38. *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 FORDHAM L. REV. 1339, 1339-40 (1996) [hereinafter *Determining the Child's Capacity*] (maintaining attorney should not conduct capacity determination with all child-clients).

39. *Determining the Child's Capacity*, *supra* note 38, at 1339 (explaining children entitled to same capacity determination procedure as adults). The Fordham Conference recommends focusing on the quality of the child's reasoning and decision-making in order to avoid judging the child solely on his expressed preference. *Id.* at 1343. If an attorney determines that a child-client possesses adequate capacity, the attorney is bound to advocate the child's well-reasoned preference even if the attorney believes the decision is unwise. *Id.*

40. *See In re Stacey S.*, 737 N.E.2d 92, 98 (Ohio Ct. App. 1999) (emphasizing parties' need for counsel by analogizing termination of parental rights to death penalty); Elder, *supra* note 31, at 9 (stating children's awareness of who represents their voice and need for trusting relationship with attorney); Guggenheim, *supra* note 25, at 91-92 (arguing seven year old should have power to direct attorney, as allowed in delinquency proceedings); Peters, *supra* note 27, at 1511 (listing questions to assure individualized representation and keep lawyers honest); Ross, *supra* note 26, at 1573, 1577-78 (contending child requires voice through counsel because child cannot remove herself from unsatisfactory situation); Jessica Cherry, Note, *The Child as Apprentice: Enhancing the Child's Ability to Participate in Custody Decisionmaking by Providing Scaffolded Instruction*, 72 S. CAL. L. REV. 811, 815-16 (1999) (stressing child deserves voice because proceedings change child's life).

41. *See supra* note 31 and accompanying text (articulating arguments for independent counsel for children and dangers of GAL discretion).

42. *See* Duquette, *supra* note 18, at 454-55 (cautioning client-directed attorney has essentially unbridled discretion); Hafen, *supra* note 18, at 455 (questioning wisdom of client-directed approach where child needs protection from abuse). Professor Duquette argues that, ironically, the client-directed approach may function to drown the voice of the child, rather than the best interests approach. Duquette, *supra* note 18, at 455. A client-directed attorney, for example, exercises his discretion in a private setting, determining matters such as child competence, making it difficult for a court to review. *Id.* In contrast, the best interests attorney's discretion is more easily reviewed because the attorney's determinations and reasoning are announced in open court. *Id.*

attorney from revealing negative information to the court, such as information about abuse.⁴³ The client-directed model permits the attorney to counsel the child away from such position, but the may nevertheless be bound to advocate a position he knows is harmful to his client.⁴⁴

C. Movement Toward a Common Ground

Recently, some scholars have moved away from this positional debate, suggesting that both the client-directed and best interests roles are important in children's representation.⁴⁵ These scholars promote utilizing aspects of both models to provide representation tailored to the unique facets of children's law.⁴⁶ These views focus on clarifying the attorney's role so that the attorney knows how to represent the client, and the client understands her relationship to the attorney.⁴⁷ This movement also recognizes the varying levels of children's competency, a nuance the client-directed and best interests models neglect.⁴⁸ A child may be able to contribute to some aspects of representation even if she cannot direct all of it.⁴⁹ This movement stresses that the attorney's job is to interact with the child and ascertain how much the child can contribute to the representation.⁵⁰

43. Hill, *supra* note 18, at 621 (fearing advocacy of stated wishes may perpetuate abusive environment); Ventrell, *supra* note 2, at 276-77 (noting Model Rule 1.6 permits disclosure when future harm to others, but not to self).

44. Hill, *supra* note 18, at 622 (explaining while client-directed approach appears to work for older children, danger may linger); Ventrell, *supra* note 2, at 278-79 (advocating use of attorney's advisor role to discuss child's stated preference and propose alternatives). Professor Ventrell recognizes that the child-client may not take the attorney's advice, and consequently, the attorney may have to advocate a position knowing it could likely harm the client. Ventrell, *supra* note 2, at 281-82.

45. Duquette, *supra* note 18, at 456 (noting shift from debate to focus on how to best act on child's behalf); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 939-40 (suggesting neither traditional attorney role nor GAL role constitute effective representation for child); Peters, *supra* note 27, at 1512-16 (explaining how best interests analysis enters client-directed representation).

46. NACC RECOMMENDATIONS, *supra* note 4, at 5-10 (creating checklist of important factors for children's representation); Duquette, *supra* note 18, at 441 (concluding definition of single lawyer role impossible, and arguing for two sets of standards); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 947-48 (listing crucial points of representation); Peters, *supra* note 27, at 1512 (promoting client-directed lawyering, but explaining attorney must also understand best interests).

47. NACC RECOMMENDATIONS, *supra* note 4, at 7 (stressing importance of defined role and duties of attorney); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 947 (stating both attorney and child must understand attorney's role); see Peters, *supra* note 27, at 1515 (commenting client-directed attorney must formulate opinion of best interests but advocate child's expressed preference). Professor Peters notes the client-directed attorney must be ready for criticism from other professionals who may find advocacy of the child's stated preference morally repugnant. Peters, *supra* note 27, at 1516. The lawyer must be prepared to explain his role to such critics. *Id.*

48. Duquette, *supra* note 18, at 460 (explaining breadth of competency and varying amounts of child participation); Peters, *supra* note 27, at 1509-10 (comparing range of child competency to dimmer switch).

49. See *supra* note 48 and accompanying text (rejecting all-or-nothing view of child contribution).

50. Duquette, *supra* note 18, at 460 (explaining Michigan statute uses age and competence to determine weight accorded to child's wishes); Peters, *supra* note 27, at 1509-11 (stressing importance of individualizing representation instead of assuming attorney understands child's situation).

In an effort to improve the substance of children's representation, The National Association of Counsel for Children (NACC) published a checklist for children's representation, stressing important elements to include in either a best interests or client-directed approach.⁵¹ The NACC checklist highlights the importance of legal counsel who understand their role, protect client confidentiality, communicate the client's wishes, and represent the child throughout the entire litigation process.⁵² The NACC checklist also catalogs needs of child-clients that are distinct from the needs of adult clients.⁵³

III. CURRENT PRACTICE STANDARDS

The majority of the states use a form of the best interests approach that combines the roles of attorney and GAL into one person.⁵⁴ This hybrid role provides the child with an attorney, but the attorney is an agent of the court.⁵⁵ The attorney-GAL determines what he feels is the best interests of the child, and advocates this position.⁵⁶ This approach does not include an attorney-client privilege because the attorney-GAL must reveal information to the court.⁵⁷

While this is the most popular method of representation, it also creates the most role confusion.⁵⁸ The role requires the attorney to act as a GAL, which is problematic because the attorney may not be trained as a GAL and because the

51. NACC RECOMMENDATIONS, *supra* note 4, at 5-10 (creating lengthy and detailed framework for representation).

52. NACC RECOMMENDATIONS, *supra* note 4, at 5-7, 11 (exposing flaws in current systems such as lay person GALs and various counsel). The NACC promotes representation that respects the child as a client and involves the client through developmentally appropriate counseling and explanations of the case. *Id.* at 5-9.

53. NACC RECOMMENDATIONS, *supra* note 4, at 9-10 (focusing advocacy on family relationships, basic needs, permanence, and efficiency of litigation).

54. *See, e.g.*, ALA. CODE § 26-14-11 (2004) (assigning attorney to represent child's rights and simultaneously serve as GAL for child); COLO. REV. STAT. § 19-3-602 (2003) (appointing attorney-GAL for all involuntary parental termination hearings); 705 ILL. COMP. STAT. 405/2-17 (2003) (appointing GAL and also counsel for the GAL unless GAL attorney himself); *see also* NACC RECOMMENDATIONS, *supra* note 4, at 10 (explaining traditional attorney or hybrid meets federal requirement); Duquette, *supra* note 18, at 442 n.3 (noting thirty of forty states appointing counsel in protection proceedings use hybrid model). Professor Duquette suggests that the Child Abuse Prevention and Treatment Act (CAPTA) is primarily responsible for these states' choice of representation. Duquette, *supra* note 18, at 441-42. CAPTA requires the appointment of a GAL to represent the best interests of a child in an abuse and neglect case before a state may receive federal child welfare funds. *Id.*

55. NACC RECOMMENDATIONS, *supra* note 4, at 10 (describing facets of attorney-GAL hybrid role).

56. NACC RECOMMENDATIONS, *supra* note 4, at 10 (noting hybrid attorney's judgment outweighs child's expressed preference).

57. *See* Katner, *supra* note 3, at 108-11 (arguing attorney and GAL roles naturally conflict due to treatment of confidential information).

58. *In re Stacey S.*, 737 N.E.2d 92, 99 (Ohio Ct. App. 1999) (explaining Ohio law permits dual role as long as no conflict between duties); Green & Dohrn, *supra* note 2, at 1288 (explaining lawyer confusion over which role serving and how to explain to child); Katner, *supra* note 3, at 103-04, 109-10 (blaming hybrid role for harming children's representation); *see* NACC RECOMMENDATIONS, *supra* note 4, at 10 (listing critiques of hybrid representation).

GAL role conflicts with the traditional functions of an attorney.⁵⁹ Instead of maintaining loyalty and client confidences, the hybrid attorney-GAL reports all relevant information to the court.⁶⁰ Instead of zealously advocating a client's objective, the attorney-GAL must determine the client's best interests and argue that position regardless of whether the client agrees with the position.⁶¹

In 1996, the American Bar Association approved the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Abuse and Neglect Standards) to clarify the role and duties of counsel.⁶² The Abuse and Neglect Standards are consistent, but more specific, than the Model Rules of Professional Conduct, which do not account for distinct groups of clients.⁶³ The Abuse and Neglect Standards provide guidance for situations that the Model Rules do not address, namely counseling a child-client in a developmentally appropriate manner and recognizing that a child's competency is contextual and often intermittent.⁶⁴ The Abuse and Neglect Standards answer calls for reform by granting children their own standards instead of grouping children under the general diminished capacity rule.⁶⁵

The Abuse and Neglect Standards improve children's representation by highlighting children's unique needs, delineating procedural steps that counsel should follow, and addressing specific difficult situations that often arise in children's representation.⁶⁶ The Standards also clearly support the client-directed approach, stating 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."⁶⁷

59. See Elder, *supra* note 31, at 9 (arguing counsel should not violate child's trust); Katner, *supra* note 3, at 107-110 (enumerating problems with hybrid role).

60. See Green & Dohrn, *supra* note 2, at 1288 (describing difficulty lawyer faces in determining best interests); Katner, *supra* note 3, at 110 (stressing problems with reconciling different duties of disclosure).

61. See Green & Dohrn, *supra* note 2, at 1288 (summarizing lawyer's uncertainties regarding role and duties); Katner, *supra* note 3, at 109 (stating roles of attorney and GAL conflict).

62. ABUSE & NEGLECT STANDARDS, *supra* note 2, at 1 (explaining application of standards); Katner, *supra* note 3, at 103-04 (tracing origins of Abuse and Neglect Standards).

63. ABUSE & NEGLECT STANDARDS, *supra* note 2, § A-1 cmt. (defining child's attorney's duties consistent with Rule 1.14); Katner, *supra* note 3, at 111-12 (explaining how use of Abuse and Neglect Standards eliminates confusion created by 1.14).

64. ABUSE & NEGLECT STANDARDS, *supra* note 2, §§ A-3, B-3 (defining "developmentally appropriate" and explaining child may direct lawyer on some, but not all, positions); Haralambie, *The Role of the Child's Attorney*, *supra* note 4, at 944 (describing ethical standards as outdated with regard to child advocacy); Katner, *supra* note 3, at 111-15 (discussing ambiguity and flawed assumptions in Rule 1.14 as applied to children).

65. *Report of the Working Group on Interviewing and Counseling*, 64 FORDHAM L. REV. 1351, 1352 (1996) (calling for a separate rule for children). The Working Group criticized Model Rule 1.14 for creating a presumption that minors cannot direct their representation, and requested the removal of minority from Rule 1.14. *Id.*

66. ABUSE & NEGLECT STANDARDS, *supra* note 2, § B (listing attorney's obligations and duties, and describing various representation scenarios); NACC RECOMMENDATIONS, *supra* note 4, at 4 (acknowledging ABA advanced toward uniformity in children's representation by publishing Abuse and Neglect Standards).

67. ABUSE & NEGLECT STANDARDS, *supra* note 2, at 1 (permitting dual role but indicating strong preference towards client-directed model).

Similarly, while the Abuse and Neglect Standards allow the dual role, the Standards suggest a client-directed approach to address conflicts between the hybrid attorney-GAL and child.⁶⁸ The Abuse and Neglect Standards focus on the attorney's duty to the child by recommending that the lawyer continue as the child's attorney and request the appointment of a new GAL.⁶⁹ This approach corresponds with the ethical duties of loyalty, preserving client confidences, and advocating the client's expressed preference.⁷⁰ While the Abuse and Neglect Standards provide clarity, the Standards are only a model, and no jurisdiction employing the client-directed approach has yet adopted them.⁷¹

Following the Abuse and Neglect Standards, the NACC sought to further improve children's representation by purposely avoiding the best interests versus client-directed debate and advocating for representation by any name that meets children's needs.⁷² The NACC lists children's vital needs, advocacy issues and duties and recommends that a jurisdiction adopt a model of representation that accommodates the enumerated needs and addresses the detailed issues.⁷³ The NACC's checklist concentrates on a practical level on describing the type of client a child is, and how that client's needs are best handled.⁷⁴ The checklist focuses on legal elements such as the child's need to present preferences to the court through counsel, the opportunity to appeal an adverse decision, and the right to have a competent attorney with time for the child's case.⁷⁵ The checklist also recognizes that the child's basic needs are paramount, so that the attorney must be concerned with obtaining food, shelter, safety and a familial environment for the child-client.⁷⁶

The NACC also compares various current models of representation, and ultimately departs from their stated neutrality on the representation debate by

68. ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-2 & cmt. (suggesting course of conduct when representative's GAL and attorney roles inapposite due to child's preference).

69. ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-2 & cmt. (explaining after lawyer and child have attorney-client relationship, lawyer cannot serve another role). *But see* Duquette, *supra* note 18, at 451-52 (criticizing ABA Standards because requesting GAL opposes child's objective).

70. ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-2 & cmt. (suggesting appointment of new GAL so attorney does not violate client's confidentiality and loyalty).

71. Katner, *supra* note 3, at 110-11 (warning jurisdictions employing ethics codes based on Model Rules of Professional Conduct need revision).

72. NACC RECOMMENDATIONS, *supra* note 4, at 14-15 (developing a client-directed approach with safeguards to protect child).

73. NACC RECOMMENDATIONS, *supra* note 4, at 6-10 (stating children deserve both proper legal representation and representation that addresses immediate physical and emotional needs).

74. NACC RECOMMENDATIONS, *supra* note 4, at 6-10 (describing child's need for permanent representation and how attorney can best serve child).

75. NACC RECOMMENDATIONS, *supra* note 4, at 6-8 (stating child needs loyal, diligent counsel and remedies when adverse judgment or ineffective counsel).

76. NACC RECOMMENDATIONS, *supra* note 4, at 9-10 (recognizing child-client has physical and mental needs as well as legal needs).

proffering an ideal best interests model.⁷⁷ Under the NACC model, the lawyer begins as a traditional attorney and counsels the child away from choosing a harmful position.⁷⁸ If the child insists on the harmful position, the attorney is required to seek appointment of a GAL.⁷⁹ Alternatively, the NACC approach allows the attorney to use her discretion and make a best interests determination if the child cannot direct the representation.⁸⁰ The NACC believes this model is the best combination of the attorney and GAL roles, but also acknowledges that critics have suggested the model has the same flaws as the best interests approach.⁸¹ To date, no jurisdiction has adopted the NACC approach.⁸²

A. Massachusetts

Massachusetts has long respected that children can make mature decisions and uses the client-directed approach, appointing a traditional attorney to the child.⁸³ Statutory law also grants the court discretion to appoint a GAL, but solely in an investigative capacity.⁸⁴ The GAL investigates domestic relationships and concerns surrounding the child's care and custody, and submits a written report of her findings to the court and all involved parties.⁸⁵ A recent survey of Massachusetts probate court judges shows that judges often ask for or require recommendations from the GAL, instead of limiting the GAL to the statutorily delineated fact-finding role.⁸⁶

77. NACC RECOMMENDATIONS, *supra* note 4, at 10-15 (comparing five models and supporting sixth model combining Abuse and Neglect Standards and NACC comment).

78. NACC RECOMMENDATIONS, *supra* note 4, at 14 (describing approach as variation of client-directed approach). The model is designed to be client-directed, but allows a best interests evaluation in certain situations when the child's preferences are dangerous or the child cannot direct the representation. *Id.* at 14-15.

79. Compare NACC RECOMMENDATIONS, *supra* note 4, at 15 (mandating counsel request GAL), with ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-2 (permitting but not requiring attorney to request GAL). The NACC approach seeks to provide more protection to the child, asserting that the Abuse and Neglect Standards allow the child an impractical amount of power. NACC RECOMMENDATIONS, *supra* note 4, at 14.

80. NACC RECOMMENDATIONS, *supra* note 4, at 14 (recognizing some children unable to direct representation and allowing objective discretion in limited circumstances).

81. NACC RECOMMENDATIONS, *supra* note 4, at 15 (reviewing accolades and criticisms of approach). Critics state that while claiming to be client-directed, the model allows substituted judgment, opening representation up to the attorney's unreviewable whim. *Id.*

82. NACC RECOMMENDATIONS, *supra* note 4, at 15 (indicating NACC approach adopted in portions, but not in full).

83. Custody of a Minor, 421 N.E.2d 63, 67 (Mass. 1981) (stating Massachusetts law requires consideration of mature child's preferences); NACC RECOMMENDATIONS, *supra* note 4, at 13 (describing functions of traditional attorney); see also Elder, *supra* note 31, at 8 (detailing decisional powers Massachusetts grants to minors although legally incapacitated).

84. MASS. GEN. LAWS ch. 215, § 56A (2004) (authorizing probate court to appoint GAL to investigate child's well-being).

85. *Id.* (setting forth reporting requirements).

86. Judges Answer Questions on Family Law, MASS. L. WKLY., Dec. 15, 2003, at B10 (reporting views of five judges on the role of guardians ad litem). The judges shared the ways they use GALs in their courtrooms, and the result showed five different approaches. *Id.* One judge stated that the GAL may make recommendations, but that the court must draw its own inferences and render its own conclusion. *Id.* Another

Statutory law, case law, and judicial rules all secure children's right to counsel; there is not one source, however, that sets out a comprehensive scheme for children's representation.⁸⁷ Instead, provisions regarding attorney performance and appointment of GALs are codified in various statutes, administrative regulations, and the Massachusetts Rules of Professional Conduct.⁸⁸

The Massachusetts Rules of Professional Conduct mandate a counsel's loyalty to his client.⁸⁹ Additionally, appointed counsel must comply with the Committee for Public Counsel Services (CPCS) training and performance standards.⁹⁰ In order to accept assignments, CPCS obliges counsel at both the trial and appellate levels to complete a Children and Family Law certification course and annually maintain certification.⁹¹

CPCS adopted its current standards in 1999, after the *Georgette* trial.⁹² The CPCS Standards explain both the role and performance requirements of counsel.⁹³ The Standards begin with the premise that counsel owes the child-

judge stated that she accepts opinion testimony in only those areas that is the subject of the GAL's investigation. *Id.* A third judge concedes that the GAL often surpasses the bounds of her appointment. *Id.* A fourth judge states that she appreciates recommendations due to the depth of information that the GAL provides the court. *Id.* This judge indicated she does not accept conclusions about mental health if the GAL is not a mental health expert, but does accept the GAL's recommendation for a psychological evaluation based on the GAL's observations. *Id.* A fifth judge stated, "[n]ot only do I allow GALs to offer opinions and/or recommendations in their reports, but routinely I require them to make recommendations." *Id.* This judge stipulates in pre-trial that the GAL may be cross-examined by either party (if so agreed by the parties), any part of the report may be redacted, and any party who disagrees with the report should file a motion in limine or a motion to strike. *Id.* In addition, this judge stated that he expects the GAL to have an opinion on competency after a detailed investigation. *Id.*

87. MASS. GEN. LAWS ch. 119, § 29 (granting right to counsel in parental termination cases); MASS. GEN. LAWS ch. 211D, § 9 (authorizing performance standards but not setting forth standards); MASS. GEN. LAWS ch. 215, § 56A (defining GAL role); *In re Georgette*, 785 N.E.2d 356, 362 (Mass. 2003) (stating children in care and protection case unquestionably have right to counsel); MASS. R. JUV. CT. Standing Order 1-93 (4) (ordering appointment of counsel in care and protection cases); *see also* Ross, *supra* note 26, at 1575 (explaining Massachusetts uses separate statutes to delegate rights piecemeal to counsel).

88. *See supra* note 87 and accompanying text (showing various sources of laws and standards); *infra* note 90 and accompanying text (describing standards promulgated under authority of MASS. GEN. LAWS ch. 211D, §9).

89. MASS. R. OF PROF'L CONDUCT R. 1.2 (2004) (mandating loyalty to client).

90. *See* MASS. GEN. LAWS ch. 211D, § 9 (2004) (authorizing creation of performance standards); CPCS STANDARDS, *supra* note 16, § 1.1 (stating attorneys must abide by standards and attorney conduct evaluated against standards); *Georgette*, 785 N.E.2d at 363-64 (discussing standards defining role of counsel).

91. COMMITTEE FOR PUBLIC COUNSEL SERVICES, COMMONWEALTH OF MASS., CERTIFICATION REQUIREMENTS FOR CLIENT REPRESENTATION IN CRIMINAL AND CIVIL CASES 3-4 (1999), available at <http://www.state.ma.us/cpcs/certreqs/civilreq.htm> [hereinafter CERTIFICATION REQUIREMENTS] (requiring attorneys complete training before gaining eligibility to accept assignments). For trial work, an attorney must complete a five-day course and work with an assigned mentor. *Id.* To maintain certification, the attorney must annually complete eight hours of continuing legal education. *Id.* at 4. For appellate work, an attorney must have trial certification, complete a one-day appeals course, have at least two years of state intervention experience or significant appellate experience, and have strong research and writing skills. *Id.* at 4-5.

92. *Georgette*, 785 N.E.2d at 363-64 (stating applicable trial standards "apparently" 1993 version and CPCS adopted new standards in 1999).

93. CPCS STANDARDS, *supra* note 16, §§ 1.1-1.6 (developing client-directed attorney's role). The

client the same representation as an adult client.⁹⁴ The Standards recognize that children have varying degrees of capacity, and that the attorney must represent the child's preferences in a developmentally appropriate fashion.⁹⁵ The CPCS Standards categorize children into three groups based on their decision-making ability, and prescribe a method for advocating the child's preferences depending on these classifications.⁹⁶ The classifications reflect the fact that not all children can make well-reasoned decisions, and mandate a different type of client-directed advocacy for those clients who cannot make such decisions.⁹⁷

The attorney must first establish if the child can verbalize a preference, and if so, the attorney must then determine if the child can make an informed decision.⁹⁸ If the attorney determines the child can make an informed decision, the attorney is bound to advocate the child's expressed preference, even if the attorney feels that the preference is not in the child's best interests.⁹⁹ The CPCS Standards expressly forbid requesting the appointment of a GAL to represent a best interests position for a competent child, stating that such request contradicts the Massachusetts Rules of Professional Conduct.¹⁰⁰ If the attorney believes the child cannot make an informed decision, he must determine whether the preference is reasonably harmless or potentially harmful to the child.¹⁰¹ If he determines the child's position is reasonably harmless, the

Standards require the attorney to counsel and explain the representation in a developmentally appropriate manner, initiate and maintain contact with the child, and represent the child in all proceedings. *Id.*

94. CPCS STANDARDS, *supra* note 16, § 1.1(d) (stating attorney has duties of confidentiality, zealous advocacy, and loyalty to child). The attorney is to advocate the child's position even if another party, such as parent's counsel, advocates the child's views as part of that party's advocacy. *Id.* § 1.1(d) cmt.

95. CPCS STANDARDS, *supra* note 16, § 1.6 (describing methods of determining child's preference and ability to make reasoned decisions).

96. CPCS STANDARDS, *supra* note 16, § 1.6(b)–(d) (categorizing based on general decision-making ability and individual decision); *see infra* notes 99, 103–104 and accompanying text (discussing attorney's role based on determination of child's capacity).

97. CPCS STANDARDS, *supra* note 16, § 1.6(d) cmt. (describing degrees of competence and appropriate corresponding advocacy). The Standards recognize that a child may be competent to direct some matters in the representation but not all matters. *Id.* § 1.6(b) cmt. The Standards caution that a child's competence may change over the course of the representation, so that a child who originally lacked the ability to direct the attorney may gain such an ability. *Id.*

98. CPCS STANDARDS, *supra* note 16, § 1.6(b) cmt. (listing child's reasoning and understanding of consequences as factors in attorney's determination of child's competency). The determinative factor in assessing the child's decision-making ability is the quality of the child's decision-making process, not whether the preference is in the child's best interests. *Id.*

99. CPCS STANDARDS, *supra* note 16, §§ 1.1(d), 1.6(b) cmt. (noting presumption of capacity and duty to advocate client's position). After determining that the client is capable of making reasonable decisions, the attorney may not advocate a position other than the child's expressed preference. *Id.* § 1.6(b) cmt. The attorney may counsel the child about potential consequences of her decision, but the attorney is bound to the child's choice, even when the attorney feels it is not a wise decision. *Id.*

100. CPCS STANDARDS, *supra* note 16, § 1.6(b) cmt. (stressing attorney may not advocate best interests approach nor request GAL to do same).

101. *See infra* note 102 and accompanying text (discussing risk of substantial harm to client in determining attorney's course of conduct). The attorney may seek the appointment of a GAL, among other methods of protective action, when he reasonably believes the client is incompetent to direct representation and that the

attorney must follow that expressed preference.¹⁰² If, however, the attorney believes the preference is potentially harmful to the child, he may choose one of four courses of conduct.¹⁰³ The attorney may: (1) advocate the child's expressed preference; (2) advocate the child's expressed preference and request a GAL to perform a best interests role; (3) communicate the child's preference to the court and request assistance of a GAL in the representation; or, (4) communicate the expressed preference to the court and separately determine and advocate what the child would choose if the child was able to make an informed decision.¹⁰⁴ The attorney may not, however, appoint a co-counsel to the case.¹⁰⁵ The legislature prohibits such appointment by restricting the CPCS budget and mandating that CPCS provide only one attorney for any party in a child welfare case.¹⁰⁶

By denying the ineffective assistance of counsel claim in *Georgette*, the Massachusetts Supreme Judicial Court affirmed counsel's decision to advocate against the client's expressed preference where counsel felt the client's expressed wishes were not in their best interests.¹⁰⁷ Although the court justified its ruling by stating counsel could not have swayed the court to place the clients with their father, the court did not admonish counsel for acting as a GAL instead of an attorney.¹⁰⁸ Instead, the court discussed various standards, including Michigan's statutory approach, and requested revision to the

client is at risk of substantial harm. MASS. R. OF PROF'L CONDUCT R. 1.14(b).

102. CPCS STANDARDS, *supra* note 16, § 1.6(d) (basing standard on Rule 1.14 of Massachusetts Rules of Professional Conduct). Rule 1.14 only permits protective action when a client is at risk of substantial harm. MASS. R. OF PROF'L CONDUCT R. 1.14(b).

103. CPCS STANDARDS, *supra* note 16, § 1.6(d) (listing attorney's options when child verbalizes preference attorney believes harmful to child). Though the attorney may counsel the child about his decision and its consequences, the attorney must not impress her view on the child. *Id.* § 1.6(a) cmt.

104. CPCS STANDARDS, *supra* note 16, § 1.6(d) cmt. (authorizing traditional representation or method including protective action). The Standards permit the attorney to take protective action when he fears his advocacy could result in substantial harm to the child. *Id.* In an extreme case, the attorney may request a GAL, but if the court does not grant it, he may also act as the GAL. *Id.* Alternatively, the attorney may represent the child through the substituted judgment method, advocating for what the child's preference would be if the child was capable of making a well-reasoned decision. *Id.* The Standards expressly state the substituted judgment method is not a best interests role. *Id.*

105. See *infra* note 106 and accompanying text (pointing to budgetary restrictions limiting one counsel per child, no facts and circumstances determination considered).

106. *One Client, One Attorney Restriction*, CPCS CHILD. & FAMILY LAW NEWSLETTER (Committee for Public Counsel Services, Mass.), Summer 2003, at 6 [hereinafter CPCS NEWSLETTER] (describing legislative mandate effective July 1, 2003). The legislature only permits CPCS to pay one attorney per client in trial court. *Id.* at 6-7. Any additional counsel must withdraw. *Id.* Neither CPCS nor the judge can waive the restriction. *Id.*

107. *In re Georgette*, 785 N.E.2d 356, 357 (Mass. 2003) (affirming decision to advocate against child's preference); Brief of Amici Curiae Children's Law Center of Massachusetts, Inc. et al. at 7, *In re Georgette*, 785 N.E.2d 356 (Mass. 2003) (No. SJC-8853) (arguing appeals court eliminated right to counsel by impliedly condoning attorney's conduct).

108. *Georgette*, 785 N.E.2d at 361 (stating no amount of advocacy could have altered court's decision); Brief of Amici Curiae Children's Law Center of Massachusetts, Inc. et al. at 7, *In re Georgette*, 785 N.E.2d 356 (Mass. 2003) (No. SJC-8853) (arguing appeals court decision blurs roles of attorney and GAL).

Massachusetts rules.¹⁰⁹

The 1999 CPCS Standards were already effective when the *Georgette* court mandated their use in 2003.¹¹⁰ In *In re Flora*,¹¹¹ however, the Massachusetts Appeals Court acknowledged that the appointed counsel may not have known that he was required to adhere to the 1999 Standards because *Flora* preceded the 2003 *Georgette* decision.¹¹² In *Flora*, the court terminated parental custody after Flora's counsel did not express her client's preference or advocate her client's desire to maintain contact with her mother.¹¹³ The Massachusetts Appeals Court held that counsel's failure to communicate his client's objectives influenced the judge's decision.¹¹⁴ The judge was forced to terminate parental custody because there was no evidence that Flora wished to remain in contact with her mother.¹¹⁵ The appeals court stated that the court was "influenced" by the 1999 CPCS Standards, even if counsel was unaware of them, and remanded the case for reconsideration with a focus on Flora's preference.¹¹⁶

B. Michigan

In 1998, Michigan enacted a two-lawyer system of representation, codifying both a client-directed role and a best interests role.¹¹⁷ The system is designed

109. *Georgette*, 785 N.E.2d at 365-68 (discussing local and national standards and scholarly works). The court demonstrated the divergence of opinions on the proper form of children's representation by highlighting CPCS' criticism of the Massachusetts Rules of Professional Conduct, and the Children's Law Center of Massachusetts' criticism of CPCS Standard 1.6 entitled Determining and Advocating the Child's Position. *Id.* at 367.

110. *Georgette*, 785 N.E.2d at 368 (noting 1999 CPCS Standards in effect until committee reports and court approves new rules).

111. 801 N.E.2d 806 (Mass. App. Ct. 2004).

112. *Flora*, 801 N.E.2d at 809-10 (justifying appointed counsel's performance). The 1993 CPCS Standards were effective until replaced by the 1999 CPCS Standards, which were published in the CPCS Assigned Counsel Manual. *Georgette*, 785 N.E.2d at 364-65. Therefore, the 1999 Standards were already in effect when the Supreme Judicial Court mandated their use in the 2003 *Georgette* decision. *Id.* at 363, 368. The *Flora* court ultimately ruled by reliance on the 1999 Standards, but suggested that the Standards did not have the force or notoriety at Flora's trial in 2002 that they subsequently gained in 2003 due to the *Georgette* decision. *Flora*, 801 N.E.2d at 807, 809-10.

113. *Flora*, 801 N.E.2d at 810 (noting child not called as witness and no evidence of mother-daughter bond presented).

114. See *infra* notes 115-116 and accompanying text (suggesting judge would have found differently if presented with child-client's preferences).

115. *Flora*, 801 N.E.2d at 810-11 (stating judge made no mention of documented good relationship in his findings). The appeals court stated the importance of expressing a child's voice on a judge's decision: "We have grave doubts whether the judge would have made his findings as to visitation and removal if Flora's counsel, in accordance with the standards of the Committee for Public Counsel Services, had brought to the fore the evidence which reflected her wishes." *Id.* at 811.

116. *Id.* at 810-12 (using CPCS Standards, but not treating as authoritative). The appeals court instructed the trial court to seek, on remand, the child's opinion on visitation as well as termination. *Id.* at 812. Additionally, in an adoption case, the court must elicit the child's wishes. MASS. GEN. LAWS ch. 210, § 2 (2004) (stating twelve-year-old must give written consent to adoption).

117. MICH. COMP. LAWS § 712A.13a (2004) (defining terminology and roles in children's representation); *id.* § 712A.17d (listing duties of lawyer-GAL); Duquette, *supra* note 18, at 444-45 (congratulating Michigan

to provide zealous advocacy for both the child's best interests and stated preference.¹¹⁸ Under the two-lawyer system, the state automatically appoints one person as a combined lawyer-GAL to each protection case, and prohibits waiver of the assistance of the lawyer-GAL.¹¹⁹ A traditional attorney may later be appointed in the event of conflict between the child's wishes and the lawyer-GAL's best interests determination.¹²⁰ The statute expressly defines the lawyer-GAL role, but does not enumerate the later-appointed, traditional attorney's responsibilities.¹²¹ In the case of *In re AMB*,¹²² the Michigan Appeals Court dismissed this problem by proclaiming that the statute describes the minimum standards of representation, and not the pinnacle of attorney-client relationships.¹²³ The court reasoned that an attorney representing a client in a potentially life altering proceeding would provide effective assistance of counsel, or else the right to counsel would be an empty concept.¹²⁴

The statute expressly states that the lawyer-GAL's duty is to the child, and the attorney-client privilege binds the lawyer-GAL.¹²⁵ Instead of merely labeling the lawyer-GAL as a best interests advocate, the statute catalogs the duties that the representative must perform to ascertain and serve the child's best interests.¹²⁶ The lawyer-GAL is specifically charged with explaining his role to the child-client, investigating through interviews, meeting with the child before each proceeding, assessing the child's needs at each proceeding, attending each proceeding, filing motions, calling witnesses, and monitoring the implementation of court-ordered plans for the child.¹²⁷ The lawyer-GAL determines and advocates the child's best interests, but must also communicate the child's expressed preference to the court if it differs from the lawyer-GAL's best interests determination.¹²⁸

for passing dual role statute).

118. See Duquette, *supra* note 18, at 441, 459 (describing two-lawyer system as aggressive representation).

119. MICH. COMP. LAWS § 712A.13a(1)(f) (appointing lawyer-GAL); see *In re Gwyn*, Nos. 248220, 248221, slip op. at 2 (Mich. App. Ct. Dec. 23, 2003) (stating appointment of lawyer-GAL not discretionary for court or party); see also Duquette, *supra* note 18, at 460-61 (explaining court must appoint GAL first or else attorney would violate confidentiality by requesting GAL).

120. MICH. COMP. LAWS § 712A.17d(2) (discussing circumstances under which court may appoint attorney). But see Duquette, *supra* note 18, at 462 (suggesting lawyer-GAL should request attorney instead of ceding to court's discretion).

121. See MICH. COMP. LAWS § 712A.13a(1)(b) (devoting only one paragraph to attorney role); Duquette, *supra* note 18, at 458 (justifying lack of defined role by stating attorney owes child same legal duties as adult).

122. 640 N.W.2d 262 (Mich. App. Ct. 2001).

123. *AMB*, 640 N.W.2d at 306 (stating lawyers may have additional duties to clients beyond parameters of statute). The court notes the statute may be used to determine the effectiveness of counsel's assistance. *Id.* at 306 n.191.

124. *Id.* at 305-06 (stating client has right to effective representation whether adult or child).

125. MICH. COMP. LAWS § 712A.17d(1)(a) (2004) (describing obligations and role of lawyer-GAL).

126. *Id.* § 712A.17d(1)(a)-(k) (mandating minimum actions in court, meetings with child and continuous assessment of child and case).

127. *Id.* (listing minimum obligations of lawyer-GAL).

128. *Id.* § 712A.17d(1)(h), (2) (suggesting consideration of child's wishes in best interests determination and mandating disclosure to court); see Duquette, *supra* note 18, at 459 (noting no disclosure required when

In the event of conflict, the lawyer-GAL does not request appointment of a separate attorney, rather the court decides whether to appoint a separate attorney based on the conflict, as well as the child's age and maturity.¹²⁹ The court may refuse to appoint separate counsel if the child's view is expressed by another party.¹³⁰ In the case of *In re C.H.*,¹³¹ the lawyer-GAL informed the court of the child's preference to return to her family, but vigorously advocated for termination of parental custody.¹³² The Michigan Appeals Court affirmed the trial court's refusal to appoint separate counsel because caseworkers, petitioners' counsel and respondents' counsel had zealously advocated the child's position.¹³³

C. Minnesota

Minnesota enacted a comprehensive statute that addresses rights to counsel and GAL for parents and children in a variety of proceedings, ranging from truancy to marriage dissolution.¹³⁴ In dependency and protection cases, the statute requires automatic appointment of a GAL to every child, and automatic appointment of counsel to children aged ten or older.¹³⁵ The statute prohibits the child's counsel from also serving as that child's GAL.¹³⁶ The GAL does not have to be an attorney, and is charged with representing the best interests of the child.¹³⁷ Minnesota values the child's voice, finding it imperative in obtaining a just result, however, Minnesota relies on the GAL to communicate the child's voice.¹³⁸ While state law mandates the appointment of a GAL to each child in an abuse or neglect case, twenty percent of Minnesota children in these cases do not have a GAL appointed to them due to fiscal constraints.¹³⁹ The statute contains a confidentiality provision that governs the GAL, but also

disclosure betrays confidentiality).

129. Duquette, *supra* note 18, at 462-63 (highlighting court's discretion and noting low number of attorneys actually appointed). The legislature had fiscal concerns when drafting the statute, and codified the discretionary judicial role instead of allowing dual appointments for every child. *Id.*

130. *In re C.H.*, Nos. 243186, 243208, slip op. at 1 (Mich. App. Ct. Apr. 24, 2003) (emphasizing appointment of separate counsel discretionary).

131. *In re C.H.*, Nos. 243186, 243208, slip op. (Mich. App. Ct. Apr. 24, 2003).

132. *Id.* at 1 (noting lawyer-GAL informed court of child's position while advocating against it).

133. *Id.* at 1 (concluding separate counsel unnecessary due to facts). The decision of whether to appoint separate counsel is discretionary, and the appeals court found no abuse of discretion where the child's voice was heard through the caseworkers and other parties' counsel. *Id.*

134. MINN. STAT. § 260C.163(3)(a)-(e) (2003) (delineating right to counsel in different proceedings); 2004 MINN. LAWS 260C.163 (amending truancy sections of statute).

135. MINN. STAT. § 260C.163(3)(a)-(e), 5(a)(identifying GAL and counsel's rights).

136. *Id.* § 260C.163(3)(d) (barring counsel from also serving as GAL).

137. *Id.* § 260C.163(5)(a), (b)(1)-(5) (defining role of GAL, and permitting representation for GAL).

138. *In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 5-6 (Minn. 2003) (emphasizing importance of hearing child's voice).

139. Judson Haverkamp, *Lean Times for Minnesota Courts*, 60 BENCH & B. MINN. 17, 18 (Apr. 2003) (quoting data reported by Chief Justice Kathleen Blatz). Chief Justice Blatz cited this statistic in a letter to the legislature seeking additional funding so that children could have a voice in the courtroom. *Id.*

contains a large exception permitting disclosure in order to fashion a best interests solution.¹⁴⁰ The Minnesota statute lists the duties and responsibilities of the GAL, but does not define the duties of counsel.¹⁴¹

The statute entitles a child who is old enough to express a preference and is not represented by counsel, to communicate that preference in the court proceeding.¹⁴² Considering that all children aged ten or older are entitled to counsel, this suggests children younger than ten may have reasonable views to express to the court regarding their placement preferences.¹⁴³

D. Connecticut

In Connecticut, statutory law mandates the Probate Court to appoint a traditional attorney in every child abuse and neglect case, but grants the court discretion to appoint a separate GAL.¹⁴⁴ An appointed GAL must be knowledgeable about children's needs, but need not be an attorney.¹⁴⁵ The GAL is supposed to make a best interests determination, even though it may be different from the child's perspective advocated by the attorney.¹⁴⁶ When such a conflict arises, the court has discretion to decide whether the conflicting advocacy serves the child's best interests.¹⁴⁷ As the court ultimately decides the issue based on the child's best interests, the conflicting advocacy may reveal more about the child and his life than either single GAL or attorney representation could provide.¹⁴⁸ Often, however, the attorney role and GAL role blur together because Connecticut law has not expressly defined the parameters of these roles.¹⁴⁹

140. MINN. STAT. § 260C.163(5)(b)(3) (2003) (balancing duty of confidentiality and best interests).

141. *Id.* § 260C.163(3)(a), (5)(a)-(e) (indicating right to effective assistance of counsel, but not defining effective assistance).

142. *Id.* § 260C.163(3)(e) (permitting child of reasonable age to express preference, but reserving determination for court).

143. *Id.* § 260C.163(3)(b)-(e) (granting counsel to children ten and older and allowing children without counsel to express preference).

144. *See* CONN. GEN. STAT. § 45a-132(b) (2003) (stating appointment of GAL not mandatory); *id.* § 45a-620 (mandating attorney appointment and allowing court discretion to appoint different person as GAL); *Ireland v. Ireland*, 717 A.2d 676, 688 (Conn. 1998) (proclaiming child's attorney should provide same representation to child as unimpaired adult).

145. CONN. GEN. STAT. § 45a-620 (outlining qualifications of GAL).

146. *See Ireland*, 717 A.2d at 688 (clarifying child's attorney argues on behalf of client based on evidence and law); *Schult v. Schult*, 699 A.2d 134, 140-41 (Conn. 1997) (concluding attorney and GAL may advocate conflicting positions with court permission because court final arbiter); *Newman v. Newman*, 663 A.2d 980, 987-88 (Conn. 1995) (contrasting attorney's role as child advocate with GAL's role in determining best interests).

147. *In re Tayquon H.*, 821 A.2d 796, 803 (Conn. App. Ct. 2003) (discussing Connecticut courts' methods in determining best interests when both attorney and GAL appointed). The *Tayquon H.* court noted that conflicting advocacy may provide the judge with a larger and clearer picture of child's situation and the child's expressed preference in this context. *Id.* at 803 n.9.

148. *See id.* at 803 & n.9 (noting judge's decision on how child best represented).

149. *Id.* at 803 (stating often no bright-line exists between attorney and GAL functions). The *Tayquon H.* court cited the lack of relevant jurisprudence as the cause of the role confusion, and emphasized the high

Under Connecticut General Statutes Chapter 815T, Juvenile Matters, the legislature has promulgated a different attorney and GAL scheme.¹⁵⁰ Under this approach, the court appoints a hybrid attorney-GAL to represent both the child's legal rights and best interests.¹⁵¹ The representative must adhere to the Connecticut Rules of Professional Conduct.¹⁵² When the representative determines that his view of the child's best interests conflicts with the child's wishes or legal rights, he must alert the court, and the court must appoint a separate GAL.¹⁵³

In marital dissolution cases, Connecticut statutory law permits the appointment of counsel for minors, but case law has characterized the counsel's role as a hybrid attorney-GAL.¹⁵⁴ In *Carrubba v. Moskowitz*,¹⁵⁵ the court reasoned that the roles of attorney and GAL are often blurred because the attorney is court-appointed and has a responsibility to determine the child's position, and not to merely repeat the child's unguided wishes.¹⁵⁶ The *Carrubba* court announced qualified immunity for attorneys serving in this hybrid capacity, reasoning that such attorneys must exercise discretion in formulating the child's representation, and the threat of a potential suit would compromise the representation.¹⁵⁷

quality of work performed by under-paid court-appointed attorneys and guardians ad litem. *Id.*

150. CONN. GEN. STAT. § 46b-129a (2003) (appointing hybrid representative). Connecticut General Statute § 46b-129a applies to petitions for neglected and dependent children. *Id.*

151. *Id.* § 46b-129a (declaring counsel shall also act as GAL, but follow Rules of Professional Conduct); *Tayquon H.*, 821 A.2d at 804, 806 (noting frequent overlap of legal rights and best interests though distinct concepts). The court defines best interests as human needs of "psychological, emotional and physical well-being," while legal rights are the right to be involved and represented in the proceeding. *Tayquon H.*, 821 A.2d at 806.

152. *Tayquon H.*, 821 A.2d at 804 (charging representative with advocacy for child). The court emphasized that a child of sufficient age may direct the representation, and that the attorney is bound to advocate for the child's objectives in the representation. *Id.* at 804, 806.

153. CONN. GEN. STAT. § 46b-129a (specifying former dual representative may continue as counsel but not as GAL); *In re Tayquon H.*, 821 A.2d 796, 804 (Conn. App. Ct. 2003) (explaining statute prohibits any person who served both roles from continuing as GAL). In the event separate representatives serve as GAL and as attorney, both representatives are to respect each other's traditional roles; an attorney is not to testify, and a GAL is not to file briefs. *Tayquon H.*, 821 A.2d at 806.

154. CONN. GEN. STAT. § 46b-54 (2004) (allowing counsel to speak child's view as long as in child's best interests); *Carrubba v. Moskowitz*, 840 A.2d 557, 565 (Conn. App. Ct. 2004) (reasoning attorney often forced to identify child's preferences and therefore exhibits GAL qualities), *cert. granted*, 847 A.2d 310 (Conn. 2004).

155. 840 A.2d 557 (Conn. App. Ct. 2004).

156. *Id.* at 562-63 (stating court-appointed attorney retains allegiance to court as well as child due to appointment). The court reasoned that the attorney's role uncovers possible instances of a child not reporting her honest views either because she is unable or is worried about disappointing a parent, and therefore, the attorney must use his discretion to determine the child's best interests. *Id.* at 564-65.

157. *Id.* at 561, 564-66 (concluding hybrid entitled to same immunity as prosecutor and such immunity fosters competent representation). The Connecticut Supreme Court recently granted certiorari to determine whether qualified immunity is proper. *Carrubba v. Moskowitz*, 847 A.2d 310, 310 (Conn. 2004).

IV. ANALYSIS

Massachusetts should enact a comprehensive statute that defines the roles of the attorney and GAL in children's representation.¹⁵⁸ Although the Massachusetts Supreme Judicial Court delegated the drafting of new rules to the Standing Advisory Rules Committee on the Rules of Professional Conduct, children's unique issues deserve more attention than a mere grouping in a general diminished-capacity rule.¹⁵⁹ A statute is needed to clarify procedure as well as substance of children's representation, thus illuminating understanding of the attorney's role and making representation more efficient.¹⁶⁰ As the *Georgette* court noted, although the CPCS Standards were in effect at the time of the trial, the court did not evaluate counsel's conduct against these standards.¹⁶¹ The *Flora* court also exposed that the CPCS Standards are not authoritative by stating that it was "influenced" by the Standards, not bound by them.¹⁶² Furthermore, the court excused *Flora*'s attorney from his failure to adhere to the CPCS Standards even though they were in effect, treating the Standards as if it was a hidden code of conduct.¹⁶³

In *Georgette*, the Supreme Judicial Court clarified that Massachusetts is in dire need of new children's representation standards, yet it did not expressly state which method of representation it would prefer.¹⁶⁴ The court requested that the Standing Advisory Committee review all standards, relevant professional opinions and scholarly pieces, thus indicating it would welcome a significant change to the Massachusetts system of children's representation.¹⁶⁵ As Massachusetts has already progressed from a best interests role, to substituted judgment, to the current client-directed standards, it appears that the pendulum is moving back to a best interests approach, or that Massachusetts may be ready to adopt a combined best interests and client-directed system.¹⁶⁶

158. See *supra* Part III.B (discussing Michigan's all-inclusive statute).

159. See *supra* note 13 and accompanying text (stating court delegated drafting of reform to Standing Advisory Committee on Rules of Professional Conduct); *supra* note 65 and accompanying text (discussing children's need for separate rules).

160. See *supra* notes 123, 125-127 and accompanying text (describing Michigan's statute expressly defining roles and duties, and setting minimum standards of conduct).

161. See *In re Georgette*, 785 N.E.2d 356, 361 (Mass. 2003) (announcing court's holding focused on father's unfitness rather than attorney's actions).

162. See *In re Flora*, 801 N.E.2d 806, 810-12 (Mass. App. Ct. 2004) (choosing to follow Standards while stating not bound to follow them); *supra* note 112 and accompanying text (discussing court recognized CPCS Standards, but accorded more weight to Standards after *Georgette* court's instruction).

163. *Flora*, 801 N.E.2d at 809-10 (forgiving attorney's ignorance of Standards because court had yet to mandate use).

164. See *supra* note 109 and accompanying text (discussing court's request for new standards and instruction to review existing standards and scholarly pieces).

165. *Georgette*, 785 N.E.2d at 367-68 (requesting clarification of children's representation by review of all views, models, and current practice standards).

166. See CPCS STANDARDS, *supra* note 16, § 1.6(d) cmt. (allowing counsel to choose substituted judgment role when child cannot make reasoned decision); *supra* notes 13, 104, 107 and accompanying text (discussing past best interests approach, current CPCS substituted judgment, client-directed approach, and *Georgette*).

The 1999 CPCS Standards are a client-directed model, but also include elements of a combined best interests and client-directed approach.¹⁶⁷ The Standards recognize the range of an individual child's competency, and how the child may be able to direct some issues in the representation, but not all issues.¹⁶⁸ The Standards also instruct the attorney to understand the best interests role while continuing to guarantee the child's voice is heard.¹⁶⁹

The CPCS Standards provide attorneys with detailed instructions on counseling children in a developmentally appropriate manner, and warnings for not over-impressing the attorney's view on the child.¹⁷⁰ These instructions are similar to instructions in the Abuse and Neglect Standards, and function as guidelines for soliciting the child's view and preserving the child's direction while also counseling the child on the consequences of their decisions.¹⁷¹ The CPCS Standards also provide counsel with a framework for determining the child's decision-making ability by focusing on the child's reasoning processes rather than on the decision itself.¹⁷² Similar to the NACC Recommendations, the CPCS Standards require attorney training and mandate that attorneys meet the child, maintain contact, explain all proceedings, respect confidentiality, and continue as the attorney until the matter is resolved.¹⁷³

While the CPCS Standards contain many elements that the new statute should preserve, the CPCS Standards fall short when an attorney determines the child cannot make an adequately reasoned decision and the child has chosen an objective that the attorney feels could be harmful to the child.¹⁷⁴ The Standards allow the attorney four options in this situation, but the options authorize a

167. See *supra* note 94 and accompanying text (stressing duties of zealous advocate); *supra* note 97 and accompanying text (recognizing child may direct representation on some issues); *supra* note 103 and accompanying text (discussing proper counseling of child during decision-making process).

168. CPCS STANDARDS, *supra* note 16, §§ 1.1(d), 1.6(b) cmt., 1.6(d) cmt. (discussing factors in determination of child's capacity).

169. See *supra* note 47 and accompanying text (stating attorney must understand best interests role because other actors in case adhere to it); *supra* notes 98, 104 and accompanying text (explaining attorney must formulate best interests opinion to counsel child but must still advocate client's choice).

170. See *supra* notes 95, 103 and accompanying text (discussing elements tailored to children's representation).

171. See ABUSE & NEGLECT STANDARDS, *supra* note 2, § A-3 & cmt. (defining and describing "developmentally appropriate"); ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-3 & cmt. (acknowledging range in child's capacity and how child may direct some of his representation); CPCS STANDARDS, *supra* note 16, § 1.6(a) & cmt. (directing attorney to enable child's maximum input in representation and suggesting methods of counseling child).

172. See CPCS STANDARDS, *supra* note 16, § 1.6(b) cmt. (discussing evaluation of child's reasoning as factor instead of solely evaluating child's final decision).

173. See CPCS STANDARDS, *supra* note 16, §§ 1.1-1.6 (listing attorney's responsibilities in representation); CERTIFICATION REQUIREMENTS, *supra* note 91, at 3-4 (explaining CPCS requires certification and continuing legal education in order to accept cases); NACC RECOMMENDATIONS, *supra* note 4, at 4-5 (suggesting effective representation must meet children's specific worries and needs).

174. See CPCS STANDARDS, *supra* note 16, § 1.6(d) (listing attorney's varied options in ethically difficult situation); *supra* note 109 and accompanying text (noting criticism of CPCS Standard 1.6).

broad range of advocacy that could create role confusion.¹⁷⁵ The attorney is permitted to: represent the expressed preference; request a GAL to make a best interests evaluation; inform the court of child's preference and request a GAL to assist in the representation; or, inform the court of the child's preference and advocate based on substituted judgment.¹⁷⁶ While the CPCS Standards as a whole provide clarity to the attorney, in this area of utmost ethical difficulty, the attorney is left without guidance and permitted to conduct either best interests or client-directed advocacy.¹⁷⁷

Michigan's statute eliminates such role confusion by defining the role and duties of the lawyer-GAL, and addressing the proper course of conduct in cases of conflict.¹⁷⁸ The statute does not impose a cookie-cutter approach to advocacy, but rather acts as a minimum guide for effective representation and allows the child two representatives, if needed.¹⁷⁹ While Michigan does combine the roles of attorney and GAL, the lawyer-GAL does not experience the difficulties of a hybrid attorney because of the statutorily-defined role.¹⁸⁰

The Michigan system provides the child-client with a lawyer-GAL bound to the attorney-client privilege, but this lawyer-GAL is also charged with independently determining and advocating the client's best interests.¹⁸¹ Although proponents of Michigan's two-lawyer system claim that ethics require that the best interests role come before the traditional attorney role, this approach is equally flawed because the child is not guaranteed her voice will be heard.¹⁸² Although the competency of a child will influence the lawyer-GAL, the child-client remains aware that the attorney actually represents her best interests rather than her voice.¹⁸³

The two-lawyer system provides flexibility that neither the traditional client-directed nor best interests approaches offer.¹⁸⁴ The obvious disadvantage to a

175. See *supra* notes 102-103 and accompanying text (creating four options without corresponding guidance).

176. CPCS STANDARDS, *supra* note 16, § 1.6(d) (listing range of options from ignoring harm to substituted judgment).

177. Compare CPCS STANDARDS, *supra* note 16, §§ 1.1(d), 1.6(b) (setting forth strict role definition for attorney when child can direct representation), with *id.* § 1.6(d) (permitting attorney to choose client-directed, substituted judgment or best interests approach).

178. See *supra* notes 117, 120, 125 and accompanying text (defining role of lawyer-GAL and stating role remains same even in conflict).

179. See *supra* note 120 and accompanying text (noting court appoints second lawyer where necessary); *supra* note 123 and accompanying text (describing statutory approach as minimum level of representation).

180. See MICH. COMP. LAWS §§ 712A.13(a), 712A.17(d) (2004) (defining lawyer-GAL's role and subjecting role to attorney-client privilege).

181. *Id.* § 712A.17(d)(1)(a) (detailing duties of lawyer-GAL).

182. See *supra* note 119 and accompanying text (stressing GAL role must come first because confidentiality more important than being heard); cf. *supra* notes 29, 31 (stressing importance of child having attorney who will represent her voice).

183. See *supra* note 40 and accompanying text (emphasizing child's need for voice and child's knowledge of who represents her individual views).

184. See *supra* notes 45-48, 50 and accompanying text (arguing healthy mix of both roles provides

two-lawyer system is the cost increase, which may ultimately deprive children of a voice if the system cannot maintain funding, as seen in Minnesota.¹⁸⁵ Nevertheless, upon implementing a two-lawyer system, Michigan did not experience a significant change in costs because a low number of cases required the appointment of two attorneys.¹⁸⁶ This is important data because Massachusetts currently limits CPCS to one attorney per child and such budgetary constraints could prevent Massachusetts from enacting a two-lawyer system.¹⁸⁷

Connecticut probate practice also provides for two representatives for the child, but in Connecticut, the court automatically appoints the traditional attorney and retains discretion to appoint a GAL.¹⁸⁸ This method preserves the child-client's trust and confidentiality because the attorney represents the child's voice, and may not use information obtained from the child to promote an objective other than the child's.¹⁸⁹ Even where Connecticut appoints a hybrid representative, the court also appoints a separate GAL when the attorney's determination of best interests conflicts with the child's wishes.¹⁹⁰ While the Connecticut Appeals Court announced the protection of qualified immunity for the hybrid attorney serving a minor in a marital dissolution case, the Connecticut Supreme Court recently granted certiorari on the issue of qualified immunity, indicating attorneys may be more accountable to their child-clients.¹⁹¹

Massachusetts' children and attorneys would benefit from a system that combines elements from the CPCS Standards as well as Michigan's and Connecticut's statutory approaches. Similar to Michigan, Massachusetts should enact a statute that clearly defines the roles of the actors in any children's protection case.¹⁹² Like Connecticut, Massachusetts should first appoint a traditional attorney, and supplement the representation with a GAL in conflict situations when the attorney determines that harm to the child could

representation tailored to individual child).

185. See Haverkamp, *supra* note 139, at 18 (stating budgetary restraints frustrate Minnesota's representation model).

186. See Duquette, *supra* note 18, at 462-63 (noting discretionary appointment codified out of fiscal concern, and ultimately resulted in few dual appointments).

187. See CPCS NEWSLETTER, *supra* note 106, at 6 (stating no possibility of waiver by court or CPCS).

188. *Supra* notes 144-146 and accompanying text (detailing Connecticut probate practice).

189. See *supra* notes 144-146 and accompanying text (observing child automatically receives traditional attorney, and contrasting attorney's client-directed role with GAL's role).

190. *Supra* note 153 and accompanying text (discussing Connecticut statute permitting dual-representative to continue as counsel but not GAL after conflict).

191. See Carrubba v. Moskowitz, 840 A.2d 557, 564-66 (Conn. App. Ct. 2004) (concluding hybrid attorney carries immunity and such immunity promotes competent representation), *cert. granted*, 847 A.2d 310 (Conn. 2004); see also Carrubba v. Moskowitz, 847 A.2d 310, 310 (Conn. 2004) (highlighting dynamic point of law in grant of certiorari).

192. See *supra* notes 120, 125-127 and accompanying text (describing Michigan's comprehensive and clear statute).

result from the client-directed advocacy.¹⁹³

Appointing the traditional attorney first comports with Massachusetts' commitment to zealous advocacy for children.¹⁹⁴ Allowing the attorney to request a GAL recognizes a unique facet of children's representation where the child may be in need of guidance.¹⁹⁵ While the request can work against the child's stated wishes, it also has the effect of freeing the attorney to zealously advocate his client's wishes without worrying that he is denying the court relevant evidence necessary to determine the child's best interests.¹⁹⁶ Beyond the bare request for a GAL, the attorney does not violate the child's confidentiality, nor will the attorney share her findings with the GAL, thereby upholding the attorney-client privilege.¹⁹⁷ This version of a two-representative system would also allow Massachusetts to retain much of the 1999 CPCS Standards, including the standards and comments discussing the role and appointment of counsel, scope of the representation, and client communication.¹⁹⁸ Counsel should continue to determine whether the client can make a well-reasoned decision, but under a two-representative system, the attorney could request a GAL instead of switching her advocacy to a substituted judgment or best interests approach.¹⁹⁹

V. CONCLUSION

Representing a child often places an attorney in the unique and difficult position of questioning his role when he believes the child's stated objective is not in her best interests. A comprehensive children's representation statute eliminates attorney role confusion and provides an effective system of representation for both the child and her attorney. By its decision in *Georgette*, the Massachusetts Supreme Judicial Court has opened the door for Massachusetts to enact such a statutory system and effect meaningful change for children and their attorneys.

193. See CONN. GEN. STAT. § 45a-620 (2003) (appointing traditional attorney to each child and GAL where necessary).

194. See *In re Georgette*, 785 N.E.2d 356, 362 (Mass. 2003) (stating children in Massachusetts indisputably have right to counsel in care and protection proceedings).

195. See ABUSE & NEGLECT STANDARDS, *supra* note 2, § B-4 cmt. (stressing attorney must counsel and inform child of relevant information but not overbear child's will); CPCS STANDARDS, *supra* note 16, §§ 1.1(b), 1.6(a) & cmt., 1.6(b) & cmt. (stating child may need guidance due to difficulty of situation).

196. See *supra* note 43 and accompanying text (criticizing client-directed approach for risking harm to child by not informing court of danger).

197. See *supra* notes 29, 40 and accompanying text (stressing importance of child having and trusting own advocate); cf. Duquette, *supra* note 18, at 462 (stating GAL request violates confidentiality and loyalty because works against child's position). But see Carrubba v. Moskowitz, 840 A.2d 557, 562-63 (Conn. App. Ct. 2004) (describing Connecticut attorney as having allegiance to court due to appointment), *cert. granted*, 847 A.2d 310 (Conn. 2004).

198. See CPCS STANDARDS, *supra* note 16, §§ 1.1-1.3, 1.5 (describing performance requirements).

199. See *supra* notes 98, 103-104 and accompanying text (describing attorney's options for representation upon determining child cannot adequately reason and position potentially harmful).

Massachusetts should enact a two-lawyer system of representation that appoints a traditional attorney to each child, and if needed, later appoints a GAL to represent the child's best interests. This system provides the child with both a voice and with guidance: the child has a voice through an attorney who is bound to represent her objectives and respect her confidentiality, and the child is also protected and guided by a GAL when the attorney reasonably believes that the child cannot make an adequately reasoned decision. Massachusetts takes pride in its commitment to children's right to counsel; however, it is an empty commitment unless accompanied by a system of representation that strives to ensure effective children's advocacy.

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