The Role of Children's Counsel: Where do we go from here?

By Anna Loparco

The role of children's counsel has evolved over the years since the inception of the Legal Representation for Children and Youth Program ("LRCY") through the Office of the Child and Youth Advocate ("OCYA"). Counsel have operated under two sets of guidelines with different terminology (one set provided by the Law Society of Alberta and one set provided by the OCYA) (collectively "Guidelines"). This has resulted in some confusion and judicial criticism. In addition, there have been numerous ethical and legal concerns raised in respect of the lack of congruence between the Guidelines, the Rules of Court and the Professional Code of Conduct.

The LRCY Program has undertaken a study of the various guidelines in Canada and the US, consulted with a number of judges and lawyers who have extensive experience with child protection and private custody matters, and reviewed relevant jurisprudence and academic articles. This paper outlines the current practice, the criticisms and concerns arising from the practice, and concludes with recommending changes with a view to modernizing and streamlining the Guidelines for child protection proceedings.

In most cases, the existing practice works well and will continue, but with some conceptual modifications. LRCY fully endorses Article 12 of the UN Convention on the Rights of the Child, which states that children capable of forming a viewpoint ought to have a voice in matters affecting them. Therefore, if a child is able to instruct counsel, counsel will take instructions directly from the child. However, if the child does not have that ability, then the recommended change to LRCY's policy is to require the appointed lawyer to fully examine the child's **interests and entitlements** and to present evidence and act in accordance with a position that honours the most favourable outcome for the child. Counsel will no longer chose to take a best interests or an *amicus curiae* role.

You are invited to send your comments and feedback on the proposals to: anna.loparco@dentons.com

1. Current Guidelines

(a) Background

Children involved in child protection and family law proceedings are entitled to be represented by counsel. While a child's right to counsel in family law proceedings is generally at the discretion of the parties and/or the Court, when a child is involved in child protection proceedings in Alberta, the Office of the Child and Youth Advocate has the authority to appoint counsel for that child at its discretion. Provisions for the legal representation of children affected by child protection proceedings are found in s. 112 of the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 ("CYFEA"). The Office of the Child and Youth Advocate administers the Legal Representation for Children and Youth Program ("LRCY"), which is an office set up pursuant to the powers in section 9(2)(c) of the *Child and Youth Advocate Act*, SA 2011, c C-11.5 ("CYAA") for the purpose of appointing lawyers to children and youth receiving designated services. LRCY has the sole authority to establish policies and procedures relating to the scope of a lawyer's appointment, training, and expectations, service standards and any decisions relating to the selection of lawyer for any particular matter. While the Provincial Court of Alberta has the authority to direct an appointment of counsel for a child under section 112 of CYFEA, all such Orders by the Provincial Court should be referred to the Child and Youth Advocate with no additional direction or terms. LRCY's authority to appoint counsel is separate and independent of the section 112 referral Order of the Provincial Court of Alberta.

In order to provide guidance to lawyers who represent children in the context of child protection and family law proceedings, both LRCY and the Law Society of Alberta drafted Guidelines: "LRCY Guidelines on the Role of Counsel" ("LRCY Guidelines") and "Law Society of Alberta Guidelines for Representing Children" ("LSA Guidelines") (collectively referred to as "the Guidelines"). The LSA Guidelines have since been removed from the Law Society website.

We have been advised that the Law Society has no intention of replacing the Guidelines. It is therefore imperative that LRCY address the concerns that have been raised with respect to the existing Guidelines in an effort to harmonize them with the Code of Professional Conduct and other key legal and ethical principles. We intend to conduct final consultations with counsel in the next few months. The following analysis compares the provisions in both Guidelines. Our hope is that any changes, once approved, will result in user-friendly, streamlined and modernized Guidelines going forward.

(b) General Principles

A fundamental premise of child representation is to ensure the child's voice is heard. The United Nations *Convention on the Rights of the Child* (the "Convention") states:

> 1. Parties shall assure to the child who is capable of forming his or her own views that right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law ((1989) 28 I.L.M. 1456 at art. 12).

In keeping with the Convention, both the LSA Guidelines and the LRCY Guidelines proceed on the basis that lawyers can, and should, act on the instructions of children where possible. This should remain a fundamental principle.

2. Concerns Arising out of the Interpretation and Implementation of the Current Guidelines

Due to the confusion caused by two sets of Guidelines, in addition to the lack of consistency in their application and in some cases, contradiction with the Code of Conduct of the Law Society and the Rules of Court, a number of concerns have been raised by the judiciary and the bench. It is clear that modernization and simplification of the Guidelines is required.

LRCY's review of these matters demonstrates that the concerns with respect to the representation of children are valid; the recommendations must, however, also address special ethical and liability concerns that arise with respect to the representation of children.

(a) Criticism of the Instruction-Based Role by the Court

Many concerns were raised by Judge Cook-Stanhope in *B.L.S. (Re)*, [2013] AJ No 459. In *B.L.S.*, Judge Cook-Stanhope reviewed the role of counsel and questioned whether counsel could have taken an instructional role for 4 of the 5 children represented. The written decision makes a number of observations in *obiter* and suggests a revision of the Guidelines. In summary, Judge Cook-Stanhope makes the following observations and recommendations:

- There is a huge difference between the *wants* of a child and that child's *capacity* to understand the implications of getting what they want. Capacity must also extend to an *ability* to then give instructions in the context of legal proceedings;

- Although the Commentary to Rule 2.02(12) suggests an objective basis for assessing capacity, the LSA Guideline 3 is unhelpful. It states that it is the responsibility of the lawyer to assess each child's ability to express a preference, opinion, or position within the context of the legal proceedings and specific issues to be determined;

- It is misleading to state as a principle that a child has capacity "when a child is able to 'articulate a preference, opinion, or position'" (LSA Guideline 3.1). The articulation of a preference, opinion, or position must be contextual and must import both objective and subjective considerations;

- Assigning the proper weight to the child's opinion is inappropriate as there is a significant difference between a child attempting to describe an observed or experienced trauma in criminal proceedings and a child giving an opinion or preference about his or her future;

- The LSA Guidelines should assist with how capacity to instruct counsel is assessed. They do not assist in any understanding when taking direct instructions may not be "reasonably" possible. They do not differentiate between ability, capability, or legal capacity. They make no mention of comprehension. A distinction should be made for when a child is "unable" to articulate or is simply "unwilling" to do so, or whether the child is "pre-verbal" or is actually "mentally impaired";

- The following commentary to Guideline 3.1 is not sustainable: although a child may lack so called "analytical ability" to make "informed decisions" in relation to all aspects of the proceedings, that child often may still have the "ability" to "understand, deliberate upon, and reach conclusions about" matters concerning their own "well-being";

- Family litigation is structured within an adversarial trial model, while the child protection hearing is structured as an inquiry. However, central to a normal lawyer client relationship would be expectations that the lawyer act with competence, follow the client's instructions unless these are in some way illegal or otherwise improper, and hold communications in confidence;

- A thorough review of disclosure by children's counsel is required to determine the child's psycho-social developmental and functional status;

- A framework is required to assist counsel in evaluating the ability of a child client to give instructions. Whether it is prudent for counsel to maintain a traditional advocate's role is a live issue for the Courts to consider;

- A lawyer/client relationship with a child can only exist when counsel has thoroughly assessed whether the child can *communicate*, *comprehend* all the information relative to any decisions and is *aware of and capable of* appreciating the reasonably foreseeable consequences;

- With respect to the amicus position, the lawyer takes no position in the litigation except to ensure that all relevant evidence concerning the child's well-being is put before the Court. This role is rarely undertaken in child protection cases as it does not accord with the trend toward more child empowerment throughout Court processes and since the Court is already obligated to make decisions based on each child's best interests; and

- Counsel ought not to advance a position without evidentiary support, even if the child does not take the stand.

The key sections of the decision are attached as Appendix A.

(b) **Analysis**

A careful review of Judge Cook-Stanhope's observations in B.L.S. reveals significant concerns with the existing Guidelines and counsel's application of same in difficult cases. While we believe that many of the concerns are valid, LRCY's recommendations take a broader approach to the solutions in an attempt to also address the ethical issues that lawyers in these types of retainers commonly face, as well as potential liability that could arise. In particular, the solutions proposed emphasize the principles underlying the role of counsel as set out in the UN Convention, and the duties of a lawyer to his or her client as set out in the Code of Conduct governing members of The Law Society of Alberta.

The fundamental principles that should be included in drafting the new Guidelines are:

(i) A Lawyer May Not Breach the Duty of Loyalty

As a starting point, any solution must honour the first principles that govern the solicitor-client relationship: Counsel to a child, as any lawyer acting in any matter, has a duty of loyalty to his or her client, and s/he must remain faithful to his or her client at all times. The Supreme Court of Canada and other Courts have articulated on many occasions the important position the solicitor-client relationship has in our justice system and that solicitor-client privilege goes to the core of that relationship.

Moreover, questioning how the lawyer could have obtained instructions from children due to the various concerns with respect to their development and mental disabilities is an improper question of counsel. To

answer such questions would put counsel in the position of breaching his or her duty of loyalty to the client by disclosing privileged information about the client.

(ii) Lawyers Must Follow their Ethical Duties and Must Not Breach the Standards of Care Expected of Them

As the foregoing analysis shows, the ethical questions raised by the Code of Professional Conduct are not merely academic concerns. In the event that a lawyer acts outside his or her professional obligations and discloses confidential information, provides evidence to the court that is not authorized by the child, or submits his/her opinion for what is in the child's best interest, s/he fails to ensure a child-rights approach, is risking professional discipline for breaching the child's loyalty, and may also be exposed to legal liability for breach of the standard of care of a lawyer. It cannot be stated enough, that in the context of proceedings involving vulnerable children, the consequences of which could be lifelong and which involve high-conflict and emotionally-charged issues, the risk to the child should be carefully considered. Finally, any practice that could leave a lawyer open to discipline and or liability should be expressly discouraged. If a lawyer is required to step out of the instructional advocacy role, it must only be done in after a proper assessment of the child's ability to instruct is undertaken. In such cases, the child's voice/viewpoint, if known, will still be an important interest that should be advanced.

(iii) Counsel for the Child Is an Advocate for the Child Whether or not the Child is Able to Instruct

According to the UN Convention on the Rights of the Child and the principles of child representation in Alberta, all children deserve a voice. If counsel establishes that a child has the ability to instruct, those instructions will be honoured. If a child lacks the ability to instruct counsel, the role of counsel should be to explore the interests and entitlements of the child by undertaking an examination of all family ties, educational interests, personal, cultural, religious and other important factors in the child's life and put forward evidence to support those interests and entitlements that favour the child without forming an opinion on what is best. If counsel has determined that the child client is able to instruct (whether it is to advance a desired outcome or merely present a viewpoint), the instructions must be honoured, even if the position or viewpoint advanced appears unreasonable to the Court or others. However, as discussed below, counsel is not merely a mouthpiece for the child.

There is a long line of jurisprudence that supports the voice of the child irrespective of the child's characteristics or the content of his or her wishes. Courts and counsel must also be careful not to superimpose a reasonableness test viewed through the adult lens, which is contrary to the first principles of child representation. A review of the jurisprudence on the role of counsel for the child reveals a number of key principles we recommend be incorporated into the new Guidelines:

- The role of counsel for the child is to present evidence consistent with the child's position;

- Counsel for the child must assist the child, as appropriate, in formulating an informed decision, position or viewpoint;

- Counsel for the child must advance the client's case; and

- Counsel's opinion on what is in the child's best interest is not relevant.

- In all proceedings affecting children, it is not required that children make a decision about an outcome. Therefore, it is important to emphasize that it is the child's 'voice' that matters, and not

necessarily their 'choice'. Therefore, the child's instructions may simply be to ensure their viewpoint is heard and considered (e.g., the positive and negative attributes of mom) and may not necessarily provide the Court with a choice (e.g., to live with mom).

(iv) A Lawyer May Not Determine What Is in a Child's Best Interests

Courts have on occasion expressed the view that regardless of the ability of a child to instruct counsel, counsel ought to be testing the reasonableness of the instructions, applying a best interest test to the child's instructions, and acting on that basis. This is an incorrect interpretation of the key principles underpinning the role of child's counsel and it is contrary to the Code of Conduct and Rules of Court.

(v) If a Child Lacks the Ability to Instruct, a Lawyer Should Take an Interest/Entitlements-Based Role

If counsel could only act on instructions, a large swath of children would simply be ineligible for legal representation, as many children will not meet the minimum threshold ability to instruct counsel.

In theory, a lawyer-client relationship exists only if a client can instruct counsel or another person has legal authority to give instructions on behalf of a client. This principle is an essential feature of the Code of Professional Conduct governing members of The Law Society of Alberta. The following extract from Chapter 2, Rule 2.02(3) of the Code of Professional Conduct reinforces this point: "A lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer. ".

Further, a lawyer has the ethical obligation to determine whether a client has the ability to instruct counsel. The Code of Professional Conduct of The Law Society of Alberta expressly states at Chapter 2, Rule 2.02(12) "[w]hen a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship." However, where that normal relationship is not possible, "it is trite law that a counsel acting for a party … who is unable to obtain instructions from that party cannot continue to act and must ask to be removed from the record" (*Catholic Children's Aid Society v C.M.*, [1991] OJ No 2500, at paragraph 41).

In the context of the representation of children, it would be impractical to take such a hardline approach where the client is unable or unwilling to instruct counsel—the result of doing so will leave many children without a voice, which is contrary to the principles and policies that seek to give children a say in proceedings that directly affect their lives.

In this regard, the Code of Professional Conduct of The Law Society of Alberta does not require a lawyer to cease to act where " the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions." The Code recognizes that "[a] client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is <u>whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.</u> Ultimately, it is for the lawyer to determine whether or not a client is "under a disability that impairs his or her ability to make decisions" and "to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships."

Where the lawyer is unable to obtain instructions from the client, the lawyer should have the option of representing the child's **interests and entitlements**. However, it is critical to note that the child's viewpoint on the matter in question, if articulated, remains an important interest to be advanced by counsel.

The move away from a 'best interests' approach may simply be seen as a change in terminology to some lawyers. Most lawyers already undertake a thorough analysis of the interests and entitlements of the child client prior to formulating a position to advance on behalf of the child who is unable to provide instructions. However, the current language used in the Guidelines encompasses specific messages and meaning, which appear contrary to the child's legal rights to representation. It is in keeping with international best practices for the representation of children that we recommend the terminology be changed to a child rights-centered approach. With this, there will be greater clarity provided to counsel and children will feel that their rights are not compromised in any way on account of their age or ability. LRCY will provide enhanced guidance to counsel with the goal of improving the overall delivery of legal services to children.

In this role, counsel may present to the Court a purely objective analysis of the child's entitlements, including, but not limited to, physical security and safety, emotional well-being, education, health, religion, family connections and social involvement (see American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases, August 2003, IV-C-2; American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, February 1996, I-B-5). Each entitlement can include an analysis of the evidence and presentation of evidence in a manner that best supports the position to be advocated.

The question that then arises is who ought to be instructing counsel when the child is unable or unwilling to do so. It is clear that a lawyer cannot give him or herself instructions. Justice Pelletier said precisely this in *F. v L.*, (2002) 211 DLR 4th 350, 369 (Que. C.A.): "Nothing authorizes an attorney representing a party to perform a role which the law reserves to legal representatives, such as tutors or legal guardians."

(vi) If a Lawyer Is Unable to Obtain Instructions, an Interest and Entitlements Role can be taken Under the Oversight of the LRCY Program

What emerges as the key issue with respect to the representation of children is how lawyers ought to proceed when their clients are unable or unwilling to instruct them. Because of the special nature of the representation of children, simply ceasing to act is not an acceptable solution. The current Guidelines permit counsel for children to take a best interests approach, an *amicus curiae* role, or request the appointment of a litigation representative. However, the above analysis highlights the issues with the best interests approach and the *amicus curiae* role: the former takes the lawyer out of his or her role of advocate and asks him or her to instruct him or herself on what the child's best interests are; the latter requires counsel to breach solicitor-client privilege by revealing all information in his or her possession to the Court.

While the appointment of a litigation representative may be a workable solution in certain circumstances where a third person is required to give instructions to a lawyer, in others, it may be practical for the lawyer to take on an Interest and Entitlements Role under the general auspices and statutory mandate of the Child and Youth Advocate. In other words, the training, policies, rules, and guidelines provided as part of the retainer with LRCY provides sufficient oversight such that in cases where the child lacks the ability to instruct counsel, the lawyer is directed to review and analyse the interests and entitlements of the child and act accordingly. No instructing agent is required.

LRCY has a mentorship program that will pair up a lawyer seeking further direction and advice on a matter with a senior mentor. This mentor is not acting as an instructing agent or litigation guardian. Rather, they are there to assist any lawyer who requires guidance in ascertaining the interests and entitlements of the child and resolving any other ethical or legal issues that arise.

3. Reconciling the Positions

As the foregoing makes clear, the proper role of counsel for the child is to take an advocacy role (either based on instructions from the child, where the child is able to provide instructions, or based on an assessment of the child's interests and entitlements where the child is unable to instruct) and to present the evidence before the Court in alignment with the child's position. Further, the proper question for counsel to ask is not whether the child has capacity to instruct, but whether s/he is *able* to. Any inquiry into the child's legal capacity has no place in the assessment by child's counsel. Finally, some sort of oversight of the child representation is required and arises automatically by virtue of the legislative mandate bestowed upon the Child and Youth Advocate. Thus, no separate appointment for a litigation representative is required.

4. Recommended Changes to the Guidelines

In light of the above, below is a summary of the recommended changes to the Guidelines, which will require further work in fleshing out the details after further consultation with counsel is completed.

a) Greater direction as to how counsel should assess the ability of a child to instruct counsel is needed in the Guidelines

The first duty of the lawyer will be to determine what role to take in representing the child. To that end, we agree with Judge Cook-Stanhope that some assessment of a child's 'comprehension' of the legal proceedings and consequences is necessary. However, in order to honour the UN Convention on the Rights of the Child and the mandate of the Child and Youth Advocate, we strongly suggest ensuring the revised guidelines do not incorporate a 'reasonableness' test for capacity. The determination of whether a child is able to instruct must be distinguished from the legal question of capacity.

There is a desire to distinguish the child's 'ability to instruct' from the 'capacity' concept applicable to adults as this better aligns with the child-centred UN Convention. The threshold is lower for children and depends on the nature of the proceeding and their ability to understand the consequences. Applying a capacity test to children would be too onerous and would in children being denied a voice. The new guidelines will set out examples and factors to be assessed in respect of a child client.

To that end, we recommend introducing guidelines with specific scenarios to assist lawyers in assessing the child's comprehension, with the direction that there is no bright-line 'test' to be met and the ability to instruct ought not to include a subjective analysis by the lawyer as to the reasonableness of the instructions. The ultimate determination rests with the lawyer and is dependent on multiple subjective factors.

It should remain incumbent on the lawyer to assess each child/youth individually to determine whether conditions are present that would preclude him from assuming the role of instructional advocate. Examples of these conditions include a child who is preverbal, a child who has easily apparent low cognitive functioning, and a child who has a mental impairment due to illness or intoxication. Further, a distinction should be made for when a child is "unable" to articulate or is simply "unwilling" to do so, or

whether the child is “pre-verbal” or is actually “mentally impaired”. The information that the lawyer acquires during this assessment is privileged and shall remain beyond the reach of other parties.

If the lawyer or an expert establishes the presence of a condition that justifies a departure from the role of instructional advocate, then the lawyer will proceed to evaluate the child’s interests and entitlements and advocate accordingly (discussed below).

b) If the child has the ability to instruct counsel, the usual instructional role is appropriate

Similar to adult clients, children may express impossible or unrealistic positions. In these instances lawyers are faced with the same dilemma of providing sound legal advice to their client, while at the same time maintaining a staunch commitment to act on the instructions of the client—whatever they may be. In the end, it is the lawyer’s ethical responsibility to provide counsel to his client, point out the probability or improbability of success, and then represent the child’s preferences to the Court. As both the LRCY Guidelines and the LSA Guidelines stipulate, counsel must obtain a child’s consent, if possible, before advocating a particular position or interest on behalf of a child.

Assuming the child has the ability to express a wish, opinion, or position, the child’s lawyer must always advocate the position most consistent with the client’s wishes. For example, if the child has expressed the wish to return to the mother’s care, the child’s lawyer must advocate for a delay in the trial to give the mother an opportunity to show up. Unless there is a serious risk of imminent harm or death in returning the child to the mother, the lawyer must advocate for the delay since it is the child’s wish to wait and see whether his or her wish can be fulfilled. It is ultimately in the Court’s power to decide whether the child’s security of the person is at risk and cannot be compromised by further procedural delay.

As such, it is imperative that the revised guidelines make clear that counsel may only act on instructions and take positions in furtherance of those instructions.

The Guidelines should emphasize that the right of the child to be heard must ensure that counsel carefully consider the child’s perspective and avoid a paternalistic approach to the examination of the child’s wishes. However, it is still incumbent on counsel to open a dialogue with the child to determine the likelihood and gravity of future harm, the child’s understanding of the consequences of the instructions to disclose or not disclose relevant information, and the availability of alternative outcomes.

c) If the child lacks the ability to instruct counsel, the “best interest role” should be eliminated and replaced with an “interests and entitlements role”

The determination of what is in the “best interests” of the child has no place in the context of a normal lawyer-client relationship. Rather, a practice of ascertaining the child’s personal interests and entitlements should govern.

In this regard, we recommend that any revised guidelines refer to the child’s legal interests or entitlements, rather than his or her “best” interests. The removal of the word ‘best’ is to ensure a consistent message that counsel’s role is that of an advocate for the child and not as a neutral friend of the Court. **The Court** has the obligation to rule on the child’s best interests after hearing all evidence and positions. The process is intended to be adversarial and the same counsel should not be expected to switch to an *amicus* role or give expert evidence or opinion on what is best for the child. This puts the lawyer in breach of his/her duty of loyalty to the client, is contrary to the child’s rights approach espoused

by the UN Convention and potentially exposes the lawyer to future liability. Counsel may not be specifically trained in child psychology, nor is it appropriate that they permit the boundaries of their legal expertise to be blurred in the representation of a child. Courts ought to be discouraged from leaning on counsel for expert advice.

It is therefore important in such cases that counsel for the child attempt to find an objective position that is defensible based on the evidence at hand and the advice of other professionals and experts.

Where the child lacks the ability to instruct, counsel's general instructions are derived from the oversight role of the LRCY Program, as established by legislation, and possible consultation with LRCY mentor lawyers. In such cases, the instructions to counsel should be to advocate for the child's interests and entitlements. No further steps will be required for the appointment of a litigation guardian or instructing agent in child protection matters. This is still an advocacy role and ensures loyalty to the client.

The new Guidelines will provide an expansive list of factors to consider in the interests and entitlements analysis. This improves the quality of legal representation by providing greater guidance to counsel and promotes consistency in the general child protection practice. If counsel has difficulty assessing the interests and entitlements of the child client, advice or guidance may be sought from LRCY, which can provide counsel with further supports as needed (such as making a request for a mentor lawyer).

Finally, counsel for the child should advise the court and other parties what role is being adopted: i.e., instructional or "interests and entitlements." However, it is inappropriate to reveal any other information in respect of counsel's assessment of the child in determining what role to take.

d) The Amicus Curiae Role is Not Required Where Counsel is Appointed

The difference between the interest-based role and the *amicus curiae* role is that in the latter case, the *amicus curiae* has the obligation to present all evidence before the Court so that all the facts are set out and not advocate in favour of one position.

It should be emphasized in the guidelines that family law and child protection matters are adversarial proceedings and not informal hearings. As such, counsel's duty will include keeping materials and information privileged if necessary to promote the child's wishes. This duty runs counter to the role of an *amicus curiae*. Where counsel is appointed and takes either an instructional or an interests and entitlements role, the *amicus curiae* is not required.

e) General Oversight of Counsel is Provided by the Child and Youth Advocate Office

It is trite law that a lawyer cannot instruct him/herself. However, it was clear in speaking to judges and counsel over the years and from a review of guidelines in other jurisdictions that eliminating non-instructional advocacy roles for counsel representing children is not desirable. Thus, while the interests and entitlements role should replace the best interest role, this proposition still creates a dilemma in law in that it lacks oversight which may result in inconsistent positions to be taken at the discretion of counsel.

In all civil, child protection, and private custody matters, a child client may be able to provide instructions. This is pursuant to Chapter 2, Rule 2.02(3) of the Professional Code of Conduct and the Commentary to Rule 2.02(3). It is the lawyer's role to determine whether the client lacks the ability to instruct in certain matters and if so, to ensure that he/she is able to continue to act.

In order to protect lawyers and their clients alike in the situation where the child client lacks the ability to instruct counsel, LRCY recommends that the new guidelines formally recognize the oversight role of LRCY so that the Court is satisfied that proper instructions are being adopted by counsel. This occurs through the retainer between the lawyer and LRCY after a decision to appoint counsel is made. This does not change the current situation as the Alberta Courts have recognized that oversight by LRCY over the quality of legal representation by LRCY exists by legislation and is desirable.

The LRCY Program is responsible for providing quality legal representation for children and youth receiving protective services. Given the vulnerability of the clients and the highly sensitive nature of the legal problems, LRCY has a heightened responsibility to ensure quality representation, and not just legal representation. LRCY Roster lawyers are leaders and role models for the children they represent. They are to understand that the child has key individuals in their life providing the important functions of care and support to the child.

While recognizing the need for independence of counsel, it is also responsible to ensure that LRCY Roster lawyers are properly trained and govern themselves according to LRCY's rules and policies. Conceptually, as a third party payor of legal services, LRCY provides the framework for counsel's role through its retainer with counsel. This retainer incorporates all of LRCY's policies and procedures. However, within this framework, counsel has conduct of the file and direct contact with the child. This policy is empowered by Section 3(3)(c) of the Act, which provides LRCY (through the OCYA) the mandate to, "represent the rights, interests and viewpoints of children who receive services".

Justice Kent, in an unreported oral decision stated that LRCY improved the situation of children: "I emphasize at this point that we not only have an institution that permits [children] to get counsel but given the program that LRCY is instituting, that monitors the education and quality of counsel, it is an appropriate institution."

In most cases, the existing practice will continue, but with some conceptual modifications. If a child is able to instruct counsel, counsel will take instructions directly from the child. This is on account of the fact that LRCY adopts the position that children with the ability to instruct ought to have a voice in matters affecting them. If the child does not have that ability, then the instructions to the lawyer, through LRCY policy, will be to examine the child's interests and entitlements and to act in accordance with a position that honours such interests.

5. **Conclusion**

In conclusion, the Child and Youth Advocate has the statutory mandate to represent the rights, interests and viewpoints of children and youth in Alberta. An important part of this mandate is to ensure children and youth have a voice, that they are properly represented in Court proceedings and that they are full participants in matters relating to their welfare. It is his ultimate purpose to ensure that their rights as individuals are not abrogated on account of the fact that they are minors. Therefore, the recommended changes to the Guidelines ensures a child-empowered voice while ensuring that the ethical concerns of counsel are addressed.

Appendix A

[239] The following remarks should be viewed with the *Code of Conduct* of the Law Society of Alberta and the Law Society's *Guidelines for Representing Children.* (See Appendix A) in mind. Rule 2.02(12) of the *Code of Conduct* states:

> When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reasons, the lawyer must, *as far as reasonably possible*, maintain a normal lawyer and client relationship (*Emphasis added*).

[240] The Commentary to this Rule adds the following:

> A client's ability to make decisions depends on such factors as *age, intelligence, experience and mental and physical health and on the advice, guidance and support of others.* A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others.
>
> The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.
>
> Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether is prevents the client from giving instructions or entering into binding legal relationships*. [Emphasis added].*

[241] It is interesting to observe that various Law Societies from across Canada appear to have adopted this same provision in their respective *Codes of Professional Conduct*, word for word. [See: Manitoba, British Columbia, Ontario, Nova Scotia, Saskatchewan, Newfoundland and Labrador].

[242] I have no doubt these children all want to go home as I imagine foster care has been a very difficult adjustment for them coming as they do from a situation where there were no firm boundaries, clear rules, or expectations and where their daily lives were lived in a state of chaos. Indeed, in my experience, it is an extremely rare occurrence when children removed from parental care do not want to be returned home. This is so whether they may have been abused or neglected, whether the family home situation is dangerous or intolerable or whether it is inappropriate for any other reason for them to be returned home.

[243] During the course of this inquiry, I reviewed and accepted evidence contained in numerous reports of various professionals who have assessed and worked with these four children. I was extremely concerned to learn of their low cognitive functioning. Each child has a complex profile of educational deficits, speech and language problems, and psycho-social vulnerabilities. Although I am satisfied that B. has the capacity to instruct counsel, based on the described cognitive status of I., J., P., and K. I believe their ability to do so is highly questionable.

[244] When representing a child, whatever the age, once disclosure is reviewed the lawyer's next obligation is to assess capacity. This requires more of counsel than simply determining whether a child can "articulate preferences, opinions or views". It must be stated that there is a huge difference between the *wants* of a child and that child's *capacity* to understand the implications of getting what they want. Furthermore, that capacity must also extend to an *ability* to then give instructions in the context of legal proceedings.

[245] When counsel purports to take instructions from a child, of course the age of a particular child is not determinative of that child's capacity to engage and instruct counsel. However, there is more than just the issue of age at work here.

[246] The *Code of Conduct* does not provide any guidance for counsel attempting to determine what the test for capacity might be. Some counsel prefer to presume the existence of capacity until it is proven not to exist. As well, although the Commentary to the Rule suggests an objective basis for assessing capacity, this concept has not migrated into *Guideline 3*.

[247] *Guideline 3.3* states that:

> It is the responsibility of the lawyer to assess each child's ability to express a preference, opinion or position within the context of the legal proceedings and specific issues to be determined. It is not within the scope of these Guidelines to propose a method for assessing capacity or prescribe any legal test of capacity.

[248] While it would certainly never be appropriate to ignore what children want to say it is unhelpful and potentially misleading to state as a principle that "when a child is able to "*articulate* a preference, opinion or position" *(Guideline 3.1)* counsel should maintain a "normal lawyer client relationship" as far as reasonably possible. It leaves the impression that articulation equates with legal competency; of course, it does not.

[249] To *articulate* means, merely, to "pronounce distinctly, express in words" "utter words", or "speak distinctly" or intelligibly. *[Oxford Shorter English Dictionary*, Oxford University Press, 1975]. It should not add reassurance to any consideration of whether a lawyer/client relationship is possible to observe that a child has the capacity for speech. Furthermore, and perhaps even more troubling, a child's historical developmental context may give rise to concerns that the child may not give the same meaning to words that an adult may understand.

[250] The ability of a child to articulate is but one step in a process of determining whether the child is capable of understanding the nature or future consequences of the legal proceedings. The articulation of preference, opinion or position must be contextual. In my view, any analysis of legal capacity must import both objective and subjective considerations.

[251] Certainly it is very well known that children lack the developmental capacity to understand abstract thought much before the age of 10 years. It is for this reason that:

(a) a child cannot be held criminally accountable under the *Youth Criminal Justice Act* (S.C. 2002, c.1 as amended), until the age of 12,

(b) a child 12 or older must be served notice of an application under CYFEA*,*

(c) the consent of a child 12 or older must first be obtained before any access order will be granted which affects them under the *Act,* [s.31(5), s. 34(9), (11)] or before a private guardian may be ordered [s. 55 (1)(c)].

[252] Some academics and jurists have expressed the opinion that because we allow very young children to give evidence in criminal proceedings and then give weight to that evidence, we should, equally, allow them to give opinions and express preferences in the context of custody proceedings. In response to this point of view I can only say that there is a very great difference between a child

attempting to describe an observed or experienced trauma and a child giving an opinion or preference about their future in the abstract.

[253] The *Guidelines* also do not answer questions of how capacity to instruct counsel is assessed. They do not assist in any understanding when taking direct instructions may not be "reasonably" possible. They do not differentiate between *ability*, *capability* or *legal capacity*. They make no mention of *comprehension.* It would be hard to understand how it could ever be possible for counsel to conclude that they could have any kind of normal lawyer/client relationship where it is unclear whether a child is "unable" to articulate or is simply "unwilling" to do so, or whether the child is "pre-verbal" or is actually "mentally impaired".

[254] The Commentary to Guideline 3.1 then goes on to suggest that although a child may lack so called "*analytical* ability" to make "informed decisions" in relation to all aspects of the proceedings that child often may still have the "ability" to "*understand, deliberate upon, and reach conclusions about*" matters concerning their own "well-being. Does that mean that it is sufficient that the child have ability but not analytical ability or that even though a child is not able to analyse the child may still be capable of understanding, deliberation and decision-making?

[255] The example then cited is the child as young as "three or four years of age" who "may be capable of *expressing a preference entitled to weight* in legal proceedings concerning their *custody*". Having reviewed child developmental literature, assessed expert evidence concerning this field of law, and having met with and heard evidence directly from children for several decades I find this statement very surprising. There is no developmental basis cited for such a proposition and, as such, it is quite simply an uninformed and unsustainable conclusion.

[256] In addition to each lawyer's duty to act candidly before the Court and never to mislead the Court, central to a normal lawyer client relationship would be expectations that the lawyer act with competence, follow the client's instructions unless these are in some way illegal or otherwise improper, and hold communications in confidence.

b) Family Litigation v. the Child Protection Inquiry

[257] Even though the preamble of the *Guidelines* speak of their applicability to child protection and family-related litigation these are two very discrete and entirely different fields of law. In addition, family litigation is structured within an adversarial trial model while the child protection hearing is structured as an inquiry.

[258] It is important that lawyers who may do children's work in these two separate domains be mindful of these differences. Furthermore, the role of the Judge in these two kinds of hearings is usually quite different, with the presider in a family hearing being far less interventionist than the Judge or Justice who may be engaged in a more child-focused inquiry.

[259] There is a very great difference between issues facing children who are involved in a tug-of-war between their parents, where eventually the "rights" of one parent will prevail over those of the other without the involvement of the State, and those which have an impact upon children caught within the State's child protection domain. Too often in a custody battle parents stand face to face against the other until their respective legal and financial arsenals are depleted, frequently reaching a draw which often characterizes the sometimes developmentally-toxic 50/50 shared parenting "solution". Other times children become the spoils of these conflicts, given over to the winner, and are themselves left in the end with little, emotionally, with which to develop into adulthood.

[260] In the child intervention context the focus shifts legislatively and factually to the protection of children whose very survival is in jeopardy due to parenting deficiencies so severe they have been removed from parental care. Protection litigation is often characterized by arguments about how parents have not been given appropriate “chances”, not been treated “fairly” by the system and not allowed adequate time and resources to correct their “mistakes”.

[261] These arguments are often made to deflect attention from very real issues which stand in the way of their children’s rights to develop in security and safety. These arguments are rarely about how much “better” one parent is compared to the other, rather how bad the State is. All of these significant distinctions must always be kept in mind by lawyers who act for children.

[262] An inquiry under CYFEA is not about “custody” as it is understood in divorce or other family law proceedings. Rather, it is about the physical, psycho-social, emotional and developmental protection of an extremely vulnerable class of individuals. The focus in such an inquiry is not on who “gets” (custody of) a child but, in essence, who the child is or will be allowed to become.

[263] A thorough review of disclosure by children’s counsel will provide critical information about the child’s psycho-social developmental and functional status. Without this information it will be difficult for counsel to determine whether to maintain an instructional advocacy approach, which has been described in both the *Guidelines* and in *LRCY* policy as the “default” position for children’s counsel, before considering some other approach.

c) Approaches to Child Representation

[264] There are three such approaches; instructional advocacy (the traditional model), the “best interests” model, and the *amicus curiae* approach.

i) Instructional Advocacy

[265] What “instructional advocacy” means is not entirely clear when one’s client is a child, although it appears that the child’s lawyer is expected to ascertain the child’s “preferences” or “opinions” or “positions”, then represent those, provided the child consents.

[266] Any discussion of the role of counsel for children should start with an appreciation of Article 12 of the *United Nations Convention on the Rights of the Child* which provides:

> Article 12
>
> 1. States Parties shall assure to the child who is *capable of forming his or her own views* the *right to express those views freely* in all matters affecting the child, *the views* of the child *being given due weight* in accordance with the *age and maturity* of the child.
>
> 2. For this purpose the child shall in particular be provided the *opportunity to be heard* in any judicial and administrative proceedings affecting the child, *either directly, or through a representative* or an appropriate body, in a manner *consistent with the procedural rules* of national law. *[Emphasis added.]*

[267] The Background to the *Guidelines* notes that they are intended to address a gap which was seen to exist in the *Code of Conduct,* specifically in the somewhat vague wording of old Rule 7.1 which had previously provided that:

> ...it may be proper in some circumstances to accept instructions from a minor or from a client who appears or has been adjudged to lack capacity in certain matters

[268] This provision did not explicitly address situations such as family proceedings, where the child's rights were directly affected. Unfortunately, the more directive language in the new Rule 2.02(12) has not helped to clarify the intention of the drafters where the children are the clients. Nor have the *Guidelines* help to clarify the Rule.

[269] Obviously it would be useful if some kind framework were established to assist counsel in evaluating the ability of a child client to give instructions. Here, while the starting point might have been the age of the client, I assume further enquiries were made by counsel in light of the extremely concerning developmental assessments done of each child. Faced with this significant information, as this Court has been, the issue of whether it has been prudent for counsel to maintain a traditional advocate's role is very much a live one.

[270] Many learned authors have considered how counsel might approach this issue. One helpful commentary is by David Day in: *"Counsel for Christopher: Representing An Infant's Best Interests in the Supreme Court of Canada"* (1983), 33 R.F.L. (2d) 16 at 23. There, he speaks of the *ability* of a child and suggests that counsel should be in a position to assess:

1. The *ability* of the child to communicate voluntarily to counsel rational and reasonable instructions;

2. The *ability* of the child to clearly and fully understand counsel's advice; and

3. The *ability* of the child to appreciate the nature and legal significance of the judicial proceeding.

[271] Professor Nicolas Bala, suggests in his article: *"Child Representation in Alberta: Roles and Responsibilities of Counsel for Children in Family Proceedings"*, (2006), 43:4 Alta.L.R.845 at 847 that capacity means an individual is able to make "*reasonable judgments* respecting their affairs". He further suggests that a lawyer must be satisfied the child can exercise judgment without undue adult influence and that the child has made a "*reasonable choice*". This requires the conclusion that the child has full knowledge and an appreciation of the legal situation and surrounding circumstances. This is clearly an objective standard.

[272] By way of example in the present case, in reviewing the issue of P.'s wishes, counsel refers to the fact that this child has "some issues with his verbal skills" but suggests that this "does not impede his ability to provide clear instructions". The focus clearly is on P.'s ability to speak and on nothing else, even though the evidence clearly demonstrates that this child has major developmental issues. These are not addressed.

[273] In reference to J.'s wishes, he is described in his counsel's Submissions as "shy" and needing a comfortable setting to speak openly with an adult. Again, although J. is "adamant" about his wishes to return home the evidence about his significant developmental and cognitive issues is not addressed by his counsel.

[274] The same applies to K. and I. who also very much want to go home. Their counsel submits that these children have said that if they do not go home and if they are not given access to their mother following a Permanent Guardianship Order they will somehow still find a way to see her. This kind of threat by a child may be taken by some to mean these two children actually do understand their legal predicament.

[275] Furthermore, counsel has discounted the cognitive delays which the child, I., experiences by saying these are merely "learning disabilities", and are therefore not at issue when the child provides "clear instructions". Once more the emphasis is on this child's ability to "articulate" and nothing more. The same applies to the statement that K. who despite a "learning disability with respect to literacy" has provided counsel clear instructions.

[276] As stated earlier, evidence provided during this hearing detailing the significant cognitive and learning deficiencies establishes that I., K., J., and P. likely have diminished capacity. While it is true that each child has made some progress during the time they have been in care, their significant developmental problems have not gone away. They continue to require specialized careful and consistent attention to their needs in school, in the community and in their home.

[277] Where, as here, there is compelling evidence of each child's impaired cognitive status and developmental difficulties I cannot conclude that the children's expressed preferences and opinions should be given much weight nor can I conclude these children have any real understanding of the developmental ramifications of a decision to return them to their mother's care, where they will not get what they need.

[278] How does counsel in the present case reconcile urging a Court to send these children home in the face of overwhelming evidence that they would be returned to the care of an incompetent parent? How will the substantial risks of real harm to these children, inherent in such a position, be minimized when the parent not only fails to recognize her inadequacies or parenting deficiencies but has learned little from years of interventions and professional assistance? How will these children ever develop to their fullest potential if returned to the care of that parent?

[279] I find that a normal lawyer/client relationship with a child can only exist when counsel has thoroughly assessed whether:

(a) the child can *communicate* clearly with counsel (this would coincide with the ability to articulate a preference, opinion or position as contemplated in the *Guidelines*);

(b) the child can *comprehend* all the information relative to any decisions the child must make (this requires an assessment of the child's mental capacity, especially when evidence calls that capacity into question)

(c) the child is *aware of and capable of* appreciating the reasonably foreseeable consequences of making necessary decisions or failing to make these; and

(d) the child is *aware of and capable of* appreciating the nature, context and consequences of the legal proceedings that affect them and the impact they may have on the child.

[280] When counsel undertakes to act on behalf of a child they must strive to achieve a balance which recognizes not only the ability of the child to articulate their wishes but also appreciates the child's developmental, social, or psychological immaturity or educational deficits and recognizes the child's historical social context. Whether or not counsel's role shifts from one of instructional advocacy to best interests, the Court's role will remain the same, that is adjudicating on all of the evidence to ensure the best interests of a child prevails.

ii) Best Interests Role

[281] Where the surrounding context, circumstances, facts or evidence require, a change in representational roles may be warranted. The *Guidelines* provide that a change in representational role should only be considered when a normal lawyer/client relationship cannot occur. One of the alternate roles that can be considered is the "best interests" approach. At the risk of sounding too maternalistic, it seems absurd that counsel's focus will only shift to best interests under the *Guidelines* when children cannot *articulate*. That role is, however, assumed to be preferable to focussing on the child's best interests *ab initio.*

[282] The best interests role for counsel is undoubtedly a much easier cloak to wear when representing children. Whether counsel takes an objective stance advancing the best interests of a child, basing their approach on an assessment of all available and relevant evidence, or whether counsel takes a more subjective approach putting forward counsel's own viewpoint on what is in their client's best interests this role is discharged at a philosophical distance from the client.

[283] As indicated in the present matter, counsel has adopted a best interests approach in the representation of the child A., arguing that she should be returned to the care of Mr. C. and Ms H. It is unclear whether counsel has taken a subjective or objective approach to best interests in advocating this position because in doing so, there has been no discussion about the mother's extremely substandard parenting capacities, Mr. C.'s intention to abdicate the majority or parenting responsibilities to her, and Mr. C.'s almost complete non-participation in parenting duties up to the time the child was apprehended.

[284] No evidence was offered on behalf of A. to suggest the mother has any capacity for change whatsoever. No evidence has been provided to address the clear intention of the parents to continue parenting the same inadequate ways they have done in the past or to address the predictable risk this would present to A. as a result.

[285] Finally, there is little to suggest that Mr. C. comprehends the impact of Ms H.'s legacy of negligent parenting practices on the developmental status of the five other children. If he did, he would not risk designating Ms H. as the primary caretaker of his daughter, A. Somehow, Mr. C. believes that with him around as the "man in the house" things will change. In fact, there is absolutely no evidence this will occur. Mr. C. is not proposing to be around. He prefers to be at work. He is not interested in meeting the demands of full-time parenting.

iii) The *Amicus Curiae* Role

[286] The task of counsel assuming the role of "friend of the Court" is to act neutrally as a helper for the child whether conveying information about Court processes to the child, explaining the law and informing the Court of the child's wishes. The *amicus* lawyer takes no position in the litigation except to ensure that all relevant evidence concerning the child's well-being is put before the Court. This particular role is rarely undertaken in child protection cases and seems inconsistent with the trend toward more child

empowerment throughout Court processes, generally, especially because the Court is already specifically mandated to make decisions based on each child's best interests.

3. Advancing a position without evidentiary support.

[287] I am surprised that counsel included in Submissions, information from the children which was not put in evidence before me. For example, apart from reiterating the children's points of view a number of times counsel provided specific examples, apparently given to her by the children, of how idyllic and wonderful life was at home with their mother and of the various activities, chores, and structures in place which made their home environment such a positive and nurturing place.

[288] Specifically, counsel submitted that "notwithstanding the concerns of the Director" the children ... demonstrated ... that their mother was a wonderful, affectionate and loving mother who was able to spend quality time with them every day." The children had rules and "they were followed". The rules included leaving the home, curfews, errands, and various chores. Hygiene was always maintained, but if one child got lice, they all got lice. The children did not feel that they were "parentified".

[289] This information was all given without any reference to contrary evidence which was properly admitted. That evidence satisfied me that the children were often truant from school, were chronically unsupervised, and were often covered in lice and filthy. That evidence established that these children had neither appropriate routines nor appropriate boundaries. That evidence established that the home of these children smelled of urine, was unclean and unkempt. Finally, that evidence satisfied me that these children had a history of residential instability due to being moved repeatedly by their mother from community to community and school to school frequently leaving specialized educational and remedial programming behind with no regard to their overwhelming need for consistency and stability.

[290] Unfortunately, much of the information contained in counsel's Submission was never confirmed before this Court with the exception of some evidence given by M., an adult sibling to the children who did not appear to be a reliable reporter, and some evidence given by the mother, whose testimony was, at best, vague and unconvincing. As this information was never tested against other significantly contradictory evidence which was properly adduced I have been forced to disregard it.

[291] It has not been my intention to single out counsel in the present action for the approach taken as children's counsel. The position taken here is no different than the one taken by many other lawyers in many other cases in an earnest attempt to comply with the Law Society's *Code of Conduct*. For that reason I have intentionally not identified counsel by name. It is my fervent hope that these comments may be of some assistance to others approaching the difficult task of acting as counsel for children.