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COMMENT

THE NEW TEXAS AD LITEM STATUTE: IS IT REALLY PROTECTING THE BEST INTERESTS OF MINOR CHILDREN?

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I. INTRODUCTION

Family law litigation can incite gruesome battles.[1] Parents often treat a custody proceeding as an intense, manipulative game where innocent

1. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 116 (2002) (describing the acrimony in divorce litigation and the difficult job family lawyers face); Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 458 (2001) (describing attorneys who feel like "they face a pit of quicksand with their hands tied" because of the lack of guidance provided by statutes, case law, or child clients in custody disputes); Dana E. Prescott, *The Liability of Lawyers as Guardians Ad Litem: The Best Defense Is a Good*

children[2] are used as pawns to prove a point.[3] Parents can become so absorbed in this game that they are unable to recognize what is best for their children.[4] At this point, the law steps in to the parent-child relationship to ensure the protection of the best interests of the children.[5] Courts have the authority to appoint a representative to advocate for a child in a custody proceeding because the child is considered incompetent under the law.[6] A potential conflict of interest arises, however, when the child

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Offense, 11 J. AM. ACAD. MATRIMONIAL L. 65, 68 (1993) (analogizing work in family law to practice in the trenches, where resources are insufficient to shield children from "parental warfare"); Mary Alice Robbins, *A Less Hostile Environment: Texas First to Adopt a Statute Allowing for Collaborative Family Law Process*, 17 TEX. LAW. 1, 2 (2001) (stating the difficulty involved when dealing "with clients who are crying or getting angry with each other," and recognizing a new law that allows spouses to dissolve a marriage in a less adversarial way without being pressured by strict deadlines in cases).

2. For the purposes of this Comment, a child is a person under the age of eighteen that has not had the disability of minority removed. *See* TEX. FAM. CODE ANN. § 31.001 (Vernon 2002) (providing that a minor is able to petition for the removal of the disabilities of minority once they are at least sixteen years of age, living independently from their parent or other caregiver, and are managing their own finances).

3. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126 (2000) (suggesting that family law litigation is inundated with emotion and personal clashes); *see also* 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, 613 (1998) (arguing that one of the main reasons for providing counsel to children in custody proceedings is because divorcing parents occasionally place their own interests above the needs of their children).

4. *See* Lewis v. Lewis, 414 A.2d 375, 378-79 (Pa. Super. Ct. 1979) (recognizing the bitterness that ensues in custody battles, that parents may lose track of their children's best interests, and that children may become adversarial with their parents); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 116 (2002) (supporting the idea that divorce litigation can be heated).

5. *See* George S. Mahaffey Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 280 (2002) (referring to the common law doctrine of *parens patriae*, which permits the state to become involved in the parent-child relationship); Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346 (1999) (discussing that the impact of *parens patriae* was to justify the king's intervention in child custody suits).

6. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR. R. art. X, § 9) (stating that "[a] lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for . . . a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client"); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003) (reporting that an attorney may seek the appointment of a guardian for a child when he or she reasonably believes it is in the child's best interests); *see also* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 265 (1998) (detailing how courts have historically

wants something different than what the court-appointed attorney determines is in the child's best interest.[7]

Many states have addressed this conflict by establishing attorneys ad litem (AAL), who advocate what the child wants,[8] and guardians ad litem (GAL), who simply represent the best interest of the child in a particular situation.[9] Further concerns arise, however, because the GAL is usually not an attorney[10] and does not have the power to introduce evidence or initiate discovery,[11] causing the GAL to be an ineffective advocate for the child.[12] Some states label attorneys as guardians ad litem to try to clarify that the attorney's duty is to help the court protect the child.[13] This at-

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viewed minors as incompetents); Charles T. Cromley Jr., Comment, *"As Guardian Ad Litem, I'm in a Rather Difficult Position,"* 24 OHIO N.U. L. REV. 567, 576 (1998) (describing how Ohio courts may appoint a guardian ad litem to protect the interests of a child during particular litigation because children cannot represent themselves). The modern view, however, is that children are beginning to have a wider range of abilities depending on their experience, psychological development, and the circumstances. Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 265 (1998).

7. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 125 (2000) (examining the issue of whether Texas courts have the power to appoint an attorney to help protect a child who is involved in a family lawsuit without binding the attorney to the wishes of the child).

8. *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 459 (2001) (stating that an attorney for a child should advocate for the child's interest but should also listen to what the child wants); Charles T. Cromley Jr., Comment, *"As Guardian Ad Litem, I'm in a Rather Difficult Position,"* 24 OHIO N.U. L. REV. 567, 586 (1998) (emphasizing the difficulty in separating the roles of AAL and guardian ad litem).

9. *See* Charles T. Cromley Jr., Comment, *"As Guardian Ad Litem, I'm in a Rather Difficult Position,"* 24 OHIO N.U. L. REV. 567, 586 (1998) (recognizing that a major problem exists in the interpretation of the role of the court-appointed attorney).

10. *See* TEX. FAM. CODE ANN. § 107.001(5) (Vernon Supp. 2004) (specifying that the GAL position may be held by "a volunteer advocate" or "a professional other than an attorney").

11. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126-27 (2000) (identifying the ineffectiveness of nonlawyer advocates resulting from their inability to perform many of the major tasks that attorneys do, such as introducing evidence or beginning discovery).

12. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 116-18 (2002) (arguing that the lack of definition in the role of guardians ad litem renders them ineffective advocates).

13. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126-27 (2000) (commenting that some courts combine the role of guardian ad litem and attorney ad litem to provide an attorney for the child who will advocate the child's best interest); *see also* Jennifer Paige Hanft, *Attorney for Child Versus Guardian Ad Litem: Wyoming Creates a Hybrid, But Is It a Formula For Malpractice?*, 34 LAND & WATER L. REV. 381, 385-88

tempt causes further ethical problems for the attorney, who must ignore the attorney-client relationship if he wants to present certain evidence to the court that indicates a potential harm or danger to the child but conflicts with the child's wishes.[14] Accordingly, states are in a difficult position when forming legislation concerning lawyers who represent children.

Texas faced a major problem in the case of *Samara v. Samara*,[15] where the First District Court of Appeals in Houston held that the obligation of a court-appointed attorney for a child was to protect the child's best interest.[16] The court's holding appears to be contradictory to most Texas lawyers' ideas of attorney ad litem duties.[17] This case exemplifies the confusion that surrounds court-appointed child advocates and highlights the need for statutory clarification.[18] In 2001, the Texas Legislature spe-

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(1999) (discussing the Wyoming Supreme Court's establishment of an attorney/guardian ad litem who is bound by the child's best interest, not the child's communicated wishes, but must inform the court of both views). Hanft explains that the creation of the hybrid attorney/guardian ad litem effectively changes the duty of confidentiality imposed by the Professional Rules of Conduct. *Id.* at 400. The Wyoming Supreme Court advised that a change in the Professional Rules of Conduct would respond to possible malpractice claims resulting from a new hybrid attorney/guardian ad litem. *Id.*

14. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126-27 (2000) (refuting that labeling guardians ad litem as attorneys ad litem will not solve ethical problems because the attorney is prevented from communicating the reasoning behind his determination of the best interest of the child due to the attorney-client privilege).

15. 52 S.W.2d 455 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

16. Samara v. Samara, 52 S.W.2d 455, 458 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). The court appointed the attorney in this case to serve as both guardian ad litem and attorney ad litem. *Id.* at 456. The trial court appointed a separate non-lawyer guardian ad litem after determining that a conflict of interest was present and allowed this guardian to hire an attorney. *Id.* The Court of Appeals held that the trial court did not have the power to appoint such an attorney and concluded that the attorney ad litem was already appointed to advocate the best interest of the child. *Id.* at 458; *see also* In the Interest of D.L.B., 943 S.W.2d 175, 179-80 (Tex. App.—San Antonio 1997, no writ) (describing a situation where an attorney ad litem could not assess the child's wishes, was unable to find a position to advocate, and declared that he would advocate the child's best interest).

17. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 1 (2003) (noting that the decision in *Samara* illustrates the confusion about the duties of an attorney ad litem) (on file with the *St. Mary's Law Journal*).

18. *Cf.* In the Interest of D.L.B., 943 S.W.2d 175, 180 (Tex. App.—San Antonio 1997, no writ) (declining to support the argument that it is mandatory for an attorney ad litem to choose a position to argue even if he is unable to determine the child's desires); Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida, 596 S.W.2d 947, 951 (Tex. App.—Fort Worth 1980, no writ) (noting the confusion that exists in the wording of the ad litem statutes); *see also* Bott v. Bott, 962 S.W.2d 626, 630 (Tex. App.—Houston [14th Dist] 1997, no pet.) (using the terms "attorney ad litem" and "guardian ad litem" interchangeably throughout the case); Coleson v. Bethan, 931 S.W.2d 706, 709 (Tex. App.—Fort Worth

cifically addressed the confusion when it selected an ad hoc committee of volunteer judges, lawyers, professors, and other professionals to examine the ad litem appointment process.[19] The committee recommended legislation, which was later adopted by the 2003 Texas Legislature to make significant changes in custody dispute proceedings.[20]

The committee focused on identifying the legal profession's expectations of court-appointed lawyers in custody cases.[21] As of September 1, 2003, the new Family Code provision allows court appointment of one of three types of representatives: guardian ad litem, attorney ad litem, or amicus attorney (AA).[22] A GAL is a person appointed to advocate the

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1996, no writ) (recognizing that the law is virtually silent on the various types of ad litem appointments).

19. John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003); *see also* HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, Tex. H.B. 1815, 78th Leg., R.S. (2003) (addressing the need to clear up the confusion surrounding court-appointed attorneys for children).

20. John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003); *see also* HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, Tex. H.B. 1815, 78th Leg., R.S. (2003) (discussing the definitions of the three roles of amicus attorney, attorney ad litem, and guardian ad litem).

21. *See* HOUSE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1815, 78th Leg., R.S. (2003) (attempting to define the roles of amicus attorney, attorney ad litem, guardian ad litem, and other terminology used in family law appointments); *see also* Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (expressing that the purpose of the committee, of which he was a member, was to examine the common understanding among judges and lawyers regarding the functions of court-appointed advocates for children) (on file with the *St. Mary's Law Journal*).

22. *See* TEX. FAM. CODE ANN. § 107.021 (Vernon Supp. 2004) (recognizing that in a suit brought by a party other than the government, and when the best interest of the child is a factor, the court may appoint an AA, an AAL, or a GAL). Since the committee wrote the choices for appointments in the disjunctive, this expression indicates that the court should not permit multiple appointments. JOHN J. SAMPSON ET AL., TEXAS FAMILY CODE ANNOTATED § 107.021 cmt., at 488 (2003). The author notes that in situations where the interests conflict between the children, the court will appoint an AA to serve the best interests of all the children to the suit. *Id.*; *see also* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 5 (2003) (advancing that a court may not appoint multiple advocates for children in nongovernment suits) (on file with the *St. Mary's Law Journal*); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (contending that a court may only appoint one of the three types of advocates established in the amendment to the Family Code, despite language in this section expressly forbidding multiple appointments) (on file with the *St. Mary's Law Journal*). In examining the amendments to the Family Code, one will not find language expressly forbidding or advocating multiple appointments of child advocates in custody disputes. *E.g.*, TEX. FAM. CODE ANN. § 107.001 (Vernon Supp. 2004) (defining the

best interest of the child with sufficient "competence, training, and expertise determined by the court to be sufficient to represent" the child.[23] The GAL is either a volunteer advocate who is "a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests," or "an attorney ad litem appointed to serve in the dual role."[24] The statute defines an AAL as an "attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation."[25] Finally, the AA is "an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child."[26]

By providing precise definitions regarding the duties of court-appointed advocates in custody litigation, the Texas Legislature attempted to cure the conflict of interest problem that many court-appointed advocates face.[27] The amendments to the Family Code,[28] however, still leave some essential questions unanswered, such as when to appoint one type of advocate over another and the specific qualifications of these advo-

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types of court-appointed attorneys in parent-child lawsuits); *id.* § 107.021 (allowing for discretionary appointments of attorneys representing children). However, the common understanding is that courts will rarely permit multiple appointments. *Id.*; *see also* Interview with Victor Negron, Family Law Attorney, in San Antonio, Tex. (Oct. 2, 2003) (confirming that judges will not appoint multiple advocates unless very extenuating circumstances exist where there are multiple children whose interests greatly conflict) (on file with *St. Mary's Law Journal*).

23. TEX. FAM. CODE ANN. § 107.001(5)(C) (Vernon Supp. 2004).

24. *Id.* § 107.001(5); *see also* TEX. FAM. CODE ANN. § 107.012 (Vernon 2002) (mandating the appointment an attorney ad litem in suits for the termination of the parent-child relationship); Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 10 (2003) (commenting that the court may only appoint a guardian ad litem in the dual role of attorney ad litem in suits filed by the Department of Family and Protective Services, formerly known as Child Protective Services, where the government seeks termination of the parent-child relationship) (on file with the *St. Mary's Law Journal)*

25. TEX. FAM. CODE ANN. § 107.001(2) (Vernon Supp. 2004).

26. *Id.* § 107.001(1).

27. *See* JOHN J. SAMPSON ET AL., TEXAS FAMILY CODE ANNOTATED ch. 107 introductory cmt., at 471 (2003) (indicating that the purpose behind the amendments to Chapter 107 of the Family Code was to eliminate ambiguity in the duties of court appointed lawyers in custody cases); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (describing that the purpose of the amendments to the Family Code was to provide clarification of the roles of court-appointed attorneys for children to end confusion) (on file with *St. Mary's Law Journal*).

28. TEX. FAM. CODE ANN. § 107.001-.031 (Vernon Supp. 2004).

cates. Such uncertainties breed difficulties for judges, appointed advocates, and the children they represent.

This Comment explores the application and implications of the recent amendments to the Family Code for Texas courts, attorneys, and children. Part II examines the evolution of representation of children and the events leading up to the amendments to the Family Code. Part III discusses Texas's approach to the appointment process. Part IV investigates the legal implications regarding the immunity and confidentiality issues of court-appointed advocates. Part V analyzes whether the legislation actually solves the conflicts of interest that led up to its enactment and whether the law will ultimately serve the best interests of Texas's children. Finally, Part VI proposes guidelines for successful implementation of the new provisions to ensure that they really provide clarity for lawyers and judges in family law and promote the best interests of Texas's children.

II. BACKGROUND

The notion that the state should provide legal representation for children has deep historical origins.[29] The Romans were one of the first societies to support the idea of child advocacy through the process of appointing a "special curator" for certain issues or transactions involving children.[30] This idea evolved into the English common law doctrine of *parens patriae*, where the king was considered responsible for infants and incompetents and was required to issue a letter appointing a certain guardian in cases involving them.[31] Later, the responsibility of providing

29. *See* Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 163 (1997) (recognizing the long history behind court appointed attorneys).

30. *See id.* (exploring the history of ad litem appointments and noting that guardianship law dates back to the Roman Empire).

31. *See* George B. Curtis, *The Checkered Career of Parens Patriae: The State As Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896 (1976) (citing the king's common law obligation to care for subjects who were unable to care for themselves, such as children, "idiots," and "lunatics"); Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 620 (1976) (describing the role of the king, as protector of the weak, to appoint the necessary guardian in court); Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346 (1999) (tracing the history of *parens patriae*, the English doctrine providing that the king, as the father of the nation, was obligated to protect the country's weak and powerless); Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 163 (1997) (explaining that under English common law, the king managed and protected the interest of infants).

a guardian for children shifted to the chancery courts.[32] Specifically, when a child custody case was brought before the Court of Chancery, the only power the court had was to support or refuse to support the existing custody rights, but not to alter them.[33]

The policy of nominating a guardian for children spread rapidly to the United States where American courts developed the concept of appointing a guardian ad litem to safeguard the interests of a child in litigation.[34] A major case regarding children's representation was *In re Gault*,[35] which applied the Due Process Clause to juvenile proceedings and recognized a juvenile's right to an attorney in a delinquency matter.[36] This case highlighted the focus on children's attorneys because it was the first time the United States Supreme Court mandated the appointment of attorneys for children.[37] Additionally, the Court has held that when a suit involves the person or property of a minor, it is the responsibility of the state, not the federal government, to make any necessary appointments for representation.[38]

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32. *See* Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 620 (1976) (examining how the Courts of Chancery subsequently assumed the responsibility of the king to protect the weak); Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 163 (1997) (noting that the king's duty under *parens patriae* eventually transferred to the English courts of equity).

33. Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1348-1349 (1999); *see also* Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619, 619 (1976) (discussing the limited role of a special curator, the predecessor to the modern guardian ad litem).

34. Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 163 (1997).

35. 387 U.S. 1 (1967).

36. *See In re* Gault, 387 U.S. 1, 27-28 (1967) (finding that children have a fundamental right to counsel in a juvenile proceeding); Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346-1347 (1999) (identifying how American courts use the doctrine of *parens patriae* to justify appointing guardians in suits involving children); *see also* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 110 (2002) (describing the history and background underlying guardian ad litem appointments).

37. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109-10 (2002) (identifying *In re Gault* as the landmark case which represents the ascendancy in status of children's attorneys in the United States).

38. *See* Ankenbrandt v. Richards, 504 U.S. 689, 694-95 (1992) (holding that federal courts do not have jurisdiction over child custody, alimony, or divorce cases due to the domestic relations exception); Ins. Co. v. Bangs, 103 U.S. 435, 438 (1880) (recognizing the state's duty to exercise *parens patriae* powers in appointing a guardian ad litem when there is a contract dispute concerning an infant); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir.

Subsequently, Wisconsin was the first state to implement a law requiring attorneys for children.[39] In 1971, at the suggestion of the state's highest court, Wisconsin enacted the first law requiring GALs in all contested custody suits.[40] The following year, the American Bar Association (ABA) proposed that an attorney should be provided for every child in contested child custody suits.[41] This proposal, however, was not formally adopted.[42] In 1974, Congress passed the Child Abuse Prevention and Treatment Act,[43] which required states to appoint GALs in juvenile court proceedings.[44] Currently, studies estimate that approximately 1,100 representatives are appointed every week for children in custody battles.[45]

In the last several decades, legal scholars throughout the U.S. have focused much debate on the proper role of an attorney who represents a child in a custody case.[46] This debate has focused on whether the attorney should argue what the child wants or whether the lawyer should advocate the lawyer's own reasonable idea of what is in the best interest of the child.[47] Although many attorneys are appointed for children

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1978) (reasoning that federal abstention should apply in matters of divorce, alimony, and child custody because of the substantial state interest in domestic relations issues, the fact that state courts are more competent to handle domestic matters, the potential for federal and state law conflicts on domestic issues, and the need for expediency in federal courts).

39. *See* WIS. STAT. ANN. § 767.045 (West 2001) (requiring a GAL be appointed in child custody battles).

40. *Id.*; *see also* Wendland v. Wendland, 138 N.W.2d 185, 191 (Wis. 1965) (encouraging trial courts to appoint guardians ad litem for children); Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 110 (2002) (noting that Wisconsin was one of the first states to encourage the appointment of attorneys for children).

41. *See* A.B.A. Family Law Section, *Proposed Revised Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 135, 163 (1973) (stating that an "investigator" may be provided in contested custody proceedings to review potential custodial arrangements, refer the child to another professional for evaluation, and may submit a report into evidence if counsel is appropriately informed).

42. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 110 (2002) (noting that the ABA's recommendations were not officially adopted by Congress).

43. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).

44. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 110 (2002) (discussing the Child Abuse Act's requirement that judges appoint attorneys for children in delinquency actions).

45. *Id.*; Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 256 n.4 (1998).

46. Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 1 (2003) (on file with the *St. Mary's Law Journal*).

47. *Id.*

throughout the United States, unresolved arguments still exist regarding exactly how attorneys or guardians should represent a child.[48]

The Model Rules of Professional Responsibility provide some clarification for court-appointed attorneys for children.[49] These rules support the idea that the lawyer should maintain a lawyer-client relationship with a child that is as normal as possible given the client's maturity level.[50] However, if "the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm . . . the lawyer may take reasonably necessary protective action, including . . . seeking the appointment of a guardian ad litem, conservator or guardian."[51] Further, the lawyer is impliedly authorized to "reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."[52] These rules support the idea that the attorney should argue for what he believes is in the child's best interest when seeking a guardianship appointment, but once appointed, the attorney should continue to argue for what the child wants.[53] However, the Model Rules make no clear delineation as to specific duties toward a child client.

Consequently, state laws differ greatly as to when it is discretionary or mandatory to appoint counsel for a child, when to appoint a separate non-lawyer guardian for the child, and what the qualifications are for the guardian.[54] The lack of a clear definition of the duties of counsel for

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48. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 125-26 (2000) (questioning the national shift of focus on an attorney's obligation to follow his child-client's desires).

49. *See* MODEL RULES OF PROF'L CONDUCT 1.14 (2003) (defining when an attorney should seek the appointment of a guardian or attorney ad litem).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* 1.14 cmt.

54. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-54 (West 2004) (determining that the court may appoint counsel for a child if it is in the child's best interest or "when the court finds that the custody, care, education, visitation or support of a minor child is in actual controversy"); IOWA CODE ANN. § 598.12 (West 2001) (allowing the court to "appoint an attorney to represent the interests of the minor child"); MONT. CODE ANN. § 40-4-205 (2002) (stating that "[t]he attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests"); TENN. CODE ANN. § 37-1-149 (2001) (mandating that the court must appoint a guardian ad litem for a child if the "child has no parent, guardian or custodian appearing on such child's behalf or such parent's guardian's or custodian's interests conflict with the child's"); UTAH CODE ANN. § 30-3-11.2 (2003) (ordering the appointment of counsel for a child in an action for the custody or support of a child if it appears in the best interest of the child to do so).

children in custody suits has led to much confusion.[55] Many states have convened oversight committees to address the confusion.[56] For example, the Ohio Supreme Court formed a task force to establish statewide standards for GALs which defined the qualifications, payment, training, and scope of obligations.[57] Massachusetts, Minnesota, and Washington have conducted similar investigations.[58]

Additionally, the ABA and the American Academy of Matrimonial Lawyers (AAML) have formed standards that closely define the role of attorneys who represent children.[59] The AAML distinguishes "impaired" children from "unimpaired" children and directs the attorney to advocate only the desires of the child who is "unimpaired."[60] While this approach is helpful, since it does not allow a one-year-old to make legal decisions, scholars criticize the AAML because it does not recognize the particular

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55. Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 112 (2002) (discussing the confusion of the GAL system in South Carolina).

56. *See id.* at 112 (describing how Ohio, Wisconsin, and Minnesota have responded to public complaints of the use of guardians ad litem).

57. Id.; *see also Supreme Court to Develop Standards for Children's Guardians*, COLUMBUS BUS. FIRST (June 28, 2001) (discussing the role of attorneys ad litem and the changes needed to clarify the roles of attorneys), *at* http://columbus.bizjournals.com/columbus/stories/2001/06/25/daily30.html (on file with the *St. Mary's Law Journal*).

58. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L 106, 114 (2002) (discussing how the Massachusetts Senate Committee on Post Audit and Oversight presented a report in March of 2001 deeply criticizing the current state of GALs in that state); PROGRAM EVALUATION DIVISION, OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, GUARDIANS AD LITEM, EXECUTIVE SUMMARY (95-03) (1995) (citing the concerns about the roles of guardians ad litem in controversial divorce proceedings), *available at* http://www.auditor.leg.state.mn.us/ped/1995/guardsum.htm (on file with the *St. Mary's Law Journal*); Raven Lidman & Betty Hollingsworth, *Rethinking the Roles of Guardians Ad Litem in Dissolutions: Are We Seeking Magicians?*, WASH. STATE BAR NEWS (Dec. 1998) (examining the meaning of guardians ad litem in Washington and that current statute are unclear), *available at* http://www.wsba.org/media/publications/barnews/archives/dec-98-rethinking.htm (on file with the *St. Mary's Law Journal*).

59. *See* A.B.A. Family Law Section, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 2, 3 (2003) (establishing the "Child's Attorney" and the "Best Interests Attorney" as the two types of counsel appointed for children in custody disputes who have different obligations); American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1, 2 (1995) (directing courts to only appoint ad litems when requested or when particularly necessary in the case).

60. American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1, 16 (1995).

dynamics to which a child in a custody case is exposed.[61] Although psychological studies report that children over the age of twelve are "mature and intelligent" enough to make their own decisions, these studies do not focus on the specific decision making skills of children involved in custody litigation.[62] Judge Debra Lehrmann, an experienced Texas family lawyer and judge,[63] cites this as a major flaw in the AAML approach because "[t]he issue is not whether children are mature or intelligent enough to make their own decisions; rather, the issue is whether children are able to make objective decisions while in the midst of such litigation, regardless of their age."[64] The standards suggested by the AAML are very helpful, but they do not sufficiently delineate the duties of an attorney who represents children.

Recently, the ABA formed the Standards of Practice for Lawyers Representing Children in Custody Cases.[65] The standards establish two different types of lawyers for children.[66] First, the ABA defines the "Child's Attorney" as "[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client."[67] Second, the "Best Interests Attorney" is "[a] lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives."[68] These standards assert that a lawyer can be either a Child's Attorney or a Best Interests Attorney.[69] The main difference between the two types of lawyers is that the Best Interests Attorney examines and argues for the child's best interest as a lawyer in the suit, whereas the Child's Attorney "is a lawyer who represents the child as a client."[70] Both types of attorneys have duties to

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61. Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126 n.7 (2000).

62. *Id.*

63. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6 (2003) (recognizing that Judge Lehrmann has sixteen years of judicial experience and is a Master for all Tarrant County Family Law Courts) (on file with the *St. Mary's Law Journal*).

64. Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 126 n.7 (2000).

65. A.B.A. Family Law Section, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 131 (2003).

66. *Id.* at 132.

67. *Id.* at 133.

68. *Id.*

69. *Id.*

70. A.B.A. Family Law Section, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 133 (2003).

"accept an appointment only with a full understanding of the issues and the functions to be performed."[71]

Notably, these standards are very different from the earlier version the ABA recommended since the new standards provide two distinct types of advocates with different duties.[72] These changes simply indicate, however, that the law is still in a state of flux regarding lawyers who represent children. Although these standards do provide many definitive answers about the roles of court-appointed attorneys in custody cases, they still require clarification regarding how judges will determine which type of advocate to appoint.

III. THE TEXAS APPROACH

Similar to the Model Rules, the Texas Rules of Professional Conduct require a lawyer to seek the appointment of a separate guardian for the child whenever the lawyer believes it is best for the client.[73] When deciding whether or not to request a separate guardian for a child client, lawyers must examine three different ethical obligations: (1) the duty to the client, (2) the duty to the legal system, (3) and the duty as a public citizen to the quality of justice.[74] Lawyers for children should weigh these obligations equally without giving one priority.[75] In her discussion of how an attorney representing a child can rationalize the conflicting duties to the client, legal system, and justice, Judge Lehrmann suggests finding "[a] balance . . . between the child's right to be heard and the child's right to be protected."[76] She further states that the duties of a child's attorney may change according to the purposes under which the attorney is ap-

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71. *Id.* at 134.

72. *Compare* A.B.A. Family Law Section, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 133 (2003) (establishing that a lawyer representing a child in litigation should either be a Child's Attorney, who advocates for the child's wishes, or a Best Interests Attorney, who presents what is best for the child), *with* A.B.A. Family Law Section, *Proposed Standards and Practices for Lawyers who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 375 (1995) (commenting that a lawyer may accept the role of both a Child's Attorney and guardian ad litem when appointed to represent a child in litigation and has the duty to protect the child's legal rights in this dual capacity).

73. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g) (stating that "[a] lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for . . . a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client").

74. Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 130 (2000) (reviewing the attorney's ethical obligations).

75. *See id.* (suggesting that none of the ethical obligations have inherent priority).

76. *Id.*

pointed.[77] Thus, if the court appoints the attorney to assist in determining the child's best interest, no duty to the child arises.[78] Consequently, the attorney is bound by the wishes of the child when the attorney is appointed to act for the child.[79]

Competency is another major ethical issue arising when representing children.[80] Currently, the law holds that children are not legally competent to make decisions for themselves.[81] A child's desire, however, is one factor a court may consider when determining custody matters.[82] However, the best interest of a child is the main determining factor in custody proceedings in Texas.[83]

In determining a child's best interest, the Texas Supreme Court has laid out a series of factors to consider.[84] These factors include:

> (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of

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77. *See id.* (stating that an attorney appointed to represent a child has a duty to advocate the client's opinion only if the court proposes that the attorney act as a representative of the child).

78. *Id.*

79. Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 130 (2000).

80. *Id.*

81. *See* TEX. R. CIV. P. 173 (contending that when an incapacitated individual is a party to a suit and is represented by a person whose interests appear to be adverse to that person, "the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs"); Byrd v. Woodruff, 891 S.W.2d 689, 704 (Tex. App.—Dallas 1994, writ denied) (stating that a child does not have the legal ability to hire an attorney to advocate her interests). An incapacitated person without a legal guardian may be represented as plaintiff or defendant in an action by "next friend" under certain rules:

> (1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.
>
> (2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

TEX. R. CIV. P. 44.

82. *See* Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976) (analyzing which factors to consider when determining the best interest of a child, including the child's desires); *see also* TEX. FAM. CODE ANN. § 153.101(2) (Vernon 2003) (stating that a child who has sent a written report of a request to change her custodial arrangements may do so if the court finds it in her best interest).

83. *See* TEX. FAM. CODE ANN. § 153.002 (Vernon 2003) (indicating that the best interest of the child is the most important focus of family court proceedings).

84. *See Holley*, 544 S.W.2d at 372 (laying out eight factors for courts to consider when determining the best interest of a child).

> the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.[85]

While this list is not exhaustive,[86] it does give the court some direction in measuring the best interest of a child when appointing an attorney for a child in a parental rights termination proceeding.[87] Although this list of

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85. *Id.*; *see also* Heard v. Bauman, 443 S.W.2d 715, 719 (Tex. 1969) (arguing that it is not in the child's best interest to consider a parent's voluntary transfer of her child to another for temporary care because of the parent's financial instability as a relinquishment of parental rights allowing the intended temporary caregiver to adopt the child); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966) (identifying the a legal presumption that the court may serve the best interest of a child by awarding custody to the child's parents, and burden of proof lies with the person seeking to deny custody to the natural parents); Mumma v. Aguirre, 364 S.W.2d 220, 221 (Tex. 1963) (considering that stability in the home is in the child's best interest, and changing custody does not normally advance such stability unless materially changed circumstances exist); Porter v. Porter, 371 S.W.2d 607, 608-09 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.) (determining that although the law presumes the child's best interest is served by awarding custody to a parent rather than a nonparent, awarding custody to grandparents or another fit person is not an abuse of discretion if the natural parent is not able to provide a proper home for the child and the child is in a better environment "for his mental, moral and emotional development").

86. *See Holley*, 544 S.W.2d at 372 (indicating that the court may use circumstances other than these factors to determine the best interests of a child).

87. *Id.*; *see also* TEX. FAM. CODE ANN. § 153.002 (Vernon 2003) (stating that "the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child"); *id.* § 153.131(b) (establishing a rebuttable presumption that both parents of a child be appointed as joint managing conservators and that appointment is in the best interest of a child unless a history of family violence exists involving the parents of the child); Edwards v. Edwards, 79 S.W.3d 88, 100 (Tex. App.—Texarkana 2002, no pet.) (directing the trial court to consider the best interest of the child when appointing a father as sole managing conservator). Additionally, awarding custody to a parent who has committed physical abuse is not in the best interest of the child. *Id.*; *see also* Lohmann v. Lohmann, 62 S.W.3d 875, 879 (Tex. App.—El Paso 2001, no pet.) (urging that custody cases first center around the best interest of the child, and pleading and practice come second). In this case, the Eighth District Court of Appeals held that no abuse of discretion existed where counsel did not file a written record of proposed instruction to the jury where the best interest of the child ultimately prevailed. *Id.* at 878; *see also* Dennis v. Smith, 962 S.W.2d 67, 75 (Tex. App.—Houston [1st Dist.] 1997, writ denied) (holding that giving one parent the right to decide the child's area of residence is not an abuse of discretion when it serves the best interest of the child); Hirczy v. Hirzcy, 838 S.W.2d 783, 786 (Tex. App.—Corpus Christi 1992, writ denied) (allowing a mother to rebut paternity and deny her husband conservatorship and visitation of children based on the best interests of the children); Wristen v. Kosel, 742 S.W.2d 868, 870 (Tex. App.—Eastland 1987, writ denied) (considering only the best inter-

factors may be helpful to the court in many respects, it does not answer the problem regarding how and when to appoint an attorney for a child in a custody dispute.

To address this problem, Texas passed new legislation in 2003 altering the Family Code to resemble the recent ABA recommendations, with a few differences.[88] The legislature sponsored this amendment through an ad hoc committee put together in 2001 by Representative Toby Goodman of Arlington.[89] The committee included a group of lawyers and judges who focused on bringing order to the definition of attorneys ad litem and children's representatives specifically in child custody cases rather than cases brought by the state.[90] The committee focused on identifying the function that lawyers and judges expect a lawyer to serve in representing a child in a custody case.[91] The new Family Code provisions allow a court to appoint of one of three types of representatives: GAL, AAL, or AA.[92] Moreover, the amendments specifically define the duties of each type of representative.[93] One difference in the duties of each of these representatives is that the GAL is not required to be an attorney, may not call or question witnesses or provide legal services, and may not veto an agreement between the parties to the litigation.[94]

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est of a child born of the marriage when deciding conservatorship). Serving the best interest of a child is a compelling reason to divide children of a household who are not the product of the same marriage. *Id.*

88. *See* Tex. H.B. 1815, 78th Leg., R.S. (2003) (amending the Texas Family Code to establish and delineate the duties for an attorney ad litem and an amicus attorney in suits brought by nongovernmental entities).

89. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 1 (2003) (discussing the significant changes in Chapter 107 of the Texas Family Code) (on file with the *St. Mary's Law Journal*).

90. *See id.* (listing the members of the ad hoc legislative committee); *see also* Tex. H.B. 1815, 78th Leg., R.S. (2003) (detailing the members of the committee formed to analyze the confusion over court-appointed attorneys in custody cases).

91. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 1 (2003) (analyzing the significant changes that Chapter 107 of the Texas Family Code experienced during the 2003 legislative session with the help of family law professors, district court judges, legal ethics experts, family law attorneys, and mental health professionals) (on file with the *St. Mary's Law Journal)*; Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (acknowledging that the purpose of the committee was to establish duties for court-appointed attorneys in child custody disputes that most lawyers and judges expected) (on file with the *St. Mary's Law Journal*).

92. TEX. FAM. CODE ANN. § 107.021 (Vernon Supp. 2004).

93. TEX. FAM. CODE ANN. §§ 107.002-.005 (Vernon Supp. 2004).

94. *Id.* § 107.002.

Further, both the AAL and the AA have the duty to interview "the child in a developmentally appropriate manner" and each party and persons involved in the suit, make investigations, receive and review copies of all relevant records regarding the child, expedite the proceedings while taking the child's interests into account, and encourage quick settlement.[95] For a lawyer to be an AAL or an AA, the advocate is required to be "trained in child advocacy or have experience determined by the court to be equivalent to that training," and once the court appoints a lawyer in either position, that advocate has the right to receive any relevant documents regarding the suit.[96] Additional duties of the AAL include seeking the child's objectives of representation in a developmentally appropriate manner, advising the child, representing the wishes of the child if the AAL determines the child is able to understand the attorney-client relationship with the AAL, considering the impact of communicating the child's wishes to the court, and complying with the ABA's standards for representing children in abuse or neglect cases.[97] Finally, an additional duty of the AA includes arguing on behalf of the child's best interest after considering the facts and circumstances of a particular case.[98]

The AA is not bound by the child's expressed wishes in the case, but must determine the desires of the child by interviewing the child in a developmentally appropriate manner.[99] The AA must consider the impact to the child of any action taken and sign or refuse to sign an order affecting the child.[100] Also, the AA must explain the justification for any decision made, explain the meaning of the AA to the child, and inform the child that the AA is not bound by an attorney-client relationship in terms of confidentiality.[101] The amendments to the Family Code also establish that the AA "may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child."[102]

The amended Family Code brings many changes to the appointment of representatives in child custody cases. The ad hoc committee that formed these amendments considered the current state of flux in the law on this

95. *Id.* § 107.003.

96. *Id.*

97. *Id.* § 107.004.

98. TEX. FAM. CODE ANN. § 107.005 (Vernon Supp. 2004).

99. *Id.* § 107.005(a), (b)(1).

100. *Id.* § 107.005(b)(3), (4).

101. *Id.* § 107.005(b)(5)-(7).

102. *Id.* § 107.005(c).

subject and aimed at making the changes clear to avoid any confusion when applying this law in the future.[103]

IV. Legal Implications of the Amendment

A. *Application*

Although there are no cases specifically involving the revised Family Code to date, it is necessary to determine how courts are going to apply the new law. The first consideration is when to appoint each type of representative in a suit affecting custody. The statute indicates that a judge has the discretion to appoint one advocate in a custody suit—either an AA, AAL, or GAL.[104] Whether or not to appoint a representative is purely discretionary except in suits brought by a governmental entity, such as child abuse proceedings or parental rights termination actions.[105] This discretion depends on a finding that the parents are unable to sufficiently protect the child's best interest.[106]

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103. *See* John J. Sampson et al., Texas Family Code Annotated ch. 107 introductory cmt., at 471 (2003) (indicating that the reason for the changes in the roles of court-appointed attorneys in child custody cases was to resolve terminology problems and create clear duties for these attorneys); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (discussing the reasons for the amendment) (on file with the *St. Mary's Law Journal*).

104. *See* Tex. Fam. Code Ann. § 107.021(a) (Vernon Supp. 2004) (stating that the court may appoint either an AA, AAL, or GAL in a suit not brought by a governmental entity in which the best interest of a child is debated); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (arguing that judges cannot appoint more than one advocate for a child in a custody case) (on file with the *St. Mary's Law Journal*).

105. *See* Tex. Fam. Code Ann. § 107.021 (Vernon Supp. 2004) (establishing that when a court is deciding whether to appoint an AA, AAL, or a GAL, the court shall consider different factors). For instance, the court shall:

> (A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and
>
> (B) balance the child's interests against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment;
>
> (2) may make an appointment only if the court finds that the appointment is necessary to ensure the determination of the best interests of the child; and
>
> (3) may not require a person appointed under this section to serve without reasonable compensation for the services rendered by the person.

Id.

106. Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* State Bar of Tex., 29th Annual Advanced Family Law Course ch. 6, at 5 (2003) (on file with the *St. Mary's Law Journal*).

Benefits and detriments exist when appointing an AAL over an AA or an AA over an AAL.[107] The appointment of GALs in child custody cases, however, is likely to cease completely because this amendment renders them powerless in terms of legal ability to call witnesses and introduce evidence.[108] Moreover, on a practical side, judges are more likely to appoint AAs than AALs because AAs will alleviate the pressure on the judge to make a decision regarding the child's best interest.[109] Appointments of AALs are likely to become less frequent because the AAL is bound by the wishes of the client, while an AA may express to the court his opinions regarding the best situation for a child and reveal the reasons for making the determination, thus giving the judge more assistance in ultimately determining the best situation for the child.[110]

The result of this amendment is to alleviate much of the strain on judges in custody cases in deciding the best interest of the child, because the attorney is specifically assigned to assist the court.[111] The AA has an insider's view of the matter because he is not bound by the rules of confi-

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107. *See id.* at 3 (2003) (presenting the arguments of both the critics and proponents of the child-directed model and the best interest-directed model of child representation); *see also* Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1141-42 (1978) (addressing the plethora of opinions on how a lawyer for a child should treat the child's preference).

108. John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003).

109. *See* Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (recognizing that a very small percentage of all custody proceedings in 2001 were tried by a jury) (on file with the *St. Mary's Law Journal*). Sampson implied that this factor indicates that the majority of Texas custody battles are tried in front of a judge, therefore it is the judge's discretion that is the most important. *Id.*

110. *See* TEX. FAM. CODE ANN. § 107.001(1) (Vernon Supp. 2004) (indicating that the main role of the AA "is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child"). Given that the main role of the AA is to help the court, it is logical that a judge would prefer to appoint someone who will assist the court more in the purpose at hand. *See also* Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (arguing that when faced with the decision of whether to appoint an AA or AAL, a judge is likely to appoint an AA more frequently because it allows the attorney more leeway in assessing the child's best interest and communicating such information to the court) (on file with the *St. Mary's Law Journal*).

111. *See* TEX. FAM. CODE ANN. § 107.001 (Vernon Supp. 2004) (defining the statutory role of an amicus attorney).

dentiality.[112] Furthermore, if a judge decides to appoint an AA over an AAL, this appointment is unlikely to be considered reversible error on appeal.[113] Only the failure to appoint a representative for the child when the interest of the current representative, usually the parents, is adverse to the child's has been held as reversible error.[114] Because appointment of an AAL or AA is not mandatory in a custody case,[115] and neither advocate is likely to have adverse interests to the child, judges can freely appoint AAs instead of AALs without fear of reversal on appeal.

B. *Immunity*

The immunity of the court-appointed advocates is another important issue considered by this amendment because it safeguards the advocates from lawsuits brought by disgruntled parents who are unhappy with the outcome of the custody proceedings. The Family Code directly addresses this matter by stating that

> (a) [a] guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.
> (b) [This] does not apply to an action taken or a recommendation or opinion given:
> (1) with conscious indifference or reckless disregard to the safety of another;

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112. *See id.* § 107.005(c) (relating that the AA "may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child").

113. *See* In the Interest of M.D.S., 1 S.W.3d 190, 196 (Tex. App.—Amarillo 1999, no pet.) (concluding that in the absence of proof that the appointment of an attorney ad litem was necessary because a party to the suit sufficiently advocated the interests of the child and their interests were not contrary to the child's, the trial court's failure to appoint an ad litem was not reversible error).

114. *See* Turner v. Lutz, 654 S.W.2d 57, 58-59 (Tex. App.—Austin 1983, no writ) (holding that a court's failure to appoint an ad litem was reversible error because of the serious nature of the parental termination proceedings and the parent-representative had interests clearly adverse to the child).

115. *See* TEX. FAM. CODE ANN. § 107.001 (Vernon Supp. 2004) (implying that appointment of an AAL or AA in a custody case is purely discretionary by not explicitly requiring the appointments). However, the Texas Family Code expressly states that an AAL must be appointed in suits brought by governmental entities. *Id.* § 107.011; *see also* Peterson v. Peterson, 502 S.W.2d 178, 180 (Tex. Civ. App.—Houston [1st. Dist.] 1973, no pet.) (finding that the trial court has broad discretion in ordering advocates or attorneys for the child's best interest, and there is always a presumption that the trial court properly ruled in this appointment).

(2) in bad faith . . .; or
(3) that is grossly negligent or willfully wrongful.[116]

Thus, court-appointed advocates face very limited liability for their actions while representing children in custody disputes.

Immunity for court-appointed advocates comes from the idea of judicial immunity, which is deeply rooted in the common law.[117] Judicial immunity covers those who are acting "as arms of the court" and government officials who have responsibilities of office that are so sensitive as to require a total shield from liability.[118] In deciding whether the actions of a government official fit within the common law tradition of absolute immunity from civil liability, the court applies a "functional approach," looking to the nature of the function performed, not the identity of the person who executed it.[119] Quasi-judicial immunity, a lesser form than absolute immunity, is measured by whether the acts performed are "intimately related to the judicial process."[120] In applying this standard, the Wisconsin Court of Appeals concluded that a "guardian ad litem's function is intimately related to the judicial process."[121] This intimate relationship is due to the fact that both the guardian ad litem and the court have the child's best interest as their main concern.[122]

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116. TEX. FAM. CODE ANN. § 107.009(a), (b) (Vernon Supp. 2004).

117. *See* Bradley v. Fisher, 80 U.S. 335, 346 (1871) (expounding that the principle, which saves judges of courts from civil liability in the exercise of judicial functions, dates back to the common law).

118. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (denying absolute immunity to presidential aides but granting qualified immunity based on policy reasoning that frequent claims against public officials create costs for society as a whole). Other policy reasons exist to justify immunity for public figures such as "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*

119. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 272-75 (1993) (applying the functional approach to find that a prosecutor's investigatory conduct was an administrative function only entitled to qualified immunity because the prosecutor was not acting as an advocate at the time of the action and that the prosecutor's statements made during a public speech were only entitled to qualified immunity because they were not an act of advocacy for the state). Although qualified immunity is a lesser form of immunity, it does provide sufficient protection to the non-advocacy functions of prosecutors to satisfy public policy concerns. *Id.* at 278.

120. *See* Berndt v. Molepske, 565 N.W.2d 549, 551 (Wis. Ct. App. 1997) (finding that a guardian ad litem's role is sufficiently related to the judicial process to warrant quasi-judicial immunity for negligence because the responsibility of both the guardian ad litem and the court is to promote the best interest of the child).

121. *Id.*

122. *Id*; *see also* Butz v. Economou, 438 U.S. 478, 512 (1978) (stating that absolute immunity is important so that judges and advocates can perform their jobs to serve the public interest without fear of harassment); Sheib v. Grant, 22 F.3d 149, 156 (7th Cir. 1994) (extending absolute immunity to a GAL who violated the Illinois Eavesdropping Statute in

Further, in *Delcourt v. Silverman*,[123] the Texas Fourteenth District Court of Appeals applied absolute judicial immunity to the acts of a guardian ad litem.[124] In support of this decision, the court cited a Sixth Circuit case holding a guardian ad litem absolutely immune in a custody case because the ad litem must act in the best interest of the child, and without this immunity, the guardian ad litem could not work properly without dwelling on possible subsequent harassment and hostile treatment from unhappy parents.[125] The court also justifies immunity in the child custody setting by listing compelling reasons, such as making unaffected recommendations to the court and recognizing and reporting the best placement for the child.[126] Next, the court reasoned that "the availability of qualified attorneys to represent children in the midst of a custody dispute might be affected if disgruntled or vituperative parents could hold the guardian ad litem personally liable."[127]

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trying to assess the best interest of the subject child); Cok v. Consentino, 876 F.2d 1, 4 (1st Cir. 1989) (finding a GAL absolutely immune in a suit by an ex-wife regarding a divorce proceeding ruling although the court suggested a possible malpractice claim by the child against the GAL); Myers v. Morris, 810 F.2d 1437, 1465-67 (8th Cir. 1987) (holding that non-judicial persons such as a GAL and AAL who conduct quasi-judicial functions closely related to the judicial process have absolute immunity for damages resulting from investigation of child sexual abuse); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (upholding a decision finding a GAL absolutely immune from a malpractice claim because he was operating within the judicial process to accomplish his goals of protecting the best interest of the subject child); Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (refusing to find a GAL liable in a suit brought by a mother on behalf of her children because the GAL's duty is to serve the public interest, a function that is within the judicial process); Ward v. San Diego County Dep't of Soc. Servs., 691 F. Supp. 238, 241 (S.D. Cal. 1988) (citing that another reason for granting GAL immunity is that the court may terminate the GAL's employment if the court feels that her actions are improper); Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) (discussing that a GAL "is an officer of the court" and is entitled to absolute immunity); State v. Weinstock, 864 S.W.2d 376, 382 (Mo. Ct. App. 1993) (stressing that the reason to grant judicial immunity to a GAL in a custody proceeding is not to protect a negligent advocate but to benefit the public by encouraging these advocates to do their jobs independently without fear of recourse); Penn v. McMonagle, 573 N.E.2d 1234, 1237 (Ohio Ct. App. 1990) (agreeing with the lower court that a GAL should be entitled to absolute immunity regarding his actions throughout a divorce proceeding); *cf.* Briscoe v. LaHue, 460 U.S. 325, 333 (1983) (indicating that an important policy reason to hold public figures immune for their public actions is that "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible").

123. 919 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

124. Delcourt v. Silverman, 919 S.W.2d 777, 784 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

125. *Id.* at 785 (citing Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir.1984)).

126. *Id.*

127. *Id.*

Another Texas court, however, held that court-appointed attorneys representing children in personal injury suits are not entitled to the same "derived judicial immunity" as attorneys appointed as advocates for children in family law cases because the same policy justifications for immunity are not present outside of family proceedings.[128] Nonetheless, the court reaffirmed the notion that court-appointed attorneys in family law cases should be afforded qualified immunity in civil actions against them.[129]

Accordingly, the qualified liability for representatives of children under the amended Family Code is supported by Texas and federal case law.[130] However, granting qualified immunity to the AAs in particular may not be necessary since neither the child nor the parents of the child could have an action against the AA because no attorney-client relationship exist between the AA and the child.[131] The only causes of action that

128. *See* Byrd v. Woodruff, 891 S.W.2d 689, 707-08 (Tex. App.—Dallas 1994, writ denied) (illustrating that in a personal injury case, a guardian ad litem is not granted judicial immunity because the attorney acts as the child's personal advocate rather than an arm of the court).

129. *See id.* (distinguishing that in a friendly suit, GALs are not entitled to judicial immunity, whereas when the GAL is acting in the minor's best interests, he would receive derived judicial immunity).

130. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993) (examining "the nature of the function performed, not the identity of the actor" when deciding whether the actions of government actors fit within the common law definition of absolute immunity); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (recognizing two types of immunity defenses: absolute immunity for legislators, judges, and certain executives while functioning under that role; and qualified immunity for executive officials with fewer discretionary powers); Delcourt v. Silverman, 919 S.W.2d 777, 784-86 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (listing the many policy reasons to grant absolute immunity to a guardian ad litem when that guardian is functioning as an arm of the court); *cf.* Fleming v. Asbill, 42 F.3d 886, 889 (4th Cir. 1994) (reciting that the policy reason to grant immunity to GALs in custody cases is to prevent anxiety in the job and to promote the ability to work without worry of later intimidation from unhappy parents, but concluding that a child may sue a paid GAL for damages if the negligent acts of the GAL cause the child damages).

131. *See* Barcelo v. Elliott, 923 S.W.2d 575, 577, 579 (Tex. 1996) (restating the general rule that privity of contract or an attorney-client relationship between the plaintiff and the offending attorney is required before that plaintiff may sue for legal malpractice); Estate of Arlitt v. Paterson, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 2003, pet. denied) (supporting the privity of contract requirement for legal malpractice claims). *But see* McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) (permitting nonclients to sue attorneys for negligent misrepresentation when both the attorney and the nonclient know that the attorney intends to supply the information, the nonclient relies on the information, and the attorney intends the nonclient to rely on the information).

may be available are negligent misrepresentation or fraud.[132] Even though some cases allow causes of action without an attorney-client relationship, the liability of the AA is still limited to reckless, indifferent, and grossly negligent representation.[133]

In summary, court-appointed attorneys under the amended Texas Family Code are entitled to qualified judicial immunity. However, such immunity is limited because it does not apply in situations of recklessness, willfully malicious acts, or gross negligence.[134] Even if a child or the child's parents wish to sue the attorney for this type of wrongful action, the claimant is further limited in actions against an AA because of the non-existence of an attorney-client relationship.[135] Thus, the court should closely examine the circumstances of the case when deciding whether to appoint an AA over an AAL.

C. *Confidentiality*

Confidentiality is the next major change in the revised Family Code. The AAL, AA, and GAL all have access to confidential information regarding the child, including records of "social services, drug and alcohol treatment, or medical or mental health."[136] Another major law requires children's attorneys to reveal any information showing neglect or abuse of a child.[137] Further, the revised Family Code provides that the AAL owes the same duty of confidentiality to the child that is owed to an adult client.[138] However, the Texas Disciplinary Rules of Professional Conduct

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132. *See McCamish*, 991 S.W.2d at 795 (allowing a claim for negligent representation by a nonclient against an attorney when information is given by the attorney to a known party for a recognized reason).

133. TEX. FAM. CODE ANN. § 107.009 (Vernon Supp. 2004).

134. *Id.*

135. *See id.* § 107.001(1) (indicating that the duty of the AA is only to the court and not to the child).

136. *Id.* § 107.006 (stating that "a mental record of a child at least 12 years of age that is privileged or confidential under other law may be released to a person appointed . . . only in accordance with other law").

137. *See* Child Abuse and Protection and Treatment Act, 42 U.S.C. § 5101 (1994) (requiring that attorneys report suspected child abuse or neglect despite the attorney-client privilege); TEX. FAM. CODE ANN. § 261.101 (Vernon 2002) (requiring all individuals, regardless of privilege, to immediately report any possible case of abuse or neglect of a child).

138. *See* TEX. FAM. CODE ANN. § 107.004 (Vernon Supp. 2004) (providing that the AAL must "represent the child's expressed objectives of representation and follow the child's expressed objectives of representation during the course of litigation"). The question of whether a child is able to direct an AAL is determined on a case-by-case basis as provided by the Family Code. *Id.* § 107.008; *see also* A.B.A. Family Law Section, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 376 (1995) (stating that a "Child's Attorney," which is similar to the AAL

allow the AAL to reveal confidential information when the attorney believes that the child is incompetent and revealing such information is essential to protect the child.[139]

Comparatively, the Texas Disciplinary Rules do not apply to the AA because there is no attorney-client relationship.[140] Nonetheless, certain restrictions apply regarding the AA's disclosure of confidential information. The Texas Family Code states that an AA may not reveal confidential information about the subject child unless the AA finds that such disclosure is required to help the court determine the best interest of the child.[141] The Family Code also requires that the AA explain to the child that an attorney-client relationship does not exist and that any information the child tells the AA may be used to aid the court.[142]

One major issue regarding the confidentiality requirements in the revised Family Code is the broad discretion AAs have when deciding whether to reveal confidential information about the child.[143] The AAL has the same broad discretion, but the AAL is in an attorney-client relationship with the child.[144] Although the AA might reasonably use his

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under the Texas Family Code, is "a lawyer . . . who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client").

139. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g) (requiring a lawyer to seek protective orders regarding "a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client); Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 9 (2003) (on file with the *St. Mary's Law Journal*); *see also* TEX. FAM. CODE ANN. § 107.008(a)(1)-(3) (Vernon Supp. 2004) (authorizing the AAL to use his substituted judgment for the child in certain limited situations). The AAL is permitted to use his substituted judgments if the attorney determines that

> the child cannot meaningfully formulate the child's objectives of representation in a case because the child:
>
> (1) lacks sufficient maturity to understand and form an attorney-client relationship . . .;
>
> (2) . . . continues to express objectives of representation that would be seriously injurious to the child; or
>
> (3) for any other reason is incapable of making reasonable judgments and engaging in meaningful communication.

Id.

140. *See* TEX. FAM. CODE ANN. § 107.001(1) (Vernon Supp. 2004) (indicating that the duty of the AA is to help the court rather than to provide legal advice to the child).

141. *Id.* § 107.005(c).

142. *Id.* § 107.005(b).

143. *See id.* § 107.005(c) (providing that disclosure of confidential information regarding a child turns on an AA's individual discretion of what will serve a child's best interest).

144. *See id.* § 107.001(2) (noting that the AAL owes the child "the duties of undivided loyalty, confidentiality, and competent representation").

own discretion in revealing confidential information, other factors should be considered when deciding whether disclosure serves the child's best interest. Such factors include the psychological effects on the child, whether the child understands the role of the AA, and the impact of any disclosure on the child's relationship with the parents or other individuals.[145]

Another major concern of the confidentiality requirements regarding AAs specifically is the requirement that the AA inform the child that any information the child shares with the attorney may be revealed to the court.[146] Although this warning does prevent the AA from misleading the child,[147] it may discourage the child from communicating candidly with the attorney. Therefore, the court should consider the broad discretion of the AA regarding confidentiality when deciding to appoint an AA rather than an AAL.

V. CONFLICTS OF INTEREST SOLVED?

Through clarifying the duties and liabilities of court-appointed advocates in custody cases,[148] the Texas Legislature attempted to cure the past

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145. *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 462 (2001) (arguing that the primary focus of an advocate for a child in a custody case is the child's ability to communicate a meaningful opinion); Thomasine Heitkamp & Tara Lea Muhlhauser, *Children in the Courts: Rethinking and Challenging Our Traditions*, 66 N.D. L. REV. 649, 668 (1990) (suggesting that any person interviewing a child should confront a child's uncooperative behavior with the initial assumption that the child is speaking the truth); 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, 627 (1998) (indicating that child advocates should consider the needs and decision-making abilities of a child when withholding or revealing communications between the attorney and the child as needed for the best interest of the child).

146. *See* TEX. FAM. CODE ANN. § 107.005(b)(7) (Vernon Supp. 2004) (establishing that the AA must inform the child that any information provided by the child may be used to assist the court).

147. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute*, *in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch.6, at 7 (2003) (indicating that the requirement that the AA inform the child that the attorney may use information obtained from the child is needed to guarantee that the AA does not mislead the child into believing the communications are confidential) (on file with the *St. Mary's Law Journal*).

148. *See* TEX. FAM. CODE ANN. § 107.001-.009 (Vernon Supp. 2004) (setting forth the powers and duties of AAs, AALs, and GALs); *see also* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 265-66 (1998) (cautioning children's attorneys to refrain from substituting their own judgment for the child's and that they must take into account all of the circumstances of the child when advocating for a child); Bonnie E. Rabin, *The Role of the Child's Representative in Private*

problems regarding conflicts of interest.[149] The amendment has solved the conflicts of interest problems in many aspects. First, by appointing an AA or an AAL, the court is defining the exact duty of the attorney. In the first case, the attorney is an arm of the court, advocating the best interest of the child, and there is no conflict because the attorney is free to advocate what he believes is best.[150] In the case of the AAL, the conflict is solved by establishing what the attorney must do: advocate what the child wants.[151]

Next, the new Family Code has clarified the role of a non-attorney guardian ad litem for a child as different from an attorney ad litem.[152] This change is very helpful because it distinguishes GALs as persons allowed to review orders affecting the child, but also clarifies that they are not parties to the suit and may not veto agreements made by parties to the suit.[153] Consequently, judges are likely to appoint GALs less

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Custody and Visitation Matters: Some General Principles, *in* CHILDREN'S LAW INSTITUTE, at 321, 329 (PLI Litig. & Admin. Practice Course, Handbook Series No. C-180, 1998) (advising that advocates for children should avoid needlessly compromising the child's need for confidentiality, should consider the impact on the child's relationship with the parent when such information could cause a parent to become angry or upset, and should seek to elicit the child's permission to reveal those communications). Rabin suggests that getting the child client to consent to revealing communications is necessary and usually not difficult. *Id.*

149. *See* JOHN J. SAMPSON ET AL., TEXAS FAMILY CODE ANNOTATED ch. 107 introductory cmt. (2003) (addressing that the focus of the committee in writing the amendments to the Family Code was to eliminate the ambiguity of the old role of guardian ad litem and provide specific duties of each new role to end any conflicts of interest); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (indicating that the impetus for the amendments to the family code establishing the new advocate roles was to end the need for two advocates for each child when a conflict of interest arose and ultimately decrease the costs to the parties for such advocacy) (on file with the *St. Mary's Law Journal*).

150. TEX. FAM. CODE ANN. § 107.005(a) (Vernon Supp. 2004).

151. *Id.* § 107.004(4).

152. *Id.* § 107.002.

153. *See id.* (listing the duties of a GAL and expressing two times that the GAL is not a party to the proceeding); John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003) (indicating that because the GAL does not have as many powers as the other types of appointed advocates, courts will decline to appoint them in custody suits); Interview with John J. Sampson, Chair, House Committee on Juvenile Justice and Family Issues, and William Benjamin Wynne Professor of Law, University of Texas School of Law, in Austin, Tex. (Sept. 17, 2003) (indicating that the amendment to the Family Code will mark the decline in the number of GALs appointed to serve in custody cases) (on file with the *St. Mary's Law Journal*).

frequently, if at all, after the change in the Family Code.[154]

While the new Family Code is very progressive and clarifies aspects long debated in the legal community regarding the duties of court-appointed advocates, several concerns still exist and must be addressed. These questions include whether Texas judges will appoint these advocates on the court's motion or by a motion of a party. Moreover, how will Texas judges determine which advocate to appoint and which appointment will serve the best interest of the child or children in the custody suit?

A. *How Will the Court Decide Which Type of Advocate to Appoint?*

The process the court will take in choosing the type of advocate is one major concern. Although Section 107.021 of the Texas Family Code identifies that the court has the discretion to appoint one of the three types of advocates when the appointment serves the best interest of the child, the Family Code does not address the exact process the court should take in making these appointments.[155] In essence, the new Family Code supports the notion that the only way a child advocate may be appointed is if it is in the child's best interest and the parties are able to bear the costs.[156] However, how will the court know what is in the child's best interest before the proceeding has developed? Thus, a brief pretrial hearing in custody disputes involving a child would help the court make the important decision of whether to appoint an advocate to represent the child.

After the court has recognized that an appointment is in the best interest of the child and that the parties are able to compensate the advocate, the court should carefully consider the benefits and detriments of each appointment when deciding which type of advocate to appoint. Given the fact that courts are far less likely to choose a GAL because of their lack of power as attorneys,[157] the main choice will be between the AA

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154. John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003) (arguing that the newly defined roles in the Family Code will result in a lower amount of nonlawyer GALs in custody suits).

155. *See* TEX. FAM. CODE ANN. § 107.021 (Vernon Supp. 2004) (providing that where the court uses its discretion to appoint an advocate to represent a child in a custody suit, the court shall consider the costs to the parties and the ability to pay balanced with the best interest of the child).

156. *See id.* § 107.021(b) (mandating that when deciding whether to appoint a child advocate, the court must consider the costs of such appointment and any available alternatives to appointing an advocate).

157. *See* John J. Sampson, *Family Law: Top 10 Things That Happened in 2003*, 66 TEX. B.J. 684, 686 (2003) (arguing that the appointment of GALs in custody cases will decrease significantly because GALs do not have the power that the AA and AAL will have as attorneys in the proceeding).

and the AAL. One benefit of choosing an AA is that the attorney is not bound by the attorney-client relationship and thus may reveal relevant confidential material to the court to prove what he believes is the best position for the child.[158] This information may be very helpful to the court, but may be harmful to the child where revealing the information may cause a parent to become upset or even violent with a child.[159]

A further benefit of choosing an AA may be that he is not bound by the child's wishes and may recommend a course of action contrary to what the child wants if he believes it is in the child's best interest. While this situation might be very helpful in cases where a child is very young and does not understand the nature of the proceedings, it is not appropriate where a child is almost of legal age to make her own decisions in other areas of the law. Furthermore, under the requirements of the statute, AAs do not have to be trained in psychology—they need only be "trained in child advocacy or have experience determined by the court to be equivalent to that training."[160] How can an attorney, not trained in psychology or counseling, really know what is best for a child? One notable Texas judge explains:

> [A]s attorneys, we must be mindful that we are not the ultimate decision-makers of what is just and fair. In a free society, it is imperative that individuals have access to an impartial tribunal to assert their rights. The attorney's duty to seek protection for a disabled client does not authorize the attorney to decide what position a client should take, to advocate what is best for the client, or to make a recommendation to the court regarding the outcome of the case. Arguably, this would absolve the court of its judicial responsibility and would give the attorney an improper amount of authority.[161]

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158. *See* TEX. FAM. CODE ANN. § 107.005(c) (Vernon Supp. 2004) (allowing the amicus attorney to reveal confidential communications if he determines that it is required to help the court in determining the best place for the child). This power of the AA shows a conflicted position and grants the attorney very broad discretion over information that would otherwise be confidential in a typical attorney-client relationship. *Id.*

159. *See* Bonnie E. Rabin, *The Role of the Child's Representative in Private Custody and Visitation Matters: Some General Principles*, *in* CHILDREN'S LAW INSTITUTE, at 321, 329 (PLI Litig. & Admin. Practice Course, Handbook Series No. C-180, 1998) (explaining that carelessly compromising a child client's right to confidentiality can "severely compromise your relationship with your child client" and can cause dangerous situations).

160. TEX. FAM. CODE ANN. § 107.003 (2) (Vernon Supp. 2004).

161. Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 134 (2000); *see also* Betty D. Friedlander, *Law Guardian Bias*, 1 Association of Trial Lawyers of America Annual Convention Reference Materials, Family Law 495, 498 (2002) (arguing that bias among attorneys who represent children is quite common), *available at* WESTLAW, Am.2002 ATLA-CLE 495; Raven C. Lidman & Betsy R. Hollingsworth, *The*

Following this argument, appointing an AA may relieve judges and juries of their responsibilities of fact-finding.[162]

Nonetheless, there may be some cases where it is appropriate to appoint an AA, such as where an attorney is unable to assess what the child wants, or where it would be obvious to any reasonable person that what the child wants is clearly not in her best interest. However, it may be more appropriate to appoint an AAL for older children because Texas courts already hold them accountable in many other aspects. For example, older children in Texas may be tried as adults in criminal proceedings[163] and may make abortion decisions despite parental wishes.[164]

Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 GEO. MASON L. REV. 255, 306 (1998) (criticizing the assignment of too much discretion to an advocate for a child and contending that "[n]o role exists for someone to predigest and prejudge the case for tribunal. Only the judge can act as a fact finder and decision maker").

162. *See* Judge Debra H. Lehrmann, *Who Are We Protecting? An Analysis of the Law Regarding the Duties of Attorneys and Guardians Ad Litem*, 63 TEX. B.J. 123, 134 (2000) (arguing that some court-appointed figures can take too much control of the fact-finding process reserved for judges and juries); *see also* Betty D. Friedlander, *Law Guardian Bias*, 1 Association of Trial Lawyers of America Annual Convention Reference Materials, Family Law 495, 498 (2002) (arguing that bias among attorneys who represent children is quite common), *available at* WESTLAW, Am.2002 ATLA-CLE 495.

163. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon 2003) (allowing the juvenile court to waive jurisdiction and transfer a child to criminal court if the child is alleged to have committed a felony and the child was either fourteen years of age at the time of the alleged crime, if the offense is a capital felony, or fifteen years of age, if the crime is a second or third degree felony); *see also* John Council, *No More Kid Stuff: The Line Between Juvenile and Adult Crime Continues to Blur*, TEX. LAW., Nov. 8, 1999, at 30 (describing how since the 1994 campaign by Gov. Bush, who pledged to get tougher on minor criminals, criminal defense lawyers claim that Texas juvenile law has been slipping very closely toward becoming adult law).

164. *See* Lambert v. Wicklund, 520 U.S. 292, 296-97 (1997) (recognizing a minor's right to an abortion without parental consent if the court determines it is in her best interests); Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (identifying that a child has constitutional rights relating to an abortion decision); Causeway Med. Suite v. Ieyoub, 123 F.3d 849, 852 (5th Cir. 1997) (finding a Louisiana law requiring notification of parents of their child's abortion decision if the judge finds it in the best interest of the child unconstitutional because every minor must have an opportunity to go to court to seek an abortion without parental notification). *But cf.* Powers v. Floyd, 904 S.W.2d 713, 718 (Tex. App.—Waco 1995, writ denied) (determining that no legal reason exists to impose the duty of full and complete disclosure to a child on a doctor in every case); Little v. Little, 576 S.W.2d 493, 495 (Tex. Civ. App.—San Antonio 1979, no writ) (refusing to adopt the "mature minor" exception which allows some "mature minors" to make general decisions about medical treatment despite the lack of parental consent). Section 33.002 of the Texas Family Code provides that a physician must provide a minor's parents or guardian with forty-eight hours notice before performing an abortion on the minor. TEX. FAM. CODE ANN. § 33.002 (Vernon 2002). However, the minor may seek to have this requirement waived by the court. *Id.* § 33.003.

Notably, the policy in Texas criminal courts is to hold minors accountable as adults for certain heinous criminal acts, starting at the age of fourteen.[165] Moreover, Texas civil courts allow children age twelve and older to petition the court in writing to change custody arrangements.[166] Thus, Texas courts should allow minors who are twelve years of age or older to contribute to their own custody cases through an appointed attorney, except in extreme circumstances where the child is unable to direct the attorney.[167] Accordingly, courts should consider the age of the child when deciding whether to appoint an AA or an AAL.

Additionally, the benefit of appointing an AAL is that there is a typical attorney-client relationship, so the attorney knows he must advocate exactly what the child wants unless the attorney cannot assess the child's desires.[168] Thus, if a child is old enough to determine the consequences

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165. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon 2003) (allowing the juvenile court to waive jurisdiction and transfer a child to criminal court if the child is alleged to have committed a felony and the child was either fourteen years of age at the time of the alleged crime, if the offense is a capital felony, or fifteen years of age, if the crime is a second or third degree felony); *see also* Faisst v. State, 105 S.W.3d 8, 15 (Tex. App.—Tyler 2003, no pet.) (allowing a transfer from juvenile court for a minor who committed intoxication manslaughter).

166. *See* TEX. FAM. CODE ANN. § 156.101(2) (Vernon 2003) (allowing the court to modify an order establishing conservatorship, possession, or access of a child if such change is in the best interest of the child, the child is twelve years of age or older, and has notified the court in writing of the identity of the person the child prefers to have authority over the primary residence of the child); *see also* In the Interest of Anglin, 542 S.W.2d 927, 933 (Tex. Civ. App.—Dallas 1976, no writ) (considering the preference of a ten-year-old child an important factor in deciding custody unless a party can show that an adverse party has intentionally influenced the child's choice); Goodale v. Goodale, 497 S.W.2d 116, 120 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (finding that although the preference of the child is a factor to be considered by the court in awarding custody, alone, it is not controlling in modification of conservatorship proceedings); Neal v. Medcalf, 244 S.W.2d 666, 670 (Tex. Civ. App.—El Paso 1951, no writ) (realizing that the preference of a child is an element to be considered in a custody modification, but the court will not give that factor much weight when an adverse party has "produced this frame of mind in the infant").

167. *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 461-62 (2001) (suggesting a model for selecting the representation for the child and arguing that the court should decide the type of attorney to appoint based on the child's custodial preference and whether the child's preference is in the child's best interest). Gilmore focuses his article on Section 506 of the Illinois Parentage Act of 1984. *Id.* at 458; *see also* 750 ILL. COMP. STAT. 5/506(a) (West 2003) (establishing similar child advocates as compared to the Texas Family Code, which include an AAL to represent the child, a GAL to address the issues the court determines, and a child's representative to argue what is in the child's best interest after hearing all relevant facts).

168. *See* TEX. FAM. CODE ANN. § 107.008 (Vernon Supp. 2004) (permitting an AAL to substitute his judgment for the child's when the attorney feels that the child lacks the ability to meaningfully formulate the objective of representation).

of her actions, she should be able to direct an attorney to advocate her wishes.[169] The only other concern in choosing an AAL over an AA is that the court may not understand the important aspects of the case because the AAL is not allowed to reveal confidential information. This is not always true; the AAL will still be required under the Texas Family Code to reveal any information relating to abuse or neglect of the child regardless of the attorney-client privilege.[170] Accordingly, the safety of the child is not overlooked when an AAL is appointed.

In summary, the amendments to the Texas Family Code do not specifically address the procedure the court should use to decide which advocate to appoint for a child in a custody suit. Thus, the legislature should amend the current code to add a section providing for a pretrial hearing to determine whether a court-appointed advocate is necessary, and if so, consider the age of the child as one factor.

B. *Do These Appointments Promote the Best Interest of the Child?*

The main reason for having court-appointed attorneys is to promote the child's welfare.[171] Because the decision to appoint an AA rather than an AAL or an AAL rather than an AA may heavily impact the outcome of a custody case,[172] the court should consider many factors when deter-

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169. *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 462 (2001) (indicating that the initial focus in determining whether a child needs an attorney to represent her wishes should be on whether the child has stated a significant custodial desire).

170. *See* TEX. FAM. CODE ANN. § 261.101 (Vernon 2002) (requiring all individuals, regardless of privilege, to immediately report any case or reasonable possibility of abuse or neglect of a child). The statute strictly protects the identity of the reporter but states that a failure to report is a Class B misdemeanor. *Id.* § 261.109 (Vernon 2003); *see also* Doe v. S&S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 299 (E.D. Tex. 2001) (declaring that educators are required to report child abuse under the Texas Family Code, but a private cause of action against the educator does not arise from such requirement); Bordman v. State, 56 S.W.3d 63, 67-68 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (finding that a defendant cannot exclude confession of the sexual assault of his children by relying on a clergy communication privilege); Rodriguez v. State, 47 S.W.3d 86, 88-89 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (requiring that one who knows about child abuse report such abuse immediately, and finding that the immediacy requirement is not unconstitutionally vague).

171. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 4 (2003) (asserting that the focus of family law and the child welfare system is to safeguard children and submit orders that serve their best interests) (on file with the *St. Mary's Law Journal*).

172. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 300 (1998) (suggesting that child advocates' recommendations often determine the outcome of many family law proceedings).

mining which type of appointment will serve the child best. The well known factors laid out in *Holley v. Adams*[173] should provide some assistance in assessing the meaning of "best interest."[174] However, applying these factors in deciding which type of advocate to appoint for a child is premature because these factors only guide the court in deciding when termination of parental rights is in the best interest of the child.[175]

Consequently, the court should consider many factors when deciding which type of advocate is in the best interest of a child. One factor the court should consider is the child's age because much deference is already given to older children in other areas of the law.[176] Certainly, if a child of twelve can choose to modify her own custodial arrangements, then a child of age twelve should be able to direct an attorney in a custody proceeding.[177]

Although age is an important factor to consider when determining which type of advocate serves the child's best interest, the court should also consider other factors. These factors include whether or not the child has expressed a custodial preference, in which case an AAL would be more appropriate if the child is over twelve years of age.[178] Also, the court should consider whether this opinion is contrary to the apparent

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173. 544 S.W.2d 367 (Tex. 1976).

174. *See* Holley v. Adams, 544 S.W.2d 367, 372-73 (Tex. 1976) (laying out many factors for courts to consider when determining the best interest of a child); *see also* McGowan v. State, 558 S.W.2d 561, 566 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (employing the *Holley* factors to show that the issue of adoption was relevant as indicating future plans for the children); *In re* J.L., No. 04-01-00767-CV, 2002 Tex. App. WL 31059854, at *4 (Tex. App.—San Antonio Sept. 18, 2002, no pet.) (not designated for publication) (expressing that a parent's drug use and unstable lifestyle are facts to consider under the *Holley* factors regarding the child's physical and emotional well being and holding that termination of parental rights in the best interest of the children).

175. *See Holley*, 544 S.W.2d at 372-73 (providing a list of factors to consider when terminating parental rights).

176. *See* TEX. FAM. CODE ANN. § 54.02 (Vernon 2002) (allowing the juvenile court to waive jurisdiction and transfer a child to criminal court if the child is argued to have committed a felony and the child was either fourteen years of age at the time of the alleged crime, if the offense is a capital felony, or fifteen years of age, if the crime is a second or third degree felony); *id.* § 156.101 (permitting a child of twelve years of age or older to file a written request to modify existing conservatorship if the modification is in the child's best interest); *see also* Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (recognizing that a child has constitutional rights with respect to an abortion decision).

177. *See* TEX. FAM. CODE ANN. § 156.101 (Vernon 2003) (allowing a child of twelve years of age or older to make a written request to change her conservatorship, and the court shall grant such request if it serves the child's best interest).

178. *See* Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 462 (2001) (recommending that judges consider whether the child has communicated a custodial preference in determining which type of attorney to appoint for a child in a custody proceeding).

best interest of the child.[179] If so, the court should appoint an AA for the child. Finally, the court should consider some of the best interest factors set out in *Holley*, such as the emotional and physical needs of the child, the desires of the child, and any possible emotional or physical danger to the child.[180] If the court finds that a child of twelve years or older has sufficient capacity to understand her custodial decision, has expressed those desires, and those desires do not appear to cause emotional or physical danger to the child, the court should appoint an AAL to represent the child. By considering a variety of factors when deciding which type of advocate to appoint, a court will ensure that it is ultimately protecting the best interest of the child.

C. *How Do the New Appointments Apply to Multiple Children?*

When multiple children are the subjects of a heated custody dispute, some difficulty can arise when appointing an attorney to represent them if the interests of each child conflict. In the case where the children's interests and wishes are the same, the court should use the same factors such as age, custodial preference, emotional and physical needs, and any possible emotional and physical danger to the children when choosing which type of attorney to appoint.

On the other hand, if the children clearly have competing interests or one child is older and the other child is an infant, the court should consider these factors when making an appointment, and if necessary, appoint an AA for the infant child and an AAL for the older child. Although the newly revised Family Code encourages only one appointment,[181] conflicting interests among subject children should require multiple appointments to preserve the best interests of the children. Additionally, multiple appointments would be conducive to the objective of the family courts.[182] Nonetheless, the court would have to consider the "ability of the parties to pay reasonable fees" and "balance the child's interests against the cost to the parties that would result from an appointment."[183] Consequently, multiple appointments in cases of multiple chil-

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179. *See id.* (recommending that judges consider whether the child's custodial preference appears to be contrary to the child's best interest in determining which type of attorney to appoint for a child in a custody proceeding).

180. *See Holley*, 544 S.W.2d at 372-73 (setting out the factors that a court may consider when deciding what is best for a child when terminating a parent's rights).

181. *See* TEX. FAM. CODE ANN. § 107.021(a) (Vernon Supp. 2004) (indicating that either an AA, AAL, or a GAL may be appointed in a suit where a child's best interest is at issue in a suit not filed by the government).

182. *See id.* § 153.002 (establishing that the best interest of a child is the first consideration for the court in deciding issues of custody and visitation of a child).

183. *Id.* § 107.021(b)(1)(A)-(B) (Vernon Supp. 2004).

dren with competing interests are likely to be rare, but should be permitted when the appointments serve the best interests of the children.

VI. PROPOSAL

The decision of the type of advocate to appoint in a child custody case is very important to a child's welfare in Texas. These advocates can have a substantial impact on children and on the outcome of a custody case.[184] Thus, the Texas Legislature should amend the new Family Code provisions to require a brief hearing to determine which type of advocate to appoint. This hearing should be performed as soon as the court or any party requests the appointment of an advocate for the subject child. It should be very brief and include only relevant facts regarding the subject child's age, whether or not custodial preference has been communicated, whether the child understands the custodial process, the emotional and physical needs of the child, and any possible emotional or physical danger to the child in the past. The focus of the pretrial hearing should be to protect the best interest of the child by appointing the most appropriate advocate.

Due to the discretion allotted to AAs, the court should appoint them only when the child is under the age of twelve or it is in the best interest of the child to do so. The appointment of an AA for a child over the age of twelve should be acceptable only when the child cannot communicate properly, has special needs, or has a custodial preference that is clearly against her best interest. Next, the court should appoint an AAL when the child is twelve years of age or older or when it is in the best interest of the child to do so. If a child is able to make custodial decisions, be criminally liable in adult courts, and make abortion decisions, she should have the power to direct an attorney in a custody case. Also, given the large amount of discretion allotted to AAs,[185] the court should be hesitant to appoint them simply to transfer the responsibility of the court in making a determination of the child's best interest to an independent party with no specific duties to the child as her attorney.

Similarly, since an AA has so much power regarding the child's confidential information[186] and very limited liability, the Texas Legislature

184. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 300 (1998) (explaining that, though an outsider, the child's GAL may have the ability to stifle the child's wishes and influence the outcome of the proceedings).

185. *See* TEX. FAM. CODE ANN. § 107.005 (Vernon Supp. 2004) (stating that an "amicus attorney is not bound by the child's expressed objectives of representation").

186. *See id.* § 107.005(c) (allowing an AA to reveal confidential information regarding a child when the attorney believes it will serve the child's best interest).

should narrow the specific qualifications required for such an advocate. Courts should appoint AAs based on more than just training "in child advocacy or . . . experience . . . equivalent to that training."[187] The legislature should specify how many years of training in child advocacy and how much experience is equivalent to that training.[188] Further, given the sensitivity of this appointment, the AA should have some knowledge of psychology or have an available psychological expert with whom he may discuss applicable psychological theories, especially those applicable to interviewing children.[189] Most importantly, the court should require the AA to inform the court, either formally or informally, on what basis his opinion is founded. After all, opinion testimony admitted in a court must generally have some empirical grounding.[190]

In summary, courts should exercise care when deciding which type of advocate to appoint for a child in a custody case. The Texas Legislature should amend the Family Code to require a hearing whenever any party to the litigation requests the appointment of an advocate for a child. Further, the legislature should develop its own specific standards as to what training or experience an AA must have to ensure that Texas courts protect the best interests of children subject to custody battles.

VII. CONCLUSION

The Texas Legislature performed a great service to children's attorneys when it clarified the roles and duties of the different types of advocates that may be appointed in child custody cases. These advocates are: the AAL, an attorney who advocates what the child wants; the AA, a lawyer who argues for the best interest of the child; and the GAL, a nonlawyer

187. *Id.* § 107.003(2).

188. *See* Trevino v. Tex. Dep't Prot. & Regulatory Servs., No. 03-01-00038-CV, 2002 WL 246328, at *9 (Tex. App.—Austin Feb. 22, 2002, no pet.) (not designated for publication) (providing that an administrative judge may establish a pool from which guardians and attorneys ad litem are selected, and finding the act of setting different criteria for advocates depending on the size of the county to be constitutionally permissible). Accordingly, the Texas Legislature may establish specific requirements for court-appointed attorneys, and Texas counties may require more strict compliance among the available pool of advocates. *Id.*

189. *See* Michael Lindsey, *Ethical Issues in Interviewing, Counseling, and the Use of Psychological Data with Child and Adolescent Clients*, 64 FORDHAM L. REV. 2035, 2040-41 (1996) (stating that time and environment are important factors to consider when interviewing a child client).

190. *See* Jonathon W. Gould, *Scientifically Crafted Child Custody Evaluations Part Two: A Paradigm for Forensic Evaluation of Child Custody Determination*, 37 FAM. & CONCILIATION COURTS REV. 159, 163 (1999) (contending that mental health professionals who contribute to the custody evaluations should meet the legal criteria for their data to be based on scientific knowledge of the field).

who argues for the best interest of the child.[191] This amendment provided an answer to the debated issue among states,[192] the AAML[193] and the ABA[194] about the role of court-appointed attorneys for children. Consequently, the new legislation addresses legal matters that will have a great impact on society and the improvement of legal services for the most vulnerable members of society.[195]

Despite the apparent benefits of the amendment, courts should use much care when deciding which type of advocate to appoint. Concerns about the liability of these attorneys and the powers they possess regarding confidential information of the children should encourage the courts to be skeptical when appointing an amicus attorney. Although policy considerations favor giving court-appointed attorneys limited liability in these cases to encourage them to participate in an often low-paying service,[196] the Texas Legislature should take an active role in making sure that these individuals are in fact qualified for the important task and following their statutory duties. Finally, the legislature should provide courts with a procedure to decide which type of attorney to appoint where important factors to consider include the age of the child, the ability of the child to make a meaningful custodial preference, and the special needs of the child the attorney will represent.

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191. *See* TEX. FAM. CODE ANN. §§ 107.001, 107.021 (Vernon Supp. 2004) (establishing three types of advocates the court may choose from when appointing representation of a child in a suit affecting the parent-child relationship).

192. *See* Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 111-12 (2002) (recognizing differing state views on court-appointed counsel for children and the various committees that state lawmakers have formed to address these issues).

193. *See* American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1, 9 (1995) (directing counsel for children to argue the wishes of the child unless the child is impaired).

194. *See* A.B.A. Family Law Section, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 133 (2003) (establishing the "Child's Attorney," who advocates the child's wishes, and the "Best Interests Attorney," who presents what is best for the child, both who have distinct roles regarding representation and are independent from the court).

195. *See* Debra H. Lehrmann, *Clarity at Last: An Analysis of the New Ad Litem Statute, in* STATE BAR OF TEX., 29TH ANNUAL ADVANCED FAMILY LAW COURSE ch. 6, at 14 (2003) (concluding that the amendment to the Texas Family Code is a more balanced form of child advocacy and will have a great impact on society) (on file with the *St. Mary's Law Journal*).

196. *See* Delcourt v. Silverman, 919 S.W.2d 777, 784 (Tex. App.—Houston [14th Dist.] 1996, pet. denied) (granting absolute immunity to a guardian ad litem because the advocate functions as an extension of the court).

The Texas Legislature should examine the message that they are sending to Texas children when they imply that our children may request modification of current custodial arrangements, may be imprisoned with adults, and may have an abortion without their parents' consent, but may not direct their own attorney in an emotional custody battle. This sort of inconsistent treatment of Texas children should not be tolerated. The Texas Legislature and Texas courts should either hold children accountable for their decisions or they should not. Age and maturity level should be the determining factors for courts when deciding to appoint an amicus attorney or an attorney ad litem in Texas custody suits.