ROLE AND RESPONSIBILITIES OF COUNSEL FOR THE CHILD IN ALBERTA: A PRACTITIONER'S PERSPECTIVE AND A RESPONSE TO PROFESSOR BALA[1]

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The representation of children and the role and responsibilities of counsel have recently become topics of discussion in Alberta. This dialogue includes consideration of whether, and in what situations, acting as a best-interests advocate, an amicus curiae, *or a traditional advocate best meets the goal of reaching an outcome that serves the best interests of a child whose parents are engaged in family law and child protection disputes. This article proposes that the most appropriate role for counsel who represent children becomes obvious once the societal motivation for having such representation is clarified. In particular, counsel's role depends on whether children are accepted as rights-bearers, which also impacts the interpretation of statutory language, particularly "interests" and "best interests," and the test for capacity to instruct counsel. This analysis rejects Professor Bala's proposal that counsel should advocate their own opinions of the child's best interests because such an approach exceeds the training and expertise of lawyers and is not supported by current legal systems. The author joins Professor Bala in urging decision- and policy-makers to develop a coherent child representation program to address these and related issues.*

La représentation d'enfants et le rôle et les responsabilités de l'avocat dans ce genre de situation ont dernièrement fait l'objet de discussions en Alberta. Ce dialogue comprend la prise en considération à savoir si, et dans quelles circonstances, le fait d'agir en avocat d'un intérêt supérieur, en ami de la cour *ou encore en avocat traditionnel est le mieux indiqué pour arriver à une conclusion qui aille dans les meilleurs intérêts de l'enfant dont les parents sont impliqués dans un conflit de droit familial et de protection de l'enfance. Cet article suggère que le rôle le plus approprié à un avocat représentant un enfant devient évident au moment de la clarification de la motivation sociétale d'une telle représentation. Tout particulièrement, le rôle varie selon que les enfants sont acceptés comme bénéficiant de droits, ce qui a aussi des incidences sur l'interprétation du langage prescrit par la loi, surtout les « intérêts » et « intérêt supérieur » ainsi que le test de la capacité de constituer un avocat. Cette analyse réfute la proposition du professeur Bala que l'avocat doit défendre sa propre opinion des meilleurs intérêts de l'enfant parce que cette démarche dépasse la formation et l'expertise des avocats et qu'elle n'est pas appuyée par les systèmes juridiques actuels. L'auteur rejoint le professeur Bala en demandant avec instance aux décideurs et aux responsables des orientations politiques d'aborder ces questions et autres questions connexes.*

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[1] This is a revised version of a paper presented at legal training programs on Child Representation, Edmonton, 1-3 April 2005 and Calgary, 15-17 April 2005. The scope of this article has been expanded and responds to some aspects of Professor Bala's article which appears in this issue: Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 Alta. L. Rev. 845.

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I. INTRODUCTION[2]

The role and responsibilities of counsel appointed to represent children has been the subject of considerable debate in many jurisdictions. The Law Societies of Upper Canada, New Zealand, New South Wales in Australia, the American Bar Association, governments and the courts in those and other jurisdictions have wrestled with and developed policy, training courses and case law on the role and responsibilities of counsel in this context. In contrast, the role and responsibilities of counsel appointed to represent children have received little public discussion in Alberta[3] over the last 15 years, although children's representation has grown considerably. Recent articles by Professors Bala and Davies[4] are welcome contemporary contributions to the debate and dialogue in this Province. In addition, the recent Child Representation training courses, the changing attitude of the courts to the representation of children, at least at the Court of Queen's Bench in Calgary (increasing numbers of appointments),[5] the recent change to the appointment method of counsel for children in child protection matters and child representation projects that were, until recently, in place[6] are stimulating analysis and discussion of this topic.

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2 Except where otherwise apparent, this article focuses on family law (separation and divorce matters). However, from the author's perspective, the same basic principles for the representation of children apply in the child protection and family law contexts. Practice may vary slightly but the fundamental principles remain the same.

3 The one exception being the Legal Education Society of Alberta (LESA) course "Representing Children, High Conflict Custody Cases" in October 2002.

4 Bala, *supra* note 1; Christine Davies, "Access for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can. Fam. L.Q. 153.

5 For some time, provincial court judges have generally been accustomed and open to young people having counsel.

6 Representation of children that was provided by the Legal Aid Family Law Office, Edmonton, Child Representation Project and by the Calgary Legal Aid Family Law Office; representation of children by the Calgary-based Children's Legal and Educational Resource Centre (CLERC); the pilot project partnership between the YWCA of Calgary and CLERC called the *Speaking for Themselves* project.

I have been asked to respond to Professor Bala's article: "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings."[7] Professor Bala suggests that counsel appointed to represent children in family proceedings in this Province must contend with uncertainty as to their role because of lack of clear guidance from the Legislature, the Law Society of Alberta or the courts. In contrast, I propose that counsel's role can be clearly identified by applying the ordinary rules of statutory interpretation to Alberta's legislation. I agree with Professor Bala that no role is appropriate for all cases. However, I disagree with Professor Bala's suggestion that counsel who take a "best interests" approach to the representation of children should be permitted to advocate a position guided by counsel's own assessment of the best interests of the child. Much as such a role is appealing, none of our legislation, *Code of Professional Conduct*[8] or legal process authorizes such a role. Furthermore, I argue that such a "best interests" position undermines the young person[9] involved and their trust in both the system and adults, that lawyers usually do not have the information or qualifications to judge best interests and that it usurps the role of the court.

In this article I will discuss a number of topics of my choosing as well as respond to some raised by Professor Bala in his article. I briefly refer to some of the history and development of the "representation" of children in Alberta. To provide practical background, I distinguish between the three traditional models of "representation" of children and suggest that frequently arguments against the advocacy role in representing children reflect a narrow interpretation of the responsibilities of a traditional advocate. I further suggest that the debate about role in this context is not really about roles but emerges from a conflict of values with respect to children and whether they are rights-bearers, particularly in the context of their parents' disputes with each other and with the state. I suggest that one's position on whether children are rights-bearers impacts the reason for representing children, counsel's role and the interpretation of language, particularly interpretation of the meaning of "interests" and "best interests." I will discuss all of these issues and their implications for the representation of children.

I argue that provisions of the Law Society of Alberta *Code*[10] to which Professor Bala refers have alternate interpretations and do not impose the constraints upon counsel advocating for children which he suggests. In this context I also comment on interpretations by Professor Bala and the Alberta Court of Appeal concerning capacity. I analyze relevant Alberta legislation and argue that counsel's role is clear. Finally, I review Professor Bala's list of potential responsibilities and expectations of counsel "representing" children and comment on some of them.

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7 Bala, *supra* note 1; I have assumed, given the content of n. 2 of Professor Bala's article that reference to "family proceedings" throughout his article includes both child welfare and family law (separation and divorce) proceedings. In this article "family matters" refers to separation and divorce matters only.

8 The Law Society of Alberta, *Code of Professional Conduct* (2 February 2006), online: Law Society of Alberta <www.lawsocietyalberta.com/files/code.pdf> [*Code*].

9 Throughout this paper I use the terms "child," "children," "young person(s)" and "young people" interchangeably.

10 *Supra* note 8.

II. HISTORICAL BACKGROUND

Alberta was once a leader in Canada in developing new approaches to dealing with custody and access disputes. One early step occurred in 1966 when Manning J. ordered the appointment of an *amicus curiae* in *Woods v. Woods*,[11] naming Bruce Rawson, a junior lawyer from the Department of Justice, as the first *amicus curiae* in Alberta. Subsequent to Manning J.'s order, courts in Alberta appointed numerous *amici*, so that Alberta has a rich body of case law and literature on the *amicus curiae*, including cases and commentary on the *amicus'* role and the appropriate circumstances for the appointment of an *amicus*. M.J.J. McHale's article, "The Proper Role of the Lawyer as Legal Representative of the Child,"[12] in Alberta during the 1970s still provides useful information about the issues counsel encounter in representing children. During the 1990s, the Alberta government ceased supporting the *amicus* and replaced it with a mediation program which continues to the present. Alberta Justice does not intend to establish a new *amicus curiae* program,[13] though it was regarded by many as an excellent service.[14]

The end of the *amicus curiae* program resulted in a significant withdrawal of resources from the Court of Queen's Bench for resolving what have been known as custody and access disputes. This occurred as the divorce rate in Canada increased substantially and the concept of children's rights developed and evolved significantly. The resulting lack of public resources allocated to judges and the courts for services to assist in resolving family law problems increasingly lead to counsel who represent children being asked to perform a role beyond that of a traditional advocate. This lack of resources and expansion of expectation are significant reasons for the debate about the role of "counsel for children." Professor Bala's suggestion of a "broader, non-traditional role that allows counsel to be guided by his or her own assessment of the best interests of the child"[15] is a further example of this role expansion.

Courts adjudicating child protection, as opposed to family law matters, and consequently the children whose families are involved in child protection matters, have fared somewhat better. In the 1984 amendments to the *Child Welfare Act*[16] (effective 1985), the Legislature of Alberta specifically included the provision that children subject to supervision, temporary or permanent guardianship applications or orders may have lawyers. That legislation also included procedural rights for children involved in the child protection system.[17] This

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11 (1966), Alberta 41748 (Alta. S.C. (T.D.)).

12 (1980) 18 Alta. L. Rev. 216.

13 Personal communication with officials at Alberta Justice.

14 Institute of Law Research & Reform, *Protection of Children's Interests in Custody Disputes, Report No. 43* (Edmonton: Institute of Law Research and Reform, 1984) [*Report No. 43*]; Judy Boyes & M.E. Walden, "The Life and Death of the Amicus Curiae in Custody Litigation in Alberta" (1992) 8 Can. Fam. L.Q. 81.

15 Bala, *supra* note 1 at 846.

16 S.A. 1984, c. C-8.1 as rep. by *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12 [*CYFEA*].

17 Many of the provisions of this legislation in which children acquired rights and standing in the provincial courts were inspired by similar legislation in New Zealand. (Personal communication with provincial policy-makers involved in drafting the 1985 *Child Welfare Act*.) New Zealand's *Guardianship Act, 1968* authorizes the appointment of counsel for children in all custody and access disputes and has been in place since 1968. (Noted in an unpublished paper presented in Edmonton, 23

legislation was drafted in the context of increasing appreciation and recognition of children's rights in this Province.[18]

In 1990, a subsequent amendment to this legislation created the Office of the Children's Advocate (now the Office of the Child and Youth Advocate). Prior to this, many of the procedural provisions in the *Child Welfare Act*, including the opportunity for children to have counsel, were little used or respected. With the advent of the Provincial Advocate's Office this situation changed. Through the commitment of the advocates and their recognition of the absence of the voices and views of young people in child protection matters, many children in Alberta have had lawyers *assigned* to them.[19] Provincial court judges are now very accustomed to lawyers appearing on behalf of children, largely in the child protection context.[20] In such matters, judges of the provincial court may now have before them counsel for the young person, a provincially-employed advocate for the young person and a provincially-employed social worker for the young person, in addition to the potential availability of evidence from foster parents, in-home support workers, parent and child assessors and counsellors. This wealth of resources contrasts with that typically available in private custody and access disputes at either the provincial court or the Court of Queen's Bench. Some provincial court judges have been troubled by the lack of resources in family law proceedings and have put significant effort toward securing counsel for children in family disputes, with mixed success.

Other provincial legislation has provided children in Alberta with the opportunity of being heard in family proceedings, at least theoretically. The *Domestic Relations Act*[21] has long provided young people with standing, that is, the opportunity to make their own application to the court without a next friend. This would be a hollow right if it were not also accompanied by the right to be represented by legal counsel.[22] Professor Bala suggests that changes in government policy, legislative reform and the *Charter*[23] have lead to increasing appointments of counsel to represent children in Alberta. However, in fact, no new government policy or legislative reform has provided young people with greater access to legal counsel; rather, that legislative opportunity has existed for some time. Young people have been constrained from accessing counsel in family matters in Alberta by lack of

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June 2003 by Judge John Adams and Usha Patel, Barrister & Solicitor.)

18 Personal communication with provincial policy-makers involved in drafting that legislation.

19 This does not mean that many children have necessarily had lawyers *representing* them.

20 To the extent that children do or have had counsel appointed to "represent" them in family matters, the funding for same has been largely provided by Legal Aid Alberta.

21 R.S.A. 2000, c. D-14 as rep. by *Family Law Act*, S.A. 2003, c. F-4.5.

22 Since at least 1942, s. 67 of the *Domestic Relations Act* (R.S.A. 1942, c. 300) included the provision that "The Court, upon the application of the father or the mother of an infant, or of an infant, who may apply without a next friend, may make such order as the Court sees fit regarding the custody of the infant and the right of access thereto of either parent." For a fuller discussion of legislative authority and jurisdiction to appoint counsel for children in family and child protection matters see the paper by the Honourable Judge Nancy A. Flatters in the materials prepared for and presented at the Child Representation courses, *supra* note 1. However, one now has to question the opportunity for a young person to exercise this right given the recent Alberta Court of Appeal decision, *Puszczak v. Puszczak* (2005), 22 R.F.L. (6th) 147, 2005 ABCA 426 [*Puszczak*], which requires either the agreement of a child's guardians or a court order before a young person can have counsel.

23 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

appropriate funding. Any recent increase in appointments of counsel for children has resulted largely from the efforts and initiatives of the bench, the bar, Legal Aid Alberta and their interplay with each other.[24]

III. THE THREE ROLES

The three roles traditionally used to describe the "representation" or "representational stance"[25] of lawyers *vis-à-vis* children are set out by Professors Bala and Davies and numerous other authors[26] each using slightly different terminology and descriptions of the roles. The terminology I use is: traditional advocate, *amicus curiae* and best interests advocate. While there is general agreement on the three roles and their functions, there are certainly areas of disagreement. Table 1 sets out my perspective of the essential distinctions between the three roles. As this Table indicates, lawyers performing any of the roles all share a common goal: to reach a decision that is in the best interests of the young person involved. The difference between the roles is largely the process by which the decision is reached.

The *amicus curiae* and best interests roles, while different from each other, share more commonalities than with a traditional advocate role. Neither an *amicus curiae* nor a best interests advocate has loyalty to any party. Individuals in both roles gather information, may hire experts to prepare reports (if funds are available) and may decide to make recommendations. An *amicus'* loyalty is to the court. An *amicus* ensures the court is fully informed and has all of the relevant facts and case law. The best interests advocate assists a judge in reaching a best interests decision with respect to the child but the court is not the client — the best interests advocate apparently has no client. A best interests advocate may argue a position that may be contrary to that expressed by the child.

As should be apparent from Table 1, I perceive the role of a traditional advocate to be broader from that typically described by many commentators. Most family law lawyers and advocates have changed their approach to the practice of family law since the publication of McHale's article. In current family law practice, alternate methods and techniques are frequently employed to resolve family disputes; legal options and court processes other than chambers applications and trials are now readily available and utilized (mediation, collaborative law, judicial dispute resolution, parent coordinators and coaches, dispute resolution officers, *etc.*).[27] Most family law lawyers now focus more on finding solutions that

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[24] The one exception to this is the *Speaking for Themselves* project created in 2005. This three-year pilot project is funded by Alberta Children's Services and provides children who have been exposed to domestic violence and high conflict custody and access disputes with a therapist and a lawyer. This program is an outcome of the Provincial Round Table on Family Violence and Bullying and community initiatives.

[25] Terminology coined by Marvin M. Bernstein in "Towards a New Approach to Child Representation: How Less is More in Child Welfare Proceedings" (1993-94) 10 Can. Fam. L.Q. 187.

[26] See Bala, *supra* note 1; Davies, *supra* note 4 at 167-170; Ronda Bessner, "The Voice of the Child in Divorce, Custody and Access Proceedings," presented to Family, Children and Youth Section: Department of Justice Canada (2002), online: Department of Justice Canada <www.justice.gc.ca/en/ps/pad/reports/2002-fcy-1.html>; Bernstein, *ibid.*; McHale, *supra* note 12 and others. On advantages and disadvantages of the three roles see Davies, *supra* note 4 at 168-69.

[27] In all of these processes, in the appropriate circumstances, there can be value in the appointment of counsel/advocate for the child in order that the child's rights, interests and viewpoints remain the focus and in order that the solutions crafted take these into account rather than simply those of the parents or guardians.

will suit individual families rather than engaging in all out litigation or as Professor Davies describes it: a contest where the objective is "winner take all."[28] Most family law matters settle. Often, those that do not have significant confounding factors where one or all of the parties involved have addictions, mental health (including personality) disorders or domestic violence issues. These types of files aside, a lawyer's practice in family law and therefore the description of the role of a traditional advocate, is now different from that described in earlier literature and case law. Most lawyers are more settlement-oriented. This is even more the case for a lawyer representing a child. The role of a traditional child advocate is elaborated further in Sections B, C and D below.

TABLE 1: KEY DISTINGUISHING CHARACTERISTICS OF THE THREE TYPICALLY DESCRIBED "REPRESENTATIONAL" ROLES

	Traditional Advocate	***Amicus curiae***	**Best-Interests Advocate**
Lawyer's Primary Focus	Child	Assist court	Assist court
Guiding Principle	Child's viewpoints, interests entitled to be heard	Direction from the court	Counsel's assessment governs
Lawyer's Function	• Take instructions, represent child's perspective • Gather information to provide context • Argue for child's position in context, not merely child's opinions • Respect solicitor/client privilege • Facilitate settlement	• Acquire information to assist the court • Ensure all relevant evidence is before the court • May prepare report • May provide recommendations • Information from the child is not privileged • Facilitate settlement	• Acquire information so counsel can make own assessment of best interests • Offer recommendations • May argue against child's position • Information from the child is not privileged • Facilitate settlement
Position of the Child	A proponent of resolution, approaches party status	No formal position; serves as a source of information and the object of resolution	No formal position; serves as a source of information and the object of resolution
Goal	Reach a best interests decision that respects and involves the child	Reach a best interests decision	Reach a best interests decision that reflects counsel's view of best interests

A. A CONTROVERSY ABOUT ROLES OR ABOUT THE STATUS OF CHILDREN?

Professor Bala suggests that there is controversy about the role of child's counsel. I argue the issue is more profound than a question about the role of counsel. I suggest the controversy to which Professor Bala refers reflects the controversy in society about whether children are rights-bearers and actors rather than merely "objects of concern." In this context, if we understand why we are "representing" children in these disputes, then the role counsel takes in representing a young person is clear and resolves itself. I suggest that the response

[28] Davies, *supra* note 4 at 175.

to "why we even contemplate the representation of children" is inextricably linked to the recognition of children as rights-bearers. If we are concerned about children having a lawyer because we want to assist the *court* in making decisions, then that dictates a different role than if we are concerned about a lawyer whose responsibilities and focus are strictly those of the *young person*. The key issue is whether we are primarily concerned with furthering the interests of and assisting the *court* in making decisions about the young person, or if the primary concern is furthering the interests of and assisting the *children* who are the subject of the dispute before the court.

The discussion about the representation of children emerges from the appreciation of an obvious gap in cases involving the care or welfare of young people which is perceived as resulting either from a lack of information (to the court) or a lack of fairness (to the young person) or perhaps both. One's characterization of the gap depends upon the values one brings to the discussion. Most decision-makers (largely judges) want to know what the children concerned would like to have happen. They are interested in knowing the young person's views and opinions, not necessarily because they see children as having rights in these situations, but rather, as part of their fact-finding process. However, many judges desire more than this and seek all available information concerning the child. One means of obtaining this information is to have someone in the court room who has talked to both the child and the parents, and generally worked to gather information, while not being tied to either (or any) of the "primary protagonists." In other words, judges often desire a sort of investigator, almost an arm of the court, who can inform the court of all relevant information. Some judges also want this investigator to provide insights and recommendations as to what should happen with the family and what might be in the child's best interests. Lawyers fulfilling these responsibilities would most likely serve either an *amicus curiae* or best interests role.

In contrast, many individuals who work with children recognize the inherent fairness and reasonableness of hearing and respecting the views and opinions of the young person who is the subject of a dispute and most affected by the resulting decisions. These individuals would largely be those who accept the concept of children's rights and recognize the long-term value and benefit of respecting a young person and the contribution they can make to decisions concerning their own well-being (as distinct from children becoming the decision-makers). Counsel acting from this perspective would most likely be taking a traditional advocate role.

To some degree, then, the debate about roles is really a debate about values and about whether one recognizes children as having rights. This debate is confounded by the constraints and strictures imposed by traditional legal processes, such as the means by which evidence is provided to the court and traditional rules prohibiting a lawyer from being both a witness and a lawyer for one of the participants. Professor Bala seems to suggest that lawyers, judges and policy and decision-makers step outside these strictures. He suggests that the children's "lawyer" should be permitted to work outside their traditional role and submit their own view of what is in a child's best interests, rather than advocate the subjective position of the young person as does a traditional advocate.

Professor Davies suggests, and I join her, that there are problems with this proposal. Some of the difficulties of Professor Bala's position arise from the constraints of our adversarial system, but this is the system within which lawyers must operate. Perhaps a better approach is to review the system as a whole, rather than attempt to graft on a foreign "species" in the form of non-traditional "counsel" for the child. Having made the suggestion, Professor Bala does not elaborate on implementation of the role. If counsel advocates their own opinion of a child's best interests, significant unfairness arises to all other parties when one counsel does not "follow the rules." This would particularly be so if counsel, as Professor Bala suggests can be the case, does not "finalize a position until all of the evidence is before the court."[29] Furthermore, if counsel for the child is submitting his or her opinion and evidence, he or she has become a witness, as well as a lawyer, in the proceedings. No opportunity is available to cross-examine this witness, challenge the source of the information or challenge the basis of the opinion. Further, lawyers have no expertise in assessing or determining what is in a child's best interests — other professionals are better qualified and potentially less expensive. As noted by Professor Davies,[30] this individual would, in effect, be taking on the responsibility and decision of the judge — much like a custody and access assessor in our current system but with less expertise and likely less information.

The role of counsel in representing children has been a subject of much controversy. It is a difficult role, particularly when the dispute between the parents is highly conflictual and the children are subject to manipulation by one or both parents. Nevertheless, the appropriate response is not to ask a "lawyer for the child" to become something other than a lawyer. At least two alternate responses exist. Resources could be provided so that all professionals can continue to fulfill their responsibilities from a principled position without performing a hybrid or distorted role. Alternatively, policy-makers, including government, the law society, the bench, the bar and social service providers — all stakeholders — could consider reviewing the totality of the existing system of resolving family law disputes to assess its effectiveness in resolving those disputes and potential alternatives, while still protecting the rights of those involved.

B. TRADITIONAL ADVOCATE

The organization with which I am affiliated, the Children's Legal and Educational Resource Centre (CLERC), by policy, takes an advocacy approach to the representation of children unless there is a reason not to. CLERC's advocacy policy is based in part on art. 12 of the United Nations *Convention on the Rights of the Child*, which states:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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29 Bala, *supra* note 1 at 866-67.

30 Davies, *supra* note 4 at 169.

> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[31]

I see no conflict between these provisions and that of art. 3(1) which states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[32]

or with art. 9(3) which states:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[33]

These provisions achieve the necessary balance between recognizing and accepting that children have rights (particularly the right to be heard in decisions that affect their lives), while acknowledging that decisions for and about children will most often be made by others and must be made based on their best interests. The *Convention* does not propose that children become the decision-makers; rather, that their views, if they have any that they wish to express, will be heard and taken into account. Any decisions made about a child must be made on the basis of the child's best interests. This balance is very similar to that of Alberta's child protection and family law legislation, discussed below in Part VI.

The justices of the Court of Queen's Bench in Calgary, appear to understand and respect CLERC's approach and the roles and responsibilities of an advocate. I have had situations when, upon learning the three possible role options, the court has directed that counsel take a traditional advocacy approach, even when children as young as four years are involved.

C. WHY AN ADVOCACY APPROACH?

Why is an advocacy approach appropriate with respect to young people? This approach is grounded in the principles articulated in the *Convention*, and respects young people and supports the development of their evolving capacities and personhood. It permits counsel to truly focus on the child and to attempt to put the child client and their views, interests, opinions and rights on a more equal footing with those of the adults involved in the situation. Listening to and respecting children's views enhances decision making and develops self-esteem, self-reliance and resilience.[34]

Several lines of evidence indicate that involvement in their own decisions serves a child's best interests. Research conducted during the 1980s found such resentment and distress

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31 United Nations, *Convention on the Rights of the Child*, (1989) 28 I.L.M. 1456 [*Convention*].

32 *Ibid.*

33 *Ibid.*

34 Children's Legal and Educational Resource Centre (CLERC), "Vision & Beliefs" (2003), online: CLERC <www.clerc-clagary.ca>.

among children who were excluded from significant decisions in their lives (their parents' decisions of where the children would live after their separation/divorce), that mental health professionals expressed concern "about the emotional harm which can be inflicted on children by their exclusion."[35] In addition, children themselves express frustration because they feel excluded from decisions affecting them directly and have expressed a desire "to be kept informed and actively considered and consulted throughout" their parents' separation and divorce process.[36] Children state that they want direct access to sources of information other than their parents, friends, television and siblings.[37] Current research reveals that information is crucial to children[38] because "[t]o some extent the impact of parental separation on the children [is] directly related to whether and how information about the separation and its consequences [are] communicated."[39] Research has also shown "that [children] can be emotionally strengthened and their self-esteem and problem-solving skills enhanced" by appropriate responses to their stressful experiences.[40] In particular, "[t]he promotion of resilience does not lie in an avoidance of stress, but rather in encountering stress at a time and in a way that allows self-confidence and social competence to increase through mastery and appropriate responsibility."[41] This research is validated by the further finding that children who have participated in decisions about their living arrangements are the most satisfied with those arrangements and are far more likely to become well-adjusted adults.[42]

When representing children, CLERC attempts to respond to the concerns noted in the research. In our view, when young people are consulted appropriately, better decisions can result. Young people should be entitled to have their views given serious consideration as they are the most affected by decisions made in family law proceedings. Counsel's loyalty to the young person alone is critical to the young person developing confidence and trust in their lawyer. In our view, a lawyer who represents both the young person's views and his or her own (as in best-interests representation) is in a conflict. A lawyer undertaking both roles compromises the representation provided to their client, is disrespectful of the young person's rights and impairs the relationship between the lawyer and his or her client. It is also unfair. If a best interests advocate does not share the same position as his or her client and argues against the child, the lawyer seriously undermines the child's position, which can have an entirely valid and reasonable basis from the young person's perspective.

A traditional advocate guides and supports the child client, provides information to the child about what is happening from a legal perspective between parents (or others), ensures

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35 Christine Piper, "Ascertaining the Wishes and Feelings of the Child" (1997) 27 Fam. L. 796.

36 Nigel Lowe & Mervyn Murch, "Children's participation in the family justice system – translating principles into practice" (2001) 13 Child & Fam. L.Q. 137 at 153.

37 Gillian Douglas *et al.*, "Children's Perspectives and Experience of the Divorce Process" (2001) 23 Fam. L. 373 at 376.

38 Ann Buchanan & Victoria Bream, "Do some separated parents who cannot agree arrangements for their children need a more therapeutic rather than forensic service?" (2001) 13 Child & Fam. L.Q. 353 at 359.

39 Douglas, "Children's Perspectives," *supra* note 37 at 374.

40 Gillian Douglas, Mervyn Murch & Alison Perry, "Supporting children when parents separate – a neglected family justice or mental health issue?" (1996) 8 Child & Fam. L.Q. 121 at 123.

41 Michael Rutter, "Resilience in the Face of Adversity: Protective Factors and Resistance to Psychiatric Disorders (1985) 147 British Journal of Psychiatry 598 at 608 as cited in *ibid.*

42 Jan Pryor & Rebecca Daly Peoples, "Adolescent attitudes toward living arrangements after divorce" (2001) 13 Child & Fam. L.Q. 197 at 207.

that the child hears from someone that the conflict between the parents is not the child's fault, clarifies to all parties that it is not the child's job to solve his or her parents' problems. Counsel's role as a child advocate includes assisting and facilitating settlement, advising of options and possible outcomes, estimating and advising on chances of success of one position over another, advising of strategies, providing information about the law, exploring alternatives, preparing the client for potential "bad" results, referring the client to ancillary services, creating arguments that support the young person's position, looking for non-traditional solutions and avoiding escalation of the conflict as much as possible. Most importantly, counsel's responsibility is to listen to the young person, understand and advocate from the young person's perspective and position, if they hold one, and assist others to understand them.

In taking an advocacy role, counsel should not ask children to choose between their parents: no one should ask them to do so. It is improper for counsel for a child to ask their client "who do you want to live with" or "where do you want to live" because it forces children to have to choose between their parents, potentially impairing those relationships, and may cause them distress and internal conflict. I always tell children that I will not ask them those questions, although if they have an opinion, I am more than willing to hear it. An advocate acquires the client's opinions on whatever subjects they choose to express them; however, counsel and all concerned with representing children must avoid seeking a young person's opinion just to assist in solving "the problem." This too is inappropriate. It places too great a burden on a child and fails to recognize the individual needs, interests, rights and evolving autonomy of the young person. It uses the children in the family to solve the problems the adults have been unable to resolve. Representation of children should not simply involve finding out their opinion; it should help them through the process and provide them with reliable support and information. In this respect, it is also inappropriate to appoint counsel, a therapist or a psychologist for a child just to find out what a young person thinks about the issues about which the judge must decide. Counsel for a child and any other supports should be involved in the process earlier, rather than later, to both assist the child and help the parents understand the issues from their child's perspective. These supporting individuals can attempt to assist the parents in thinking through the problems and resolving the dispute in a way that incorporates their child's needs and interests. The ideal in representing children is to employ a team approach. Using a mental health professional and a lawyer allows the child's views to be heard and taken seriously, provides professional social support to the young person and provides assistance in coping with parental conflict.

Professor Bala indicates that when counsel adopts the role of child advocate (traditional advocate), "it is ultimately for the child to make decisions about his or her life and give counsel instructions about how to protect the child's interests and rights."[43] This misstates a child's position when they have their own advocate. The advocate protects the child's right to be heard, not the child's right to decide. A child's advocate must always make that distinction clear to his or her client. Ultimately, the responsibility for making the decisions on the matters at issue, provided the child is not at an age and in circumstances when they will take matters into their own hands, still rests with the decision-makers, whether it be the child's guardian(s) or the courts. Furthermore, neither a child client nor an adult client is

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[43] Bala, *supra* note 1 at 850.

capable of instructing a lawyer on how to protect their rights and interests. The lawyer, after consultation and discussion with their client, must determine how best to protect their client's rights and interests. Clients have opinions on desired outcomes. The lawyer must realistically assess, determine how to support, negotiate and achieve something close to that outcome, if it is within the realm of possibility. This determination is made by the client and lawyer together, relying on the lawyer's experience and expertise.

Professor Bala also states that counsel adopting the traditional advocate role "will treat the child as any other client."[44] This is certainly the broad goal, but I suggest that anyone who represents children recognizes it is not possible to treat a child like any other client. A child is in a very special and vulnerable position in any litigation. A child cannot and should not be treated like any other client. Professor Michael Freeman, as quoted in Professor Davies' article, articulates the balance that counsel representing children attempt to achieve:

> In looking for a children's rights programme, we must ... recognise the integrity of the child, and his or her decision-making capacities, but at the same time note the dangers of complete liberation. Too often writers on children's rights see rights in "either-or" terms: there is either salvation or liberation, nurturance or self-determination. But to take children's rights more seriously requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential.[45]

Representing children requires a much finer touch and greater attention and attentiveness than when one is counsel for an adult. For example, one must vigilantly guard against conveying any personal views or opinions that are so easily betrayed by words, actions, silences, inflections, non-verbal cues or poorly framed questions. The children one represents are as alert to their lawyer's judgments and attitudes as counsel must be to not conveying any.

In summary, if managed appropriately and sensitively, an advocacy approach respects young people, supports and benefits young people and results in better decisions that are more likely to be supported by those most affected.

D. "INTERESTS" VERSUS "BEST INTERESTS"

In the context of Alberta's legislation, the *Code*[46] of the Law Society of Alberta and Professor Bala's article, attention must be paid to the distinction in meaning between "interests" and "best interests" to fully consider a traditional advocate's role. Many authors seem either to confuse "interests" and "best interests" or are not careful about the distinction between them. This confusion seems particularly common in the literature discussing or supporting the view that lawyers representing children should take a best interests approach. This appears to be the case in Professor Bala's article as he seems to use these terms interchangeably. One example is Professor Bala's suggested interpretation of "interests" as used in the *Family Law Act* at s. 95.[47] Here he suggests that for counsel representing a child,

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[44] *Ibid.*

[45] Michael Freeman, "Whither Children: Protection, Participation, Autonomy?" (1994) 22 Man. L. J. 307 at 324 as cited in Davies, *supra* note 4 at 155.

[46] *Supra* note 8.

[47] S.A. 2003, c. F-4.5, s. 95(3).

interpreting the word "interests" as used in that section of the *Family Law Act*: 1) might be "most consistent with counsel adopting the role of best interests guardian"; 2) is too vague to determine role; or 3) leaves counsel free to use their own discretion to determine their role as counsel for the child.[48] This suggests that to Professor Bala the word "interests" has no distinct meaning. If "interests" is susceptible to Professor Bala's interpretations, then lawyers in Alberta, at a minimum, are in considerable difficulty in interpreting our *Code*, as it contains several references to "interests" and lawyers' responsibilities with respect to their clients' interests.[49]

I suggest that a lawyer representing any other client understands very well the distinction between representing a client's "interests" as opposed to their "best interests" and that ordinarily a lawyer's job is to represent their client's interests. Why should this understanding change when the client is a child? As lawyers, we frequently use "interests" in our discourse and our writing whether we are referring to "insurable interest," "adverse interest," "beneficial interest," "conflict of interest," "vested interest" or to "rights, interests and entitlements" (as might appear in contracts), or whether we are referring to something "against that party's interest" or something that "altered the respective positions or interests of the parties" as referenced in c. 10 of the *Code*.[50] "Interests" is a broader concept than "best interests." *Stroud's Judicial Dictionary of Words and Phrases* equates "interest" with a right or claim.[51] *Black's Law Dictionary* refers to "interest" as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something ... a right to have the advantage accruing from anything."[52] In a later edition, *Black's* states: "Collectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity."[53] I submit that these interpretations are understandable and the meaning of interests is understandable to lawyers. There is no reason to deviate from that understanding when representing children, particularly when a statute specifically charges lawyers with the responsibility to represent those interests, not best interests as does Alberta's legislation, discussed further at Part VI below.

I define interests and best interests broadly as follows: "interests" are what a person wants, cares about and to which one believes they have some entitlement. "Best interests" are what a person or anyone else believes might be good for that individual. "Interests" are personal to that client and should be considered to be that client's subjective interests as contrasted with an objective perception of what might be best for that person.

How does one interpret "interests" in the context of representing children? I submit that counsel who represents a child's interests presents issues and information to the court that reflect that young person's place in the world and what is important to that young person — what they have an interest in doing, what they care about as well as their legal interests. For example, Professor Davies states: "what the child views as important in his/her life and how

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48 Bala, *supra* note 1 at 853.

49 *Supra* note 8 at c. 10.

50 *Ibid.* at c. 10, C. 13.

51 Daniel Greenberg & Alexandra Millbrook, *Stroud's Judicial Dictionary of Words and Phrases*, 6th ed. (London: Sweet and Maxwell, 2000) at 1327.

52 Henry Campbell Black., *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West's Publishing Co., 1979).

53 Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, Minn.: West's Publishing Co., 1999).

he/she wishes those matters to be crafted in a parenting plan"[54] would certainly be matters about which counsel should present evidence and would reflect matters in a child's interests. Presenting a child's interests to the court can include presenting information about: extracurricular activities, a young person's friends, where they live, what school they attend and wish to attend, how many schools they have attended, how often they have moved, whether they live with and can visit siblings, whether they have a relationship with extended family, where that family lives, whether visiting has been interrupted for some reason, if they had five wishes what would they be, what troubles or worries them, are they afraid of anything, what makes them feel good, what is their favourite food, does anyone cook it for them? A myriad of interests might be relevant to the court's decision. Representing a child's interests requires knowing and representing to decision-makers *what* is important to that young person and *why*. What motivates that child? What is the context of their lives? Only the imagination, curiosity and sensitivity of the representative limits what information counsel might acquire. Counsel's task is to determine the relevance of the information acquired for the decision-maker and to attempt to put the information before the court. Counsel's job is to create an argument. In representing a young person, counsel should advocate for the young person's interests to be heard and understood, and to be taken into account in the decision-maker's "best interests" decision. A child advocate's role involves more than simply asking "with whom do you want to live" or "where do you want to live" and presenting those opinions to the court. As discussed earlier, these are improper questions to ask a child in the context of his or her parent's litigation.

E. ADVOCACY AND A NON-POSITIONAL OR INARTICULATE CHILD OR YOUTH

Professor Bala suggests that it is impossible to adopt an advocate's role if counsel is representing a child who is unable or unwilling to give counsel instructions. I take issue with this perspective. Even when a child is unwilling to take a position on a particular issue, the child client deserves representation and may still have capacity to instruct counsel. A child is unlike many adult clients in that they have had no role in the creation of the conflict or dispute before the court. Perhaps advocacy is not possible if counsel representing the child sees their role as simply a mouthpiece for the child and limited to providing the child's opinion in response to direct questions like "where the child wants to live" or "who the child wants to see" and "when the child wants to see them." If counsel takes the broader perspective of interest-based representation as discussed above, much more information can be provided to a decision-maker than merely answering those bare questions, provided the child permits counsel to do so. Usually the greater difficulty for child's counsel is finding means of putting relevant information before the court — procedural and evidentiary constraints are often greater barriers to effective representation than is a child's inability or unwillingness to give instructions or to share information with counsel.

A young person is entitled not to express an opinion and their desire not to make a choice between their parents is relevant information for a decision-maker. Presentation of this position is part of counsel's responsibility as the child's advocate, if the child concurs. If a child chooses not to take a position in any matter, it is not then counsel's responsibility to decide that issue for the young person; particularly issues such as where they should live and

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[54] Davies, *supra* note 4 at 159.

if or when they should visit each parent. If a lawyer acts to assist the young person, even a non-positional young person, an important advocacy role remains *vis-à-vis* that child; in contrast to Bala's assertion that it is "impossible for counsel ... to adopt the advocate's role."[55] In particular, a non-positional child still needs someone to provide information, to focus the court on their issues, to assist the young person with and help them understand the process and situation, to help them be heard and to have their perspective presented to the court on issues in general, as opposed to their position on the issues to be decided by the court. A child's reticence, however, does hamper participation by a lawyer who acts to assist the *court and adults* in making a decision by simply soliciting the child's views about where they want to live and when they want to visit.

Even a child who is inarticulate, perhaps because the issues are too difficult for them or because they are too young or lack capacity, benefits from representation by a lawyer whose focus is the child. Indeed, an infant can have interests, though they will undoubtedly overlap with best interests, different from those of any other player or individual involved. The child's interests can include: the maintenance of existing relationships; a safe placement, a healthy environment; an earlier rather than a later decision of their residency, status or placement; and settlement of the file. All of these interests coincide with best interests and would ideally be considered by the decision-makers. In these situations a lawyer's role will be quite similar to that of an *amicus curiae*. For example, consider the issue of whether to return a child home when there is evidence of safety concerns. Suppose also that a government social worker operates under policy to maintain family units or to reduce the number of children in care. The lawyer speaking on behalf of an inarticulate child can ensure the safety issue receives appropriate scrutiny but can also raise all factors relevant to a child's interests and best interests.

F. WHEN ADVOCACY IS NOT APPROPRIATE

Even though CLERC's first position is that of advocacy on behalf of the client, situations arise in which acting in this role is inappropriate even with a competent client. One situation when this occurs is if the young person is subject to intense pressure, manipulation, lobbying or influence by one or both parents (or others) and parents (or others) who fabricate facts and misrepresent the other parties. This can occur to such an extent that the child's view of a parent is affected and/or they are completely conflicted. In such cases, having a lawyer acting as a child's advocate exposes them to greater pressure, causes them more stress and potential trauma and places them more intensely into the conflict between their parents. In these situations, CLERC's approach is to seek an order of the court appointing counsel to an *amicus curiae* position, even if counsel has previously been acting in an advocate position. Everyone involved, particularly the client, must be aware of this possibility from the outset.

Confirmation of manipulation may require considerable time. In virtually every situation when a young person holds a firm position and aligns with one parent rather than another, the allegation of "parental alienation" will be raised. My experience in these circumstances is that often the parent raising this allegation has little capacity to look at their own actions and assess the impact of these actions on their child and on their relationship with their child.

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[55] Bala, *supra* note 1 at 851.

However, if manipulation is occurring, there is no benefit to the child to have an advocate of their position. In my experience, counsel may have difficulty confirming manipulation by a parent. A social service or psychological professional who engages a young client in counselling, as opposed to merely assessing a young person, is better equipped to make such a determination. As noted earlier, a team of professionals including a counselling professional and a lawyer, is a good solution to assisting children who are placed in these high conflict, manipulative situations. The child receives the benefit of longer-term counselling, not merely "snapshot" interviews with either an assessor or a lawyer hired simply to determine a young person's opinion or position.

IV. SHOULD AN *AMICUS CURIAE* OR BEST INTERESTS ADVOCATE BE CALLED THE CHILD'S LAWYER?

In my view, the only true representational role of counsel for children is that of a traditional advocate. Neither the *amicus curiae* nor a best interests advocate can be considered a child's representative or child's counsel because their role really is to assist the court in its decision making responsibilities (Table 1). Professor Bala called Alberta's *amicus curiae* program a "child representation program" and one in which children's interests were "represented."[56] In my view, the role of an *amicus curiae* does not equate to acting as child's "counsel" or to "representing" a child. I am supported in this view by others[57] and Professor Bala himself.[58] While referring to the *amicus curiae* as representing a child's interests, Professor Bala acknowledges that the *amici* appointed in Alberta were not seen as having a traditional advocate's role. The *amicus curiae* program in Alberta was created by the courts and was intended to assist the courts. Similarly, a best interests lawyer cannot be considered the child's lawyer because they can fail to pay attention to a young person's views and may argue against a young person's opinions and instructions. Lawyers, parties, and most particularly the children, should not be misled by such terminology into thinking that a person serving either an *amicus curiae* or best interests role is the young person's lawyer. As neither an *amicus* nor a best interests lawyer represents the child, they should not be called the child's representative, the child's lawyer or the child's counsel. Similarly, one often hears that it is important to "hear the voice of the child." If the intention is not to assist and respect the young person and their right to be heard in decisions affecting them, then the motivation implied in this phrase is inaccurate.

An individual acting as *amicus* or a best interests advocate could have many titles, including the case investigator, the best interests investigator, the family court worker or the court's lawyer; however, that individual is not the child's lawyer, counsel or representative. Certainly the court would benefit from more supports but individuals performing such roles would be assisting the court and they should not be confused with lawyers acting for the young person. If a lawyer acts in an *amicus* or best interests role he or she should ask: "Who is my client?" If an individual primarily functions to assist the court in investigation and the like, rather than to represent the young person, then it is appropriate to ask why this person

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56 *Ibid.*

57 *Report No. 43*, *supra* note 14 at 15: "We do not think that the *amicus curiae* can properly be said to 'represent' either the child or the child's interest in any sense in which counsel usually 'represents' a client or a client's interest." See also Davies, *supra* note 4 at 168-69.

58 Bala, *supra* note 1.

need be a lawyer. A lawyer is specially trained in advocacy, not home assessments, investigation, risk assessment, counselling, social work or psychology. More appropriate, potentially less expensive professionals are better qualified to address and provide information on the best interests of children.

Respect for children requires fair and honest treatment. Children who are told that they have a lawyer believe in that person. When asked in CLERC evaluations whether having a lawyer made a difference, young people answered "yes" and offered the following explanations. "[B]ecause my lawyer wasn't on my Mom's or Dad's side." "It made a lot of difference to me because my feelings could get heard in court." "I felt that the lawyer understood me and that in court something good would happen because now the lawyer knew what I wanted to say. And that I had accomplished something." "It made a difference because ... if I didn't get what I wanted then they would try and do something that would be close to what I wanted." "It allowed me to have a voice in court." "[My lawyer] ... was the one I could talk [with] that would listen."[59] This kind of trust must not be betrayed. Someone who does not represent the child must not be called the child's lawyer.

The definitions and descriptions of the *amicus curiae* and best interest advocate are somewhat fluid and have become blurred and confused. In some jurisdictions, the latter two roles have been fused in cases involving the custody or care of a child and by policy there are only two role options for the lawyer involved with the child: "best interests representative" and "direct representative" (traditional advocate).[60] At the same time, the guardian *ad litem* or next friend position is retained for use in different circumstances and involves quite different responsibilities from any of the three typically described roles.[61]

While acting as an *amicus curiae*, I have found it virtually impossible and perhaps not appropriate to remain neutral in the face of reliable evidence (expert or otherwise) pointing in one direction, particularly when the views of the young person involved are in accord with that evidence. The tradition in Alberta was not that the *amicus* remained neutral. One of the *amicus'* responsibilities, often set out in the appointing order, was to investigate, prepare a report and "make recommendations to the court on the issues of custody and access."[62] Such an order clearly indicates that the *amicus* was not neutral. Thus collapsing the two roles into one makes some sense except that a best interests/*amicus* lawyer should only advocate based on evidence, not their own opinions. A further significant issue and probably the subject of least agreement between Professor Bala and I, is determining when a lawyer should act as an *amicus*/best interests advocate as opposed to a traditional advocate. This issue is discussed below in the context of the capacity of a young person to instruct counsel.

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59 Anonymous responses to CLERC evaluations included with permission of survey respondents.

60 See "Representation Principles for Children's Lawyers" (Law Society of New South Wales, Australia) and Judge A.P. Nasmith, "The Inchoate Voice" (1992) 8 Can. Fam. L.Q. 43.

61 The roles of guardian *ad litem* or next friend presently exist in Alberta in our Rules of Court. A guardian *ad litem*/next friend in Alberta (and Australia) means an adult who is appointed by the court to stand in for the minor and gives instructions to the lawyer. The lawyer's client is the guardian *ad litem*/next friend. The guardian *ad litem*/next friend is usually used in situations when a young person's financial or similar matters are at issue and an adult, often a parent, is appointed by the court to protect and further the young person's interests.

62 *Report No. 43*, *supra* note 14 at 12.

V. ISSUES ARISING FROM THE *CODE OF PROFESSIONAL CONDUCT* OF THE LAW SOCIETY OF ALBERTA

Professor Bala indicates that drafters of the *Code*[63] did not consider the representation of children in family law matters.[64] Thus, problems with provisions of the *Code* and the representation of children are expected. However, in my view Professor Bala's concerns about the *Code* are not as problematic for child-advocate counsel as he suggests.

A. CAPACITY

Much has been written on a young person's capacity to instruct counsel. Professor Bala reviews court decisions and articles supporting either a low or high threshold for the determination of capacity. Professor Davies reviews some of these and other cases and authors. I interpret Professor Davies to suggest that at this time, the issue is less about assessment of a young person's capacity to instruct counsel than about the practical realities of what is being decided for and about the young person. Indeed, Professor Davies asserts that "[i]t is high handed, to say the least,"[65] not to hear the views of the young people involved. The issue of determining capacity has significant bearing on counsel's role. If counsel decides that a young person does not have capacity, then counsel cannot be a child's advocate and must either become an *amicus curiae* or best interests advocate.

Professor Bala states that the *Code* requires that counsel "adopt the advocate's role if, and only if, satisfied that the child has the legal capacity to provide instructions."[66] Professor Bala interprets the capacity rules in the *Code* as follows:

> [T]hat individuals are only regarded as able to instruct counsel if they can make "*reasonable judgments* respecting [their] affairs." ... Counsel should be satisfied that the child has made "*a reasonable*" choice; counsel does not need to be satisfied that the child is making a decision that accords with counsel's view of the child's best interests but should be satisfied that the child's desired position is not "unreasonable."[67]

Professor Bala then lists five circumstances in which a child should be considered to lack capacity because their judgments would not be reasonable, including situations in which the child's decisions: 1) will likely result in harm (including risk of serious harm) to the child; 2) meet short-term objectives only; 3) are influenced by adult(s) such that the decision(s) are not really the young person's; 4) frequently change or 5) are confusing or inconsistent.[68]

These comments must be evaluated in the context of the Rule and Commentary referenced by Professor Bala. Chapter 9, Rule 7.1 of the *Code* states:

> *When* a client is unable to provide proper instructions in a matter due to incapacity:

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63 *Supra* note 8.
64 Bala, *supra* note 1 at 858.
65 Davies, *supra* note 4 at 159.
66 Bala, *supra* note 1 at 859.
67 *Ibid.* at 860-61 [emphasis added], citing the *Code*, *supra* note 8 at c. 9, C. 7.1 [emphasis added].
68 *Ibid.* at 861.

(a) the lawyer must make reasonable efforts to cause the appointment of a legal representative for the client; and

(b) pending such appointment, the lawyer must continue to act in the best interests of the client to the extent that instructions are implied or as otherwise permitted by law.[69]

I interpret 7.1(a) to mean that if a child lacks capacity, then counsel must make efforts to find someone who can provide instructions to counsel on the child-client's behalf. The Commentary with respect to Rule 7.1 states:

> *Whether* a client is able to make reasonable judgments respecting the client's affairs is a ***legal issue*** rather than an ***ethical*** one. However, it may be proper in some circumstances to accept instructions from a minor or from a client who appears or has been adjudged to lack capacity in certain matters.[70]

Thus, the *Code* does not specify that counsel can act as an advocate for a child only if the young person can make reasonable judgments. Rather, the *Code* does *not provide guidance as to the test of capacity of a client.* Instead, the *Code* states that the test for capacity/ability to make reasonable judgments respecting one's affairs, involves *legal* rather than *ethical* considerations. The *Code* is intended to deal with ethical issues and standards for the profession, not to resolve legal issues and questions. This is the task of lawyers in the daily practice of law. As with any legal issue, counsel does not consult the *Code,* but instead must look to definitions, case law and legal texts to determine the test for capacity. The *Code* does stipulate that counsel must be satisfied that the client has capacity to provide instructions, or is not unable to provide instructions due to incapacity; however, the *Code* does not specify any test of capacity.

Even if the test were the ability to make reasonable judgments respecting one's affairs, I suggest it is inappropriate to determine "reasonableness" simply based on counsel's own views of whether a specific decision in a particular set of circumstances is unreasonable. I suggest the five examples cited by Professor Bala are simply that: examples of when Professor Bala would judge that a young person does not have capacity; however, they do not assist counsel with establishing a principled standard for determining whether a client has capacity. Changing one's mind, being influenced by another, looking only to short-term objectives, even choosing to live where there may be risk of harm need not indicate a lack of capacity. Instead, they may simply be factors that influence a person's decision one way or another, or there are reasons for the decision which counsel must learn and with which counsel must contend. In my experience, the parents of the young people I have represented often exhibit exactly the kind of thinking and decision making behaviour to which Professor Bala refers in his examples. Parents exhibiting such behaviour are not declared to lack capacity and therefore to be unable to instruct counsel. From a young person's (or anyone's) perspective, such decisions can be reasonable given the situations in which they find themselves. Counsel certainly needs to be sensitive to such circumstances and attempt to understand fully what motivates a young person's decision making and be alert and vigilant to the types of situations highlighted by Professor Bala. However counsel should not use these circumstances as a substitute for assessing capacity or simply to conclude that the

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[69] *Code, supra* note 8 at c. 9, R. 7.1 [emphasis added].

[70] *Ibid.* [emphasis added].

young person lacks capacity. There must be principles upon which counsel can rely to determine capacity, otherwise counsel is relying upon an arbitrary and unfair standard by substituting counsel's opinion of what is reasonable for that of the young person.

Jeff Leon (in M.J.J. McHale's article) quoting Jonathan Dick supported the following high threshold test of capacity:

> Such competency may be *roughly* assessed by determining whether the child: "...is able to appreciate the nature and purpose of the proceeding, the alternatives available to the court, the risks [or benefits] to him if he is permitted to remain at home, [in the family law context, perhaps remain with either parent or transfer from home to home] and ... appears to possess sufficient maturity to weigh these factors with a reasonable degree of dispassion and objectivity."[71]

Many children I represent easily meet this test of capacity. However it is unfair to impose on young people a test of capacity which we would not require of adults, that is, that they should "possess sufficient maturity to weigh these factors with a reasonable degree of ... objectivity."[72] Many adults in family disputes have little ability to view their situation with "a reasonable degree of objectivity." Those that can are usually not in litigation. I find some merit in the more relaxed test set out in Professor Bala's article and proposed by Rothman J.A. in the Quebec Court of Appeal case *M.F. v. J.L.*,[73] which basically states that a young person who can form an opinion and express it should be deemed competent. The issue then goes to what weight should be placed on the young person's views and perspectives. The test used by Justice for Children and Youth of Toronto, Ontario: "Does the young person understand their choices and based on their understanding are they able to give instructions and make choices" also has merit.[74] The point is that there be some predictable, fair, objective and principled means by which counsel can assess capacity rather than rely on their own subjective determination of what is reasonable.

I agree with the late Judge Nasmith that rather than place barriers in the way of considering a young person's perspective by relying on subjective tests of capacity and examining a young person's ability to make "reasonable judgments," we should find legal tests that recognize the dynamic and developing autonomy and capacity of young persons and their entitlement to involvement in decisions affecting their lives.[75] Judge Nasmith stated "the rule should be that where the child communicates a custodial preference, his lawyer should bring that forward and support it."[76]

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71 McHale, *supra* note 12 at 231, citing Jeffrey S. Leon, "Recent Development in Legal Representation of Children: Growing Concern with the Concept of Capacity" (1978) 1 Can. J. Fam. L. 375 at 411, citing Jonathan Dick, "The Role of Counsel in Neglect and Dependency Proceedings" in *Juvenile Court in Transition*, 49th Annual Legal Aid and Defender Conference (Denver, Colo., 5 November 1971).

72 *Ibid.*

73 (2002), 211 D.L.R. (4th) 350 (Qc. C.A.), leave to appeal to S.C.C. dismissed without reasons, [2002] C.S.C.R. No. 218 (QL).

74 Personal communication, Martha McKinnon, Executive Director, Justice for Children and Youth, Toronto, Ontario.

75 Nasmith, *supra* note 60 at 53-55, 59.

76 *Ibid.* at 54.

I also agree with Professor Bala that it is important not to use an age-based standard in determining a young person's capacity. A major concern in involving children in family law matters is that young people are highly subject to influence, leading to the ever-present suspicion by the parent who is not favoured when a child is positional that the other parent put the child into that frame of mind. I have certainly seen situations of significant manipulation of children in this regard. (I avoid using the language of alienation as it is inflammatory, often ill-founded and arose from the creation of an alleged scientific concept, "parental alienation syndrome," which has been largely discredited.)[77] However, in my experience, teenage children are as susceptible or more so to such manipulation as younger children. Very often reliable and important information and sometimes opinions can be acquired from young children, indeed as young as four, which need to be given as much credit as any evidence acquired from teenagers.

Finally with respect to the *Code*, Professor Bala's discussion regarding the assessment of capacity and role determination and his suggestion that "[i]f counsel is not satisfied that a child meets the legal test of capacity to instruct or if the child is not giving instructions, counsel *may* take the role of best interests guardian, advancing a position based on counsel's assessment of the child's best interests,"[78] reference should be made to c. 10 of the *Code*. Rule 11 states: "A lawyer must not express a personal opinion or belief to the court as to the facts in evidence."[79] The Commentary with respect to Rule 11 states:

> A lawyer's role is to present the evidence on behalf of a client fairly without assertion of any personal knowledge of the facts at issue. What the lawyer believes about the merits of the case is essentially irrelevant. It is therefore inappropriate that a lawyer become, in effect, an unsworn witness by expressing a personal opinion as to the matters in dispute. ... [S]tatements of this nature by the advocate may be accorded undue credibility or accepted without question.[80]

The Commentary points out that lawyers should not be expressing their personal views with respect to evidence before the court and highlights difficulties in doing so, including that the lawyer becomes both a witness and an advocate.

B. COMMENTS ON *PUSZCZAK V. PUSZCZAK*[81]

Professor Bala refers several times in his article to the recent Alberta Court of Appeal decision of *Puszczak v. Puszczak*. Initially, he acknowledges that the issue of capacity to instruct counsel was not at issue in the case, that is, that comments by the Court on the issue of capacity are *obiter dicta*.[82] However, Professor Bala proceeds to rely on the Court's statements as a ruling on the determination of the capacity of a child to instruct counsel. In *Puszczak*, the Court of Appeal overturned an order of the Court of Queen's Bench that had appointed a lawyer for a 12-year-old boy. The child was subject to a joint custody order

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77 Carol S. Bruch, "Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases" (2002) 14 Child & Fam. L.Q. 381.

78 Bala, *supra* note 1 at 861.

79 *Supra* note 8 at c. 10, R. 11.

80 *Ibid.* at c. 10, C. 11.

81 *Supra* note 22.

82 Bala, *supra* note 1 at 861.

when the proposed lawyer for the child was contacted, paid by the father and saw the child, unbeknownst to the mother.

The main issue considered by the Court was whether the father was "entitled to retain counsel on behalf of his son without consultation with the mother who is the child's joint guardian and primary custodial parent."[83] The Court of Appeal was extremely concerned with the appearance of alignment of child's counsel with the position of the father and stated that "[i]f counsel is to be appointed for the child, it is imperative that the counsel, *at the outset*, be free from the appearance of alignment with the position of one of the parents."[84] The Court held that unless a custody order states otherwise, the appointment of independent counsel is not a day-to-day decision, is an incident of joint guardianship, and requires consent of both guardians.

Although the issue of capacity was not before the Court, the Court stated that "[b]efore appointing counsel for a child, the court must be satisfied that the child has the capacity to instruct counsel."[85] In this case the chambers judge found the child had capacity to instruct counsel. The Court of Appeal went on to state:

> This requires that the child be capable of making reasonable choices and can exercise judgment without undue adult influence. This is embodied in the Law Society of Alberta's *Code of Professional Conduct*, Chapter 9, Rule 7.1.[86]

This is language very similar to that of Professor Bala's in his paper as it was presented at the Child Representation training sessions in Edmonton and Calgary in 2005 referred to in both our articles. In that paper Professor Bala presented his belief that the *Code* states:

> [I]ndividuals only have capacity to instruct counsel if they can make "*reasonable judgements* respecting [their] affairs." This seems to require that counsel is to be satisfied that the child has made a reasonable choice, and that the child has exercised that 'judgement' without undue adult influence.[87]

Both Professor Bala and the Court of Appeal, apparently relying on Professor Bala's statements, misinterpret the provisions of the *Code*. There is no test of capacity set out in the Alberta *Code*. As noted above, the *Code* merely states that "*[w]hether* a client is able to make reasonable judgments respecting the client's affairs is a legal issue rather than an ethical one."[88]

This Court of Appeal ruling cannot be relied upon as a statement of the test of a young person's capacity to instruct counsel. This issue was not fully reviewed or analyzed and relies on both its own and Professor Bala's misreading of the Alberta *Code*. All of the problems

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83 *Puszczak*, *supra* note 22 at para. 18.

84 *Ibid.* at para. 28 [emphasis added].

85 *Ibid.* at para. 20.

86 *Ibid.*

87 Paper presented at the Child Representation training programs (program materials), *supra* note 1. Professor Bala's paper appears at Tab 4 at 6.

88 *Supra* note 8 at c. 9, C. 7.1 [emphasis added].

discussed above apply equally to the Court of Appeal's statements as to a young person's capacity to instruct counsel due to this misreading of the *Code*.

In addition, the assessment of "undue adult influence" is an unsatisfactory test as there is no guidance as to how counsel is to determine undue adult influence. In my experience, significant time and contact with a young person is required before counsel, without other social supports, can appreciate the pressures and influences brought to bear upon a young person, whether by their parents, others or themselves. Unless the young person has some level of trust in their counsel, counsel is unlikely ever to learn much about these aspects of a young person's relations. A better approach is that set out earlier in my discussion of capacity.

Finally, with respect to "undue adult influence" or parental manipulation, ultimately these are the young person's parents and this is how the young person's family members behave. The young client may be doing his or her best to navigate the circumstances and perhaps that young person's coping mechanisms need to be respected. Rather than an approach that reinforces the stark contests, competition and conflict within families and between parents, ways of dealing with the problems within the family should be sought. As noted earlier, a team approach to the representation of children creates an extremely powerful dynamic. The *Speaking for Themselves* pilot program of the YWCA of Calgary and CLERC partners a therapeutic counsellor with a lawyer for the child. With the assistance of a therapist, a young person is provided with a much better opportunity to learn appropriate coping skills. The reality of his or her life is more likely to be learned and ultimately be available in more proper evidentiary form. Parents are aware that their child has suddenly acquired some power in the family unit. This can be both threatening and heartening to parents and seems to affect the family dynamic such that new solutions emerge. This approach is a more constructive and respectful method of dealing with potential undue parental influence than a determination that a child is not competent to instruct counsel.

C. CONFIDENTIALITY

Lawyers representing young people need to maintain confidentiality with their client to every extent possible (a solicitor/client relationship) in both child protection matters and in parenting and contact disputes. In parenting disputes, many young people tell their lawyer the truth about where or with whom they want to live but are completely unwilling to have that information more widely known. Children are often fearful of the potential impact on their relationship with the parent with whom they do not wish to reside and they are concerned about hurting that parent's feelings. In other cases, the young person is completely comfortable with that information being disclosed. Counsel must find appropriate and ethical ways of dealing with such situations so that there is no risk to the client, the client's relations with their parents or the lawyer's relation with the client.

Professor Bala states that when counsel is taking an advocate role, counsel should inform the child that confidences will be kept and will only be disclosed with consent of the young person, with one exception. Professor Bala indicates that the *Code* requires that:

> [I]f the lawyer learns that the child has been abused and may be placed in a setting where death or bodily harm (which includes sexual abuse) is likely to result, the *Code* of the Law Society of Alberta requires that counsel disclose this information.[89]

Again it is important to note the actual provisions of the *Code* and the related Commentary. Rule 8(c) of Chapter 7 states that:

> A lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime.[90]

It is not clear from this provision whose crime is referenced: a crime perpetrated against the client or one the client perpetrates. The Commentary provides insight:

> A client who seeks an advocate with respect to past conduct is entitled to have disclosures held in confidence by the advocate. The same rationale does not apply to a prospective crime since the client has no right to expect the lawyer to assist in future misconduct. Included within the concept of "prospective crime" are crimes of an ongoing nature that have a prospective element, ...
>
> A lawyer advised of a prospective crime by a client must first assess whether it is reasonable to assume that the client will carry out the expressed intention.[91]

The Commentary clarifies that unless the client is disclosing an intention to commit a crime themselves, there is no duty upon the lawyer to betray the client's confidence. Although it may seem that a lawyer for a child should be required to report a crime of which he or she is aware that is likely to result in death of, or bodily harm to their client, I maintain that it is very important that lawyers not be required to disclose such information. Lawyers require the trust of clients to represent them effectively. Trust is not forthcoming if the client knows their lawyer will report their disclosures to others. In the child protection context, a client will certainly not be forthright knowing reports will be made to their social worker. This has certainly been my experience. Under s. 4(3) of the *Child, Youth and Family Enhancement Act* a lawyer is not required to report "information that is privileged as a result of a solicitor-client relationship."[92] In both the child protection and the family law contexts, reporting a client's disclosure that they are potentially subject to such threats can expose the child to even greater harm at the hands of a perpetrator. I provide such information to no one until I am very sure I can guarantee protection of my client, I have their full and informed consent and I am confident of their and my own understanding of the consequences of the disclosure of the information with which they have entrusted me. Counsel needs to find ways of managing the situation other than betraying the client's confidence, such as: arranging counselling; providing the child with means of accessing safety planning information; risk assessment expertise and emergency contacts; contracting with clients to take particular steps if they are in danger; and, if appropriate for both of you, means of contacting you. A child's lawyer may be the only person on whom the client can rely. How such situations are

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89 Bala, *supra* note 1 at 850.

90 *Supra* note 8 at c. 7, R. 8(c).

91 *Ibid.* at c. 7, C. 8.2 (Rule # 8(c)).

92 *CYFEA*, *supra* note 16, s. 4(3).

managed may mean the difference between safety and harm for the client and must be handled very delicately and ethically. There are no easy solutions or answers when you are dealing with clients who are vulnerable and often mistrusted and disbelieved.

VI. LEGISLATIVE CONTEXT AND THE DETERMINATION OF ROLE OF COUNSEL FOR THE CHILD

Professor Bala states that the current statutory language in Alberta is too vague to assist counsel in determining their role. I disagree and suggest that attention to the language used, the ordinary rules of statutory interpretation, definitions and usage lead to a clear determination of the role of counsel for the child.

A. ROLE OF COUNSEL IN CHILD PROTECTION MATTERS

The language of Alberta's child protection legislation, the *CYFEA*[93] (previously the *Child Welfare Act*) suggests that the drafters of the legislation did not intend that lawyers appointed to represent children would take a non-traditional, non-advocacy or a best interests approach to represent child clients. It is fully accepted that decisions concerning children in both child protection and family law are to be based on the child's best interests. The *CYFEA* (and its predecessor) is clear. Section 2 of the new legislation states:

> [A] Court, an Appeal Panel and all persons who exercise any authority or make any decision under this Act relating to the child must do so in the best interests of the child.[94]

It is important to note that the requirement to operate in the best interests of the child is directed to "*all persons who exercise any authority or make any decision*" relating to the child.[95] The courts are directed to base their decisions on the child's best interests, as must the Director of Child Welfare and his or her delegates, who are tasked with exercising authority and making decisions under the *CYFEA* relating to the child. Therefore a social worker employed by the Director, who is responsible for children in the care of, or about to be in the care of the Director, is also required to exercise authority and make decisions based on the best interests of the child.

Section 3 of the same legislation sets out the authorities, roles and responsibilities of the Child and Youth Advocate for the province. Subsection (3)(a) states that:

> The Child and Youth Advocate shall ... advise the Minister on matters relating to the *interests* of children who receive services under this Act.[96]

and states at clause (c) of that same subsection that:

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93 *Ibid.*
94 *Ibid.*, s. 2.
95 *Ibid.* [emphasis added].
96 *Ibid.*, s. 3(3)(a) [emphasis added].

> The Child and Youth Advocate shall ... represent the *rights, interests and viewpoints* of children who receive services under this Act.[97]

In addition, the advocate has a number of other responsibilities. However, nowhere in the legislation is the Child and Youth Advocate given any decision making responsibilities with respect to young people receiving services under the *CYFEA*.

With respect to the role and responsibilities of counsel, s. 112 of the *CYFEA* provides for the appointment of counsel for the child and states as follows:

> (1) If an application is made for a supervision order, ... or a temporary or permanent guardianship order, or a child is the subject of a supervision order ... and the child is not represented by a lawyer ... the Court may direct that the child be *represented* by a lawyer if
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> (a) the child, the guardian of the child or a director requests the Court to do so, and
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> (b) the Court is satisfied that the ***interests or views*** of the child would not be otherwise adequately represented.[98]

These clauses are the only statements in the legislation concerning the role of a lawyer who is appointed to represent a child. Nowhere in the legislation is the lawyer appointed for the child given any *decision making* responsibilities with respect to the child. I submit that the responsibility of the lawyer so appointed is to do exactly what is prescribed: to *represent* the young person as we would traditionally understand that role, and the lawyer is to represent the child's *interests* and *views* — not their best interests. I suggest that the use of "or" in the legislation is conjunctive when considering what the lawyer is to do, as it would not make sense to restrict the lawyer's representation to either interests or views. The absence of the representation of those considerations triggers the appointment of counsel for a child, so this must be the lawyer's positive responsibility. I further submit that the legislature and drafters of the legislation were specific and intentional in their drafting. That the word "best" is not included in either ss. 3 or 112 of the *CYFEA* is no mistake, but instead indicates that the lawyer represents a child's interests and is expected to behave differently than would a lawyer representing a child's best interests. The drafters would have assumed that the young person's "best interests" would already be under consideration because of the responsibilities of the Director of Child Welfare, his or her delegates and the court. It would be a distortion of the plain language of the statute and contrary to the rules of statutory interpretation to suggest that there is no distinction between the use of "best interests" as opposed to "interests."

Given the language of the *CYFEA* ("views," "rights"), the interests that are to be represented are the subjective interests as perceived by and from the perspective of the young person. Therefore, based on the Alberta legislation, the responsibility of counsel appointed to represent a young person in child protection matters is to be a traditional, not a best-interests, advocate. The lawyer for the Director of Child Welfare, the Child Welfare social worker and the court are required to take the best interests position and decision. Of what

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[97] *Ibid.*, s. 3(3)(c) [emphasis added].

[98] *Ibid.*, s. 112(1) [emphasis added].

benefit, particularly to the child who is the subject of the proceedings, is there of another lawyer in the courtroom duplicating or reinforcing those positions and responsibilities?

B. ROLE OF COUNSEL IN FAMILY LAW MATTERS

The *CYFEA* does not address the role of counsel representing young people in family law matters. Alberta's *Family Law Act* states at s. 95:

> (1) Subject to subsection (2), where a child is a party to an application under this Act, the application may be brought or defended
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> (a) by a guardian of the child in the name of the child, or
>
> (b) by a next friend or guardian *ad litem* or any individual appointed by the court to act on behalf of the child.
>
> (2) A child who is or has been a spouse or adult interdependent partner ...
>
> *(3) The court may at any time appoint an individual to represent the interests of a child in a proceeding under this Act.*
>
> (4) Where the court appoints an individual under this section, the court shall allocate the costs relating to the appointment among the parties, including the child, if appropriate.[99]

The legislation also states at s. 18(1) that "[i]n proceedings under this Part, the court shall take into consideration only the *best interests* of the child."[100] At the same section the statute lists what the court must ensure and consider in taking into consideration the best interests of the child. Professor Bala suggests that the language of s. 95(3) is too vague to direct counsel to adopt any particular role. I must again disagree. This legislation again uses both "interests" and "best interests." My earlier comments with respect to representation in child protection matters and the difference between "interests" and "best interests" apply equally to the representation of children in family law matters. The *Family Law Act* is sufficiently clear — certainly clear enough to clarify that "interests" and "best interests" are used differently, not interchangeably, in the statute. In their usual practice, lawyers understand that interests are more akin to rights than to best interests. Again I suggest the absence of the word "best" at s. 95(3) is not an oversight by the drafters of the legislation. If they had intended that child's counsel should take a best interests position *vis-à-vis* their client, they would have used that language. Furthermore, the court can order that the young person contribute to the cost of the lawyer. Patent unfairness would result if a young person had to pay for a lawyer who did not represent them or attempt to protect their interests, rights and views and, in fact, could argue against them.

The *Divorce Act*[101] is silent with respect to the role of counsel representing young people. Unless a particular role is directed by the court, counsel who represent young people in family law matters choose their own representational stance. At the Court of Queen's Bench in Calgary, few counsel currently act for young people as there has not been ready means of compensation. This may change with the increasing interest and receptiveness of the bench

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[99] *Supra* note 47, s. 95 [emphasis added].

[100] *Ibid.*, s. 18(1) [emphasis added].

[101] R.S.C. 1985, c. 3 (2d Supp.).

and the bar to young people having counsel and the new provisions of the *Family Law Act*[102] may impact divorce matters. As noted earlier, many Queen's Bench justices in Calgary understand and accept the role of counsel acting as advocate, that is, speaking for a child's interests, not best interests.

VII. RESPONSIBILITIES OF COUNSEL FOR THE CHILD

Many of the responsibilities of counsel proposed by those advocating best interests or *amicus curiae* roles are similar to those undertaken by lawyers who advocate their client's interests, rights and viewpoints. A young person's interest includes an end to the conflict between his or her parents. Therefore, the advocate for the child works toward settlement of the dispute between the young person's parents or their parents and the state, in a manner that accounts for the young person's opinions and interests. Knowledge of and preferably training in mediation and interest-based negotiation should be a requirement for anyone undertaking this work. The young person's advocate meets with parents and their lawyers, individually and together as appropriate, holds settlement meetings when possible and appropriate, perhaps mediates some issues between the parties and attempts to facilitate communication between the parties and narrow the issues between them. The lawyer for the child should gather information supporting efforts to facilitate settlement. Counsel should refer the young person and parents to further resources that might assist them in communicating and settling. I now routinely ask those responsible for children whether the child is receiving counselling or whether there is any possibility of putting counselling in place — for everyone. Lawyers taking any of the roles would make these efforts. Lawyers in this field, of course, should have and demonstrate the same knowledge, skills and level of competency as lawyers representing any other client, including knowledge of additional and appropriate resources, case law and legislation.

Professor Bala provides a list and explanation of "Responsibilities and Expectations for Child's Counsel" which includes suggestions of tasks, methods of work, ethical duties, skills and training.[103] With a few exceptions, as Professor Bala makes no distinction as to whether lawyers performing the different roles will approach any of these matters differently, I largely agree with Professor Bala's suggestions. I provide comments on some of those responsibilities and expectations using his headings.

Maintaining Independence: It is important that counsel be as even-handed as possible with parents and all parties which I suggest is slightly different than maintaining independence. The Court of Appeal in *Puszczak* notes that non-alignment is particularly important at the outset of counsel for the child's involvement.[104] If counsel is the child's advocate and the child is positional and aligning with one parent then, barring other considerations, so, in effect, will counsel. Child's counsel must nonetheless maintain professional, respectful and even-handed relations with all parties. Victoria Adamson's paper from the Child

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102 *Supra* note 47, specifically s. 95(4) which permits the court to allocate the costs of counsel for the child.

103 Bala, *supra* note 1 at 864-69.

104 *Supra* note 22 at para. 28.

Representation training programs material includes an excellent discussion on the approach and behaviour of counsel for the child to promote appropriate relations with all parties.[105]

Review of Documents and Reports: I usually review only the current Order prior to an initial meeting with a child. This approach guards against forming an opinion of any party prior to meeting with the child based on affidavits and reports that can colour counsel's perspective.

Meeting with the Child: Feedback from children to CLERC indicates that they like to meet with counsel away from any of the pro- or antagonists. Children are very comfortable in a vehicle.

Communication with the Child: Professor Bala states counsel "should always attempt to elicit the child's views."[106] In contrast, I suggest counsel should consciously avoid operating under this imperative. Counsel welcomes the child's views if they are willing to share them but developing a relation with and engaging the child is more important — the views will usually follow.

I do not automatically assume children want to be kept informed of what is happening, particularly, for example if the matter is in trial. Instead I confirm whether they want information about how matters are proceeding, how they want to be informed and by whom.

Contacting Parents and Collaterals: Parents are often very anxious about what they tell their child's lawyer and what counsel will do with the information learned. I advise parents that there is no confidentiality between us. I also advise them that I will not use the information to attack them or to cast them in an ill light because usually my motivation and interest are directed to settlement. These are the child's only parents. Counsel should not contribute to inflating the conflict or eroding relations between parents and child.

Investigation of Placement and Resources: I disagree that counsel is responsible for investigating possible placements and child care arrangements. Counsel is not an investigator or social worker but counsel should ensure that all options are considered especially those suggested by the client, for example, suggestions of counselling or living arrangements.

Making Known Counsel's Role: I disagree with Professor Bala that any lawyer should wait until all the evidence is before the court before finalizing a position. This approach is unfair to other parties, puts the lawyer in a decision making role and tacitly acknowledges that counsel cannot learn beforehand the information that would be available to a judge hearing a trial.

Facilitation of Settlement: Generally, counsel must respect agreements reached between parents; however, a hard and fast rule that counsel must not interfere with such arrangements is inappropriate. Parents can make agreements that suit their needs and interests and may fail

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105 V. Adamson, "The Role of Children's Counsel and the Etiquette of Independence" (Paper presented at the Child Representation training programs), *supra* note 1 at Tab 4.

106 Bala, *supra* note 1 at 866.

to consider those of their children. Counsel for a child must have the latitude to argue for amendments that respect the child's interests.

Ensuring the Child's Views and Preferences Are Before the Court: Practically, a child advocate's approach to evidence is dictated by the proceeding. In chambers applications, usually no procedurally proper means of putting evidence before the court exists without placing the child further into the fray between the litigants. When I advocate for a young person, I advise parties of information I wish to present to the court prior to appearing. With permission of the court and the parties on the record, I will provide information directly to the court; however, I generally avoid highly prejudicial content. As pointed out by Alfred Malmo and noted in Professor Davies' article, counsel acting as an *amicus* generally has greater leeway in putting evidence before the court.[107] At trial, my experience is that counsel must adhere to the normal rules of evidence to put the child's evidence on the record. As with any representation, counsel may be unsuccessful in ensuring all relevant information is presented to the court, for whatever reason, whether it be forgetful witnesses, unreliable witnesses or no witnesses at all.

As noted in the discussion supporting an advocacy approach, I believe it is inappropriate to hire a social worker merely to interview a child to determine the child's opinion. For the reasons stated, the relation should involve engagement with the child, rather than simply an interview to discover his or her views.

The Child Communicating with the Court: Alberta courts are loathe for children to give direct evidence in custody and access or parenting disputes. Usually the preferred approach is a judicial interview. Counsel for the child can be instrumental in preparing both the child and the judge, if permitted, for a positive interview experience. Counsel must always query both the circumstances of any letter already written to a judge, which is presented to counsel by a young person, and the genesis of any requests by the young person to speak with the judge.

Ensuring Evidence Is Before the Court: As the advocate of a competent child, counsel should not consider that they also have an obligation to ensure that all evidence is before the court. This places counsel in a conflict. In addition, as a child's evidence cannot easily be put to the court, child's counsel may have difficulty ensuring all relevant evidence relating to the child is before the court. Unless the rules of evidence are relaxed and counsel him or herself can report, this practice is neither possible nor always appropriate. Counsel is in a much better position to ensure all evidence is before the court, without compromising counsel's advocacy role, when working in partnership with a mental health professional who can be called as a witness.

Ending the Relationship: Given the nature of family law matters, issues for the young person may not end with resolution of the current matter. When CLERC represents young people we always advise that they may call at any time.

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[107] Davies, *supra* note 4 at 169.

Withdrawing From a Case: Young people I have represented do not fit Professor Bala's description of unreliable, mistrusting, defiant or uncommunicative. Indeed, parents more commonly exhibit such behaviour. Young people's attitudes may be affected by whether they perceive counsel as loyal to them, or to some other or perhaps mixed purpose.

Parents may influence or attempt to influence a child to fire their lawyer if the lawyer is perceived as not aligning with that parent's position. Therefore, withdrawing from a case or acquiescing to a firing can be a tricky matter. Counsel may consider seeking leave of the court to become an *amicus* so that neither parent has this power over their child.

Future Proceedings: Depending on the nature of counsel's appointment, reappointment should be unnecessary if counsel for the child is on the record. Counsel's representational responsibilities would normally end only after counsel has filed and served a Notice of Intention of Ceasing to Act. If reappointment is required, appointing bodies should be encouraged to reappoint counsel with whom a young person is already familiar, even if that lawyer is not on their roster, unless there have been problems between counsel and his or her client.

VIII. CONCLUSION

As should be apparent, my primary focus when representing children is the child and I attempt always to view a situation through the lens of the child. For the reasons cited in this article, this approach seems only fair and appropriate and in most situations requires that I be the child's advocate. Although I agree with Professor Bala that no role is appropriate for all cases, counsel should not be asked or expected to become something other than a lawyer, as is implied in Professor Bala's suggestions. When representing children, I certainly form my own opinions of what should happen for my clients and would relish informing the court of them. However, I refrain from presenting these views because such an approach is contrary to our current procedures and lawyers have no qualifications to be best interests investigators or assessors. Careful consideration should be given before deciding lawyers can advocate their own rather than their client's perspectives. Without specialized support, it is difficult for any lawyer to gather all the relevant evidence and, most importantly, counsel's loyalty should be to his or her client: counsel is the client's advocate, not an advocate of their own opinion of the client's best interests. As Professor Davies suggests, substitution of a lawyer's own opinion for that of the young person usurps the role of the judge in legal proceedings. Having said that, I completely understand the court's desire for as much information as possible before making its decision. However, until our current legal systems and modes of operation have been discussed fully and perhaps revised, I argue that the manner in which that information is put forward must comply with current ethical duties and rules of procedure. Furthermore, information must be presented in a manner that respects the rights, interests and viewpoints of clients and of the other parties. Anyone who represents children knows the incredible power and influence of counsel for the child. Professor Bala invites counsel to have even more power and influence but with no predictability or fairness. Arguably if counsel is "guided by his or her own assessment of the best interests of the

child,"[108] counsel usurps the role of the decision-maker without the existing procedural safeguards.

I agree with Professor Bala that leadership from the government and/or the Law Society of Alberta in organizing and providing resources to young people who need the services of a lawyer would be welcome. Representing young people using a counsellor and lawyer together provides great support to a young person, enables their views and interests to be presented in acceptable evidentiary fashion and often facilitates settlement. Development and implementation of such a new, child-centred program requires significant political will and financial commitment, new government programming and cooperation of government departments.

Alberta is at a moment of opportunity for developing a coherent program for the representation of children: to address issues of "recruitment, screening, education"[109] and accountability of counsel who do this work, and to address the need for appropriate social supports for children and resources for the courts dealing with highly conflictual issues involving children. I encourage policy-makers to take up the challenge and engage in full and comprehensive review and discussion of these issues with all affected and interested individuals, organizations and institutions. This discussion should involve all areas of practice involving the representation of children to encourage comprehensive consideration of the issues. With respect to family law matters, questions should include whether present rules, procedures and venues provide the best means of resolving family law disputes and whether a therapeutic approach — engaging mental health, domestic violence and addictions professionals instead of lawyers, courtrooms and judges — should be adopted more often to resolve high conflict cases.

In contrast to the general lack of discourse on the representation of young people and children's rights in general in Alberta, these matters have received serious, intense and lengthy discussion in other jurisdictions. Policy development in Alberta concerning the representation of children would benefit from consideration and investigation of the experiences of others. A full dialogue involving all interested parties is necessary to develop a legal system that allows the role and responsibilities of counsel to reflect modern perspectives on the rights of children and their position in Alberta society.

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[108] Bala, *supra* note 1 at 846.

[109] *Ibid.* at 869.