

## Introduction

Child abuse and neglect<sup>1</sup> is a social problem that cuts across all segments of American society. All ages, genders, races and ethnicities are represented among both perpetrators and victims of abuse and neglect, with no particular group immune.<sup>2</sup> In the year 2000, nearly three million American children were the subjects of child abuse and neglect investigations.<sup>3</sup> In nearly a third, or 879,000, of those cases children were confirmed as victims of abuse or neglect.<sup>4</sup>

Although federal funding statutes<sup>5</sup> influence states' efforts to combat the problem, child abuse and neglect is primarily a state matter governed by state statutes. In Michigan, the primary child abuse and neglect statute is referred to as the Child Protection Law.<sup>6</sup> The Child Protection Law, among other things, defines child abuse and neglect<sup>7</sup> and gives to a state agency the authority to investigate<sup>8</sup> alleged abuse and neglect and to take action<sup>9</sup> to protect the victims when

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<sup>1</sup> In this paper, child abuse and neglect refers to civil child abuse and neglect. A single instance of child abuse or neglect can at the same time be a criminal offense subject to the consequences of the criminal justice system, *see* the Penal Code, Mich. Comp. Laws § 750.5 et. seq. (2003), and a civil offense subject to the consequences of the child protection system, *see* the Child Protection Law, Mich. Comp. Laws § 722.621 et. seq. (2003). The primary difference between the criminal and civil systems is that the aim of the criminal system is punishment of the offender while the goal of the civil system is protection of the child and rehabilitation of the family. Another significant difference between criminal and civil child abuse and neglect is that the criminal system deals with any act by any person that violates a criminal statute pertaining to child abuse or neglect. The civil system, on the other had, deals with only those situations where the perpetrator of the abuse or neglect is a parent or a person in a parenting role, such as a guardian, step-parent, adult household member, etc. See definitions, Mich. Comp. Laws § 722.621 (2003).

<sup>2</sup> U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2000* (2002) *See* pages 25-26, 47.

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Id.*

<sup>5</sup> *See* The Social Security Act, 42 U.S.C. § 601 et. seq. (2003).

<sup>6</sup> Mich. Comp. Laws § 722.621 et. seq. (2003).

<sup>7</sup> Mich. Comp. Laws § 722.622 (2003): "Child abuse" means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare. "Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following: (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care. (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

<sup>8</sup> Mich. Comp. Laws § 722.628 (2003).

<sup>9</sup> *See* Mich. Comp. Laws §§ 722.628d, 722.637, 722.638 (2003).

abuse or neglect is confirmed. In Michigan, the administrative agency to which this task has been assigned is the Michigan Family Independence Agency (FIA).<sup>10</sup>

In fiscal year 2002, the FIA children's protective services (CPS) unit investigated nearly 73,000 reports of suspected child abuse or neglect in Michigan.<sup>11</sup> Abuse or neglect was confirmed in over 17,000 cases.<sup>12</sup> When abuse or neglect is confirmed, CPS has access to a number of remedies designed to protect the child and rehabilitate the perpetrator.<sup>13</sup> In the majority of cases, these remedies involve maintaining the child in the home setting and providing services to the family designed to alleviate the risk of future abuse.<sup>14</sup> In such cases, no court is involved and the family participates with the services provided by CPS on a voluntary basis.<sup>15</sup>

However, in more serious cases of abuse or neglect or where prior rehabilitative efforts have failed and the abuse or neglect has continued,<sup>16</sup> CPS petitions the family division of the circuit court and requests that the court take jurisdiction of the child.<sup>17</sup> In the majority of instances where a petition is filed, the child is removed from the care of the custodial parent who either perpetrated the abuse or neglect or failed to protect the child from abuse or neglect.<sup>18</sup>

When a child is the subject of court jurisdiction, the usual goal is to rehabilitate the perpetrator

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<sup>10</sup> Mich. Comp. Laws § 722.622(j) (2003).

<sup>11</sup> Michigan Family Independence Agency, Policy Analysis and Program Evaluation Division, Service Delivery Administration, *Program Descriptions – FY 2004* (2002). See page 35.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 34-35.

<sup>14</sup> See Michigan Family Independence Agency, *Children's Protective Services Manual*, Policy CFP 711-1 (Rev. Oct. 1, 2001), page 1: "Because children have a right to be with their own parents, the ultimate objective of CPS is to protect children by stabilizing and strengthening families whenever possible through services, either direct or purchased, to the parents or other responsible adult to help them to effectively carry out their parental responsibilities."

<sup>15</sup> *Id.*, Policy CFP 714-1 (Rev. May 1, 2002).

<sup>16</sup> See Mich. Comp. Laws §§ 722.628d, 722.637, 722.638 (2003).

<sup>17</sup> "Child" here includes the identified victim child and in most instances, other children in the household such as siblings or stepsiblings. In Michigan, a parent's treatment of one child is probative of that parent's treatment of other children. See *In re Powers*, 208 Mich. App. 582; 528 N.W.2d 799 (1995). Thus, absent extraordinary circumstances, an abuse and neglect petition filed with the court includes all children in the home. See Michigan Family Independence Agency, *Children's Protective Services Manual*, Policy CFP 715-2 (Rev. Oct. 1, 2001).

<sup>18</sup> In less frequent instances, the FIA seeks court jurisdiction while allowing the child to remain in the parent's physical custody. See Mich. Comp. Laws § 712A.13a.

and eventually return the child to the parental home.<sup>19</sup> If that goal cannot be accomplished within a reasonable amount of time, the FIA may petition the court to terminate the parent's legal rights and place the child for adoption.<sup>20</sup> In certain egregious cases, no efforts are made to rehabilitate the perpetrator and return the child home and the FIA is mandated by law to pursue termination of parental rights at the outset of the court action.<sup>21</sup>

In September of 2002, nearly 20,000 abused or neglected children in Michigan were under the jurisdiction of the family division circuit court.<sup>22</sup> All of these 20,000 children were or had been at one time living apart from their parents in settings such as foster homes, relative's homes, group homes or institutions.<sup>23</sup> And the reality of the foster care system means that in addition to being removed from a parent, a child in foster care is often also removed from siblings, relatives, friends, school, and the community.<sup>24</sup> And rarely is the remedy short term. Nationally, on September 30, 2001, the close of the federal government's fiscal year, the average amount of time children spent in foster care before returning home or being adopted was nearly three years.<sup>25</sup> Fifteen percent of foster children spent three or four years in foster care, while 17

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<sup>19</sup> See Michigan Family Independence Agency, *Children's Foster Care Manual*, Policy CFF 721 (Rev. Dec. 1, 2001), page 1: "Services are focused on resolving the problems which necessitated removal."

<sup>20</sup> *Id.* "When families cannot be restored, children should be prepared for safe, appropriate and permanent placements." See also Mich. Comp. Laws § 712A.19b (2003).

<sup>21</sup> Mich. Comp. Laws § 722.638 (2003). (Such situations include those where a parent had his/her rights to another child previously terminated and there is risk of harm to a new child, or situations where the parent seriously abused the child, a sibling of a child, or failed to protect the child from such abuse by another and the abuse includes: abandonment of a young child; criminal sexual conduct including penetration, attempted penetration or assault with the intent to penetrate; battering torture or other severe physical abuse; loss or serious impairment of an organ or limb; life threatening injury; murder or attempted murder.)

<sup>22</sup> Michigan Family Independence Agency, *Program Descriptions – FY 2004*, *Supra* at 45.

<sup>23</sup> *Id.*

<sup>24</sup> Michigan Family Independence Agency, *Families First of Michigan: A Decade of Keeping Children and Families Safe*, Publication 600 (Rev. Oct. 2002). See page 4.

<sup>25</sup> U.S. Department of Health and Human Services, Administration for Children and Families, administration on Children, Youth and Families, Children's Bureau, *AFCARS Report* (March 2003). See page 1.

percent were in care for more than five years.<sup>26</sup> During what may be the most critical time in a child's life, who protects the child's rights and interests?

In this paper, I will review the legal representation provided to abused and neglected children in Michigan who are under the jurisdiction of the court as temporary or permanent wards. I will discuss the form of representation that was in place in Michigan before the major child welfare reform of the 1990's, the criticisms of that representation and the need for reform, improvements Michigan made during the course of the reform, and the system in place today. I will conclude with recommendations for further improvement to the representation Michigan provides to abused and neglected children involved in child protective proceedings.

### **A Brief History of Providing Legal Representation to Abused and Neglected Children**

Abused and neglected children involved in protective proceedings do not have a recognized constitutional right to legal representation.<sup>27</sup> While children involved in delinquency proceedings<sup>28</sup> have a constitutional right to independent legal representation,<sup>29</sup> to date that right has not been extended to abused and neglected children. However, while not constitutionally protected, today most states, including Michigan, afford abused and neglected children involved in child protective proceedings some form of legal representation pursuant to court rule or statute.<sup>30</sup> In the few states that do not appoint attorneys to represent children, a non-attorney

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<sup>26</sup> *Id.*

<sup>27</sup> Jennifer Walter, *Averting Revictimization of Children: State Funding Needed for Independent Counsel Representing Children*, J. Center Children & Cts. 45, 47 (1999).

<sup>28</sup> Delinquency proceedings relate to children who have been accused of an act that is unlawful solely because the offender's status as a minor or an act that would be a crime if the child were an adult. See definition of "Delinquent Child", *Black's Legal Dictionary* (6<sup>th</sup> ed. 1990).

<sup>29</sup> *In re Gault*, 387 U.S. 1, 41; 87 S. Ct. 1428; 18 L. Ed. 2d 527 (1967).

<sup>30</sup> U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, *Adoption 2002: The President's Initiative on Adoption and Foster Care, Chapter 7: Standards for Legal Representation of Children, Parents, and the Child Welfare Agency*, available at: <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm>.

guardian ad litem<sup>31</sup> or court appointed special advocate<sup>32</sup> is assigned to assist the court in ensuring that the child's best interests are protected.<sup>33</sup>

The idea of protecting the rights and interests of abused and neglected children involved in child protective proceedings is a relatively modern phenomenon and was not given widespread consideration until the federal government passed the Child Abuse Prevention and Treatment Act in 1974 (CAPTA).<sup>34</sup> CAPTA was the first comprehensive effort by the federal government to assist the states in meeting the needs of abused and neglected children.<sup>35</sup> CAPTA is a funding statute that provides federal dollars to the states to combat child abuse on the condition any state receiving such funding include certain provisions in its child protection system.<sup>36</sup>

At the time it was originally enacted, one of the requirements of CAPTA provided that “in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings.”<sup>37</sup> The legislation did not define the term guardian ad litem, and the corresponding regulation stated only that the guardian ad litem's responsibility was to represent “the rights, interests, welfare and well-being of the child.”<sup>38</sup> Such broad statutory provisions and regulations gave states wide discretion in

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<sup>31</sup> A guardian ad litem is an advocate that represents the child's best interests. *Id.* at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm#guidrp>.

<sup>32</sup> Court appointed special advocates “are screened, trained, and professionally supervised lay volunteers who advocate for the best interests of abused and neglected children, primarily in dependency proceedings.” *Id.* at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm#guidcasa>.

<sup>33</sup> *Id.* at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm>.

<sup>34</sup> Pub. L. No. 93-237, 88 Stat. 4 (Jan 31, 1974).

<sup>35</sup> Caroline Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 Vand. L. Rev. 183, 192-193 (Jan. 1998).

<sup>36</sup> Pub. L. No. 93-247, *Supra*. Presently codified at 42 U.S.C. §§ 5101 et. seq. (2003).

<sup>37</sup> *Id.*, This provision of CAPTA has since been amended and now states that: “in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate (or both) shall be appointed to represent the child in such proceedings (parentheses in original). 42 U.S.C. § 5106a (2003).

<sup>38</sup> 46 FR 16830 (Mar. 13, 1981). Like the statute, the regulation pertaining to the appointment of a guardian ad litem has also been amended originally promulgated and now reads: “In every case involving an abused or neglected child

determining how this requirement would be accomplished. Of particular interest is the fact that the federal law did not require that a guardian ad litem be a licensed attorney. Michigan first implemented the mandates of CAPTA when it enacted Public Act 238 of 1975, called the Child Protection Law.<sup>39</sup> The Child Protection Law, however, exceeded the minimum requirements of CAPTA with respect to the representation of children involved in judicial proceedings and required that “legal counsel” be appointed to fulfill this role.<sup>40</sup>

### **Children Need Independent Legal Representation**

Those not familiar with child abuse and neglect and the realities of child protective proceedings might ask: “Why do children need such representation?” The State Bar of Michigan Children’s Task Force provided a common sense and understandable answer when it wrote:

A child faced with any bureaucracy -- a school, a hospital, or the child welfare system -- needs someone to guide him or her through the complex system. The child needs an advocate. In most instances a parent is capable and legally responsible for the protection of the child's interests. In legal cases, however, where custody of the child is at stake, and the suitability of the parents to care for the child is often the question, parents cannot be depended upon to protect the best interests of the child or to look out for the needs of the child. In such cases, the child needs an independent advocate whose function, among others, is to help the child through the difficult process. By definition, fundamental aspects of the child's life are being threatened in these legal proceedings. The child could lose mother, father, sister, brother, extended family, school, or community. On the other hand, the child faces the prospect of harm at the hands of an unfit caretaker, or of systemic indecision as to what ought to happen to him or her. Children lack the capacity to speak for and care for themselves in these instances and someone else needs to speak and act on their behalf.<sup>41</sup>

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which results in a judicial proceeding, the State must insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child. This requirement may be satisfied: (1) By a statute mandating the appointments; (2) by a statute permitting the appointments, accompanied by a statement from the Governor that the appointments are made in every case; (3) in the absence of a specific statute, by a formal opinion of the Attorney General that the appointments are permitted, accompanied by a Governor's statement that the appointments are made in every case; or (4) by the State's Uniform Court Rule mandating appointments in every case. However, the guardian ad litem shall not be the attorney responsible for presenting the evidence alleging child abuse or neglect.” 45 C.F.R. § 1340.14, as amended by 48 F.R. 3698 (Jan. 26, 1983).

<sup>39</sup> Codified at Mich. Comp. Law §§ 722.621 et. seq. (2003).

<sup>40</sup> Mich. Comp. Law § 722.630 (1975).

<sup>41</sup> State Bar of Michigan, *Children’s Task Force Final Report*, (Sept. 21, 1995).

It is clear that while child protective proceedings may protect a child from immediate harm to the child's well-being, this harm is often merely substituted for a myriad of other less tangible injuries that, while not imminent, nonetheless have the potential to impact the child for a lifetime.<sup>42</sup> Children in general, and especially those impacted by abuse and neglect, are incapable of fully comprehending and balancing these competing interests and cannot be expected to adequately safeguard and advocate for their own rights.

Abused and neglected children need and deserve legal protection of their rights and interests during child protective proceedings. A 1999 article by the Journal of the Center for Children and the Courts summarized what should be viewed as an abused and neglected child's "rights" when subjected to government intervention: the right to be free from abuse, the right to grow up in one's own family, the right to a swift and legally permanent plan, and the right to be informed and have a voice.<sup>43</sup> As the National Association of Counsel for Children points out: "The children who are the subject of [protective] proceedings are usually the most profoundly affected by the decisions made, and these children are usually the least able to voice their views effectively on their own."<sup>44</sup>

A related question that might be asked is if the state's job is child protection, doesn't the intervention taken by the state after a child has been deemed abused or neglected adequately protect the child's rights and interests? This might seem like a simple and economical solution, however closer scrutiny reveals obvious shortfalls in delegating this responsibility to the state. While there is certainly a degree of overlap in the interests of the state and the child, there also

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<sup>42</sup> For example, abused and neglected children who spent time in foster care are more likely to have emotional problems, use drugs, engage in criminal activity, etc. and are less likely to finish high school, be consistently employed, etc. See Richard Wertheimer, *Youth who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, Child Trends (Dec. 2002).

<sup>43</sup> Walter, *Averting Revictimization of Children*, *Supra* at 47.

<sup>44</sup> National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, NACC Children's Law Manual Series (2001 ed.).

exists inherent conflict: although both share the common goal of ensuring the child is free from abuse or neglect, the state has numerous other interests that may impede its pursuit of that common goal. For example, the state is also interested in ensuring that the parent's rights are not violated.<sup>45</sup> In addition, the state has numerous economic considerations such as the cost of the child's placement, the costs of services provided to the parent and the child, the legal resources expended on the family, etc.<sup>46</sup> In sum, the state cannot equally protect the child's interests while at the same time pursuing potentially conflicting interests of its own.

And as indicated, a child also has other interests affected by child protective proceedings aside being free from abuse and neglect. For example, the manner in which the child protection agency chooses to address the abuse and neglect in a given case affects: where the child lives; whether the child continues his relationship with relatives and/or siblings; whether the child is required or allowed to have continued contact with his parents and whether that contact is supervised or not; whether the child and/or the parent are provided remedial services to address the underlying abuse or neglect; whether the child is required or allowed to testify in court; how long the child remains in a temporary living situation and what the permanent plan for the child is; and the list goes on. The agency's decisions with respect to these collateral issues are often motivated or affected by issues that can easily conflict with the child's rights and interests, such as financial considerations, caseload size, the availability of placements, the social worker's expertise in abuse and neglect and child development, etc.<sup>47</sup> A very simple example is the child removed from his home who has a safe and supportive relationship with a grandparent willing to provide care. If the grandparent lives a considerable distance away, the child's assigned social worker might instead place the child in an unfamiliar foster home close by, contrary to the

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<sup>45</sup> See generally *Santosky v. Kramer*, 455 U.S. 745; 102 S. Ct. 1388; 71 L. Ed. 2d 599 (1982).

<sup>46</sup> *Id.*

undisputed view that the child would be more comfortable and less traumatized placed with his grandparent.<sup>48</sup> The most common reason for this decision is that it takes less time for the social worker to supervise and monitor the child in a home nearby, than at a grandparent's home a distance away.

Another noteworthy example of the potential divergent interests between the child and the state arises in the context of the legal proceedings themselves. The agency's ultimate interest may be in obtaining court jurisdiction over the child to ensure child safety and doing so quickly and efficiently.<sup>49</sup> Once jurisdiction is achieved and the child is safely removed from the abusive environment, the agency may believe that the goal of child protection has been accomplished. As a result, the agency may be willing to enter into a plea bargain with the parent in which the agency strikes the more serious allegations from a petition in exchange for an admission or plea of no contest, thereby leaving the child vulnerable to future decision-making that fails to consider the true extent of the underlying abuse or neglect.<sup>50</sup>

Lastly, and perhaps most important, the state is not obligated to legally represent child abuse and neglect social workers when who appear in court as a representative of the state in child protective proceedings.<sup>51</sup> With no legal training and facing possibly multiple adversaries,

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<sup>47</sup> Walter, *Averting Revictimization of Children*, *Supra*. See page 50.

<sup>48</sup> See Michigan Family Independence Agency, *Children's Foster Care Manual*, Policy CFF 722-3, page 5: "Placement with Relatives" (Rev. Aug. 1 2002).

<sup>49</sup> Walter, *Averting Revictimization of Children*, *Supra*. See page 50.

<sup>50</sup> *Id.*

<sup>51</sup> In Michigan, there is no statutory right for state agents to be legally represented in child protective proceedings. Mich. Ct. R. 5.914 requires only that the prosecutor's office be available to the agency for legal "consultation", not representation. The rule goes on to state that where the prosecutor's office does not appear on behalf of the agency at court proceedings, the agency may hire outside counsel. *Id.* In addition, case law supports the right of the prosecutor's office to actively oppose the agency in a child protective proceeding if the prosecutor believes that the agency's recommended plan for a given case is inconsistent with the desires of the people. See *In re Jagers*, 224 Mich. App. 359; 568 N.W. 2d. 837 (1997). Some agency county offices contract with the prosecutor's office for representation, however this is strictly voluntary and is not undertaken by all counties. See Mich. Child Wel. Law Man. § 18, available at: [http://www.michigan.gov/documents/MCWLCChap18\\_34827.pdf](http://www.michigan.gov/documents/MCWLCChap18_34827.pdf). The only exception to agency caseworkers not having legal representation is in Wayne County, Michigan, where the state has contracted with the attorney general's office for legal representation at all stages of child protective proceedings. *Id.* at § 18.5.

agency workers can be overwhelmed and unprepared to fully and zealously advocate for the state's rights and interests, let alone the rights and interests of the children on the social worker's caseload. In addition, in Michigan, most often one social worker serves all of the children in a given family.<sup>52</sup> If the agency caseworker cannot adequately protect a single child's rights and interests, the agency is certainly not in a position to protect those of multiple children from one family whose rights and interests may conflict with each other.

### **Legal Representation of Abused and Neglected Children in Michigan Before the Reform**

When the first Child Protection Law was passed in Michigan, in an effort to implement the mandates of CAPTA, Michigan elected to provide greater legal representation of children than CAPTA required.<sup>53</sup> Although CAPTA mandated that states provide a "guardian ad litem" to children who are the subjects of child protection proceedings, there was no requirement in the statute or the regulations that the person who filled that role be an attorney.<sup>54</sup> Michigan, however, opted to include this requirement from the beginning.<sup>55</sup> Since that time, Michigan has made several changes to this law as well as to other laws and court rules pertaining to the representation of children. The majority of these changes occurred in the decade of the 1990's, an era of reform not only in Michigan, but across the country.<sup>56</sup>

In order to fully understand the nature and extent of the representation of children today and appreciate the improvements Michigan has made in recent years, it is necessary to review

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<sup>52</sup> See Michigan Family Independence Agency, *Children's Foster Care Manual*, Policy CFF 722-1 (Rev. Oct. 1, 2001).

<sup>53</sup> Pub. L. No. 93-247, *Supra*; 46 F.R. 16830, *Supra*.

<sup>54</sup> *Id.*

<sup>55</sup> 1975 MI. P. A. 239 § 10 (Sept. 2, 1975), codified at Mich. Comp. Laws § 722.630 (1975).

<sup>56</sup> Much of the reform was prompted by the passage of the federal Adoption and Safe Families Act, Pub. L. No. 105-89 (Nov. 9, 1997), which amended the Child Abuse Prevention and Treatment Act and changed the course of abuse and neglect services to focus on child safety and child permanency, rather than solely on reunifying families. In addition to this federal legislation which required states to make major changes in the way they provided child welfare services in order to qualify for federal funding, Michigan was at the same time pursuing its own child

how Michigan responded to the need to protect children’s legal rights and interests before the reform of the mid-to-late 1990’s occurred. Going back just a decade, if a single word could describe Michigan’s attempts at representing the rights and interests of children in child protective proceedings, it would be “confusing.” At that time, there were a number of statutory provisions and court rules that pertained to this issue, each using different, often undefined terminology that was at a minimum inconsistent and at worst, in direct conflict with each other.<sup>57</sup>

Before the reform was undertaken, the biggest debate in Michigan, as in many other states, with respect to the representation of children and the terminology used was whether a legal advocate appointed to a child was obligated to represent the child’s wishes or the child’s best interest.<sup>58</sup> The literature in this area clearly indicates that the practitioners believed that “representing the child’s wishes” and “representing the child’s best interest” were two different undertakings that could not necessarily be fulfilled by the same person because of the inherent conflict. The legal community asserted that representing the child meant taking on the role of the traditional attorney where the client directed the representation and the attorney advocated for what the client wanted.<sup>59</sup> Representing the “child’s best interests,” however, was believed to be more consistent with the role of a guardian ad litem and meant that the obligation was to determine what the child’s best interests were and advocate accordingly, even if in direct conflict with what the child wants.<sup>60</sup>

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welfare reform prompted in large part by the Lieutenant Governor’s Children’s Commission headed by then Lieutenant Governor, Connie Binsfeld. See Exec. Ord. 1995-12 (May 23, 1995).

<sup>57</sup> See, generally, Michigan Judicial Institute, *Child Protective Proceedings Benchbook: abuse and Neglect, Benchnote 4: An Overview of Representation of Children* by Nannette Bowler (1999); Albert E. Hartmen, *Crafting an Advocate for a Child: In support of Legislation Redefining the Role of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases*, 31 U. Mich. J. L. Ref. 237 (Fall 1997); American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* (Feb. 1996).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

The federal law and regulation on this issue are likely responsible for much of the confusion in the statutory provisions adopted by the states. The original version of CAPTA mandated that states provide a guardian ad litem for abused and neglected children, yet said the role of the guardian ad litem was to “represent the child.”<sup>61</sup> The original regulation promulgated to assist with the statutes implementation stated that the role of the guardian ad litem was to “represent the child’s rights, interests, welfare, and well-being.”<sup>62</sup> Those terms taken together seem to imply that the guardian ad litem initially contemplated by the federal government was some kind of hybrid between a traditional attorney and a guardian ad litem. With this as the basis, it is easy to see how states, including Michigan, might have stumbled when implementing state statutes and court rules designed to fulfill the federal mandate.

Both the law and the corresponding regulation have been amended since first enacted or promulgated, and the amendments helped to clarify what the federal government envisioned when it used the term guardian ad litem. In 1996, the law was amended to its current version to state that the guardian ad litem was to make “recommendations to the court as to the child’s best interests.”<sup>63</sup> The regulation similarly was changed to state the role of the guardian ad litem is to “represent and protect the rights and best interest of the child.”<sup>64</sup> While still not entirely clear, there is certainly a greater emphasis on the child’s best interests, consistent with the common meaning of guardian ad litem.

Although Michigan elected early on to fulfill the mandates of CAPTA by requiring that the legal representative of a child be a licensed attorney, the language used in its first statute

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<sup>61</sup> Pub. L. No. 93-247 § 4(b)(2)(G), *Supra*

<sup>62</sup> 46. F.R. 16830, *Supra*.

<sup>63</sup> 42 U.S.C. § 5106a, *Supra*.

<sup>64</sup> 42 C.F.R. § 1340.14, *Supra*.

highlights the view that Michigan was confused about what the federal government intended.<sup>65</sup>

Michigan followed the federal government's lead in selecting language that made it all but impossible to determine whether the focus was on advocating for the child's best interest or the child's own wishes.<sup>66</sup> This confusing language remained in place for over 20 years when Michigan chose to settle the debate by changing the law entirely. However, in order to appreciate the improvements that have been made, it is helpful to review what was in place before the reform occurred.

In Michigan - prior to the reform - there were two statutes and one court rule that dealt with providing legal representation to abused and neglected children involved in child protective proceedings.<sup>67</sup> Reviewing these provisions demonstrates just how confusing the state of the law was and makes it easy to understand how the professionals in the field could have reached different conclusions and interpretations of the roles and responsibilities of a child's legal advocate. The provision in the Child Protection Law that related to the representation of children read:

Appointment of counsel to represent child; duties of counsel.

Sec. 10. The court, in every case filed under this act in which judicial proceedings are necessary, shall appoint legal counsel to represent the child. The legal counsel, in general, shall be charged with the representation of the child's best interests. To that end, the attorney shall make further investigation as he deems necessary to ascertain the facts, interview witnesses, examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court, and participate in the proceedings to competently represent the child.<sup>68</sup>

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<sup>65</sup> 1975 MI P.A. 238 § 10 (Oct. 1, 1975).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; 1939 MI P.A. 288 (Sept. 29, 1939); Mich. Ct. R. 5.915 (Jan. 1, 1988).

<sup>68</sup> 1975 MI P.A. 238 § 10, *Supra*, underline added.

In one sentence, the law says that the role of the child’s legal counsel is to represent the child’s best interest. In the next sentence, the law outlines activities that must be performed to represent “the child” with no mention of the child’s best interests.

At the same time, a provision added to the Probate Code<sup>69</sup> in 1988 called for an attorney to be appointed to represent the child, making no mention of the child’s best interests.<sup>70</sup> This provision, which was codified at MCL 712A.17c(7), stated in pertinent part:

In a proceeding under section 2(b)<sup>71</sup> or (c) of this chapter, the court shall appoint an attorney to represent the child. The child shall not waive the assistance of an attorney. The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each subsequent proceeding or hearing, review the agency case file and consult with the foster parents and the caseworker.<sup>72</sup>

Further, Michigan Court Rule 5.915 relating to child protective proceedings included the following:

(2) Child. The court must appoint an attorney to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of an attorney.

(a) The attorney for the child must be present at every hearing for which the attorney receives notice.

(b) The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child.

(c) If the child is placed in foster care, the attorney shall, before representing the child in each proceeding or hearing subsequent to a preliminary hearing or emergency removal hearing, review the agency case file and consult with the foster parents and the caseworker.

(d) The court may permit another attorney to temporarily substitute for the child's

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<sup>69</sup> 1939 MI P.A. 288, *Supra*, also commonly referred to as the “Juvenile Code.”

<sup>70</sup> 1988 MI P.A. 92 (June 1, 1988).

<sup>71</sup> Section 2(b) refers to Mich. Comp. Laws § 712A.2(b), the provision of the probate code dealing with jurisdiction in child protective proceedings.

<sup>72</sup> Underline added.

attorney at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. An attorney who temporarily substitutes for the child's attorney must be familiarized with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker prior to the hearing unless the child's attorney has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule.<sup>73</sup>

Again, as with the provision of the probate code, the court rule pertaining to an attorney appointed for a child in child protective proceedings makes no mention of the child's best interest and seems to contemplate a more traditional attorney-client relationship.

However, in addition to the mandatory appointment of an attorney, whose role pursuant to the court rule appears to be more of a traditional attorney, the court rules also allowed for a guardian ad litem to be appointed to the child in a child protective proceeding, at the court's discretion. Michigan Court Rule 5.916(A) read:

The court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it.

Although no definition of guardian ad litem was provided at the time the court rule was promulgated, it is reasonable to assume that this provision contemplated more of a "best interests" advocate, consistent with the common meaning of the term guardian ad litem.

Otherwise, the appointment of an attorney (at least as that term is defined in the court rule<sup>74</sup>) and the appointment of a guardian ad litem would be redundant. But what if the guardian ad litem appointed was also a licensed attorney? Did that affect the role of the guardian ad litem at all? Did this attorney have the same or a different role than an attorney appointed to the child pursuant to the Child Protection Law or the Probate Code? Was this person act as a traditional

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<sup>73</sup> Mich. Ct. R. 5.915, *Supra*.

<sup>74</sup> *Id.*

attorney representing the child client's wishes, or as a guardian ad litem representing the child's best interests?

Before Michigan reformed its statutes and court rules pertaining to the role of a child's legal representative in child protective proceedings the answers to the above questions were as numerous as the questions themselves and the confusion was apparent in the legal literature.<sup>75</sup> The debate in the legal community about the proper role of the lawyer appointed to a child in a child protective proceeding, however, seemed do little more than clarify that the role was unclear and subject to varying interpretations.<sup>76</sup> In addition, little direction was provided by way of interpretation of these provisions by the appellate courts. In fact, the only appellate case that directly addressed the confusion among these statutes and court rules fell short of resolving it. In *In re Shaffer*, 213 Mich. App. 429; 540 N.W.2d 706 (1995) the Michigan Court of Appeals attempted to sort out the confusion yet ultimately seemed confused itself. The court was itself unable to determine with any certainty whether the lawyer appointed to the children in the case acted as a traditional attorney zealously advancing her client's position, or whether she took on the role of guardian ad litem advocating for the children's best interests.<sup>77</sup> In the same paragraph, the court states: "we are gravely concerned that the best interests of these children were not adequately protected" (i.e. guardian ad litem) and "we cannot say that the children were

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<sup>75</sup> See footnote 54. See also Donald Duquette and Sarah Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. Mich. J.L. Ref. 341 (Winter 1987); Martin Guggenheim, *Matters of Ethics: Counseling Counsel for Children*, 97 Mich. L. Rev. 1488 (May 1999); State Bar of Michigan, *Children's Task Force Final Report* (Sept. 21, 1995).

<sup>76</sup> *Id.*

<sup>77</sup> *In re Shafer*, 213 Mich. App. 429; 540 N.W.2d. 706 (1995). The very issue in this case was whether the lawyer appointed to represent sibling group in a child protective proceeding was appointed as and/or acted as a guardian ad litem or as a traditional attorney. The probate court, the circuit court (which heard the first appeal) and the Court of Appeals all reached conclusions to some extent. Ultimately, the Court of Appeals concluded that, likely because of the confusion, the lawyer appointed to the children failed to fully satisfy the requirements of either a guardian ad litem or a traditional attorney. The Court of Appeals held that the law (at the time) *required* the appointment of an "attorney" and *allowed* for the appointment of a "guardian ad litem" and that where an appointed guardian ad litem is also an attorney, it is possible for that person to fill both roles as long as no obvious conflict existed.

afforded the zealous advocacy of an attorney” (i.e. traditional attorney).<sup>78</sup> One issue the opinion exemplifies is that if neither the court nor the lawyer clearly understands the lawyer’s role, the appointed counsel will undoubtedly fail to fully satisfy the requirements of either a traditional attorney or a guardian ad litem, leaving the child with inadequate and ineffective representation from any perspective.

### **Legal Representation of Abused and Neglected Children in Michigan After the Reform**

In Michigan, and around the country, substantial child welfare reform commenced in the 1990’s. What prompted reform in this state was primarily a combination of two forces. First, the federal government amended the Child Abuse Prevention and Treatment Act by enacting the adoption and Safe Families Act of 1997.<sup>79</sup> The adoption and Safe Families Act changed the ultimate goal of child welfare services from reunifying families (with what at times seemed to be “at all costs”) to providing safety and permanency for children, whether that was provided by their own families, or some other arrangement.<sup>80</sup> If states wanted to continue to receive federal funding, states had to change the way they provided child protection to conform to the new mandates of the federal law.<sup>81</sup>

Second, child welfare reform in Michigan was also prompted in large part by the efforts of then Lieutenant Governor Connie Binsfeld, who at the time who took a great interest in children’s issues. In 1995, Governor John Engler, by Executive Order,<sup>82</sup> created the Lieutenant Governor’s Children’s Commission, whose stated purpose was to devise recommendations to

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<sup>78</sup> *Id.* at 432-433.

<sup>79</sup> Pub. L. No. 105-89, *Supra.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Mich. Exec. Order No. 1995-12, *Supra.*

reform Michigan's child abuse and neglect services.<sup>83</sup> One component of this reform included recommended changes in the way children involved in child protective proceedings are represented. The Binsfeld Commission, which was comprised of both legal scholars and experienced social science professionals,<sup>84</sup> produced its final report of recommendations, entitled *In Our Hands* in July of 1996, and made several recommendations relating to the legal representation of children.<sup>85</sup>

As a direct result of those recommendations, numerous statutes were enacted and collectively given the term "Binsfeld Legislation," including five dealing directly with the legal representation provided to children who are the subjects of child protective proceedings.<sup>86</sup> The most significant of those was Michigan Public Act 480 of 1998, which created the position of "lawyer-guardian ad litem" as the primary legal representative of a child involved in child protective proceedings. This statute all but eliminated the confusion and debate about whether the proper role of the child's primary legal advocate is to represent the child's best interests or the child's wishes. Under the new law, the former view clearly won out. The Act, which amended the Probate Code, was actively supported by numerous members of the child welfare community in Michigan.<sup>87</sup> The Act was codified at Mich. Comp. Laws § 712A.17d and reads:

- (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
  - (a) The obligations of the attorney-client privilege.

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<sup>83</sup> The mission of the Children's Commission, as stated in its final report entitled, *In Our Hands* (July 1996) was: "To provide recommendations for the integrated reform and collaborative direction of services that protect children from abuse and neglect and, ultimately, improve and nurture the lives of Michigan's children and their families."

<sup>84</sup> *Id.*, see pages 3-4 for a detailed list of members and their professional affiliations.

<sup>85</sup> *Id.*, see recommendations 76, 77, 78 and 80.

<sup>86</sup> 1997 MI P.A. 169 (eff. Mar. 31, 1998); 1998 MI P.A. 480 (eff. Mar. 1, 1999); 1998 MI P.A. 483 (eff. Mar. 1, 1999); 1998 MI P.A. 484 (Eff. Jul. 1, 1999); 1998 MI P.A. 530 (eff. Jan. 12, 1999).

<sup>87</sup> In addition to the State Bar of Michigan and the State Court Administrative Office Court Improvement Program, the act was publicly supported by the Lieutenant Governor's Children's Commission, the Michigan Family Independence Agency, the Michigan Federation of Probate Child and Family Agencies, the Michigan County Social Service Boards. See the Michigan House Legislative Analysis report, available at: [http://www.michiganlegislature.org/documents/1997-1998/bill\\_analysis/house/htm/1997-HLA-0954-A.htm](http://www.michiganlegislature.org/documents/1997-1998/bill_analysis/house/htm/1997-HLA-0954-A.htm).

- (b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.
- (c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information.
- (d) Before each proceeding or hearing, to meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the child's parents, foster care providers, guardians, and caseworkers.
- (e) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.
- (f) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.
- (g) To attend all hearings and substitute representation for the child only with court approval.
- (h) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.
- (i) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.
- (j) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.
- (k) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.<sup>88</sup>

Not only did the statute make clear that the emphasis was on representing the child's best interests, but it also specifically enumerated all of the actions a lawyer-guardian ad litem must take in order to fulfill this obligation. In addition, the related provision of the Child Protection

Law dealing with the legal representation of children was also amended to cross-reference the Probate Code provision and create consistency in the terminology and the role of the lawyer-guardian ad litem.<sup>89</sup>

The additional public acts affecting the legal representation of children that were passed during the reform created statutory provisions that further enhanced the protection of the child's best interests through the use of a lawyer-guardian ad litem. For example, under Mich. Comp. Laws § 712A.17c(7), a child cannot waive the assistance of a lawyer-guardian ad litem. Under Mich. Comp. Laws § 712A.17c(9), the lawyer-guardian ad litem must serve until discharged by the court. In addition, Mich. Comp. Laws § 712A.17c(9) prohibits the court from discharging the lawyer-guardian ad litem until the child is no longer under the jurisdiction of the court or the Family Independence Agency, unless the court does so for good cause stated on the record. And in that instance, the court must immediately replace the discharged lawyer-guardian ad litem with another.<sup>90</sup> Clearly, when compared to the earlier statutes and viewed together, these new enactments provide much greater assurance that every child involved in a child protective proceeding has a consistent legal advocate present at every hearing, available to the child, and working to protect the child's best interests.

Another significant aspect of the improved legislation is that it contemplates the possibility that a child involved in child protective proceedings might require a second kind of legal advocate in circumstances where the child's best interests are in substantial conflict with the child's own wishes. Mich. Comp. Laws § 712A.17d(2) states:

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<sup>88</sup> Underline added.

<sup>89</sup> Revised section 10 of the Child Protection Law, codified at Mich. Comp. Laws § 722.630 (2003) now reads: "In each case filed under this act in which judicial proceedings are necessary, the court shall appoint a lawyer-guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has the powers and duties in relation to that representation as set forth in section 17d of Chapter XIIA 1939 PA 288, Mich. Comp. Laws 712A.17d. All provisions of section 17d of chapter XIIA of 1939 PA 288, Mich. Comp. Laws 712A.17d, apply to a lawyer-guardian ad litem appointed under this act."

(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

Mich. Comp. Laws § 712a.13a(1)(b) defines “attorney” in child protective proceedings in order to clearly distinguish that role from the role of the child’s lawyer-guardian ad litem:

"Attorney" means, . . . , an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client.

Although Michigan implemented new or amended statutory provisions regarding legal representation for children in child protective proceedings relatively quickly in the era of the reform, Michigan was considerably slower in revising its court rules. Although revisions to the court rules were first officially contemplated in 1998,<sup>91</sup> they were not complete and the new rules not adopted until February 3, 2003.<sup>92</sup> This meant that for a period of years and until very recently, lawyers and courts had to operate under statutes and court rules that remained in conflict with each other. This allowed the debate over the proper terminology and the role played by a child’s primary legal advocate appointed in child protective proceedings to linger much longer than necessary, even if on a smaller scale. When the revised court rules were adopted, consistency among these provisions was finally achieved. The relevant provision of Mich. Ct. R. 3.915 (eff. May 1, 2003) now reads:

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<sup>90</sup> Mich. Comp. Laws § 712A.17c(9) (2003).

<sup>91</sup> See Mich. Sup. Ct. Admin. Ord. 1995-50.

(a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d.

(b) If a conflict arises between the lawyer-guardian ad litem and the child regarding the child's best interests, the court may appoint an attorney to represent the child's stated interests. In such instances, the court, in its discretion, may appoint an "attorney" for the child.

Overall, the Michigan statutes and court rules regarding the representation of children involved in child protection proceedings have been improved considerably since they were first adopted in the 1970's and 1980's in response to CAPTA's federal funding requirements. The two major accomplishments during the child welfare reform include creating consistency among the statutes and court rules and clarifying the roles and responsibilities of the legal advocates appointed to represent a child. Children are much more likely to receive the representation to which they are entitled if the appointed legal advocate and the court both clearly understand the advocate's role and responsibilities. It is no longer debated whether children need a legal advocate to represent them or whether the person who fills that role should be an attorney.

### **Compensation as a Barrier to Full Implementation of Michigan's Lawyer-Guardian Ad Litem Statute**

Although this author has concluded that the improvements made to the statutes and court rules have put Michigan in the forefront of providing legal representation to abused and neglected children, there remains a major criticism that many say has impeded Michigan's ability to fully implement these provisions: lawyer-guardian ad litem compensation, an issue that has been raised not only at the state level, but also nationally.<sup>93</sup> While paying more money does not

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<sup>92</sup> See Mich. Sup. Ct. Ord. Pertaining to Mich. Sup. Ct. Admin. Ord. 1998-50 and 2001-19, entered Feb. 1, 2003, available at: <http://courts.michigan.gov/supremecourt/resources/administrative/1998-50-2001-19.pdf>.

<sup>93</sup> See American Bar Association, *Standards of Practice for Lawyers Representing Children in Child Abuse and Neglect Cases* (Adopted Feb. 5, 1996):

guarantee a better a better product or better service in exchange, it cannot be seriously argued that the level of compensation bears no correlation to quality. All of us have heard the saying “You get what you pay for.” If there is any truth to that saying, some children in Michigan may not be afforded the full extent of the advocacy contemplated by the statutes and court rules.

The only guidance provided by court rule or statute pertaining to the compensation provided court-appointed lawyer-guardians ad litem or attorneys in child protective proceedings is as follows:

MCR 5.915(2)(e) The attorney appointed to represent the child must receive compensation as determined by the court, including compensation for all out-of-court consultations as required by statute or court rule.

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“A child’s attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and postdispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.”; U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, *Adoption 2002: The President’s Initiative on Adoption and Foster Care, Ch. 7, Standards for Representation of Children, Parents and the Child Welfare Agency*, available at: <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm>.: “Primary causes of inadequate legal representation of the parties in child welfare cases are low compensation and excessive caseloads. Reasonable compensation of attorneys for this important work is essential. Rather than a flat per case fee, compensate lawyers for time spent. This will help to increase their level of involvement in the case and should help improve the image of attorneys who are engaged in this type of work. When attorneys are paid a set fee for complicated and demanding cases, they cope either by providing less service than the child-client requires or by providing representation on a pro bono or minimum wage basis. Neither of these responses is appropriate.”; The National Association of Counsel for Children, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Adopted Oct. 13, 1996): “Children need attorneys with adequate time and resources. The system of representation must include reasonable caseload limits and at the same time provide adequate compensation for attorneys representing children.” (The NCAA also adopted the above commentary of the Children’s Bureau as support for this recommendation.); Michigan Supreme Court, State Court Administrative Office, Court Improvement Program, *Assessment of Probate Courts’ Handling of Child Abuse and Neglect Cases Final Report* (1997): “Attorneys representing children and parents should receive compensation that is reasonable and commensurate with the amount and complexity of work involved in child abuse and neglect cases. Compensation systems should not be utilized that provide disincentives to fulfilling responsibilities mandated by statutes, codes of professional responsibility and other standards (e.g., annual, “no case cap” contracts).”; State Bar of Michigan, *Children’s Task Force Final Report* (Sept. 21, 1995): “The State Bar of Michigan Children’s Task force says: “[I]t is usually important to have an attorney as GAL because attorneys are trained to protect and pursue the child’s interests in legal proceedings and to initiate and pursue remedies and matters in other courts and/or administrative forums. The Task Force determined that without an attorney GAL, a child’s interests may be negatively affected during most legal proceedings. The Task Force believes that adequate funding of courts, such that every child receives adequate legal representation, should be a budgetary priority.”

Interestingly, the revised court rules adopted in February 2003 and effective May 1, 2003 omit this particular provision entirely. As a result, lawyer-guardian ad litem or attorney compensation is not addressed in any provision of the revised rules. Lawyer-guardian ad litem compensation is not addressed in any provision of the revised court rules, nor is it addressed anywhere in statute anywhere in statute (contrary to compensation for court-appointed counsel in other actions such as in criminal matters,<sup>94</sup> mental health matters where a client is subject to involuntary commitment,<sup>95</sup> etc.).

The connection between lawyer-guardian ad litem compensation and the quality of representation provided to abused and neglected children was first documented in the *2000 Annual Report* of the State of Michigan Citizen's Foster Care Review Board Program.<sup>96</sup> In the report, the Foster Care Review Board (FCRB)<sup>97</sup> highlighted the particular issue of lawyer-guardian ad litem compensation, giving the following reason for doing so:

For many years local foster care review boards have recognized inadequate representation of children in child protective proceedings as a statewide problem. In July 1996 the Report of the Binsfeld Children's Commission expressed similar concerns stating that 'the present system fails to provide children with adequate representation in court.' The Commission recommended several reforms to address this issue. In response, 1998 PA 480 was enacted and contains one of the most comprehensive statutes in the nation governing the manner in which children should be represented in a child protective proceeding. However, full

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<sup>94</sup> See Mich. Comp. Laws § 775.16 (2003): "The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed."

<sup>95</sup> See Mich. Comp. Laws § 330.1454 (2003): "The supreme court may, by court rule, establish the compensation to be paid for counsel of indigents and may require that counsel be appointed from a system or organization established for the purpose of providing representation in proceedings governed by this chapter."

<sup>96</sup> Michigan Supreme Court, State Court Administrative Office, Foster Care Review Program, *2000 Annual Report* (2000), available at: [http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb\\_ar00.pdf](http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb_ar00.pdf).

<sup>97</sup> From the State of Michigan Foster Care Review Board website: "The Foster Care Review Board (FCRB) provides citizen review of court and social agency efforts to find permanent families for children in foster care. The need for review resulted from the perception that children entered foster care to escape an abusive home, but then languished in the system. Although the family division of circuit court, Family Independence Agency (FIA), and private child placement agencies all play major roles in addressing children in care, it is difficult for any single one of them to provide an independent, objective assessment of the foster care system. Local citizen review boards can provide an objective look at the activities of the primary players in the foster care system.", available at: <http://courts.michigan.gov/scao/services/fcrb/fcrb.htm>.

implementation of this statute has been problematic. Recognizing the seriousness of this problem, the Foster Care Review Board Program established ‘improving attorney representation for children’ as one of its Biennial Goals for 1998-99.

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The Program’s statewide advisory Committee sought to determine if compensation is at the heart of the problem.<sup>98</sup>

The report went on to note that although the lawyer-guardian ad litem statute imposes numerous obligations on lawyer-guardians ad litem that require substantial time outside of the courtroom to fulfill (i.e. conducting an independent investigation, meeting personally with the child, interviewing the child’s caretakers, caseworker, etc.).<sup>99</sup> Two-thirds of the courts surveyed by the FCRB said that compensation schemes are based only on in-court activities and do not take into account time spent outside the court.<sup>100</sup> As a result, the FCRB indicated anecdotally that many lawyer-guardians ad litem appear to simply ignore these out-of-court responsibilities. A number of FCRB members indicated that it is not uncommon for a lawyer-guardian ad litem to never meet his or client and never talk to that child’s caretaker.<sup>101</sup>

In response to this report, Michigan commissioned a more formal study of the implementation of Michigan’s Guardian ad litem statute, which was conducted by the American Bar Association Center on Children and the Law. Its report, recently released in November 2002, identifies a clear relationship between compensation and quality of representation.<sup>102</sup> The first sentence of the chapter focusing solely on compensation states, “Among the most contentious issues concerning the role and practice of lawyer-guardians ad litem in Michigan are the manner in which they are appointed and the level of their compensation.”<sup>103</sup>

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<sup>98</sup> Foster Care Review Board, *2000 Annual Report, Supra*.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> American Bar Association, Center on Children and the Law, *A Challenge for Change: Implementation of Michigan’s Lawyer-Guardian Ad Litem Statute*, (Nov. 2002).

<sup>103</sup> *Id.* at 17.

Payment for court-appointed lawyer-guardians ad litem in Michigan is by county or circuit court.<sup>104</sup> Among the 83 counties represented by 57 circuits, nine different methods of compensation were identified.<sup>105</sup> And among the various methods, the amount of the compensation also varied greatly.<sup>106</sup> For example, for those counties or circuits that paid lawyer-guardians ad litem an hourly fee, the amount of that fee ranged from \$35.00 per hour to \$65.00 per hour.<sup>107</sup> In addition, the kinds of activities for which hourly lawyer-guardians ad litem could bill also varied.<sup>108</sup> In some counties, the hourly fee was applied to all legal services provided to the client.<sup>109</sup> In other counties, the hourly fee applied only to specific activities, such as time spent in court.<sup>110</sup> Overall, regardless of the method of compensation, nearly 80% of lawyer-guardians ad litem who responded to a survey viewed their compensation as inadequate.<sup>111</sup> Similarly, just under 20% of courts indicated a belief that current compensation levels are adequate to achieve the level of representation mandated by Michigan's lawyer-guardian ad litem statute.<sup>112</sup>

Interestingly, some argue that the issue of inadequate compensation existed under the old provisions, but are even greater now since the enactment of Michigan's lawyer-guardian ad litem law. The reason given for this assertion is that the list of a lawyer-guardian ad litem's responsibilities included in the new law places even more obligations on them than before.<sup>113</sup> Under this view, many of the activities enumerated in the lawyer-guardian ad litem statute are

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<sup>104</sup> In Michigan, most counties make up their own circuit, however in some rural areas, multiple counties are joined to form a single circuit. Michigan's 83 counties comprise 57 circuits. For more information on the makeup of Michigan circuit courts, see the State of Michigan Courts website at: <http://courts.michigan.gov>.

<sup>105</sup> American Bar Association, *A Challenge for Change*, *Supra* at 19.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Foster Care Review Board, *2000 Annual Report*, *Supra* at 5-6.

<sup>110</sup> American Bar Association, *A Challenge for Change*, *Supra* at 22-23.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 88-90.

thought to be *in addition* to activities required under the former provisions and certainly in addition to the activities required to represent an adult client in a normal lawyer-client relationship. Some assert that new statute actually violates Michigan's constitution<sup>114</sup> because it imposes increased duties on local governments without a corresponding increase in funding.<sup>115</sup> Those of this opinion believe that such added responsibilities cannot legally be imposed without increasing the lawyer-guardian ad litem's compensation and that any challenge brought to enforce the statute would not be successful for this reason.<sup>116</sup> As a result, some lawyers choose not to carry out all of the activities enumerated.<sup>117</sup>

Others disagree with that argument and assert that the law does no more than enumerate the activities required when representing a child to ensure that the lawyer-guardian ad litem meets the obligations to the child that a lawyer would owe an adult client under the Michigan Rules of Professional Conduct.<sup>118</sup> The law simply outlines the specific activities necessary to satisfy the rules of conduct when the client represented is a child in involved in Michigan's abuse and neglect system.<sup>119</sup> Although the difference between these two views is substantial, most agree that under either position, Michigan's compensation of lawyer-guardians ad litem is nonetheless inadequate.<sup>120</sup>

One conclusion that can be drawn from the American Bar Association report<sup>121</sup> and the Foster Care Review Board report<sup>122</sup> is that with no consistency among the counties as to the method or amount of compensation for lawyer-guardians ad litem, the quality of legal

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<sup>114</sup> Mich. Const. Article VI, § 8.

<sup>115</sup> American Bar Association, *A Challenge for Change*, *Supra* at 90.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 22-23.

<sup>121</sup> American Bar Association, *A Challenge for Change*, *Supra*.

<sup>122</sup> Foster Care Review Board, *2000 Annual Report*, *Supra*.

representation received by an abused or neglected child in Michigan may well depend on the county with jurisdiction. Although not the focus of this paper, it should at least be mentioned that such dramatic differences from county to county in compensation raises the question of equal protection. Although courts have held it is not a violation of the equal protection clause<sup>123</sup> for one indigent client to receive better legal representation than another, this conclusion is based on the assumption that “adequate” representation is provided.<sup>124</sup> However, it can be argued that any instance of representation of a child by a lawyer-guardian ad litem that does not include personal contact with the child (or the child’s caretaker if the child is too young to communicate) is inadequate, and evidence exists showing this omission to be all too common.<sup>125</sup>

To summarize, Michigan’s statutes and the revised court rules seem to cover all the bases with respect to a child’s need for representation in child protective proceedings. The provisions of these statutes and rules place Michigan at the forefront when compared to other the representation provided by other states. At a minimum, *every child* in Michigan has a lawyer-guardian ad litem.<sup>126</sup> The lawyer-guardian ad litem must be present and every hearing and cannot be waived by the child, discharged by the court, or substituted.<sup>127</sup> The lawyer-guardian ad litem must observe and consult with the child before each hearing, consult with the child’s caretaker and the agency caseworker, etc.<sup>128</sup> However, despite how comprehensive these statutes and court rules are, if they are not fully implemented they do no more than

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<sup>123</sup> U.S. Const. Amend. XIV § 1.

<sup>124</sup> See *Pennsylvania v. Finley*, 481 U.S. 551; 107 S. Ct. 1990; 95 L. Ed. 2d. 539 (1987).

<sup>125</sup> See American Bar Association, *A Challenge for Change, Supra*; Foster Care Review Board, *2000 Annual Report, Supra*.

<sup>126</sup> Mich. Comp. Laws § 722.630 (2003).

<sup>127</sup> Mich. Comp. Laws § 712A.17c (2003).

"look good on paper." As a result, Michigan needs to take additional steps to ensure that the laws already passed are followed.

Michigan should standardize compensation schemes and increase compensation levels to ensure at least adequate representation and basic compliance with the obligations outlined in the law across the state, as recommended by the American Bar Association.<sup>129</sup> Given the correlation between compensation and the quality of the representation provided, improving compensation for lawyer-guardians ad litem can have a direct impact on the lives of our state's abused and neglected children. Michigan should implement a uniform method compensating lawyer-guardians ad litem and should ensure that compensation levels are reasonable across the state. In determining what amount of compensation is reasonable, consideration should be given to all of the tasks required of a lawyer-guardian ad litem to fulfill the obligations under the lawyer-guardian ad litem statute and the rules of professional conduct.

While increasing consistency across counties and raising overall compensation levels will surely require additional allocation of already scarce resources, failing to do so will essentially guarantee that many of Michigan's abused and neglected children will fail to receive the legal representation contemplated when Michigan's lawyer-guardian ad litem statute was enacted. It will also guarantee that abused and neglected children in different counties or circuits will receive different levels of representation.

#### **Additional recommendations**

Although issues related to compensation can have a substantial impact on the representation provided, the need for improvement also exists with respect to two other aspects

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<sup>128</sup> Mich. Comp. Laws § 712A.17d (2003).

<sup>129</sup> American Bar Association, *Challenge for Change, Supra*.

of the current statute's implementation.<sup>130</sup> These two additional recommendations complement the recommendation regarding compensation and ensure that the state will “get what it pays for” if it makes the commitment to pay reasonable and consistent wages. These two recommendations address the issues of improved training and increased oversight of lawyer-guardians ad litem performance.

First, Michigan should mandate both prior training and continuing education for all attorneys who wish to represent abused and neglected children as lawyer-guardians ad litem in child protective proceedings. This training should focus on two distinct issues – training on the lawyer's role and the requirements of the lawyer-guardian ad litem statute and, second, training specifically about children, including topics such as child development, the impact of abuse and neglect on children, communicating with children, the importance of sibling and familial relationships on children in out-of-home care, etc.

Training about the lawyer's role and the obligations under the lawyer-guardian ad litem statute is necessary because taking on an abused or neglected child in a protective proceeding as a client requires an entirely different set of skills than representing adults in general civil proceedings. Lawyer-guardians ad litem encounter specialized proceedings and court rules, must fulfill very specific requirements outlined in the statute that are different than any other kind of representation, and must clearly understand the role of determining and advocating for the child's best interests.

Substantive training about children, specifically abused and neglected children, is equally critical, if not more so, to effective representation as a lawyer-guardian ad litem. While lawyers

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<sup>130</sup> These additional recommendations relating to the implementation of Michigan's current lawyer-guardian ad litem statute are adapted from the recommendations by the American Bar Association in *A Challenge for Change, Supra*. The report makes 20 separate recommendations, however all can easily be placed in one of three main

representing adults in general civil proceedings draw from their own already established knowledge about interpersonal, communication, and advocacy skills, very little if any of this knowledge can be transferred by analogy to representing abused and neglected children. As a result, lawyer-guardians ad litem should be specially trained in a variety of topics including child development, child communication and interviewing techniques, the effects of abuse and neglect on children, the impact of out-of-home placement on children and the disruption of the parent-child and/or sibling relationships, etc. Without a clear understanding of these issues, the lawyer-guardian ad litem cannot genuinely understand his client or ascertain and advocate his client's best interests.

Second, it is recommended that Michigan establish a uniform method of evaluating lawyer-guardians ad litem appointed in child protective proceedings to ensure that all obligations under that statute are satisfied and that the lawyers appointed have the skills necessary to fulfill those obligations competently. There are a variety of relatively easy and inexpensive activities that can be undertaken to evaluate the competency of the representation provided children in such proceedings. For example, the child or the child's caretaker could be provided information at the time of the appointment clearly explaining the lawyer-guardian ad litem's role and responsibilities. Every three to six months, and/or when a child's cases closes, a survey could be completed by the child or child's caretaker indicating whether the lawyer-guardian ad litem fulfilled his obligations to his client. In addition, the court can simply ask the lawyer-guardian ad litem on the record at the beginning of each hearing whether the lawyer-guardian ad litem has met his client, consulted with the client's caretakers, read the agency's case file and developed

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categories: those dealing with compensation, as already discussed, and those dealing with lawyer-guardian ad litem training and lawyer-guardian ad litem oversight.

an opinion about the child's best interests. Sanctions should be created and imposed on lawyer-guardians ad litem who consistently fall below and accepted minimum level of competency.

Lastly, in addition to recommendations focused on the implementation of the statute as it exists today, this author also recommends one substantive change to the statute itself. It is recommended that the statute mandate the appointment of an attorney for the child (in addition to the lawyer-guardian ad litem) whenever a child's lawyer-guardian ad litem determines that a material difference exists between the child's best interest and what the child's own interests. As it exists today, the statutes make the appointment of such an attorney subject to the court's discretion.<sup>131</sup> Currently, once a material difference is identified by the lawyer-guardian ad litem, the law allows the court to appoint this second type of legal advocate when the court deems such an appointment "appropriate."<sup>132</sup> Making such an appointment mandatory would improve consistency across the state and make the basis for appointing an attorney more objective, rather than purely subjective based on the individual judge's view of what is appropriate. In addition, it would also eliminate the potential for the court to abuse its discretion and make such decisions based on improper considerations such as constraints on the financial or other resources of the court.

### **Conclusion**

The legal representation of children in child protective proceedings has been a requirement of statute or court rule in Michigan for over 30 years. Unfortunately, in the earlier part of this period, the provisions in statutes and court rules were inconsistent, making the role of the legal representative unclear and subject to interpretation. While some adopted the view that the lawyer's role was to advocate for the child's best interests, others believed that a child client

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<sup>131</sup> Mich. Comp. Laws § 712A.17d, *Supra*.

<sup>132</sup> *Id.*

should be represented in essentially the same manner as an adult client, with consideration given to the child's legal disabilities relating to the child's age and competency. What often resulted was representation that appeared to adopt components of each view, resulting in the child client receiving neither the zealous advocacy of a traditional attorney, nor the full and complete protection of the child's best interests.

During the 1990's, an era of considerable reform both nationally and at the state level, both legal and social science professionals recommended that the issue of legal representation be included in the areas to be reformed. It was recommended that Michigan bring consistency among the various applicable court rules and statutes and clarify the proper role of a child's legal advocate. For the most part, Michigan succeeded in accomplishing both of these goals.

First and foremost, Michigan adopted the view that a child's primary legal advocate should be a lawyer and should act as a guardian ad litem representing the child's best interests, rather than a traditional attorney pursuing his client's wishes. Michigan accepted the view that sometimes a child might need both a lawyer-guardian ad litem and an attorney and enacted a discretionary statute allowing for the appointment of an attorney where a conflict exists between the child's best interests and child's own wishes. Secondly, albeit at a slower pace, Michigan amended the various applicable court rules to ensure consistency and eliminate the debate about the appointed lawyer's proper role.

Despite the substantial improvements that resulted from the reform, additional changes are needed, primarily in the implementation of the provisions as they currently exist, but also in the substance of the statute itself. To improve implementation, Michigan needs a near complete overhaul of the method and level of compensation of lawyer-guardians ad litem. Currently, each county or circuit has its own method and level of compensation, resulting in drastic differences

across the state. This often means that two like children in different counties receive different levels of representation. Because all abused and neglected children deserve adequate representation regardless of the county or circuit court that assumes jurisdiction over them, this system needs to change.

In addition to issues relating to compensation, Michigan needs to improve implementation of the current system by requiring specialized training and increased oversight for lawyer-guardians ad litem. Training is needed in both procedure and in substantive topics relating to children and child development. This is necessary because the characteristics of abused and neglected children are substantially different than those of adult clients or even non-abused or neglected children. In addition, child protective proceedings are very specialized proceedings and do not closely resemble any other type of civil or criminal proceeding. While some rules of procedure are similar no matter the kind of proceedings, the bulk of child protective proceedings are unique and should be mastered by the lawyer-guardian ad litem before such representation begins.

Lastly, Michigan should change the provision of its lawyer-guardian ad litem statute that allows for the appointment of an attorney at the discretion of the court whenever the lawyer-guardian ad litem determines that a conflict exists between the child's best interests and the child's own wishes. Making such a provision mandatory rather than discretionary ensures consistency across the state and guards against a child failing to receive full representation of all of the child's legal needs.

In sum, as with most areas of reform, improvements have been made, yet there remains work to be done.